



May 2014

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

By email: access.justice@pc.gov.au

Dear Madam / Sir,

KINGSFORD

LEGAL CENTRE

Submission on access to justice arrangements inquiry

The Kingsford Legal Centre (**KLC**) appreciates the opportunity to make submissions on your inquiry into access to justice arrangements. Our submission is drawn from the experiences of our clients and staff in dealing with the law and legal system over a period of 30 years. All case studies have been de-identified to protect our clients' confidentiality.

Kingsford Legal Centre

KLC is a community legal centre (**CLC**) and a member organisation of the National Association of Community Legal Centres (**NACLC**).

We provide free advice and casework on a wide range of legal matters to people living, working or studying in the Botany and Randwick local government areas. We also provide a specialist discrimination law advice and representation service throughout NSW. We actively participate in law reform and policy projects as well as community legal education.

Advice and casework

In 2013 we provided advice to 1,811 clients. Of these clients:

- over 11% identified as having no income (170 clients);
- almost 50% identified as having a 'low income' of less than \$40,000pa (553 clients);
- almost 20% identified as having a 'medium income' of between \$40,000pa and \$60,000pa; and
- 10% identified as having a 'high income' of more than \$60,000pa.

We opened 287 cases for clients in 2013. Of the cases we opened:

- 11% was for clients who identified as having no income (33 cases);
- over 65% was for 'low income' clients (191 cases);
- 11% was for 'medium income' clients (33);
- the remaining cases statistics are not well recorded

Collaborative and complementary service provision

KLC has a long history of working in cooperation with other legal service providers. By working to each of our strengths, we are able to provide a full and thorough service with each service providing essential parts of the service.

Operated by the Faculty of Law of The University of New South Wales
F8-003, Kingsford Legal Centre, UNSW 2052 NSW AUSTRALIA

Telephone +61 (2) 9385 9566 • Facsimile +61 (2) 9385 9583 • TTY +61 (2) 9385 9572

Visa cancellation clinic

In 2011 KLC began talking to Legal Aid NSW about the lack of legal services for prisoners who faced the cancellation of their visa. Legal Aid had limited ability to assist these clients and KLC had more clients coming to us with this problem. As a result of these discussions KLC developed a proposal in conjunction with Legal Aid and was funded through the Community Legal Centre and Legal Aid Partnership Program. This program took referrals from Legal Aid and from prisoners directly. The aim of the project was to improve the quality of submissions made before visa cancellations decisions, which would result in less need for Legal Aid in appeals.

Legal Aid lawyers worked with KLC lawyers to develop the program. As a result of the collaboration KLC assisted 67 clients. As a result of KLC's work some clients' visas weren't cancelled. When clients needed further advice about appeals KLC was able to organise this with Legal Aid. At the end of the program KLC and Legal Aid presented training to CLC lawyers about how to work with prisoners in this situation.

Family law early intervention unit outreaches

In early 2013 KLC began discussions with the Legal Aid NSW family law early intervention unit about the need for family law outreaches in the local area. KLC had identified a need for women experiencing domestic violence to have specialist family law assistance and for Aboriginal clients who don't use the family law system as readily as they could.

In response to this, KLC began negotiations with Legal Aid to commence two family law outreaches. Rather than duplicate existing resources, KLC did not want to develop a family law advice clinic as it has no expertise in this area and Legal Aid NSW has substantial expertise. KLC has strong community connections with the Deli Women and Children's Centre and with the local Aboriginal community through our Aboriginal access worker. As a result of these relationships, KLC was able to broker two new family law early intervention outreaches. These outreaches provide much needed services to Aboriginal clients and women experiencing domestic violence, who both face significant barriers accessing the law and legal system.

Responding to regional and local areas of legal need

Employment clinic

It has been well documented that in NSW in particular, there is a lack of employment law services. KLC addresses this gap in legal service provision by operating a specialist employment law and discrimination law service. We work collaboratively on the NSW Legal Assistance Forum in relation to employment law. We have also provided extensive training to CLC lawyers on discrimination and employment law to increase the capacity of other legal centres to undertake this work. We have also played a role in convening a group for CLC lawyers to share knowledge of employment law and are a Centre that other CLC lawyers can call for detailed and expert advice in employment law advice.

Kooloora Community Centre

Kooloora Community Centre is located in an area surrounded by housing public estates. The coordinator of the service has very strong relationships with the local residents, many of whom are elderly and extremely disadvantaged. We invested a lot of time and energy building up a good relationship with the coordinator and local residents.

The coordinator now refers many community members to our service for legal advice and we also provide an outreach legal service at the centre on a fortnightly basis. The success of our outreach has meant that local tenants groups are now approaching for advice about how to run effective meetings.

This relationship has meant that we able to provide accessible legal services and other empowering skills to a vulnerable group of people, many of whom would not have had the confidence approach us before.

Our flexible service provision allows us to meet the urgent and complex needs of our clients, many of whom do not have any other support networks in the community

George

KLC runs a state-wide discrimination service. We helped an Aboriginal man in the far west of NSW who complained about race discrimination. During the time that he had a case with us George was homeless, and was moving between towns in far western NSW. KLC assisted him with all his legal needs during this time – from problems with Housing NSW, issues with access to medical care and one time advice when the town he was in was flooded. CLCs take a holistic approach to clients and are able to deal with multiple issues clients' face. We also referred George to financial counselling and charity assistance. We won his race discrimination complaint. From time to time he calls us when he has a problem and we always take his call.

Sen

KLC acted for Sen who was an elderly client who came to us because he was facing eviction from his public housing. He was elderly and in very poor health. He couldn't read or write and had no family or friends. It emerged that the client had had another person move into his unit and refuse to leave. This younger person was taking his pension money and at times threatening him. Sen did not have enough money to buy food and as a result was hospitalised. KLC worked with Sen for a long time to help him identify that he was being financially exploited. We were able to help him access an Aged Care Assessment Team and get independent help managing his finances. We were able to resolve his housing issues. His health improved when we organised Meals on Wheels for him meaning he had regular meals and money to buy his prescriptions.

Filippo

An elderly vision impaired man who had been discharged from hospital with nowhere to live came to KLC for our help. He had been sleeping on train stations and in parks after he had been excluded by an AVO from his public housing home. A KLC solicitor was able to see the Filippo immediately and worked that day with hospital social workers and the Housing NSW to secure emergency accommodation for him. We were able to secure a new place for the client to live and were able to obtain help from charities to get him a bed and basic furniture. Our solicitor called and wrote to Housing NSW every day to ensure that the Filippo had somewhere to sleep that night.

CLCs are good value for money

Volunteer solicitors

KLC was founded in 1981 and from its beginning relied on volunteer or pro bono solicitors in order to provide advice to the community. KLC has always given high levels of quality, culturally appropriate legal advice. In 2013 we gave over 1800 individual legal advices. KLC spends time and resources on supporting and developing the pool of volunteer solicitors and barristers who donate their time and expertise to KLC. Currently the Centre operates six different advice shifts every fortnight with approximately 60 volunteers giving their time.

In recognition of the commitment and dedication of KLC's volunteer solicitors, two of them separately won the NSW Law and Justice Foundation Justice awards for their service. Each solicitor, David MacMillian and Michael Steinfeld, has volunteered at KLC for over 30 years. This means they know KLC's client groups, the areas of law KLC specialises in and the ways in which we work with students. Not only have they given hundreds of individual legal advices, they have also taught and mentored law students who see first hand the example of solicitors giving their time pro bono.

By relying on highly dedicated and skilled volunteers, CLCs such as KLC can increase the services we provide to disadvantaged clients and communities.

Chapter 5: Understanding and navigating the system

Information request 5.3: The Commission seeks feedback on how best to facilitate effective referrals for legal assistance between organisations responsible for human service delivery, and, where appropriate, greater information sharing across departments and agencies.

We believe it is important to ensure that systems and services are in place to ensure people are referred to appropriate services for assistance to resolve their problem. Failure to provide appropriate referrals can result in people getting stuck on the 'referral roundabout' and cause them to abandon their efforts to seek help.

In our experience, referrals between legal assistance providers are handled efficiently and effectively. For example, we have informal arrangements with Legal Aid and local CLCs to advise clients outside each other's catchment areas where there is a conflict of interest. In our experience LawAccess NSW also provides appropriate referrals to people seeking legal advice. We therefore do not think it is necessary to increase information sharing across departments and agencies.

It is our view that if services want to share information, they should obtain prior informed consent from a person before sharing any of their personal information. People should have the opportunity to control what information is shared, if any, with whom and for what purpose. People should also have opportunities to review information held by agencies and complete, correct and/or update any information held by agencies. Sharing information without prior informed consent may result in people feeling they cannot share information and may mean that problems remain unresolved and escalate.

Recommendation: Any information provided to agencies and departments should only be shared with the prior informed consent of the person who provided the information.

Chapter 6: Information and redress for consumers

Draft recommendation 6.8: The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.

We agree that there is an information asymmetry between lawyers and consumers, particularly disadvantaged consumers, and we agree with the best practice principles put forward by the NSW Law Reform Commission for handling complaints about lawyers.¹ However we disagree with draft recommendation 6.8.

Confidentiality is a fundamental principle of the lawyer-client relationship. It serves to build trust and confidence between lawyers and clients and without it clients may be reluctant to give full and honest instructions, which may result in adverse outcomes for the client. Clients often disclose information about themselves to lawyers that is deeply personal and traumatic, including domestic violence and child sexual abuse. We submit that even if the information obtained were used solely for investigating a lawyer's conduct, many clients would feel very uncomfortable knowing that other people, including investigative bodies, could access their information without their prior informed consent.

If draft recommendation 6.8 were implemented lawyers may be put in the position of having to advise clients that their information might be disclosed if they are investigated. This may put some clients off getting legal advice and their problems may escalate and/or remain unresolved.

Recommendation: The Commission remove draft recommendation 6.8.

¹ PC p 204.

Chapter 7: A responsive legal profession

Draft recommendation 7.1: The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:

- the appropriate role of, and overall balance between, each of the three stages of legal education and training
- the ongoing need for the ‘Priestley 11’ core subjects in law degrees
- the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education
- the relative merits of increased clinical legal education at the university or practical training stages of education
- the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.

KLC, as well as being a CLC, is also part of the Faculty of Law, University of New South Wales (**UNSW**). It delivers a range of clinical legal education courses for the Faculty of Law. Clinical legal education differs from practical legal education because students gain academic credit for courses they study.² While students are given responsibility for cases, or community education or law reform projects, their courses also include specific learning objectives and include a weekly classroom component. Clinical legal education is highly effective as a means for teaching the substantive law, skills and also to develop students’ critical capacity to analyse the legal system, their role as a future lawyer and the place of disadvantaged clients within it.

Clinical legal education is recognised as being a highly effective methodology for teaching law, however it is also an expensive way of teaching law. Due to its effectiveness we submit it should be used in all law schools to ensure good learning outcomes for law students.

Recommendation: Clinical legal education be used in all law schools.

We support a review to examine the three stages of legal education. The use of the ‘Priestley 11’ is outdated and limited in its focus on the content of law. This is instead of, the skills needed by lawyers such as analytic reasoning, ethical understanding and application, dispute resolution mechanisms. It has been well recognised in the USA as well as Australia that law schools should integrate “the teaching of knowledge, skills and values and not treat them as separate subjects addressed in separate courses.”³

Recommendation: All law schools should review the appropriateness of using the ‘Priestley 11’ to teach law students.

² Evans and Others, Best Practices Australian clinical legal education, The final report of the project, Strengthening Australian Legal education by integrating clinical experiences: identifying and supporting effective practices. 2013.

³ Stuckey and Others, Best Practices for Legal Education: A vision and a roadmap.2007.Clinical Legal Education Association.

Information request 7.4: How should money from ‘public purposes’ funds be most efficiently used?

The Legal Aid Commission of NSW (**LAC**) administers the Public Purpose Fund (**PPF**) funding to [36 CLCs](#) in NSW. On 20 December 2012 the former NSW Attorney General [announced](#) new [guidelines and funding principles](#) which prohibit CLCs from using PPF funding for “*lobbying activities, public campaigning and providing legal advice to activists and lobby groups*” on the grounds that funding would be better spent providing direct client services to the most disadvantaged people in the community. We do not agree.

We agree with the Commission that:

- “*Advocacy can... be an efficient way to use limited taxpayer dollars*”⁴; and
- “*Strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities). Advocacy can also be an efficient use of limited resources. It can be an important part of a strategy for maximising the impact of LAC and CLC work*”⁵; and
- “*advocacy should be a core activity of LACs and CLCs.*”⁶

Recommendation: Remove paragraph 3 of the [Legal Assistance Services Funding Principles](#).

Chapter 8: Alternative dispute resolution

Draft recommendation 8.5: Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.

Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.

The teaching of the full range of dispute resolution mechanisms is an essential development in the current law curriculum. UNSW has led curriculum renewal with the development of “Resolving Civil Disputes” which teaches students the importance of the spectrum of civil dispute resolution, including litigation, but not limited to litigation. As the vast majority of civil disputes are resolved through non-litigation methods, it is essential that law curricula teach law students about these.

We submit all law schools should offer similar subjects to their students.

⁴ PC p 609.

⁵ PC p 623.

⁶ PC p 625.

Recommendation: All law schools should develop subjects that teach students about the important of the full spectrum of civil dispute resolution.

We also develop and deliver community legal education (**CLE**) for community workers, which aims to provide training to non-legal professionals in identifying and understanding legal disputes and how to make effective referrals.

Chapter 10: Tribunals

Draft recommendation 10.1: Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

We believe that it is important that tribunals remain as user-friendly and as informal as possible. However we also believe it is important that applications to leave seek to have legal representation should be determined on a case-by-case basis, particularly taking into account the imbalance of power between the parties. There is also often a lot at stake for parties before tribunals, for example tenancy tribunals may be deciding whether or not to terminate a party's residential tenancy agreement.

Zeynup

Zeynup is an elderly Iranian-speaking woman living in public housing for 23 years. She had been a good tenant. However, Housing NSW sought to terminate her tenancy after the Police found a very small quantity of illegal steroids in her adult son's room in her property. We represented Zeynup in her hearing, presenting relevant case law and making legal submissions. Housing NSW was represented by a barrister. Housing NSW's application was dismissed.

If we were denied leave to represent, Zeynup likely would have felt pressured to agree to leave her property and would have struggled to find alternative accommodation. We also felt it was inappropriate for Housing NSW to use public funds to employ a barrister to represent it in what is an informal arena.

While we support the requirement to seek leave to have legal representation in most tribunals, overly strict and narrow guidelines determining leave to have legal representation may result in unfair or unjust outcomes for socioeconomically disadvantaged clients. It is very difficult for people who do not read or write English fluently to prepare their own case at a Tribunal, even with the assistance of an interpreter at Tribunal appearances. It is also very difficult for people who have a mental illness, intellectual disability or brain injury to prepare and present their own case at a Tribunal. The risk of increased formality at tribunals, which may be a consequence of having legal representation, should not come at the cost of justice and fairness to the parties.

We also believe that the frequency with which parties are granted leave to have legal representation does not necessarily reflect whether or not tribunals are operating fairly. For example increased approved legal representation applications may mean that matters are being determined more efficiently, with better outcomes for the parties.

Recommendation: Tribunals should continue to consider applications for leave to have legal representation on a case-by-case basis, particularly taking into account the (im)balance of power between the parties.

Chapter 13: Costs awards

Information request 13.1: The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to:

- the legal professional providing pro bono representation;
- the non-for-profit body providing or coordinating the pro bono service;
- a general fund to support pro bono services.

The Commission is interested in any other options that could be examined.

We agree with the Commission that people considering litigation, particularly disadvantaged people, are more concerned about possible losses than possible gains and often decide not to pursue meritorious claims to avoid the risk of having to pay the unknown costs of the other party.⁷ While reforming the structure of the costs system may improve access to justice for some potential litigants by providing greater certainty regarding costs they may have to pay if they lose, we do not believe that reforming the structure of costs awards will improve access justice for disadvantaged people. Disadvantaged people would still be put off litigating if they think they might have to pay the other party's costs if they lose.

The current federal framework for discrimination is complex and creates significant barriers to access to justice. In our experience, the most significant barrier for people experiencing discrimination is the risk of adverse costs orders in the Federal Court system. Federal anti-discrimination laws reflect Australia's international human rights obligations to protect people from discrimination. It is widely understood that discrimination and vilification can cause serious psychological harm. In *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34, Commissioner Webster was satisfied that the applicant:

"suffered a severe major depressive disorder with significant pain and suffering and loss of enjoyment of life as the result of racial abuse. He has suffered constant fatigue, has been suicidal, has problems sleeping with recurrent nightmares of racial abuse. He suffers sweating, heart palpitations, fear of going outside, he is now withdrawn socially, he is unable to concentrate, and as a result of the medication he is using he suffers impotence. Mr Rugema's confidence and general feelings of self worth have been diminished."

Stephan Kerkyasharian, President of the Anti-Discrimination Board of NSW, told the Committee of the NSW parliamentary inquiry into racial vilification laws that race-hate speech can cause psychological and social harm:

*"it is important to recognise that vilification has the potential to cause real harm. It is widely accepted that speech promoting prejudice and hatred can cause significant psychological and social harm to individuals from targeted groups. Indeed, the person who lodges a complaint is not the only person affected by the vilification, because hate speech does not just have one victim."*⁸

According to the 2011 Lowitja survey about racism, 50% of all participants and 65% of participants exposed to 12 or more incidents of racism reported experiencing high or very high levels of psychological distress.⁹ According to the 2008 NATSISS, Aboriginal and Torres Strait Islander people who had experienced discrimination were more likely than

⁷ PC Draft report p 406.

⁸ NSW Legislative Council, Standing Committee on Law and Justice, above n 8, at [2.7].

⁹ Lowitja, above n 8.

those who had not experienced discrimination to report high or very high levels of psychological distress (44% compared to 26%).¹⁰

Given the individual and social harm discrimination and vilification causes, it is important that victims have access to courts to remedy the harm caused. Litigation may also serve to prevent further discrimination and vilification in the community.

Not all the divisions of the federal court system require the losing party to pay the winning party's costs. Costs are not recoverable in proceedings arising under the *Fair Work Act 2009 (Cth)* (FWA) if:

- (a) *the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or*
- (b) *the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or*
- (c) *the court is satisfied that the party unreasonably refused to participate in a matter before the FWC and the matter arose from the same facts as the proceedings.*¹¹

For the purpose of discrimination complaints, the Federal Court and Federal Magistrates Court should become a no-costs jurisdiction. An exemption should allow for costs in vexatious or frivolous proceedings, or for unreasonable conduct during proceedings, in line with state and territory discrimination tribunals. A no-costs jurisdiction would also ensure consistency with adverse action claims under the FWA. This is significant as many discrimination claims relate to employment matters, and so could be brought under the FWA. Therefore it is important to ensure that in relation to costs, the legislative schemes are consistent.

A no-costs jurisdiction would also provide certainty as to costs for risk adverse litigants and encourage respondents to settle so to minimise their costs. The majority of disadvantaged clients cannot afford to litigate and rely on legal aid commissions, CLCs or pro bono schemes to represent them in discrimination proceedings. As litigants would not incur costs in these circumstances, there is no need to indemnify them if they win.

Recommendation: The Federal Court and the Federal Magistrates Court should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings.

In circumstances where costs are awarded to pro bono parties, we believe that costs should be awarded to the not-for-profit body providing or coordinating the pro bono service. This would provide another stream of funding for these services, which are typically under-resourced and heavily reliant on government funding. Awarding costs to not-for-profits would avoid the costs of setting up and administering a separate fund to support pro bono services.

While pro bono services are important, they are not the main way of providing access to justice and providing for costs awards to pro bono services will not necessarily increase pro bono services.

Recommendation: Costs awarded to pro bono parties should be awarded to the not-for-profit body providing or coordinating the pro bono service.

Chapter 16: Court and tribunal fees

¹⁰ ABS, above n 7.

¹¹ *Fair Work Act 2009 (Cth)* section 570.

Information request 16.2: The Commission invites comment on the relative merits and costs of automatically exempting parties from paying court fees based on:

- the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card;
- passing an asset test in addition to possessing a concession or health card;
- the receipt of a full rate government pension or allowance.

The Commission also seeks feedback on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.

We believe that anyone in possession of a Commonwealth concession or health care card should be automatically exempt from paying court fees. We acknowledge that not all Commonwealth concession or health card holders are subject to an asset test. However, they are assessed as having a low income and will likely be liable to pay other significant costs associated with litigation.

Recommendation: People in possession of a Commonwealth concession or health care card should be automatically exempt from paying court fees.

We believe that partial fee relief would increase access to civil courts for low to medium income earners. We support a sliding scale of fees based on the litigant's income with the option of postponing the payment of fees until the matter has been finalised. The percentage of the full fee each income bracket should pay would depend on what the amount of the court fee.

Recommendation: Courts should implement partial fee relief in the form of a sliding scale of fees based on the litigants' income. Litigants should have the option of postponing the payment of court fees until their matter is finalised.

Draft recommendation 16.4: The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.

Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible party is successful in recovering costs or damages in a case.

Fee guidelines in courts and tribunals should also grant automatic fee relief to:

- parties represented by a state or territory legal aid commission
- clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.

Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.

We agree that the Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for waiver, reduction or postponement of fees. We believe that the criteria should be consistent across jurisdictions.

We agree that parties represented by a state or territory legal aid commission, CLCs and pro bono scheme should be granted automatic fee relief. Firstly, most CLCs do not have the administrative and technological resources to administer strict means and asset testing. Secondly, CLCs have traditionally “filled the gaps” in situations where legal aid is not available and private legal representation is not possible. While CLCs do not have formal financial hardship criteria, CLCs generally only provide representation in litigation to low income clients, who without our help, would not be able to pursue litigation and would suffer a significant injustice as a result and/or there is a public interest element to clients’ case. Applying for a fee waiver in these circumstances can be very difficult for clients and time consuming for CLCs. Granting automatic fee relief to litigants represented by CLCs and pro bono schemes would improve access to justice for clients who do not meet the strict eligibility requirements of legal aid commissions, but who would still experience significant hardship paying a court fee.

Alternatively, clients represented by CLCs and pro bono schemes should at least be automatically entitled to postpone the determination of their court fee until the matter has been finalised. A sliding scale of fees based on the litigant’s income could be applied at the conclusion of the matter, if they are awarded compensation.

Recommendation: Fee guidelines in courts and tribunals should grant automatic fee relief to clients of approved community legal centres and pro bono schemes.

Chapter 21: Reforming legal assistance services

Draft recommendation 21.1: Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

We support the Commission’s draft recommendation to manage funding for criminal law matters separately from the funding for civil law matters. We submit that any funding for civil law matters, should be in addition to, not drawn from, funding for criminal law matters.

Recommendation: Funding for civil law matters should be in addition to funding for criminal law matters.

Draft recommendation 21.3: The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.

We disagree with draft recommendation 21.3. LACs have to have eligibility criteria that apply to all people across NSW whereas CLCs can assist people who are disadvantaged but do not meet LAC eligibility criteria. If eligibility criteria were aligned, unless LAC criteria were significantly broadened, some disadvantaged people would miss out on assistance. CLCs can also target their casework to the needs of their local community. For example a CLC may do housing casework in areas with a high concentration of public housing tenants or debt casework in areas with high rates of mortgage defaults, bankruptcy and/or credit card debt.

Requiring CLCs to apply formal eligibility criteria for the provision of our services would limit our ability to respond quickly and appropriately to local community needs. It would also limit our ability to consider the unique circumstances of each client, which is important in

determining whether they are able to pursue and achieve just outcomes. See the case studies above as examples of the ways in which KLC has responded to community need.

Recommendation: The Commission remove draft recommendation 21.3.

Information request 21.3: The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.

Draft recommendation 21.4: The Commonwealth Government should:

- discontinue the current historically-based Community Legal Services Program (CLSP) funding model;
- employ the same model used to allocate legal aid commissions funds to allocate funding for the CLSP to state and territory jurisdictions;
- divert the Commonwealth's CLSP funding contribution into the National Partnership Agreement on Legal Assistance Services and require state and territory governments to transparently allocate CLSP funds to identified areas of 'highest need' within their jurisdictions. Measures of need should be based on regular and systematic analyses in conjunction with consultation at the local level.

Draft recommendation 21.5: The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.

KLC believes it is important to address the overall inequity in relation to legal services and supports NACLC's position in relation to any future funding model. We would like to make the following comments on the 'historic' funding of CLCs.

'Historic' funding of CLCs

KLC was established in 1981 and is one of the older CLCs in NSW. While we recognise that the current the CLSP funding model could address legal need differently, we would like to stress the importance of maintaining stable funding for CLCs so that they can work effectively with their local communities and flourish. It is KLC's very longevity and history that we think makes it effective in terms of our work. We have been around long enough to see other smaller CLCs struggle without effective long term funding. In order to get maximum productivity from a CLC and achieve access to justice for clients, a stable and predictable base of core funding must be maintained.

The Commission notes the relative effectiveness of LAC's compared to CLC's based on caseloads. In part, this is due to the administrative and other burden carried by CLC lawyers. In our experience, the longer the CLC has been working in an area the more efficient processes and procedures become and the institutional knowledge of the CLC can be built on. KLC runs efficiently in part because we have procedures honed and refined over years of service delivery. Our work is also properly administratively resourced and we have maintained areas of expertise and core focus. In times of unpredictable funding, most CLCs are not able to do this and must seek new ways of keeping the door to the CLC open. This inevitably leads to CLCs being stretched thin in implementing new programs. This is problematic when the funding obtained is not ongoing. The CLC may become expert and

efficient at the end of a funding cycle, which is not then renewed, sparking another search for more funding.

We agree that CLCs should be responsive to community legal need but in our experience the CLC model of service delivery is incredibly responsive to the community in which it works (see case studies above) but in order for this to work effectively CLCs must have core ongoing funding which allows for proper engagement with the local community and building of local knowledge and expertise.

Responding to legal need

CLCs have improved access to justice for some of the most vulnerable, disadvantaged and marginalised people in the community by developing strong relationships with local communities. The value of these relationships should not be underestimated. Building trust and relationships with people and services in communities takes time and a lot investment and is key to providing accessible legal services to the most vulnerable people. See the case studies discussed above for examples of our strong community relationships, which have resulted in improved access to justice for disadvantaged clients.

We provide accessible, flexible and responsive services in communities, which are tailored to the unique needs of local communities. This flexibility has allowed us to respond quickly to community needs and change and adapt our services to reflect changing community needs.

While ABS data and other forms of data can provide some indication of the legal needs of communities it does not have the ability to provide a nuanced assessment people's circumstances and their ability to access justice. CLCs, working in and with local communities are in the best position to assess and address their unique 'legal needs' and should continue to be funded to do so.

Competitive tendering would undermine effective collaborations between CLCs and LACs

Asian women at work project

In 2012 KLC and Legal Aid NSW as well as the community organisation, Asian Women at work ran a joint community education project. It included 6 workshops in Mandarin and Vietnamese for women in low skilled and low paid jobs about their rights at work. KLC and Legal Aid used a case study mechanism, based on the problems which women talked about, to develop resources for these communities. Without KLC's key relationships with the community, and specifically the organisation Asian Women at Work, this project could not have developed or achieved the results it did. Resources in community languages have now been developed which continue to educate this highly disadvantaged group of workers.

Competitive tendering would undermine other initiatives, which have enhanced collaborative service delivery.

New South Wales Legal Assistance Forums

Another success area of the provision of legal assistance services is in the development of Legal Assistance forums. In NSW this is the New South Wales Legal Assistance Forum. This relies on cooperative and collaborative relationships between legal assistance providers such as the Legal Aid commission, the Aboriginal Legal Service and Community legal Centres. They also involve government agencies responsible for the particular area of focus. To introduce competitive tendering for services would undermine many of the collaborative approaches taken between service providers which have enhanced service provision.

We believe that radical changes in the ways CLCs are funded may result in:

- the breakdown of strong relationships with vulnerable communities, community service providers and volunteers;
- a loss of the nuanced understanding of legal needs of local communities;
- huge administrative burdens setting up new services identified by data as areas of high legal need;
- reduced legal service provision while new relationships are built and local community needs are understood by the legal service providers.

We submit that these risks should be carefully considered before any significant changes are made to the current funding arrangements for CLCs.

Recommendation: The Commission should adopt NACLC’s position on future funding models for CLCs.

Chapter 23: Pro bono services

Draft recommendation 23.1: Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis. Further, those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland.

- For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the last three years (without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.

Lawyers volunteering at CLCs have the benefit of being covered by the professional indemnity insurance of that CLC. However, volunteer lawyers are required to hold a practising certificate before they can provide legal advice at a CLC as a condition of the CLC’s membership in the professional indemnity insurance scheme.

The skills and knowledge of retired and career-break solicitors are an invaluable resource to community legal centres. A survey conducted by the National Pro Bono Resource Centre in 2009 found that 9 of the 43 CLCs that responded to their survey reported having existing retired volunteer lawyers, whilst 12 of the 43 CLCs reported having existing career-break volunteer lawyers.¹² Consultations between CLCs and retired and career-break lawyers indicate that the cost of practising certificates presents an obstacle to such lawyers providing pro bono legal assistance in CLCs.¹³

KLC supports the provision of free practising certificates to solicitors involved in pro bono and volunteer work and who would not otherwise require a practising certificate. KLC has had many pro bono solicitors who are either retired or on maternity leave and keen to volunteer on an evening advice clinic. Some of our volunteer solicitors pay for their practising

¹² National Pro Bono Resource Centre, *Engaging Retired and Career-Break Lawyers in Pro Bono* (February 2010), at 23.

¹³ *Ibid* at 24.

certificates for the sole purpose of volunteering at KLC. It is clearly unfair to require these solicitors to pay for their practising certificate.

Recommendation: The Commission should adopt draft recommendation 23.1.

Please feel free to contact us should you have any questions about this submission.

Yours faithfully,
KINGSFORD LEGAL CENTRE

Anna Cody
Director

Kellie McDonald
Solicitor