

Joint Submission to Productivity Commission Inquiry into Access to Civil Justice

Centre for Rural regional Law and Justice

National Rural Law and Justice Alliance

This submission is a joint collaboration between the National Rural Law and Justice Alliance and Deakin University's Centre for Rural Regional Law and Justice (CRRLJ).

The Centre for Rural Regional Law and Justice's mission is to *enhance access to improved justice systems and services for rural and regional Australians through research, education, engagement and advocacy*. The Centre, based within Deakin University School of Law, draws on cross disciplinary knowledge and expertise, and actively engages with regional communities, services, industry and government.

The National Rural Law and Justice Alliance was formed in response to the growing awareness that regional, rural and remote Australia's views are largely excluding in relation to the law and in influencing the provision of justice system services.

The Alliance aims to address the critical need for a high level law and justice congress to provide a 'voice' for rural and regional communities. It includes an eight member Board of Management and twenty member Council, representing the legal profession, industry and human services provider bodies from all Australian States and Territories. Patron of the National Alliance is South Australian Chief Justice Chris Kourakis.

Response to the Issues Paper

The Alliance and CRRLJ welcome the opportunity to respond to the Productivity Commission Issues Paper.¹ The paper highlights a breadth of important issues pertaining to access to justice arrangements however there are a range of considerations specific to rural, regional and remote communities not apparent in the paper.

These considerations include:

1. In relation to the discussion of "*legal need*" in Section 3² we consider there needs to be a acknowledgement and breakdown between rural, regional and remote clients against metropolitan clients, which reflects the implications for commensurate funding.
2. In Section 4, *the Costs of Accessing Civil Justice*, explicitly notes geographical constraints, suggesting that appropriate legal resolutions 'may' not occur due to lack of services available at a local level and the high cost of travel. However, in Section 5, the rise of self- represented

¹ *Access to Justice Arrangements*, Productivity Commission Issues Paper, Australian Government, September 2013

² *Ibid*, 6

litigants is put down to affordability or unwillingness of representation³. The reality of unavailability due to geography also needs to be considered.

3. In Section 6, *Preventing Issues from Evolving into Bigger Problems*, there is discussion about building community capacity and resilience, and 'legal health checks'⁴, but this is also dependent upon the availability of services and supports which many rural regional and remote communities are also struggling to access.
4. Section 11 examines in detail the role of courts and areas of reform⁵. However, there is a need to consider the disadvantages relating to access to courts and court processes and programs for rural, regional and remote communities. This includes, for example, travel/public transport availability, availability of court and community based services and programs, cost and time of discovery, and cost and availability of legal representation, experts and witnesses.
5. The discussion of Pro Bono work in Section 12⁶ needs to identify how the aspirational target can be supported in rural, regional and remote areas, particularly in relation to covering the costs of disbursements, resources and insurance.

There is scope for undertaking extensive research into a number of aspects of the Productivity Commission's issues paper which could illuminate potential areas for substantial costs savings while improving access to justice:

- Remote Communication and Information Technology and avenues for application in courts and justice related services for rural, regional and remote Australia – a review of current innovative practices nationally and internationally, with the development of recommendations for trialling, applications and expansion.
- Improved cross-border protocols established in relation to the, provision of justice system services, particularly the application of court orders and where appropriate, the fostering of parallel legislation between states.
- An examination of the scope and application of 'Collaborative Lawyering' and 'Appropriate Dispute Resolution' within a rural and regional setting.
- In light of a decline in rural and regional legal practice, an investigation into the impact of regionally based legal practices on regional economies, particularly small business.
- The growth of self-representation in Australia – particularly examining if there is a connection with geography. What assistance is provided by courts and tribunals and what are the implications of this for rural, regional and remote areas?

The Centre for Rural and Regional Law and Justice and National Rural Law and Justice Alliance would welcome the opportunity to contribute to further discussions and research in these areas.

³ Ibid, 9, 10

⁴ Ibid, 12

⁵ Ibid, 22-27

⁶ Ibid, 35

The Centre for Rural Regional Law and Justice's current and past work offers particular insights into access to justice for rural regional and remote communities.

1. Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria.⁷

Much of the more recent hallmark Australian research around 'access to justice' has focussed on access to public and private legal services for socio-economic disadvantaged groups. There has been little research, however, that looks at equity in the administration of the law in regional communities, through courts and tribunals and associated services.

Postcode Justice provides a broad picture of the factors that combine to create the disadvantage experienced by regional communities. *Postcode Justice* identified a myriad of factors and combinations of factors that create disadvantage for people living in rural and regional Victoria when using justice system services. The report investigated the impact of legal and related professional services in rural and regional communities and examined how the lack of local human service agencies affects justice system outcomes.

Postcode Justice also explores the additional challenges for legal practitioners and local human service agencies based near state borders due to variations in law. Its recommendations have been inserted into the appropriate sections of this submission below.

2. Providing Legal Services to Small Business in Regional Victoria⁸

This research examined regional Victorian small business expectations of local legal practices, their degree of satisfaction with existing legal services and identified current and potential demand and supply gaps. By doing so it sought to determine potential areas in which regional law firms can improve, expand and refine their services in response to the current and emerging demands on them and the communities they serve.

⁷ R Coverdale, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law*, Centre for Rural Regional Law and Justice, Deakin University, 2011. This report also combines the relevant discussions and findings of other reports which have identified aspects of disadvantage in the administration of justice system services in regional communities. These reports include:

- Rural and Regional Committee, Parliament of Victoria, *Inquiry into the Extent and Nature of Disadvantage and Inequity in Rural and Regional: Final Report* (October 2010); - Access to Justice Advisory Committee, 'Access to Justice - An Action Plan', AGPS, (Canberra 1994); - Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (December 2009); Senate Legal and Constitutional Affairs Reference Committee, *Legal Aid and Access to Justice Report*(June 2004); - Access to Justice Taskforce, Australian Government – Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009); - Access to Justice Advisory Committee, 'Access to Justice - an Action Plan' (1994) 33; TNS Social Research for Federal Attorney Generals Department, *Summary of Conclusions and Implications in Study of the Participation of Private Legal Practitioners in the provision of Legal Aid Services in Australia* (December 2006); Suzie Forell, Michael Cain & Abigail Gray, *Recruitment and Retention of Lawyers in Rural, Regional and Remote New South Wales*, (Law and Justice Foundation of NSW, 2010); Victoria Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 39; Law Reform Committee, Parliament of Victoria, *Review of Legal Services in Rural and Regional Victoria* (2001).

⁸ R Coverdale, L Jordan and J du Plessis, *Providing Legal Services to Small Business in Regional Victoria*, Centre for Rural Regional Law and Justice, Deakin University, 2012.

Each of these research publications identified disadvantages experienced by regional and rural Victorian communities including:

- Poor physical amenity of regional courts, for example, for family violence-related matters, the physical amenity can be a disincentive to attendance;
- Limited availability of video conferencing facilities and information and communications technologies (ICT);
- Limited availability of court programs introduced over the past decade as part of the 'problem solving' (Therapeutic Jurisprudence) approach to the role of the justice system, for example, the Court Integrated Services, the Mental Health Court Liaison Service; and Specialist Magistrates' Courts such as the Family Violence Division and Drug Court;
- Limited availability of quality mediation services to regional communities, particularly in relation to commercial/civil matters and the lack of court annexed mediation;
- Lack of hearing date certainty for County Court circuit courts;
- Limited availability of senior barristers and senior Crown Counsel at circuit County Courts;
- Limited provision of local Victorian Civil and Administrative hearings;
- Declining ratio of private law firms to regional populations resulting in an increasing frequency of 'conflict of interest' issues.⁹
- Lack of local human service agencies in rural and regional areas affects justice system outcomes;
- The variation in laws and government programs and policies across borders, compound the difficulties rural and regional services and their clients already face.

Additionally, transport issues are consistently rated by rural and regional communities as one of the most significant barriers to accessing services, employment and social networks.

⁹ Ratio of lawyers 1:1243 to citizens in Regional Victoria cf. 1:252 in metro. (Legal Services Board figures 2011).(from Small Business report p 6).

A response to the Inquiry's terms of reference.

The Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance propose to respond to the following matters raised within the Inquiry's terms of reference:

1. Impact of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services;
2. Economic and social impact of the costs of accessing justice services, and securing legal representation;
3. Impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions;
4. Alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution.

1 & 2 - The impact of the costs of accessing services and securing legal representation; and the economic and social impact of the costs of accessing justice services, and securing legal representation

Lawyer shortage

Law firms in regional areas are essential to ensure that clients' legal needs are properly addressed and to ensure continuity of service provision from receipt of instructions to hearing. Firms which provide pro bono services are also essential to support legal need in these communities. Clients in regional, rural and remote areas, however, face variability in the quality of services and less opportunity for and choice of legal representation due to the reduced numbers of lawyers.

A 2009 survey found that approximately 40% of rural and regional lawyers currently had insufficient staff to service needs and also revealed worrying succession issues in that 38% said they would no longer be practising in the next five years.¹⁰ The problem of attracting and keeping graduates in rural and regional communities continues. There is also a lack of specialist counsel available to these communities.

The lack of lawyers and other dispute resolution services can prolong and exacerbate matters, which impacts on costs and aggravates individual, family and community tensions. The shortage of legal services or appropriate advocacy and representation for women and children in cases of family violence, for example, impacts on the health and safety of the individuals involved. Of concern, the Centre for Rural Regional Law and Justice's most recent research examining access to justice for women experiencing family violence in regional Victoria has highlighted how some women stay in violent relationships due to lack of access to affordable legal advice and representation.¹¹

It is suggested that a hotline for rural and regional communities be established - a high quality advice service where specialist lawyers offer assistance.

¹⁰ Law Council of Australia and Law Institute of Victoria, Report into the Rural, Regional and Rural Areas Lawyers' Survey, July 2009, p. 21.

¹¹ Jordan L and Phillips L, *Women's experiences of surviving family violence and accessing the Magistrate's Court in regional Victoria*, (2013, forthcoming), Centre for Rural Regional Law and Justice, Deakin University.

Awareness

The CRRLJ's research *Providing Legal Services to Small Business in Regional Victoria* found that there is often insufficient awareness of when a legal problem has arisen and of the services that lawyers can provide to prevent problems or minimise risk. Furthermore, regional businesses often access inappropriate services, such as accountants rather than lawyers or lawyers without the necessary specialist expertise.

Specialisation and referral

The CRRLJ's research on small business and the law suggests that while regional practitioners have traditionally offered generalist services, the growing complexity of laws is requiring a greater level of specialist expertise, which is placing pressure on practitioners to take on work in areas they lack proficiency.¹² Additionally, the CRRLJ's recent work examining conflict of interest issues in regional communities has found that lawyers from more remote areas are more likely to take on a greater range of areas of practice.¹³

A recommendation of the Small Business Law research in response to this was for a more structured referral system managed by Law Societies, that acknowledges and encourages referrals between regional lawyers to support generalist practice, maintain and foster local specialised practices, and in so doing encourage a 'best fit' between practice skills and client needs.¹⁴

The establishment of a regional network of specialist lawyers to support more generalist practitioners would also benefit rural and regional communities wanting to access specialist services.

Legal professional practice issues

Rural and regional lawyers have difficulty accessing professional development.

There is an urgent need to provide greater support to lawyers in rural and regional areas to enable them to better serve clients needs within an increasingly complex legislative and regulatory environment.

There is also a need to make professional collaborations and referral processes more responsive to client needs. More formalised referral processes and the expanded use of communication and other technologies are important considerations for future practice and research.

Effective legal advice requires local understanding of the unique circumstances of a particular community, region or industry. Less adversarial approaches such as alternative dispute resolution and collaborative lawyering are better suited and arguably more cost effective particularly for rural and regional communities where people live and work together.

¹² A 2006 study also found that law firms felt it an economic necessity to accept a wide range of clients and provide a breadth of services: TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, TNS Social Research: Manuka, ACT, 2006.

¹³ R Coverdale and L Kyle, Centre for Rural and Regional Law and Justice Report on the impact of conflicts of interest on the provision of legal services in rural and regional Victoria, (2013, forthcoming).

¹⁴ Coverdale, Jordan and du Plessis, above n 8.

3. Impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions

Engagement in legislative reviews

There is insufficient regional engagement in law and policy, that is, law and policy is not sufficiently well 'rural-proofed'.¹⁵ A recent Victorian Parliamentary Inquiry called for all policy and legislation to be 'rural-proofed' by a state government-established independent rural proofing advisory body. In other words, there needs to be a check on how policy and legislation impacts on rural and regional Victorians and how well it reflects and responds to the diverse needs of rural and regional Victorians.¹⁶ The inquiry suggests that a rural filter be applied when "reviewing, developing, implementing, reporting and evaluating policies and plans".¹⁷

Postcode Justice recommends:

- An independent authority be established whose role will be to review the impact of government policy, services and programs on the equitable provision of justice system services in rural and regional Victoria, and advise government on the outcomes of such reviews. Additionally, that body should be provided with the powers to nominate to the Attorney General or relevant Ministers, new and amended legislation likely to significantly impact upon regional communities and which require a Regulatory Impact Statement review. The body would contribute to such reviews.¹⁸

County and Magistrates' Courts

The impact on regional communities of the closure of local courts is significant. The *Postcode Justice* report indicated that the number of Magistrates' courts has declined significantly in rural and regional Victoria from 119 in 1983 to 54 now.¹⁹ Attempting to balancing notions of efficiency with principles of justice, can be fraught. The loss of a local court or the establishment of more 'efficient' processes in managing courts or the lack of availability of court or community based programs can have a significant but often unidentified negative effect on outcomes for rural and regional participants in terms of access, representation and resolutions or penalties.

The *Postcode Justice* report identifies a number of areas in which rural and regional communities are disadvantaged by court process and structures and makes several recommendations in relation to these.

Postcode Justice recommendations include:

- That the State Attorney General commission an independent review of County Court practices and procedures where they impact on users of rural and regional circuit courts. The review is to have particular reference to addressing the current inequity between

¹⁵ A criticism raised by *Postcode Justice* interviewees was that legislation is drafted with little consideration of its relevance, effect or application to regional communities.

¹⁶ Parliament of Victoria, *Inquiry into the Extent and Nature of Disadvantage and Inequity in Rural and Regional Victoria*, Final Report, October 2010, Chair's Foreword, xiv. (Reference made to Recommendation 1, p. xviii, discussed on p 323). Economides writes about 'rural proofing' in *Strategies for Meeting Rural Legal Needs; Lessons from Local, Regional, and International Experience*, (2011) 16(1) *Deakin Law Review* 47, 55.

¹⁷ *Ibid*, 329.

¹⁸ Coverdale, above n 7, 11.

¹⁹ *Ibid*, 33.

regional and metropolitan processes for setting hearing dates; the impact of 'circuit counsel'; and strategies for improving the availability of senior barristers, Senior Crown Council and related Office of Public Prosecutions services to regional courts. See pages 49.

- That the State Attorney General commits to "Establishing a review of court support programs with the aim of developing a general court support service model that provides state-wide services to all Victorian Magistrates' Courts at all its venues and across all specialist lists and divisions;
- Improved facilities and services provided at 'satellite' regional Magistrates' Courts, including security and the provision of safe, separate waiting areas, video conferencing facilities and soundproofed interview rooms. Greater investment for 'virtual courts' for specialist jurisdictions and satellite courts in regional areas.
- That improved monitoring and data collection systems be established by the Department of Justice and the Courts, which encompasses comparative data relating to courts and tribunal administration, the administration of court programs, civil matter outcomes, bail remand, penalties and sentencing in rural and regional Victoria.²⁰

4. Alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution.

Use of Information Technology innovation

Technology initiatives can promote and support access to justice and have a preventive impact through the provision of information, for example, via legal information and referral websites, applications, social media.²¹

In any geographical location, clients need to have a choice in the method of communication, provided that it is effective. Face to face contact between lawyer and client is required in many circumstances, however video conferencing, Skype and other IT options, if accessed more frequently and effectively, can provide access to legal services that work in conjunction with face to face contact. Difficulties in accessing justice and legal services faced by regional, rural and remote clients necessitate more innovative solutions than face to face contact in isolation; as this ensures continuity, timeliness and efficiency of legal service provision and better legal outcomes.

Use of technology in outreach services depends upon the existence and effectiveness of infrastructure in outreach locations to provide an IT response. Compatible technology is essential to ensure communication. Services need to be willing to engage in the use of IT infrastructure. The associated costs are a barrier.

The NBN may provide lawyers with more options such as the benefits from more efficient and accessible video-conferencing.

With video-conferencing:

- Rural and regional lawyers can more easily confer with and support each other;
- Clients can be helped to access legal aid or other services in situations where conflict of interest prevents their lawyer acting for them;

²⁰ Ibid, 11-12.

²¹ *Harnessing the Benefits of technology paper to improve access to justice*, Standing Council on Law and Justice, Australian Government, 2012.

- Professional development can be assisted. Ideally CPD should be available as ‘just in time knowledge’ rather than ‘just in case’ so that information is available to practitioners when they need it. ‘Just in time knowledge’ uses technology to make available “online facilities that can offer ..

briefings, updates, introductions and guidance on particular topics, as they arise, rather than searching for old notes or conference folders. .. training is not about attending a course .. it is .. for instance, about putting useful multi-media presentations, perhaps delivered by leading experts, at the fingertips of .. lawyers ..²²

Additionally, law firms can have virtual legal practices under one virtual roof which can meet demands that they offer services in a wider range of areas of law.²³

Online dispute resolution is another area where technology can facilitate access to dispute resolution.

The attraction and retention of staff can also be facilitated with modern information technology, a better web presence and more flexible working conditions.²⁴

Hart recommends research into the alliances needed, that is, how to protect and promote lawyer collegiality. There should be acknowledgement of those lawyers less confident with technology and support and professional development opportunities need to be made available.²⁵

Specialist Courts

Expansion of specialist services to all regional Magistrates’ Courts with consideration given to greater use of information technology services including ‘virtual courts’ and video conferencing, where appropriate. In particular there is an urgent need to expand family violence specialist services to regional Magistrate’s Courts. Dealing more effectively with family violence through specialist courts can reduce the personal, social and economic costs of violence against women and children - an estimated cost of 3.4 billion per annum to the state²⁶. The CRRLJ’s research on family violence in regional areas highlights how women’s safety is repeatedly placed at risk where the complexities of family violence are not understood or dealt with appropriately by the court.

Discrete lawyering or unbundling

Discrete lawyering or ‘unbundling’ legal services refers to giving legal assistance and support at various stages of proceedings without providing full legal representation.²⁷ This can assist more parties²⁸ but it is not without its critics. The approach is said to be consistent with “a lawyer’s duty to provide clear and timely advice to assist a client to understand relevant legal issues and to make

²² R Susskind, *Provocations and Perspectives*, a working paper submitted to the UK CLE Research Consortium (Legal Education and Training Review), October, 2012, 26.

²³ Hart, C., *Sustainable Regional Legal Practice: The Importance of Alliances and the use of innovative information technology by legal practices in regional, rural and remote Queensland*, Vol 16, No. 1, *Deakin Law Review*, 2011 p. 225.

²⁴ Hart, C., *ibid*; *Harnessing the benefits of technology paper to improve access to justice*, Standing Council on Law and Justice, Australian Government, 2012.

²⁵ *Op. cit.*

²⁶ State of Victoria, *Victoria’s Action Plan to Address Violence Against Women and Children: Everyone has a responsibility to act*, 2012 - 2015, 2012.

²⁷ Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice, 2004, 201.

²⁸ QPILCH .. ref

informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement”²⁹.

Self-help or *pro se* is connected to this form of legal service. A lawyer, for example, could draft a legal document for a client who is otherwise acting for themselves without formally disclosing their involvement in its preparation.

Early intervention, prevention and mediation.

Some areas are more isolated than others and may not receive the regular services afforded to other regional areas. Early intervention, whether by dissemination of legal information or by early representation or alternate dispute resolution processes, reduces the cost to the justice system and to the community as a whole.

Community legal education can both effectively prevent and minimise the escalation of legal issues and disputes. Where lawyers help prepare people to act for themselves, they will be assisting in the reduction of legal costs as well as assisting in early intervention and prevention.

Improved access to mediation is required. Mediation is often more effective than litigation in resolving disputes. There needs to be a big effort to increase access to mediation services and to raise awareness of this option.

Expansion of Legal Service /Aid Provision

The National Rural Law and Justice Alliance advocates for innovative exploration of models of service provision to attract and retain legal professionals in regional, rural and remote areas. The Alliance purports that as well as exploring opportunities for remote communication and competent use of information technology, there is also scope for instigating a range of measures to ensure rural, regional and remote provisions to improve access to justice. Key elements for consideration could include:

- Funding for the cost of travel and accommodation for legal professionals
- Funding for expansion of offices and fringe benefits for legal professionals to equitably provide Legal Aid
- Significant expansion of technology to equitably provide Legal Aid,
- Research into utilitarianism of ‘bonded place’ or rural access models and HECS reduction or offsets,
- Development of models of effective mentoring for professions in rural and remote areas,
- Innovative professional development opportunities to build legal professional capacity in rural, regional and remote areas.

²⁹ Law Council of Australia draft paper 2013 p 9.