

Our Ref: UNSWLAWSOCGS2/2014

Box/Vol No:

Your Ref:

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4 June 2014

Access to Justice
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Re: Access to Justice Arrangements

The UNSW Law Society is the peak representative body for all students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. We seek to develop UNSW Law students academically, professionally, personally and socially, and seek to assist UNSW Law students to aspire towards their professional and personal paths. The UNSW Law Society is proud to celebrate a rich diversity of students with a multiplicity of aims, backgrounds and passions.

We welcome the opportunity to make a submission in response to the Access to Justice Arrangements Draft Report, released in April 2014. The submissions below reflect the varied personal, collective, and academic interests of the students of the UNSW Law Society. Rather than seek to address every aspect of the Draft Report, the submission covers the following areas:

- **Chapter 7 ('A Responsive Legal Profession')**
 - Part 7.2 ('Becoming a Lawyer – Education and Training')
- **Chapter 8 ('Alternative Dispute Resolution')**
 - Part 8.4 ('Facilitating Greater ADR')
- **Chapter 9 ('Ombudsmen and Other Complaint Mechanisms')**
 - Part 9.1 ('What do Ombudsmen Do?')
- **Chapter 11 ('Court Processes')**
 - Part 11.3 ('Case Management')
 - Part 11.5 ('Discovery')
- **Chapter 18 ('Private Funding for Litigation')**
- **Chapter 19 ('Bridging the Gap')**
 - Part 19.2 ('Unbundling Legal Services')
 - Part 19.4 ('Legal Expenses Contribution Scheme')

The submission also addresses the UNSW Law Society's concern about the lack of attention to student volunteers in Chapters 20 and 21 of the Draft Report.

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The UNSW Law Society welcomes the Productivity Commission's attention to the importance of legal education in improving access to justice. In response to Chapter 7.2 of the Commission's draft report, we make the following submissions:

1. Oversupply of law graduates

As students experiencing an educational environment steadily increasing in volume, the UNSW Law Society appreciates the concern about oversupply of law graduates.

- 1.1. However, our concern does not stem from oversupply of graduates to the profession, because we agree that many students will pursue non-legal careers upon completion of their degree. Rather, our concern stems from the burden on teachers and students having to operate with increased class sizes.
- 1.2. The UNSW Law Society is of the view that smaller, interactive, seminar-style classes improve the quality of education to the individual student. The merits of class participation are many: it develops oral communication skills, allows students to critically engage with materials on an ongoing basis¹ and exposes students to social and situational learning.² It also allows for broader theoretical and contextual perspectives to be discussed, even in heavily doctrinal subject areas. A broader contextual approach 'allows students to see the impact of law on various sections of society, and this can enhance their growth as professionals and their sense of justice'.³ The graduation of well-rounded students with a deep, contextualised understanding of the law improves the quality of the legal profession.
- 1.3. As class sizes increase, the scope for this depth of involvement decreases. Again, the concern of the UNSW Law Society is the net reduced teaching quality to all students, with a particular disadvantage to those who wish to enter the legal profession if they lack a strong foundation.
- 1.4. **The UNSW Law Society submits that any review of legal education in Australia must include an investigation into appropriate class size, from a pedagogical perspective, to ensure law school is an equitable, high-quality learning experience for all students. This is necessary to foster the future of the profession.**

2. Clinical Legal Education

Exposure to pro bono work and ethical legal practice via clinical legal education is a valuable experience to students. With clinical legal education (CLE) being linked — since its earliest days — to the legal aid objectives of community legal centres, there has long been a connection with

¹ Alex Steel, Julian Laurens and Anna Huggins, 'Class Participation as a Learning and Assessment Strategy in Law: Facilitating Students' Engagement, Skills Development and Deep Learning' (2012) 36 *UNSW Law Journal* 30, 40–1.

² *Ibid* 35–6, 41.

³ Alex Steel, 'Law in Broader Contexts' (Good Practice Guide (Bachelor of Laws), Australian Learning and Teaching Council, 2013), 7.

CLE and improving access to justice through professional cultural change.⁴ Clinical legal education provides a good grounding for the student to be an ethical lawyer, with an appreciation for social justice issues and accessing the legal system on a 'grass roots' level.

2.1. Legal Professional Conduct forms one of the Priestley 11 core courses to be included in Australian legal education. The corresponding course at UNSW is called Lawyers, Ethics and Justice and contains a component run in conjunction with the Kingsford Legal Centre (KLC). This part of the course provides students with an opportunity to take a case brief from clients attending the KLC evening clinics. Students are then assessed on a report, which requires them to critically reflect on both their experience at the clinic, and the role of community legal centres in the Australian legal landscape. This compulsory component is often a very rewarding practical experience for students who are able to gain an appreciation for the operation of the law as a client service profession.

2.2. UNSW provides students with a range of clinical legal education options. These are available as electives, generally after most core courses have been completed, and encompass a broad range of opportunities for students to appreciate the intersection of real world problems and the black letter law. The UNSW Law Society is of the view that such programs, when structured with clear learning outcomes and assessment methods,⁵ can serve students' legal training and facilitate broader access to justice.

2.2.1. One such opportunity at UNSW is again through the KLC, where students are able to undertake an internship as part of the KLC's general, employment or family law clinics. This program sees students engaging with clients, managing casework under supervision, being involved in the Centre's law reform endeavours, and experiencing the workings of a high-volume legal practice.⁶

2.2.2. Students are also able to take on various other internships that cover an array of specialities including refugee law, international financial regulation, children's and youth law and online legal resources.

2.3. Additionally, UNSW Law Society aims to foster an interest in social justice among its member students. It has a dedicated social justice portfolio whose aim is to involve students in events and publications with a social justice focus. This is an important element of developing a culture of awareness within the legal profession; new graduates attuned to gaps in the legal system are in a better position to effect positive change in the future and actively develop ways of improving access to justice.

⁴ Frank S Bloch and Mary Anne Noone, 'Legal Aid Origins of Clinical Legal Education' in Frank S Bloch (ed), *The Global Clinical Movement* (Oxford University Press, 2011) 153, 156.

⁵ Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Final Report, Strengthening Australian Legal Education by Integrating Clinical Experiences: Identifying and Supporting Effective Practices Project, 2013) 48–61.

⁶ Anna Cody and Barbara Schatz, 'Community Law Clinics: Teaching Students, Working with Disadvantaged Communities' in Frank S Bloch (ed), *The Global Clinical Movement* (Oxford University Press, 2011) 167, 176.

2.4. The UNSW Law Society is of the view that early exposure to social justice issues is fundamental to law students' development as ethical legal professionals. To this end, clinical legal education plays a vital role in helping students appreciate lawyers' responsibilities as well as understanding client relationships, advocacy and law reform issues. Experiential learning produces students who are more confident as new lawyers, because they understand both the legal and social issues of practice. This has a positive impact on the quality of the profession.

2.5. Furthermore, clinical legal education can help broaden access to justice by putting more legal advice services at the disposal of the community. Particularly where law clinics employ a community empowerment model, whereby clients are encouraged to take the maximum responsibility for their own legal issues after receiving advice,⁷ both students and client community members are empowered by their contact with the clinic.

3. Amending the Priestley 11 to include Alternative Dispute Resolution (ADR)

The increasing emphasis on ADR and mediation in the everyday practice of the law means that a solid understanding of ADR is an essential skill for both new and seasoned lawyers. Law students graduating without an appreciation for this element of dispute resolution will lack a basic skill required for modern legal practice.

3.1. However, we recognise that the increasing shift towards ADR does not always serve real justice between the parties. In particular, it is sometimes important for matters to be litigated in the transparent court system, particularly if those matters are of significant public interest requiring public exposure, assurance of accountability and if they may contribute to social progress.⁸

Therefore when students and lawyers are taught ADR skills and knowledge, it must include: an emphasis on ethical conduct foregrounding the desires and participation of the client, and an awareness of the systemic issues affecting dispute resolution such as power imbalances, social and cultural factors.⁹ Clients who are not sufficiently engaged in the mediation process may be disappointed with the final outcome and feel justice has not been served.¹⁰ It should also be noted that closed-door negotiations can potentially prevent important public interest cases being ventilated in the courts.¹¹

3.1.1. UNSW has included the subject Resolving Civil Disputes as a core subject for its law students following its 2010–13 major curriculum review. This subject contains an

⁷ Ibid 176–7.

⁸ Andrea Durbach, 'Test Case Mediation — Privatising the Public Interest' (1995) 6 *Australian Dispute Resolution Journal* 233, 235.

⁹ Mary Anne Noone, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37 *Monash University Law Review* 57, 79–80.

¹⁰ Durbach, above n 8, 240.

¹¹ Ibid 241; Noone, above n 9, 67.

ADR component which recognises the push towards mediation and teaches students the necessary skills to:

- a) prepare for and carry out mediation;
- b) understand that there are various avenues for dispute resolution of which mediation is only one option. Students are taught to understand factors determining when it is appropriate to mediate or litigate, with a particular focus on client needs.

3.1.2. Further, one of the modules in UNSW's core Lawyers, Ethics and Justice course is 'Ethics in Negotiation and ADR', introducing students to the negotiation process and relevant ethical issues and conduct.

3.1.3. Both courses above focus on the non-adversarial nature of mediation processes, which seek to find a mutually beneficial outcome for all parties. The courses emphasise the alternative skills and structures that may aid a successful negotiation, without taking an adversarial approach.

3.2. The UNSW Law Society supports the integration of ADR as a compulsory core learning area in Australian law school curricula. Any such teaching of ADR should include not only technical skills but also teach students how to engage in ADR ethically and in line with professional standards and obligations. The appropriateness of ADR methods should be considered carefully where public interest cases are concerned, and students should understand this tension.

4. Technological advancement and information saturation

The use of computers has revolutionised the legal profession, but in many respects lawyers lack competency in the efficient use of online legal resources. The rapid rate of technological change and pervasiveness of computer-mediated communication means it is increasingly important for legal professionals to develop and maintain relevant skills.

4.1. While digitization of legal resources has made information much more freely accessible, it has also allowed for a proliferation of information sources — some authoritative, some unreliable. The ability to identify the reliability of these sources is not an innate skill. Effective online legal research needs to be learnt by old and new lawyers alike if they are to have current knowledge and avoid professional negligence.

4.1.1. The corollary of this is that lawyers who are *not* equipped with such skills are particularly susceptible to professional negligence suits or, at a minimum, heavily reliant on colleagues and other sources. This in turn drives up costs to the client and unnecessarily prolongs the running of cases.

4.1.2. At the law school level, it is now practically impossible to complete a law degree without some level of computer literacy. It is important to stress, however, that these

skills are necessary for all members of the profession. The courts in NSW have embraced, to a great extent, the capabilities of technology with the introduction of e-filing at Online Registry and JusticeLink. Authorised depositories of legislative material and case law are easily accessible online at no cost (such as Comlaw, AustLII, and the official state legislation and court websites).

4.1.3. As such, there is little excuse for protracted legal costs relating to matters quickly resolved online. It would be prudent for professional legal regulation to include some way of monitoring this type of competency. Since it is crucial to professional practice across the board, one solution could be its inclusion in Continuing Legal Education requirements. This would also account for the constant change of resources as various institutions adapt to the digital environment.

4.2. Another serious consideration for lawyers is how their professional obligations may be compromised by their use of technology. In particular, the widespread uptake of cloud computing poses a threat to clients' confidentiality if data is unsecured or accessed by third parties for storage purposes.¹²

4.2.1. Email is now a commonplace method of communication between legal practitioners. It is also a portal through which information can easily go astray or confidential information can be accidentally disclosed. Firms should have IT systems and training in place to ensure lawyers do not unwittingly breach their professional rules.

4.3. The UNSW Law Society is of the view that use of technology in the legal profession requires some level of regulation. This is because of its rapid development and widespread use in law firms, courts, law schools etc. It is also necessary to ensure that computer mediated communication is being used to increase efficiency and reduce costs, rather than inflate them via unnecessarily frequent (and billed) contact.

In response to Draft Recommendation 8.5 of the Commission's draft report, the UNSW Law Society makes the following submissions:

5. The UNSW Law Society is pleased to see the UNSW Faculty of Law receive credit for its progressive law education and introduction of LAWS2371, Resolving Civil Disputes.¹³ The Draft Report encourages the accessibility of these courses for tertiary students of non-legal disciplines.¹⁴ In its publication Teaching Alternative Dispute Resolution in Australian Law Schools, the National Alternative Dispute Resolution Advisory Council (NADRAC) said:

¹² The Office of the Legal Services Commissioner (OLSC) *A Guide on Practical Issues: Cloud Computing* (January 2013)

<http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/practice_guideline_cloud_computing_jan_2013.pdf>.

¹³ Productivity Commission above n 1, 271.

¹⁴ Productivity Commission, above n 1, 272.

NADRAC considers that teaching law students ADR knowledge and skills is important not just for those who go on to practice law, but also for those who seek employment in other areas. Conflict management and resolution and skills are critical in many professional roles.¹⁵

6. The Commission may be interested to know that at UNSW currently has a Masters of Dispute Resolution postgraduate degree, available for graduates of both legal and non-legal degrees. There is also a Graduate Diploma of Dispute Resolution, and a four-day workshop called Mastering Facilitation.
 - 6.1. The UNSW Law Society suggests that the draft recommendation strengthen and widen the incentives for students and faculties, both legal and non-legal, to cooperate. Currently, UNSW sends student contingents to some international mediation competitions which support both students of non-legal and legal disciplines being on the same team, such as the International Chamber of Commerce Mediation.¹⁶

7. The UNSW Law Society is also interested in the Draft Report's observation that 'many legal professionals have no or limited experience in the application of ADR'. This observation is relevant for integrating ADR and other non-adversarial options into Law School core curricula. The UNSW Law Society suggests that education and training for these disciplines are run by professionals, who *both practice in the field* and have relevant academic qualifications (like a Doctorate). This promotes a practical and relevant training program.
 - 7.1. The UNSW Law Society agrees with Steve Lancken's comments in his submission regarding Draft Recommendation 8.5: 'courses need to be practical (with minimal theoretical focus) and include experiences that allow students to understand practically how processes work'.¹⁷ Hiring this combination of professionals can help deliver such experiences. At UNSW, we have a Visiting Professional Fellow, who while having her own business practicing ADR (*Strategic Action*), participates in the university's activities as a coach of its Negotiation competition teams, as well as a lecturer for some of its elective subjects, like Dispute Resolution and Principled Negotiation.¹⁸

8. There is also a pressing need for more guidance within the legal profession on the relevancy of certain types of ADR for certain cases. This could be implemented by promoting educational avenues such as the LexisNexis published *Australian Alternative Dispute Resolution Law Bulletin*.¹⁹ Encouraging the proliferation of such journals and supporting them would assist practitioners in keeping abreast of current developments in the field, allowing them to be better placed to advise clients on alternative mechanisms.

¹⁵ NADRAC, *Teaching Alternative Dispute Resolution in Australian Law Schools*, Report to the Attorney General (2012) 12.

¹⁶ 9th ICC International Commercial Mediation Competition Rules (2014), 9-10.

¹⁷ Steve Lancken, Submission to Productivity Commission, *Access to Justice Arrangements*, 18 May 2014, 6.

¹⁸ UNSW Law, *Rosemary Howell* (2014) UNSW Australia < <http://www.law.unsw.edu.au/profile/rosemary-howell>>.

¹⁹ *Australian Alternative Dispute Resolution Law Bulletin*, 1(1) 2014.

9. Judges too experience difficulties in knowing which cases should be directed towards ADR. We propose that guidelines be introduced by the panel as a broad framework for making decisions on ADR referrals. While this should not constrain judges, it would act as a helpful tool. In the judgment of *Stellar v Lasotav Pty Ltd*,²⁰ Foster J considered three main factors in his referral to mediation: the interlocutory procedures already involved which had all been challenged, the potential for substantial legal costs should the matter continue in litigation and the parties' awareness of their cases.²¹
10. While education and training mainly concern core curricula, the UNSW Law Society would like to suggest the recommendation includes encouraging extra-curricular activities, which teach ADR related skills. While such an exercise may be limited by resource constraints, it is important to consider that these extra-curricula opportunities are both educating and awareness-raising exercises.
 - 10.1. For example, the extra-curricular Negotiation Competitions run by many Australian universities raise awareness because students practicing it invest, learn skills, and begin to emotionally appreciate the exercise. In fact, in UNSW, this is reflected in the large (and growing) student uptake of the extra-curricular Negotiations competition. Almost 70 teams participated in Beginners' Negotiations in 2013, which is more than a third of that year's undergraduate cohort. This year, a third tier of Negotiation competition had to be created; the three tiers cater for different stages in one's law degree (1st year, 2nd year, and 3rd year and above).
11. This has also interacted with uptake in the curriculum. More and more students are taking subjects like Principled (Interest-Based) Negotiation as an elective. This subject is offered at least two times a year, with 68 people taking the course over Semesters 1 and 2 in 2014.²² Being commonly in touch with the student body, the UNSW Law Society can also report that the perception of ADR as being less 'mainstream' is being broken down. Perhaps this is an innovative outlet which supports the need for 'improving general awareness and education', as expressed in Chapter 8.4 in the Draft Report.²³
12. We also suggest that revisiting the Priestley 11 to assist the integration of the full range of legal dispute resolution options in core curricula. (Please see **Part 3** above).

In response to Draft Recommendation 9.1 of the Commission's draft report, the UNSW Law Society makes the following submissions:

13. The UNSW Law Society supports this recommendation. We are pleased to see 'the more prominent publishing of which Ombudsmen are available and what matters they deal with' specified. This is mainly because the role of ombudsmen clearly occupies part of the ADR space, so more prominent publishing in this manner can better inform the public of where Ombudsmen fit in the overall Australian picture of ADR. Within universities, this will aid a clear teaching of both ADR and what Ombudsmen do. At the moment, the required clarity can elude us. For instance, as pointed out in

²⁰ *Sellar v Lasotav Pty Ltd* [2008] FCA 1766.

²¹ *Ibid* [37]–[38].

²² UNSW Australia, *UNSW Class Timetable 2014 (LAWS8980)* (2014) <

<http://www.timetable.unsw.edu.au/current/JURD4780.html>>; UNSW Australia, *UNSW Class Timetable 2014 (JURD4780)* (2014) UNSW Class Timetable < <http://www.timetable.unsw.edu.au/current/JURD4780.html>>.

²³ Productivity Commission, above n 1, 267.

LEADR's submission, the use of the terminology 'Ombudsman' conveys an independence which is not necessarily present in every case. Consider the potential advocate role planned in the creation of a *Small Business and Family Enterprise Ombudsman*.²⁴ Raising the profile of Ombudsman services can help clarify our understanding of the concept.

In response to Draft Recommendation 11.1 of the Commission's draft report, the UNSW Law Society makes the following submissions:

14. Effective implementation of case management reforms requires a clear and common understanding among judges and practitioners as to how fair and expeditious litigation should be achieved. If elements of the Federal Court's Fast Track model are more broadly applied, then procedures should be clearly stated in written practices. Ad hoc implementation of elements within the Fast Track model would not encourage its application for lack of certainty among judges and practitioners. A clear outline of rules and procedures will also ensure litigants are appropriately advised of the time and costs involved in the litigation process.²⁵ They can therefore weigh up the benefits and disadvantages of litigating before commencing proceedings.
15. Your suggestion of facilitating greater participation in judicial education programs by judges is a good mechanism for encouraging better use of case management tools. However, discussion on improving case management in the courts should not be limited to judges. Case management education should be extended to barristers and lawyers, who are equally critical in ensuring court proceedings run expeditiously. Furthermore, practitioners will need time to become accustomed to a system of managerial judging.²⁶

16. Issues to consider

16.1. Requiring strict observance of time limits

16.1.1. This is needed to ensure unnecessary costs and delays are avoided, but not all matters can be subject to tight time frames. The Fast Track Directions allows matters to be removed from the Fast Track list if the judge or one of the parties thinks it inappropriate to proceed on Fast Track Directions, but this would potentially undermine the benefits of uniformity enabled through standardized procedures. There needs to be a balance between custom-tailored case management and tracking.

In response to Draft Recommendation 11.5 of the Commission's draft report, the UNSW Law Society makes the following submissions:

²⁴ LEADR, above n 4, 13.

²⁵ The Honourable Justice Michelle Gordon, 'Benefits and Burdens of Case Management' (2009) 34 *Hearsay* 1, [15].

²⁶ D Williams, 'Changing Roles and Skills for Courts, Tribunals and Practitioners' in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (The Federation Press, 1999) 1, 5.

17. Introduction

- 17.1. The UNSW Law Society is of the view that discovery needs to be reformed as it increases costs and delay disproportionately to the corresponding benefit it provides. This is especially so for complex litigation, where it has long been recognised as expensive and onerous.²⁷ It is important for courts to distinguish between cases where discovery needs to be controlled to prevent disproportionate costs and delay, and cases where limiting discovery would cause unnecessary costs. Generally speaking, such distinctions can be made based on the type of matter.
- 17.2. The UNSW Law Society submits that the reform of discovery should adopt a number of measures that cumulatively and correspondingly limit the expense and burdens of discovery.

18. General discovery and the ‘direct relevance’ test

- 18.1. Lord Woolf, in his 1996 review, recommended that discovery should normally be restricted to ‘directly relevant’ documents and ‘indirectly relevant’ documents should be disclosed only by court order.²⁸ This recommendation was followed in the UK and then in most Australian jurisdictions.
- 18.2. The UNSW Law Society generally is in favour of the recommendation that all jurisdictions shift to limit general discovery to information of direct relevance. It strongly supports a presumption against general or standard discovery, particularly for complex cases. A test of relevance should be uniformly adopted across all jurisdictions, as consistency and uniformity has clear benefits for practitioners.
- 18.3. There is some variance across jurisdictions as to the narrowness of the test of relevance. In NSW, the document has to be ‘relevant to a fact in issue’.²⁹ In Victoria, the ‘train of inquiry’ test as propounded in the *Peruvian Guano* case remains the test of general application for discovery.³⁰ In the Federal Court, a party must discover documents that it relies on, that adversely affect the party’s case, and that support or adversely affect another party’s case.³¹
- 18.4. However, the limitation that discoverable documents be directly relevant to the matter is one that is easily rendered useless without corresponding strong case management and judicial oversight. Left to their own devices, solicitors will continue to disclose everything that may in any way be relevant.³²

²⁷ CW Pincus, ‘Court Involvement in Pre-Trial Procedures’ (1987) 61 *Australian Law Journal* 471, 474; *Seven Network Ltd v News Ltd* [2007] FCA 1062, [21].

²⁸ Lord Woolf, *Access to Justice: Final Report* (1996), 86–7.

²⁹ *Uniform Civil Procedure Rules 2005* (NSW) r 21.2(3), (4).

³⁰ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 427; *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 65.

³¹ *Federal Court Rules 2011* r 20.14(2).

³² Lord Jackson, *Review of Civil Litigation Costs: Final Report* (2009).

- 18.5. The UNSW Law Society submits that a narrow test should be favoured, along the lines of the Federal Court test, but that there should be an option for expanded discovery with the court's leave. The 'direct relevance' test could be further refined to more effectively limit documents in discovery. The ALRC considered reforms to narrow the test of 'direct relevance' would not be an effective means of controlling the cost of discovery since litigants would still be required to view the same number of documents in order to identify those of sufficient relevance.³³
- 18.6. The UNSW Law Society agrees that simply narrowing the test of 'direct relevance' would, by itself, be insufficient to have much impact. But such a reform would need to be made in conjunction with other reforms that allow for judicial case management to tailor discovery.
- 18.7. Discovery can be tailored to suit the issues in a number of ways. It can be tailored to the specific case, or category of case by requiring disclosure in stage, or describing discoverable documents by categories. The UNSW Law Society recommends a 'menu' approach, where by all these options are available for the judge to use their discretion and apply given the circumstances of a particular case. The US concept of specific proportionality, where the amount, type and sequence of discovery is pre-determined by the parties so that its cost is proportionate to what is at stake in the litigation, provides assistance in choosing the correct item of the menu.³⁴
- 18.8. The Federal Court has adopted the approach of tailoring discovery by utilising categories,³⁵ but the ALRC has found that this has not achieved significant efficiencies as desired, because parties are formulating overbroad categories.³⁶ The UNSW Law Society considers such flaws to be remediable by greater judicial involvement in the formulation of categories, perhaps in the form of objective criteria outlined in a Practice Note. Also, greater emphasis on the early and clear identification and definition of the issues in dispute would allow for more effective formulation of the categories of discovery required for each case.³⁷ The tailoring of discovery works best when done in conjunction with an individual docket system.
- 18.9. In conclusion, the UNSW Law Society submits that the Commission's recommendation that there be a presumption against general discovery is one that should be implemented uniformly across Australia. The recommendation that court rules or practice directions should promote tailored discovery with clear guidance for practitioners and the courts on the discovery options available should be implemented. This is best done using objective criteria to clearly formulate categories of documents.

³³ Australian Law Reform Commission, *Managing Discovery: Final Report*, Report No 115 (2011) 121.

³⁴ Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011) 77–8.

³⁵ Federal Court, *Practice Note CM 5: Discovery* (2011) r 2(c)(v)–(vi).

³⁶ Australian Law Reform Commission, above n 7, 139.

³⁷ Andrew Stephenson, 'Turning Mountains into Molehills: Improvements to Formal Dispute Resolution' (Paper presented at Society of Construction Law Inaugural Conference, Perth, 2010) 16, cited in Australian Law Reform Commission, above n 7, 144; Arthur R Emmett, 'Reforming Discovery' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis, 2013) 51, 60.

19. Leave requirements and justifying discovery orders

- 19.1. The UNSW Law Society is in agreement with the Commission that leave should be required for discovery. The requirement to obtain the court's leave to serve a notice of discovery is an important control over the use and breadth of discovery. The leave requirement needs to be supplemented by more explicit obligations for parties to justify their applications for discovery orders.
- 19.2. These justifications for leave should explain why discovery is necessary and proportionate to justly determine the issues in dispute. Such obligations exist in a number of jurisdictions, including the NSW Supreme Court Equity Division.³⁸ This would necessarily involve a determination by the court and foster the greater judicial scrutiny and case management that is needed overall to make the judicial process more efficient and inexpensive.

20. Costs orders

- 20.1. The UNSW Law Society submits that the Commission's recommendation that courts should be expressly empowered to make targeted costs orders in respect of discovery should be implemented. This creates incentives for litigants to be more conscientious of how they conduct discovery, and deters them from abusing the discovery process. There needs to be consideration of whether costs should be ordered against those who cause unnecessary discovery disputes, or whether costs orders should be used as security. The UNSW Law Society considers that both approaches are feasible, each serving a slightly different purpose. Also costs orders specifying the maximum cost that may be recovered for giving discovery or taking inspection is an approach with great merit.
- 20.2. The UNSW Law Society recognises that costs orders for discovery must be carefully implemented. There need to be clear procedures and guidelines in place for judges to determine when and whether such orders are appropriate. These guidelines need to balance the interests of justice with the need to deter abuse and inefficient use of the discovery process.

In response to Draft Recommendation 11.6 of the Commission's draft report, the UNSW Law Society makes the following submissions:

21. General discovery in an electronic age

- 21.1. The effect of any reforms to limit general discovery should be considered in the context of the rapidly evolving nature of Electronically Stored Information (ESI). The advent of electronic discovery, with its attendant focus on digital search strategies, can make the discovery process simultaneously larger and quicker.
- 21.2. Hence, the UNSW Law Society, whilst acknowledging the importance of limiting the scope of general discovery, regards such concerns as being increasingly anachronistic because of

³⁸ Supreme Court of NSW, *Practice Note No. SC Eq 11*, r 6.

the prevalence of electronic discovery, especially in complex litigation where the most substantial disproportionate costs and waste takes place.

- 21.3. Thus, the UNSW Law Society considers that greater effort and thought should be spent on pre-emptively creating a framework to more efficiently deal with electronic discovery than on general discovery.

22. Managing e-discovery

- 22.1. ESI has a number of distinguishing features from paper documentation including its volume, the variety of sources and formats, its dynamism, and its relative indestructibility.³⁹ These unique characteristics of ESI need to be factored into the litigation process.
- 22.2. The UNSW Law Society supports the Commission's recommendation that all courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently. Electronic discovery will inexorably supplant paper-based discovery, and it is crucial for courts in all jurisdictions to stay relevant.

23. Pre-discovery conferences

- 23.1. The key to managing electronic discovery in complex litigation is case management or pre-discovery conferences where the issues in dispute, what types of data, the format it is sought in, and whether metadata is included in the discovery obligations are discussed. From these discussions, the parties should be required to file a discovery plan with the court before being given leave for discovery. A discovery plan outlining all these matters will give some structure and guidance to the court and parties as to what is expected in discovery and how long it may be expected to take.
- 23.2. The UNSW Law Society submits that Registrars with information technology expertise should chair these pre-discovery conferences. These Registrars would be in a better position to direct parties as to how to limit electronic discovery, how to devise appropriate discovery plans, and how to formulate effective search strategies. Over time, these Registrars would develop familiarity with the best strategies for particular types of matters, and this would allow for greater efficiency in the discovery process.
- 23.3. The UNSW Law Society acknowledges QPILCH's concern that electronic documents create access to justice problems when litigants cannot afford specific software to access, categorise and review documents. Such disadvantages will be lessened because the continuing advancement and proliferation of technology will ensure that appropriate technology will be affordable and accessible in the future.

24. Scope of e-discovery

³⁹ Legg, above n 8, 72.

- 24.1. Electronic data should be limited to the extent that it can be categorised. Two common categories are accessible and inaccessible data. The former includes online data, near-line data and offline storage or archives; the latter includes backup tapes and erased, fragmented or damaged data.⁴⁰ The time and expense of data retrieval is dependent on whether such information is kept in an accessible or inaccessible format. In the UK, the party seeking discovery of inaccessible documents must ‘demonstrate that the relevance and materiality justify the cost and burden of retrieving and producing it’.⁴¹
- 24.2. The UNSW Law Society considers the approach in the UK as one that should be adopted in Australia, as a means of limiting discovery and, again, allowing for judicial oversight.⁴²
- 24.3. Transparency and cooperation are the keys to conducting a ‘reasonable search’ – the former involving awareness by all actors of the search strategy to be employed, the latter involving parties working together to ‘develop, test and agree upon the nature of the information being sought’.⁴³ The UNSW Law Society considers that the approach taken by the Federal Court in relation to the exchange of electronic documents is the most appropriate in ensuring that each party conducts a ‘reasonable search’. Here the parties are expected to meet and confer for the purpose of reaching an agreement about the protocols to be used for the exchange of electronic documents.⁴⁴ If one party contests that another has failed to make ‘reasonable efforts’ then the court can use that agreement as a key consideration in weighing the cost and inconvenience to the party giving discovery against the value of the documents sought.⁴⁵

25. Search strategies

- 25.1. The demands of ESI require the utilisation of various tools and methodologies to identify, cull and sort ESI for the purposes of relevance, privilege and confidentiality.⁴⁶ The US is at the forefront of developing and testing new technologies and methodologies to make electronic discovery less burdensome and expensive. The UNSW Law Society submits that the Commission should consider the US literature on ESI discovery to formulate recommendations that allow guidelines to be developed for practitioners and the courts on utilising cutting-edge technologies and innovations.

⁴⁰ Ibid 78–9.

⁴¹ United Kingdom Civil Procedure Rule Committee, *Practice Direction 31B: Disclosure of Electronic Documents* (July 2010) [24].

⁴² See further Legg, above n 8, 79, citing *Slick v Westpac Banking Corp (No 2)* [2006] FCA 1712; *Leighton Contractors Pty Ltd v Public Transport Authority of WA* [2007] WASC 65, [21].

⁴³ The Sedona Conference Proclamation (July 2008), available at <www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf>.

⁴⁴ Federal Court of Australia, *Practice Note CM 6: Electronic technology in litigation* (2011) r 7.1.

⁴⁵ Australian Law Reform Commission, above n 7, 160.

⁴⁶ Ronald Levine and Susan Swataski-Lebon, ‘Finding a Needle in an Electronic Haystack: The Science of Search and Retrieval’ (2009) 7(1) *Mass Torts* 16, cited in Legg, above n 8, 84.

- 25.2. The most commonly used search methodology today is the use of ‘keyword searches’ – ‘set-based searching simple words or word combinations’.⁴⁷ However, this alone is often inadequate.
- 25.3. ‘Predictive coding’ is a process whereby computers are programmed to search large quantities of documents using complex algorithms to mimic the document selection process of a knowledgeable, human document review.⁴⁸ Owing to its speed and accuracy, it has been described as ‘a fundamental change in the way discovery is conducted’.⁴⁹ The technology has been implemented on a limited basis in federal cases in the US, but there are still unresolved issues regarding how much human input is necessary, and how accurate the results need to be.⁵⁰ This must be determined on a case-by-case basis.
- 25.4. Technology is developing at a faster pace than the law.⁵¹ In many ways, this is unavoidable. Nonetheless, the UNSW Law Society is of the view that continual education and training programs for practitioners and the courts on new developments in information technology relevant to the legal field will create a culture where greater innovation in utilising appropriate technologies to improve discovery processes is welcomed. Practitioners should be allowed to take the initiative in pre-discovery conferences to propose the use of these technologies in any particular matter, and educating judges and their opponents on how the proposed technology is used, with a view to avoiding later disputes about its use.⁵²

26. Conclusion

- 26.1. The UNSW Law Society submits that Draft Recommendation 11.6 should be implemented, with checklists and questionnaires used to provide guidance and structure to how electronic discovery is conducted.
- 26.2. Courts should be at the forefront in embracing the technological changes that will impact litigation by supporting the continuing education of practitioners on new technologies and how they may be utilised to make discovery more efficient.

In response to Part 18.1 of the Commission’s draft report, the UNSW Law Society makes the following submissions:

27. Damages-Based Billing

⁴⁷ Legg, above n 8, 84.

⁴⁸ Charles Yablon and Nick Landsman-Roos, ‘Predictive Coding: Emerging Questions and Concerns’ (2012-2013) 64(3) *South Carolina Law Review* 633, 634.

⁴⁹ *Ibid* 634.

⁵⁰ *Ibid* 642–7; *Da Silva Moore v Publicis Groupe*, 11 Civ 1279 (SD NY, 2012).

⁵¹ Legg, above n 8, 85.

⁵² *Ibid*.

- 27.1. The UNSW Law Society opposes the reintroduction of damages-based billing in Australian jurisdictions. Damages-based billing imposes irreconcilable conflicts of interest on practitioners in providing legal advice.
- 27.2. To liken damages-based billing to conditional billing is misleading given that damages-based billing impedes lawyers' ability to give honest and impartial advice due to perverse incentives. Damages-based billing will pose conflicts of interest throughout the dispute resolution process, in contrast to conditional billing where the initial question of acceptance of the claimants case is perhaps the sole time when the lawyer will be conflicted. Contingency fees equate every stage of the litigation to a determination by the lawyer on whether the uplift of continuing with the matter will be economical. This is an entirely different scenario from the conditional-billing arrangement where time-cost billing is accepted. For example, damages-based billing can foreseeably lead to the early or inopportune cessation of proceedings when the lawyer considers it uneconomical to persist with the proceeding. While there are sound arguments for its reintroduction, due to the inherent uncertainty of litigation and dispute resolution, damages-based billing can cement agency problems, which the profession seeks to exclude from the fiduciary relationship of client and solicitor.
- 27.3. The institutionalisation of the conflict of interest by provision of damages-based billing would be a retrograde step in ensuring lawyers' standing and position in the community and belief in the fairness of the Court system more generally. Damages-based billing has been associated with diminished public faith in the justice system. This is problematic in a profession that relies on the public's acceptance of its ethical conduct to discharge its duties.
- 27.4. In short, as emerging lawyers, the UNSW Law Society considers the challenges posed by the introduction of damages-based billing too great to justify.

In response to Part 18.2 of the Commission's Draft Report, the UNSW Law Society makes the following submissions:

28. Third Party Litigation Funding

- 28.1. Third party litigation funding is now an established means for the community to access justice. However, private funding of litigation imposes conflicting ethical duties on lawyers, while funders require their own regulation to ensure that class members are not left abandoned mid-action. As such, the UNSW Law Society makes two submissions on this point of inquiry.
- 28.2. Firstly, while third party litigation increases access to justice, solicitors' ethical duties need clarification by legislative or professional guidance (as opposed to leaving these matters to the courts) in order to operate with commercial certainty. If solicitors intend to fund actions (as contemplated by Claims Funding Australia Equine Influenza class action and Melbourne City Investments Leighton class action), then it is important that lawyers have certainty their claims or claim funding vehicles will not be struck out or prohibited and the claim drawn to a premature end due to the Court's determination regarding ethical duties at some latter stage of proceeding.

- 28.3. It is on this ground that the UNSW Law Society submits that lawyers be prohibited from being both funders and legal practitioners in an action. This will not only remedy ethical concerns regarding legal practitioners management of a proceeding, it will also deliver clarity to practitioners and funders who currently proceed on an uncertain basis. Further, it may reduce spurious claims where a true ‘class’ may not exist. The UNSW Law Society also seeks a set of specific professional standards for lawyers acting in matters involving a third party funder to provide guidance on how to discharge their ethical duties to both clients and class members.
- 28.4. Secondly, the UNSW Law Society supports the Productivity Commission’s recommendation of a licensing scheme for third party litigation funders; however, the Society submits that the scheme should be an independent scheme rather than operate pursuant to the Australian Financial Services Licensing (‘AFSL’) regime. The other categories of capital providers who are subject to AFSLs conduct fundamentally different businesses from litigation funders; the interests of justice are not at stake for other AFSL holders. While capital adequacy requirements will be an important aspect of any licensing scheme, no doubt litigation funders will owe different duties to claimants and lawyers and the proper conduct of their business in respect of these duties will be different to the proper conduct of other AFSL holders. Further, if funders were to propose the sale of ‘shares’ in an action to investors or other forms of securitisation of claims (as is foreseeable in the future), then a licensing regime would be needed to specifically manage the shareholders’ duty to claimants. The UNSW Law Society submits that any licensing scheme for litigation funders be independent of other regimes and specifically designed to regulate litigation funders.

In response to Part 19.2 of the Commission’s Draft Report, the UNSW Law Society makes the following submissions:

29. Unbundling Legal Services

- 29.1. The UNSW Law Society supports the provision of unbundled legal services. The provision of legal services in this adapted form will increase the availability of legal services, formalise arrangements for lawyers and clients already providing and receiving services and address the gap that is the ‘missing middle’ who are ineligible for legal aid or community legal centre service but cannot afford full service assistance from a private solicitor (see further **Parts 30–32** below on a Legal Expenses Contribution Scheme). The success of this model of legal service provision is evidenced by its adoption in more than 40 states in the US, while it is the standard mode of advice in domestic jurisdictions.
- 29.2. However, the adoption of this method of providing legal services needs to be subject to specific professional rules in order for lawyers to discharge their ethical duties to clients. In the absence of statutory guidance, lawyers performing unbundled legal services do so by bearing risk of being subject to liability, professional discipline and reputational damage. If firm professional standards are not adopted, then lawyers will provide unbundled services at great risk, or (as is more likely) will not provide unbundled services at all.
- 29.3. It is for professional bodies and state legislatures to determine the specific content of

unbundled retainers and professional duties which accompany solicitors bound by unbundled retainers. However, there are two key recommendations which the UNSW Law Society advances:

29.3.1. Due to issues of professional liability, the availability of unbundled legal retainers be restricted to litigious or potentially litigious matters; and,

29.3.2. When obtaining informed consent, the solicitor retained be bound by statute to also provide advice on how best to utilise the unbundled services.

29.4. The Productivity Commission has noted that '[c]lear and explicit rules that deal with unbundled assistance provide the foundation for dealing with professional liability concerns, and support the development of a market for appropriate indemnity insurance.' While this is true, the UNSW Law Society supports the restriction of unbundled legal services to litigious or potentially litigious matters as these matters will attract advocates' immunity, negating issues that may arise with respect to increasing premiums from professional indemnity insurers.

29.5. Advocates' immunity has been broadly applied in Australia and while not available in other common law countries (such as the UK and New Zealand), the doctrine is routinely reinforced.⁵³ The High Court's decisions in *Giannarelli v Wraith*⁵⁴ and *D'Orta v Ekenaike*⁵⁵ illustrate that the doctrine has been upheld by the highest judicial authority, at a time when other jurisdictions were departing from its use. The doctrine is entrenched in Australian law and protects both barristers and solicitors from claims in contract or tort when the lawyer conducted work in court or work out of court, which led to a decision affecting the conduct of the case in court. The broad construction given to the immunity in recent times suggests that any work reasonably connected with litigious matters falls within the immunity. Advocates remain subject to professional disciplinary bodies and the relevant rules in discharging their duties, guaranteeing that aggrieved clients will still be able to take disciplinary action.

29.6. By imposing the restriction that provision of unbundled legal services be undertaken only in litigious or potentially litigious matters, concerns regarding professional liability will be discharged. It should be noted that such a restriction will not unnecessarily restrict access to legal services: private clients traditionally seek transactional legal advice in the more affordable areas of property conveyances and wills. Such a restriction will increase access to justice, while limiting the professional liability of solicitors.

29.7. Secondly, requiring the lawyer, in obtaining informed consent, to give professional advice on when best to utilise their unbundled services, would discharge concerns regarding the client being unable to make use of their unbundled legal services. The lawyer would exercise their professional judgment and the client would be better informed by their own practitioner on the best use of their funds. Given the lawyer is entering into an unbundled, lower fee earning retainer on any basis, the likelihood of a conflict of interest emerging between the optimal time to provide

⁵³ See, eg, *Donnellan v Woodland* [2012] NSWCA 433, [160]–[234] (Beazley JA).

⁵⁴ (1988) 165 CLR 543.

⁵⁵ (2005) 223 CLR 1.

advice and when it is in the lawyer's interest is low. This, in addition to factsheets and advice from referral services, would ensure the client receives an earnest assessment of when is the most suitable time to seek legal advice.

- 29.8. By restricting unbundled legal services to litigious or potentially litigious matters, and requiring provision of advice as to the optimal time to provide legal advice in any unbundled retainer, some of the concerns regarding lawyers' entry into unbundled retainers would be removed, and this innovative billing arrangement could become more broadly used.

In response to Part 19.4 of the Commission's Draft Report, the UNSW Law Society makes the following submissions:

30. Introduction

- 30.1. The UNSW Law Society is of the view that the introduction of a Legal Expenses Contribution Scheme (LECS) as a supplementary funding model would be beneficial. As students, we understand the value in an income contingent loan to assist funding tertiary education. The same principle could effectively be applied to address legal needs currently unmet.
- 30.2. LECS would enhance access to justice to many Australians currently ineligible for assistance in funding legal expenses, notably the 'missing middle.' In the context of limited funding channeled through Legal Aid and CLCs, currently only the most disadvantaged are offered assistance. For the majority of Australians there is a distinct lack of financial support available to ease the burden of an exorbitant justice system.

31. Potential design problems

- 31.1. However, three inherent design problems are clear, and not discussed in the Preliminary Report.
- 31.1.1. At first instance it is necessary to place limitations on eligibility. A suggested mechanism for determining initial eligibility is to tie eligibility for a LECS loan to whether an applicant receives monetary support from the government. This would incorporate a range of Australians, much wider than the current criteria for legal aid or CLCs. Students and young people, the unemployed, families and pensioners would all be entitled to receive LECS. This would avoid those who receive an upper level income being able to access LECS, which is aimed at assisting those in the 'missing middle'. The use of a pre-existing mechanism would also lower costs and ensure efficiency in implementation.
- 31.1.2. After determining initial eligibility, we would assert that the secondary criteria for attaining LECS would not follow a merits based test, as suggested in the Preliminary Report. If a merits test were to be used, the LECS scheme would purely function as an

extension of Legal Aid. Legal Aid has a very narrow scope of types of claims that can be funded. The introduction of LECS would attempt to broaden this field, thus widening the scope of Australians eligible to receive Legal Aid *or* LECS. As such, a broader range of matters could be financed, such as civil matters, which currently fail to attract Legal Aid funding. An alternative reasonable prospects of success test as determined by a practicing solicitor could be used instead.⁵⁶

31.1.3. The UNSW Law Society would suggest that it would be unnecessary to create an independent implementation board. Instead, the program could be administered as a subsidiary body of Legal Aid. This would allow the two sectors to work closely, with those applicants who are unsuccessful in qualifying for Legal Aid being referred to the LECS scheme. The combination of eligibility as tied to government benefits and the prospects of success test should ensure that Australians who don't succeed in the merits based assessment of legal aid would be able to seek this financial assistance.

32. Potential imbalance of power in legal proceedings

32.1. A potential problem that could arise in proceedings is if one party was benefiting from a LECS loan, and the other was not. Potentially it could place the party with LECS at a disadvantage. In practice, the party that was reliant on a LECS loan to fund their legal work, may not be able to progress as far in the legal proceedings as they would have liked, or may have to settle at an earlier point than was desirable. Moreover, the non-LECS party may be merciless in their approach to proceedings, particularly those involving litigation, in the knowledge that there are limited legal steps that the LECS party could fund. However, the counter argument would assert that some, albeit limited, access to financial aid is more preferable than never entering the legal system. If the LECS scheme was to be pursued, this may be a consideration in implementation.

The following section expresses the UNSW Law Society's concern about the lack of attention to student volunteers in Chapters 20 and 21 of the Draft Report.

33. Summary

The UNSW Law Society is concerned with the lack of attention to student volunteers in Chapters 20 and 21 of the Draft Report.

33.1. Firstly, there is the issue of the opportunities, rights and protections available to volunteers.

33.1.1. The absence of a consistent legislative definition for 'volunteer' inhibits the development of a standardised regime for protecting and enhancing the experiences of student volunteers.

⁵⁶ Richard Denniss, Josh Fear and Emily Millane, *Justice For All: Giving Australians Greater Access To The Legal System* (2012) The Australia Institute 27.

- 33.1.2. Student volunteers are not protected by award conditions or workplace agreements as salaried staff are.
- 33.1.3. There are limited protections prescribed by legislation, such as the provision of a healthy and safe environment, reimbursement of out-of-pocket expenses, sufficiency of training and disclosure of volunteer policy and other policies that affect volunteers.
- 33.1.4. However, the requirement for remaining conditions is largely a ‘moral obligation’ of the legal centre.⁵⁷
- 33.1.5. Whereas Community Legal Centres (CLCs) and non-profit organisations are likely to be more familiar with volunteers and, perhaps, more inclined to support such obligations, the same cannot be said of private legal services.
- 33.1.6. UNSW Law Society recommends that there be a unified definition for ‘volunteer’ in legislation relating to volunteers, developed in consultation with community organisations.
- 33.1.7. UNSW Law Society recommends that there be a legislative regime that requires community and private organisations to comply with a standardised Code of Practice for volunteers that establishes essential professional and personal development goals, and protective work conditions in addition to those available by other legislation.
- 33.2. Secondly, this is an issue of equity.
- 33.2.1. The number of law graduates is increasing, disproportionate to the work availabilities.
- 33.2.2. This puts pressure on students to take up extra-curricular activities – such as unpaid work – so as to better their chances of employment.
- 33.2.3. Students from lower socio-economic backgrounds, who need to obtain paid work to support themselves, are excluded from this opportunity.
- 33.2.4. The prevalence of internships in the model is also serving to undercut entry-level job opportunities, as they carry out work which would otherwise be done by a paid employee.⁵⁸
- 33.3. The difficulty of implementing the volunteer model in remote, regional and rural communities (Box 20.2) could be alleviated by the provision of greater financial support available for those wishing to participate.
- 33.4. UNSW Law Society recommends the implementation of a Code of Conduct for all CLCs and institutions which offer unpaid-internship or student volunteer positions.

⁵⁷ Andrew Stewart and Rosemary Owens, ‘Experience or Exploitation’ *The Australian* (online), 10 January 2013 <<http://www.fairwork.gov.au/ArticleDocuments/2293/UW-complete-report.pdf.aspx?Embed=Y>>.

⁵⁸ Carla Drakeford, ‘Hidden Cost of Free Labour’, *The Australian* (online), 8 January 2011 <<http://www.theaustralian.com.au/business/hidden-cost-of-free-labour/story-fn71714s-1225983259802>>.

34. Significance of unpaid volunteers

- 34.1. Chapters 20–21 of the Access to Justice Draft Report make brief mention of the significant contribution made by volunteers, including student volunteers.
- 34.2. Law student volunteers are a significant participant in the legal assistance landscape which provides access to justice.
- 34.3. The UNSW Law Society shares the view that the dearth of official statistics for volunteers makes evaluation of the significant contribution of unpaid volunteers difficult.
- 34.4. In addition to the NACLC submission, we refer to the Australian Board of Statistics' (ABS) most recent report into the state of Legal Services in Australia.⁵⁹ The ABS found that in a single month in 2008 there were 4474 volunteers providing 38 600 hours in assistance at CLCs and Aboriginal legal services. Of this only 1713 volunteers were practising barristers and solicitors.
- 34.5. It is probable that the majority of the remaining 2761 volunteers were student or community volunteers.
- 34.6. It is also probable that the volume of student and community volunteering in the legal industry has risen significantly since 2008 as CLCs have played an increasing role in access to justice.

35. Rights of Unpaid volunteers

- 35.1. Considering the significant time and cost incurred by students and their families of unpaid work, it is crucial that unpaid work provide safe and suitable working conditions, reasonable opportunities for personal and professional training, and gainful experiences that lead to future employment.
- 35.2. A standardised legislative definition of 'volunteers' will enhance the consistency of these experiences for volunteers. No such definition presently exists.
- 35.2.1. For example, the *Work Health and Safety Act 2011* (NSW) describes a volunteer as a 'person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses)'.⁶⁰
- 35.2.2. The ATO also does not provide for a legal definition of 'volunteer' for tax purposes, instead referring to the dictionary definition of a volunteer as 'someone who enters into any service of their own free will, or who offers to perform a service or undertaking.'⁶¹

⁵⁹ Australian Bureau of Statistics, *Legal Services* (Cat No 8667.0, 2008).

⁶⁰ *Work Health and Safety Act 2011* (NSW) s 4 (Definitions).

35.2.3. The inclusion of a standardised legislative definition for volunteers will improve the public perception and student expectation of what being a ‘volunteer’ entails.

35.2.4. This will also go some way towards improving the potential for further monitoring of volunteer trends, and regulatory oversight of student volunteers and unpaid interns in the legal industry.

35.3. It is recommended that there be formal recognition of a Code of Practice for volunteers, such as the Model Conduct of Practice developed by *Volunteering Australia*.⁶²

35.3.1. A standardised code will provide volunteers with reasonable expectations of the level of professional and personal development that will be provided.

35.3.2. A standardised code will provide community and non-profit organisations with a best practice system for managing volunteers whilst leaving their implementation to the organisation. This balances the need for consistency with the need to reflect the unique circumstances of the organisation.

35.3.3. A standardised code will also provide organisations an ability to evaluate their own practices and engage in continual improvement.

35.3.4. It is noted that some CLCs and non-profits currently adhere to a disparate network of Codes or have an internal Code that sets out the rights and responsibilities of volunteers. However, compliance with the code is wholly at the discretion of the organisation.

35.3.5. The UNSW Law Society recommends that the Code of Practice be developed through a consultative process with CLCs, non-profit organisations, student bodies and labour organisations.

36. Unpaid work: Towards a new global trend

36.1. Unpaid work, in its various manifestations, has become a new means for young people to transition from education to paid employment.⁶³

36.2. This is a new global trend, and concerns of how this is affecting both students and other paid employees has led to the adoption by the International Labour Conference (ICL) in June

⁶¹ Australian Tax Office, ‘Distinguishing between Volunteers and Employees’ (2013) <<https://www.ato.gov.au/Non-profit/Employees,-volunteers-and-other-workers/In-detail/Employees,-volunteers---other-workers/Volunteers/Volunteers-and-tax/?page=2>>.

⁶² Volunteering Australia, ‘National Standards for Involving Volunteers in Not for Profit Organisations’ (2001) <http://www.volunteeringaustralia.org/wp-content/files_mf/1377052577VANationalStandardsforinvolvingvolunteersinnotforprofitorganisations.pdf>.

⁶³ Andrew Stewart and Rosemary Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Report to the Fair Work Ombudsman, January 2013) <<http://www.fairwork.gov.au/ArticleDocuments/2293/UW-complete-report.pdf.aspx?Embed=Y>>.

2012 of a new resolution, entitled *Resolution concerning Youth Employment: A Call for Action*.⁶⁴ This call to action centred on the concern of the ILC that this new trend is exploitative toward young graduates, and becoming an entrenched method of undermining paid positions. The ILC labels unpaid work as ‘disguised employment’, as it serves to provide cheap labour and thereby replace positions that would otherwise be remunerated, under the guise of being an educational experience.

36.3. This is a trend at a global level. The challenge lies in Australia in ensuring that young people and those transitioning from education to paid employment are not exploited, nor at a disadvantage under this new trend.

37. The changing context of the Australian legal market

37.1. The past decade has seen a doubling of the number of law graduates in Australia, without the commensurate increase in jobs. According to Graduate Careers Australia, the proportion of bachelor-degree law graduates who find full-time employment has fallen from 96% in 2001 to 83% in 2012.⁶⁵

37.2. This has meant that competition for legal jobs is on the increase. While commentary suggests that a law degree is now considered a good ‘generalist degree’, this does not alter the fact that there is still now greater pressure for graduates to have experiences that make them ‘stick out from the crowd’.

37.3. Internships and other forms of unpaid work are experiences which are increasingly becoming a mandatory line on a successful job application. This is for good reason; well-run internships programs can be beneficial learning experiences for students, as well as opportunities for students to explore what career suits them while still at university.

38. Unpaid work – An equity issue

38.1. However, unpaid work assumes that the individual undertaking it is able to otherwise financially support himself or herself.⁶⁶ This will either assume that the worker is sufficiently affluent to not need financial compensation, or that they are otherwise able to simultaneously maintain other (paid) employment. As such, internships and unpaid work too often become the purview of the ‘upper middle class and the super rich’.⁶⁷

⁶⁴ International Labour Office, *Youth Employment Crisis: A Call for Action* (Resolution and Conclusions of the 101st Session of the International Labour Conference, Geneva, 2012) <http://www.ilo.org/washington/areas/youth-employment/WCMS_185950/lang--en/index.html>.

⁶⁵ Edmund Tadros, ‘Graduate Glut: 12 000 New Lawyers Every Year’, *Sydney Morning Herald* (online), 14 February 2014 <<http://www.smh.com.au/business/graduate-glut-12000-new-lawYERS-every-year-20140214-32qnm.html>>.

⁶⁶ Stewart and Owens, above n 7, 20 (2.17).

⁶⁷ Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso Books, 2012) 62.

38.2. The completion of work by unpaid interns can also mean that entry-level paid positions are made redundant. Unpaid work is therefore further limiting paid positions available to those who need remuneration for their work.⁶⁸

39. Recommendations for the CLC Model

39.1. As noted in Chapters 20–21, volunteers form an integral part of the CLC model. The UNSW Law Society does not wish to see this change: volunteers are an invaluable means of keeping costs down while providing access to justice to those whom otherwise may not be able to do so. The concern of the UNSW Law Society is that measures be put into place so as to ensure that this does not result in the exploitation of the students themselves, or lead to the disappearance of remunerated work.

39.2. To achieve this, the UNSW Law Society recommends the implementation of a Code of Conduct which all CLCs with student volunteers would be required to sign. On the issue of equity, this would be with an eye towards limiting the time period of volunteering each person can do. This would result in a two-fold consequence of allowing for a higher turnover of volunteers, and therefore more opportunities available to the growing number of law graduates, while also preventing unpaid work from replacing otherwise paid positions.

39.3. The UNSW Law Society notes the findings in the report of the understaffing of regional, remote and rural CLCs. The UNSW Law Society would recommend the allocation of funding, where possible further contributed to by universities, for the creation of a stipend allowance for students wishing to work in these locations. Working in rural communities entails a high financial cost; this makes such work prohibitive for most. A stipend system, aimed at solely covering basic living costs, would help alleviate the deficit in volunteers in these communities, while also addressing the equity issue in regards access to unpaid work experience.

⁶⁸ Rachel Brown, 'Union Call For Code To Crack Down On Exploitation Of Interns', *Sydney Morning Herald* (online), 18 February 2014

<http://newsstore.fairfax.com.au/apps/viewDocument.ac?jsessionid=30E0427F636F7214109867B4161F6F61?sy=af&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=657&clsPage=1&docID=SMH140218FP79U68ORIH>.