

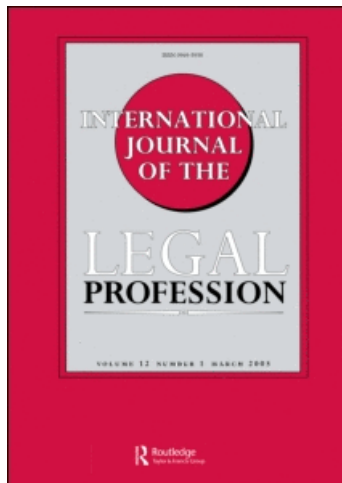
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Access to justice: a new approach using human rights standards

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ABSTRACT *This article details a trial of a new approach to measuring access to justice that utilises human rights instruments as the reference point. It involves an examination of people's actual experience of the justice system using human rights standards as the benchmark. The research project selected the right to income security. The project trialled a range of methods gathering data about how people have been treated in the Australian social security system and how they would expect to be treated if there was a human right to social security in Australia. This data is assessed against the set of standards developed to measure the enjoyment of the right to social security. The trial suggests that without knowledge about human rights and legal rights, without the confidence to exercise those rights and without the capacity or capability to seek or find help it is unlikely that people will realise their rights and accordingly access to justice is placed in question. The research methodology has the potential to be a useful model to conduct further access to justice research.*

If we believe in human rights, we must work hard to define what they mean for people's daily lives. We must identify the real and concrete outcomes that represent the achievement of human rights in practice and make sure they are incorporated in government programs and policies, as well as ensuring that the broad principles and goals of human rights form part of national and local government targets, mission statement and evaluation.¹

We've just had a young guy living with us for a few days, a twenty year old bloke who is unemployed and is homeless . . . I don't think he would see that he's got a right to that so he wouldn't go in and yell and scream or argue or get somebody to advocate for him and there's probably a lot like that. They're not prepared or have the capacity to stand up to the system and make the system work or justify itself. That's very hard to do to.²

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Introduction

This article details the trial of a new approach to measuring access to justice. The modest research project discussed involves an examination of people's actual experience of the justice system using human rights standards as the benchmark for determining how access to justice is attained.³ The focus of the research is on people who experience significant socio-economic disadvantage and the right to social security.

In this article, we briefly set out background information on the applicability of human rights instruments in Australia, particularly the right to social security, and then we discuss the context and aims of the trial research project. We outline the methodology of the trial and examine our findings from the research. Finally, we comment on the merits of the research methodologies.

This article is not intended to be an analysis of the human right to social security or an interpretation of human rights instruments. The research project grew out of the developing body of legal needs and access to justice research not human rights jurisprudence. It aims to suggest an innovative research approach which measures access to justice (or unmet legal needs) by using as a measurement people's experience of how their human rights are adhered to in practice. In the past, researchers have grappled with measuring 'legal need' or 'unmet legal need' but this has been fraught with difficulty both in defining legal need and finding how best to measure it.⁴

Recent studies emanating from the United Kingdom have examined people's advice seeking behaviour and have provided rich data on impediments to accessing legal services.⁵ This modest trial builds on the work in the United Kingdom. The article proposes to researchers a different approach by examining more directly people's actual experience of their legal and human rights. The trial suggests that without knowledge about human rights and legal rights, without the confidence to exercise these rights and without the capacity or capability to seek or find help it is unlikely that people will realise their rights and accordingly access to justice is placed in question.

People's capacity to seek assistance when in legal difficulty, to enforce entitlements, to seek redress, and to participate and generate change in civil society are connected to a realisation of other aspects of well-being including health, housing, and employment opportunities.⁶ The connection between access to justice, appropriate service delivery and enjoyment of human rights is becoming clearer. This research illustrates how these three elements can be integrally connected.

Increasingly, there is reliance on human rights as a mechanism in the fight for increased access to justice.⁷ Within this context and the Australian experience of limited funding for large scale surveys of justiciable problems we developed this alternative approach to measuring access to justice by using adherence to human rights instruments of the United Nations.⁸

The limited trial discussed in this article was confined to the examination of only one human right; the right to social security under Article 9 of the *United Nations Covenant on Economic Social and Cultural Rights*. This right was chosen as it is relevant to large numbers of people who experience disadvantage. The suburb of West Heidelberg was the site of the trial and is one of the poorest postcodes in Australia.⁹ A set of standards were developed that sought to measure what elements

would be necessary if the right to social security was to be adhered to. The project utilised a range of methods gathering data about whether the standards were met. This included data on how people were treated in the current social security system and how people would expect to be treated if the human right to social security existed. Data were collected as to people's experience of the right and then assessed against the indicators of the human right to measure the level of adherence to the right to social security.

In this research, we particularly wanted to develop a methodology which was inclusive and that reached out to vulnerable and marginalised groups. In view of limited funding in Australia for such research, we wished to provide a model which could be replicated in other jurisdictions, which face similar research funding constraints, a model which could be utilised across a range of different human rights and used to draw comparisons and make conclusions about the reality of human rights adherence and accordingly the level at which people can be said to have access to justice. The research, if replicated, would have a larger number of participants involved in focus groups and if appropriate any survey would need to have a larger sample from the community than we could undertake. The standards developed for specific human rights will be subject to debate, alteration and refinement.

We conclude that the approach taken in the research trial warrants further exploration. Potentially it is an innovation that can facilitate the appraisal of human rights benchmarks against the actual experiences of members of the community. Actual experiences of people of their human rights are often overlooked in the formal processes of governments reporting on their human rights compliance to the United Nations.¹⁰ This innovation can provide an appropriate evaluative framework to assess access to justice in future studies. This can then inform public policy and improve the delivery of services.

Background

Human rights benchmarks

Previously, we have explored the concept of legal need and sought the views of stakeholders on the definition of legal need. At the conclusion of this work in 2002, we proposed to trial a different approach to measuring access to justice based on the benchmarking of human rights standards.¹¹

Australia is a signatory to, and has agreed that it will abide by, various human rights instruments, including the *United Nations Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Convention on Economic Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Elimination of Discrimination against Women*. Many of these instruments set standards related specifically to the manner in which rights can be enforceable and articulate the approaches that institutions and the state should take towards people. As such, they can be seen as an appropriate starting point in working out a framework for measurement of access to justice, moving away from the problematic concepts of

legal need.¹² This is a move towards analysis, which can measure the broader notions of justice and its applicability in society.

The approach of examining ‘capability’ outlined by Sen which involves looking at what individuals are actually able to do and the alternatives that they have as real opportunities, encompasses a much broader approach to measuring legal need and explores what people can actually realise.¹³ In the authors’ view, it lends a sense of reality in any measurement of access to justice.

The task of selecting benchmarks and standards for citizenship is complex. It cuts across public policy and involves identifying the formal rights and duties of citizens as well as the collective and government standards needed to sustain them. Salvaris proposed a clear definition of the basic rights and duties of individual citizens; identification and establishment of standards in at least those policy areas that are necessary to sustain social participation and social well-being; and careful consideration of the most effective way to implement them. He stated that it is necessary to have some agreed reference points and to have benchmarks in policy areas that affect the lives of Australians in employment, education, law, housing and health, as well as poverty, discrimination, equality and participation in society.¹⁴ With a trend in the Western world for the incorporation of human rights protections into legislative frameworks which require audits of human rights compliance by governments and their agencies, there is even more relevance in a research approach which develops measurements and benchmarks people’s experience against human rights standards.¹⁵ The utilisation of human rights audits is increasing. For instance, in New South Wales, the Council for Civil Liberties completed an audit of the criminal justice system¹⁶ and there is work on the pilot of an Australian Audit of Human Rights.¹⁷

Legal and human rights in the broadest sense are linked with notions of citizenship.¹⁸ They enable a person to have certain rights and remedies, should those rights be impeded. Salvaris argued that such rights need not merely exist or be aspirations but have to be attainable and accessible in practice to enable full participation in society. This may not mean that all citizens choose to exercise or enforce those rights, but they should be able to if they choose, without the barriers imposed by class, ethnicity, and marginalisation, or limited finances. The degree to which the standards are attainable or unattainable may be a better measure than ‘need’.

As social security is a right recognised in the Convention, we sought to examine how the UN states that right should be advanced and examined and what would need to happen in order for the right to be implemented. This was then measured against the practical reality. We did this with a view to expanding the trial into measuring other areas of human rights adherence contained in other United Nations human rights instruments in the future. These could range from civil and political rights, the rights of children in family law and other proceedings, the right to non-discrimination and other economic social and cultural rights.

Site of project – West Heidelberg – an area of disadvantage

West Heidelberg was selected as an area for the study for pragmatic reasons. This was a trial project with limited funds and we aimed to maximise the opportunity by

minimising time required to familiarise ourselves with a local area and the facilities and services provided.

The School of Law, La Trobe University has a longstanding relationship with the West Heidelberg Community Legal Service and one of the researchers worked as a solicitor and clinical legal education supervisor at the Legal Service.¹⁹ The legal service is collocated with the Banyule Community Health Centre and this provided the opportunity to access a range of staff members and through them members of the community (see below for further discussion).²⁰

West Heidelberg is one of the most disadvantaged postcodes in Victoria, Australia. International research indicates that high levels of legal need and people with a cumulation of problems are likely to be concentrated in areas of disadvantage.²¹ In 2006, research into social disadvantage in Victoria (a state of Australia) found that West Heidelberg was included in the 40 highest ranking postcodes (out of a total of 726) for general disadvantage. It ranked number 20 in this list. This level of disadvantage was similar in 1999 and 2004. This research looked at 24 indicators. The major ones included: computer use, Internet access, low income families, post-school qualifications, disability/sickness support, interventions by State child protection agencies, early school leavers, low work skills, year 12 incomplete, dependency ratio and criminal convictions.²²

Human right to social security

Given the small scale of the research project only one human right was selected. It needed to be one which has importance and relevance to the people in the area of West Heidelberg. A significant number of people living in the area are reliant on social security for their income support.²³ In addition, at the time of the project, data from the West Heidelberg Community Legal Service indicated that issues around social security were matters affecting a high number of clients of the legal service.²⁴

Consequently, the human right focused on was the right to social security contained in Article 22 of the *Universal Declaration of Human Rights*. This right is amplified in Article 9 of the 1966 *International Covenant on Economic Social and Cultural Rights* (ICESCR) (operative 10 March 1976 for Australia) that provides “the right of everyone to social security, including social insurance”.

Application of human rights

If a human right is to be accessed, then the ICESCR norms must be recognised in appropriate ways within the domestic legal order and the appropriate means of redress, or remedies, must be available to any aggrieved individual or group. The applicability of this process to the right to social security is briefly outlined.

The Australian Government has signed and ratified the Covenant. Article 2 of the ICESCR states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially

economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The duty to give effect to the Covenant in the domestic legal order has been outlined by the Committee on Economic, Social and Cultural Rights which has helped to evolve jurisprudence in this area, both through its reaction to reports by individual states and through its general comments. It states that States have the obligation to take steps in areas which are deliberate, concrete, targeted and appropriate.²⁵ It has also noted that certain rights are immediately justiciable. It states as follows,

In its General Comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1, of the Covenant) the Committee addressed issues relating to the nature and scope of States parties' obligations. The present general comment seeks to elaborate further certain elements of the earlier statement. The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so 'by all appropriate means', the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.²⁶

But this flexibility co-exists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognised in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.²⁷

How international human right law is implemented domestically becomes critical for our methodology of benchmarking the practical application of international human rights to social security. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in Article 8 of the *Universal Declaration of Human Rights*, according to which "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".²⁸

The ICESCR contains no direct counterpart to Article 2, paragraph 3(b), of the *International Covenant on Civil and Political Rights*, which obligates States parties to, *inter alia*, "develop the possibilities of judicial remedy". Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of

economic, social and cultural rights would need to show either that such remedies are not

appropriate means within the terms of article 2, paragraph 1, of the *International Covenant on Economic, Social and Cultural Rights* or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.²⁹

The Committee describes the role of legal/judicial remedies as follows:

The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. *Any such administrative remedies should be accessible, affordable, timely and effective.* An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. [our emphasis] By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.³⁰

In March 1996, the Australian Delegation to the Commission on Human Rights stated

We reject the notion of a hierarchy of rights, or the suggestion that any one group of human rights can be subordinated to another . . . The *Covenant on Economic, Social and Cultural Rights* is of immediate and direct relevance to both the normative and operation dimensions of economic and social development.³¹

The delegation also stated, “economic and social indicators could be developed to provide benchmarks of economic, social and cultural rights and to monitor the extent to which these are translated into actual outcomes”.³²

The ICESR has not been added to the Australian Human Rights and Equal Opportunities mandate (unlike the *International Covenant on Civil and Political Rights*) and has never been incorporated into Australian domestic law. This means it cannot be invoked in any law suit.³³ In its explanation about this to the Committee on Economic, Social and Cultural Rights, the Australian Delegation implied that the Covenant Rights are already protected by law in various forms; the common law, legislation and subordinate legislation from the Federal Parliament and the states and territories.³⁴ The adequacy of such protection and whether it

complies with international human rights standards would be one of the benchmarking exercises in any research using our approach.

Article 8 of the *Universal Declaration of Human Rights* provides that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

Any such administrative remedies should be *accessible, affordable, timely and effective*.³⁵ An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.

Focus of research

The standards developed for the trial research were based on the United Nations treaty bodies comments that if the right to social security were fully implemented then any administrative remedies would be *accessible, affordable, timely and effective*.³⁶

In addition, if the right to social security were fully implemented then we determined that these indicators would also need to exist:

- Knowledge of the right by the person affected.
- Capacity of the person affected to pursue the right.
- Confidence of the person affected to pursue the right.
- Availability of processes that are accessible, affordable, timely and effective for the person affected.

The primary focus of the research was to examine whether these standards and indicators exist for the people living in the West Heidelberg area. In order to gather these data we posed these questions: how are the people in West Heidelberg treated by the Australian social security system? How does this compare with how they should expect to be treated if there was enjoyment of the human right to social security? What do the findings reveal about the level of access to justice?

As this research focussed on a disadvantaged community, the approach adopted sought to recognise the impact of vulnerability upon different methodologies.³⁷ The aim was to develop an inclusive research approach to ensure that it reached those who are on the margins and who are more likely to experience difficulty in accessing justice.

Research methodology

The project trialled a range of methods gathering data about how people have been treated in the current social security system and how they expect to be treated if there is a human right to social security in Australia.

This research adopted a triangulated methodology. The limitations, recognised in the international literature, stipulate that selecting only one or two types of approaches are mitigated through the use of three methods. In particular the proposed research aims to build upon local knowledge.³⁸ The triangulated methodology included the benchmarking of standards, and comparing the practical reality or experience of people with the benchmark.

The benchmarks were tested through the establishment of:

1. a community advisory panel;
2. a mapping exercise of existing services both legal and non-legal, formal and informal who could be invited to focus groups and to provide linkages to members of the community with experience of the social security system;
3. two focus groups (one with service providers and the other with people who have had experience of the social security system); and
4. a small survey.

Clearly, the survey size used here was small due to the funding constraints. A full scale survey would be desirable. Despite this, as will be revealed in later discussion, the authors of this paper are sceptical about the use of surveys where people to be surveyed are disadvantaged and lack literacy and numeracy skills or who fear reprisal as this can skew their responses.

A critical feature of the research was the use of a range of approaches to access people whose capacity to enforce their legal rights or seek meaningful legal assistance may be unmet or unrealised.³⁹ As overseas research explains, without detailed analysis, the complex patterns between use of law and other variables such as class, income, gender, education, expectations and attitudes require not just accurate data but also a capacity to glean what lies beneath.⁴⁰ Surveys and focus group research methodologies have been developed overseas and the project utilised the best of these and tried to overcome shortcomings and build upon local knowledge.⁴¹ The research involved a number of complementary strategies to ensure that local knowledge and understanding was fed into the process. Legal needs research, involving as it does an aspect of human services, requires elements of subjective as well as objective analysis in order to be valid. Related research in England and Wales has found that quantitative studies of legal need require complementary focused qualitative studies to provide insights into what methods might be adopted to allow aspirations to be made real.⁴²

The trial of this research project involved:

1. Convening a Community Advisory Panel (CAP).
2. The formulation of standards to assess adherence to/enjoyment of the human right and liaison with the CAP both on these standards and how best to access community members and service providers.
3. Mapping of local services relevant to the project and its geographical area.
4. Conducting a focus group with service providers in the region.
5. Conducting a focus group with people with experience of Centrelink (i.e. the social security system).
6. A small sample survey of people in West Heidelberg to test/trial the questions and process.

An integral aspect of the research methodology was not only to assess the adherence and experience of the human rights to social security but to also provide information to participants about the legal nature of the social security system and the remedies available.

Community Advisory Panel

The Community Advisory Panel (CAP) assisted in making linkages within the community and ensured that the researchers were informed in the conduct of the research by local knowledge. This panel of five people included key people involved in service delivery in the West Heidelberg area, a staff member from the Victorian welfare rights organisation and an academic adviser. The panel met three times and settled some of the research questions through email feedback. It confirmed the relevance of the right to social security for the local area, and assisted in the formulation of the appropriate standards and indicators after the CAP became familiar with the various United Nations commentary and the human rights instruments. The CAP members provided insights into the experience of local residents and Centrelink; and assisted in contacts for the focus groups. A key focus was about how to reach people who might otherwise be excluded, e.g. the homeless and people with low literacy and a non-English background.

Standards for the enjoyment of the human right to social security

A concurrent task with formulation of the CAP was to develop the standards to benchmark the actual domestic implementation of the right to social security. In formulating the standards we were cognisant of the statements from the relevant UN committees and the interrelatedness of the various UN instruments. We drafted a set of standards and consulted with the CAP (see below) about the content. The CAP agreed to the following set of standards for the right to social security.

If a right to social security existed in Australia we would expect the following:

- Right enshrined in legislation and administrative procedures.
- Right is universal and not categorical or based on discretions.
- Provision by government of information about entitlement to the right.
- Provision by government of information about the administrative system and procedures.
- People have knowledge and understanding about and confidence in the right and how to claim it.
- People have knowledge and understanding about and confidence in the administrative system of social security (Centrelink).
- Establishment by government of an administrative system of social security that is fair; transparent; simple; consistent and predictable; accessible; customer focussed (e.g. simple forms, suitable physical surrounds, good communication processes); accommodates individual capacity (e.g. literacy, mobility, incapacity, homelessness); non-discriminatory; respects an individual's privacy; and promotes quality primary decision making.
- People who have a dispute with the administration system (Centrelink) have access to an appeal process that is: fair; timely; free; accessible; and effective.
- People who have a dispute with the administration system (Centrelink) have access to information about all levels of the appeal process that is timely, appropriate and sufficient.

- People who have a dispute with the administration system (Centrelink) have access to legal advice and assistance about their dispute that is timely, appropriate and sufficient and assistance in pursuing their dispute that is timely, appropriate and sufficient.⁴³

A set of questions based on these expectations was prepared to use in the focus group discussions and as questions for the survey instrument. The survey instrument was developed only after the focus groups were held. The idea was that the participants' responses to these questions would be tested against the indicators/expectations.

Map of local services

The mapping exercise involved identifying organisations or individuals that might provide services to people on Centrelink payments in the West Heidelberg area. A draft map of service agencies and individual staff members was submitted by researchers to the CAP who provided further names and agencies to approach for the focus groups. The CAP suggested service providers who were trusted by the community and who would be prepared to assist in approaching clients with experience of social security to participate in a focus group.

Focus groups

The aim of the focus groups was to explore the following issues:

- Views on what is meant by a human right?
- Whether social security should be a right?
- Stories of how people have been treated by Centrelink.
- Views of how people want/expect to be treated by Centrelink.
- Aspects of language used in relation to social security.

The focus groups were run by a facilitator and attended by the researchers. One focus group (seven participants) was conducted with service providers in the region. A second focus group (10 participants) was conducted with people most likely to have had a decision about social security affect them (selected with help from service providers and advisory panel).

A letter was sent to staff members across the region explaining in detail the aims, objectives and purposes of the project. We also sought their help in linking to clients who might be prepared to participate in the focus group with the community. The participant staff members in the focus group included a social worker, a health worker, and a worker with Somali men, a housing worker, and a person who dealt in provision of crisis and emergency support, as well as two members of the local religious community who work with people in crisis.

Survey

Drawing on the material gathered in focus groups a survey document was drafted. The survey aimed to gather data on the particular elements of the right. It included the following aspects:

- Demographic material about survey recipient.
- Information about person's actual experience with Centrelink.
- Questions to ascertain their level of knowledge about the right.
- How a person expects to be treated by Centrelink in comparison with how they were treated?
- What they would expect if human right fully implemented?
- Have they had any disputes with Centrelink?
- What did they do?
- Were they assisted in their dispute? If so, by whom?

This survey was trialled in West Heidelberg and although 50 people were approached only five people agreed to participate in the survey (see Appendix B). This was not intended to be a representative survey but a test of the survey instrument.

Assessment of human right standards and data collected

In this section we discuss the standards that we decided would need to be present for adherence to the right to social security, we discuss the data collected and how the data related to these standards.

Social security as a human right

- **Right enshrined in legislation.**
- **Right is universal and not categorical or based on discretions.**

One of the primary benchmarks is whether the right to social security is enshrined in legislation and administrative procedures. A related issue is whether the right is universal or categorical or based on discretions.

The right to social security is not enshrined in Australian domestic legislation. The Australian social security system is legislatively based and administered primarily through the private agency *Centrelink*. It is a categorical system with multiple types of benefits and allowances: "It has been, and remains, distinctive for its range of flat-rate, tax funded, income-tested cash benefits, unrelated to prior labour force attachment or insurance contributions".⁴⁴ The level of payment depends on the individual's particular circumstances. For instance, an unemployed person receives a lesser payment than an aged pensioner. There remains some element of discretion in the administration of the system within the legislation but increasingly this is diminishing. In a recent article, Carney concludes that the courts have taken little notice of human rights jurisprudence in the task of interpreting the social security legislation. However, he does note that the appeal process has recently been positively reviewed as meeting its statutory objective of "providing a mechanism of review that is fair, just, economical, informal and quick".⁴⁵

In the focus groups, both the service providers and community members indicated they had never thought of social security as a human right and the majority of service providers believed that social security benefits were inadequate for survival.

The community members had firm views that if social security were a human right then the system would be respectful, treat people with dignity, would be fair and just and adequate to live on with simple proceedings that supported people rather than believing they had to justify being on the benefit. As one participant described it, they “find us guilty until presumed innocent”.

No you get your basic level of Centrelink payment which is supposed to be just to get you at that level of survival and then people get breached⁴⁶ for \$60 so how can you be expected to live below the recognised poverty line you know and this is our own government doing this to people or allowing it to happen to people. So you know you talk about human rights and economic security it's more what people talk about than, it doesn't happen. . . . There's a huge injustice and the injustice is perpetrated by our own government.⁴⁷

In discussion regarding what constitutes a human right and who decides them, participants talked of concepts of right to basic entitlements for survival, the right to exist and the right to exist and feel equal.

Right not to be abused.

Right to adequate shelter and adequate food . . . the right to live like everybody else.

Basic entitlement.

Participants spoke of their understanding of social security being about ensuring that people who are unable to provide for themselves are provided with an adequate income for survival.

Prepare for retirement or upsets in our lives.

Any circumstance that leaves a person to not be able to earn an income below which they can't live.

Some participants, predominantly service providers, spoke of current rights as being a reflection of community values, enshrined in legislation by governments and protected by a range of organisations from international bodies to local community organisations working with disadvantaged people. There was an understanding amongst participants of power discrepancies between people when asserting their rights and the governmental instrumentalities which administer these rights (in this case Centrelink).

Not everyone is equally empowered in their rights to decide what their rights are.

You're so scared of anything affecting that payment that you say very little or do very little to affect that.

Participants spoke of experiences where their social security payments had been denied by Centrelink for months, leaving them unable to adequately feed and provide for their families and reliant on the charity of their community (see Appendix A). These experiences had left people with no confidence to assert their right to social security in further dealings with the administrative system and meant they would

not query the system because of the fear of again losing the income they needed for survival.

In discussion, there was a general lack of confidence in how the right to social security was being met in reality and an overall impression that the day-to-day experiences of people was that social security was understood to be a benevolence that recipients should appreciate rather than a right they could assert.⁴⁸ This was particularly the experience of people who were most disadvantaged – people with a disability, people who experience episodes of mental illness, newly-arrived peoples, sole parents, women experiencing domestic violence, young people. Participants spoke of feeling like, or people being treated like, a ‘second class’ citizen when claiming social security. All participants in the research commented that the right to social security was difficult to assert and that in its current form it did not meet the needs of ‘survival’.

You shouldn't feel like a second class citizen.

They (the Somali community) think it is charity from the government ... so anytime it is breached or cancelled or stopped they just (assume) it's their fault.

I don't think he would see that he's got a right. So he wouldn't go in and yell and scream or argue or get someone to advocate for him ... there's probably a lot like that. They're not prepared to or have the capacity to stand up to the system.

You have the feeling that it is their money ... you feel like you're asking for a hand out.

You get your basic level of Centrelink payment which is supposed to get you at the level of survival and then you get breached for \$60.00 so how can you be expected to live below the recognised poverty line.

Knowledge about and confidence in administrative system

- **Provision by government of information about entitlement to the right.**
- **Provision by government of information about the administrative system and procedures.**
- **People have knowledge and understanding about and confidence in the right and how to claim it.**
- **People have knowledge and understanding about and confidence in the administrative system of social security (Centrelink).**

While there was some acknowledgement from participants of positive experiences with the Centrelink system (usually with particular staff members within the system) the general experience of focus group participants was that the Centrelink system was difficult, that knowledge about the system was gained in a piecemeal fashion, usually through trial and error, and that barriers seemed to exist to prevent people accessing the system. There seemed to be a heavy reliance on specialist staff members within Centrelink (such as social workers, community based staff members and psychologists where these were available) and staff members within

community agencies to advocate for people in order that they achieve their right to social security.

I think the complexity of the system is a real barrier to people even getting to the stage of actually accessing Centrelink.

While participants spoke of positive experiences with some staff members at Centrelink, the overall experience of the system was negative. Participants felt the system was not designed to help them.

Centrelink won't help you. You have to help yourself.

Whenever you go to Centrelink you don't feel like it's your right to get payment from the government.

You feel like a lower class citizen.

It's seen as a big institution, big government and the more you go and argue the more they've got the capacity to just breach you even more so you just shut up and behave.

And I think the complexity of the system is a real barrier to people even getting to the stage of actually accessing Centrelink.

There's the requirement that everybody has adequate literacy skills to be able to complete forms and documents and this sort of thing. People just don't have that.

- **Establishment by government of an administrative system of social security that is fair, transparent, simple, consistent and predictable, accessible, customer rights focussed, has a culture of understanding, accommodates individual capacity, non-discriminatory, respects an individual's privacy and promotes primary decision making.**

Fair. The experience of participants generally reflected a system that placed obligations on recipients to adhere to timelines and rules of accountability, while not placing such rules of conduct on itself. Participants felt that Centrelink did not have to be accountable to them if Centrelink lost forms or documentation, or did not call back on specific days, or took longer to assess a claim than they had stated they would, or sent correspondence out late. In fact, recipients often had to bear the consequence of errors made by Centrelink in terms of them resubmitting paperwork or even having payments affected. This is also reflected in legislative provisions that enable collection of an overpayment by Centrelink even though the debt arose due to the act or omission of Centrelink staff.⁴⁹ If recipients of Centrelink missed deadlines or did not respond appropriately to correspondence then there was a constant threat of payments being stopped or altered.

if you're lucky enough to get a job and tell them straight away, you make a phone call to them . . . and they don't seem to follow it up on their end. All of a sudden you have an overpayment.

They give me a letter on the day they've stopped my Centrelink payment.

They don't give feedback to us and that's wrong.

People have to provide the same documentation over and over again, like how many times do they need a birth certificate.

There was also a feeling amongst participants that the system was more focussed on catching out those that may be 'cheating' the system rather than helping those who needed social support.

they doubt you first and then you have to prove.

Yeah, I think a lot of people feel that they, the people that are doing the right thing feel like they're paying for the ones that aren't.

Participants spoke of experiences where certain staff members were better than others and of individual staff members having the power to stop or decrease payments based on assumptions they had made about people's lives without any basis or evidence to support these assumptions. People then had to set about proving their story, and in doing so had to talk of incredibly painful experiences to staff at Centrelink in order to have their payments reinstated. This was reported to be a long and difficult process during which time people were forced to live off decreased or no payments. People would be back-paid but they never received an apology or explanation for the misunderstanding.

One staff member, she did that, one woman she destroyed my life.

Well you can't (complain).

Depends on which staff member you come across, most are good.

I was told I would lose my pension if I did not say the name of the father of my fourth baby when I was in hospital to give birth . . . after, I had no money for food for my four children . . . only with support of . . . social worker . . . could I reveal I had been raped . . . they kept sending me away and I could not explain . . .

Participants also spoke of the unrealistic expectation of being able to survive on the current social security income, particularly if this income is decreased by a breach.

The changes in our society and costs of living are just not reflected . . . it's not going up and it's not increasing.

I think the system is really cynical and deliberately been set up to keep the poor, poor.

Transparent, simple, consistent and predictable. Participants in the focus groups spoke of the system being difficult to navigate, that processes were not simple and often long and time consuming, information was not openly given or presented in a way that made it easy for people to access services, people gained knowledge of how to negotiate the system through trial and error or through word of mouth amongst other people in the community rather than directly through the system itself, and often the system was inconsistent.

It was that damn thick, I had no idea how to fill it in . . . and all of a sudden I got it (a payment for one son) and I said well why didn't I get it for the first child and all of a sudden I started getting it for (him).

They're (the forms) worded that you can't understand them.

Unless you know what the services are they won't offer to tell you about them.

A lot of the forms, the questions seem to want to trip you up.

Participants stated that they felt 'harassed' by the constant need to prove that they met the criteria for payments and that some people would give up rather than go through the process. Often participants would have to prove the same thing over and over again when it was a circumstance obviously unlikely to change. Carers spoke of difficulties and confusion in attaining payments and constantly needing to supply paperwork to maintain these payments. They felt the system was repeatedly asking them to justify their needs rather than supporting them to care for people in the community – people that might otherwise be in the care of the state. Other participants spoke of the difficulties they encountered with the system once they attained employment. Informing the system of their income often led to errors – through information not being recorded properly by Centrelink or people not having a correct knowledge of their income or pay periods. This often resulted in overpayments and debts that people had to pay back. The system made people feel like they were attempting to cheat the system rather than this being the result of errors – sometimes made by the system itself. They stated this was a disincentive to find work as people feared losing or having complications with the income they relied on to survive.

You're trying to start a new job and it's just about impossible, that's hard enough much less having to, on the mobile phone with Centrelink, and they stick you on hold and its costing you a fortune just to report you got a job and then they overpay you and you ring them up and tell them, oh you've got to pay us back and you've got a debt.

I get letters constantly from Centrelink every five months about rent assistance. I mean I'm saving the government thousands of dollars by (caring for my son).

Accessible and customer rights focussed. Participants spoke of difficulties with filling in forms and the system offering little assistance with this, of onerous expectations to provide documentation repeatedly, and expectations to meet obligations at certain times that did not meet with the realities of people's lives.

They just assume you can drop what you're doing to accommodate them.

My Mum needs to be with my Dad (who is ill) not on the phone ringing Centrelink all the time.

Participants stated that they had had good experiences with the system when they had a point of contact at Centrelink – a staff member known to them – to help them work through an issue. This may be with a social worker, staff member or psychologist

at Centrelink or it may be with a staff member with whom they had established rapport. Some participants spoke of positive experiences with the call centres as they felt they had been given more time and privacy than when going into the Centrelink offices. However, there was a recognition that it was sometimes difficult to get through by phone and that some people were unable to use the phone to talk to Centrelink.

The general experience of the physical surrounds of Centrelink was one of alienation, lack of privacy and offices set up as 'post offices' where forms are lodged to be assessed by faceless staff members and therefore people feeling lost in the system. Participants spoke of long waits, little recognition of the inconvenience to people of this or of being sent away to come back another time, of offices being established few and far between and often not accessible to groups within the community that need to access it.

You stand in line and when you get to the front of the queue the guy tells you you're in the wrong bloody queue . . . and there's never an apology.

You have no privacy either . . . The people behind you hear what you're saying.

You know other people are listening so you don't say half the stuff you want to say.

The offices are a little bit few and far between.

Heidelberg is quite a trek.

Culture of understanding. The experience of participants was that the level of understanding from the system was often dependent on the staff member that you dealt with, their interpretation of your obligations, situation and needs and that this was often inconsistent. Participants spoke of positive experiences with many staff members and there was recognition amongst participants that staff were under pressure with workloads and expectations. However, there were also stories of people feeling that staff members were at times unaware of the power they held over people's lives, displayed little understanding of people's individual needs and capacity to assert themselves and, at times, seemed to display attitudes of apathy to people in need and distress.

By the time you get down there you're in a queue and you're waiting, by the time you get to see the actual person you are meant to see you're a little bit apprehensive and then it seems the only thing they want to do is get you out of the place. They're not interested in listening to your complaints or anything they are only interested if you're going to cause them any strife.

Participants also spoke of difficulties with the system in terms of its requirements to provide documentation that was often unavailable to people due to their personal situation – birth certificates to prove age amongst refugee communities where dates of birth are unknown or not documented, young people having to provide various forms of identification, people experiencing homelessness or mental illness having to keep correspondence and documentation and locate it at varying times.

Accommodates individual capacity. Participants' experiences were of a system that relied heavily on literacy skills and on people having the capacity and confidence to talk about their needs and stand up for their rights within a bureaucracy.

Navigate your way through. If you're not this, proceed to question blah blah blah ... Very lengthy and requires a lot of literacy skills.

They are not patient with your broken English.

I did not understand a big word in one of the letters and when I went to ask they laughed at me.

A friend ... has gone there at times with regards to a disability pension and she had a bit of trouble because she doesn't say things right ... and her mother does most of the talking ... (Centrelink) is not a place that someone like that could go and feel comfortable.

Participants stated that people who were not confident or capable of expressing themselves verbally or in writing often relied on family members or community support services to negotiate for them with Centrelink. The system did not generally promote understanding or support services within the system.

Non-discriminatory. Participants stated that most staff members at Centrelink were not discriminatory against people based on race, gender etc. Interpreter services were used or offered for people from NESB. But there were experiences of assumptions being made about people based on race, gender or a person's lifestyle. Also, the system assumed a level of communication ability and confidence, cultural knowledge about how the system works and an understanding of the process of supplying and recording documentation that is not available to all people.

Respects an individual's privacy. Participants spoke of a lack of privacy within Centrelink offices (as stated previously). People stand in queues where they are able to hear people talking at the counter, offices are open plan and staff members often talk amongst themselves regarding people's details. Participants also expressed concern in regard to how much information was kept on their computer file and how accessible this was to all Centrelink staff. There was also concern in regard to the amount of personal information that was required by Centrelink in order to justify a need for a payment.

They practically ask you who you are sleeping with.

If you don't answer their questions, you do not get paid.

Promotes quality primary decision making. Participants spoke of frustrations with the system where forms are lodged at a counter to be assessed by someone else. Participants often did not have a contact with someone with whom they could discuss their payments and as a result often felt lost in the system.

They make an appointment, you go down and see someone and they'll ask you all the questions and stuff and then that gets taken to another person, not that we get to meet this other person.

Participants spoke of positive experiences with the system when they had established a working relationship with a Centrelink staff member who they felt was attempting to assist them.

To summarise, service providers believed that how well their clients/patients were treated depended on the personal biases and attitude of the Centrelink staff; they commented on the inappropriate office set up in Centrelink offices where privacy and confidentiality were made difficult; the participants viewed the forms, letters and expectations of Centrelink as confusing and 'intimidating' for clients/patients; they considered the breaching regime to be unfair and lacking in opportunities for people to explain their sometimes reasonable circumstances for breaching; they felt that when they were present their client/patient had a better chance of being listened to; and based on observations in the queue believed that many people had no assistance and struggled to cope with Centrelink's expectations which were 'unrealistic'.

The majority of community members were confused by the expectations of Centrelink; said that sometimes depending on the staff member they might be treated well. They complained about the queues and lack of simplicity in how the office procedures at Centrelink are conducted. They commented on the inefficiency of Centrelink in their continuous lack of record keeping where documents had to be provided over and over again at cost to the participant which they could not afford, e.g. birth certificates. They felt that the Centrelink process was confusing and forms and letters indecipherable; and felt their personal privacy and confidentiality was not respected.

- **People who have a dispute with the administrative system (Centrelink) have access to an appeal process that is: fair, timely, free, accessible, effecting, people are well informed that they can challenge the system.**

Amongst participants there was little experience of a formal appeal process. Most negotiation about discrepancies in payments was done with staff members at Centrelink sometimes using a community worker or family member for support. Some participants had experience of a more formalised appeal process, but most of this was with the first steps of lodging an appeal within the system and most participants had little knowledge of taking an appeal beyond this. Participants also spoke of a fear of taking an appeal too far.

Terribly bad (a participant's description of their experience with an appeal).

You're so worried that you're going to lose that payment and can't feed your family.

- **People who have a dispute with the administration system have access to: information about all levels of the appeal process that is timely, appropriate and sufficient, legal advice and assistance about their dispute that is timely, appropriate and sufficient, assistance in pursuing their dispute that is timely, appropriate and sufficient.**

Participants stated that they were either not informed about the process of appealing a decision made by Centrelink or were not told about it in a way that meant they had a good understanding of the process and their right to it. The system offered little support to access the appeal process.

Participants did not seem to view difficulties with Centrelink as a legal issue and almost all had not thought to use a legal service for assistance with Centrelink difficulties. The one instance of using a legal service had not had a positive outcome and had made that person reluctant to use a legal service for a Centrelink issue again.⁵⁰ Some participants expressed a reluctance to involve a legal service because of fear this may be 'creating too many waves', others felt that it would not be viewed as important enough by a legal service and others felt that it would be just another system they would have to negotiate.

You'd upset the apple cart someway and it just gets too hard.

So you are saying once you've appealed you could still go to a lawyer and have a go at them.

I would suspect a lot of people when you think legal services it's as bad as thinking Centrelink.

To summarise, the majority of service providers were unfamiliar with processes of reviewing Centrelink decision-making and were unaware that the Centrelink system was established under law and therefore might be a legal issue where they might need to seek legal advice on behalf of their client/patient.

The majority of community members also did not see Centrelink as governed by law and would never seek legal advice on a Centrelink decision and did not want to 'waste the lawyer's time'.

The majority of service providers had never recommended that a client/patient formally review a decision of Centrelink as it was 'too difficult'.

A significant majority of community members expressed fear of reprisal if they were to challenge a Centrelink decision. All community members indicated they were frightened of challenging Centrelink in case they lost any entitlements they may have left.⁵¹

Reflections on methodology

The research assistant

The research assistant worked at the West Heidelberg Community Legal Service for a few days prior to commencing the conduct of the research and was introduced to both its staff and the staff of the health service which is co-located with the legal service. In this way the research assistant was able to liaise with key staff and one of the programme managers who was also on the community advisory panel, and build relationships prior to the focus groups. This building of trust between the research assistant and other workers was critical to the project in terms of encouraging both service provider participation and their preparedness to link us in with community members whom they were naturally keen to protect.

The Community Advisory Panel (CAP)

The purpose of the Community Advisory Panel was to involve people from local service agencies and members of the community who could advise on local sensitivities and understandings. The methodology needed to involve members of the community in an advisory capacity so that local diversity could be reflected in the process and to ensure that the processes were relevant and any local impediments could be known in advance and overcome. A panel would be critical if such a research undertaking were to be expanded so that a capacity to inject local exigencies is possible. The panel consisted of service providers in the West Heidelberg area, an expert on social security issues and an academic adviser who had done similar survey and focus group work in his own research on human rights and citizenship. The CAP was critical to the research. The members of the CAP were able to suggest approaches which would reach people on Centrelink, name workers in the community who were trusted and who would become good contact points for encouraging participation in the focus groups. The CAP members also fed their sense of reality into the development of the indicators to ensure they were relevant and comprehensive.

Focus groups – the process

To maximise the success of the focus groups it is critical that sufficient preparation is undertaken. If this does not occur then it could compromise the outcome of the focus group and the range of people who can or wish to attend. It is imperative to explain to the prospective participants the scope and reasons for the research and how the research will be used.

In an area such as an examination of human rights adherence, we learned that many people have minimal understanding of the concept of human rights and that this lack of knowledge was evident in the service agencies as well as community members. Therefore, even a preliminary knowledge of human rights could not be assumed in the design for the focus groups otherwise confusion would result. Many questions reflected this with “If, social security was a human right what elements would you consider necessary . . .”. Even though at international law social security is considered a human right, most people were not aware of this and had never thought about social security in this way. By phrasing questions without making such assumptions, we learned during the focus groups that most social service agencies and community members had never thought about social security as a right. They saw it as something the government or individual staff member at Centrelink decided you could or could not have.

Uniformly, all participants of the focus groups were not aware that social security was part of a legislative regime and that accordingly, it could be classified as a legal issue with legal recourse where process was not followed. It is important to underline this finding as it demonstrates that in the design of and conduct of the focus group knowledge cannot be assumed and questions need to be carefully designed to avoid assumptions otherwise confusion and misunderstandings might not be exposed. It highlights that when conducting research about access to justice of vulnerable

and low socio-economic groups who often have had limited access to education and are often marginalised from sources of information, great care needs to be taken not to assume knowledge without testing first that it exists.⁵²

There was also a fear by both service providers and community members of reprisals and so mechanisms to ensure confidentiality need to be considered, thought out and explained. Even then, many prospective participants indicated high levels of fear and so those who participated could be considered very brave.

Explaining therefore how the signed consent forms required by the university's Ethics Committee would be separated and filed separately from the information gathered, stored in locked filing cabinets and that participants could either call themselves by their first name or by another name to de-identify themselves during the taping of the focus groups, were reassuring measures for participants. However it also confused some of them, making them feel that if all these precautions were necessary then perhaps they should be fearful of participating in the research. In this way it was a 'double edged sword'. Even then, there were still issues concerning privacy which emerged during the focus groups.

Focus group with service providers

The two focus groups required significant preparation and a lead time for recruitment. It was critical to the success of the project that we held the focus group with service providers first and that the focus group with community members followed this. The enthusiasm at the conclusion of the first focus group meant that the service providers were keen to assist with the focus group with community members. Critical to its success was the action research approach that the researchers decided to adopt (see discussion below). We had active involvement from the panel not only in the identification in the mapping process mentioned above but also in encouraging the participation of members of their known organisations and those beyond it. This highlights the importance of choosing members for the panel who are energetic and committed to the project and who are well connected to the local community. This was particularly the case with having the lead agency programme managers from the health service on board. The health service could not only provide health and allied health staff members but also is the lead social service provider in the area and so this meant a range of staff members from different fields were participants in the focus group with service providers.

In meetings between the researchers and their research assistants we identified that even in the initial discussions to organise the focus group with service providers, many asked what they were to get out of the focus group as they were busy people. We decided that an action research approach was integral to the project's success and to encourage involvement. We needed to be able to offer something to participants in return for their contribution. The researchers designed an Information Sheet about social security and information about where to go to get help and explaining in simple terms the processes and avenues for redress if required. At the conclusion of the first focus group the Information Sheets were handed out and questions were briefly explained and the service providers stated this was extremely useful.

Focus group with community members with experience of Centrelink

Critical to this focus group was the assistance the researchers received from service providers and the advisory panel in assisting in the building of trust relationships and in linking in with people who were on the margins of society and unlikely to participate without such linkages. All community focus group participants came through connections made through the service provider focus group participants.

In the focus group with community members, their contribution of time was acknowledged and respected with a gift of \$25 being made to each participant. In addition, similar Information Sheets were made available at the conclusion of the focus group. As many participants were on a low income, the timing of the session was at 11 am to give people time to prepare and arrive (some participants had a disability and so needed time to organise themselves and this was one reason to make the time of the focus group late morning). As it was winter we organised for Halal soup and bread rolls to be provided. These ancillary issues were important as they created a welcoming and reassuring environment and encouraged participation for many who were quite anxious about the day.

In addition, as the information and consent forms required by the university Ethics Committee are considerably complex for many in the second focus groups, people who had telephoned the researcher to express their interest in attending the focus group were visited by the research assistant or the Banyule Community Health Service staff members with whom they had a connection. For instance, the Somali worker thought that it would be best if she contacted one-on-one members of the Somali community. This was undertaken in advance of the focus group so that the project and forms could be explained in advance and so that they could build up a relationship of trust with the researcher. This was also critical to encouraging and facilitating participation of people who would have otherwise remained on the margins and been reticent to contribute for a range of reasons.

The other critical feature of this research was to provide blocked appointments at service agencies and the legal service for participants in the research. Participants were opening up and sharing their experiences for the researchers and in many cases we realised this would throw up the need for personal counselling as their experience of telling their stories could be distressing or it might emerge that they needed additional information, support or follow up. We therefore brought an appointment sheet for the legal service and advised legal service staff of the need to be available to follow up with legal advice and similarly the health service provided a block of appointment time for the health centre.

The focus group reflected a broad cross-section of ages and experiences and included a young unemployed person, an elderly carer, a person who had experienced periodic times as a homeless person, three women from non-English speaking backgrounds, a person who was in his fifties and had been in and out of work, a woman in her late forties with significant chronic health issues, two women with disabilities, and a single parent and a woman in her late twenties.

One important lesson from the focus group with the community members was that in the transcription process those who were softly spoken, shy or where English

was not their first language or they had a strong accent, were not as sufficiently reflected in the final transcribed version of the proceedings. This highlighted for the researchers how easy it can be in research methodologies to inadvertently exclude from the process people who are already vulnerable and excluded by the actual social security process by the way in which proceedings are recorded. This added another layer to their exclusion and highlighted the degree of care needed in the design of research methodologies so that they do not exclude vulnerable sections of the community whose input is necessary if the research is going to reflect true community experience. It was fortunate, in this case, that the researchers had also kept their own handwritten notes whilst observing the focus groups. This enabled us to identify the existence of the gap in the transcriptions and the reasons for it when we re-played the oral taped version of the proceedings.

Survey

This was never intended to be a representative or random survey due to funding constraints. At all times the decision to undertake a survey was dictated by the desire to see how suitable the survey was to collect quantitative data. It is an important means of obtaining more objective data although the methodology is more limited in the level of detail that can be obtained as many of the questions are closed. The idea is that the results of each methodology can be cross referenced and verified.

The need for confidentiality and anonymity were always going to be difficult in such a small community. The task of surveying people with social security experience was performed by the research assistant. For security reasons however one of the researchers stayed in close proximity whilst the survey was conducted.

The survey instrument was not finalised until the focus groups had been concluded and after the transcripts and analysis of the themes identified had been undertaken. In view of the limited funding and the aim of the project being to trial the methodology and instruments, our aim was modest. A postal survey was ruled out. This was not only due to the cost but in view of the high number of West Heidelberg residents who have low literacy we believed it would exclude a large number of welfare recipients. Experience from the focus groups taught us that there was a level of fear and concern about reprisals from Centrelink and that this might deter people from responding in writing. After much discussion about how and where to conduct the survey, we selected a location frequented by many West Heidelberg residents, the local shopping mall. The mall has the largest grouping of shops in the area that is walking distance for most residents. It also houses the local post office and banks and therefore the researchers viewed it as the most convenient place to find residents. The mall also has a number of comfortable park benches, some in the shade and others in the sun, and some coffee shops where the research assistant could take the participants in the survey with the scope for offering and paying for refreshments. Permission from the privately owned mall was obtained in advance of the survey.

The survey instrument was devised with input and suggestions from the academic adviser on the panel and the Chair of the La Trobe University Ethics

Committee. The survey was difficult to construct in such a way that assumptions and levels of understanding about the social security and legal systems were not made. We tried to simplify the questions and the responses but also tried, where appropriate, to provide scope for additional comment.

The survey was conducted from 11.00 am until 4.20 pm on a Friday. In total 50 people were approached and the survey was explained. Once people indicated they either did not live in West Heidelberg or had no experience of Centrelink they were excluded. In all, five people were surveyed (for details see Appendix A). We anticipated that in surveying vulnerable disadvantaged people there was inevitably going to be difficulties.⁵³ In the surveyed community there are issues with literacy, 'paranoia', non-English speaking backgrounds, traumatic experiences and the ever present factor that if they say something they may lose their livelihood (see Appendix C).

In the limited experience of the survey approach, it is considered that this was problematic as a research tool for measuring access to justice for people who experience disadvantage. The researchers have concluded that the survey approach is not an effective research tool in this target group for this topic. Reasons for this conclusion include the high number of people who expressed significant fear of putting anything in writing and yet orally were prepared to comment on their experience; those who were identified in the screening as clearly lacking in the cognitive skills as information was provided about the project; those who were excluded on ethical grounds and a number of people who evidenced low literacy skills. The conclusion is that the survey approach is limited because it excludes a significant range of people.

Findings related to the trial methodology

1. The Community Advisory Panel was an effective mechanism to connect with the community and ensure that the process adequately recognised local difference. A Community Advisory Panel would be critical in any extension of this research in other geographic regions, with people from a non-English speaking background, indigenous people, different ethnic communities, people with a disability and so on. It ensures that the methodology and approaches are relevant and respectful as well as sensitive to local issues.
2. The use of a survey as a tool for gathering information from highly vulnerable sections of the community is imperfect as it presumes literacy and limits the responses and prevents the storytelling narrative that can be rich and is more familiar to many vulnerable groups, i.e. indigenous people.
3. The transcription process can add another layer of exclusion for people who are softly spoken, have speech impediments or who have thick accents as often their views and experiences will be difficult to hear and transcribe.
4. The general approaches taken in the detailed preparation for the focus groups were critical including: the formulation of trusting relationships and safe environments for disclosure by participants; the clear indication of the purpose of the project: the expected benefits and the provision of helpful

information about where to go to get help and how and information about the right to social security being provided; and blocked appointments for follow up in individual issues raised. These were all critical in the success of the focus groups and the richness and frankness with which often moving and personal stories were revealed. In view of the fear of reprisals about making formalised complaints which was revealed in the focus groups, the methodology and time and thought in preparation were critical to gaining information from the participants on their experience in trying to access their right to social security under the articles in the CESC.R.

What does the research tell us about the right to social security for some West Heidelberg residents?

In this research, service providers as well as service users had very little knowledge or understanding of social security as a human right or their rights at law. The overwhelming majority of participants, in the modest trial of the research methodology, had little information or knowledge or understanding of the methods by which such treatment could be addressed, including that there were legal aspects to the problem and that legal advice could be sought. Few people were aware of their rights or their remedies when their rights to social security were infringed or they were treated inappropriately by Centrelink officers. Without a knowledge about legal rights and where to go to seek help or a lack of confidence in doing so it is unlikely that a person will be able to access justice at a most basic level.

Participants expressed a high level of fear about reprisals for complaining about their treatment as many service users believed that if they challenged a decision or their treatment they might jeopardise their remaining payments.

The data from this research project suggest that without information and knowledge about the right to social security and the norms of what was appropriate treatment, and in the absence of a capacity or confidence to pursue the right, it was unlikely that the right was going to be realised. It could be concluded that for the participants, the standards for the right were not met and consequently, their access to justice limited.

In order to have a right to an effective remedy, knowledge, a capacity and the confidence to be prepared to exercise that right when it is threatened or curtailed is a necessary pre-condition. The administrative remedies for the participants in the research were not accessible or effective as a result of this pre-condition not being met. The question of whether the administrative remedies were timely and affordable (although the latter indication is the process of review is free) was not tested. In the context of the actual experience of the research participants, their remedies were so rarely exercised, even though on the face of the experiences presented by the participants it was revealed that the curtailment or reduction in their benefits may have been challenged.

The experience of social security recipients and their service providers who participated in the research, when benchmarked, revealed little knowledge and

information about their rights due often to limited literacy and English skills and the following:

- Confusing documentation and requirements of Centrelink for these people.
- Limited knowledge and experience about where to go for help and limited help being sought.
- Questions around accountability of decision-makers for their mistakes and treatment of participants.
- Discriminatory practice revealed in relation to people with a difference, e.g. indigenous or disability.
- Complexity of documentation sent and required.
- Lack of privacy both in terms of physical layout and queues and the manner in which information was kept.
- Requests made for the same documentation already provided over and over again at a financial cost to the recipient.
- Ad hoc and inconsistent treatment, misinformation and a lack of quality decision-making by decision-makers.

If the right to social security was a human right and enshrined in domestic legislation, then for those people surveyed and those people in both of the focus groups, it was not capable of being realised in practice as people, including service providers in the West Heidelberg area, had little knowledge, capacity or confidence and were unable to exercise the right. Supportive of the research findings in this modest trial are findings by Rebecca Sandefur, who was conducting research into money and housing problems in the United States at the same time that the authors were conducting their own research. She has come to similar conclusions, namely that:

The implication of this body of research is that people whose social position is near the bottom of an unequal structure will be the less likely to take actions that might protect further their own interests.⁵⁴

Conclusion

The research project trials a new approach to measuring access to justice. It involves an examination of people's actual experience of the justice system using agreed human rights standards as the benchmark for determining how access to justice is attained.

The findings suggest that people's state of knowledge about their rights, whether they have the capability, wherewithal and confidence to action their rights, will affect their ability to access justice as it can influence their ability to have their rights enforced. The research highlights the impediments for the people in West Heidelberg in accessing their legal and human rights in a context where the administrative system itself seemed to compound their endeavours.

- The research methodology has the potential to be a useful model to conduct further access to justice research. It may be better able to inform the delivery

of legal and other services in the context of the realities for vulnerable and marginalised members of our community. A society cannot claim to have access to justice and to protect human rights, where the actual experiences of people on the ground reveal that there are significant barriers for certain sections of the community in realising their legal and human rights and where they have little knowledge of their rights or confidence to pursue them. The approach taken in the research trial warrants further exploration.

Notes

- [1] M. Salvaris, Measuring human rights as though we cared, in: Human Rights Alliance of Australia, National Conference, *From Rhetoric to Reality: Making Human Rights Work*, RMIT University, Melbourne, 2004.
- [2] Transcript – Focus group of service providers, 5 May 2006, West Heidelberg.
- [3] We thank Kate Digney for her thoughtful and considerate research assistance in this project. Research Project funded by Faculty of Law and Management, LaTrobe University.
- [4] P. Pleasance, A. Buck, T. Goriely, J. Taylor, H. Perkins & H. Quick, *Local Legal Need*, Research Paper 7, Legal Services Research Centre, January 2001; and E. Curran & M.A. Noone, The challenge of defining unmet legal need (2007) 21 *Journal of Law and Social Policy* 63.
- [5] P. Pleasance, *Causes of Action: Civil Law and Social Justice*, 2nd edition (UK, Legal Services Commission, 2006).
- [6] *Ibid.*
- [7] S. Rice, A human right to legal aid, address to the conference on *Protection and Promotion of Human Rights through Provision of Legal Services: Best Practices from Africa, Asia and Eastern Europe* (Kyiv, 2007); *Human Rights and Criminal Law in New South Wales: the International Context* (New South Wales Council for Civil Liberties, 2001); R. Smith, Old wine in new bottles: legal aid, lessons and the new Europe, paper presented at *International Legal Aid Group Conference*, Killarney, Ireland, 8–10 June 2005.
- [8] The exception is the work of the Law and Justice Foundation of New South Wales, see www.lawfoundation.net.au.
- [9] T. Vinson, Dropping off the edge: the distribution of disadvantage in Australia (2007) *Jesuit Social Services Australia* 66–70.
- [10] See H. Charlesworth, The Australian reluctance about rights (1993) 31 *Osgoode Hall Law Journal* 218; and see: Howard government refuses to admit major human rights abuses in our own backyard, Press Release (17 July 2007), National Association of Community Legal Centres, available at: http://www.nacclc.org.au/multiattachments/2159/DocumentName/NACLC_HR_Release.pdf.
- [11] For further discussion on benchmarking justice within a human rights framework, see: L. Curran, J. Giddings & M.A. Noone, Identifying gaps in access to justice, paper presented at the Legal Services Research Centre Conference, *Social Exclusion: A Role for Law*, Edinburgh, 2004; L. Curran, How can we best measure needs for legal services: developments in Australia and elsewhere, *Griffith University Centre for Socio-Legal Studies Seminar*, May 2004; M.A. Noone & L. Curran, Access to justice research in Australia, *International Legal Aid Group Killarney Conference Papers*, (2005); Curran & Noone, *op. cit.*, 63.
- [12] Interviews with stakeholders conducted by the authors overwhelmingly supported this view, November 2001–February 2002; see also Curran & Noone, *op. cit.*, 63.
- [13] A. Sen, *Development as Freedom* (New York, Anchor, 1999), at pp. 74–7.
- [14] M. Salvaris *et al.*, *Human Rights Benchmarks: Benchmarks and Indicators for Economics and Social Rights in Development Assistance Programs* (Melbourne, Swinburne Institute for Social Research and Deakin University, 1996).
- [15] *The Human Rights Act 1998 (UK)* section 6, the *Charter of Fundamental Rights and Freedoms 1992 (Canada)*, the *Bill of Rights Act 1990 (NZ)* section 3, the *Human Rights Act 2004 (ACT)* Section 34 Schedule 2, and the *Charter of Human Rights and Responsibilities 2006 (Vic)* section 4, impose

obligations on the executive and its agents to act consistently with human rights. Providing a method for measuring whether this in fact occurs based on the experience of people on the ground in a substantive way based on people's real-life experiences of executive decision-making, rather than a formulaic claim of acting consistently with human rights, must be of value in measuring human rights adherence and accordingly people's access to justice.

- [16] *Human Rights and Criminal Law in New South Wales: The International Context* (New South Wales Council for Civil Liberties, 2001).
- [17] Footnote 6 in M. Salvaris, Economic and social rights: the Charter's unfinished business (2007) *Just Policy*, Footnote 3 (2007) 43 *Just Policy* 30.
- [18] This view was also consistent with the interviews with stakeholders conducted by the authors in 2001–2002, Curran & Noone, *op. cit.*, 63.
- [19] J. Dickson, 25 years of clinical legal education at La Trobe Uni – keeping the community in legal education (2004) 29(1) *Alternative Law Journal* 37; L. Curran, Making connections: the benefits of working holistically to resolve people's legal problems (2005) 12 *E Law – Murdoch University Journal of Law* 1&2, available at: http://www.murdoch.edu.au/elaw/issues/v12n1_2/Curran12_1.html; M.A. Noone, Australian community legal centres – the university connection, in: J. Cooper & L. Trubek (Eds) *Educating for Justice: Social Values and Legal Education* (Dartmouth, 1997).
- [20] M.A. Noone, 'They all come in the one door'. The transformative potential of an integrated service model: a study of the West Heidelberg Community Legal Service, in: P. Pleasance, A. Buck & N.J. Balmer (Eds) *Transforming Lives: Law and Social Process* (UK, The Stationary Office, 2007); Curran (2005), *op. cit.*
- [21] P. Pleasance, A. Buck, N.J. Balmer, N.J. O'Grady, H. Genn & M. Smith, *Causes of Action: Civil Law and Social Justice*, 2nd edition (Norwich, The Stationary Office, 2004).
- [22] Vinson, *op. cit.*, 66–70.
- [23] See data on the City of Banyule, available at: <http://www.id.com.au/banyule/commprofile/Default.asp?bhcp=1>.
- [24] CLSIS data for the last yearly quarter of 2005 which are maintained by the legal service revealed that, a high percentage of clients of the legal service were on social security.
- [25] C. Chinkin, *Can International Law Provide Effective Sanctions for Violations of Economic and Social Rights? Lessons from the Creation of the International Criminal Court* (Overseas Development Institute, 10 March 1999), see: www.odi.org.uk/speeches/chinkin.html.
- [26] General Comment 9, The domestic application of the Covenant (nineteenth session, 1998), UN Doc. E/C.12/1998/24 (1998) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 54 (2003).
- [27] *Ibid.*, paragraph 9.
- [28] Universal Declaration of Human Rights, 1948 (UN).
- [29] Comment 9, The domestic application of the Covenant, *op. cit.*, paragraph 3.
- [30] *Ibid.*, paragraph 9.
- [31] Items 5 & 6 Statement: *Questions of the Realisation of Economic Social and Cultural rights/ Questions of the Realisation of the Right to Development*, Fifty-Second Session of the Commission on Human Rights, delivered by Mr Damir Ivkovic on behalf of the Australian Delegation on 28 March 1996, see: www.dfat.gov.au/hr/comm_hr/chr52_item5.html.
- [32] *Ibid.*
- [33] D. Otto, Economic, social and cultural rights, in: *Human Rights Law Resources*, ch. 8, available at: www.austlii.edu.au/au/other/HRLRes/2002/3/, accessed 5 June 2007; see also www.hreoc.gov.au/speeches/human_rights/social_cultural.html.
- [34] *Australia's Third Periodic Report*, 23 July 1998, paragraph 7: UN Doc.E/1994/104/Add.22.
- [35] Comment 9, The domestic application of the Covenant, *op. cit.*, paragraph 3.
- [36] *Ibid.*, paragraph 9.
- [37] A. Buck, N. Balmer & P. Pleasance, Social exclusion and civil law: experience of civil justice problems among vulnerable groups (2005) 39(3) *Journal of Social Policy and Administration* 302–22. As an example of the difficulties for vulnerable people in the community in accessing legal services,

- see N. Balmer, T. Tam & P. Pleasance, *Young People and Civil Justice: Findings from the 2004 English and Welsh Civil and Social Justice Survey* (Legal Services Research Centre, February 2007).
- [38] Pleasence *et al.* (2001), *op. cit.*, p. 24 and Appendices 1, 2 & 3.
- [39] See Buck *et al.* (2005), *op. cit.*
- [40] R.L. Sandefur, The importance of doing nothing: everyday problems and responses of inaction, in Pleasence *et al.* (Eds), *op. cit.*, p. 112.
- [41] Pleasence *et al.*, *op. cit.*, p. 24 and Appendices 1, 2 & 3.
- [42] *Ibid.*, pp. 22, 31.
- [43] These elements could be described as the indicators of whether the human right to social security exists or not.
- [44] T. Carney, *Social Security Law and Policy* (Federation Press, 2006), p. 2.
- [45] T. Carney, Neo-liberal welfare reform and 'rights' compliance under Australian social security law (2006) 12(1) *Australian Journal of Human Rights* 22.
- [46] Breaching refers to a process whereby, if the social security recipient does not meet the conditions required by Centrelink, they can have their support reduced, curtailed or varied. It is colloquially referred to as 'breaching'. For example, if a social security recipient does not keep a detailed diary in the proposed form of all of their efforts to gain work they may be breached, if they do not return letters or attend interviews with Centrelink and or other agencies as prescribed then they may be breached.
- [47] Service Users Focus Group.
- [48] These findings around people's fear of reprisals and subsequent inaction by the people in these focus groups in accessing the legal rights for seeking redress are consistent with recent research findings in relation to research being undertaken concurrently with the authors' trial but in the United States. Sandefur, in focus groups with the low and moderate-income residents in a Mid-western American city exploring problems involving money and housing, found five rationales for inaction amongst the respondents. These included shame, a sense of insufficient power, fear, gratitude due to previous experiences and frustrated resignation. See Sandefur, *op. cit.*, p. 112.
- [49] Section 1223(1) of the *Social Security Act* 1991.
- [50] Such inaction is consistent with the research that has been conducted by the Legal Services Research Centre around advice seeking behaviour people who have a problem that could have a legal solution. The LSRC found that often people's previous negative experiences would have an influence on subsequent decisions not to take the any action. See Buck *et al.* (2005), *op. cit.*
- [51] This fear of pursuing grievances is reinforced in Sandefur, *op. cit.*
- [52] The research findings of the Legal Service Research Centre (LSRC) in the United Kingdom in a paper produced in 2006, after our trial was concluded, are consistent with the authors' conclusions about how people's state of knowledge, understanding and awareness of their rights as being integrally connected create the ability to enforce their rights. The LSRC findings as a result of conducting periodic surveys across England and Wales since 2001 show that if people are not aware of their rights, this can produce a lack of understanding, knowledge, skills and confidence which are necessary tools for citizens to reach the capability to enforce their rights. The research concludes that respondents without educational qualifications have high rates of doing nothing to resolve problems. They also concluded that the most common reason for doing nothing for the respondent was a perception that it would make no difference. This was not always the case in reality. The LSRC commented on the level of uncertainty as to rights and what to do rather than where to go to get help. See A. Buck, P. Pleasence & N.J. Balmer, Education implications from the English and Welsh civil and social justice survey, *Annexe to the PLEAS Task Force Report*, LSRC, July 2007.
- [53] T. Smith, *Decolonising Methodology, Research and Indigenous People* (New Zealand, Zed Books and University of Otago Press, 1999).
- [54] Sandefur, *op. cit.*, pp. 112, 117.

Appendix A: Two cases studies from focus group with individuals

Case study 1

A sole parent refugee woman from a NESB was contacted in a public hospital by Centrelink whilst she was in labour with her fifth child. Centrelink had heard she was pregnant and asked her to provide them with the name of the father. The lady refused to provide them with the details. The nurse put an end to the call. Centrelink curtailed the woman's payment for a total of four months. The woman went to the Centrelink office repeatedly begging for income to support all her children. They refused and on one occasion in front of a witness stated "Oh here she is again – go away" without providing the lady with an opportunity to explain why she had attended the Centrelink office on the day. The staff did not allow her to explain her situation. The woman struggled to survive and received emergency assistance.

One day she was linked into a support staff member. She explained her situation as there was a relationship of trust. The staff member assisted the woman in attending the Centrelink office. The staff member asked for a private office in which they could discuss the client's situation. This request was initially met with resistance as the Centrelink staff wanted to deal with the issue across the counter.

On locating an office the woman, supported by the staff member, was able to explain to the Centrelink staff member that she was raped and did not know the identity of the father. This had been why she would not provide the details of the father of the new baby at the hospital because of the personal trauma and shame it had caused her, the lack of support that she felt she had and the lack of privacy that was involved in the earlier dealings with Centrelink.. Only then was her entitlement to Centrelink reinstated.

Centrelink has no right to ask these questions nor to insist on answers as a pre-condition to support.

Case study 2

A young girl in her early twenties has an intellectual disability. Her mother usually helps her out on visits to Centrelink but she had been unwell and so the young girl was looking after herself. She was used to receiving letters from Centrelink repeatedly. This time she read a difficult word that she did not understand. She had been told that she always had to ensure she understood everything Centrelink wanted as if she did not comply, it could jeopardise her entitlement. She therefore went to the Centrelink office to clarify the meaning of the difficult word.

As she reached the front of the queue she asked the person at the counter to explain the word. The woman laughed out loud and said to another Centrelink staff member and stated in a loud voice so that everyone could hear, "hey, she doesn't understand what . . . means! What do you think of that?" And then the two Centrelink staff laughed aloud. The girl was humiliated and left the Centrelink office never finding out what the word meant. Two other people in the focus group stated that they remembered witnessing the incident and how awful it was.

Appendix B: Surveys – 8 December 2006 in Heidelberg Mall

- Approximately 50 people approached over five hour period.
- Approximately 20 people stated that they did not fit criteria, e.g. did not reside in postcode 3081 or had no experience of Centrelink. This was anticipated as likely to reduce the sample by the researchers as the people had to fit into both categories to complete the survey.
- Approximately 10 declined prior to hearing about survey.
- There were three people that the researcher decided, after speaking with the person, it would not be appropriate to survey, although they fit criteria and were willing to complete the survey. After brief assessment of the person's emotional and mental health, the researcher decided that person may find the survey confusing and upsetting.
- Approximately 10 people stated they did not have time or were not able to complete the survey that day – one person took the survey home to send in.
- Three people indicated that they did not want to talk about Centrelink – they also stated that what they would say would not be very complimentary.
- Five surveys completed
 - one male, four female
 - age range – 15–24 × 2
 - 35–44
 - 55–64
 - over 74
 - one person from ATSI background
 - one person from NESB.

Appendix C: Difficulties with survey

The difficulties in conducting the survey were numerous. They included the following:

- A number of people approached clearly had cognitive issues. They were not surveyed as they clearly did not understand the project, nor the information and consent forms. It would have been unethical to survey these people.
- People in the mall were in the mall to shop and so were short of time.
- Some people were observed struggling with physical disabilities and the shopping exercise was clearly exhausting and stressful for them. This added to their reticence to partake.
- Some people declined to undertake the survey as they were concerned about doing so. One person for example stated, “What I would say about Centrelink wouldn't be nice, so I wouldn't do it to you”.
- The response ‘strongly agree’ ‘strongly disagree’ to statements confused people from a non-English speaking background. It was noted that they were keen to agree with any statement.

- The detailed 'Information and Consent Forms' required by the Ethics Committee tended initially to turn people off as it appeared too formal and contractual and they shied from these until the forms were explained to them.
- The survey risked being more about those who wanted to be surveyed and so there was an element of self selection in this. For instance the elderly were predisposed to chat whereas others were not.
- Many people were happy to chat about their experience and tell their stories but were inhibited by the formality and rigidity of the limited question and response format. Those who did surveys tended to want to tell a story about their experiences which were rich in content but even the 'elaborate' provisions for certain questions did not offer enough scope.
- People were approached in the Mall. They had little time to consider their involvement in the research or to understand completely what the aims of the research were. Mail-outs or interviews conducted over one week with advertising that allowed people to make a decision on whether they would like to be involved and to make a time to complete the survey with a researcher may have been a better process as it may have given people time to consider their involvement and ask further questions in regard to the purpose of the survey.
- The shopping mall was picked as a place to conduct surveys because of its anonymity. However, once the researcher started conducting surveys she realised the Mall may in fact be too anonymous a place to survey people on a subject that is quite personal. The researcher felt this affected not only people's willingness to be involved in the survey but also the answers that were given by those who did complete a survey. It may have been better to conduct the survey in place where people felt safe, e.g. at the community health centre.
- The survey did not allow people time to establish trust with research and researcher. Throughout the course of the survey, the researcher felt that people would become unsure of how to answer questions and answers would often contradict each other, e.g. people would state that counter staff were helpful but then would remember particular stories when counter staff were hostile and rude. The survey did not allow time or the space to flesh out these issues, trust between the researcher and the person being surveyed was not developed, and so the researcher felt people hesitantly gave answers and were not completely happy with one word answers for questions.
- People would often have stories to tell and want to talk more than just give answers of agree/disagree. In one case, an indigenous man sitting with two friends under a tree volunteered to complete the survey but wanted to do so in the presence of his two friends who did not want to respond to a written survey themselves for fear of "where it might go". The survey participant wanted to tell his story rather than be restricted to filling out the rigid survey. His two friends, during the survey being taken continuously interrupted telling of their own experiences of the Centrelink system. They too, clearly had a story to tell but this could not be recorded for reasons of

consent and as the responses did not conform to the rigid survey document. There was little space or capacity to record accurately the survey recipient's answers.

- It was difficult at times to complete the survey to the end as people would become involved in telling their stories prompted by the questions rather than responding to the specific questions. They would then need to move on because of time commitments.