



Submission to the Productivity Commission

Inquiry into Access to Justice Arrangements

December 2013



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INC 9896948

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December 2013

This submission was approved by the New South Wales Society of Labor Lawyers Executive. It is in line with the Society's principles, objectives and values.

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Preface

1. The NSW Society of Labor Lawyers (the “**Society**”) is pleased to provide a submission to the Productivity Commission's Inquiry into Access to Justice Arrangements (the “**Inquiry**”).
2. The Society aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education.
3. Access to justice is a core issue for the Society, and we welcome the Inquiry. We hope that the investigation of access to justice by the Productivity Commission underscores that access to justice is not just a matter of welfare or equity, but an issue which goes to the heart of how our legal system and in turn our economy and society can be made to function both fairly and efficiently. We acknowledge the effort of the former Assistant Treasurer David Bradbury in commissioning the Inquiry.

Introduction

The Commission invites comment on how best to define and measure legal need. How does legal need relate to the concept of access to justice?

4. The definition of legal need proposed to be relied on by the Commission is that developed by Johnsen and used by Currie in his report to the Canadian Department of Justice:

"Legal needs are the legal problems that individuals cannot resolve effectively using their own means. A second condition is that the improvement brought about by the resolution of the problem ought to lead to improved welfare for the individual."¹

5. Defining legal need is difficult, but this suffices as a good working definition. The Commission ought to heed the advice of the Law and Justice Foundation, which in its 2012 study of legal need in Australia emphasised that "a broader approach to legal needs research provides a better starting point for quantifying unmet legal need".² A broader approach includes issues which never reach any part of the formal justice system and issues which those involved might not even be aware have a legal aspect.
6. The 'justiciable event' analysis originally used by Genn³ and adopted by Currie is a good starting point for the Commission in coming to grips with this vast category of issues. Wherever there is doubt, though, the Commission should tend towards a more inclusive definition of legal need. A narrower understanding of legal need is apt to compound the problems of access to justice by neglecting precisely the sectors of society most in need of attention.

What constitutes unmet need in the civil dispute resolution system and how significant is it? How has the level of unmet legal need changed over time? What has driven this change and what evidence is there to support it?

¹ Ab Currie, *The Legal Problems of Everyday Life - The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (2007). [Available at: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/index.html].

² Law and Justice Foundation (NSW), *Legal Australia-wide Survey: Legal Needs in Australia* (2012). [Available at: <http://www.lawfoundation.net.au/ljf/app/EDD640771EA15390CA257A9A001F7D08.html>].

³ Hazel Genn and Alan Paterson, *Paths to Justice: Scotland* (2001).

7. The best evidence available indicates that unmet need in the Australian civil justice system is vast. The Law and Justice Foundation's survey last year found that legal problems were 'ubiquitous' in Australian life: 49.7% of respondents had experienced one or more legal problems during the previous 12 months.
8. Despite this ubiquity, people do not generally access legal processes, seek professional advice, or use information from legal sources.⁴
9. Of course, the appropriate response to a legal problem will not always (and perhaps rarely) involve formal legal action. Nonetheless, there is good reason to believe that the low levels of contact Australians have with legal assistance has a negative impact on the resolution of the disputes in which so many find themselves involved.
10. The Law and Justice Foundation found that:

"A substantial proportion of people take no action to resolve their legal problems and consequently achieve poor outcomes. Most people who seek advice do not consult legal advisers and resolve their legal problems outside the formal justice system."⁵
11. The costs of the choosing not to act, or choosing an ineffective form of action, are well-evidenced. Aside from the type of legal problem involved, these choices have the most significant impact on the likelihood of a problem being finalised.⁶ Those who take no action experience the least favourable outcomes, while outcomes for those who seek some form of advice or who handle the problem themselves are substantially better.⁷

⁴ Attorney-General's Department, *Managing Justice* (2009). [Available at: <http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>]. Research on responses to legal problems is summarised in Ch 2.

⁵ Law and Justice Foundation (NSW), above n 2, 205.

⁶ Law and Justice Foundation (NSW), above n 2, 197.

⁷ Law and Justice Foundation (NSW), above n 2, 204.

How frequently do Australians — including individuals, businesses and other organisations — experience substantial civil legal disputes including in the area of family law?

12. After controlling for minor issues in the survey responses mentioned above at [10], the Law and Justice Foundation concluded that some 4,664,000 Australians had experienced a 'substantial' legal problem during the reference period.⁸ Substantial problems were those which respondents identified as having a 'moderate' or 'severe' impact on their everyday life.
13. Although crime was one of the most prevalent categories of legal problem overall, the proportion of respondents with criminal law problems who identified such a problem as 'substantial' was comparatively low. By contrast, while fewer respondents overall indicated that they had a family law problem, 77% of those respondents said that at least one of their family law problems was substantial. Other categories of civil problems which were more likely to have a substantial impact on those who encountered them included health, rights, and money (incl business, investment and wills/estates) problems.
14. The Commission ought to take into account, then, that improved access to the civil justice system has the capacity to alleviate more of the legal problems which weigh most heavily on the lives of Australians.

What are the consequences of unmet legal need? For example, what are the social and economic impacts arising from problems that are either unresolved or escalate due to lack of access to legal assistance?

15. There are significant costs to unmet legal need.

⁸ Law and Justice Foundation (NSW), above n 2, Ch 3. NB: this survey included criminal matters not the subject of the Productivity Commission's present inquiry. However, problems relating to criminal law comprised only 14% of 'substantial' legal problems.



16. At a subjective level, respondents to the Law and Justice Foundation survey reported on the range of negative consequences that their legal problems caused them:⁹

Table 4.4: Adverse consequences of legal problems, Australia

<i>Adverse consequence</i>	<i>N</i>	<i>%</i>
Stress-related illness	3 786	19.7
Physical ill health	3 548	18.5
Relationship breakdown	1 931	10.1
Moving home	1 043	5.4
Income loss or financial strain	5 551	28.9
All problems	19 203	

Note: N=19 203 problems. Data were missing for 185 problems. Percentages do not sum to 100, because not all problems had adverse consequences and multiple adverse consequences were reported for some problems.

17. As a matter of principle the Society submits that we should do as much as we can to ensure that these adverse consequences are not visited on Australians, especially when it is well established that legal problems are more likely to affect people who are already vulnerable by reason of youth, disability, or economic or social disadvantage, and more likely to ‘cluster’ around those people.
18. Given the purview of the Productivity Commission, however, we also want to emphasise that an expansion in access to justice is not always a net cost to public finances, and that the provision of better and earlier assistance to people experiencing legal problems can in fact alleviate pressures on the legal system more broadly, and result in a more efficient legal system and society overall.
19. PricewaterhouseCoopers has, for instance, undertaken an analysis of legal aid, focussing on a family law context, and concluded that there was a strong economic justification for outlay on legal aid:¹⁰

“- Direct legal aid assistance in relation to court and dispute resolution services for Family Law matters has a net positive efficiency benefit for the justice system. These benefits outweigh the costs of providing these services, ranging from a return of \$1.60 to \$2.25 for every dollar

⁹ Law and Justice Foundation (NSW), above n 2, 83.

¹⁰ PricewaterhouseCoopers, *The Economic Value of Legal Aid* (2009). [Available at: http://www.legalaidact.org.au/pdf/economic_value_of_legalaid.pdf].

spent.

- Efficiency benefits can be expected to be observed in a greater magnitude through the provision of education, information and legal advice by legal aid. These services reach a broader group of recipients and are likely to lead to appropriate and efficient pathways taken through or away from the justice system, from the outset.
- Benefits also accrue to individuals and the community from quality and effective justice outcomes and resolutions of matters, reached with the assistance of legal aid services. The case studies presented in this report give some indication of these benefits and when these results are extrapolated out across legal aid recipients they are significant."

20. The Commission ought to be wary that any costs savings which might be achieved in public or community provision of legal assistance in appropriate circumstances do not prove to be a false economy. This is particularly pertinent in light of the Commonwealth government's proposal to reduce legal assistance provided to asylum seekers¹¹ – a proposal which could further increase the already considerable burden imposed on the federal courts by migration matters.

In what areas can the Commission most add value in undertaking this inquiry?

21. In 2010, Ronald Sackville AO wrote that:

"[a]ccess to justice is universally regarded as an important objective of the civil justice system. A repeated theme of the many official reports including 'access to justice' in their title is the apparently endemic inability of the Australian legal system to attain that objective."¹²

22. As Sackville noted, there have been numerous ad hoc inquiries into access to justice in Australia in recent decades, of varying emphases and conducted by various institutions. He argued that these had, by and large, been ineffectual. The 'fragmentation' of the access to justice literature and the various inquiries held back progress in reforming what is a complex system.

¹¹ SBS News, *Opposition to end free legal aid for boat people* (13 September 2013). [Available at: <http://www.sbs.com.au/news/article/2013/08/31/opn-end-free-legal-aid-boat-people>].

¹² Ronald Sackville AO, *Access to justice: towards an integrated approach* (Conference paper, National Access to Justice and Pro Bono Conference 2010, Brisbane).



23. The Commission is well placed, especially with such broad terms of reference, to take the necessary holistic view. The Society encourages the Commission to add value by focussing on the functioning of the civil justice ecosystem as a whole; to take stock of how reforms in any one of the areas considered below interact with other policies; and to draw together the contributions of previous efforts at improving access to justice.
24. We also support Sackville's suggestion that, in light of the proliferation of reviews and inquiries, some thought might be given to establishing a permanent institution or process for the ongoing assessment of access to justice.

Legal Aid

25. The system of legal aid in Australia was conceived and implemented by the former Commonwealth Attorney-General Lionel Murphy forty years ago. The imperative behind the then-national legal aid system was to “ensure that legal aid be readily and equally available to all Australian citizens.”¹³ It is widely recognised that, forty years on, the legal assistance system is in disarray, and consequently having difficulty in fulfilling its mission. The founding vision for legal aid was based on national priorities of social inclusion and access to justice. A cornerstone of these goals was the accessibility of the civil legal system.
26. Legal aid today is a devolved system of state-based legal aid commissions (LACs) providing services that cover both state and Commonwealth areas of law. Despite LACs delivering legal services in state and Commonwealth matters, the share of Commonwealth funding for LACs has fallen from around 50% on a per capita basis to around 35%. Combined with budgetary pressures at the state level and the regression of state funding, this has led to

¹³ Michael Colbran QC quoted in ‘Law Council says Lionel Murphy legal aid vision blurred by underfunding’ (31 July 2013). [Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1335%20%20Law%20Council%20says%20Lionel%20Murphy%20legal%20aid%20vision%20blurred%20by%20underfunding.pdf>].

severely diminished services and prohibitive means testing whereby only a sub-poverty line income will give a client access to a grant of legal aid when they most require an advocate.

27. Legal assistance services, especially in the area of civil law, should be considered a national priority and funded as such. The federal government should adopt the Law Council of Australia's recommendation that a new National Partnership Agreement on Legal Assistance Services ('NPA') be formulated based on national goals rather than bifurcated state and Commonwealth goals, as is currently the case.

Do legal assistance service providers deliver the right mix of services (in terms of forms of assistance and across the various areas of law)?

28. LACs in Australia are generally organised into three divisions which provide services in criminal law, family law and civil law. Civil law services (outside of family law) provided through LACs in every state and territory are a relatively small part of overall LAC spending. For example, according to the latest annual report (for fiscal year 2011-2012), spending on civil law services accounted for only 12.75% of total spending by Legal Aid NSW, with criminal law and family law accounting for much larger portions of the remainder.¹⁴ In South Australia (for fiscal year 2011-2012) spending on civil law services (including migration services) amounted to only 5.15% of total spending.¹⁵
29. As recognised in the Issues Paper, the current model in most states for legal aid is a mixed model. The model is mixed in the sense that those who are given a grant of aid under the relevant state legal aid act can be assisted either by in-house legal aid solicitors or private practitioners paid by a legal aid grant. The model for service delivery is also mixed in the types of services a member of the community can receive from a LAC.

¹⁴ Legal Aid NSW, *Annual Report (2011-2012)*. [Available at: <http://www.legalaid.nsw.gov.au/publications/annual-reports/pdf-annual-report-2011-2012>].

¹⁵ Legal Services Commission of South Australia, *Annual Report (2011-2012)*. [Available at: http://www.lsc.sa.gov.au/cb_pages/annual_report_current.php].

30. Although a common view of legal aid is of a client who is assisted by a legal aid advocate in court under a grant of aid, the vast majority of a legal aid services are in the form of advice or minor assistance. In NSW, for example, anyone with a legal problem can access a 20-minute advice session with a legal aid solicitor. LAC solicitors then generally have a discretion as to whether they provide minor assistance to that client. There are broad guidelines for when minor assistance should be given, for example, in cases where a client is at a 'special disadvantage'. Minor assistance will generally involve making further enquiries for the client, drafting a letter or making representations to a government agency, and not cost any money in the form of disbursements. Unlike a grant of aid, advice and minor assistance are not means tested.
31. The importance of advice and minor assistance in improving access to justice and ensuring a more equitable as well as more efficient legal system is recognised in the NPA on Legal Assistance Services.¹⁶ These are recognised as critical early intervention services. The availability of these services to the general community makes the legal system more accessible, reduces costs down-stream and should be fully supported.
32. Any changes to the delivery of civil law services by LACs should ensure that advice and minor assistance services are preserved and enhanced. These services should remain non-means tested and their availability should be widely promoted in the community. Initiatives such as civil law outreach clinics that are common in NSW should be strongly encouraged and supported with appropriate funding. These are all areas where civil law divisions of LACs, with adequate funding, are able to enhance the community's experience of the legal system and improve access to justice.
33. The importance of appropriately funding LACs to provide timely advice and minor assistance is also important in migration and refugee cases. Migration and refugee legal services are, as noted above, likely to be subject to imminent cuts. These cuts set a dangerous precedent for LACs that offer

¹⁶ Section 17(c)(iii) of the NPA on Legal Assistance Services.

concurrent services to asylum seekers and those in need of migration services. Denying access to basic advice and legal information to non-citizens at earlier stages of their dealings with the government will cause inefficiencies later in the process with self-represented applicants, unaware of their rights, filling up the courts at considerable expense to themselves and to the community.

34. The services offered in the civil law space by different LACs are highly varied, with NSW the high water mark. Civil law services in NSW range from advice in migration and asylum seeker cases to representation in employment law or discrimination matters before the Federal Court of Australia, as well as representation in compensation matters such as police torts. Services are provided in-house both at head office as well as at metropolitan and regional offices. Additionally, civil law services may be provided through grants where a private practitioner is retained to perform work for a legally aided client. There is currently no benchmark for what civil law services should be offered by LACs and this variability means access to justice depends arbitrarily on state of residence.
35. As a priority, the Commission should recommend the federal government work towards making civil law services provided through LACs consistent among the states and territories. The federal government should accomplish this through the following channels:
 - a. Working through inter-governmental mechanisms to agree with the states and territories on access to justice standards and baselines in relation to civil law services; and
 - b. Concluding a new NPA on Legal Assistance Services after the 2013-2014 fiscal year, which commits the Commonwealth to its funding objectives but based on national goals such as social inclusion and access to justice rather than a distinction between state and federal legal issues

What factors determine the volume and distribution of current funding for legal assistance at both the Commonwealth and state and territory level?

How should the total volume of funding and distribution of funds for legal assistance in Australia be determined and how should it be managed over time?

What principles should determine the relative contribution of Commonwealth and state governments to that funding? How should it be apportioned in terms of responsibility for funding particular types of matters and for specialist services?

How effective has the NPA for legal assistance services been in addressing its objectives?

36. Adequate funding is at the core of a well-functioning legal assistance system that provides access to justice. Funding affects a number of questions raised in the Issues Paper, in particular:
- a. The effectiveness of the NPA on Legal Assistance Services and the ability to achieve the goals it sets out;
 - b. How well legal assistance services assist those with complex needs, including the effectiveness of eligibility criteria for legal aid;
 - c. How well LACs can attract and retain appropriately qualified staff; and
 - d. Effectiveness of the NPA on Legal Assistance Services.
37. Chief Justice of the Supreme Court of Queensland Paul de Jersey noted at the Launch of the History of Legal Aid Queensland, 'governments have created a complicated legal system and expect people to work effectively within it.'¹⁷ An example of this complicated legal system can be seen in the two tiers of state and Commonwealth legal aid priorities with different implications for service delivery. Additional Commonwealth funding for LACs provided under the NPA for Legal Assistance Services has helped achieve a number of its goals and the Commonwealth service priorities, particularly in providing more early intervention services and additional services in areas such as

¹⁷ Quoted in Pricewaterhouse Coopers, above n 10, 17.

employment law.¹⁸ These expanded service areas reflect Commonwealth priorities and generally involve areas of Commonwealth law. However, while the focus on the Commonwealth's priorities backed by its funding has seen some services expanded, others have been neglected.

38. Funding under the NPA on Legal Assistance Services is due to expire after the 2013-2014 fiscal year. In order to ensure that progress made on increasing access to justice and achieving the goals of the NPA on Legal Assistance Services is not reversed, the Commission should recommend the federal government renew the Agreement but work with the states to ensure that its priorities reflect agreed national goals.

How effective and appropriate are the current eligibility criteria for legal aid at targeting service provision? Which Australians are not eligible for legal assistance but also not in a financial position to pursue a legal problem?

39. Recent cutbacks to legal aid funding at the state level have led to LACs scaling back already sparse services in civil law. Eligibility for a grant of legal aid for casework has been restricted on both means and merit grounds. Stricter means tests mean that those eligible for legal aid are generally those earning make \$26,000 or less a year.¹⁹
40. In addition to strict means testing, funding cutbacks have led to counter-intuitive gaps in what legal aid can be granted for and when legal assistance can be provided:
- a. Migration cases: aid cannot be granted and due to resourcing pressures legal aid lawyers cannot perform work in a visa cancellation matter when the department flags that it may cancel the client's visa. Instead, a client must wait until his or her visa has been cancelled before applying for legal aid to assist with an appeal to the AAT. Even in these circumstances the eligibility grounds for aid are so narrow that

¹⁸ Legal Aid NSW, for example, has expanded its employment law group within its Civil Law Division by employing additional solicitors and support staff.

¹⁹ L Curran, 'Society's neediest in no position to brave the rigours of private sector' (The Australian, 25 October 2013).

a client must be at risk of permanent separation from minor children to receive a grant.

- b. Police torts: funding and policy restrictions mean that while aid is available in narrow cases for police torts, ancillary requirements to bringing the action may not be covered. For example, if a client requests information relevant to the tort under GIPA but is refused access to information he or she may not be able to receive a grant of aid to appeal the police's refusal to the ADT. In such circumstances, the client, with the assistance of the solicitor, must seek a grant of aid outside the Act from the CEO of the Commission for the appeal.

41. The Commission should consider instances such as these where purported savings in legal aid funding are in fact hindering the efficient provision of services, and causing needless complication of matters and attendant costs. Adequate and appropriate funding will improve access to justice by giving more people access to legal assistance as well as making that assistance more responsive to their needs. It will also help achieve greater consistency and common sense in eligibility for aid.

How difficult is it for legal aid services to attract and retain appropriately qualified lawyers as core staff?

42. Funding and the services that are funded have a real impact on staffing at LACs. Like most other members of the profession working in the public interest sphere, lawyers at LACs generally work on short- and medium-term contracts. These provide very little job security and the prospect of securing permanent employment at a LAC is low and diminishing. This has led to low morale among many staff. Many staff willing to stay on are unable to due to contracts not being renewed as a result of funding cuts and directives to find savings.
43. Commonwealth commitment to consistent, long-term funding levels will help address these issues. Currently, the expansion in some civil law services and the additional staffing has relied on Commonwealth funds through the NPA on

Legal Assistance Services, which is (as noted previously) due to expire shortly. A long-term and consistent commitment is needed to ensure that LACs can recruit long-term and dedicated staff to provide essential services to the community.

Community Legal Centres

44. We will separately address substantially the same questions raised by the Issues Paper as they relate to Community Legal Centres ('CLCs'): organisations which operate in a complementary but distinct role from LACs.
45. CLCs are independent, not-for-profit, organisations that provide legal assistance to local communities within their geographical catchment area. CLCs primarily target disadvantaged members of society who would ordinarily face difficulty accessing legal services. They operate at a grass-roots level, providing a range of legal assistance services to both individuals, and communities that fall within their geographical catchment areas.
46. Most CLCs operate as 'generalist' CLCs providing free legal assistance on a range of legal issues including, family law, tenancy, consumer law, administrative law, employment and criminal law. There are also a number of 'specialist' CLCs which cater to specific groups, or that focus on specific areas of law, such as the Aboriginal Legal Service and the Women's Legal Service.
47. The types of legal assistance service provided by CLCs can be divided into two broad categories. On the one hand, CLCs perform casework through the provision of legal advice, legal work, and referral services to individual clients who face particular legal issues. On the other hand, CLCs also provide a range of 'community development' services, which promote access to legal information on a community-wide scale. These services tend to focus educating communities about their rights in relation to particular legal issues. They can be targeted at specific groups of people that are considered 'at risk'

of encountering particular legal obstacles, or they can be provided aimed at educating the wider population. It is this latter type of legal assistance services work that distinguishes CLCs from other legal assistance services such as Legal Aid. Services such as Legal Aid primarily operate to provide individualised legal assistance on a case-by-case basis. This assistance is generally provided after a legal issue has already arisen. In contrast, the community development serviced performed by CLCs aims to intervene and address the root causes of legal issues before these issues have a chance to crystallise. In this way CLCs can be considered to be engaging in a form of 'preventative' legal assistance.

Demographics of those who commonly access services provided by CLCs

48. Over the 2012/2013 Financial Year CLCs assisted approximately 211,896 clients providing approximately 248,970 advices.²⁰ CLCs primarily target disadvantaged members of the community. Accordingly, it is estimated that over 80 per cent of clients who receive personalised legal assistance from Australian CLCs have an income of less than AUD 26,000.00 per year.²¹
49. Clients approach CLCs seeking assistance with a variety of legal issues. Over the 2012/1012 Financial Year, 57 per cent of the individual legal assistance provided by CLC related to civil and administrative matters, 35 per cent related to family law matters, and 8 per cent related to criminal law.
50. The strong representation of clients seeking civil and administrative matters likely reflects the fact that, as discussed above, assistance from State LACs is generally not available for these types of legal issues. This means that Australian CLCs service a large number of clients who cannot afford legal assistance on a commercial basis, but who otherwise would not be eligible for Legal Aid.

²⁰ National Association of Community Legal Centres, *NACLC Annual Report (2012-2013)* 1.

²¹ Community Law Australia, *Unaffordable and out of Reach: The Problem of Access to the Australian Legal System* (July 2012) 6.



51. Of those clientele who seek legal assistance with civil matters, the most common issues relate to government and administrative issues (13 per cent), credit and debit issues (18 per cent) and tenancy issues (23 per cent).²² Tenancy in particular represents one of the most significant growth areas for CLCs in recent years, as the pressures associated with declining housing affordability push more clients into the rental markets.

Cost-Efficacy of CLCs

52. On the one hand the provision of legal assistance by CLCs can be seen as a relatively inexpensive and efficient means of delivering legal assistance. Since most CLCs have relatively few waged employees and are highly reliant on solicitors and support staff who volunteer their time, it can be postulated that the running costs of CLCs are less than other legal assistance services, such as Legal Aid.
53. However the real public benefit bestowed by of CLCs is better framed by scrutinising their potential for 'cost avoidance'. The focus CLCs have on early intervention and resolution of legal proceedings mitigates the substantial costs to the taxpayer that are an inevitable result of matters progressing to adversarial proceedings.²³ The National Association of Community Legal Centres has estimated that, on average, for every dollar spent by government in funding CLCs, they return a benefit to society that is equivalent to 18 dollars.²⁴ Much of this benefit is in the form of avoided costs. The study only focused on the provision legal assistance on an individual basis. The economic benefit of the community development work performed by CLCs is difficult to accurately quantify. However it should be noted, effective legal education can be provided on community-wide basis for fairly low cost. If performed effectively such as to address the root causes of particular legal issues, these programs may successfully prevent certain 'legal events' ever

²² National Association of Legal Centres, *NALCLC Annual Report 2013/2013* (July 2013) 13.

²³ Access to Justice Taskforce Attorney-General's Department, *A Strategic Framework for Access to Justice Demand in the Federal Civil Justice System* (2009) 36.

²⁴ Judith Stubbs & Associates, *Executive Summary of the Economic Cost Benefit Analysis of Community Legal Centres* (June 2012) 4.

manifesting. In this way the cost benefit of community development programs may very well exceed the cost benefit of legal services provided by CLCs on an individual basis.

Challenges and Issues Relating to Access to Justice

54. As is the case with LACs, many of the challenges faced by CLCs are attributable to the pressures created by lack of funding and resources.
55. Currently, both Commonwealth and State governments are responsible for contributing to the funding of CLCs through a funding scheme known as the Community Legal Services Program. Whilst some CLCs also obtain further finding from private donors, CLCs remain primarily dependant on the taxpayer to meet their operating costs.
56. Funding allocated to CLCs has failed to keep pace with the demand for their services. This has been exacerbated in recent years with funding cuts at both the Commonwealth and State levels. The result has been that CLCs have been unable to meet the growing demand for their services. In 2007 Australian Council of Social Services estimated that up to 72 per cent of persons who sought assistance from a CLC were turned away because of the centres were operating at maximum capacity²⁵.
57. Faced with an overwhelming demand for legal assistance, CLCs have been forced to limit eligibility for legal assistance to the most disadvantaged clients. This has lead to a growing 'middle ground' of people who do not qualify for the assistance of either Legal Aid or the services provided by CLCs, but who are nevertheless unable to afford legal on a commercial basis.
58. Cuts to State Legal Aid commissions have also added to the pressures faced by CLCs, as more people are denied Legal Aid look to CLCs for assistance. It is of particular concern where Governments look to shift the burden of Legal Aid recipients to the community legal sector. Doing so ignores the

²⁵ Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (2009) 151.

fundamental differences in the services and philosophies of Legal Aid and community legal services. It also threatens to create injustices on the part of clients, because although CLCs are a good source of early advice and intervention, they lack the resources to properly assist individuals in adversarial proceedings.

59. It is suggested that the increasing unavailability of legal assistance to disadvantaged communities has contributed to the proliferation of self-represented litigants in recent years.²⁶ Many of these self-represented litigants may have successfully avoided court proceedings had they received early and had been given the access to proper legal advice. The rise in self-represented litigants also raises the spectre of potentially 'unjust' outcomes more cases. Whereas the adversarial system generally operates on the assumption that all parties to a dispute are will be represented by skilled professionals,²⁷ most self-represented litigants lack a proper understanding of court rules and the substantive law.
60. Funding constraints not only affect who CLCs are able to provide legal assistance to, but also have the potential to alter the type of legal services CLCs are able to provide. Whilst CLCs are effective in providing early advice to people with legal issues, funding constraints limit the amount of ongoing assistance CLCs are able to provide. Often clients may receive assistance which falls short of the help they need, and that they would otherwise receive if the community legal sector was adequately funded.²⁸ For the same reasons CLCs rarely represent clients in adversarial proceedings, limiting such involvement to certain test cases and instances of extreme need on the part of the client.
61. Faced with the growing number of clients who require individual legal assistance, CLCs are forced to make a choice between the amount of

²⁶ R Hunter, J Giddings and A Chrzanowski, 'Legal Aid and Self-Representation in the Family Court of Australia' (2003) [Available at: http://www.nla.aust.net.au/res/File/PDFs/NLA_selfrep_FCA.pdf].

²⁷ Murray Gleeson AC, *The Rule of Law and the Constitution*, (ABC Boyer Lectures, 2000) 118.

²⁸ Community Law Australia, *Unaffordable and out of Reach: The Problem of Access to the Australian Legal System* (July 2012) 7.

resources they can devote to individual casework, and the amount of resources they can devote to community legal development programs. When faced with an overwhelming and immediate need for individual legal assistance, CLCs may often be forced to forgo the amount of community development work they could otherwise perform. This is despite the fact that community development programs may be more cost-efficient, in that these services can be supplied to a fairly large population for a relatively low cost, and that they may maximise cost avoidance by addressing the root causes of particular legal issues before they have an opportunity to manifest. Curiously, this restriction of the community legal sectors ability to deliver community development services may only serve to exacerbate the number of people who eventually require individualised legal assistance.

62. It should also be notes that the challenges faced by CLCs in the provision of legal services are only further exacerbated in rural and remote communities. Here communities generally have lower incomes, have access to far fewer legal services providers, and are confounded by physical obstacles such as significant geographic distances.²⁹
63. The Society asks the Commission to recommend that the government maintain a strong commitment to the Community Legal Services Program, and to expand the funding to meet the growing demand for their legal services to combat the growing “middle ground” of individuals who are neither eligible for State Legal Aid nor the service provided by the community legal sector.
64. The Society urges the Commission to recognise the distinction between services provided by LACs, and those provided by the community sector, such that CLCs are not treated as ‘replacement services’ which justify cuts to the funding of State Legal Aid.
65. The Society recommends that the Commission investigate the significant public advantage that community legal sector offers by way of cost avoidance.

²⁹ Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice Demand in the Federal Civil Justice System* (2009) 43.

Special funding ought to be allocated to the community legal sector to expand community development programs which aim to address root causes and intervene to prevent legal events occurring, with the potential for substantially reducing strain on the legal system downstream.

Pro bono legal services

How important is pro bono work in facilitating access to justice? How much pro bono work is currently undertaken, by whom and for whom? What areas of law, which groups, or geographic locations is pro bono particularly important for?

66. Pro bono legal work plays an important role in providing access to justice. Legal services provided free of charge, or for a small fee, can fill at least three 'gaps' that may arise in a government policy framework designed to ensure access to justice.
67. First, pro bono legal services can be used to provide legal services to individuals who do not qualify for government funded legal services, but are still unable to pay for quality legal help themselves. In particular, pro bono legal service can play a role in ensuring individuals who do not qualify for Legal Aid have access to legal representation, and that individuals seeking asylum, or who are otherwise progressing through the immigration system, have access to legal assistance in order to present their application in the best possible way.
68. Second, pro bono legal services can provide legal services to individuals or groups in areas that are not covered by Legal Aid, or other government funded legal services. This includes providing advice to individuals in many areas of civil law, including victims' compensation, family law and housing or tenancy disputes, as successfully demonstrated by the partnerships between some commercial law firms and community legal centres. This aspect of pro bono work can also extend to providing advice to charities or non-profit groups who provide a valuable service to the Australian community. For example, tax or corporate structuring advice can be highly valuable to these organisations to

ensure that they are set up in a way that ensures the maximum amount of their time, money and energy is devoted to providing services to those they are established to assist.

69. Third, pro bono legal service can extend to the provision of legal advice and representation where a group or individual needs to access the legal system to protect their rights in respect of controversial or contested areas of the law. This may include a test case challenging a certain piece of legislation, or a class action brought against a corporation who has allegedly wronged a large number of people. It is important that the understanding of pro bono legal work extends to this work, and large private firms with considerable resources and legal skill consider taking on these controversial causes, despite the potential consequences to the firm's bottom line.³⁰ Such cases can often have far reaching consequences for access to justice. Recently, this has been demonstrated in *Rowe v Electoral Commissioner*,³¹ where Mallesons Stephen Jacques acted pro bono in a case that ensured up to 100,000 additional Australian had the right to vote in the 2010 Federal election.³²
70. It is important to note here that legal services provided on a pro bono basis should not be seen as a potential replacement for publically funded access to justice measures. Having full time legal experts, supported by well-funded government programs, will usually be the most suitable way to ensure access to justice. Further, government should not use the existence of pro bono programs to avoid expanding existing government programs to cover these areas. Pro bono legal services should complement, not replace, government assistance to ensure access to justice.

How successful is the National Pro Bono Aspirational Target in encouraging pro bono work?

³⁰ For the importance of the understanding of pro bono work extending beyond 'the form of assistance by lawyers to indigent clients, charitable work for worthy causes, community or public-spirited activities' see, eg, Andrea Durbach, 'Pro Bono: Challenging the Definitions' (2000) 38(9) *Law Society Journal* 64.

³¹ (2010) 243 CLR 1.

³² See 'High Court Upholds GetUp! Case' (ABC News, 6 August 2010). [Available at: <http://www.abc.net.au/news/2010-08-06/high-court-upholds-getup-case/934934>].

What cost effective ways are there to make the provision of pro bono services more attractive? How well do pro bono programs operate, how are they resourced, and are they effectively targeted?

71. The National Pro Bono Aspirational Target (Target) has been successful in bringing the importance of pro bono work to light across the profession. By providing a benchmark to be met, the Target has encouraged efforts to engage in free legal work across the profession. Since 1996, around 20 firms have now established dedicated pro bono legal teams,³³ and since the introduction of the Target, the number of solicitors voluntarily committing to undertake pro bono work has tripled and the amount of pro bono work undertaken has doubled.³⁴
72. However, there is no doubt that more needs to be done to encourage involvement in pro bono legal work by those whose general practice area is elsewhere. Measures should be taken to increase the quantity improve the quality of pro bono work being provided.
73. The key to increasing the quantity of pro bono work rests in redefining the way it is viewed within the profession. Pro bono work should not be seen as a added extra to running a firm or practicing as a lawyer, nor should it be seen as a burden. It should be seen as an intrinsic part of the profession.³⁵ This can be done by:
 - a. tying the capacity to generate profit with a requirement to provide pro bono services where appropriate: Firms seeking a position on the Commonwealth Legal Services Multi-Use List are now required to demonstrate their commitment to pro bono work.³⁶ Similar policies could be adopted across the government and non-government sectors

³³ Michelle Hannon and Elise Ball, 'CSR and Pro Bono Law' (2006) 87 *Reform* 27.

³⁴ Fifth Annual Performance Report on the National Pro Bono Aspirational Target (2012) 3.

³⁵ See Andrea Durbach, 'Pro Bono: Challenging the Definitions' (2000) 38(9) *Law Society Journal* 64.

³⁶ *Legal Services Multi-Use List Application for Inclusion*, Commonwealth Attorney General's Department. [Available at: <http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Conditions%20for%20participation%20and%20guidance%20material%20for%20applicants.pdf>].

to encourage firms to improve their commitment to pro bono services;
and

- b. focusing on a particular social need to demonstrate the effectiveness of services being provided: By encouraging firms and individual practitioners to focus on a particular area of need, it is more likely that the effectiveness of their work will be demonstrated to them, providing encouragement to increase time spent on pro bono work. An effective way this is currently achieved is through partnerships with the community legal sector including with community legal centres, specialist legal services and referral schemes such as the Public Interest Law Clearing House.³⁷ These partnerships allow pro bono providers to develop a relationship with the service provider and its clients, showing first hand the benefits of their work. Policies that provide further encouragement and support for these partnerships would be a cost effective way of increasing the amount of pro bono work currently undertaken.

74. Improving the quality of pro bono work provided by practitioners requires a focus on:
 - a. broadening the knowledge base: For practitioners to provide effective pro bono services, it is necessary for them to develop expertise in the area in which those services are to be provided. Community legal services already provide effective training programs for firms that they partner with, and by focusing efforts on particular areas of social need firms are already providing their staff with the manageable task of extending their knowledge to select areas of law outside their commercial work. Policies that fund and assist community legal services to train pro bono staff would be a cost effective way to improve the delivery of pro bono services, allowing practitioners to provide larger amounts of higher quality legal work; and

³⁷ Michelle Hannon and Elise Ball, 'CSR and Pro Bono Law' (2006) 87 *Reform* 27.

- b. utilizing existing areas of expertise: Commercial firms have extensive access to high quality legal support, such as research staff, precedent data bases and billing and filing systems. These services could be harnessed to assist community legal services and other less resourced providers, and policies should be developed to support this. Further, there should be an acknowledgement that pro bono legal work does not necessitate direct service provision to disadvantaged clients. The example of Salvos Legal and Salvos Legal Humanitarian demonstrates the cost effectiveness of commercial lawyers using their existing experience to generate a profit, which can be directed to supporting others to provide services to clients in areas of social need.

What are the costs and benefits that accrue to legal service providers who provide pro bono services?

75. The benefits of pro bono legal work are self-evident. It allows practitioners to expand their knowledge base, utilize their existing skills in a different setting, feel a sense of purpose in their work and contribute to their community.
76. However, the costs are also apparent. Practitioners participating in firm pro bono scheme can be concerned about the time they spend away from their commercial work and barristers, and sole practitioners or those in smaller practices, sacrifice time that could be devoted to generating income.
77. As stated above, by adopting policies that focus on addressing the quantity and quality of pro bono work, it may be possible to encourage a shift in the profession that sees pro bono become a central part of all practitioners' working life and allow practitioners to provide pro bono services in vastly different ways than are currently available. By doing this, the benefits of pro bono work will be enhanced, and the costs will be minimised.