COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Legal aid and access to justice

THURSDAY, 13 NOVEMBER 2003

SYDNEY

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

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

SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Thursday, 13 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, Ludwig, Nettle 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.

GRANT, Mr William, Chief Executive Officer, Legal Aid Commission of New South Wales

WALKER, Ms Judith, Acting Director, Family Law, Legal Aid Commission of New South Wales

CHAIR—This is the third day of hearings for the committee's inquiry into legal aid and access to justice. This reference was referred to the committee by the Senate on 17 June, and the committee is to report by 3 March 2004. The terms of reference, copies of which are available from the secretariat, 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. We have received 96 submissions to this inquiry, all of which have been authorised for publication and are available on our web site.

Witnesses are reminded of the notes they have received regarding parliamentary privilege and the protection of official witnesses. Further copies of these notes are also available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. We prefer that all evidence be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. I welcome representatives of the Legal Aid Commission of New South Wales. We have your submission, which we have numbered 91. Do you need to amend or alter it?

Mr Grant—No.

CHAIR—Would you like to make an opening statement?

Mr Grant—Yes, I have a few comments. On behalf of the Legal Aid Commission of New South Wales, I would like to thank the committee for the opportunity to make a submission to the inquiry into legal aid and access to justice. The New South Wales submission is, I believe, comprehensive and deals thoroughly with many of the issues being examined as part of this inquiry. The executive summary of the New South Wales Legal Aid Commission's submission succinctly summarises the matters raised in the submission, but I will briefly refer to some of these matters as part of my opening statement.

Having had the opportunity to examine some of the submissions made to this inquiry, it is obvious that many common themes are emerging. One of these themes is the need for an evidence based approach to the planning, delivery and evaluation of legal aid services, based on a reliable national assessment of legal needs. Some of the submissions have made the point that Australian research into such issues is almost non-existent and falls way behind the research conducted in other jurisdictions, particularly the United Kingdom and particularly England. More must be done in this area if there is to be an understanding of the extent of legal need in this country and if we are to have a constructive dialogue as to how all the service providers can work together to meet these needs.

Another common theme in many of the submissions is that the Commonwealth government must inject more funding into the legal aid community. This includes legal aid commissions, community legal centres and Aboriginal legal services. The submissions speak for themselves and I need say no more on the subject. Another issue regularly picked up in the submissions is that the so-called funding divide, whereby the Commonwealth will contribute legal aid funding for Commonwealth matters only, should be abolished. While this result, in the eyes of some, may be essential, it flies in the face of stated government policy. The New South Wales submission suggests some alternatives, including a re-examination of the basis of the Commonwealth-state funding divide, with particular emphasis on whether it creates barriers to innovative and flexible service delivery. Such an examination could be carried out by a number of bodies, including the Commonwealth Attorney-General's Department, with contributions from legal aid commissions across the country and from other interested parties.

Another alternative is to introduce some flexibility or a discretionary component in the use of Commonwealth funds, particularly in areas where there is overlap between the Commonwealth and state jurisdictions, the classic example being domestic violence. In addition, there could be a substantial relaxation of the very strict Commonwealth guidelines pursuant to which all legal aid commissions must grant legal assistance in Commonwealth matters. The ways in which these guidelines could and should be relaxed are comprehensively dealt with in the New South Wales submission.

Another important issue I wish to raise relates to the new Commonwealth-state agreement, to operate from 1 July 2004. In the New South Wales submission, details are provided of how we have been expanding our Commonwealth services to meet client demand and to fully utilise available Commonwealth resources. As a brief illustration, we have established a new office in Nowra, servicing the South Coast of New South Wales; we have put additional practitioners into our Lismore office, to service the area from Lismore to the Tweed; and we have opened an office in Dubbo to better service the far west of New South Wales. We have made these decisions to provide services to regional New South Wales at a time when it is getting increasingly difficult to keep practitioners, particularly in country areas, doing legal aid work.

As we approach the end of 2003, we still do not know what financial resources will be available to us in New South Wales to carry forward and increase our service delivery across the state in matters relating to Commonwealth law. In saying this, I make no criticism of the Commonwealth Attorney-General's Department, as its officers must work within the Commonwealth budgetary structures, and there has been a constructive dialogue on these issues at officer level. However, in trying to deliver services in New South Wales, it is extremely difficult, if not hazardous, to make business decisions which have long-term financial impacts when the resources available over that term are not well understood.

New South Wales is in the position where it has increased its service delivery state-wide to such an extent that, if it does not receive at least the same amount of funding as it is currently getting plus an appropriate CPI amount, it will have to again reduce services, as we did in the 1999-2000 year, with disastrous effects on our partnership with the private profession and for the New South Wales community, particularly in regional areas. In stating this, I make no special plea for New South Wales as I think all commissions across the country have ordered their business on available funds. To give them less under any new agreement would be unacceptable.

There is only one other matter I would raise as part of this opening statement. It is a matter which strikes at the heart of the system of legal aid in this country and its independence from government control. In its submission, the New South Wales Legal Aid Commission has stated that there is a need to ensure that legal aid funds are administered independently of any agency responsible for making administrative legal decisions in the area of law covered by that funding.

Under the current guidelines, New South Wales and other commissions cannot grant aid in immigration matters, except in very limited circumstances. The only other avenue for granting legal assistance is pursuant to contracts entered into with the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs. Pursuant to these arrangements, legal aid commissions can no longer grant assistance in immigration matters as they used to prior to these arrangements coming into force. It is completely unacceptable that one side of the bar table controls funding available to the other side.

There is a similar situation in veterans' matters, where the Commonwealth guidelines are so restrictive that the commissions cannot assist veterans in preparing their claims until the matter gets before the AAT. The commission made a comprehensive submission in this matter in the inquiry into veterans' matters and would be happy to make a copy available, should that be required. In both of these areas of law, it is unacceptable that the commission does not have a wider discretion to grant aid—and to grant aid earlier than is currently allowed. It would be beneficial to the community and to the parties in dispute to allow more flexibility in this area by restoring the discretion that commissions used to exercise in these areas in granting aid. The commissions, of course, would still apply means and merit tests. Another restriction would be the availability of funds.

CHAIR—We will start by taking up your offer for that submission, if you could make it available to us.

Mr Grant—I can.

CHAIR—You mentioned that it is getting close to midnight and you do not have details of the new agreement. Has that been normal practice in recent years, or is that something different which is happening this year?

Mr Grant—It has. Going back to the last year of the first agreement, which was 1999-2000, I was then the deputy director of the Attorney-General's Department, and I was acting as CEO of the Legal Aid Commission from about April to the end of October 1999. In the first couple of years of that agreement, the Legal Aid Commission had expended about $8 million more of available Commonwealth funds than it should have. As you recall, that was an era of massive reduction in funds and a massive reorganisation of services.

When I left the commission in October 1999, I had no idea of what was going to be on the table for a new agreement on 1 July 2000. In that year, we were obliged by the Commonwealth to make sure that the three-year agreement was looked at as a whole. We were about $8 million over after two years. In that third year, we had to reduce services dramatically, which meant cutting family law services. So in New South Wales, we had to virtually stop assigning legal aid. We could not do anything with our in-house practices—they are a fixed cost on our books—so we virtually had to stop assigning it.

We lost a lot of practitioners in the 1999-2000 financial year. When I left in October, we had no idea what resources were going to be available. Thankfully, there was quite a substantial uplift for that second agreement, over what was available in the first three years, but again it was very difficult to order our business. So, in the first year of the new agreement—1 July 2000 to 30 June 2001—the commission again underspent its family law resources by about $7 million or $8 million because the practitioners we had to abandon in the final year of the first agreement did not come back to legal aid. We lost a lot of good practitioners.

Coming back to your question, we are in the same position now. We have an idea. Officers of the Commonwealth Attorney-General's Department have quite rightly pointed out that budgetary situations are difficult and can change every year. We would expect, at the very least, that the amount that is available nationally in the final year of this agreement that we are currently in will be available for the start of the new agreement with an appropriate CPI figure, but we do not know.

CHAIR—Is there no indication in the budget outlays as to what will be available?

Mr Grant—There was a four-year figure of what was available but, as we keep getting told, that is not set in concrete, and budgetary figures change according to the needs and priorities of government.

CHAIR—Is there some suggestion that there might be a redistribution amongst the states?

Mr Grant—Yes. The Victorian submission, which I had the opportunity to read in the last 24 hours or so, dealt with the question of funding formulas and how they considered that they had not received their fair share et cetera. We are all labouring under the difficulty of not knowing, if the pie remains the same size, how it might be cut up. That was part of my comment: certainly the New South Wales position is that no commission should be adversely affected by any change in formulas which, at the very least, are artificial.

CHAIR—Moving on to the Commonwealth-state divide, you have raised a number of points in respect of it, but the one I would like a bit of elaboration on is domestic violence. You said that a bit more flexibility there would be quite productive. What are your problems and how would you like to overcome those problems?

Mr Grant—I will make a couple of comments and then I will pass over to Judith Walker, who is the head of our family law area and can talk with more expertise than I can. The obvious area is that people come to us with a selection of problems. Some of those problems will be family law related problems; others will be domestic violence related; others may relate to state jurisdiction care and protection legislation or area jurisdiction. So they have a multitude of problems and we then have to work out what is Commonwealth related and state related, and what we can fund and cannot fund. If you are providing, for example, outreach services to Aboriginal communities, they have a full range of problems as well. It gets very difficult to tailor a service for people who have these multitudes of problems. It is not impossible and we all cope with it as best we can across the country, but it is very difficult. There is no acknowledgement in the Commonwealth guidelines that people have these problems that cross Commonwealth and state boundaries. I will now ask Judith to comment.

CHAIR—Before you do that, Victoria told us yesterday that the cost of administering the scheme, and particularly costs arising out of this divide, was about five per cent. Would that be the same in your experience?

Mr Grant—I think we get about 4½ per cent. We were not quite as good bargainers as Victoria.

CHAIR—Please go ahead, Ms Walker.

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

Outreach is a particular problem experienced on the North Coast, where in various Aboriginal settlements and communities people will come and want to talk and receive advice about domestic violence, care and protection and family law matters. Those clients will have a mixture of difficulties, which you want to be able to treat if possible in a holistic way. The same issue can arise with care and protection. I went to Dubbo to help do some training of Indigenous community workers for our PDR. I spoke about family law, and they said to me: 'Can you help us? The department come and they want to take our babies.' They also saw the link into care and protection as being so important for them. Again, that comes under another budget and another program. Yet these people's lives are in both areas.

We find that in the Family Court too, where it is acknowledged now, I think, that child abuse is almost core business of the Family Court. So we are dealing with those abuse matters, in Children's Court matters—one budget area and one program area—and, again, in the Family Court. It is quite a difficulty for us in that way and perhaps people's needs are being met more in one of those program areas than in another area where perhaps we are more under-resourced. That is a problem too because we feel that there may not be a balance in the way we can meet people's needs according to what jurisdiction they might be in.

CHAIR—What does it do to the client?

Ms Walker—For the client there is incredible confusion, as you might imagine, because dealing with the legal system is difficult for clients in any case. You can explain to clients what is happening in court but, even with great explanation, their understanding is somewhat limited simply because of procedures. But when you have this fragmentation of the system as well, it is extraordinarily difficult—people drop out, people do not comply, people can feel quite overwhelmed by it all.

Senator PAYNE—Mr Grant, in terms of the arrangements for funding of the New South Wales Legal Aid Commission, I understand how the money comes to you from the Commonwealth but what sort of an arrangement do you have with the state government? Do you have a funding agreement?

Mr Grant—No, there is no funding agreement; we are just like any state government agency battling for our share of available state funds. We are funded from three sources: we get funding from the Commonwealth government, from the state government and from, what is called in New South Wales, the Public Purpose Fund. This fund has a variety of names in other jurisdictions, but it is quite common in legal aid arrangements. It is the interest on solicitor statutory deposits. Legal aid gets a share of those available funds as well.

Senator PAYNE—What proportion of your funding comes from the state government and the Public Purpose Fund?

Mr Grant—Perhaps I can answer that best by giving you a diagram which will show you that.

Senator PAYNE—Thank you.

Mr Grant—The percentage is hard to work out, and I have not got that available.

Senator PAYNE—That is okay.

Mr Grant—Since the Commonwealth-state change in arrangements in regard to the merger agreements, the arrangements have been such that the state has had to put in more funds to compensate for the reduction in Commonwealth funds, and they have done so to quite a significant extent. The diagram shows quite dramatically the increase in available state funds over the period of the Commonwealth agreement. I have just found it.

Senator PAYNE—So you negotiate your state funding on an annual basis?

Mr Grant—Yes, it is a matter of making bids under the state's budgetary process to maintain our services and, if we are lucky, to try and get money for enhancing our services.

Senator PAYNE—In the last couple of years, has the New South Wales Legal Aid Commission sought any of the funds from the Commonwealth Criminal Law—Expensive Cases Fund?

Mr Grant—We did at the commencement of that fund, and we gave up because it was really quite apparent that the smaller jurisdictions were going to have more access to that fund. We have been meeting our very expensive cases from our generally available Commonwealth funds.

Senator PAYNE—When you say gave up, was it because the bureaucratic processes were too difficult?

Mr Grant—No. In the first year of this new agreement, when the fund was set up, we had a surplus of funds available to us because we underspent in that first year.

Senator PAYNE—Was that a surplus of Commonwealth funds?

Mr Grant—Yes.

Senator PAYNE—Do you still have a surplus of Commonwealth funds?

Mr Grant—No, we do not; we are using our Commonwealth funds entirely. In fact, early next year we are probably going to start to look quite carefully at how we can restrict access to some of the Commonwealth services.

Senator PAYNE—That contrasts with the information we had from Victoria yesterday. In the new round of funding arrangements between the Commonwealth and the state, New South Wales may have a different view about whether the expensive criminal cases fund should be continued, if it is not something to which you gain access.

Mr Grant—Expensive cases are an enormous problem. You could take the dreadful bodies in the barrels case in South Australia to see how no legal aid commission could have funded that from its resources. From a state point of view, we make submissions regularly to our state government about what effect expensive cases are having on us. The use of things like DNA, transcripts of telephone interceptions and multiple co-accuseds in drug cases are increasing every year. The law is becoming much more complex, we are catching more people in the webs and there are more conspiracies et cetera.

We have one case from our Newcastle office that has 26 co-accused—that is a large amphetamine case. I think they are all legally aided. We have the same in Commonwealth matters, and in our submission we have given a couple of examples. We had one Commonwealth matter which cost us about $1¼ million. It started this year. There were nine defendants. Five had no verdict returned, two were acquitted and two were found guilty. It starts again in February. So expensive cases are becoming much more of a problem for us right across the country. There needs to be some mechanism to have flexibility because if you cannot fund the expensive case, it will be stayed under Dietrich and then you have a problem in terms of what the prosecution does—does it continue or does it stop.

Senator PAYNE—In principle, it sounds to me like you support the continuation of the fund.

Mr Grant—In principle I do. I think there has to be a mechanism for the Commonwealth to be flexible in how it looks at these cases popping up all over the place.

Senator PAYNE—In terms of the structure of your commission—the balance between in-house solicitors and the use of private practitioners—how do you work out what the appropriate balance is between how many solicitors you retain in-house and how often you brief outside?

Mr Grant—We have increased our in-house practice in the last two years I would think by about 20 per cent or so. The main reason for that has been to get service delivery in regional New South Wales where we cannot get it at the moment.

Senator PAYNE—In your submission you go into quite some detail about where your LAC has grown and established in regional New South Wales. It still leaves gaps though, doesn't it?

Mr Grant—It does leave gaps. We had a submission not so long ago from a group of community organisations in Taree saying: 'Please come and open an office for legal aid. There are not enough private solicitors doing legal aid work in the Taree area.' We have put a solicitor

in there from our Newcastle office who does outreach work once a fortnight. We started doing that and are gauging the community's response to see what else is needed. We have an ability to go to once a week if it becomes necessary. The figures do not justify that at the moment, but it takes a while for outreach services to grow.

Senator PAYNE—So you have some latitude built in that would allow you to do that?

Mr Grant—We do. We are able to do that immediately if the numbers demand. Yesterday, for example, there were only two people on the list—for the fortnightly visit—and the solicitor quite rightly said, 'I am not going up there for that.' So she conducted telephone interviews and was able to satisfy those clients with those. Outreach services take months to build.

Senator PAYNE—Absolutely. Have you done a comparison of the costs of using in-house versus private practitioners? Which is more efficient for the commission?

Mr Grant—We have not done a comparison of actual costs for the commission to that extent. In some ways it begs the question—it is an important issue and I am not trying to run away from that—why do we not have private practitioners available to do it? That Lismore example we gave is classic—between Lismore and the border there was only one firm of solicitors prepared to do legal aid work.

Senator PAYNE—Have you actually kept state-wide statistics on the number of private lawyers withdrawing from legal aid work?

Mr Grant—We have not got an actual figure on that because some of them just reduce their services rather than withdraw. Some of them will take grants of aid if it is bundled up and given to them but will not actually see a client, give advice, apply for aid and deal with it.

Senator PAYNE—So more on a case-by-case basis?

Mr Grant—Yes. We know we can approach some solicitors—particularly, say, when we have conflict of interest situations or in a town where we might act for one party and the other party might also be eligible for legal aid. We would not be able for both because of that conflict so we could approach a solicitor and say, 'We have a grant of aid; there is a matter here.' Some of them will take it on that basis but will not see a client, give advice or help them fill the form out. I have to say that we have done various things to try to combat that.

Senator PAYNE—I just have two other quick questions. One is in relation to the pilot duty solicitor scheme at Parramatta, which is the registry where my office is located in fact—and so is the FMS—and the one you are doing in Newcastle. Have you done an evaluation of the effectiveness of those schemes?

Ms Walker—Yes, we have done an evaluation of the Parramatta scheme. For the Newcastle scheme, we have recruited a solicitor in the last week. That solicitor will be having discussions with the court in terms of the protocols under which that scheme will operate. That scheme will be operational before the end of the year. In Newcastle, there is expected to be a big demand because of the enormous waiting time in both the FMS and the Family Court: it takes between

18 months and two years to get a case onto hearing in Newcastle. There are large lists of up to 50 or more so we expect that in Newcastle.

In Parramatta we have done an evaluation of the scheme and we have seen the unrepresented litigants we have been able to assist on a continuing weekly basis. We have had a look at the services that we are able to provide to them. It has especially been useful in the Federal Magistrates Court. We have been able to assist people who may be employed but on very low means who may not have come within the means test. Where possible, we have tried to provide assistance to settle matters and very often that has been effective because we have been able to negotiate on behalf of one of the parties and settle a matter on the day, which has enabled court proceedings to conclude—at least on an interim basis.

In other cases, the scheme has operated as a referral service. It has been able to achieve a certain standing in court on one day so that maybe somebody in fact would be able to apply for legal aid. We have referred them to PDR or, if they have been above our means test, we have referred them to a private practitioner at the court who will be able to assist them. The scheme is also seen as sort of a gateway service, being able to channel people in the appropriate way afterwards.

Senator PAYNE—If you could make that evaluation available to the committee that might be of great interest to us. Have you had feedback from the court on the effectiveness of the pilot duty scheme?

Ms Walker—Yes. The court particularly likes it. Particularly, the Federal Magistrates Service finds it a very useful service because again they have very large lists and they have litigants who are before the court who do not understand why they are there and who do not know what to do with the forms they are meant to complete. Obviously, it makes the court more efficient.

Senator PAYNE—That would be interesting. Thank you very much. Just to conclude, Mr Grant, in your submission in funding history in particular you talk about the challenge of keeping Commonwealth money separate in terms of the need you see to deliver innovative service delivery models—for example, in Indigenous communities. I would be interested if you could expand on that because a lot of the evidence we have had does bear out those views and indicates challenges in trying to cater properly for Indigenous communities in particular.

Mr Grant—We do a reasonable amount of outreach. I have to say I would like to do more and I think our new Dubbo office in Western New South Wales will let us do more outreach in that part of the world. They are growing into that. We have several family and criminal lawyers in that office. There are problems with getting into a situation where you have to count things separately, charge for certain things and not charge for other things. It is not insurmountable but it makes it very difficult. What do our lawyers do when they are sitting with people who have a glad bag of problems? They say, '10 minutes of that was Commonwealth or 40 minutes of that was whatever.'

What we are saying is there should be some amount of discretionary funding at our discretion from Commonwealth funds that we can put into those programs where we know people are going to have a mixture of problems. Whether you say that on the basis of the Commonwealth having special responsibility for the Indigenous community or whether you simply say it is

practical matter of life that these people often present with half-a-dozen problems and not just one so we cannot send a family lawyer just to give family advice or a lawyer just to give civil advice. These people have all the problems and they want to talk to you about everything that is going on. And most often they are interrelated. We would just like to establish these schemes, put a certain amount of Commonwealth money in and a certain amount of state money in and then meet people's needs without having to worry too much about it.

Senator PAYNE—You work with the Aboriginal legal service in those areas?

Mr Grant—We do.

Senator PAYNE—Do you encounter the conflict problem which we have also been told about? That is to say, do you find that when either the ALS or the LAC is already acting for one party to a dispute, which is a family law dispute—it may be acting for them in another capacity, criminal or property—and the LAC or ALS finds itself unable to represent the other party, that person can be left unrepresented?

Mr Grant—I have two comments on that.

Senator PAYNE—Most often the woman.

Mr Grant—You very accurately state the problem so I need say nothing more about that. But it is a massive problem for legal aid commissions, for community legal centres and for the Aboriginal legal service. Conflict is huge.

Senator PAYNE—And for the woman involved.

Mr Grant—Yes, absolutely, particularly if you then have trouble locating another private practitioner solicitor for example. We are working very hard on conflict. We are working also with the New South Wales Legal Services Commissioner, who has a conflict of interest party working on it. My own view is eventually we will need some form of legislative solution.

Senator PAYNE—Really? At a state or Commonwealth level?

Mr Grant—I think at both levels, because the state level would not necessarily protect us in the Commonwealth jurisdiction. I think both jurisdictions might need to recognise that these organisations are frequently last resort solicitors—there is nowhere else for these people to go. We cannot be conflicted out of a matter on technical grounds because we saw the man in an armed robbery hold-up case five years ago and, in a completely unrelated family law situation, we cannot deal with the woman, particularly in the Indigenous community.

The second comment I would make is that, as you are aware, the ALS are so strapped for funds that their primary focus is crime—keeping people out of jail. They find it very difficult to act in family and civil law. They are nearly always conflicted out anyway. We deal with an awful lot of ALS work in crime as well, because it is conflicted out. Apart from that, a member of the Aboriginal community can choose to come to us anyway, and many do. The conflict situation is a part of it, but the funding of the ALS is another. They do not have enough money to really get into those areas.

Senator PAYNE—Thank you very much. I appreciate your help.

Senator LUDWIG—I want to touch on something Senator Payne raised with you. We heard yesterday that the Victorian LAC had some $20 million—or in excess of—in reserves and there was another $5 million set in for expensive cases. If the $20 million is sent to a reserve fund and is not expended in Commonwealth matters, is there a flaw in the model or is there something wrong between Victoria and New South Wales or the other states? You have indicated that next year you may need to curtail your Commonwealth programs because of insufficient funds. If there is a deficiency in New South Wales should that money then be redistributed?

Mr Grant—It is hard for me to say what was in the Commonwealth's mind when they looked at the Victorian situation and gave them a certain amount of funding and no more. The system of allocating the funds originally was flawed. The system was supposedly based on some form of needs analysis and was not accurate. It relied on applications for aid rather than on need in the community. That is why in our submission we have put a lot of emphasis on saying that in the national interest there has to be some proper study into legal needs.

The Victorian situation is different from ours. They have a substantial reserve; we do not. We did have at the beginning of our four-year agreement, because we lost a lot of those practitioners because we had to slash availability. We have worked hard to get practitioners back. We have done a lot. We have increased our in-house practices in regional New South Wales. We do not have a surplus at the end of this agreement. If I can use a motoring analogy, we have been on cruise control coming up the hill and we are now over the hill. The problem is, if the police are waiting down there to get us, we will be over the limit because we are powering down the other side. We now have powered up our service delivery at the end of this agreement. If our funding disappears or even if it does not—even if it stays the same, plus CPI—we have to watch what we are doing because we have many things happening.

We have been quite innovative in a lot of ways. We have introduced an $80 fee for practitioners. We call it an ELF—electronic lodgment fee. Practitioners who lodge a claim electronically on behalf of a client and have it approved will get a fee of $80, representing under the Commonwealth agreement one payment of $40 for advice and one payment of $40 for minor assistance for lodging that claim. The reason we have done that is that we want country practitioners to give clients advice. We recognise that they cannot do that unless they get some remuneration for it, which they do not normally get. It also helps us because we find that our refusal rate for electronic lodgment applications is somewhere around two per cent, whereas our refusal rate for manual applications is in the twenties. That involves a lot of requisitioning from us with the individual client: 'You haven't told us this. What can you say about that? Give us verification of this.' It is much better if solicitors do it. One of the main aims is getting practitioners in country areas to talk to clients, give some advice and lodge an application on their behalf, rather than to say, 'Here is a legal aid application. If you get it, come back to us.'

Senator LUDWIG—The Commonwealth has already spoken to you about the model. The Victorian LAC also indicated the same. They believe that there is a flaw in the Rush-Walker model. As a consequence, they are in the process of discussions with the Commonwealth in relation to a new model. Are you similarly in that position?

Mr Grant—Yes, we are talking with the Commonwealth, but not so much about the details of the model because, to be perfectly honest, they are all flawed. The Commonwealth Grants Commission have done some great work for us, but their work is not definitive either. The real problem with all of that is: there is no way at the moment you can get an accurate gauge of legal need; therefore you cannot factor that very important point into these formulas—because we simply do not know how to measure legal need or unmet need at the moment. That is the difficulty.

I take a very practical view on the availability of Commonwealth funds. My view is: if the pie does not increase for next year beyond CPI, they should stick to the same funding formula until they can get more money into legal aid—base it on a needs analysis and then distribute that in the appropriate way across the commissions. But all commissions have ordered their business over the last four years on an available supply of money. To take any funding away from any commission, even with the good intentions of providing it where it is thought it is needed more, would have disastrous business effects on those commissions, whether they are large or small.

Senator LUDWIG—In respect of the telephone answering service, does your commission have a telephone advice or advisory system?

Mr Grant—We had a Legal Aid help line, and in 1999 the commission started plans for a New South Wales-wide scheme, which is now called LawAccess New South Wales. LawAccess is a joint initiative of the Legal Aid Commission, the Attorney-General's Department, the Law Society, the Bar Association and community legal centres. I think LawAccess is one of the first of its kind in the world—where all the service providers have got together behind a single telephone service which is supposed to act as a proper referral service for the client. So, instead of us passing the client around between Legal Aid, community legal centres and the Law Society's scheme, we go to one place now and you get the best advice about how to get the problem resolved.

Senator LUDWIG—Do you have any figures available on that?

Mr Grant—Yes, we do.

Senator LUDWIG—I mean figures like how many calls you take and the success rate or referral rate or however you monitor the key performance indicators.

Mr Grant—Indeed.

Senator LUDWIG—You are aware of the Commonwealth LawOnLine program and the Regional Law Hotline?

Mr Grant—Yes.

Senator LUDWIG—Are they complementary to or in competition with your system?

Mr Grant—It is a total waste of money. It does not deliver the service it is supposed to deliver. We have had this discussion at officer level many times: if they rolled that money into LawAccess, we could provide a better service. We already provide an enormous amount of

advice in Commonwealth family law through the LawAccess advice line. To have a competing service, if you like, is not complementary; it is confusing. We are all focusing on this one service, and that is the view of commissions right across this country. All the commissions either participate in or have a legal aid help line.

Senator LUDWIG—Have you asked the federal government about that?

Mr Grant—Yes.

Senator LUDWIG—What was their response?

Mr Grant—Their response is the continuation of the current telephone services.

Senator LUDWIG—So they have ignored you?

Mr Grant—Yes.

Senator LUDWIG—I might just hold it there and allow other members to ask questions, Chair, while I look at the issue.

CHAIR—Before we go to Senator Nettle, you mentioned earlier that you have reached a situation where you may have to wind back on allocating Commonwealth matters. Can you tell us what you actually mean by that? To what extent do you fund Commonwealth matters now? Can you fund the need that is around the place and how will you cut it back?

Mr Grant—We cannot get anywhere near to funding the need because the Commonwealth guidelines are so restrictive that we can very rarely grant legal aid to deal with property disputes. Our legal aid in family law is principally directed towards custody matters—

Ms Walker—Parenting matters.

Mr Grant—Parenting matters, basically. We grant very few because the Commonwealth guidelines are so restrictive that we cannot meet the need. A lot of the self-represented litigants before the Family Court—

CHAIR—The best way to handle this might be for you to take on notice a request from us for a list of the Commonwealth matters that you currently do not fund.

Mr Grant—Yes. We can give you something in that regard.

CHAIR—Thank you. Senator Nettle?

Senator NETTLE—You were talking before about the difficulties of assessing legal need and unmet need and you gave the example of when you were looking at expanding into Taree. How do you determine where you will try and provide an additional service? How do you determine what sort of service you are going to provide there? In the Taree example it sounded like they did it by contacting you.

Mr Grant—They did.

Senator NETTLE—Does that stipulate the areas where you try to expand because there is not a way to assess the need? Could you elaborate on that?

Mr Grant—There are a number of answers. We have 20 regional offices—10 in the greater part of Sydney and 10 in country New South Wales. Each one of those regional offices has service delivery plans where they are looking at the services they can provide in their community and what they cannot provide. That is one way that we look at where we can expand. The community tells us, as the Taree organisation did. In the creation of our Dubbo office, the stimulus was the collapse of Dubbo Legal Aid—private practitioners prepared to do legal aid work. They virtually came to us as a group and said, 'We're all resigning from the legal aid rosters, mainly in crime.' We then had to put practitioners in there in a hurry. One of the firms hosted one of our own in-house solicitors until we could get an office together. So it was simply those practitioners saying to us, 'We can't do this anymore with the money you pay us.' We have now established an office, which is very good thing because, apart from criminal lawyers, we have got family lawyers and civil lawyers. We had no civil lawyers west of the mountains, apart from one half-position in Orange. Apart from that, we had no civil law solicitors. Dubbo now gives us a springboard to try to do something more in that area.

There are other factors which indicate need. Take the Taree example. We do get applications for legal aid from Taree firms. We look at our records of what applications have been made in certain areas. We did not pick up a problem in Taree. The Taree people alerted us to that. We are seeing what the need actually is, and it is fluctuating a little bit. The time before last, we had 10 appointments for advice. Last time, as I said, we had two. That will fluctuate over time, but we will measure that need and see what we need to do. As a result of that, we started examining Taree, Port Macquarie and Kempsey. We have a Coffs Harbour office. At the moment, we have started a service from Coffs Harbour down to Kempsey. We started looking at that area, and, when we looked at all the ABS statistics, we saw that Port Macquarie is the place that has grown 10 per cent in population between 1996 and 2002 or so, while the other areas have grown negligibly. So we thought that, if we were going to put an office in then we would probably put an office in Port Macquarie and we would service down to Taree and up to Kempsey. But the figures have not got us there yet, so that is on the drawing board.

We do a lot of analysis. We analyse the ABS statistics, we look at population shifts, and we talk to other agencies. For example, if you talk to the human services areas in New South Wales, like DOCS, you find they will be mapping where their telephone calls come from or abuse systems are operating. We know then there will be some impact on legal aid, because we will have youth problems or whatever. We do little bit of that but not enough, to be honest.

Ms Walker—Lismore and Gosford were obviously both areas of increased population growth. It was apparent to us that the Tweed was a growth area and there was really a lack of service provision there, so we were able, looking at that population growth, to expand from our Lismore office into the Tweed. We have a solicitor go to the local court on the list days to do duty work and take on casework in Tweed. In Gosford it is the same thing, because that is a phenomenal area of growth on the Central Coast. It is very much affected too by delays in the Family Court and the FMS. Even in the local court, for a family law matter filed there is a delay of nearly two years.

We have enhanced our in-house practice at Gosford too. Again, because we became aware of the move west, the need in the lower Blue Mountains and the need to provide services to Lithgow and Katoomba, we have recently added a family lawyer to the Penrith office to look at those things. So we look at the population movements as well. We look at those sorts of things and then try to expand out from where our current resources are.

Mr Grant—The answer is not new legal aid offices everywhere. We are very reluctant to do that. It is not cost-efficient to create the office with all its infrastructure et cetera. We pay practitioners between $120 and $130 an hour. It is very difficult for us to compete, with what we are paying practitioners. We know we have not got the funds to increase that. We have increased that by about $20 over the last two years, so we have done some work to get it up there. But it is not the answer just to open a legal aid office. Insofar as Taree is going, we are looking at a tendering process. If the numbers come up in Taree, next year we will go to the private profession and we will tender out an advice service for Taree. That is what we are looking at at the moment. We are trying different mechanisms to meet community need without necessarily all the expense of opening an office.

CHAIR—Not duty solicitors?

Mr Grant—We have duty solicitors all over the state, in 158 courts. We have duty solicitors in every court, and it is a mixture of private practitioners and legal aid in-house staff. And that is the answer; the mixed service delivery model works right across this country.

Senator NETTLE—I do not know if this is a difficult question to answer, but I wanted to ask you about the number of clients that you have to turn down, for a range of different reasons—either they do not meet the formula or you do not have the funding. Have you assessed what is the largest group of clients that you have to turn down because either they do not meet your formula for funding or you simply do not have the funding to meet their needs? Is there any way you can answer that question?

Mr Grant—We might be able to provide some material, but to be honest it is not as scientific as it should be. We do not keep those sorts of records. It is very difficult to know without doing a purposeful study of that. We do advice clinics every day of the week all over the state, and anyone can come to us for advice. It is not means tested; we will see anyone and give advice once. Frequently those people may be told, 'You don't qualify for legal aid, but this is what you should do,' but we do not keep records of those. It would be useful to do a proper study to identify the sort of issue that you have raised, but we do not have that material at the moment.

CHAIR—Just two quick questions, and you may want to take the first one on notice. The Law Reform Commission made a number of recommendations about legal assistance, specifically recommendations 39 and 57. Can you come back to us with your attitude towards those recommendations?

Mr Grant—Certainly.

CHAIR—Secondly, you said during your evidence that the Grants Commission model is not definitive either. What are your problems with that?

Mr Grant—Again, it is not based on an accurate assessment of legal need, which really has to underpin any funding formula—what need is out there and what money or resources you need to fulfil that need.

CHAIR—How do you quantify that, though? In the absence of that need being quantified in the foreseeable future, is the Grants Commission model the best available to us?

Mr Grant—My view is yes. That view is not shared by all commissions, because some commissions win and some commissions lose under that formula. It is the best that I have seen—rather than any reworked Rush-Walker model, which the Victorians are pushing—but it has flaws. Again, my view fundamentally is that until there is new money put into legal aid we should not be tinkering with splitting up the pie at the moment. It would only cause more damage.

CHAIR—When you say it has flaws, are we talking about a lack of recognition of the geographic spread or something else?

Mr Grant—There are a lot of things when you look at their formula, yes—the ability to service communities and the ability to deal with communities. In our submission we have given the example of our Fairfield office and the special problems they have because of their client base. Those are the sorts of factors which are very hard to factor into this sort of thing.

CHAIR—Thanks very much. Your submission has been useful and so has this morning. Thank you.

Mr Grant—Thank you.

[9.49 a.m.]

WEISBROT, Professor David, President, Australian Law Reform Commission

CHAIR—Good morning. The Australian Law Reform Commission submission is numbered 26. Are there any alterations or amendments?

Prof. Weisbrot—I just noticed the omission of a word on page 7, in the third line of the first full paragraph. There is a missing word, which I am guessing is 'could' or 'should'. So it would read:

The ALRC felt it could—

I think—

not do this, however …

I think the meaning is plain anyway, but it reinforces it.

CHAIR—Would you like to start with an opening statement?

Prof. Weisbrot—The submission pretty much speaks for itself. The commission generally, and I in particular, have been involved in these issues for some time. I was a member of the 1994 Access to Justice Advisory Committee which was appointed by and reported to then Attorney-General Lavarch. In more recent times the commission completed its review of the federal civil justice system which is referred to extensively in our submission. I was also the chair of the National Pro Bono Task Force which looked at some of these issues from a slightly different perspective. I hope that that experience comes through in the written submission and I am delighted to assist further in relation to questions.

CHAIR—I want to start with a reference to your reference to administration matters. You state in your submission that it would be more beneficial if there were earlier access to legally aided services in federal admin matters. Could you spend a little time identifying for us the current problems and a possible way ahead in respect of that area of law?

Prof. Weisbrot—We found in a number of areas that earlier access to legal advice would probably be of great assistance. For example, in terms of a merits review it would often be better if a lawyer were involved at a much earlier stage to assist in the decision-making process or in advising the client of the method of review to take. We found that too often tribunals or lawyers, if they were involved at all, came in at too late a stage to make an effective difference. Although it may be counterintuitive to some people, we found that lawyers seem to assist the efficiency of the tribunals and courts and that there seemed to be a general preference in some sections at least to try to have the tribunals or the more informal areas of decision making lawyer free as though that would somehow speed the process and make it more efficient.

Our empirical study of the federal civil justice system indicated that clients were actually much better off where they had some legal advice early on. That was often because they were given sensible advice on how and whether to settle. We found that lawyers were able to go in, if they were sufficiently experienced, and advise the client about their genuine prospects so they were able to deal effectively with the other side. Sometimes that meant having reasonable settlement agreements. Non-legally aided litigants were often unable to make that proper assessment. They were unsure whether the offers being held out to them were appropriate. That was the general tenor of our remarks: lawyers at an early stage might help. That does not necessarily mean that that would assist people through the whole process through to some result in litigation, but it might mean that they assisted clients to avoid protracted litigation.

CHAIR—In those admin matters, once a case has been settled and the point of law has been decided upon, do you find that the decision and the interpretation of the law are implemented? Or is the initial definition stuck to and the matter has to be retried? Is there a flow-on effect? Is there a capacity for that to be done?

Prof. Weisbrot—I do not think we studied that in particular and I do not have a personal general view of that.

CHAIR—We had a lot of evidence yesterday not only from community legal centres but also from most of the organisations before us about the detrimental aspects and effects of the funding ceiling cap. Your report indicated that you felt that only a small percentage of matters were affected by the cap—I think it was about two per cent. The submissions we had yesterday indicated that even if it were as little as that, it was still a major problem. People felt that the indirect effects would indicate that more than two per cent of cases would be affected by it. Have you revisited this aspect of your recommendations?

Prof. Weisbrot—No, but I think there could be a logical explanation for that disjunction. Our study was of the federal civil justice system—I guess the emphasis is on 'federal'—so many of the matters that the legal centres would be concerned about would probably be in state and territory jurisdictions.

CHAIR—We are talking about family law matters.

Prof. Weisbrot—Okay. We as an institution have not revisited that figure but I would still agree with the general conclusion that the caps can cause difficulty. It comes in both ways. You will have noticed that some of the recommendations were that, if there are going to be caps, better targeting of legal services might be appropriate. We found that there were cases in which the legal aid money was exhausted before the most serious issues in the matter kicked in in the Family Court, and certainly that would be cause for great concern. One of our issues with that was in part the artificiality of the ceiling and, on the other side of it, the fact that the processes and cost structures of the Family Court were such that significant amounts of money were being exhausted before it got to the stage of dealing with the very hard issues.

Although it is my understanding that the Family Court was set up to be, in effect, a district level court in its original conception by Lionel Murphy and others, it has become in effect a supreme court in its cost structures, so there are those additional expenses. The intervention of the magistrates court may solve some of those problems.

We also had grave concerns about the case management processes of the Family Court. That was well worked out in the report and it is detailed in our submission. We thought that far too many case events were being required by the court in order to come to some conclusion and that legal aid funds were being exhausted along the way. When it got down to the pointy end of the case, often people were butting up against the caps, and that was very unfortunate.

CHAIR—Has there been any ongoing dialogue with the Family Court with respect to those recommendations? I think their response was negative.

Prof. Weisbrot—'Dialogue' would probably not be the proper characterisation of the relationship. I think we have been confident since the appointment of Richard Foster as the CEO that they have been actually attentive to the recommendations that the commission made. You would not know that from reading the various annual reports of the Family Court but in fact Mr Foster has been quite good about periodically giving us tables which indicate initiatives that the court has taken, and they match up very well with the recommendations that the commission made. When the government recently released its whole-of-government response to the *Managing justice* report, the government also made the point that many of the recommendations of the commission had been or were in the process of being implemented, although there was no formal acknowledgement of it by the court.

CHAIR—Are you happy with progress?

Prof. Weisbrot—I think that progress is headed in the right direction, yes. The most serious problem, apart from the fact that the court had not taken active steps to eliminate all those intervening interlocutory matters in getting to a decision, was that, as we said in our report and submission, there was no triage. I think it stemmed from a faulty idea of equal access to justice—that every litigant would be treated in exactly the same way. But of course in the court there are some matters that are really fairly frivolous and there are others that are very serious. All of them proceeded in that same lock-step formation. Although the court did not accept our total package of recommendations on case management, I am much more confident that they are now identifying at an earlier stage matters that require judicial attention rather than attention by a sequence of registrars and that those cases are being handled more effectively. There is a trial project in Melbourne, I think, that confirmed the value of doing that and I believe that that is now being spun out to the totality of the court system.

CHAIR—How did you come up with the two per cent figure?

Prof. Weisbrot—I have no idea.

CHAIR—You can take that on notice.

Prof. Weisbrot—I have no recollection. I assume it is documented in the discussion paper or the report. We did commission an extensive empirical study. It is detailed much more in the discussion paper than in the report. We had several thousand cases that were taken about equally in thirds from the federal merits tribunals, the Federal Court and the Family Court. We coded everything that happened in those cases—whether or not people were represented, the extent of representation, whether there was ADR, the number of case events, the extent of legal aid and all those sorts of things. We then did a couple of fairly sophisticated statistical analyses of those. We

used external consultants; we do not have the in-house social science expertise. It would have come out of those studies. That was a slice of what was happening in the federal civil justice system in about 1997 or 1998.

CHAIR—It was a 2000 report, wasn't it?

Prof. Weisbrot—The figures may be a little bit dated.

CHAIR—There might be more information that you are able to locate for us on that point. Could you take it on notice?

Prof. Weisbrot—Yes.

Senator PAYNE—With regard to the aspect of your submission that refers to special needs funding, we have been exploring the expensive criminal cases fund with the legal aid commissions. In fact, Mr Grant, who is one of the witnesses who appeared this morning, said that New South Wales tend not to try to access it because they figure that the smaller LACs are going to receive priority. Your commission's suggestion was to expand such a fund to cover other areas of case law than just the expensive criminal cases. Could you flesh that out for us?

Prof. Weisbrot—There are individual cases that come up that have some particular merit, in terms of either the litigants or exploring issues that may be in the public interest and that would create appropriate precedents for further action—either legal precedents or in terms of handling. We thought that it would be useful to set aside that additional funding to be available for those sorts of cases. It also arose out of submissions from the courts which said that they strike these kinds of cases from time to time. The courts felt that there were some serious issues involved with litigants and that persons were not able to fully explore them to the level that would be in the public interest. Those that have come across the board may come up in the merits review tribunals, such as the AAT, in respect of some important matters, or in the Federal Court or the Family Court.

Senator PAYNE—I think the Commonwealth response was not to support that recommendation. Are you pursuing it in any way with the Commonwealth?

Prof. Weisbrot—That is not really our role. As you know, we are an advisory body and we make recommendations to government. We do not, at least overtly, lobby for their implementation once we produce the report.

Senator PAYNE—I would like to talk about the issue that Senator Bolkus raised with you about case management at the Family Court level and your suggestion that they needed a system of triage, like a case track system. I assume that is what you mean.

Prof. Weisbrot—Yes, or something similar, because we do recognise that it is a high volume jurisdiction. It is not completely in line with the Federal Court, which, at the time we studied it, had a much smaller caseload.

Senator PAYNE—Although that is, as we hear from estimates, increasing.

Prof. Weisbrot—Yes. That is why I used the past tense.

Senator PAYNE—Indeed. The discussions that we had yesterday—for example, with witnesses like the National Legal Aid chair, Norman Reaburn, who is acutely familiar with these matters from both sides of the fence—were that there were some challenges in the court in dealing with what may elsewhere be termed 'vexatious litigants' but because of the complexities of Family Court matters the court is reluctant to go down that road. We may have litigants who are doing their level best on one side of a matter to exhaust the other party's legal aid up to the point of the cap so they know that they will be left high and dry. Is that the sort of issue that the ALRC was mindful of in some of its considerations?

Prof. Weisbrot—We certainly referred to that. You can assume, in many areas, a rational player model in litigation—that people will do what is in their self-interest and they will make decisions about resolving a case or discontinuing litigation when it is sensible to the ordinary person or ordinary corporation to do that. Then there are some other areas where there may be structural reasons to not pursue a successful litigation strategy but rather delay in a zero sum area. The refugee or immigration area is one example where it may be in the interests of the party. It might be quite rational for the party to try to delay proceedings as long as possible, although we usually talk about delay as a negative thing in litigation.

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

Senator PAYNE—Let alone with legal aid funding.

Prof. Weisbrot—Yes, that is right.

Senator PAYNE—You also make an observation on page 9 of your submission, in the part pertaining to in-house representation, as to some of the benefits of in-house representation in LACs. What we have found in the past couple of days is that it seems that the commissions are going more to in-house representation because so many private practitioners are withdrawing from legal aid work. In the case that Mr Grant presented this morning in relation to New South Wales, when there were funding changes a few years ago they lost a lot of their regular private practitioners and had no choice but to go to in-house representation. Was that evident through the ALRC's research?

Prof. Weisbrot—Not specifically because that has really happened subsequent to our inquiry, but that is certainly my impression particularly through the pro bono inquiry. As for that area, it was interesting, although by no means was this a scientific study, that we had many practitioners say to us that they would probably be prepared to do more cases pro bono in that area and match up with legal aid if the legal aid rates were higher. It seemed to them that some of the fees were at such a derisory level that it was a problem to do it and that if they were doing it on legal aid

then they did not feel they should also be doing pro bono. So if the level of legal aid were set higher, they might be minded to handle more cases on a pro bono basis if they felt they were getting a fair go on legally aided matters. That may be something that is worth exploring.

Again, that is not a scientific survey by any means but it was repeated often by practitioners in many jurisdictions, particularly by country practitioners who found that they were often doing pro bono work for their own communities in a sense because they were embedded in their community and they were dealing with people over a long period of time. These people may have been paying clients at one stage but, due to circumstances, they were not able to pay and they may not be eligible for legal aid but the lawyers were not going to cast them adrift, so they were in effect having to supply their services on a pro bono basis.

Senator PAYNE—Right at the very beginning of your submission, in considering a number of the observations that came out of *Managing justice*, you repeat the observation:

> Government departments whose decisions are disputed need to be mindful of dispute management and resolution, to make litigation and administrative review processes more efficient.

That would seem to me to be a statement of one of life's truths. You would hope that government departments would take that approach and not engage in unnecessary litigation when they could deal with it in another way, whether it was by ADR or just more sensible decision making. In terms of the commission's research, what sort of an assessment can we make or draw of how much time, effort and money are wasted in unnecessary litigation from a bureaucracy perspective?

Prof. Weisbrot—It is hard to make an estimate of that. I guess you could pluck a figure out of the air and you would probably not be wrong or exaggerating. But what we were calling for was a more strategic approach to decision making and the use of litigation. We asked that the government and its departments develop strategies for litigation avoidance and more effective conflict management. I believe some progress has been made over a period of time—for example, through the Office of Legal Services Coordination in the Attorney-General's Department. One issue may be the fact that not every government department has that sort of mechanism within it to try to provide more rational use.

Senator PAYNE—But they probably should.

Prof. Weisbrot—They probably should. They should certainly have some sort of strategy for the use of litigation. The Administrative Review Council, of which I am an ex officio member—wearing yet a different hat—has been working steadily for some years with primary decision makers to try to get primary decision making better and to make sure that external and internal merits review processes are well articulated. I think all of those things would increase access to justice in a meaningful sense, whether or not it was legally represented. I think people would get a better quality of justice if that worked better.

Senator LUDWIG—I want to pick up on something Senator Payne was talking to you about in respect of alternative dispute resolution. Have you read Sue Tongue's report in relation to legal spend or outsourcing by the Commonwealth government?

Prof. Weisbrot—No.

Senator LUDWIG—You might want to take it on notice in respect of the comments that they have made about ADR. Effectively Sue Tongue did a survey of all Commonwealth agencies in relation to their legal spend and then determined what expenditure on outsourcing of legal services had been done. But it was also a requirement that they respond in respect of ADR, and the response was—this is my word—dismal. That was from all government departments. I understand that you have said that the office may be picking up on ADR, and that your understanding is that it could be. If you have a look at Sue Tongue's words in respect of that, you might like to reconsider your remarks.

Prof. Weisbrot—I would be interested to see them.

Senator LUDWIG—The other matter I wanted to raise with you was that a number of submitters in Melbourne yesterday indicated that pro bono work is not a substitute for legal aid.

Prof. Weisbrot—Absolutely.

Senator LUDWIG—I note that you were the chair of the Pro Bono Task Force. Do you agree or disagree with that remark?

Prof. Weisbrot—The report of the Pro Bono Task Force had, I think, about nine or 10 underlying principles before it went to our recommendations. Principle No. 1, in full caps and bold, was that pro bono is not a substitute for a proper system of legal aid. I do not think anyone would disagree with that. But even in a lusciously funded legal aid system there would still be advantages in having pro bono practice, both in terms of that being an aspect of lawyers' professional responsibility and also because it provides opportunities for specialists who are not ordinarily legal aid lawyers to become involved in cases and to spread some of that work around. But the basic premise I agree with 100 per cent.

Senator LUDWIG—A number of submitters in Melbourne then said that what is happening with legal aid is that, as the money is drying up, pro bono work is filling the void. Is that what the pro bono scheme is designed to do? If it is not, what is the solution or what do you recommend for pro bono? What area should pro bono work actually be in? In other words, is it being drawn out of where the task force or the pro bono proponents recommend it should be and into a substitution in any event?

Prof. Weisbrot—That may be happening in practice. The idea of the Pro Bono Task Force really flowed out of the first National Pro Bono Conference in August 2000. One of the startling features of that was the heavy presence of the private profession there. A statement which I think it would be fair to say drew audible gasps was by a major firm saying that they could never spend their annual pro bono budget. In an era when we know that there is a great deal of unmet legal need, people were quite shocked about that.

So the idea of the task force was to identify some of the structural impediments to pro bono being delivered and to try to provide some solutions to some of those. That included things like providing a best practice pro bono handbook so that law firms that were interested in delivering that sort of service would not have to reinvent the wheel but there would be material there about

how you recognise pro bono in-house, how you identify conflicts of interest, how you make sure that people are properly credited for doing pro bono work and how you try to deal with issues of costs and disbursements which may be a problem in pro bono—a range of those sorts of issues. In its essential spirit the idea was not to try to provide some sort of backdoor legal aid but really about how to facilitate an area of legal services that was growing anyway. Law firms, small and large, city and country, were saying that they were interested in doing that as an aspect of professional responsibility, professional pride and service to the community, and that there were some ways that that could be facilitated.

The National Pro Bono Resource Centre, which has been established on a recommendation from the task force and given four years of seed money by the federal government, has been starting to pick those sorts of issues. It is doing a mapping project on legal need in rural New South Wales which has been funded by the Law and Justice Foundation of New South Wales. It has produced the first version of that pro bono best practice handbook, which has been getting a very good reaction here and overseas. So it is starting to roll out some of those things. It is also working with law schools to try to instil a pro bono culture in Australian law students, which hopefully will carry through to their professional practice. Those are things that the Pro Bono Task Force and the centre are trying to do. Again, going back to the basic premise, it is not meant that those things will be a substitute for a proper system of legal aid.

Senator LUDWIG—In respect of access to legal aid on page 4 of your submission you are critical of—if I can put it in my words—a needs based model, yet you have just referred to a needs based study that was been undertaken by the pro bono body. What is your view of that? Are they different? I am trying to understand your criticism in respect of the needs based model in relation to access to legal aid.

Prof. Weisbrot—I am trying to remember the basis of that. On the pro bono side—

Senator LUDWIG—I am happy for you to take that on notice. It seems that Legal Aid New South Wales was keen on a needs based model—in other words, keen on at least study being undertaken to ascertain what legal need there is. The pro bono body that you have just referred to is also trying to ascertain legal need to be able to then meet that need. Yet you seem to at least indicate that it presents practical difficulties. I was wondering where that came from. But I am happy for you to take that on notice, just to understand it a little bit more. What I am trying to understand is whether there is a need for a needs based model or at least for some studies to be undertaken to ascertain legal need. If there is not, then of course we do not need to look at expending money in that area. We can rather expend it on legal aid as a priority.

The other area that I was looking at was the veterans area. You commented on veterans cases. Legal Aid New South Wales—or it might have been Victoria Legal Aid—indicated that there was money available for hearings, which meant hearings before the AAT. Is there no money available for the Veterans Review Board?

Prof. Weisbrot—I believe that that is separately funded, and that is why that is the case.

Senator LUDWIG—So it is not under this same area. Perhaps I should ask them. I was just wondering whether you had made any investigation or any report in respect of that area as to whether it should or should not be or whether it should come under the same area. That was the

interest I had, in respect of whether the commission had or had not done any work in that area. In other words, was it efficient or less efficient to do it that way, or had you made any recommendations to improve access to legal assistance in the area of veterans affairs? It would seem more logical to fund a matter from the same pot of money—means tested or however they wanted to deal with it—whether it is before the Veterans Review Board or had to go to appeal. If you are changing horses, so to speak, or dealing with that separately, it seems to me that it could create more difficulty. The only area I was interested in, from your perspective, was whether or not you have done any work in that area.

Prof. Weisbrot—Not since the time of the *Managing justice* report. I will go back and check the funding basis at that time, but my recollection is that funding for Veterans Review Board matters came directly from the Department of Veterans' Affairs and not from the general legal aid pool.

Senator LUDWIG—You have the same problem, in that the party giving the funding is sitting on the other side.

Prof. Weisbrot—I cannot give you an answer. I will take that on notice.

Senator NETTLE—I have two things I want to ask you about. Firstly, did you get any negative responses from the government to the recommendations of the *Managing justice* report which stood out as being either particularly surprising or particularly disappointing?

Prof. Weisbrot—That is a difficult question. I do not think there were any that were particularly surprising. There were some, I guess, in areas where the government has simply allowed the process to flow. In a previous era, when we completed a review we would have recommended some substantial piece of legislation. But now it is a much more dispersed system. Most of our recommendations in *Managing justice* were not to government. A great deal of the recommendations went to the AAT, the merit review tribunals, the Family Court, the Federal Court, university law schools, state and territory legal aid commissions, the legal profession and its peak associations, and the government. So I guess the government has responded in the way we would have anticipated to those recommendations that were directed to government. In the other areas, the response simply said, 'These are matters for the other body and we will keep those under advisement.' So we hope there will be some more progress in those areas.

Senator NETTLE—For any of the other recommendations to government, are there any areas where the concerns you had or the recommendations you made in 2000 have since been heightened? Are there any areas where a negative response in 2000, and a heightening of the area of concern since 2000, have created any greater need to respond to that recommendation?

Prof. Weisbrot—Not that I can think of off hand, in terms of cause and effect. Certainly at the time that we were looking at these matters, in the lead-up to 2000, the courts were very concerned about litigants in person, and their being substantially involved in meetings with judges in recent times has perhaps heightened concern about that. There are some areas that the commission dealt with—not in *Managing justice* but in the subsequent inquiry into the federal Judiciary Act—which looked at finding some ways for dealing with special leave applications to the High Court. For example, there is quite a striking graph in the Judiciary Act report which indicates along the lower axis the number of successful special leave applications. Over a very

long time—over 20 or 30 years; I forget exactly how long—it is a fairly steady line. But the number on the upper axis goes up. In that large gap—in that slice—there is an enormous amount of court time spent and a great deal of it is in respect of unrepresented litigants. We made some recommendations to government, which have not been acted upon to date, about how some of those matters may be addressed.

Senator NETTLE—There is another thing that I wanted to ask you about. I do not know if you were in the room when Mr Grant was giving evidence before. He was commenting on the government's proposals to introduce the Regional Law Hotline and access online. That is again something that you have picked up on in terms of a response to one of your recommendations. Mr Grant's comments were not favourable towards the contributions that the government had made there; rather, he advocated the LawAccess process that is in place in New South Wales. I just wondered if you had any comments. It seemed to be a different view. Your submission has positive comments about the hotline, and he did not have so many. I just wanted to ask you if you had any comments on that?

Prof. Weisbrot—I did not hear his comments. I do not have a view about the relative success or otherwise of the current initiatives, other than that I guess it was the relative success of the New South Wales model—the LIAC model—that we did favour in making a call for government to extend that process more widely. Whether that has been done effectively or not, I am not sure.

I would certainly join with Bill Grant in saying that I think the Legal Information Access Centre model that we have in New South Wales is a very effective one, and if that could be played out nationally in the same way it would be good. What we were trying to do in *Managing justice* was look at a number of different strategies to provide people with basic information about legal need, assessing their cases and being able to prepare some aspects of those cases themselves.

We dealt with the issue of what we called the unbundling of legal services. We said that, if the legal aid dollar is stretched, it may be that lawyers should not spend a lot of time down at the beginning end of the stage—and this is a similar area to that covered by questions Senator Bolkus asked earlier. They may be more needed at other critical stages. Sometimes that is earlier on and sometimes it is later on. If individuals could assist in some way in those stages when lawyers were not involved, that would advance the process and their own interests as well. So I guess that is the underlying rationale, apart from general democratic theory about citizens having full access to the law and full opportunities to inform themselves.

CHAIR—I have one final question. Your *Managing justice* report made recommendations in respect of the publication of statistics on unrepresented litigants. The government's response was to leave it to the courts. Have you been able to make an assessment of what the courts do produce now and how much further they have to go to satisfy your recommendation?

Prof. Weisbrot—I could take that on notice. I have not done any significant analysis of that. I would maybe just add something to what you have said: part of the basic problem in operating in this area is that we have insufficient statistics as a general matter and insufficient research. I think it is actually recommendation No. 1 in *Managing justice* that said that we need a great deal more research in this area and that far too much policy is based on lawyers' war stories rather

than on detailed analysis. We need collection of good statistical material and then a good secondary analysis.

We suggested in part that that could come about through university academics accessing what at that time were called SPURT grants. I think they are called something else now. But those are the applied institutional grants in which university academics can link with other bodies, private or public, like legal aid commissions or other bodies. Unfortunately, I think that has not been well taken up here. The academy in other common law countries has a much stronger tradition of doing that kind of applied research on the legal profession and legal services. It has been very limited in Australia. I can count on the fingers of one hand the number of academics who have an interest in that area. So, as a general matter, I would still push hard for implementation of that recommendation, which is that we need a much better statistical portrait and better secondary analysis of what is happening across the system.

CHAIR—This is probably one of my obsessions: has the commission done any work or assessment of the cost of the tax deductibility mechanism of corporate legal fees—that is, what the taxpayer foots for that provision?

Prof. Weisbrot—No. That has been one that has been bouncing around a lot. The 1994 Access to Justice Advisory Committee spent considerable time looking at that. The commission dealt with it in *Managing justice: a review of the federal civil justice system*, but did not spend a long time on it. We had really conflicting evidence. Again, it is one where you would need a much more sophisticated model. On the one hand, there is a certain positive gut reaction to saying that major corporations that use funds in strategic tactical litigation should not be able to then deduct those from their tax in a way that becomes a liability for us all. On the other hand, it becomes very hard to separate that out. Smaller businesses that are involved in trade practice litigation—for example, where they are fending off larger corporations or where they are acting against a government department such as the tax office or some other department—were adamant that it would be a real problem for them if they could not deduct those sorts of expenses.

So we found it very difficult. We found, firstly, that we did not have a good empirical portrait of what was actually happening and that, again, we were dealing with individual, notorious cases. Secondly, we found that it was hard to develop public policy in the absence of that empirical portrait. If you were going to go that way, a line-drawing exercise would be critical so that you did not unfairly punish small- and medium-sized businesses with policies that were really designed to go towards major corporations which use legal expenses in the same way that they might use marketing or other kinds of public affairs expenses.

CHAIR—I suppose there is the other aspect too. If you could quarantine the cases where corporations are defending themselves against the Crown, in all other cases would you need to have full tax deductibility or could you develop a model which would allow, for instance, 50 per cent deductibility and would give you some flexibility in a revenue sense to fund some of the cases of the individuals that the corporations are probably appearing against in court? Have you done any modelling along that basis?

Prof. Weisbrot—We have not. Just looking at some of the intellectual property issues we are dealing with at the commission now, you can see that a small company's only asset really may

be some bit of intellectual property that is being threatened by a much larger corporation. In that case 100 per cent of its survival, in essence, is staked on the outcome of that litigation or the resolution of that dispute. I think that is the sort of case where you would not want to have that arbitrary line nor to say, 'You can deduct half your expenses and half you can't, and the same applies to the large corporation that you are in litigation with.'

CHAIR—Do you not have a worse situation in consumer cases where an individual may not have any resources at all, but the corporation does and gets tax deductibility for its expenses?

Prof. Weisbrot—Yes. There may be some other models that are better for dealing with that. There are some pieces of legislation in the United States, for example, which deal with individual consumers who are acting against major utilities. In California there is a system where, if you have a dispute in relation to power utilities and so on, there is a special legal aid fund for that that comes out of the utilities earnings. Also, there are opportunities for collecting costs and treble costs if you are successful. I think, in that same spirit that you are concerned about, there may be some other mechanisms that are worth exploring—if not instead of then alongside that issue of tax deductibility.

CHAIR—Thanks very much. Thanks for your submission, your presence and your evidence this morning.

Prof. Weisbrot—Thank you.

[10.35 a.m.]

MORAN, Mr Simon, Board Member, Combined Community Legal Centres Group of New South Wales

PORTEOUS, Ms Polly, Advocacy and Human Rights Officer, Combined Community Legal Centres Group of New South Wales

ANDERSON, Ms Lea, Western Australian Joint State Representative on Executive Committee, National Association of Community Legal Centres

BISHOP, Ms Julie, Director, National Association of Community Legal Centres

O'BRIEN, Ms Elizabeth, National Convener, National Association of Community Legal Centres

CHAIR—Welcome. We have received submissions 84 and 60 from you. Do we need to amend or alter them at all?

Ms L. Anderson—I understand that you heard yesterday from Naomi Brown, who drafted the Western Australian submission to this committee inquiry. You requested of her a copy of the Western Australian joint review, which was a Commonwealth-state government review. I am happy to table that. It is available in electronic form on Legal Aid WA's web site.

Ms O'Brien—We have a number of other documents which we will table, but we are not adding to our submission at this stage.

CHAIR—Would you like to start with an opening statement?

Ms Porteous—The New South Wales group will go first.

Mr Moran—I will make the statement very brief, given the number of us here and the questions you might have. I will make a couple of overarching points about our submission. We wanted to say something good about legal aid. I am not sure what people have told you, but I imagine a great deal has been said about the limitations of legal aid. We thought we should say some things about how we believe New South Wales has provided a very good quality legal service, even if it is limited in its eligibility.

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

New South Wales Legal Aid has delivered some innovative methods to try to extend its service delivery, within the limitations of its budget. One example is a current pilot that is taking place in two areas of rural New South Wales, in Dubbo and in the Northern Rivers area around Lismore. That is trying to combine or link up the various services to ensure that there are not endless referrals of clients and duplication of services provided. That does not in itself extend services, but it can take some of the burden off cross-referrals and continual discussion of who does what.

Nevertheless, legal centres in New South Wales have definitely felt the burden of the increasing ineligibility of people for legal aid. It is worth noting that legal aid has a number of tests for eligibility. There is a jurisdiction test. Legal aid is not available across the board, as I am sure you are aware. As solicitors who are applying for legal aid or advising clients about legal aid, the jurisdiction question on its own can present difficulties and confusion and can limit people's rights to access legal aid.

The means test is very complicated. The main area in which Sydney, particularly, is affected by the means test is the asset test. It is not just an income test; it is also an asset test. Given Sydney house prices, there are often people who have very limited income but, because they have an asset in a particular area that is worth a great deal, they do not qualify for legal aid.

The third element is the merit test, which again is complicated—particularly the Commonwealth merit test, which has three different limbs to it. I will hand a copy in to give you a sense of its complexity, as I do not think it was part of our submission. Initially there is a legal and factual test, which is, essentially, a reasonable prospects of success test. That is how any private solicitor, if they were engaging in a matter on a speculative basis, would approach a case.

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

Ms Porteous—I have three points to raise in relation to access to justice, as far as the experience of community legal centres goes. There are a lot of points in the submission, but there are three that we want to draw out. The first issue is about problems with access to interpreters. Our submission goes through the way that interpreter services are provided in New South Wales. Basically, it is a bureaucratic system and quite arbitrary. For a legal centre trying to book an interpreter, in theory there are exemptions—you do not have to pay the New South Wales Community Relations Commission—but in practice there is a cap. Once a certain number of free interpreters are used up from the community legal centre allocation, that is it. So people turning up to a legal centre the next day will be told: 'No, I'm sorry. We can't get an interpreter, so we don't really know what your problem is.' We made a suggestion in the submission about running a pilot, which would involve putting some money towards allowing all community legal centres in New South Wales to have free face-to-face interpreters during the day or in the

evenings, which is when most advice clinics are run, and, at the end of a 12-month period, figuring out how much money is needed—whether or not it is more than $100,000. We think something has to be done; otherwise some people will simply not get their problems dealt with at all.

The second issue is rights for Indigenous people in terms of access to justice. We think a lot of Aboriginal people are not going to legal services at all, particularly in relation to civil law. One way that that they can be assisted is if community legal centres are given funding to have Aboriginal specialist workers who do outreach programs. Some programs are now running—for example, the Hawkesbury Nepean Community Legal Centre has an Aboriginal access project. Unfortunately, its funding is about to cease. It has been looking for funding for that, but people are saying, 'No, we don't want to fund that.'

The third issue is that, even though in New South Wales there are some good movements towards having integrated service delivery, with legal aid commissions, community legal centres and pro bono, in rural and regional areas there is still a lack of access to justice for people. Some people have to travel for 200 or 300 kilometres to even see a solicitor. And some people miss out on seeing a solicitor because, if there are only two or three private solicitors in their immediate area, the other party may have been to see each solicitor in the area. So there needs to be something to deal with that. Community legal centres in rural areas are also finding it very difficult to attract solicitors or to attract trained staff because they are so far away and the conditions are not that hot. We have made recommendations about improving funding to rural and regional community legal centres so that they can attract more solicitors.

Ms O'Brien—As you have been going around, you would have heard that the problems of what we call RRR centres—rural, regional and remote centres—are common across Australia. Perhaps there is no better illustration than the fact that this inquiry itself is not going to the Northern Territory, Tasmania, Western Australia or Queensland. We believe that that is partly because it takes a long time and costs a lot of money—and that really is the point. Australia is a very big place. Community legal centres exist across the country.

CHAIR—Just to interpose for a moment, we kicked off this inquiry in Port Augusta.

Ms O'Brien—Yes, I am aware of that.

CHAIR—I think that was a recognition of the fact that there are problems in rural and regional Australia. This committee has had 16 inquiries going this year, and I think rather than a matter of resources it is a matter of paying full attention to all the inquiries and trying to do service to them all.

Ms O'Brien—Certainly. I will take that on board.

CHAIR—Unless we can clone ourselves, we are not going to be able to get to every country town.

Ms O'Brien—We were not suggesting you go to every country town—we are aware of the limitations. That was my point—that those limitations apply across the delivery of legal services throughout Australia, and they are particularly critical in the community legal sector network.

There are more than 200 CLCs across the country, and they have been operating in the area of community law for some 30 years. We typically see clients who are, for one reason or another, not able to afford private legal assistance or are not currently in receipt of grants of legal aid.

You will have seen, throughout our submission, a number of recommendations. We do not want to take up your time going through all of those. We just want to add to our submission a number of things which have come to our attention in the last few days that we thought we could usefully provide for you. We have an evaluation of the Law by Telecommunications project, the Australian LawOnLine project, which we carried out in May, I believe, last year. We seek to table that because it might be useful to the committee. We also have a copy—which has been provided to us and we have been told it is fine to provide to you—of the *Legal aid and self-representation in the Family Court of Australia* report by the Socio-Legal Research Centre of Griffith University, looking particularly at unrepresented litigants in the Family Court.

Since the inception of community legal centres some 30 years ago, I think it is important to note that the amount of legislation or law affecting ordinary Australians has doubled. As a primary focus, community legal centres were to ensure, through community legal education, that ordinary Australian citizens could understand the law as it affects them, and ways for them to access justice or to use that law in their interests. With the doubling of that sort of legislation in the last 30 years—and particularly in the last 10 years—and the chronic, ongoing underresourcing of the legal aid dollar, we are now facing a significant crisis.

We have a number of innovative programs throughout the community legal sector in Australia. We provide, as you will hear from all of the states as you go around, a varying number of programs designed to ensure that people can maximise the very small legal aid dollar. However, we have arrived at a point where nobody in this sector—legal aid commissions or community legal centres—can do any more without further resources. We are now absolutely maximised.

For all the things we may put forward as possible solutions—new ways of doing things and new ways of seeing things—the basic problem is that there is not enough money. The basic requirement is for more money. When we launched our Doing Justice project is Tasmania in September, a private practitioner from Hobart who was on the board of a community legal centre in that city was asked if there were three things he could put forward as the solution to the crisis in justice and legal aid in Australia. He said: 'One, more money; two, more money; and three, more money.' I think there is now no way of avoiding this crucial issue—that the underfunding of legal aid in Australia has reached crisis proportions.

It does not require any of us to spend a few weeks in jail to know that incarceration in Australia is directly related not to your guilt or innocence but to your ability to pay for legal assistance. People are in jail not just for criminal matters but for civil matters. People are alienated from their communities and from our civil society because they do not feel that they have access to justice. Critically, as we say throughout all of our submissions, the legal aid dollar is not going proportionately to Indigenous people or Indigenous communities.

The Commonwealth Attorney-General's Department has one program for Indigenous people—the Indigenous Women's Program—on which you will have heard some information in Port Augusta. It is a small program. Since its inception in 1998, it has not received another cent. It has done critically important work in combating family violence in Indigenous communities,

but it is chronically underfunded. It is underfunded to the extent now that to call it a pittance would make it sound like too much.

Our submission to you included our budget submission for the last round. We brought a couple of extra copies with us for the committee in which we go through formulas for basic funding and requirements of community legal centres, if that is useful to you. I would like to table also our *Doing justice* paper, in which we look at the entire issue of justice throughout Australia, if that is useful to hand up. Did we bring some extra copies of that?

Ms Bishop—We have some Christmas cards!

Ms O'Brien—Thank you. We haven't got any whistles or streamers.

CHAIR—Thank you. Mr Moran, you gave us the merit test document, and I agree with you that some of those tests are a bit curiously framed or a bit curious in themselves. Can you give us any idea of the sort of case that may have been rejected on that third ground—the 'appropriateness of spending limited public legal funds' test?

Mr Moran—I can give you two examples. The first is a disability discrimination case that was brought by a man who had a disability and who could only have accessed the town centre using his wheelchair. He could not access the town centre as a result of various problems with footpaths, with paving and with access on and off buses. So he considered bringing a complaint of disability discrimination against the town council on the basis that he could not access the premises—the premises being the footpaths. We applied for legal aid there. Essentially Legal Aid said, 'It's going to cost too much to run; we can't fund this case,' even though that person fitted into the means test and there were reasonable prospects of success. It was not really a matter we could take on on a speculative basis, as there was a substantial need for reports to support the case. A second case, which is slightly different, was in New South Wales, a coronial inquiry where—

CHAIR—Before you move to the second one, can we infer from that that there may be a reluctance to fund discrimination cases?

Mr Moran—I do not think there is reluctance to fund them. Some cases are perhaps too expensive to run, or the commission thinks that the prospects of success are not strong enough. I think you could probably say there is a reluctance in some circumstances to fund discrimination cases.

CHAIR—But in this case it was the appropriateness test that knocked it out?

Mr Moran—It was.

CHAIR—And the second case?

Mr Moran—The second case related to a coronial inquiry into the death of young woman at a rock concert. In that particular case—again, a very important systemic issue, about safety at rock concerts—legal aid was provided, but there was a clear limit to it. I think in the end the decision

to limit legal aid there was specifically to limit the cost of the proceedings. They were fairly extensive proceedings; they went for six weeks.

Senator PAYNE—To whom was the legal aid provided in that matter? I know the matter you are referring to.

Mr Moran—The legal aid was provided to the family of the—

Senator PAYNE—Of the child.

Mr Moran—child, yes.

Ms L. Anderson—Can I be a bit cheeky and offer a Western Australian view of the merit test, and give you an example in family law?

CHAIR—I have never found Western Australians to be anything but!

Ms L. Anderson—Pushy, aren't we! The nation does not end at the Great Dividing Range, as I am sure you know! It just seems that on a very regular basis the paralegals and lawyers in my agency—I work at the Women's Law Centre—are assisting clients to appeal decisions by the Legal Aid Commission to refuse aid on the basis of their cases not having merit in family law matters. We are succeeding with those appeals—many of those matters go on to be successful—but it is extremely frustrating that that is how we have to use our scarce legal resources. It also is not access to justice, in our view, when clients are in effect having their matters heard and determined in a clerical or administrative sense without being able to take their matters to the relevant court or tribunal.

Mr Moran—At the end of last year, I put in four separate applications to the Legal Aid Review Committee because I had been refused aid in four separate cases. That bogs down a solicitor—who essentially is just trying to represent a client—in the administrative structure. I am not necessarily saying that there is anything wrong with the decision making in legal aid, but it is a symptom of the limited funds available to legal aid and the constant pressure that is being put on administrators within the commission.

CHAIR—The second question I have concerns the fund for interpreters and translating services, which I think is a good idea. You say in your submission that CLCs are accessed by more culturally-diverse communities than others. Do you keep stats on the proportion of non-English-speaking background clients that you have?

Ms Porteous—The Commonwealth data program does keep those stats but, unfortunately, I do not have them. We can provide information on the breakdown of the New South Wales stats, I think.

CHAIR—Thank you.

Ms Bishop—We can also give you a national picture, if that is helpful.

CHAIR—That would be good.

Ms Bishop—Do you want NESB?

CHAIR—Yes.

Ms Bishop—We can only give you country of birth.

CHAIR—Sure.

Ms O'Brien—We would need to possibly add to that the need for interpreters for Indigenous people.

Ms L. Anderson—And Auslan interpreters.

CHAIR—Thank you. On page 5 of your submission, you talk about enhancements that have been provided for CLCs. Are there any other enhancements that you think we should be looking at that are necessary for the operation or should we be looking at base funding? I notice on page 6—putting the new initiatives aside—your submission says:

> 22.4% of centres have received increases over 2% while 54% of centres received an increase of 1% or less.

That must be causing an enormous tightness in a budgetary sense.

Ms Bishop—I think it is not simply that only 54 per cent of centres over the last five years have received less than one per cent funding increases, but it is also what has happened with wages in comparison during that same period of time. According to ABS stats, the average wage index has increased on an average of 4.5 per cent. So that is where we are noticing that resources are being stretched in two ways: firstly, operating costs—simple things like replacing photocopiers et cetera; and, secondly, but most importantly and what forms the basis of this submission, trying to retain our experienced staff. The reason why we have trouble retaining them comes back again and again to wages and the fact that, with that sort of funding, we just have not been able to match the increase. That is why we put in that table listing the comparative salaries with the private law firms. In essence, the issue for us is attracting and retaining suitably qualified staff.

Senator PAYNE—In relation to the national association submission, you make a recommendation in relation to the Indigenous women's legal services and Aboriginal legal services. In hearings of this committee on other inquiries in Perth, Darwin, Alice Springs, Brisbane, and other parts of Australia that the committee visits as part of its role, we have met with and heard from countless representatives of Aboriginal legal services, legal aid commissions and practitioners who have urged that a similar initiative be taken. The committee has always taken those views very seriously and made appropriate recommendations in many cases. You recommend adequate funding of existing services. Are you talking about the ATSILS in that regard?

Ms L. Anderson—And the Indigenous women's programs that are funded within CLCs, and the family violence units.

Senator PAYNE—In regard to your recommendation that new services be established in areas which are not presently covered, could you give some examples of initiatives you might have in mind there?

Ms L. Anderson—Based on the Western Australian review, I understand that you probably had some specific Kimberley region examples provided to you yesterday. There are two private solicitors for the whole of the Kimberley region, based in Broome. There is a community legal centre based in Kununurra, which is a 12-hour bus ride from Broome. There are ALS solicitors and outreach workers: there is a solicitor based in Kununurra and outreach workers at Halls Creek and Fitzroy Crossing.

Senator PAYNE—We certainly talked about Fitzroy Crossing yesterday, and I am familiar with Kununurra, having been there myself.

Ms L. Anderson—Yes. So, if you are looking at that region and you are trying to sort out conflicts for clients who face disadvantage, then the resources are fairly stretched. The ALS, the community legal centre in Kununurra and the legal aid office in Broome, which runs two solicitors on an outreach program, work in fairly well. The Murchison-Gascoyne mid-west region, coming out of Geraldton, would benefit from better resourcing for the CLCs and more effective resourcing for the Aboriginal Legal Service in those regions—often those services are non-existent or non-operational—and legal aid offices.

Ms O'Brien—I was going to leap across to the other side of the country, but I will wait until you have asked your question.

Senator PAYNE—I will ask a question in relation to an issue we have discussed at some length over the last day and a bit. It is the issue of representational conflict that afflicts Indigenous legal services in particular. In regional and remote areas one often finds that in the event of a family law dispute or even a domestic violence dispute—a family and community violence dispute—the legal service is already representing one of the parties in the family on another matter. It may be a criminal matter, a property damage matter or something like that. The other party—more often than not the woman—may find themselves unrepresented. Is that an accurate assessment of where your organisations find themselves across Australia?

Ms O'Brien—Yes. This is a significant problem. If we just go across to the other side of the country, Cape York is one of the areas where services—

Senator PAYNE—I am sure the committee will get to Cape York at some stage.

Ms O'Brien—are critically needed. We did a big project on family violence matters in Cape York, and in it you can see your point illustrated, particularly in regard to what the ALSs are able to do—as they must—for perpetrators of family violence. You can see the problem: if you have 1,500 perpetrators you have 1,500 victims. The 1,500 victims are not able to receive the services, except in areas where those family violence projects are or where there are more of the Indigenous women's projects that the Attorney-General's Department funds. Those are the sorts of gaps we are looking at.

Senator PAYNE—The CEO of the New South Wales Legal Aid Commission, Mr Grant, suggested this morning that the only solution that would address this conflict problem might be a legislative solution at both a state and Commonwealth level. Would you have a view about that?

Ms L. Anderson—We did not hear the whole of that submission.

Senator PAYNE—Would you mind having a look at his suggestion in the *Hansard*, taking the question on notice and responding to the committee?

Ms L. Anderson—Sure.

Senator PAYNE—Thank you. In the New South Wales Combined Community Legal Centres Group's submission, you make a recommendation in relation to a preference for use of in-house solicitors rather than private solicitors. We have found, from the two legal aid commissions that we have questioned in the last two days, that it is inevitably moving in that direction—the withdrawal of private practitioners means the use of more in-house staff. For example, the Victorian LAC has 22 in-house family law practitioners on its books. Your assessment looks at the Commonwealth commissioning a study, but at the end of the day can't the LACs tell us whether it is more effective for them to use in-house practitioners or to brief out?

Ms Porteous—Regarding that part of the submission, quite a few legal centres said that from their clients' perspectives they got better service if they were being represented by an in-house solicitor. Obviously it is a decision for the legal aid commissions about how they decide to deliver services, but what we have been hearing is that for the clients the in-house solicitors often have experience dealing with disadvantaged, vulnerable people. It may be the same legal aid solicitor who works with a particular community over a period of time, which is particularly an issue for Indigenous communities. They feel comfortable with that person, rather than having to go to different private legal aid solicitors. So, from the perspective of the individual, they feel like they get a better service. Simon might like to answer your other question.

Senator PAYNE—I understand that, but I think there are two points to draw out of this. Firstly, who should commission a study? My question was really: aren't the LACs in a better position to tell us what works and what is most cost-effective and efficient for them? We could go down that road.

Ms Porteous—Yes.

Senator PAYNE—Secondly, if you go all the way down this road, don't you run the very dangerous risk of absolutely minimising the number of private practitioners taking on legal aid matters—to the point where you cut off your nose to spite your face?

Mr Moran—I am not sure about how to answer your first question. Maybe the legal aid commission thinks that it does not want to commission more studies but it is a reasonable idea—

Senator PAYNE—We have not asked them, but your suggestion is that the Commonwealth does it. I am suggesting that perhaps the commissions themselves are better placed to do it.

Mr Moran—I think the commissions would be fine to make that sort of decision. In answer to your second question, yes, it does lead to the risk that private solicitors will not be willing to undertake legal aid. I suppose it is a reality facing the commission now that many private solicitors are already not prepared to take legal aid, and that is simply because there are so many conditions and restrictions to a grant of legal aid, given legal aid's funding. If legal aid had a lot more funding and was willing to pay the rates that private solicitors normally receive then perhaps those solicitors would be inclined to take legal aid work. For example, before I took my current position I worked in a legal centre in Western Sydney.

Senator PAYNE—Which one?

Mr Moran—Macarthur Community Legal Centre. We had a number of local solicitors who would volunteer on our roster. A couple of solicitors were extremely good family law lawyers. Around about 1996-97, they decided that they would no longer work for legal aid because of the amounts they were being paid, because of the difficulties in obtaining legal aid and because of the complications relating to bills that they submitted to legal aid. I do not think they doubted legal aid's commitment to providing a service; it was just that the limited nature of the funding meant there were so many problems created for them. Because they were very skilled family lawyers, they had a great demand for their services from people who would pay significantly higher rates.

Senator PAYNE—So really, rather than going down the road where you may find yourself pulling further and further back from the participation of the private profession in legal aid—which I think is really important—there are base-level issues such as remuneration, efficiency and effectiveness between the commission and the private practitioners, which you could address. You could seek to address those, rather than get yourself to a point where you are not encouraging private practitioners to participate—because legal aid commissions cannot be everywhere. Mr Grant said that this morning: they cannot fill every single gap; there needs to be participation of the private practitioners—and I am paraphrasing his words.

Mr Moran—I think that is right, and I know how over the last two years the commission has attempted in some places to place legal aid lawyers—

Senator PAYNE—It has done a great job by the looks of it.

Mr Moran—and also at other times tried to raise the fees that are paid to private solicitors to undertake matters. But there is a significant difference between the $200 you get paid for legal aid matters—if you are successful in civil cases; it is significantly less if you are not successful—and the amount those private solicitors can get paid for doing their own work.

Senator PAYNE—Sure. So that is a fundamental issue. I would like to turn now to some of your family law issues. In chapter 7 you talk about the use of PDR where domestic violence or family and community violence and child protection issues are involved. It was my understanding that, essentially, PDR would and should not be used in family law matters in such circumstances, but you say that CLCs are reporting that families facing these issues are put into PDR. Is that by administrative error? Is it because there is no other available process? What are the reasons for that?

Ms Porteous—The section on family law was actually written in conjunction with the women's legal network. They are the experts on family law. We were trying to get them to appear here. I understand that there might be some hearings in Canberra where the women's legal network are able to speak; I am not sure about that. They really know the ins and outs of the system. There would be women's legal network people from NSW who could tell you what actually happens on the ground. Neither Simon nor I are family law lawyers so we would rather not comment on that.

Ms Bishop—Lea Anderson can answer that from a national perspective.

Senator PAYNE—Well, let us try that and then we might get you to take some questions on notice.

Ms L. Anderson—Certainly it would be great if the committee got the opportunity to hear from the National Network of Women's Legal Services.

Senator PAYNE—We heard recently from Catherine Carney on another matter during another inquiry, so we take her evidence regularly.

Ms L. Anderson—And Zoe Rathus in Queensland—absolutely. With regard to PDR—or ADR—it is not a panacea. In my agency, we can refer or divert less than 10 per cent of clients into that area. They are picking up clients who have had experience of domestic and family violence. I do not believe that it is—

Senator PAYNE—Who is referring them? How do they get into PDR if they have a family violence issue?

Ms L. Anderson—They are going straight through from Legal Aid—primarily that is how they are getting there.

Senator PAYNE—So the problem is at Legal Aid?

Ms L. Anderson—I think so—they are being asked. Some commissions have the view that they can protect women in those circumstances by offering them shuttle conferences, but it is our view that the negotiations are occurring under the shadow of the law and that that is not good enough. Although people are in separate rooms, they may feel coerced or pressured into arriving at decisions that they will walk away from and that are unworkable and unfair, and then, in fact, they go back into the system, represent themselves and face litigation.

Senator PAYNE—Is it because the commissions are, by virtue of the strictures placed upon them, taking short cuts? That is not a criticism of the commissions; it is just a question about process.

Ms L. Anderson—In my view you are right: I think it is flavour of the month—that is where the funds are. We are happy to—

Senator PAYNE—That is not what I mean. What I mean is: in terms of process, is it easier to say, 'We'll start these all off with PDR and then keep going if that method is not appropriate for

resolution—but we will start there'? Is it a process issue rather than a wilful attitude of 'We're going to force people with family and domestic violence and child abuse issues into PDR'?

Ms L. Anderson—I think it varies across the states and territories. My view is still that that is where the funds are so clients are being encouraged to go into ADR and PDR in the first instance. I do not think that is the best way to look at clients' legal needs, particularly where there is experience of family and domestic violence. We are glad that there are alternatives within the system, but they are not the panacea and they do not adequately meet the needs of everyone—particularly, women with families who have had experience of domestic and family violence. You cannot replace representation for those clients.

Senator PAYNE—I understand that, and I understand the importance of face-to-face interaction. That has been emphasised by a number of witnesses. Chair, I have three more questions but I am aware of the time, so I do not want to go on for too long.

CHAIR—Senator Nettle has some questions.

Senator NETTLE—I have a question regarding difficulties with the staffing of community legal centres and the comments you have made about staff going elsewhere. When people do go elsewhere, do they leave forever or do they spend some time out of the sector and then come back? What happens to them when they leave the community legal centres?

Ms Bishop—There are a number of career paths, if you like, for people in CLCs. One of the submissions you have received talks about the impact of the increased HECS obligation on CLCs to recruit staff. That is because we regularly get fresh graduates. So fresh graduates who have large HECS debts are not able to accept our wages, because they want to pay off their HECS debts more quickly. However, there are some who work with us anyhow. They stay for a few years: generally, the work is exciting for them, it is interesting and they feel they are making a difference. They know they are not making money, but they feel their work is worthwhile—but then they have children or want to buy a house.

It is as simple as that: there comes a point at which either they have a partner who earns a lot of money and subsidises them or, if they are the major breadwinner, they have to leave. A lot of our staff are at Legal Aid commissions in New South Wales, or they will go to tribunals, or they will go into the private profession. Often they will then become volunteer solicitors, so they will stay. In Victoria, there was recently a ceremony that awarded 20-year certificates to volunteers, including the Attorney-General's father and the previous Premier—all sorts of people. So there is a very strong volunteer culture in legal centres, and those who cannot afford to stay are regularly committed and come back as volunteers. But as to coming back to work again: maybe if they won the lottery they would. I do not know..

Senator NETTLE—My other question was about the charities bill that you mentioned in the New South Wales submission. Do you have any further advice or indications as to the impact of that bill on the work of CLCs?

Ms Porteous—What I put in the submission was that we would like this committee to be aware that that could impact. Since then we have done a comprehensive submission, which we are quite happy to forward to the committee if you would like to see that.

Senator PAYNE—Regarding the recommendation that you make on the cap in the New South Wales submission—I hate to tell you this is another family law question, so you may decide to take it on notice—we have been discussing the cap at some length over the past couple of days, particularly in relation to parties on the other side of matters extending proceedings with what could be described as vexatious or frivolous actions in order to exhaust the cap. When you recommend the removal or raising of the cap, how does that take into account that particular problem? On the basis that we do not have a bottomless capacity to pay, should there be more activity from the court in managing that process in terms of case management and issues like that? How would you see that playing out?

Mr Moran—We will take that on notice, but I might also just say that that is an issue. We have that as an issue all the time. I work at the Public Interest Advocacy Centre, and we run litigation against large corporations. They are very deep-pocketed, they will drive up costs substantially, and they do that. So there may be some issues there in relation to tax deductibility of legal expenses.

Senator PAYNE—And management of the legal process.

Mr Moran—And management of the legal process as well. Having said that, I know very little about family law, so we will respond to that on notice.

Senator PAYNE—Do we have any criminal lawyers with us today?

Mr Moran—No.

Senator PAYNE—You have a very comprehensive submission. I will give you another question on notice in relation to criminal issues and recommendation 18, which pertains to funding for employment law matters. Have the New South Wales CLCs approached New South Wales Legal Aid on that? If so, what is their response?

Mr Moran—I think Legal Aid considered employment lawyers some time ago. Given their limited resources, they had to choose which area they funnelled their civil law funds into. They have a list of civil law areas and jurisdictions, and they have decided not to go into employment law.

Senator PAYNE—Thank you very much.

CHAIR—You raise a point about travel costs. I think this might be from New South Wales as well. Do you see any scope or need for a greater travel budget for some of your CLCs? What is the current experience, for instance, in some of the regionally based ones? Have you been trying to get extra resources for travel and so on?

Ms Porteous—I will just talk about New South Wales, but I think it is an issue that the whole network is dealing with. Some community legal centres in New South Wales try to do outreaches where they do a circuit. They might travel, for example, from Broken Hill and go around communities. There are some people who have never seen a legal centre at all and have severe legal problems, so they are trying to get to those communities. Some of those circuits take so much time and money that they have done it once or twice and then realised that that has used up

their entire travel budget. Their travel budget is not increased in recognition of the kind of work they have to do, so it is on a par with travel budgets in urban areas, which does not make sense. But I think nationally there is also—

Ms O'Brien—I think it is clear that travel time and distance is an issue for us all.

Ms L. Anderson—Kimberley Community Legal Services took a long time to convince the Commonwealth department that they should be able to spend some of their funds on a four-wheel drive. That was absolutely necessary for them to provide outreach to communities like Oombulgurri, and that includes driving through creeks. When our joint state-Commonwealth review visited Kununurra, the same vehicle drove us around within about a 12-kilometre radius. We had the director and manager of our state legal aid commission and representatives from the Commonwealth Attorney-General's Department and the CLC. It was patently obvious how practical that was and how worthwhile it had been having that blue in order to spend those moneys, because that is what that community needs. So having that flexibility with regard to funding—and looking at issues such as travel costs without straitjackets—is very important in enabling the delivery of relevant services to our varied communities.

Ms Bishop—Could I add a brief point in relation to that and travel costs? Earlier today you asked two witnesses about the Regional Law Hotline and LawAccess and those things. While legal centres think the LawAccess model is the preferable model because of the way it combines the Law Society, CLCs and legal aid, and it has face-to-face advice available et cetera, as you will see in the reports we tabled, we feel that, while the money provided to legal centres through the Regional Law Hotline has been effectively used, the model itself has not been particularly effective. This is where travel costs are related. It is the legal centres' experience rather than belief that the outreach services, while more expensive in the short term, are much more effective, both in terms of dollars spent and outcome, than trying to resolve particularly rural and regional issues through telephone calls.

CHAIR—Thanks very much. Thanks for your submissions, your time and your contribution this morning. We look forward to some of those answers coming through.

[11.21 a.m.]

BOERSIG, Mr John Forrest, Coordinator, Researcher, Coalition of Aboriginal Legal Services of New South Wales

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

Mr Boersig—I am a coalition of one today.

CHAIR—They are normally the most dangerous. They can make decisions.

Mr Boersig—No. I learned that a long time ago; I am just representing a voice. I undertake research and coordinate the Coalition of Aboriginal Legal Services of New South Wales, on behalf of the six Aboriginal legal services in New South Wales.

CHAIR—Your submission is No. 5. Do you need to amend or alter it, or would you like to start off with a statement?

Mr Boersig—I do not need to amend or alter it at all. I really just want to talk from the submission and make a short statement, and then I would be happy to answer questions. The background of this submission comes in relation to a National Audit Office recommendation back in 1996 which talked about the nature of Aboriginal legal services or ATSILS—I should describe them as that—and the relationship that they had with the rest of the legal aid landscape. In particular, it talked about their nature as legal services and the possibility of mainstreaming.

This submission really comes in that context. At the heart of what we are trying to do is to show why Indigenous legal services are important as organisations in their own right and why the core business of ATSILS is crucial. To do that, I have set out a history of the development of Aboriginal legal services and endeavoured to show the rationale for having discrete Indigenous legal services. That is a broader project that relates, no doubt, to other Indigenous organisations—that is, the importance of Indigenous control and management. That is a very big issue currently, as we are all aware.

A number of issues arose as I was listening to the other speakers. One was the issue of conflict of interest. That has been a long and very thorny issue. In New South Wales that is addressed by saying in the policy framework that the first person in is the person who gets the advice and assistance. That is a very difficult policy to implement at times, particularly when the core business for many organisations is criminal law. There are a number of ways in which the conflicts can be addressed. I suppose what I am looking at is a landscape of legal service providers. The provision of legal services by an Aboriginal legal service is not the only way in which services are delivered, obviously. There is referral to other practitioners and there are legal aid commissions which provide similar types of services.

It is important, in delivering core ATSILS services, to have good protocols in your relationships with those other organisations and to find ways in which you can strengthen their

delivery of services to Indigenous people. ATSILS are not delivering a service in isolation, and they need to strengthen other providers. Whilst ATSILS are the major service provider in New South Wales for Aboriginal people in criminal law matters, there are significant matters that go elsewhere and that are provided for by the Legal Aid Commission. So we need to find ways in which we can develop a landscape where conflict of interest issues are met and where lack of resources issues are met, because—as I hear that you have heard throughout Australia—underfunding is chronic. I do not want to dwell on the lack of money; it is obvious an injection of money would be marvellous and would do many things. What I want to talk about today is how you deal with the money you have got and how you can find creative solutions.

The first point I want to make about that is that we need to be clear about what the core business of Aboriginal legal services is. They cannot provide services to everyone in the community, but they can, given the amount of money, provide high-quality professional services—and at heart that is what they are trying to do. Historically, in New South Wales ATSILS have developed strong criminal practices, and that reflects the high incidence of Aboriginal people coming before the courts and their high rates of incarceration. There is a real need and of course that need continues. I put a number of figures in the submission. Forty-two per cent is the rate of incarceration of Indigenous children to non-Indigenous children around Australia; that is, 42 per cent of those in custody are Indigenous children. The rate for Indigenous women is currently 31 per cent, an increase in less than 10 years from something like a little under 15 per cent—a huge growth.

The Indigenous prison population is shown to be increasing by about eight per cent per year—a horrendous figure—so there is a great need to maintain representation in criminal matters. That of course is broader than simple representation in court, although that is important. It is not just about being there when someone is sentenced; it is about the way the matter is conducted, it is about being out there in the field when people are arrested and it is about prevention. It is getting out there and educating people about their rights and responsibilities. Ultimately the point I am making is that in relation to the landscape we also need to find creative ways to address these issues, apart from money and apart from recognising this issue of core business.

The second point I want to make is that there are a broad range of other services that need to be provided to Indigenous people. There are civil and family law services—no doubt you have heard about that at length—in which domestic violence issues are crucial, as well as all the issues associated with that, such as victim's compensation, mediation, child care and protection. One example is provided by the office where I work in Newcastle. There are three different service providers operating out of the same premises. The key service provider is the University of Newcastle Legal Centre. Attached to that are the civil lawyers with the Legal Aid Commission, and also attached is one of the officers of the Many Rivers Aboriginal Legal Service. Each of those services has a particular specialty. The Many Rivers Aboriginal Legal Service focuses on criminal law, the university provides family law and other related civil services, and the Legal Aid Commission provides civil services.

There you have a one-stop shop for a range of services that can be cross-referred so that Indigenous people can be assisted more broadly with their legal needs and in an environment which is acceptable to them. Most recently the university was successful in gaining some internal funding for a civil lawyer on a part-time basis to address specifically Indigenous civil needs. That has been going since July and, as we were sure would happen, the person in that

position has been overwhelmed by the number of people who need that kind of assistance. So I think when you co-locate organisations they should maintain their own integrity—each with their own policy and guidelines—but you should provide a system where you can cross-refer. That is the kind of relationship you want to develop.

Both in Newcastle and, indeed, in other areas, including Lismore and Redfern, officers of Aboriginal legal services also involve students. That has been very effective in adding value to the kinds of services that can be provided. For example, in Redfern a lot of the submissions made to government are initially prepared by students, who then work with lawyers to hone those submissions. They go out to court and do a lot of the legwork. That is another way to add value.

In New South Wales there have also been a number of initiatives where we have tried to work with the Legal Aid Commission. There is a family law project at the moment, where the Legal Aid Commission is now providing grants to three Aboriginal legal services, on a pilot project, to try to provide family law advice and assistance. There is also a solicitor advocacy scheme. Because ALSs do not have enough money to provided sufficient representation in the High Court for all cases—and I can go back to that in a minute—we are working with the Legal Aid Commission, senior lawyers and public defenders to provide representation. There are memoranda of understanding with both the Legal Aid Commission and the public defenders of New South Wales to do that. They want to address those issues too. In a number of offices we have also provided opportunities for Legal Aid Commission staff to provide civil services within the ALS office. ALSs are not funded to do this, so they have worked with the Legal Aid Commission to bring Indigenous people into their offices to start addressing those services.

One other area I would like to refer to is video link services. Again, ALSs have no money to provide video link services. Those services are being set up—for example, for bail hearings in remote areas—with a video link in the Legal Aid Commission. We are able to use that link both for bail matters and to deal with our clients in prisons. As you would expect and have no doubt heard, distance is a particularly big issue for Indigenous legal services. It is often the case, for example, if someone is arrested in Walgett, which is 8½ hours north-west of here, that their lawyer might be three hours away from there, and they may be put in Bathurst jail. Using video links is a very practical way of dealing with that.

The only other point I would make about money is that there has been no substantial increase of funds in New South Wales since 1996. The centres are basically operating on the same budget they were on in 1996. There has been no CPI increase during that period either. The current CEO of ATSIS has indicated that that will be remedied this year, which is great. There was $80,000 provided a bit over 12 months ago, and that has been the only other injection of money since that time. It is very difficult, as you will see in the report, to maintain lawyers and other staff.

About 18 months ago—and this is not in the report—I did a wage parity comparison between legal aid commissions and New South Wales Aboriginal legal service listers, looking at job descriptions and wage ratios and at field officers in comparable positions in government. Generally, there was a $7,000 to $12,000 wage differential between lawyers, and often it was as much in relation to field officers. For example, a field officer was getting around $32,000 in an ATSIL, whereas if they worked as a court liaison officer in the Legal Aid Commission in the

court it was closer to $40,000. So there are very basic disparities. That has run-on effects in relation to retaining staff and experience.

CHAIR—Thank you very much. We probably do not know where to start with asking you questions. One issue you did not raise was the prospect of competitive tendering. Have you worked out what is being proposed and what the impact of that might be?

Mr Boersig—New South Wales went through a tendering process in the late 1990s and actually undertook that. In fact, all the ATSILS in New South Wales tendered for their current regions. There were major issues and concerns about how that would work out. I think it is fair to say that, while it was a process ATSILS were required to go through, in the end the best organisations got a guernsey. A lot of fear about losing jobs and so forth was around, and is still around, and that fuels these kinds of issues.

One of the problems with the tendering process, we would suggest, is their fixed price. In a sense, you are being asked to do a job that you have not got the money to do. The terms of the tender when they go out are crucial. If you are asked to do too much then you are going to fail. If the Indigenous connection is not maintained in the tendering process—and I appreciate what best practice is about this—then you may move to a very low common denominator where large firms might find it cheaper to employ lawyers, but no Indigenous staff, to provide the services.

What the reviews and audits have shown of ATSILS, and indeed of the national program, is that Indigenous people, while they grumble and complain sometimes about the individual services—and fair enough—want Indigenous based services, because they give the best outcomes. That finding was not a surprise. That finding was made by Mr Ruddock in 1980, it was made by Mr Harkins about seven or eight years later when he did a report, and it was made most recently in an audit of the national programs. Indigenous people want to control and maintain their own legal services and they think that is where they will get the best outcome. Indeed, that is ultimately what ATSILS are trying to do in providing a quality service. That is why we are careful about being stretched too much.

CHAIR—One of the issues that has arisen in the last few days has been the question of there being no strategic overview by the Commonwealth of legal aid as a whole. In that respect, it was put to us that you have different departments that are providing funding, whether it is A-G's, DIMIA or ATSIS. From what you have just said, you see a very strong reason for the current funding hierarchy to be maintained.

Mr Boersig—In terms of the importance of delivery of service by ATSILS. That is not to say there might not be some other good ways of doing it. The Fitzgerald report in Queensland identified the best way in which a whole of government approach can work, and that is, partly, by rationalising the number of people within government that Indigenous people have to deal with. That was one of the major recommendations in his work. He was looking particularly at the North Queensland area. There are changes on both sides there, but the whole-of-government approach is really the way to go. The issues here that are addressed by Aboriginal legal services are the consequences of historical and current social and economic difficulties that range from health to other services.

CHAIR—In that context, you mentioned the rates of recidivism in Aboriginal youth. I presume there is no difference between girls and boys?

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

CHAIR—The point you make is that with diversionary methods and so on there is a consequent increased burden on the Indigenous legal services to provide support and infrastructure. Is that not being funded in any normal way?

Mr Boersig—It is not. One of the difficulties is that legislation is state based and Aboriginal legal services are Commonwealth funded. There is a mismatch there in the sense that there are a number of initiatives by the New South Wales government—circle sentencing, for example, and youth conferencing on the one hand, and specific provision in legislation that requires police to contact Aboriginal legal services, which means we need to be available 24 hours a day—but no funding over here to provide those services at all. So, whilst ALSs support the initiatives being made, we are getting further and further behind in being able to address them. Most kids are arrested early in the morning or after work, so providing those services is very difficult. Circle sentencing, for example, takes probably two or three hours, which is a lot of time to be away from the office. Again, we are fundamentally supporting those initiatives—including youth conferencing—but it is very difficult to meet all those other requirements

CHAIR—Is family conferencing something that would be coordinated by the legal service?

Mr Boersig—Family conferencing has a fascinating history. It started in New Zealand to address the issues of Maori people. It developed in New Zealand and has been imported into New South Wales under the Young Offenders Act. Its value is that it keeps children out of court and tries to find solutions between victims and offenders, in the context of minimising harm to the community.

CHAIR—Within that process is there a capacity to increase the awareness of tradition and, consequently, to increase self dignity?

Mr Boersig—In New South Wales they are trying to bring Indigenous people in to be involved as conference convenors. There are wider issues about elder involvement that are addressed in both circle sentencing and youth conferencing. There will always be a struggle with a one-size-fits-all system in addressing particular local needs. As you have no doubt heard from Indigenous people, they are very much interested in local solutions and local needs. The development of youth conferencing needs to take that into account and provide local solutions.

Senator PAYNE—Thank you for those comments and for your extremely comprehensive submission, and for starting a 'glass half-full' approach as opposed to a 'glass half-empty' approach. I want to ask you a funding question. Yesterday we met with your colleague in Victoria, Mr Guivarra, and he indicated that one of the matters concerning him, in funding terms,

was that the ALSs were funded for six months from 1 July 2003 but you are still awaiting advice on further funding for the rest of the financial year. Is that the case?

Mr Boersig—I understood that that issue had now been resolved, but I would have to take that on notice.

Senator LUDWIG—Resolved since when?

Senator PAYNE—When did you understand that to be the case?

Mr Boersig—I understood that it had been resolved. The people involved in this are actually in the room, so they might be able to tell us.

Senator PAYNE—Not from back there, they can't!

Mr Boersig—I understood that there was funding for the rest of the financial year.

Senator LUDWIG—Perhaps you could take that on notice and get back to us.

Mr Boersig—Yes, I will.

Senator PAYNE—That is in contradistinction to what we were advised yesterday.

Mr Boersig—That was certainly the situation up until recently, I am sure, but I will check that. I can get the answer because I know the people!

Senator PAYNE—Thank you very much. I want to move on from some of the questions that Senator Bolkus was asking you. Regarding the conflict issue that you adverted to briefly in your original remarks, I guess the impression I was left with yesterday by your Victorian counterpart is that every strenuous effort is made to ensure that parties are represented. That may require briefing out, and it may require a number of other options. Is that the approach of the New South Wales Aboriginal legal services?

Mr Boersig—It is. Again, all these services are regional, so they are dealing with these people on a regular basis. That is why I say that there needs to be a landscape of reform of legal services that is more broad than just the ALSs. Policy work is crucial here, in terms of trying to address the issue of who comes in and who gets the best service. So the short answer is, yes, there are major restrictions because the referral-out budget is so small. The referral-out budget for most ALSs would be maybe $150,000.

Senator PAYNE—Per annum?

Mr Boersig—Per annum. Referring out a familial matter would cost—if it ran to a hearing—maybe $10,000. You could not do many of those.

Senator PAYNE—You can do 15 of those in a year.

Mr Boersig—That is right.

Senator PAYNE—That is pretty limiting.

Mr Boersig—Yes. The difficulty is that the High Court money, which was $500,000 in 1996, was still $500,000 in 2002. We tried to remedy that by dealing with the public defenders and coming to arrangements with the solicitor advocates in the Legal Aid Commission. We would like to do it ourselves.

Senator PAYNE—I am sure you would. What is the size of your client base in New South Wales? How many clients would the ALS have on its books?

Mr Boersig—In New South Wales, it has been very difficult. There have been real issues about the collection of data. There are six Aboriginal legal services. The data collection of that material is only just coming to fruition—it is linked to a national database. Can I take that on notice?

Senator PAYNE—Certainly. I want to turn to a recommendation of the New South Wales combined centres, which I might ask you to look at. They recommend that the Commonwealth provide funds to the Hawkesbury Nepean CLC Aboriginal legal access project. They further recommend that the Commonwealth fund five Aboriginal specialist positions—to be placed at Wirringa Baiya CLC in Sydney, the Far West Community Legal Centre in Broken Hill, the North and North-West Legal Centre in Armidale, the Western New South Wales Community Legal Centre in Dubbo and the Northern Rivers Community CLC in Lismore—and, further, that $100,000 be allocated by the Commonwealth and/or the New South Wales governments toward a central CLC interpreter and a translating fund for a 12-month pilot, to determine the real cost of providing an adequate level of interpreter services to community legal centres in New South Wales. From their perspective, that pertains to both Indigenous and NESB clients. I would be interested in the view of the ALS on whether that is the sort of targeting that needs to happen, and whether they are appropriate recommendations. Thank you very much, Mr Boersig.

Senator NETTLE—I want to ask you about the role that field officers play. Can you explain how they assist the lawyers involved in a case—and also whether there are people playing a similar role in CLCs and legal aid commissions?

Mr Boersig—There are a number of features which distinguish Indigenous legal services. One of them, of course, is management by Indigenous communities. The other is the employment of Indigenous staff. The role of the field officer is something that started at the beginning of the Aboriginal legal services, which you can trace back to the early 1970s. That bridges a gap between non-Indigenous lawyers and Indigenous people. Their role is that of liaison between lawyer and client and, more broadly, liaison between the Indigenous community and legal services. They provide the most crucial role in the delivery of Aboriginal legal services. It is one of the reasons Indigenous people come to legal services; it shows the ownership they have.

The role that a police liaison officer plays in the local courts is quite different. Their role is much more linked to the management of the court, the facilitation of getting people through and into the organisation, softening the edges of that system and making it more accessible. They

provide a different role, in that sense. The role of police liaison officer has been very controversial at times. I will not address the issues relating to that. They, too, provide a way in which Indigenous people should interface with police, but we have some concerns about those roles.

Senator NETTLE—Do CLCs or legal aid commissions dealing with Indigenous clients have similar people playing the role of field officers?

Mr Boersig—No, not that I am aware of. There are none in New South Wales that I know of, except for the Wirringa Baiya—but that is a particular kind of service.

Senator NETTLE—My last question is about circle sentencing or juvenile justice conferencing. What is needed to make that model work for Indigenous communities? You commented before that it needs to be flexible enough to be localised to people's needs. What is the gamut of things that are needed to make that model something that can be effective in Indigenous communities?

Mr Boersig—The crucial thing is Indigenous control. There also needs to be passage of authority to make the decision. In most of these situations—for example, in circle sentencing—the decision is ultimately still made by the magistrate. We need to pass that decision-making power to the Indigenous people. There is an inquiry in Western Australia at the moment in relation to the role of customary law. We need to find ways of interfacing that, particularly in the more remote areas, so that those decisions can be made. There are parallels overseas. For example, the Navaho community have their own discrete legal system, where the principles they use to make determinations draw upon their own custom and culture as well as established legal principles. Ultimately, drawing from that, we need to see a system where the Indigenous view of the world is used to resolve the problems that arise within the Indigenous community.

Senator NETTLE—To move forward, would you suggest getting juvenile justice departments and Commonwealth bodies involved in a pilot program to work with a particular Indigenous community to do that? Is that the sort of thing that might be a first step down that path?

Mr Boersig—That is clearly a first step. Steps have already been made towards this by involving Indigenous people at a local level as conference conveners. I do not mean to use the phrase 'whole of government' as a cliche, but it actually does recognise that solutions need to be drawn from more than just one department. Indigenous people and the department are part of that. That is why I liked the way the Fitzgerald report talked about rationalising some of those issues.

CHAIR—Thank you very much for your evidence and, as the deputy chair said, for your very comprehensive and important submission.

[11.52 a.m.]

BENJAMIN, Mr Robert James Charles, President, Law Society of New South Wales

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

Mr Benjamin—I am primarily a family lawyer. I have practised in the family law area since 1975.

CHAIR—Yet you can still smile!

Mr Benjamin—Yes. We have prepared a paper for you.

CHAIR—You have made a submission, which we have numbered 79. Do you wish to make any amendments or alterations to it, or would you just like to start with an opening statement?

Mr Benjamin—I do not need to amend or change the submission in any way. From the point of view of the Law Society of New South Wales, legal aid is a fundamental necessity, a fundamental part of what government needs to provide in the areas where it provides it. There is a problem, which I guess this committee has needed to deal with, with the dichotomy between the state and federal systems. I suspect that there is not much you can do to fix that and that the joint funding—part from state government, part from federal government—is going to continue.

Legal aid in New South Wales probably falls into three or four main areas: firstly, crime and state based crime, which seems to be reasonably adequately resourced; secondly, civil litigation, which has all but disappeared in terms of legal aid funding in New South Wales, certainly from the levels that existed in the 1980s; and, thirdly, family law legal aid, which has been a struggle. Because of the lack of funds for family law legal aid some years ago, many practitioners who undertook legal aid in that field fell away from it. They are having real troubles getting them to come back to legal aid. Also, of course, there is legal aid for Indigenous Australians, which we have dealt with in our paper. That is trying to cure one end of a significant social problem which many governments have tried to address, but the problems still exist in a broad way. I am probably here more to answer your questions than to make statements but, as a lawyer, I had to make some sort of statement.

CHAIR—I might just start with that point you just made about withdrawal by private legal practitioners from the family law jurisdiction. How long do you say that has been going on? What has been the impact of it in terms of the quality of advice that may or may not be flowing to legally aided clients?

Mr Benjamin—There is a significant number of people who probably qualify for legal aid but are unable to get it. The Legal Aid Commission adopt quite an appropriate policy: if they have acted for one party to a dispute, they will not act for another. The other party, if they are entitled to legal aid, have to find someone. They just cannot find them. The country firms and the suburban firms who have done it now fill their days with more remunerative work and just

do not take it on. There has been an increase in the legal aid rate from $110 to $130, or something like that, but it just does not seem to have attracted them back.

CHAIR—What needs to happen? Do we need to look at something similar to the Federal Court order No. 80, whereby a judge can identify or locate a lawyer to assist on a pro bono basis?

Mr Benjamin—First of all, I guess everyone who has sat in this chair today has said that it needs more resources. It needs just to bring those levels up a bit closer to real practice. That is a start. Am I too softly spoken?

Senator PAYNE—You would be the first president of the Law Society of New South Wales in a long time who has been too softly spoken, Mr Benjamin.

Mr Benjamin—Clearly that may be a problem for me. Bringing the rates up a little higher will bring the private practitioners back in. They are interested in doing the work and they do not mind doing it. If I can give you an example, my firm does a fair amount of child representation work. We charge legal aid at whatever the going rate is, but we make our solicitors time that in accordance with the normal method so that we can gauge how much we are contributing towards legal aid and make commercial decisions in relation to that each year. It shows on the figures that we get about 25 per cent of what it really costs us. On a child rep matter where you get $2,200 or $2,300, you will be looking at total costs of about $6,000, $7,000 or $8,000. If that figure were brought up a bit, firms, particularly country and suburban firms, would be more inclined to take on that sort of work.

Practices such as mine, which make perhaps 15c or 20c in the dollar as remuneration for the partners, suburban practices would make hopefully about 30c or 35c to the dollar. If you are only getting 25c then there is a real cost that the practitioner has to pay. So there is that level to it. Secondly, there is the way you try to combine your legal aid work with the paid work. If you are going to a local court, the Federal Magistrates Court or the Family Court, you go there with a couple of matters rather than one. That means that, hopefully, you can get better leverage and the cost is not so significant.

CHAIR—When was the last increase?

Mr Benjamin—I think it stayed at $110 in New South Wales for about eight or 10 years. I think it went up to about $130 recently.

CHAIR—Is it too early to tell whether that increase is going to have any effect?

Mr Benjamin—From what we can determine so far, it has not had a significant effect, but we have not had any empirical measurement of that at this stage.

CHAIR—I have one other line of questioning. There has been a somewhat strident law and order campaign in New South Wales. Have you felt the impact of that in terms of the need for legal assistance?

Mr Benjamin—Yes. If you look at the number of people who were refused bail, you will see that that has doubled or tripled in the last five or six years. That must impact because people who are in custody make constant applications for bail and are constantly looking for a basis on which to be released. I am not sure of the precise numbers, but certainly the time people spend in jail for offences seems to be increasing in New South Wales. That certainly increases the need for representation. Have you had a look at Rosemary Hunter's report on representation and non-representation in the Family Court? I will dig that out for you if you do not have it.

CHAIR—We got it this morning.

Mr Benjamin—That report shows, again in terms of family law, that the more people are represented the fewer the court resources that are used and the more likely it is that the matters are going to be resolved. I suspect that that would be the same with criminal law. Competent practitioners would look at defending the issues that are defendable and not expanding the litigation.

CHAIR—These campaigns are often accompanied by extra resources for police and prosecutors. Do you know if there have been extra resources for legal aid?

Mr Benjamin—I cannot accurately comment in relation to that.

CHAIR—We will try to find that out.

Senator PAYNE—If I characterised Mr Boersig's submission from the ALS as a glass half full I would probably characterise the submission of the Law Society of New South Wales as a glass half empty in terms of the perspective you take on the access to justice issues that we are examining. You make a passing reference to the advocacy role of the Law Society in this area, but I am interested in what activities the Law Society pursues to encourage practitioners to continue to participate in legal aid. I understand all the points you make about the challenges, the difficulties and how you manage your practice with the remuneration processes the way they are, but does the Law Society take a proactive approach to help ensure that private practitioners continue to participate in the legal aid process?

Mr Benjamin—We certainly do. There are two fundamental functions of a law society which justify our existence. The first is in terms of legal education and the second is in terms of standards and behaviour. We have had a significant pro bono study and discussion going on throughout the profession for the last three or four years and we have encouraged discussion in that regard. We have involved our regional presidents. We have had presidents talk to the regional groups about the need to be involved in pro bono work. We drive that through organisations within the Law Society, and even outside the Law Society, such as a pro bono provided by the large firms in a structured way. We recognise and encourage pro bono in an unstructured way in which the suburban and regional firms operate. We support that in those particular ways.

Senator PAYNE—At the same time, I assume you would contend that pro bono is not a replacement for legal aid but a necessary adjunct to those who are appearing before court who do not qualify for legal aid but are otherwise in dire circumstances. I do not mean down to every single word of that, but in the broad.

Mr Benjamin—In the broad, yes. It is not a substitute and cannot be a substitute.

Senator PAYNE—In terms of the Law Society's pursuit of these issues, can you give us some idea of the advocacy approaches that you have made to both the state and Commonwealth governments about the issues that are of concern to you?

Mr Benjamin—I do not have the precise number, but we make about 180 submissions per annum.

Senator PAYNE—And we are always grateful for those that come to this committee.

Mr Benjamin—As Chairman of the Family Law Committee, I can say that we will always make some sort of submission in relation to legal aid. Much of what we have here comes from those previous submissions. We certainly support it in terms of our advocacy to both state and federal government. We support it in terms of the contribution that comes from the Public Purpose Fund of New South Wales. Under the statute, it gives priority to legal aid.

Senator PAYNE—Mr Grant spoke to us about that this morning.

Mr Benjamin—There is a fair amount of money that comes out of the Public Purpose Fund. We support it in terms of very public and professional recognition of those solicitors who undertake legal aid work to ensure that they are recognised as part of the peer groups. We promote that in our journal. We promote it to the profession through our e-newsletters and through our caveat. Is that the advocacy you were talking about?

Senator PAYNE—Yes. That is exactly what I was talking about.

Mr Benjamin—The president of our council last year was in fact a Legal Aid solicitor and made quite a mark as president. It is something that, as a Law Society, we are proud of. We recently changed the constitution of our Law Society to entrench positions for different groups of solicitors, which include government solicitors—and we hope that will be reflected in Legal Aid solicitors—corporate solicitors, and large city, small city, suburban and country solicitors so that we have a broad range. That will mean that it is easier for Legal Aid or government solicitors to get onto the council of the Law Society and influence the policy. In the past it has been fairly hard for that small group to garner the numbers to get elected.

Senator PAYNE—The challenges of achieving elected office—

Mr Benjamin—At the end of the year, I become a feather duster, so I can sit back and watch.

Senator PAYNE—It is always awaiting the rest of us. One further point which is well made in the submission, about provision of justice generally, is:

The provision of justice not only involves the proper administration of justice by judicial officers—

and I would add the access questions that we are discussing here in this inquiry—

but also the proper and efficient administration of matters by the legal practitioners involved.

I think your submission makes that point quite well.

Mr Benjamin—Thank you.

Senator LUDWIG—The answer, of course, is hard to find, but in your submission you say:

In the Law Society Committees' view, there is an urgent necessity for level of legal aid funding provided by the Commonwealth to be increased so that Legal Aid Commissions and Aboriginal Legal Services are able to meet the demands of their client base with respect to proper legal representation.

It seems a truism from the number of submitters that we have heard in the last couple of days. We have also heard that the level of funding for the future is yet to be determined. They have not yet worked out what the new model will be, let alone what the funding arrangements are likely to be when that is handed down. Does that create difficulties for the Law Society in representing your members, who are in both commissions and who work in that area, who are uncertain of their future in terms of where the funding is going to come from or whether they will have a job the next day—some of the more mundane issues perhaps but still relevant to their life?

Mr Benjamin—I do not think it causes a conflict within the Law Society. We promote both the private practitioner and the Legal Aid solicitor because both serve their own particular areas of the community very well. The Legal Aid solicitors who undertake family law work in Sydney are of a universally high quality. They are very, very good solicitors. We cannot, however, get them into every court in the country or every suburban court. The issue is the balance between providing legal aid services through the commission which in some areas is very efficient and good and in other areas is not so efficient. In terms of funding, the more funding we can get into that, the better we can get these matters justly dealt with through the courts. Does that answer your question, or have I missed the point?

Senator LUDWIG—Yes. In respect of the funding, is there any view of how much more funding you need? Has anyone looked at this issue? If you are going to say, 'We need more funding,' I suspect there are always budgetary limits on all of these things.

Mr Benjamin—I guess we look at it from a fairly narrow perspective and your job is to look at it from a broader view. We have not analysed to a precise figure what more we could take. I guess we just have not done that.

Senator LUDWIG—It becomes a piece of a string, in the sense that—

Mr Benjamin—The more you give us, the more we want—and the more we want, the more we need, I guess. You could pour as much as you want into legal aid and it would be serviced. It is quite incredible being out there when people come into your office and want assistance and you have already got sufficient work to try and manage. Sending them away is heartbreaking for the practitioners, I know. That will continue to go on, I guess, no matter how much money you put into legal aid.

Senator LUDWIG—But is there Commonwealth spending in this area that the New South Wales Law Society recognises as being wasted that could otherwise be used in this area? Some

submitters today have talked about LawOnLine or Law by Telecommunications. Mr Bill Grant mentioned those as a waste of time.

Mr Benjamin—I knew he was going to say that. In terms of the way the Legal Aid Commission is run, they have been squeezed as hard as they can be squeezed and they are very efficient. In terms of the way the practitioners run, they do it now pro bono—and I use the term pro bono because there is a significant element of pro bono in it. As to how the broader public information systems work, I do not think we are in a position where we can tell. I have a great interest in legal education and education. You can measure how many people use that but it is hard to measure what value people get out of it. I guess someone could do some empirical research into that. But it is quite astonishing in practice the number of people who come in now with information. The use of the Internet has really empowered a lot of people, who come in with far more information than they have had before. I am more and more challenged by clients who have data and material and who say, 'Hang on: I've read this on this site and read this on that site,' or 'I've been to the Family Court site and they've told me this,' or 'I've been to the Legal Services Commissioner site and that says you've got to provide this information.' I do not necessarily agree with Bill Grant in that area.

Senator LUDWIG—Thank you.

Senator NETTLE—You were saying that you get 25 per cent of the remuneration for cases that you are doing for Legal Aid. Can you outline what component of the work that solicitors are doing for Legal Aid is not covered through the money that you get from Legal Aid?

Mr Benjamin—I probably cannot. If we get a child rep matter in, our responsibility for that child is to issue subpoenas, interview the child, interview the counsellor, attend at court, file affidavits, read other people's affidavits, turn up and argue the case and make submissions to the court. Because we charge on an hourly rate, we measure all those hours up. We know as a matter of practice that Legal Aid pay us whatever the current rate is and at the end of the day we know that this will cost an average amount of $5,000 or $6,000. We cannot measure it against any part of it. What we can measure it against though is interesting and it perhaps gets back to Senator Payne's comment. If we do not offer to do this sort of work, we do not get the best graduates. The young lawyers will come in and say to us: 'You're a great family law firm. You chase property in the eastern suburbs. What do you do in the broader sense?' If we do this sort of work, we can get the younger practitioners to come in and work with us and stay with us; if we do not do that sort of work, they will not—which is a credit to what is given to them in their law schools.

CHAIR—Thank you very much. I think you might be quoted on one of those comments you made.

Mr Benjamin—So long as it is one of your reports and not in the *Telegraph* or the *Financial Review*, I am quite happy!

CHAIR—You don't reckon anyone will read our reports—is that it?

Mr Benjamin—I think the people who read your reports are perhaps far more—I won't go on.

CHAIR—You almost got yourself out of that! Thank you very much.

Proceedings suspended from 12.15 p.m. to 1.31 p.m.

FRAIL-GIBBS, Ms Patricia, Wirringa Baiya Aboriginal Women's Legal Centre

CHAIR—I welcome our next witness, who is the coordinator of the Wirringa Baiya Aboriginal Women's Legal Centre. Your submission is numbered 89. Do you need to amend or alter it?

Ms Frail-Gibbs—There are a few little amendments I need to make—spelling mistakes and that type of thing.

CHAIR—Perhaps we can work it out as we go along?

Ms Frail-Gibbs—Yes.

CHAIR—Would you like to start with an opening statement?

Ms Frail-Gibbs—I just want to point out that before Wirringa Baiya came about there was really no access to justice within Australia for Aboriginal woman. So we were the first of our kind in Australia. Next year will be our 10th anniversary. Before that we worked for about three years in trying to set the organisation up. I was one of the founding members of it and I have continuously been involved in Wirringa Baiya ever since. The reason that I say Aboriginal woman did not have access to justice before is because the Aboriginal legal service was set up in relation to a lot of males being put in jail for criminal matters—for example, for perpetrating crimes against women. When they were setting up the ALS, the argument was that the women had access to the police prosecutor. But they did not have access to all of the other things that come with the legal issues involved when women or children are going through domestic violence or sexual assault, and that was one of the reasons we were set up.

Aboriginal women did not really access mainstream organisations—they were not really culturally appropriate. Mainstream organisations also did not know how to encourage Aboriginal women to use their services. When you are working with Aboriginal clients it takes a long time before the client will actually feel safe enough to disclose all of their information to you. They are some of the reasons we were set up. As I said, we were the first of our kind in Australia and we are extremely proud—I am personally extremely proud of it. As I stated in my submission, we are a state wide service, but we have only got 1½ solicitors for the state. Looking at the statistics on how many Aboriginal women are going through or have been subjected to violence, having 1½ solicitors is a bit of a joke. For years we had one solicitor. When I came on board last year, I was able to restructure our organisation. I looked at our wages and was able to come up with another half a solicitor. That is the only reason we have 1½ solicitors; otherwise we would still have one solicitor.

We have recently put in a submission to the New South Wales Attorney General's Department for some more funding. The submission has gone to Treasury and we are just sitting back, waiting and praying that it is going to be passed in Treasury. If it does not get passed in Treasury, I do not know what we are going to do. Basically, we cannot continue to provide a service to victims of crime or survivors of crime with only 1½ solicitors.

There are some other things that I have not put in my submission. I was talking to HREOC yesterday. I am extremely concerned about employment law and how it affects workers in the CDEP—the Community Development Employment Program. As yet, there is no award whatsoever within Australia for participants working in that scheme. So if they are dismissed or if anything happens they have no legal access to justice. HREOC said it was unclear whether CDEP workers also have access to the Sex Discrimination Act 1984. That is another thing that we are going to be looking at very shortly. There is no award access to the provisions of the industrial legislation—the federal Workplace Relations Act. So it is not only the Aboriginal women who have nowhere to go; all Aboriginal people who are on the CDEP, if they are being treated badly, have nowhere to go.

We all know that we have to wait for a test case, but that is really unfair because one person is going to have to come along and put in a complaint, and that person is going to be up against the whole Aboriginal community—not just their own community but Australia wide—and that is a really big ask. We and the New South Wales Working Women's Centre are going to be looking at what else we can do to push these workers into line with the rest of Australia.

Another thing has come up, really only in the last couple of weeks. We have had a couple of cases of Aboriginal youths who, whilst trying to protect their mothers from domestic violence, have picked up an instrument and without meaning to—or I am not too sure why—have killed another person with that instrument. We need to start looking at what we can do for our youth—not just for Aboriginal youth but for youth all over Australia. Youth issues and children's issues are not being addressed. The youngest youth to die in Australia was a 15-year-old Aboriginal girl. That was in western New South Wales. She had twice been to the police station to get an AVO and had twice been denied an AVO. So youth issues just are not being addressed. I suppose the committee might have realised that through the course of this inquiry.

I just want to point out one really good, positive thing. On 30 October this year, the last Thursday in October, we at Wirringa Baiya Aboriginal Women's Legal Centre held a corroboree to reclaim our rights as Aboriginal women. We are saying that domestic violence, family violence, sexual assault and especially child sexual assault are just really not part of our culture. We want those rights back again. We do not want to be subject to these horrific acts. We have done a statement of purpose. We had a good turnout. This year was the official launch of it. Last year we did it just to see how it would go. We are aiming for that to become a national event. That is Aboriginal women coming together, standing up and saying, 'Enough is enough.' You will hear a lot more about that as the years go by.

I did not touch on the issue of literacy. Within our community, as you all know, Aboriginal people really do not have an opportunity to go to school and to stay at school. If they do one thing wrong they are out of the system, and there goes their education. Literacy is a huge problem within our community. That is one of the reasons why you need services such as ours, because we understand that. We are culturally appropriate and the people in our organisation are nearly all Aboriginal, so Aboriginal people are more likely to disclose that they cannot read or write. However, we did a test case last year. It took us a fairly long time to find out that the young lady that we were working with could not read or write. She just hid it so well. She hid it from us as Aboriginal women. Literacy really does need to be taken into account when you are talking about justice.

As I was saying earlier, we have got huge concerns about the charities bill, because it is going to affect all of us. I wanted to say that we really support everything that was said earlier. I will quickly go back to employment law. We have found that if Aboriginal youth have one bad experience in employment they do not even stand up and complain or do anything like that. They just walk out; they leave the workplace. The girls, especially, do not go back into the workplace until they are at least in their late 30s. That is after they have had children and, in most cases, have gone through the whole cycle of being abused. They are finally finding their feet in their late 30s and getting out and looking at ways of going back into the work force.

I was pretty dismayed at the Prime Minister's summit on violence within the Aboriginal community, which was held on 23 July. The Prime Minister called this summit in response to Pat Dodson's speech at the Press Club. Pat had talked about the violence and what is happening within our communities, but he did not say anything that we as Aboriginal women have been saying for years. All of a sudden you have the Prime Minister running around saying, 'Wow, listen to this; listen to what is happening within this community.' We have been saying this for years. Yet the Prime Minister did not come and talk to any of us who are experts in the field, who have the knowledge of what is happening in our communities. He invited people that really do not have a lot of knowledge about domestic violence, sexual assault and especially child sexual assault. We put in a report. There were quite a few women's organisations from New South Wales and we had the support of other organisations around Australia. We put in this report but we still have not heard anything positive come out of the Prime Minister's summit on violence within our community. I have got to say that I am amazed that people are still saying that alcohol is the cause of violence within our community. Take away the alcohol and the violence is still going to be there. Maybe the incidents will not be as violent, but they are still going to be violent. That is something that I wanted to quickly bring up.

CHAIR—You say it is still going to be violent. What do you attribute that to?

Ms Frail-Gibbs—We attribute that to a lot of things—and that is another point; we have never had an inquiry into violence within our communities. It would be a good if we had an inquiry into that so we could get those answers for you. But there are quite a few reasons for the violence, and one is acceptance of the violence.

CHAIR—We are not talking about a naturally violent people, though, are we?

Ms Frail-Gibbs—No, we are not. Our lore was quite specific: these were the things you were allowed to do, and if you did not do them then you were punished by the clan or by the tribe—by the people—not on a one-on-one basis. This one-on-one basis is what we are up against now, so what do we do? How do we stop this? And how do we get communities to start feeling pride in themselves again and say, 'Domestic violence is not welcome in our community. Sexual assault and child sexual assault are not welcome in our community'? All it might need is just one community standing up and doing it. But you are right: normally we are not a violent people.

CHAIR—You say you have responsibility for the whole state. How do you fulfil that responsibility? Do you move around, or don't you move around? Do you do lots of work by telephone?

Ms Frail-Gibbs—We do lots of work by telephone. We have a 1800 number. We produce a lot of resources that we send out to the community. Some of the resources we have produced are absolutely brilliant—it is a pity I did not bring some. We actually produced 11 information sheets for Aboriginal youth on subjects such as AVOs—which are apprehended violence orders—depression and suicide, and homelessness. There were 11 different subjects and they were written in a language that youth understand and in Aboriginal English.

CHAIR—Maybe you can send them to us.

Ms Frail-Gibbs—Yes, I would love to.

CHAIR—I will ask the next question and then we will move on to other senators. You say you give legal assistance to over 100 women. The percentage of Aboriginal women in the prison population is some 31 per cent. How many, in numbers, are we actually talking about? And how many of that 31 per cent would have come through you or through other Indigenous legal services?

Ms Frail-Gibbs—Those clients who are now in prison would have gone through the criminal law system, and we do not do criminal law at all. They would usually go through Aboriginal legal services or other criminal law services.

Senator PAYNE—You do not do criminal law?

Ms Frail-Gibbs—No.

Senator PAYNE—So what do you concentrate on?

Ms Frail-Gibbs—Victims of crime and civil law.

Senator PAYNE—Right. Wirringa Baiya is in Marrickville?

Ms Frail-Gibbs—Yes.

Senator PAYNE—Why did you choose Marrickville—or did you choose it?

Ms Frail-Gibbs—Cheap rent. We just happened to get a suitable place at the time. We now need to move out of those premises. We can move wherever we want to because we are a state-wide service so it does not matter where we go.

Senator PAYNE—In the Sydney metropolitan area, where do the bulk of your clients come from?

Ms Frail-Gibbs—I could not answer that off the top of my head. Could I get back to you on that?

Senator PAYNE—Sure, I was just wondering about possible locations and whether you bore in mind in that decision the location of other Aboriginal legal services, other CLCs and things like that. If you could just think about that, that would be good.

Ms Frail-Gibbs—Yes, no worries.

Senator PAYNE—One of the issues which you have raised in your submission, which obviously comes from your state-wide representation, is access for women in rural, regional and remote Australia. Aside from all the endemic climate and infrastructure issues, you refer to a monopoly of legal service provision by particular private practitioners. What do you mean by that?

Ms Frail-Gibbs—In some communities, and especially out west, you may have only one or two private solicitors and they have a monopoly in that community.

Senator PAYNE—Does that mean that they do not do the work that you think is important, or that they won't?

Ms Frail-Gibbs—You also have to remember that they are doing work that, in the end, pays for their bread and butter so that is what they need to look at—and rightly so. When I wrote that, my solicitor advised me that that was another issue.

Senator PAYNE—If your solicitors wanted to flesh that out for you, and give us some more information, that would be helpful.

Ms Frail-Gibbs—That would be fine.

Senator PAYNE—You were here this morning before the lunch adjournment so you would have heard some of the questions we were asking about conflict issues and where that leaves parties unrepresented. Can you give us some idea of how Wirringa Baiya experiences that in terms of what you see happening?

Ms Frail-Gibbs—No, because Wirringa Baiya does not have issues of conflict.

Senator PAYNE—I understand that, but you say:

The fact remains that in many of the matters we deal with, the female client is refused access to a Legal Aid office in for example, family law matters, because her partner has already received advice from the LAC.

What sort of experiences are those women having that you could tell us about?

Ms Frail-Gibbs—Again, this is prominent in rural areas. If there are solicitors out there doing family law and if the ex-partner has already used that organisation then the woman cannot access that service, regardless of how long ago their partner used that service or what he used it for. That is what we were trying to say there.

Senator PAYNE—Do you then pick up those women and act on their behalf? Is that what you try to do?

Ms Frail-Gibbs—We only provide advice in family law, because it is such a long and drawn out process that we cannot actually undertake case management. So we provide advice and try to help them find another solicitor.

Senator PAYNE—I just have a couple of other questions. You have put some very interesting information in your submission about dealing with children and issues of child abuse and child sexual assault. One of the issues which I think is important out of that is your observation that the agencies that work with children are not working with CLCs to address the issues that you raise. Have your CLC and other CLCs tried to talk to agencies about that?

Ms Frail-Gibbs—No, but it will be on the agenda. The agencies are government agencies so they are not really used to working with community organisations, such as services like ours.

Senator PAYNE—You might hope they were, actually—or at least I would.

Ms Frail-Gibbs—Exactly, yes. That is why we are going to start aiming for that. There are a lot of areas that we have to start working in. We have to start thinking outside the square that we have always been working in.

Senator PAYNE—Are there any in particular in New South Wales that you think you need to approach specifically on those sorts of things?

Ms Frail-Gibbs—Yes. I think the Department of Community Services would be a big one.

Senator PAYNE—The suggestion that you make just before the end of your submission is another interesting one. You suggest that you are looking for a model that effectively connects and coordinates services. I think you refer to your CLC and similar organisations—solicitors, branches of the Law Society, health and community service providers and Legal Aid—who can look at the needs of residents in regional, rural and remote areas. What sort of model did you have in mind? Who do you think would initiate that sort of coordination? Where would that come from? Would it come from the state government or from the Legal Aid Commission itself? It is already pretty strapped, we hear.

Ms Frail-Gibbs—It would need to come from community service providers, because then we are not so tied in with restraints.

Senator PAYNE—Thank you.

Senator LUDWIG—I am trying to understand how many other Aboriginal women's legal services there are in New South Wales. Do you break it up by region?

Ms Frail-Gibbs—No. We are the only independent service within New South Wales. There are only two independent services within Australia, and that is us and ATSIWLAS. I do not know what the acronym stands for, but it is in Brisbane. In the Women's Legal Resource Centre at Lidcombe, here in Sydney, they have the Indigenous Women's Program, which is federally funded. They also have an outreach service, which is the family violence unit in Walgett in western New South Wales. That is it—the three of us for the state.

Senator LUDWIG—What does ATSIC fund in relation to the Aboriginal women's legal service? Do you get any funding from them? They obviously fund the Aboriginal legal service.

Ms Frail-Gibbs—Yes. I really do not know, because we are funded entirely by the New South Wales Attorney-General's Department. We are the only community legal centre in Australia that is funded entirely by a state Attorney-General's department.

Senator LUDWIG—I see. So there is no Commonwealth funding?

Ms Frail-Gibbs—No. We are unique. We are black women, so we are unique.

Senator LUDWIG—Thank you very much.

CHAIR—Thanks very much for your submission. We look forward to some of the further answers.

Ms Frail-Gibbs—Okay. Thank you.

[1.59 p.m.]

FINLAY, Ms Jacqueline Anne, Principal Solicitor, Welfare Rights Centre

FORBES, Ms Linda Athalie, Casework Coordinator, Welfare Rights Centre

CHAIR—Welcome. Your submission is numbered 55. Do you need to amend or alter it, or would you just like to start with an opening statement?

Ms Forbes—Just an opening statement is fine.

CHAIR—Go for it.

Ms Forbes—I firstly want to thank the committee for coming up to Sydney to hear our evidence. There has been a bit of a commotion because there is now a National Welfare Rights Network. We are not representing the whole network. We are talking on behalf of Sydney and we are talking about New South Wales. There are state and territory issues, and we decided just to put in a submission on our own behalf. A lot of the things we are saying apply all over the country, although with slightly different issues in each state and territory. The Welfare Rights Centre, as you may be aware, is a specialist community legal centre, specialising in social security law—but we only do administrative law. We assist people with internal reviews, with authorised review officers within Centrelink. We assist people at the Social Security Appeals Tribunal, the AAT and the Federal Court—but only on administrative review, not on criminal matters.

There is a bit of a misapprehension about this. There is an understanding that social security law can be very complex, particularly with regard to debts, which is basically what we will be talking about today. That is understood. It is understood that social security legislation is huge and widespread and affects a lot of people in Australia. However, it is not understood that anyone who incurs a debt of over $5,000 can find themselves facing criminal charges. Those criminal charges relate to the complexity of social security law, and our concern is with the crossover of administrative and criminal law. As I said, we only do administrative law, not criminal, so we are forced to refer people for whom we cannot get a waiver of recovery of their debt to either a private solicitor or Legal Aid for representation where they have been charged with a criminal offence.

There are many misconceptions about social security offences. Unfortunately, a lot of those misconceptions are fed or bolstered by a lot of publicity that comes out in the form of media releases from Commonwealth departments such as Family and Community Services and its main agency in this respect, Centrelink. There is a perception that anyone who has a large debt is necessarily a fraudster. Just in the last few days, we have been looking through press releases that have come out, and they definitely do feed that misconception. That misconception flows right through Centrelink. It can even flow on to solicitors who are seeking to take instructions from people who have been served with a summons to appear in regard to a criminal offence relating to a social security debt. There is a widespread misconception, as we mentioned in the submission, that the whole offence is a strict liability offence—you have received the money, so

necessarily you had the intent to get that money to which you were not entitled. Our frustration comes from the fact that we can assist people in some respects but not with regard to the criminal.

Within Centrelink, there is a problem with the key performance indicators. When Centrelink performance is being checked by its contracting departments—in this case Family and Community Services—there are very tight key performance indicators on the percentage of cases referred to the DPP where a debt is over $5,000. There are tight performance indicators on the length of time from the raising of a debt, the referral into the prosecutions unit within Centrelink and then the referral on to the DPP. So, once a person has a debt raised against them for over $5,000, that case can very quickly end up at the prosecutions unit in Centrelink or, as a worst case scenario, at the DPP.

The appeals system though with regard to debts is notoriously slow. There are not tight KPIs on the speed with which appeals are dealt with. In fact, for appealing against recovery of a debt, the first step in the appeals process—which is generally a review within Centrelink by the original decision maker—can take months. So, in the background to a debt, you have got Centrelink moving very slowly with administrative review and potential waiver and proper and deep consideration of the issues and the cause of the debt—and then prosecutions unit staff moving very quickly.

The worse case scenario for us in the Welfare Rights Centre is getting people coming to us either when their case is already at the prosecutions unit or, even worse, when their case is already with the DPP. We then have to refer the people on for advice. Our concern—and this is highlighted in the paper, so I will not go on about it—is that it appears to us that social security prosecutions are judged by the profession and the courts at a lower benchmark than any other criminal offence. A lot of this comes down to the fact that if someone goes to a solicitor and says they have been charged with theft of a car that person will be clear that what they need to do is say to their solicitor either, 'I didn't steal the car', 'I had a reason to steal the car,' or, 'Yes, I stole it,' or to lie. They understand what they have been charged with. Where an offence relates to incurring a substantial social security debt, in our experience—and in the experience of the solicitors to whom we refer these cases—people quite genuinely do not understand, often, how the debt accrued and they do not understand what they have been charged with. They think, 'I've received the money, so I must have made a mistake and I should plead guilty.'

Finally, for those people who are confused, there is a problem at the moment with the provision of legal aid. If they can get legal aid, that is great, but in our view the Legal Aid Commission is not properly resourced to deal with these cases adequately. The people who are doing the criminal cases at the Legal Aid Commission should have expertise and training in the administrative side of social security. They should understand the social security system as profoundly as the people doing the Federal Court cases regarding administrative review—but they do not. Because the family home is taken into account, people who have their own home in New South Wales are precluded from legal aid, even if they only have income by way of social security support, with no other income at all. We refer them to a private solicitor, but they cannot afford a private solicitor, because they are on social security. They cannot get a loan to pay the private solicitor, because they are on social security, and so they end up self-representing. Because they do not understand the offence, they plead guilty. In our view, there are a lot of

people pleading guilty and being convicted of offences where really there should have been a not guilty plea.

Ms Finlay—I will give some background on the people in New South Wales who are dealing with this issue. There are seven advocates whose part-time work is to handle these and many other cases. They have another part to their jobs. We understand there are five lawyers at the Legal Aid Commission who specialise in administrative law. They do not do criminal law, but they can assist. We know of one criminal lawyer in Sydney who knows both social security and criminal law and has experience in both. We know of one legal firm in Newcastle who are giving social security criminal offences a good go, but they are still learning. As far as we are aware, that is the access available in New South Wales to specialist assistance.

CHAIR—Starting from the perspective of the department, are you suggesting that there might be a need to reorganise benchmarks or the culture of the department to take into account more relevant facts when making a decision to prosecute?

Ms Forbes—Absolutely. The National Welfare Rights Network has been talking to Centrelink and actually took part in the review of Centrelink's prosecutions guide—the guide that is used by the prosecutions unit staff. When we read through the last version we could understand why some of those staff believe that all these offences are strict liability and why some of the prosecution's taped interviews, which are used as evidence, went awry and ran down the wrong path. A lot of it was due to the training and resource material given to Centrelink staff. We are quite grateful that Centrelink involved us in reviewing that but, as you mentioned, there is a cultural issue there. Those staff now have resource material that, if it were read and if some training were done, would help them to do their jobs a bit more appropriately. Particularly for the long-term staff, who have learned to do their jobs in a particular way and have their taxpayer hats firmly placed on their heads, it is very hard to create a different culture for them to work in. It has to happen, though, and it can happen. But with these KPIs the way they are there is no way that it will happen.

CHAIR—Were your suggestions picked up in the review, or are you still waiting for the outcome?

Ms Forbes—The suggestions were picked up but we are concerned that there is no real training or retraining or anything designed to change the culture in those units. One of our frustrations with Centrelink is what we call—and what they call as well—a silo effect, where you have prosecution staff, compliance staff, debt recovery staff and staff involved in the delivery of payments with very little crossover and very little understanding of what the other silos do.

If a person has a compliance activity—a person is believed to be underdeclaring their income—the compliance unit will investigate their case. A debt may be raised and then the debt may be referred to the prosecutions unit. It will also be referred to the debt recovery unit. The only direct phone number into Centrelink that the person will get is the debt recovery unit. The person may then say something like: 'What can I do about this?' They are not told by that person about their review rights. They are told by that person that they have to pay the money back and that they need to negotiate a repayment plan.

That is the reason a person can get to the point where they are only seeking independent advice about what to do about this and only realising the seriousness of the whole thing once they finally get a summons. All that can take place in between. It is way too late. Considering the underresourcing of legal aid and the lack of regard for due seriousness in these issues on the part of the legal profession, a lot of people are ending up with criminal convictions.

CHAIR—Are you saying there might be a need for some structural change in the organisation?

Ms Forbes—Yes.

CHAIR—Are prosecutions done in-house or by the DPP?

Ms Forbes—The preparation of the case to a large extent is done in-house and then a recommendation is sent off to the DPP with all the supporting evidence. It is up to the DPP to make a decision as to whether to pursue it.

CHAIR—Do you find that all the evidence goes or just part of that silo information goes?

Ms Finlay—It goes if you write a note at the end. If you are writing a request for a review of a debt and you write a note at the bottom or you fax a second copy to the prosecution section, it absolutely goes. Otherwise it is only if anyone is talking to someone else about the case.

CHAIR—Right.

Senator PAYNE—Ms Forbes, you just said—if I jotted in my notes correctly—that you were concerned about a lack of regard for due seriousness from the legal profession.

Ms Forbes—Yes.

Senator PAYNE—That is a pretty indicting statement of the legal profession in New South Wales. Does that mean that the Welfare Rights Centre has taken these issues up with the Law Society, whose job it is to monitor and to take appropriate action in relation to legal practitioners who do not do the right thing?

Ms Forbes—We have not taken it up. Again, we feel a little bit constrained by the fact that our whole expertise is in administrative law.

Senator PAYNE—Everyone has specialties. In fact, that is the problem you are pointing out, so why would you be constrained by the fact that you are dealing with a specialty?

Ms Forbes—We are constrained by a concern about whether we have the capacity or breadth of knowledge to make a formal complaint to the Law Society. You are maybe reading slightly too much into what I said.

Senator PAYNE—That is why I am seeking your clarification.

Ms Forbes—This is the information that we have because of the way we deal with cases through administrative review and the feedback we get from clients. All I am saying is that we, for instance, get clients who go to a private solicitor. All they take with them is the summons. The private solicitor has no idea from the summons what went on. The private solicitor might say to them, 'What are your instructions?' The client then might ring me—and I have had this happen on a few occasions—and say, 'The solicitor is asking me what my instructions are.' They ask, 'What are instructions and what should I tell them?'

When we deal with, for instance, a particular solicitor in Sydney that deals with these cases very capably—he has experience in social security admin review—his first step will be to say to the client that an adjournment will be sought. He puts in a freedom of information application—which gets to Senator Bolkus's question as well—because it is quite clear that all the relevant evidence is not always sent to the DPP. Often the only evidence sent to the DPP is the evidence which indicates that the person made a false statement, not any information or evidence that may suggest that they did not recklessly or intentionally do so. These are impressions that we get. As part of the project that we are doing generally on the way Centrelink deals with prosecutions, we will be talking in more depth to the private solicitors that do this and also to legal aid. Certainly we welcome this whole review. The best placed organisation to deal with this in a uniform manner across the country is legal aid and, considering that we are talking about people who have incurred debts due to receipt of social security moneys, it needs some Commonwealth overview.

Senator PAYNE—The Australian Law Reform Commission, who appeared before us this morning, have also done some work in making recommendations in relation to how government departments should approach their engagement in legal actions and perhaps what best practice is in that regard. So I think it is an issue that is being taken up more broadly. I do not know if the Welfare Rights Centre has had any encounters in that process but it may be something worth looking at.

The other issue that I wanted to ask you about pertains to observations in your submission about what I suppose you would call 'process'. The resource constraints on legal aid in New South Wales are such that—and I am paraphrasing your submission—the legal aid duty solicitor probably will not see someone until after their first court appearance. You then go on to say that it is probably a sensible means of regulating intake, given the resource constraints. What would be another way to do it, do you think?

Ms Finlay—It would be similar to your having a family law problem. Generally speaking, it would not be ideal to see your solicitor on the first mention.

Senator PAYNE—No, but a lot of people do.

Ms Finlay—Yes, I appreciate that. In our experience with social security prosecutions, unless a client gets a private solicitor they never see their solicitor prior to the first mention. Then it is a matter of quickly seeing if you can get an adjournment, and of course that delays the process. Whereas, if they could have had about a month's notice, the solicitor could have put in a freedom of information request immediately and got the ball rolling much quicker, therefore reducing delays with the court later on down the track.

Senator PAYNE—In your capacity as the Principal Solicitor at the Welfare Rights Centre, do you act for individuals in their social security cases?

Ms Finlay—Yes, but not for prosecutions. We represent at the Administrative Appeals Tribunal and at the Federal Court, but we do not do the criminal prosecutions. We do not have the funding—the resources—to do that. I want to add to Linda's earlier comment about the expertise of the profession. Our point is that, as you referred to earlier, an individual's services are specialised in an area, and solicitors are the same in that they specialise in different areas. But social security is quite different. I think the reason there is this lack of experience in the legal profession in this area is that it is so complicated. It is complex and it is difficult but it is not lucrative work. Perhaps another area of law that is very complex but could be lucrative is tax work. That is a complex piece of federal legislation, and probably it is fairly lucrative for some lawyers to assist clients with tax issues.

Senator PAYNE—So they tell me.

Ms Finlay—This has the same level of complexity but it is not lucrative. So you are not getting any experience in it, and without the experience you have to make certain assumptions. Possibly a lot private practitioners reflect back and, if they are doing 'crash and bash' and simple theft cases, they apply those principles; they are not trained to think like a tax lawyer.

Senator PAYNE—What I was at pains to avoid was a blanket condemnation of the New South Wales legal profession, who I think for the most part try very hard to participate. I am concerned that we have got a combination of recommendations which say, 'Let's have it all in-house and let's not engage the private profession,' and I am thinking, 'My God, you do not want to do that; you want to engage the private profession and have them participate at this level of the process. Thank you.

Senator LUDWIG—I am just trying to gain an appreciation of your organisation. How many people do you employ directly in relation to social security matters?

Ms Finlay—Out of 10 staff, our service has seven case workers. Two are solicitors and the other five have different backgrounds. They provide advice and assistance on any type of social security matter to all clients in New South Wales.

Senator LUDWIG—If it is in a regional area, how is that dealt with?

Ms Finlay—With the telephone and fax. Unfortunately, we have tribunal hearings over the telephone; it is the only way it can be done. In the past, the department or Centrelink would sometimes cover our costs to go out with their advocates if the hearing was in, say, Dubbo. But, in my experience, that has not been happening lately.

Senator LUDWIG—Has there been a change in the department's attitude?

Ms Finlay—Yes.

Senator LUDWIG—When was that?

Ms Finlay—How many years ago was that? Two or three years ago?

Ms Forbes—Yes.

Ms Finlay—About two or three years ago. In the past they were more likely to fund us. If it were a test case and going to the Administrative Appeals Tribunal or the Federal Court, they would fund our client's representation and perhaps pay for a barrister for us to brief. They would pay for our costs sometimes—not all the time—to go out to regional areas so that the client had us representing them as well as the departmental advocate. In our experience, that is not the case any more; it is now by the telephone.

Senator LUDWIG—In your view, what has brought about the change?

Ms Finlay—It is far more adversarial. We feel that, generally, there is less recognition of the model litigant policy and less appreciation that the goal is to get the right favourable decision as opposed to a win for the department.

Senator LUDWIG—Is that now becoming the usual course that is taken by the department in respect of the recovery of these sorts of things or the sorting out of these sorts of legal issues that may arise?

Ms Finlay—In my experience, yes.

Senator LUDWIG—Have there been any recent test cases in respect of this area?

Ms Finlay—In respect of social security law?

Senator LUDWIG—Yes.

Ms Finlay—Yes, there have been.

Senator LUDWIG—Who funds that?

Ms Finlay—Legal Aid will fund it. If it is a test case, generally speaking, it will be either one of the in-house lawyers or us, and they will fund counsel for us or Legal Aid.

Senator LUDWIG—What about the National Welfare Rights Network?

Ms Finlay—We are sort of independent but loosely affiliated—no, we are not; we are incorporated. We have telephone link-ups.

Ms Forbes—Sydney is the biggest one. There is one other welfare rights worker in New South Wales at the Illawarra Legal Centre but, otherwise, for instance, in Queensland there are a few welfare rights workers in the Welfare Rights Centre in Brisbane and half a person in Townsville and there is one person in Darwin for the whole of the Northern Territory.

Senator LUDWIG—In your experience, is the department's changed attitude that you have noticed in New South Wales also prevalent in other states?

Ms Finlay—It seems to be a general change. New South Wales have the national manager of all the advocates and the Service Recovery Team, which is what their advocates are now called. The approach has changed generally over the last few years.

Senator LUDWIG—What is their name?

Ms Finlay—They were the Administrative Law Team; they are now the Service Recovery Team.

Senator LUDWIG—Do you think that might have been reflected in the change of attitude as well?

Ms Finlay—I think that has something to do with it.

Ms Forbes—It is an interesting name.

Senator LUDWIG—Thank you.

CHAIR—Before we finish, your recommendation under the means test is one that is attractive to us on this side of the table. The assets test means that anyone with equity above $195,000 cannot get assistance for criminal matters in New South Wales.

Ms Forbes—That is right.

CHAIR—What is it in other states?

Ms Forbes—I do not know.

CHAIR—That would make it almost impossible to get legal aid unless you are homeless?

Ms Forbes—Exactly. As we mentioned, a lot of those people are currently on social security, so they cannot get a loan either. They are more likely to self-represent or more likely, particularly in rural, regional and remote areas, to get very quick advice on the day of the first court appearance.

CHAIR—So you are likely to meet that assets test if you are not living in the city, but if you are not living in the city you are not likely to be able to get lawyers?

Ms Forbes—That is right. If you are living in the city, fortunately you may get a Legal Aid solicitor that will liaise with the Administrative Law Section in Sydney, which is very well resourced and does excellent work.

CHAIR—So are you a saying that the income test should override the assets test, or that the assets test should not apply?

Ms Forbes—What page are we looking at?

CHAIR—Page 3, second paragraph, under 'Means test'.

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

Senator PAYNE—You would hope that in the case managing world of delivery of social welfare that those matters were to the fore of the matter, not the back. I gather from your evidence that that is not the case.

Ms Forbes—I have a client at the moment with an intellectual disability whose case has just been referred to the DPP. I have had to write a very quick submission to the authorised review officer trying to get waiver of recovery of the debt, because I believe it was solely caused by administrative error and received by her in good faith. It is very lucky that she came to us when she did. It was under declaration of income and, as you are probably aware, the income test arrangements for social security payments are very mysterious to most of us.

Senator PAYNE—We discuss them at length in the Senate.

Ms Forbes—Yes.

CHAIR—If the social security system is not going to provide more balanced evidence, should there be greater obligation for the DPP to seek out information before going ahead?

Ms Forbes—Yes.

Ms Finlay—In our experience, they get a file from Centrelink and that is only sent over if they are going to recommend a prosecution. If we ring the DPP in the early stages and say, 'Are you going ahead or not?'—obviously, they are underresourced as well; they do not have a chance to look through it in detail—from what we can see, they have often only had a bit of a cursory glance; what the person has put on the form is not absolutely correct, so it passes whatever their test is to take it on. A lot of the time our clients plead guilty, and so they never have to examine the evidence. Of the cases we refer on that actually get defended—this is very anecdotal—quite a lot come back successful, but successful only because the DPP has withdrawn the charges once someone has tested what they got.

CHAIR—So does the DPP get all the documentation by the end of the process—for instance, the documentation you would get under an FOI—or is that made available to them at the start?

Ms Finlay—The prosecution unit in Centrelink decide what papers are necessary for the DPP to see in order to consider a prosecution. My understanding is that, unless the DDP thought

something was missing and sent it back with a request, they would not necessarily get the person's whole file.

CHAIR—So you are saying that legal aid funding should be made available for Commonwealth social security matters of both a civil and a criminal nature.

Ms Finlay—Yes.

Senator LUDWIG—You indicated that you do not deal with amounts over $5,000.

Ms Forbes—Yes, we do.

Senator LUDWIG—You do in the sense that you try to resolve them before they end up with the DPP?

Ms Forbes—If someone comes to us and they have a debt over $5,000, there are automatic alarm bells for us because of the potential for it to be referred. So in a lot of cases, we will put in a full freedom of information application and really scrutinise the case, looking for administrative error and that sort of thing. Hopefully, a person comes to us when the debt is first raised, but sometimes they come to us when they have already received a summons; it has gone that far. That is when it is more difficult for us and that is when all these other issues come in.

Ms Finlay—Centrelink just came up with an arbitrary figure. If it is under $5,000 and it is deliberate fraud, they will refer it to the prosecutions unit—not a problem. Everything over $5,000 is automatically referred to prosecution to consider. Out of that pool, which is obviously a lot of the debts, they then decide how many they will ask to provide a taped interview because they are considering for referral to the DPP and how many they consider clearly had no intent and were not reckless, and those are sent back to debt recovery to continue with.

Senator LUDWIG—As I understood it from another area, there was an increased prevalence of long-tail debts that were brought back up again through data matching. Have you noticed an increased prevalence of those long-tail debts?

Ms Forbes—It is a big issue at the moment in the Hunter region of New South Wales, where there was a massive drive to raise debts as a result of data matching between Centrelink and the Taxation Office. We are finding that a lot of those debts were significantly smaller than the debts raised; in some cases there is no debt, and often the debts were caused solely by administrative error. Those debts over $5,000 were, en masse, referred to the prosecutions unit. Those prosecutions unit staff are not investigating the cases to the required level to establish whether the person did actually intentionally set out to be overpaid; that is left to organisations like us. But, in regard to their duty of care, they should be looking at these more intensely than they do.

Ms Finlay—Because it only requires the debt to be over $5,000, if the debt is over six to eight years and there is an underdeclaration, the debt is often less than $1,000 a year. It is not that hard to underdeclare by $1,000, due to the complicated rules, but, all up, it looks like a huge amount of money. If you break it down into smaller periods it can be an underdeclaration by $20 a month or something, but it ends up being something that would be referred to prosecutions.

Ms Forbes—The classic thing with evidence is for Centrelink to refer to DPP things like review forms and some example letters that were sent to the client during the period of the debt. When we look at the letter, we scrutinise it to see if the person was clearly advised of their obligations to advise of certain things within a certain period. The letter might clearly say, 'You are required to advise of an increase in your income from the above amount within 14 days.' So it looks for all intents and purposes like the person failed to comply, but when we interview the client, they may say, 'I rang Centrelink on several occasions, and they said don't worry about that. You're going to get a 13-week review form'—which is how all this used to be done—'Just put it down on that and attach your pay slips.' If after a few years a big data match is done of the last few financial years, that person will probably end up, on paper, looking like they have been overpaid, even though they have rigorously complied with what they were told to do. It is only during an interview, looking at the freedom of information material, spending a bit of time on these cases, understanding the way the legislation works and understanding Centrelink systems as well that these can be adequately looked at. It is all done in a fairly roughshod way.

There are way too many cases, in our view, being referred to the DPP. It is having a significant impact, particularly on people that are quite vulnerable: young people, people with certain types of disabilities that affect their capacity to manage these things, Indigenous people and all those people who, for the very reasons of vulnerability and the lack of ability to deal with the system, are the least likely to appeal the debts and the most likely to do something only when they get a summons. They are then told, 'You'd better plead guilty,' or they are not told anything and just decide to plead guilty to make it go away and then they end up with a criminal conviction.

Senator LUDWIG—You say it is partly the responsibility of the social security department, in the sense that they have referred them for prosecution, or at least for a decision for prosecution. Do you know what is creating that drive? In your view, has there been a change in policy? Has Centrelink advised you of why they are now doing that?

Ms Forbes—We are quite perturbed by the KPIs on the raising and recovery of debts and separate KPIs on the percentage of cases referred to DPP and the speed with which they are dealt.

Senator LUDWIG—So what you are saying is that Centrelink staff have KPIs that they have to meet?

Ms Forbes—Yes.

Senator LUDWIG—And one of the KPIs is a referral to a debt recovery?

Ms Forbes—Yes. And the motivation of debt recovery staff is to recover the money; their motivation is not to adequately advise clients of their appeal rights, just in case the debt is not in fact recoverable or just in case there are grounds to waive recovery of the debt.

Senator LUDWIG—So you are saying that their KPI is debt recovery—the amount of money raised?

Ms Forbes—Yes. It absolutely is.

Ms Finlay—It is like a commercial agency. You recover so much in a month to make a profit. Under their KPIs, they have to recover a certain amount a month.

Senator LUDWIG—Thank you.

CHAIR—Thank you very much. It has been very useful.

[2.36 p.m.]

ANDERSON, Ms Jill Patricia, Acting Director, National Pro Bono Resource Centre

LOVRIC, Ms Jenny, Project Officer, National Pro Bono Resource Centre

REDMOND, Professor Paul Murray, Board Member, National Pro Bono Resource Centre

CHAIR—Welcome. We have received submission No. 80 from you. Do you need to amend or alter that?

Ms J. Anderson—No.

CHAIR—Would you care to elaborate on the capacity in which you appear?

Prof. Redmond—I am also a professor of law at the University of New South Wales, which is affiliated with the centre.

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

Ms J. Anderson—If it is all right, there will just be the one opening statement—from me. Firstly, I would like to thank you for inviting us to participate this afternoon. For obvious reasons, the subject of our submission is pro bono services, in terms of the centre's role and functions. Australian lawyers provide a very significant amount and range of pro bono services, including but extending far beyond the provision of advice and representation to individual clients. Information on some of the current models of pro bono service delivery is provided in our submission.

There is not a lot of information quantifying this pro bono work. The Australian Bureau of Statistics has produced figures reflecting solicitors' and barristers' estimates of pro bono work done in the financial years 1998-99 and 2001-02. We extract some of those figures in our submission. They are impressive figures in their totals, but they also show that the professional responsibility of lawyers to provide pro bono services is not evenly shared in practice. In particular, on average, small legal practices provide significantly more pro bono than large practices and city practices provide significantly less pro bono than practices located elsewhere. Developing strategies to increase contributions to achieve a more even distribution of the pro bono load is one of the tasks of our centre. It should be recognised, however, that the ABS figures must be treated with caution, because of sampling and non-sampling errors, and that part of the problem is that many practitioners do not keep records of the pro bono work they do.

The lack of more detailed and accurate information about pro bono is a problem that needs addressing in order to facilitate the identification of gaps in services, so as to target scarce pro bono resources to areas of greatest need and design strategies to make the most effective use of pro bono. There is evidence that restrictions on legal aid funding in recent years have led to an increased demand for pro bono services, not just in the civil law area but in areas that are traditionally the core areas of legal aid—family law and criminal law. There is clearly a very

high level of commitment to providing pro bono services on the part of many practitioners. However there is a strong feeling that the profession is being expected to pick up the pieces of an inadequately publicly funded system.

There is a concern amongst practitioners and in the community sector that providing pro bono services may allow governments to avoid meeting their responsibility to provide publicly funded services to those in need. It appears to us that an increase in funding for legal aid for community legal services and Indigenous legal services would help to alleviate this suspicion and concern, enhance the goodwill of the legal profession and community sector and therefore increase willingness to provide pro bono legal services.

There is potential to enhance and expand pro bono services—in particular, through organised programs; the development of new schemes such as clearing houses and clinics such as the Homeless Persons Legal Clinic; multitiered relationships between law firms and community legal organisations; partnerships between legal aid commissions, private practitioners and others; increased involvement of government lawyers; creative use of technology to share information and expertise; and developing mechanisms for getting city resources out to regional, rural and remote areas. The centre and other public interest organisations and practitioners are undertaking work in many of these areas.

There are, however, a number of barriers that obstruct the provision of pro bono services, including conflicts of interest, disbursements and expertise, and the more general problems of the very limited resources of many legal practices, the rising costs of legal practices and the impact of tort reforms which have restricted important traditional practice areas. Some of the specific barriers can be worked through systematically. For example, the centre has developed a protocol concerning government and conflicts of interest designed to address the problem that lawyers can be reluctant to take on pro bono matters that are against government because of the perception that this may prejudice them in securing or retaining government legal work. Other more general barriers are more problematic and some may be insurmountable.

The existence of pro bono services must not be an excuse for failing to properly fund legal aid and community legal services. Pro bono services operate to supplement in a limited and finite way the provision of publicly funded legal services. The effective provision of pro bono services is dependent upon a healthy legal aid and community legal services system. The areas of pro bono that show the greatest prospects for development are those where integration with legal aid commissions and community legal organisations will be crucial.

The best way forward in legal service delivery is to adopt a strategic and cooperative approach, acknowledging the complex, multilayered and interdependent relationships between legal service providers, including legal aid bodies, Aboriginal and Torres Strait Islander Legal Services, community legal centres and pro bono providers. This needs to occur at a national level as well as regional level. There is a need for more support for national bodies such as the National Association of Community Legal Centres and National Legal Aid so that they are able to engage in this cooperative planning approach as well as work to assist their sector to work as effectively as possible—for example, through sharing information, developing resources for on-the-ground services and acting as a catalyst for new initiatives. That is the end of my opening statement.

Senator PAYNE—In the summary of your submission, one of your conclusions at point 6 is about the scope for extending and enhancing pro bono services. You cite perhaps half a dozen approaches that could be taken to do that. By whom and how? Is that bound up in observations made in the rest of your submission that, really, the important relationship is the one between the community legal sector and legal aid bodies and the rest of the profession for referral of pro bono matters and engagement at this level? Is that where you expect the who and the how to come from?

Ms J. Anderson—There are several questions there.

Senator PAYNE—I am like that—sorry.

Ms J. Anderson—Some of the initiatives for developments in pro bono come from the private practitioners. However, it should be recognised that some of those private practitioners may also be actively involved in providing services at community legal centres, so the distinction between the private profession, the community legal sector and the Legal Aid Commission is not always a clear one, and that is a good thing. The most interesting initiatives, I think, are where we are seeing the cooperative working arrangements that we have indicated as desirable in the submission.

For example, some of the involvement of the large law firms in pro bono work has been particularly enhanced through working very closely with legal aid bodies and community legal centres which perform a clearing house or a sort of filtering role for those firms. They are able to assist the firms in identifying where the areas of greatest need for their services are and to give the firms ideas about what they can do to provide pro bono services. So I think you would find that firms with active pro bono practices—certainly the larger firms—have close relationships with the other players in the legal services system.

I suspect that, in smaller firms, those relationships are not as crucial—insofar as the smaller firms may well be receiving the people walking through the door with the particular legal problems. Even then, we are finding that there are often relationships between small firms and community legal centres, for example, and if there is a local legal aid office, that as well. All can understand which is best placed to provide the service—and able to provide the service—so there can be referrals between them.

With initiatives such as training and mentoring, I think we are looking very much at the close relationships. We are finding that, where pro bono practitioners are training up to provide a pro bono service, often the source of that training is the legal aid and community legal sector. They come in with trainers and organise a program. I suspect you would have heard about some of that through the homeless persons legal clinics and the training they provide.

The more organised and structured programs that we refer to in point 6 is a reference to the development, which I think has been quite pronounced and very exciting, in the provision of pro bono service by the larger firms. In America, England and Australia, as firms have grown in size and have, for whatever reason, decided to get more serious or more organised about their pro bono work, they have been developing structured programs. We have seen the employment of full-time or part-time pro bono coordinators in firms and the development of pro bono policies, procedures, intake procedures and the like. That is increasingly occurring.

So, when I am talking here about organised and structured programs, in part I am referring to the larger legal institutions which are trying to incorporate pro bono as part of their business plans, in recognition that the ad hoc approach does not work as well when you have a large structure, which in all other respects is managed and coordinated and has committees and the like.

Senator PAYNE—Thank you. That is very helpful. An issue which has come before the committee previously and which is popping its head up again in this inquiry is the question of conflicts of interest but, most particularly, the behaviour of Commonwealth departments. The suggestion is that lawyers who have acted in a pro bono capacity against a department have been designated in a certain way and find themselves unbriefed in the future. That is perhaps the most subtle way I can put it. PILCH suggested yesterday that they had an example of a government department which had gone down that road but, to protect their information, they were unable to identify it—and we understand that. Your submission advises that you have been in communication with the Attorney-General on this issue and that, at the time of submission, a response was forthcoming. Is that still the case?

Ms J. Anderson—There has been a response insofar as the former Attorney advised that, in principle, legal service providers should be given the same level of consideration in relation to the provision of tender bids for legal services, regardless of whether those lawyers have acted pro bono for clients against the government. The department was considering how best to address this issue. When we approached the former Attorney with the protocol, we asked the Attorney to implement the protocol in the form of legal services directions. This seemed like a good vehicle, in particular because, as delegated legislation, they have binding force upon agencies. We consider that one of keys to the success of a protocol is the perception by practitioners that it is real, it has teeth and it is going to be adhered to. So we asked the Attorney to implement in that way. From a recent communication with the department, our understanding is that the department is planning to review the legal services directions generally and that the protocol would be referred to and clearly raised in the proposed discussion paper if that review occurs. That discussion paper would be released to stakeholders for comment. That is our understanding.

Senator PAYNE—Perhaps they forgot to tell us that they were reviewing the legal services directions at estimates last week. It can easily slip one's mind!

Ms J. Anderson—I cannot comment on that. Perhaps I should say that they are planning to review. They have not undertaken a review as yet.

Senator PAYNE—Yes, I understand that in terms of its timing. I have two more questions. In relation to government solicitors, does your organisation—the National Pro Bono Resource Centre—pursue the matter of encouraging government lawyers to participate in pro bono work?

Ms Lovric—The issue about government lawyers undertaking pro bono work is certainly on the centre's agenda, but at this stage—

Senator PAYNE—State and federal, I assume?

Ms Lovric—Yes, it is, but at this stage we have not pursued it in any great detail. By way of background, we have been casually looking at what is going on in the States and we have a little bit of an idea there, but at this stage it is something that has not yet been pursued.

Senator PAYNE—Do you mean the US?

Ms J. Anderson—Yes.

Senator PAYNE—To return to expertise, the points that you make in relation to the mismatch in expertise of private pro bono lawyers in the most common areas of need have been referred to in other submissions and in other ways. I assume that the training and mentoring opportunities that you have talked about are meant to address those gaps?

Ms J. Anderson—That is right.

Senator PAYNE—I heard a story just last week which I would be interested in your comments on. It was about a pro bono endeavour by a major Australian law firm, which sent a solicitor of medium experience to East Timor relatively recently to assist in a particular project there. It is not the first time I have seen that happen: I met someone from, I think, Blakes there a couple of years ago and she was doing an exceptionally good job. But this person, who sat beside a colleague of mine on a plane, was surprised to hear that the law which applied in East Timor was Indonesian civil law and even more surprised to hear that it may have been beneficial for him to have studied civil law at some time in his career to be of any particular assistance on the ground in East Timor. I understand the rest of the story does not have a particularly happy ending.

When the major firms that are participating in the pro bono process deploy—for want of a better word—a solicitor in that way how is the match made? Do you understand how that works? How is someone who really does not have any background or capacity in that area end up in that way, probably trying very hard to do a good job and make a real contribution but, with no language skills—no nothing—is nevertheless finding it a wee bit challenging?

Ms J. Anderson—I am not familiar with matches of that overseas form, and the other point to note is that two people presenting evidence after us today will be well placed to answer that.

Senator PAYNE—They will—one of them in particular!

Ms J. Anderson—The centre is somewhat torn on this issue of expertise because, on the one hand, lawyers and law firms—barristers—can be quick to acquire new expertise when the need arises to service the needs of a commercial client. The centre encourages that kind of approach to pro bono work also—to treat pro bono work as something that is not outside the realm of your competence if you have the right training and gear up to do the work.

If anything, we tend to find that the firms we have a lot to deal with are very cautious about taking on work that they do not have the expertise for, not only in terms of individual solicitors who would be doing the running of it but also the partners who would in the ordinary course of case work practice supervise that work. One of the things that this centre has been trying to do is to say: ‘Yes, be cautious. You’ve got to have the right skills. But is it really that hard to get

them? Let's think creatively about what you can do. It might be that you only need an hour of general framework training and then you can read up on the legislation and do the rest of it yourself.'

Senator PAYNE—And a good lawyer can make a good contribution.

Ms J. Anderson—Absolutely. One of the points that we make in the submission is that in some areas the expertise problem is not as great as it at first blush appears when you consider that lawyers are equipped with a range of generic skills—getting on top of legislation et cetera. Also on the expertise side, in one of the exciting developments over the last five to 10 years, possibly even just the last five, you are seeing organisations who traditionally have not done particular work saying, 'You'—Legal Aid or community legal centres—'have told us you really need people doing domestic violence work. We don't do that, but let's learn how to do it,' and actually devising training programs that they offer not only to their own employees but also to other firms that they invite to participate. That has happened, for example, in relation to domestic violence. It has happened in complex compensation of victims matters.

Ms Lovric—And certainly in immigration matters.

Ms J. Anderson—And immigration matters as well. There is a willingness to undertake training if you can identify the area in sufficiently discrete a manner to make the firm think it does not have to learn an entire subject—for example, family law, which is the vexed one.

Senator PAYNE—That will be certainly be beneficial in adding to the reputation of the profession and various firms' triple bottom line assessments.

Ms J. Anderson—Absolutely. The firms' appreciation of that triple bottom line and what that means and how they can put that into practical effect is very much behind the increases that we are seeing in pro bono work.

Senator PAYNE—The profession makes a substantial contribution.

Senator LUDWIG—Just to follow up, Senator Payne asked you a question in relation to conflicts of interest and you referred to a letter from the Attorney-General; could you inquire as to whether that is available to the committee?

Ms J. Anderson—Certainly.

Senator LUDWIG—That is just in relation to resolving their view in respect of conflicts of interest. In addition, on the potential for review in relation to the LSDs from the OLSC, I was wondering if you could identify where that came from. I recall the Sue Tongue report in relation to outsourcing of legal services, and one of the recommendations in that referred to—and this is off the top of my memory—a review by the OLSC in relation to LSDs but I do not know whether it went to the extent of this issue that we are now talking about. I was wondering if there was any other source for the recommendation.

Ms J. Anderson—To review the legal services directions?

Senator LUDWIG—Yes.

Ms J. Anderson—I am not aware of that. All I know is that there is a plan to do that, and that as part of that review the proposed discussion paper would raise and refer to our proposed protocol. I do not know how it came to be that this review was suggested. Our concern was that if there was to be such a review we would really want this issue in there.

Senator LUDWIG—Yes, and the only one I can recall was from the Sue Tongue report in relation to outsourcing of legal services; it was a recommendation more broadly directed at legal service directions. It may be that that is what they were referring to. I can certainly ask them in estimates in February, but if you have any earlier source it would be helpful.

Ms J. Anderson—If I could clarify with you, the first matter is the letter from the Attorney-General—

Senator LUDWIG—The letter from the Attorney-General in relation to conflicts of interest.

Ms J. Anderson—and the second is the source of the proposal to review the legal services directions.

Senator LUDWIG—Yes. I do not know whether you put it as high as a proposal but it is a consideration of a review.

Ms J. Anderson—Okay. Certainly.

CHAIR—Your submission refers to a diverse range of court based pro bono referral schemes. Is there anything we can draw from the diverse number of them? Do they operate essentially in the same way? Is there a need to make them more consistent or to extend them to other jurisdictions?

Ms Lovric—At this stage it seems that the schemes operate in parallel in different jurisdictions. I think you were provided with some of the information on the numbers of referrals made under the schemes. We had mixed reports about the usefulness of the schemes and the motivations for initiating the schemes. It seems in some ways that the schemes operate to assist the courts in respect of the rise of unrepresented litigants before the courts. The schemes were initiated to assist in the administration of justice. We can see that the numbers are not terribly high, although certainly they are assisting some people. The anecdotal evidence that we have had from the profession is that the same firms and the same barristers are the ones who have been called upon to provide pro bono services under those referral schemes.

CHAIR—There is some suggestion out of Victoria that governments, in making decisions on contracting legal work, may take into account the level of pro bono work done by respective law firms. Do you have a view on that sort of proposal?

Ms J. Anderson—That proposal caused some controversy in Victoria, as you can imagine. I think it is early days, and an evaluation of how that has worked would be most useful before you reach too firm a position on whether it should be adopted elsewhere. But it was certainly something that this centre was concerned to leave open as a possibility when drafting the

protocol. You will observe that the protocol is attached to the submission. The protocol is seeking for the fact that you have provided services against government not to be taken into account to the detriment of the provider, which would leave open the possibility of it being taken into account in favour of the provider. I personally would be interested in seeing how the Victorian system is operating. I note that there is quite a lot of support for seeing the extension of that kind of scheme, although this centre has not adopted a position formally on it as yet.

CHAIR—You talk about the rural, regional and remote areas. You signal that you will be doing a study in the near future with respect to how CLCs and their clients in those areas can gain access to pro bono legal services. Do you have a timetable for that? Are there any directions that you are anticipating going down?

Ms Lovric—Once it has formally commenced, the project should take about eight months. We did receive some extra funding from the Law and Justice Foundation of New South Wales to undertake that project. Part of the project involves an evaluation of how the project worked. It has a number of facets. One is simply to facilitate dialogue between community legal centres and regional law firms, as well as major city law firms.

Ms J. Anderson—It is also worth noting that the New South Wales Legal Aid Commission has been doing some work on this same sort of matter—that is, how we can get services working out in regional, rural and remote areas. They have a couple of pilot projects running which are based on a cooperative arrangement in particular regions between the local law society, the Legal Aid Commission office and the CLCs in that region. In each pilot they are also involving at least one of the large city law firms. Those models have started operating.

Ms Lovric—We would have to say that those coalitions of services working together are perhaps the most promising in areas of pro bono work, in that the community needs are clearly being addressed by service providers who are on the ground and who actually know where the unmet legal needs are. They can direct those to the large firms.

CHAIR—Thanks very much. Thanks for your submission and your advice this afternoon.

[3.05 p.m.]

BAIN, Ms Annette, National Pro Bono Coordinator, Freehills

CREGAN, Ms Anne, National Pro Bono Coordinator, Blake Dawson Waldron

CHAIR—Welcome. We have your submissions, which we have numbered 75 and 63. Is there any need for amendment or alteration?

Ms Bain—No.

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

Ms Cregan—We spoke about this earlier and decided that we would not make an opening statement but would rely on the submissions we have made. But we are happy to answer any questions.

Ms Bain—That is also my position; I am happy to rely on my submission.

CHAIR—I am not so sure about these caucuses!

Senator LUDWIG—In respect of the Freehills submission, I would like to go to page 5—in particular, to general issues at paragraph 4.1. A number of submitters today have spoken generally about the issue of call centres, such as Law by Telecommunications and LawOnLine. Bill Grant from the New South Wales Legal Aid Commission said that they were a complete waste of time. Others indicated that they seem to be misdirected, or perhaps that their model is wrong, and that they should be changed or at least—to paraphrase them—that they may be able to be salvaged in some way. Your statement says:

It is preposterous to assume that an information line will equip such a person to perform "D-I-Y" justice.

The issue surrounding that, of course, is that Law by Telecommunications is not so much an information provider as a referral service. In respect of that, is your statement still valid? The New South Wales Legal Aid Commission also provides information via telecommunications. Do you also include them in that statement?

Ms Bain—Yes, I stand by it as far as the telephone advice services go. If it is a service where someone speaks to a solicitor who, after hearing the particular facts of that person's matter, advises them and gives them their options, I think that is a valid and good service. That is quite different to the ones that I am describing, which are providing information that somebody who is better resourced or better educated, and who can read English, can get from a web site or perhaps from reading some books on the subject. But people who cannot really do that phone up a service and might simply have the New South Wales law handbook read to them, for example. I think that that kind of service is inadequate. I am not familiar with the telecommunications services in New South Wales. I have heard of a model—

Senator LUDWIG—It is a federal program.

Ms Bain—I see. Is it, as in Western Australia—

Senator LUDWIG—It is Australia wide. A couple of programs are run by the Commonwealth government. One of them is called LawOnLine—an Internet based system—and there is another adjunct to that, which has a rural focus, which funds CLCs to have solicitors in-house answering the telephone in relation to inquiries. There is also a referral service called Law by Telecommunications, where people can ring in—it is effectively a 1800 number—and receive a referral to assist them with their legal issue.

Ms Bain—Yes, I am familiar with that. I did not think of them in quite those terms but, yes, I am familiar with those.

Senator LUDWIG—They are effectively call centres.

Ms Bain—Yes, exactly. Again, I really stand by what I have said. I do not think they are an adequate way of resourcing those people who are least able to access justice. In fact, as I have mentioned in my submission, I think they can be counterproductive. There is a perception that you have given somebody some facts or have described the law to them. But, while it is effectively advice, it is not something that is useful to the person. To find out where those people go next would be very helpful in terms of how useful these services may be. I have heard of a very large percentage of people doing nothing further after getting advice from one of those lines. Is that because they do not know what to do with that information? That is my own observation, but it is also experience. Previously, before working with Freehills, I worked on a telephone advice line. I am a solicitor and educator, and I was working in women's legal services and domestic violence services in New South Wales. I provided a lot of advice in that way, as well as providing follow-up advice and connecting the client to a pro bono program or somewhere else. So I am really very mindful of how the different models work. Of the people who came to us who had previously been given information that they could not take any further, it was often just a fluke and they were quite lucky to even hear about us. They were not necessarily referred to us.

Senator LUDWIG—We have heard through a number of submissions that pro bono work is not a substitute for legal aid; yet their evidence goes on to suggest that it is in fact being utilised as a substitute for legal aid. Do you mark out a particular area where you will provide pro bono services or assistance such that, if you consider it is a substitute for legal aid, you do not do it or you refer it to the Legal Aid Commission for them to do it? Or do you undertake it in any event, because the person otherwise cannot or will not find assistance? I am happy for either of you to answer that.

Ms Bain—I am not sure I caught each of those questions. If someone can obtain assistance from legal aid we are only too happy that that is the case, and we are not really going to consider them if they have got that opportunity.

Senator LUDWIG—Do you ask them that when they come to you?

Ms Bain—Yes, we do ask if that is a possibility. But very few who come to us are in fact eligible for legal aid. Sometimes it is an area of law that the Legal Aid Commission cannot assist in. For example, they do not assist in the work we do with small organisations. Also it is about our expertise. We want to assist in matters where we know the work, matters that relate to our in-house practice in areas such as charity law, leases and contracts for not-for-profit organisations from community legal centres through to large national charities. On the other hand, in response to a need, we have the example at Freehills of the Shopfront Youth Legal Centre, which we set up about 11 years ago. Partners at Freehills read the Burdekin report into youth homelessness, and it moved them to ask, 'How can we respond to this need?' They set the centre up, and then went about developing the expertise to respond in the area. That is pretty much how things are continuing. As needs arise we try to respond in different ways. Most of the work we do in-house tends to be for organisations. Because we have a public interest guideline, we tend to only assist individuals if it is going to assist more than one particular person or if it is going to test a point of law. The work we do with individuals tends to be either at the Shopfront Youth Legal Centre or through secondments of our people to community legal centres.

Ms Cregan—Similarly, we tend not to act in matters where legal aid is available. There are some exceptions. There are matters which are peculiarly within the skill set of a large firm which perhaps are not within the skill set of smaller firms, which might more traditionally take legal aid work, or within the Legal Aid Commission itself. As a matter of policy, one of the reasons we do not do family law—apart from a number of other very practical considerations, including an inability to properly supervise it—is that we consider as a firm that that is more properly within the remit of legal aid. We steer away from that sort of work for that reason.

Senator PAYNE—The submissions both provide us with a lot of very useful detail about what two large, multinational firms do. That is very helpful to us. They lead to a couple of questions, though. For example, I am interested that the Freehills submission refers to your endeavours to do pro bono work with people and organisations from rural and remote areas. How do you go about doing that? What activities do your solicitors engage in to assist those sorts of individuals?

Ms Bain—It is very much about building our relationships with the community legal sector. We see them as best placed to be at the front line and out there knowing the communities. Our work usually comes through referrals directly from them. It also comes through some other networks, especially with charitable and not-for-profit entities, on another level because of my connection with women's legal services, the services that deliver to Aboriginal women—there are two services there—and one out at Walgett, which is another source of work. We also attend the conference of the National Association of CLCs. We make it our business to work with that sector as much as we can.

Senator PAYNE—So what proportion of the pro bono work that Freehills does would be assisting those in rural and remote areas, do you think?

Ms Bain—I would like to get back to you on that, if I may.

Senator PAYNE—It is an interesting question because a lot of the evidence that we have taken over the last couple of days has been about how difficult it is to get pro bono support

outside metropolitan areas. So to have an acknowledgement of that is important, and I would like to follow that up with you.

Ms Bain—Certainly. I am sure it is going to be a sad answer.

Senator PAYNE—I think some answer is better than no answer! Ms Cregan, does Blakes engage in pro bono work outside the metropolitan area?

Ms Cregan—We do. We do not do it as effectively as we should. We are actually one of the firms that are involved in the pilot in New South Wales that Jill Anderson from the National Pro Bono Resource Centre was talking about. Under that pilot we are linked with the central and far west of New South Wales in a coalition of community legal centres, Legal Aid Commission offices, chamber magistrates and women's domestic violence court assistance schemes to work with them and also to try to work with the local professionals to identify need and gaps in the availability of services. The other way in which we are hoping to work with community legal centres—and again it is very much working in partnership with the community sector—is our rural telephone advice and minor assistance program, which is going to be rolled out in Broken Hill in January and hopefully in Queensland, probably in Townsville, next year. We hope to link a Blake Dawson Waldron office in each state with a community legal centre in a rural, regional or remote area. The idea is to be able to take some of the advice and minor assistance load off the regional and remote community legal centres.

It arose from a situation in Sydney where I had lawyers ringing me up saying: 'I want to get on the roster of a community legal centre to do some voluntary work after hours and I've been placed on a waiting list. Is there anyone else I can assist?' At the same time, rural and remote community legal centres were coming to us saying: 'We just get crushed by our advice load. We can't get assistance locally. It's inhibiting our ability to do casework.' It seemed to me that that was almost a ridiculous situation. It is not going to be ideal; there are a lot of problems with legal assistance via telecommunication. However, we are hoping to use email, faxes and scanners to be able to get access to documents and then to be able to provide to rural and remote centres the sort of service that is provided by voluntary solicitors at community legal centres in the city. Those are two of the ways we are trying. So much of the work with rural, regional and remote communities and community legal centres depends on relationships, and they are very hard to build because of distance and very hard to maintain because of the high turnover of staff in those areas.

Senator PAYNE—I think it is the Freehills submission—and excuse me if I do confuse them—that provides a general list of areas in which you do most of your pro bono work. I know Ms Cregan has said that Blakes does not do family law, for a range of reasons. It is evident to us that there are a number of professional gaps in the support for people trying to get access to justice. We had the Welfare Rights Centre here earlier this afternoon—I think you were in fact listening—talking about the sort of work they do under the social security legislation, which sounds to me extraordinarily challenging, with not a great deal of support from practitioners. Taking that as an example—so, social security law, tenancy law, general poverty issues around credit laws and those sorts of things, PI, criminal law—if you are not currently addressing those in your pro bono work, what would make it possible for you to do that?

Ms Bain—With regard to family law, which I think is generally considered the area that is the least well resourced, some of the pro bono firms are planning a meeting for early February to try to work out what in fact we can do. We are mindful of the fact that, because none of the firms have this kind of expertise nowadays, it does not really lend itself to assistance. But, in the same way—

Senator PAYNE—Who coordinates that sort of an initiative?

Ms Bain—It is partly through our association with the National Association of CLCs. I understand that a resolution came out at their last conference to speak to pro bono providers about how we might go forward. I was contacted about liaising with some of the other coordinators. I think Mallesons may be hosting it in February with people from the national association and their key people on that particular subject. That may be a helpful model to try and work at. We know there is the problem, but at the same time each of us do unbundled bits, if you like, or do some family law—not, say, within the firm itself but when we are on secondment or at shopfront there are aspects of that work done. Anne will tell you about some of the work they do in that regard. I can only speak for Freehills. It is not much at this point, but perhaps there are ways when you look at how you break it down.

The concern with family law in particular is that people see it as this general area of matters that go on forever when in fact it is really just a small part of family law that is like that. We know that around 95 per cent of matters—correct me if I do not have the latest stats—resolve more or less along the way. Something like five per cent are usually those most entrenched ones which have strident concerns around children—often with violence—or property. If there is property, there is no problem; they can find their own legal assistance in most cases. But it is where there are children or violence that there is a need you cannot ignore—a human rights issue. That is why we are going to look at it to see whether there are some specific tasks that we may be able to respond to. How can we take it on? In the same way, the homelessness clinics have been set up as a model of that kind of collegial approach in response to the need. There have been other recent examples you have seen with refugees and so forth. This may be another way of approaching this.

Ms Cregan—In terms of meeting areas of need that are outside experience, it very much comes down to, as the national pro bono centre said—I think it was Jill, but I am not sure which speaker said this—training and mentoring, and also to identifying a discrete area of law. Using the welfare law example, one of the things that would concern me about the firm taking up that sort of law is that it is incredibly complex, so it is going to take a great deal of time to get on top of. You would really need to devote considerable resources to getting on top of the area of law.

The second thing that would concern me is the very issue that was raised by the Welfare Rights Centre, which is that it is by practising continually and as a large part of your practice in the area that you start to understand the practices and procedures which are vitally important to being able to operate properly and well in the area. There is a real issue that you can get on top of the law but, unless you understand the way the law works in practice in the courts day in and day out, sometimes you can do more harm than good. That is using that example. However, there are other areas of law that are more discrete and can be picked up and taken on through training and mentoring.

Senator PAYNE—I suppose the other side of that coin is the statements Jill Anderson made about the fact that in some cases it will take an hour of basic briefing of yourself to work out what you are working with and take it from there. The criminal aspect of the issues that the welfare rights organisation raised is obviously very important to their clients. They find it almost impossible to get support in that area. It may be a burgeoning opportunity for pro bono involvement. I have one or two other questions, one which pertains to the observations in paragraph 5.3 in the Freehills submission about family law, particularly in relation to the conflict of interest question, which my colleagues have heard from me repeatedly in the last two days, but I do not apologise for that. That is where the Legal Aid Commission, as you note, is representing, or has represented, another party—the opposing party—in either previous family law proceedings or previous criminal matters. You make the observation:

... the Commission will generally pay for a private solicitor to represent the "conflicted out" party—

which is not really the evidence that we have received in the last couple of days. You go on to say:

... in many cases this is not communicated very well to the applicant—

which I can well imagine might be the case—

resulting in the perception that they are unable to obtain representation at all.

That would certainly be our perception, and it would certainly have been reinforced to us over the past couple of days. If you have a different experience, I would be interested to hear about that.

Ms Bain—No, I think perhaps it has not been phrased very clearly. My experience is that, in cases where there is a conflict, there is first of all the problem of: will that person be advised that they may be eligible for the matter to be assigned to a private solicitor? That is the point I was trying to make there. I am sorry if I have not made it clear. That is what does not seem to always happen. People go away thinking, 'I am conflicted out; end of story,' and do not realise they may in fact be eligible for assistance. Either they have not been told that clearly or perhaps—and I think this might be usual—they have not really had explained to them how to go about finding a private solicitor, which is a huge challenge.

Senator PAYNE—So once you have cut out the ALS and the Legal Aid Commission, there is not a lot left for that individual—usually the woman?

Ms Bain—It seems to be the case, overwhelmingly. Because it seems the conflict usually relates to the fact that the Legal Aid Commission has previously assisted the partner or husband in a criminal matter, that is often the case.

CHAIR—As to your proposal for a structured panel, would that panel help locate a legal adviser or would it be a panel of potential legal advisers?

Ms Bain—It would be a panel of potential legal advisers in the way in which I understand there is now with respect to children's law. I might ask Anne, who was previously with Legal

Aid, to assist here, in terms of what is the latest position. My understanding is that there was a panel available to which you could refer a client, knowing that the people in the panel would accept legal aid work and had passed whatever test or requirements were put by Legal Aid.

CHAIR—That would be run by the commission or by the court?

Ms Bain—By the commission.

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

[3.28 p.m.]

CROZIER, Mr Michael John, Principal Solicitor, Blue Mountains Community Legal Centre Inc.

LOUGHMAN, Ms Janet, Principal Solicitor, Marrickville Legal Centre

CHAIR—Welcome. Do you wish to alter or amend your submissions?

Mr Crozier—Yes. It is perhaps a minor thing, but on the second last page of my submission, in the dot point recommendations, I refer to a two per cent decrease in funding for an efficiency dividend. I am now reliably informed that that practice ceased some time ago. It was always a bit of a mystery to us as to why we were penalised for being efficient. That obviously needs to be removed.

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

Ms Loughman—I can probably do that. I was going to briefly outline the work of Marrickville Legal Centre as in our submission and then go on to talk about interpreters and the unmet needs of children and young people. Marrickville Legal Centre is almost 25 years old. We get funding from the Community Legal Centre Funding Program, with which we run a general legal service with two evening advice clinics a week and a children's legal service, which we have been operating since the beginning of Marrickville Legal Centre. We also have additional state funding to provide a designated tenancy advice service and a domestic violence court assistance scheme.

Our catchment area has extended well beyond Marrickville over the years. We have been flexible in responding to community need. Our client base extends to Bankstown in the west and Sutherland in the south. We use outreach to reach out to communities that have been identified as being more marginalised than others. We have a high level of interpreter use. Our experience has been that in the last five years or so the provision of interpreters has gone backwards, and that has created a significant problem for our clients and us.

I want to talk in a little bit more detail about the unmet needs of children and young people. Much of what needs to be said in relation to that has been well documented but sadly ignored. We have files going back as far as 1979 detailing a history of inquiries and reports documenting unmet legal needs and demands for advocacy for children and young people. These include the 1986 *Legal aid needs of youth* report by Ian O'Connor and Claire Tilbury; the Burdekin report, *Our homeless children*; more recently in New South Wales, the inquiry into children's advocacy; and, at the Commonwealth level, the *Seen and heard: priority for children in the legal process* report from the Human Rights and Equal Opportunity Commission and Australian Law Reform Commission inquiry. It is not only recommendations from those reports that have been ignored but also, over the years, modest requests for establishing advocacy schemes.

The Community Legal Service Funding Program allocates just over $500,000 nationally for the community legal services for children and young people, and approximately $240,000 comes

from the state. In New South Wales, there is no designated Commonwealth or state funding for a children and youth advocacy service, although I need to qualify that by saying that the National Children's and Youth Law Centre is in Sydney, although it has a national focus, and that in New South Wales the Legal Aid Commission provides well for criminal and care advocacy in the courts through their duty solicitor scheme.

In New South Wales there are 2.2 million children and young people under 25. Of those, 887,000 are aged nine to 19 years. As at June 2001 there were over 7,000 children in care, which is a significant increase from just over 5,000 in June 1997. There is significant research that shows that children and young people in care experience poor life outcomes, as reflected in high levels of placement breakdown, lower levels of education, prevalence in the juvenile justice and care systems, greater risk of homelessness, mental illness, substance misuse and criminal activity. Indigenous children and young people are overrepresented in both the care and juvenile justice systems. In New South Wales we have seen the percentage of Indigenous young people in detention increase from 26 per cent of young people in detention in 1990 to over 35 per cent.

I would just like to finish with a case study of a young person who we advocated for over a number of years. It illustrates the advantages of funded youth advocacy services, where we are able to provide flexible advocacy for young people with a variety of legal problems without restrictions on jurisdiction or type of matter. I will call our client Michael, although that is not his real name. He became a client of the centre when he was 15 years old. He was in custody, charged with attempted murder.

During the course of giving instructions to our solicitor, he disclosed that he had been sexually assaulted by the alleged victim of his attempted murder. His history further indicated that he had been homeless since the age of 13 and that the Department of Community Services had failed to respond to his child protection needs in his natural family. In fact they had informally placed him in the home where he had been sexually assaulted. We successfully made a bail application for him in the Children's Court and then continued to support him and advocate for him in relation to victims compensation applications, social security issues, employment, supported accommodation problems, breaches of bail and eventually further criminal matters. We supported him through the two traumatic experiences of giving evidence in the trials against the perpetrator of his sexual abuse—he went through two trials, both of which ended in hung juries. We also briefed the public defender in his attempted murder matter and supported him through his trial process. Through that process, he started university and turned his life around. They are the issues that I want to highlight. Thank you for the opportunity.

Mr Crozier—Our centre is quite unique in some ways. We are a small centre; we are only funded for three core positions. We have an additional full-time position for a Women's Domestic Violence Court Assistance Scheme worker. Our office was originally set up to cover the Blue Mountains greater government area but in fact our area of influence has had to expand to cover Lithgow, which is a town of about 5,000 people near the Blue Mountains, and as far as Bathurst, which is a major centre about two hours west of the upper Blue Mountains. Bathurst is a town of about 20,000 people that does not have a Legal Aid office, does not have a community legal centre and does not even have a Women's Domestic Violence Court Assistance Scheme. So our area of influence has had to expand because of a lack of services.

I think our area is a bit unusual in that we are wedged between the city—because the western suburbs of Sydney border the lower Blue Mountains—and the far west, which is extremely remote. There seems to be a bit of a black hole in terms of services in the Lithgow-Bathurst area, where there are some fairly major centres. With our three core positions we technically have one full-time solicitor—and that is me—but we actually have, through budgeting, stretched that to use some of our community legal education time for solicitor work and to employ a part-time solicitor two days a week. So we have stretched the five days of solicitor time to seven days.

I think a lot of the issues have been raised by previous speakers about problems with conflict of interest. In Lithgow, which, as I said, is a reasonably large town, there is only one solicitor out of about five firms who is prepared to do legal aid work. He is also on the legal aid duty roster so he often appears for people in criminal matters. Of course that then conflicts out other people, such as spouses or wives who may want family law advice or assistance or domestic violence assistance. We found that, when legal aid funding was reduced in about 1997 for family law—as other speakers have said—a number of solicitors got out of family law, and it is hard to get them to come back into that area. In Katoomba, in the upper Blue Mountains, there are probably three solicitors out of about 15 firms that are prepared to do legal aid work. In the lower Blue Mountains it is very sporadic; there are probably only one or two solicitors in the lower Blue Mountains that are prepared to do legal aid work.

I will just go to the recommendations that I made on the last three pages of my submission. One of the things that we think is essential is that our centre, and probably other rural and remote centres, should be funded for at least five core positions and have at least two full-time solicitor positions. If we had those resources, we would envisage trying to dedicate a solicitor position to the Lithgow and Bathurst areas and maybe doing some work in those areas, particularly in Bathurst, to support the local community to get their own community legal centre. We would also see that a funded vehicle was attached to the position that did outreach into those areas.

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

We have been having discussions with our local Legal Aid office and the director about a dedicated family law position to the upper mountains and Lithgow area. I think something was said earlier today about that, but I am unaware of any particular moves to make a dedicated position. The Penrith Legal Aid office have for the last couple of years nominally made a solicitor available to attend Lithgow and Katoomba courts to do family law, but other priorities take over and they rarely attend.

CHAIR—Ms Loughman, I want to take you back to something that you mentioned earlier but we never quite got on to. The inner city has a very diverse population base—what sort of budget do you have for interpreter services and what could you spend?

Ms Loughman—We do not have any budget for interpreter services. All legal centres have an exemption from paying fees to the Community Relations Commission in New South Wales, but that does not cover any Commonwealth matters and covers only a limited number of state matters. Otherwise, we have to rely on the Commonwealth telephone interpreter service or the Commonwealth face-to-face interpreter provision, and that has a national limit which gets used very early in the month and then there are no interpreters available until the next month. Also, their face-to-face interpreters are not provided out of hours, and our advice clinics are open out of hours. So, for our two evening advice clinics—on Tuesday and Thursday nights—we are not able to provide face-to-face interpreters in any Commonwealth matters and in some state law matters.

CHAIR—Does that cover Indigenous people as well as migrants?

Ms Loughman—Yes.

CHAIR—What you do for Indigenous people?

Ms Loughman—In my experience, our Indigenous clients have good English language. It is in the more remote communities where Indigenous languages and interpreters are a problem.

CHAIR—In terms of the workload, backlog and matters that you are turning away, what areas and what profile of potential clients would be of gravest concern?

Ms Loughman—We have a high number of employment problems and of particular concern are people who have trouble managing the legal process for themselves either because of their English language skills—

CHAIR—Are the employment problems under Commonwealth or state law?

Ms Loughman—Under both—unfair dismissals or unpaid wages—mostly unfair dismissals. Some of them have discrimination aspects to them. We have a lot of call for advice and representation in victims compensation matters—women who have experienced domestic violence or sexual assault, or children who have experienced sexual assault. We do not have a capacity to represent those clients. We have initiated, with some of the pro bono firms, an arrangement whereby we are providing them with training and support to take more work in the victims compensation, domestic violence and sexual assault areas. So we are able to provide some referrals in those matters.

Senator PAYNE—In your submission, you talk about the Legal Aid Commission's conflict of interest policy and practice. How does that manifest itself, in your experience, in the Marrickville area? We have talked about it a lot in rural, regional and remote Australia.

Ms Loughman—It affects us in a couple of ways. We find we get a lot of referrals from the Legal Aid Commission, or clients present to us saying: 'Legal Aid cannot help me because there is a conflict of interest.' Rather than the client knowing that they can go to a private solicitor and apply for legal aid, they come to us expecting that we can do it—and we cannot. So we manage that by information, advice and referral.

Senator PAYNE—Do you help them to try to find a private solicitor?

Ms Loughman—We give them initial advice and refer them to a private solicitor who we know does legal aid work. We also have appointments available for people for basic family law advice and, provided we have the volunteers with family law experience, some assistance with ongoing representation, if they need it—often assistance to support them as unrepresented litigants.

Senator PAYNE—You have made favourable observations about the Legal Aid Commission's duty solicitor scheme at the Family Court registry at Parramatta.

Ms Loughman—Yes. I do not have direct personal experience of that, but we have had feedback from others to say that it has worked well. That is a good thing Legal Aid has done.

Senator PAYNE—I understand they are exploring it for Newcastle as well.

Ms Loughman—I do not know about that.

Senator PAYNE—On the Blue Mountains CLC submission, Mr Crozier, you have made a recommendation on your second last page about the staged grants process for legal aid and merits review, and finetuning that. You have said that there should be a presumption against terminating a grant of aid prior to hearing, unless there are exceptional circumstances. We heard some evidence on similar matters in Melbourne yesterday. Have you had any experience of matters being terminated either just prior to or during a hearing, because of the expiration of a legal aid grant?

Mr Crozier—Yes. I have had one person—not that long ago—who was terminated prior to a hearing because of some funds that came through from a property settlement. The funds would not have covered the costs of the hearing, but they exceeded what Legal Aid thought was a reasonable amount of money. In that situation, I think they should have—and they can do it—continued aid but with a contribution.

Senator PAYNE—So they do that by negotiation with the individual concerned, I imagine. There are then compromise positions available, such as the one you suggest, but in this case they did not proceed with it.

Mr Crozier—She appealed to the Legal Aid Review Committee and they knocked it back as well. Decisions like that tend to vary. It is hard to know what the rationale is. The Legal Aid Review Committee does not give detailed reasons for its decisions.

Senator LUDWIG—Are you funded by the Commonwealth?

Ms Loughman—Yes, and by the state.

Senator LUDWIG—What proportion is Commonwealth and what proportion is state?

Ms Loughman—Our community legal centre funding is almost fifty-fifty.

Senator LUDWIG—I am trying to focus on what happens at the shopfront, and I take it you are at the shopfront.

Mr Crozier—Yes.

Senator LUDWIG—Is your funding directed to you on a monthly basis over the year, and do you then split up the budget as needed?

Ms Loughman—We get our funding annually. We have three-year funding agreements, but we have annual allocations of funding. We have an annual budget.

Senator LUDWIG—Do you produce an annual report?

Ms Loughman—Yes, we produce annual reports of our work.

Senator LUDWIG—Could you make one of those available?

Ms Loughman—Certainly.

Senator LUDWIG—It would help us to understand the work that you do. I was up at Townsville and I had a look at the annual report for their community legal centre. It provided a lot of information about what you do, how you do it and the amount of volunteer hours that you can access. It is an extremely helpful document to understand your work at a local level. When is the next round of funding due? When would you expect to receive your next allocation?

Ms Loughman—It goes July to June, and we make pre-budget submissions to each Commonwealth and state budget.

Senator LUDWIG—When do you get notified that you have been successful?

Ms Loughman—We get notified of those at the state level in May and at the Commonwealth level at the same time, I think.

Senator LUDWIG—Do you know at this point in time what your allocation will be in June next year?

Ms Loughman—No, we do not actually know, but we hope that it will be at least the same.

Senator LUDWIG—You are notified by the state government in May. When are you notified by the Commonwealth?

Ms Loughman—We only see from the state budget in May whether there has been an increase to the CLC funding program. We are notified shortly before the end of June, I believe, with our new contracts.

Senator LUDWIG—What about the Commonwealth?

Ms Loughman—It is the same; the New South Wales Legal Aid Commission administers the Commonwealth money and the state money.

Senator LUDWIG—So you know by the end of June that you have an allocation?

Ms Loughman—Yes.

Senator LUDWIG—Thank you.

CHAIR—Mr Crozier, you talk about the problems of getting legally qualified people out into rural Australia. Have given any thought to what sorts of incentives might be thrown up? One idea that has been tossed around is some sort of HECS relief as an incentive for law graduates to be tempted out into the bush. Have you any ideas yourself?

Mr Crozier—I think people need to be tempted into the community sector generally. HECS relief is going to be essential, certainly to get people to rural areas. I have no specific detailed proposals.

CHAIR—I think that seems to be a common problem across the country.

Mr Crozier—Yes.

CHAIR—Thank you for your submissions and for your time this afternoon.

[3.54 p.m.]

KAMAND, Ms Suhad, Director/Principal Solicitor, Immigration Advice and Rights Centre Inc.

BOON-KUO, Ms Louise, Coordinator, Refugee Advice and Casework Service

CHAIR—Welcome. Do you have any amendments that you wish to make to either of your submissions?

Ms Kamand—No.

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

Ms Kamand—I would like to start by thanking the committee for inviting IARC to partake in this inquiry. I would like to emphasise that the submissions we made on 22 September should not be taken in any way to be an exhaustive statement of IARC's concerns. I was thinking of how I would express our concerns in a way that would enable the committee to fully appreciate them. I think the best way to do it is to go through some of the services that IARC provides.

I might hand a document to the committee. The figures on that document are taken from the National Information Scheme, which is the database scheme that we are required to report under. In the period 1 July 2002 to 30 June 2003, IARC provided face-to-face advice to 1,952 people. That is during our drop-in service, which is provided on a Monday night from Surry Hills and on a Wednesday night from Parramatta. We provide a telephone advice service for two days a week for two hours on each day, on Tuesday and Thursday, to in the order of 2,000 people. As at 30 June 2003, we had 75 active cases in which we provided ongoing casework assistance to people. We provide 13 sessions of community legal education a year. In those community legal education sessions, we invite people from migrant resource centres and heads of community groups so as to get them up to speed on some immigration issues. Items 5, 6 and 7 refer to general information inquiries. People drop in to the office and ask for general information and we assist with those. Of those services, about 60 per cent would be covered by funding under the Commonwealth and state community legal centres funding program, 20 per cent would be covered under the IAAAS and the remaining 20 per cent would rely on self-generated funds—we generate those through education seminars and publications.

If we assume that those figures reflect the full extent of the demand for immigration advice and assistance then the funding is clearly inadequate. If you add to that the reality that those figures do not reflect the full extent of existing demand and that, of the 2,000-odd people who come in for drop-in advice sessions and the 2,000-odd who call us during our telephone advice sessions, many actually require ongoing assistance and more than just a one-off consultation, then that probably would reflect where our concern stems from.

A large number of people that we have to turn away who do seek ongoing assistance are low to nil income earners. They have poor English language skills. They are unfamiliar with the way things are done in Australia and with government and tribunal processes. They are left without

representation. They cannot go to commercial agents because they cannot afford commercial agents, and pro bono lawyers often do not offer migration advice because of the registration requirements—they are not registered to provide migration advice. Non-fee-charging agents simply do not have the capacity to assist them.

The flow-on effect of that is that unrepresented applicants can undermine the processes that the department of immigration has in place. If the department receives an incomplete application, if an application contains errors or if it does not contain all of the evidence required, it is slowed down in its processing. Applications that could be decided on a positive basis by the department get rejected and they go to the Migration Review Tribunal, where fuller evidence is provided and the DIMIA decision gets set aside. Perhaps if those people had representation at the primary stage, the matter would not have gone to the MRT.

We have some additional concerns that have arisen since we put in the previous submissions in September—in particular, the increasing cost and administrative burden of complying with the MARA's registration/re-registration compliance requirements. While we support a regulatory regime that seeks to protect the consumers of immigration services from unscrupulous migration agents who are taking advantage of people's misfortune to make a profit, we say that those numbers are few and those concerns really do not apply to non-profit migration agents who have nothing to gain by putting up what the Migration Legislation Amendment (Migration Agents Integrity Measures) Bill defines as 'vexatious applications' and that kind of thing.

I know that separate submissions were invited in relation to that bill, but my concern is that an assessment of access to legal aid and justice needs to consider the burden that is placed on non-profit migration agents by the regulatory measures that are being put in place. If you look at the MARA's annual report over 2002-03, you will see that the trend is that there is a decreasing proportion of migration agents practising on a non-profit basis. We are concerned that the increased compliance costs have become prohibitive and a large disincentive for people to act on a non-profit basis. Commercial agents can increase their fees to cover those costs; non-profit agents cannot. That is really the extent of my opening statement and further submission.

CHAIR—You should have a look at the transcript of the Senate's legislation committee inquiry into that bill a few weeks ago to get a sense that maybe we have a few—quite a few—concerns about that legislation too.

Ms Boon-Kuo—RACS is a community legal centre in name but does not receive community legal centre funding. We receive our funding from two contracts with the department of immigration: one through detention referrals, and one through community contract. This funding is inadequate to meet the needs that are presented at RACS. In looking at the statistics from our 2002-03 financial year annual report, we have found that almost 40 per cent of our ongoing community case work assistance is provided on a pro bono basis. So each year we completely expend our community contract; in fact, we go beyond that by 40 per cent just in ongoing casework. At RACS, there are five staff members, four of whom are case workers. Two of those case workers, me and another case worker, also have responsibilities for coordination. I am the coordinator, and the other person is also employed to coordinate our temporary protection visa project.

One of the major new case loads that has emerged in the last few years has been initiated by some changes in legislation, in the introduction of temporary protection visas in Australia. Unauthorised arrivals—or people arriving without correct paperwork and passports; for example, boat arrivals or people arriving on false documents—are eligible only for temporary protection visas. This means that they are assessed once on arrival and then in three years time, at the expiry of 36 months, they are assessed again as to whether continuing protection is required. This doubles the need for legal assistance, because there are two stages in which it is required. There has been no recognition of that in the funding contract between RACS and the department of immigration.

Our organisation is expected and encouraged to accommodate the needs of the 4,000 additional assessed refugees in their claims for further protection. This is creating a strain on the resources of RACS. Whilst we have responded to that by organising pro bono schemes, volunteer advice nights, community briefing sessions and these kind of measures to begin to meet the needs of this population, it is clearly not enough. The largest issues facing RACS in terms of trying to meet the access to justice needs of asylum seekers and refugees would be the need for further caseworkers and the need for further resources to enable RACS to provide ongoing training to those participating in pro bono schemes organised by RACS. They are the two major needs. The other major need of RACS is to have ongoing core funding. The contracts for the department of immigration are negotiated on a periodic basis. Our present contract runs from last July until February 2004. Obviously, this means that only short-term planning is possible. That concludes my opening statement.

CHAIR—How do you prioritise? You have a potential case load of 4,000 TPVs—and that has to be a pressing responsibility. How do you prioritise between them and other categories?

Ms Boon-Kuo—Basically, everyone who calls up is eligible for an initial interview, an initial appointment, at RACS. In that interview, merits and means are looked at. So it is basically determined in that fashion. We have a special assistance scheme on Tuesday evenings for people on temporary protection visas. There are defined stages which people on TPVs face. One is the request for further information as people approach 30 months in their 36-month visa. Another is the stage of preparing for the Refugee Review Tribunal, should that be required.

CHAIR—Putting aside the TPV people, do you keep statistics on the rest of your case load? Do you keep statistics on what proportion you advise do not have a legitimate claim?

Ms Boon-Kuo—Yes, I did not bring copies of our latest annual report—which we produced since our initial submission to the committee. I can produce that information in a percentage table, which would be more useful than what I have in front of me now.

CHAIR—Would you like to take that on notice and come back to us?

Ms Boon-Kuo—Yes.

CHAIR—Thank you. If there were to be extended legal aid in migration matters, what eligibility criteria should apply and in what circumstances should aid be made available as a matter of priority? Obviously, you cannot fund all the potential cases.

Ms Kamand—It should be similar to the current criteria that apply under the IAAAS, but the IAAAS is limited in that it applies only to members of the community. So that excludes offshore spouse applications, offshore humanitarian applications—anything that is offshore. Also ministerials do not come under that. We really need funding that fills that gap or funding that allows us to employee another caseworker to build up the expertise and use that expertise—whether it comes out of a common pool of funds or not. Really the areas that I identified—the offshore and the humanitarian areas—are the areas that are currently very underserviced.

CHAIR—Do you have access to pro bono assistance at the moment in these cases?

Ms Kamand—We have volunteer migration agents who assist us on our Monday and Wednesday evening advice nights, but in terms of secondees we do not.

CHAIR—In terms of the private profession that might run court cases for you?

Ms Kamand—We have a small number who do, depending on their capacity, but not enough for us to be able to say that each case that deserves or needs assistance will get it.

Senator PAYNE—In relation to RACS and your submission—you may have said this, and I am sorry if I missed it—how many employed legal positions are you funded for?

Ms Boon-Kuo—We have four positions that are caseworkers.

Senator PAYNE—Are they all lawyers?

Ms Boon-Kuo—Yes. Each person is a solicitor and a migration agent. Although, in effect, it is three full-time caseworker positions due to the fact that my position is half-coordination, half-casework, and the TPV coordinator/caseworker is half-TPV coordination and half-caseworker.

Senator PAYNE—You augment that number with volunteer migration agents—I see from your submission—who do your evening advice roster.

Ms Boon-Kuo—Yes.

Senator PAYNE—What sort of support do you receive through the pro bono process for your secondment program? That is pro bono, I assume?

Ms Boon-Kuo—Yes, it is. Basically we have arrangements with a couple of firms that they provide solicitors and migration agents for periods of between three to six months. It is not completely regular; it is episodic. At the moment, we do not have a secondment. Part of the difficulty with that is getting enough solicitors in private firms registered as migration agents so that that is more of an option and, if a particular solicitor is not able to be taken away from a firm, there is another option of a person within that firm who may be able to. Many times firms may be interested, but if there is not a sufficient pool of people who are registered as migration agents that process can take anywhere between a month and three months.

Senator PAYNE—That is an interesting question. Earlier this afternoon we were discussing the expertise question with the National Pro Bono Resource Centre. We then discussed with two

of the major firms how they fill the gaps in their expertise and whether indeed they are inclined to do so. Do you as a CLC assist in training or mentoring those solicitors who may be sent from major firms to you?

Ms Boon-Kuo—Absolutely. We provide training. One of the biggest challenges with firms is not having colleagues who have that as their area of expertise, so we provide training. We attend the offices of firms and provide training to groups of solicitors from a number of firms. We also provide training for migration agent volunteers who act pro bono on our evening advice nights.

Senator PAYNE—One of the firms who appeared here earlier this afternoon—I think Ms Kamand was here—was talking about an effort being made by large Australian firms, in Sydney at least, on family law issues. They recognise there are some serious gaps and there may be some capacity for them to assist in filling some of those gaps—although they are not inclined to turn themselves into a replacement for legal aid. They made that very clear. Do you know if there is any similar initiative in regard to the sorts of immigration law issues you deal with?

Ms Boon-Kuo—I think there is a fair amount of support by firms and by people engaged in pro bono work for the work that happens at RACS. The difficulty is how many people are actually registered as migration agents. At present not so many are registered as migration agents. Many of those who are employed in the large firms who are registered as migration agents are currently volunteering at RACS.

One of the difficulties for the TPV service is that we coordinate a roster of solicitors rather than migration agents, which means the type of assistance that is being provided to people on temporary protection visas and the taking down of statements is restricted to the taking down of statements. The supervising migration agent is able to provide advice on that night, but any other advice must be provided through our Monday night migration agent evening service. Whether the pro bono community could offer what is required by clients of RACS is a different matter. A lot of people do require ongoing casework assistance.

Senator PAYNE—Yes. It is not a one-off event; it is a long-term project.

Ms Boon-Kuo—Yes, that is the difficulty. We can engage people in the advice services, but for ongoing assistance it is a little more difficult. For example, if people are in detention, that requires a train trip out to Villawood and back. So there are difficulties.

Senator PAYNE—That is if they are in Villawood.

Ms Boon-Kuo—It is a big ask. You cannot really replace that kind of collegiate training and experience in the one workplace.

Senator PAYNE—This may be something you already thought about a long time ago—if it is, just ignore my question—but it seems to me some of the issues we have discussed today are then taken up through the national network of community legal centres and even the New South Wales body, so it might be appropriate to talk to them about the migration agent question. But you may have already done that.

Ms Boon-Kuo—Yes. We are speaking to community centres at the moment about people becoming registered as migration agents to increase the pool of people who are qualified to provide this kind of advice.

Senator PAYNE—Yes. As I understand it, they talk regularly to the pro bono coordinators at the large firms. Thanks very much.

CHAIR—The trial is over! Thanks very much for your submissions and for your evidence.

Committee adjourned at 4.17 p.m.