

**QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE
INCORPORATED**



**RESPONSE
TO THE
PRODUCTIVITY COMMISSION'S DRAFT REPORT INTO
*Access to Justice Arrangements***

21 MAY 2013

Prepared by the Queensland Public Interest Law Clearing House Incorporated
PO Box 3631
SOUTH BRISBANE BC QLD 4101
T: 07 3846 6317
F: 07 3846 6311
E: admin@gpilch.org.au
W: www.gpilch.org.au

We thank the following volunteer lawyers from QPILCH member law firms for their great assistance in the preparation of this paper: Ashurst (Joel Moss); King&Wood Mallesons (Hannah Lalo, Evelyn Peter); McCullough Robertson (Richard Hundt) and MinterEllison (Robert Reed and Katie Clark).

QPILCH staff members Andrea de Smidt, Catherine Hartley, Iain McCowie, Dan Nipperess, Elizabeth Pendlebury Sue Garlick and Tony Woodyatt and Michael Carey also prepared sections of this submission.

About QPILCH

QPILCH is an independent, not-for-profit incorporated association bringing together private law firms, barristers, law schools, legal professional associations, corporate legal units and government legal units to provide free and low cost legal services to people who cannot afford private legal assistance or obtain legal aid. QPILCH coordinates the following services:

- The **Public Interest Referral Service** facilitates legal referrals to member law firms and barristers for free legal assistance in public interest civil law cases.
- The **QLS Pro Bono Scheme** and **Bar Pro Bono Scheme** facilitate legal referrals to participating law firms and barristers for legal assistance in eligible civil law cases.
- The **Homeless Persons' Legal Clinic** (HPLC) provides free legal advice and assistance to people experiencing homelessness or at risk of homelessness.
- The **Refugee Civil Law Clinic** provides free legal advice and assistance on matters other than immigration law to refugees and asylum seekers experiencing financial hardship.
- The **Administrative Law Clinic** provides legal advice and extended minor assistance in administrative law matters.
- The **Self Representation Service** (SRS) provides free, confidential and impartial legal advice to eligible applicants without legal representation in the civil trial jurisdictions of the Brisbane Supreme and District Courts, the Queensland Court of Appeal and the Queensland Civil and Administrative Tribunal (QCAT).
- Mental Health Law Practice** provides civil law assistance to people experiencing mental illness and advocacy to review Involuntary Treatment Orders before the Mental Health Review Tribunal.

For more information about QPILCH services, please see the QPILCH website at www.gpilch.org.au under Services.

QPILCH was established in June 2001 as an initiative of the legal profession and commenced services in January 2002.

QPILCH is a member of the *Queensland Association of Independent Legal Services*, affiliated with the *National Association of Community Legal Centres*, and is a member of the PILCH network.

Chapter 1 – Introduction and Summary

This submission follows the structure of the draft report. We attempt to address some of the specific questions and further information requests. Given the time and resources available to prepare the submission, QPILCH has been unable to examine all the issues raised, even issues with which we have some experience.

QPILCH commends the fine work of the Productivity Commission in bringing this enormous undertaking together in less than 12 months.

As a general comment, in QPILCH's view, overwhelmingly, the people who work in the justice system work with compassion and dedication to advance the ideals expressed in Chapter 1. All stakeholders, not just 'courts and governments', have been working for decades to improve the ability of more Australians to access justice 'by improving the capacity and capability of the justice system'.

The Commission again notes that many inquiries have been established to improve capacity, but 'concerns remain'. QPILCH reiterates the many inquiries into the justice system that have preceded this one have produced recommendations that went unimplemented. Looking back will help to identify the origin of problems and the reasons why they have not been previously addressed. Many of the issues raised in this inquiry are far from new.

QPILCH shares the Commission's view that available taxpayer funds must be used to best effect to maximise community wellbeing. The primary question for the Commission is whether its systemic recommendations will be implemented by governments and will improve community wellbeing to address concerns within its terms of reference - 'to promote access to justice with cost constraints'? We think that efficiencies can be gained but this improvement will depend on additional, rather than less government funding.

Our submission deals with the individual issues raised by the Commission and groups our comments around the chapters and draft recommendations that the Commission makes, but this section seeks to examine the overall portrait.

It appears to QPILCH that an overall theme of the Commission is to increase competition in the system as the basis for generating improvements and savings - competition it assumes will generate efficiencies in the legal services. It is our view that while not an acknowledged policy, some form of competition has been a feature of the free service delivery sector and a reason for some problems in the system. A competition-based approach in the legal assistance sector would be in our view strongly at odds with recent attempts to improve the system through greater cooperation and coordination, a long strived for goal.

It is incumbent on the Commission in our view to demonstrate that should its approach be adopted, it will produce the desired results. In our view, a more competitive approach will not achieve the desired results, at least in relation to free legal services. In our experience, it is only recent collaborative processes that are generating improvements to access and service delivery, but these efforts are constrained by the current policy framework. The proposed policy shift may be counter-productive.

In our view the current policy framework ties the hands of service providers and the system is characterised by:

- resourcing that is sporadic and uneven;
- poor coordination resulting in the inability of services to capitalise on best practice and the sharing of ideas;
- government micro-management and imposition of stifling red tape.

In contrast, the essence of QPILCH's submission and this response is that much greater returns will be gained through:

- better targeted and transparent government funding that increases over time in measured and structured ways;
- project funding;
- fewer rather than more intense restrictions on service providers within broader policy and priority parameters;
- increased and resourced cooperation, collaboration and coordination through mechanisms that involve all relevant stakeholders;
- better communication between government, the courts and service providers;
- better communication with users that draws on their insights of how the system and its parts actually operate; and
- a system that capitalises on the strengths of each participant in the system.

It is more than money building institutions and systems that deliver access to fair resolutions for all members of the community is a complex task. It needs to consider:

- The structures and institutions used to deliver and administer decisions;
- The nature and accessibility of the rules themselves; and
- Access to proper support and professional services to help navigate these rules and institutions.

We urge the Commission to make recommendations that are implementable, not just relying on government to do so, but also trusting stakeholders to participate in implementing solutions.

It is important to inform the Commission of the difficulties that smaller, but nonetheless active participants in the system have in making a more detailed and meaningful contribution in the time given for public comment. Written submissions generally fail to communicate the nuances of the system that are crucial to understanding it. QPILCH hopes to be able to participate in the public hearings in Brisbane on 18 June 2014 in order to more finely focus the views expressed in this paper.

Chapter 3 – How accessible is the civil justice system?

QPILCH supports the key points made in Chapter 3. However, we note that the Commission's analysis of the financial costs of resolving civil disputes, and in particular whether legal costs have increased over time, seems to have been constrained by a lack of available and comparable data. This is a reoccurring theme in this policy area. A lack of reliable and comparable statistics makes sensible comparisons of the operation of the sector extremely difficult.

Chapter 4 – A policy framework

QPILCH agrees with the many points and findings by the Commission in this chapter.

In the absence of requests for information or specific recommendations, we make several comments and urge further consideration by the Commission.

4.2 Civil Justice and the role of Government

Review of laws

The Commission acknowledges the role of government in making laws that establish the infrastructure of justice, regulate the legal services market and fund dispute resolution.

The Commission does not however address the issue of the substantive laws and procedural rules that apply to these institutional arrangements and to everyday life.

These laws and rules are complex and confusing for most citizens, let alone lawyers. If people are to navigate the system and enforce their legal rights, the laws and the dispute resolution procedures need to be understandable. They need to be written in plain English and they need to be drafted with input from people to whom they apply. (See The Honourable Wayne Martin AC, Notre Dame University Eminent Speakers' Series, 26 February 2014, p19-20)

QPILCH recommendation

QPILCH proposes that the Commission recommend the establishment of a review of legislation, similar to the UK Parliamentary Counsel's Office "good law initiative" with the aim of simplifying legislative language and developing new ways to lay out legislation so that it is easier for the public to follow and understand.

QPILCH recommendation

We urge the Commission to recommend that State Governments, courts and tribunals be encouraged to review their laws and rules with input from users (lawyers and members of the public) so that laws, rules and procedures are accessible and comprehensible.

Government as a partner

Governments frequently talk about partnering with service providers but rarely know how to work in partnership or cooperatively, particularly with community based services.

In Queensland, representatives of the Commonwealth and Queensland Governments participate in QLAF and this participation is having a profound effect on the coordination of services and the development of sector-wide priorities and initiatives. However, this collaboration has just started, and it is important that it not only continue but improve. QLAF activities are supported by part-time assistance provided by LAQ staff members. Some other jurisdictions have been able to secure funds for dedicated secretariat support.

Governments do not usually consult with service providers in developing policies and setting priorities for service provision. While it is clear that the responsibility for allocation of public funding lies with government, many decisions are taken without consultation resulting in the unequal distribution of resources (the criticism of service concentration in cities for example in the draft report is not the result of the services, but the failure of government to take the longer view).

In adopting an approach in favour of competition, the hard years of seeking to foster and develop partnerships and cooperation will be lost. In our view, this will be a backward step. Competition

between CLCs and between LACs and CLCs, caused by non-transparent funding policies, has resulted in duplication of services, waste and suspensions, that have only recently been overcome.

QPILCH recommendation

We urge the Commission to recommend that cooperative mechanisms be properly resourced to promote collaboration and coordination.

Government as primary funder

What governments do best is fund services for people who have no chance of accessing the system. While the Commission is looking at other funding models, it is unlikely that government's essential role will change for some time.

But part of the reason why peak bodies like the Law Council of Australia are frequently calling for an injection of significant funding is because there has never been a consistent and measured approach to funding, a means to easily connect consumer needs with services or a way to promote innovation and best practice in meeting new needs.

For this reason, later in the paper, we support the use of a set of objective and balanced criteria, such as that currently used to fund LAC's as a basis for regularly reviewing and increasing the funding available to the CLC sector.

What governments do badly

In the worthy cause of promoting the best use of taxpayers funds, governments micro-manage service providers, particularly community based ones. However, the red tape employed in the name of accountability effectively wastes funds and diverts providers from service delivery.

Community legal centres, for example, while under constant pressure to improve frontline services to meet increasing demand, are required to spend considerable time and resources meeting excessive accountability and reporting requirements. The regulatory burden on CLCs is disproportionate to the capacity of CLCs to comply and of regulators to effectively scrutinise the mass of information, statistics and accounting supplied.

The reporting obligations are unnecessarily duplicative, complex and do not promote greater accountability. In our view, the system can be streamlined to promote the dual purpose of reducing red tape, improving accountability and freeing up time for service provision.

This involves an acceptance that CLCs are independent legal entities with active and professional management committees committed to the efficient running of the organisation and the provision of high quality services. CLCs now have a highly sophisticated accreditation scheme and have many internal monitoring procedures. However, government is constantly looking over the shoulder of the CLC committee, often stifling innovation and enterprise.

The Commission has neglected to consider this important issue in the draft report.

QPILCH recommendation

Recognising the need for full accountability, we recommended that the Commission either reviews the manner and level of accountability or recommends a full open review be conducted by government with service input with a view to cutting unnecessary red tape for publicly funded legal assistance services.

4.3 Promoting efficiency and effectiveness

State and Federal Governments of all political colours continually assert that access to justice is an imperative for the proper functioning of a society. In the area of access to justice, especially as it relates to Community Legal Centres, there is an obsession for policy makers to consider everything through the prism of 'market failure'.

A key challenge for the CLC sector and the justice system as a whole is the limitations that a pure 'market failure' analysis has when analysing a complex and evolving system like the justice and dispute resolution system. CLCs and Legal Aid Commissions clearly do operate in areas of at best, market asymmetry, and at worst market failure - where individuals and groups cannot access the services they require at anything approaching a price they can afford.

There is no doubt that market based analysis can and will deliver significant and important innovations in the way legal services are provided – where there is already a commercial market for the services, such as personal injuries, insurance, banking and finance and criminal law.

The Commission highlights that where there is no commercial market and no viable means of having one operate – for example servicing homeless clients, victims of domestic violence, people unable to afford legal services such as the majority of self-represented litigants you simply cannot make a market for these services. In these circumstances using market based analytical tools will only ever solve a small portion of the problems.

Any market, especially the market for legal services, is heavily influenced by a range of social, political and legal factors along with the behaviour of key institutions. Markets facilitate the development of new kinds of products and services and, although they can arise spontaneously, they often require the support of government to develop and work effectively.

In QPILCHs view we need to see governments involved as key actors in this system, not to prevent a simple narrowly defined 'market failure' but to prevent wider system failure. People are not entitled to the outcome they seek in civil dispute processes but they are entitled to an argument. They must be able to access the information, support and advice they need to resolve their disputes in a fair way. We can build a more vibrant society if we are willing to accept the challenge of continually improving our civil dispute resolution processes and this requires a more nuanced view of the system.

Government needs to see its role as facilitator of greater innovation in the way the entire system operates – not just in the way it funds particular parts of it. What sorts of behaviours and incentives should we be encouraging in the community legal sector and how do these behaviours contribute to the overall goal of maintaining a system of justice that services the community?

From QPILCH's perspective the goal of funding in this area of legal services should be, at least in part, designed to generate innovation and collaboration in the way services are offered and delivered. The current funding system penalises organisations and CLCs for thinking in this way.

Innovation is said to come from "freedom within bounds". If freedom is fully constrained, innovation will be stifled. QPILCH is lucky to have a degree of freedom that enables innovation. All service providers should have this freedom.

Innovation policy and its application to justice services

Over the past decade there has been significant focus on the policy settings and structures which make up the 'innovation system'. Traditionally the 'innovation system' incorporates:

- Business innovation activities;
- Pure research and development activity;
- Academic and higher education research;
- Directly funded scientific research through institutions such as the CSIRO.

The policy work has been focused on the building and putting in place policy frameworks that encourage 'innovation' across our economy. In our view many of the principles that have been applied in the area of innovation policy can and should be applied to the legal system, especially the CLC sector. Central to this is the idea that legal services and access to justice exists within a complex and ever-changing web of organisations and institutions. This view of the area as a 'complex evolutionary system' is a much more realistic assessment than the simple market based analysis that is routinely set out by the leading policy departments.

In the 2013 Innovation and Industry statement the Commonwealth Government argued that:

"Innovation is increasingly a collaborative pursuit that runs across firms, regions and sectors. Successful innovation occurs through an 'innovation system', linking together the ideas, technology, finance and production networks needed to successfully develop new ideas and methods and then bring them to scale in a particular industry sector" (A Plan for Australian Jobs: The Australian Government's Industry and Innovation Statement Pg. 13)

There is in our view clear application for this kind of thinking within the access to justice legal policy framework.

In another context the Productivity Commission itself has argued that further rises in productivity may not simply be brought about through an increase in the application of market discipline. In a paper talking about increases to Australian productivity the PC argued:

"The stimulus of intensified competition and the gains of flexible markets remain, but further productivity improvement is now in the more difficult terrain of improving human capital and innovation" (Productivity Commission 2009)

Whilst this comment was made by the Commission about economy wide productivity growth in our view this applies to the current situation in the market for legal services.

QPILCH recommendation

We ask that the Commission consider making recommendations which place the focus on funding within this sector within a framework that along with service centred funding prioritises innovation and collaboration above the market failure approaches which have dominated the sector for many years.

CHAPTER 5 - Understanding and navigating the system

Information Request 5.1

The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

The Legal Health Check is an extremely efficient and effective means of identifying legal need.

The Legal Health Check (**LHC**) developed by the QPILCH Homeless Persons' Legal Clinic (**HPLC**) was trialled with a group of our most vulnerable clients – residents of Roma House whose homelessness and behaviours were complex, entrenched, and often excluded them from other homelessness services. People experiencing homelessness have been subsequently identified by the Law Survey Australia as having the most unaddressed legal problems (Coumarelos and People p23)

QPILCH developed the LHC because our experience has been that vulnerable clients have multiple but unrecognised legal issues which cannot be addressed by community legal education or self-help responses.

As well as data already provided in the QPILCH submission (pages 28 and 30) about the use of the LHC at Roma House, the LHC has proved an effective resource to encourage identification of multiple legal issues in other vulnerable groups such as refugees and people with a mental illness through QPILCH's Refugee Civil Law Clinic and Mental Health Civil Law Clinic. QPILCH has applied the LHC in both clinics with good effect. Both newly arrived immigrants and people experiencing mental health issues do not always successfully identify the full extent of their legal needs. For each cohort that QPILCH uses a LHC with, the content varies according to the typical legal needs identified in that group.

Two QPILCH pilot projects indicate the likely effectiveness of the LHC to other vulnerable groups.

Outreach Legal Clinic

People at risk of homelessness on Brisbane's north side who are supported at one of our partner community agencies – a women's' refuge, a support program for young parents (19 years old and under), a tenancy support service and a migrant settlement agency can complete a LHC with their worker and then access a pro bono casework lawyer together, by phone, for assistance with any issues identified.

In the first 6 months of the pilot, 16 clients were assisted with 50 legal matters (an average of 3.1 legal matters each), ranging from debts, fines, tenancy, family law, guardianship and victims compensation.

LegalPod

Young people transitioning from the child protection system in Queensland can now access a small team (the Pod) of lawyers for the duration of their transition to independence – typically four years. The lawyers complete a LHC with the young person when they first connect to the LegalPod service and will revisit the LHC at least every 6 months with the client, targeting issues that are likely barriers to sustaining housing and employment.

In the first month of operation, LegalPod has referred 11 young people to pro bono legal services to receive a comprehensive and personalised service.

In QPILCH's experience the effectiveness of the LHC is directly related to on-going training and resourcing of community workers. We consider this issue in more detail below.

Legal assistance services around Australia have identified their vulnerable clients as potential beneficiaries of a LHC approach. QPILCH is regularly asked to support other services to establish LHC processes. These services include medico-legal partnerships, specialist and generalist community legal centres and the Department of Human Services.

The LHC approach is an efficient use of collective resources when:

- It is designed to target the relevant legal issues of the client group – especially issues that are barriers to housing, independence or employment; and
- It targets and supports community workers. Many community workers do not have adequate knowledge of the legal needs of their vulnerable clients. Building effective tools to help them identify the issues with a client, or a schema to prioritise these needs with the non-legal needs of the client are very effective support tools for community workers. Once these skills are developed they benefit all the clients supported by that worker. The HPLC has been able to develop new legal clinics on the back of skilled and trained workers moving to a new location. Community workers also often move roles within an organisation (for example, from supporting homeless people to supporting prisoners) and bring their understanding of the relevance of legal need to the new client demographic.
- It is embedded in the existing practices and assessment tools of the host community agency. For instance, at the 139 Club, a homeless drop-in service with limited casework resources, the workers identified just two questions from the LHC – one about fines and one about court attendance, which they now verbally ask all clients requesting emergency supplies (such as tinned food, clothes and toiletries) from their resources room. These clients are then encouraged to attend the HPLC (visiting the 139 Club weekly) for these matters.

Questions about debt and legal issues were embedded in the Vulnerability Index recently administered to homeless people as part of Micah Projects 500 Lives/500 Homes campaign and the HPLC is now working with Micah to connect participants to an HPLC.

A tenancy support service on Brisbane's north side identified client debt as a barrier to their advocacy to sustain their client's housing, and administers a LHC accordingly.

In the LHC training videos, Roma House Manager, Kelly Sciacca notes:

...when workers are having initial talks with residents around their journey and their experiences, often questions that relate directly to the Legal Health Check come up.

Regular training and support enables workers (especially in the context of the high staff turnover characteristic of this sector) to use the LHC in the most effective way.

The capacity of workers to embed and maintain these processes is dependent on QPILCH providing regular training and support. The LHC training videos for community workers are used in this context. (see www.qpilch.org.au/lhc). A number of service providers make it a critical part of the induction of new staff:

It's part of our induction as well when new workers come in. We found that the advice and information HPLC has regularly provided very useful to keep up the momentum of the clinics here at Roma House. (Kelly Sciacca)

The case worker not only completes some or all of the LHC prior to the interview with the lawyers, but continues to support the client to engage with the on-going legal casework. Kelly Sciacca notes:

So workers can be involved with the clinic on a couple of different levels. Once they signed the consents that the client's okay for them to communicate with the lawyers, they can keep on top of the situation to assist the law firm in delivering communication and also being aware of all the issues affecting the resident that they are working with which again feeds into their recovery and support plan.

Further efficiencies exist when the completed LHC is provided to the lawyers prior to the initial legal interview maximising the time and skills of the lawyer. QPILCH uses this approach at the Outreach Legal Clinic.

As indicated above, non-legal workers are well-placed, with support, to complete part or all of the LHC with their clients, and the HPLC LHC was designed to be used in this way. The worker can best assess the other priorities of the client and determine the most effective timing to engage with the legal issues.

It's just having a holistic view of what's happening for the person. [The worker can] really address those issues as a whole like the legal issues and how they contribute towards the other issues that that person is experiencing. (Kelly Sciacca)

Support and training for workers is necessary and QPILCH delivers this in the following ways:

- Training videos, postcards (mini LHCs) and posters are provided as free resources for non-legal workers using the LHC.
- Separate postcards are available for specific legal issues encountered by homeless, publically-housed, refugees, young people transitioning from care and people experiencing mental illness respectively. There is a need for translations of these postcards in languages other than English.
- In-house and cross-sector training on the content and rationale of the LHC, to support non-legal agencies to administer the LHC; and
- Phone-based on-going support to all agencies in the sector about effective referrals using the LHC.

The appropriateness of non-legal workers completing the LHC must be assessed on the basis of the caseload and resources of the community agency. In our experience where the agency provides assessment and referral services, rather than on-going support, the capacity of the worker to complete the LHC with the client is limited by a high volume of clients. However, where the worker has funding to support a client intensively for 3 or more months, the appropriateness and efficiency of completing a LHC is evident. A de-identified LHC completed by a worker at one of our partner agencies is **attached** to this submission.

QPILCH notes that it is not appropriate to have clients and workers completing LHCs where no referral pathway exists to have the problems identified by the process addressed. Separate funding to community organisations to complete LHC with their clients is an important first step but will be ineffective without complementary funding to legal service providers to train, support and liaise with the agency. An LHC is pointless if the individual cannot go on to access legal advice to resolve the issues the LHC discloses.

QPILCH acknowledges that there is a need for more data and evaluation of the LHC model in a range of contexts. QPILCH can make its existing client data available to the Commission for more thorough analysis.

Draft Recommendation 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

QPILCH supports the development of widely recognised single-entry points for legal information and referral but notes that such an approach needs to be supported by adequate funding for the entry point to maintain accurate and current information about referral pathways. The challenge of maintaining up-to-date referral pathways should not be underestimated.

The jurisdictional response should be targeted as costs vary. Including a capacity to provide basic advice is more costly than hosting a simple referral point. QLAF is considering this issue in the Queensland context.

Single entry point models are still not accessible by many of the most vulnerable groups in the community. These groups often struggle with multiple barriers such as:

- communication skills;
- not identifying the issue as a legal problem; and
- a genuine need for personalised, trauma-responsive services.

Any single entry point approach will still need to be buttressed by specialised services working on an outreach model to identify legal need in highly vulnerable clients.

Information Request 5.2

Information is sought on the costs and benefits of adopting the legal problem identification training module (being developed by the Commonwealth Attorney-General's Department and DHS) more widely among non-legal workers who provide service to disadvantaged groups.

QPILCH was informally consulted by DHS about the development of this resource and considers that all vulnerable groups will benefit from an increased awareness of legal need in the mainstream agencies which support them.

QPILCH refers to the qualifications outlined in QPILCH's response to Information Request 5.1 in regard to the need for on-going support for workers and genuine referral pathways to support clients participating in such an approach. In our experience, the process and quality of the referral will greatly impact its efficacy.

All mainstream agencies which support vulnerable clients would benefit from these training modules. However, there is a limit to the number of legal services available to provide the casework arising out of these referrals. Without a place to send clients for assistance this approach is largely pointless.

The QPILCH LHC training videos were developed with a grant from the Legal Aid Queensland CLE Collaboration fund for less than \$10,000.00 by using volunteer resources and locations, and are freely available on the QPILCH website.

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.

The QPILCH HPLC, RCLC, MHCLC, MHLP and OLC all operate on a co-located outreach model, visiting homelessness services, mental health services, hospital units, and refugee settlement agencies. The QPILCH Self Representation Service is located at the registries of courts and tribunals. As indicated in QPILCH's response to information request 5.1, the Legal Health Check was developed in recognition that outreach and co-location of itself may not maximise collaboration with hosting services.

Time and resources to collaborate with the host service or agency is not always funded in these services, but is necessary to support effective service delivery.

Information sharing across government departments can trigger privacy concerns, and is particularly problematic when the client is highly vulnerable or the use of the information is not well-defined. QPILCH considers that a better approach is to locate independent legal casework clinics at a target agency, such as Centrelink, and for the legal service to then act as a "hub", and develop protocols for information and service access with other relevant government agencies, such as Legal Aid, Housing departments and with CLC's. This approach protects client confidentiality, may minimise inappropriate referrals and overcome inter-agency barriers such as whether agencies are state or federally based.

Chapter 6 Information and Redress for Consumers

General Comment

QPILCH agrees with many of the recommendations of the Commission in this chapter but believes that it would be beneficial for consumers of legal services to have input into many of the ideas proposed.

Consumers are best placed to comment on the effectiveness of the proposals and will deliver the greatest insight into the current issues associated with legal service provision.

QPILCH recommendation

QPILCH recommends that if time permits, the Commission undertake consultation with a range of different legal consumers in relation to the recommendations in this chapter.

Information Request 6.1

Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?

Although we are unable to comment in detail on this issue, QPILCH believes that there may be scope for legal service commissions to directly enforce the Australian Consumer Law if there is evidence to suggest that regulators are duplicating their efforts.

Draft Recommendation 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

QPILCH agrees with this recommendation and the benefits that this approach would have for consumers of legal services including:

- Managing client expectations and limiting misunderstandings;
- Ensuring that clients have understood the client agreement and fees which have been charged; and
- Limiting client complaints.

Having such a standard would also present clear benefits for clients who are particularly disadvantaged, such as those who do not speak English as a first language or are experiencing other vulnerabilities, such as mental illness or homelessness. What may be considered reasonable in these circumstances will obviously be different to what is considered reasonable for a more sophisticated corporate client. There are also benefits to this approach when, for example, a client is initially offered assistance on a pro bono basis but the scope of the assistance provided later changes and fees are incurred.

Draft Recommendation 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

Although we are unable to comment in detail on this issue, QPILCH believes that national cooperation in delivering minimum standards for the protection of consumers through billing requirements may increase transparency and provide greater certainty for both consumers' and practitioners.

Draft Recommendation 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.

The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.

QPILCH agrees with this recommendation and believes that publicly available information about what and how practitioners charge will improve the information base of consumers.

In our experience, many vulnerable and disadvantaged clients struggle to understand the various fee structures which may be appropriate for different types of matters. For example, speculative or deferred fee assistance may be more appropriate than pro bono assistance in personal injury claims or family provision applications.

We consider that a centralised resource may assist in clarifying this.

Information Request 6.4

The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether:

- *consumers are aware of complaints avenues and using them*
- *resolution of disputes and investigations is timely and the sanctions imposed proportionate*
- *consumers and lawyers are satisfied with the outcomes of complaints processes?*

In our experience, consumers are aware of the complaints avenues available to them and appear to be using them.

Many of our clients who have complaints about their lawyers are aware of the Legal Services Commission and have already initiated a complaints process. Some of our clients are frustrated by the length of time taken to investigate a complaint and can be dissatisfied with the outcome of the process.

In many cases, this arises from a lack of understanding of what the Legal Services Commission can and cannot do, with many clients wanting some form of monetary compensation.

Often clients seek additional advice about pursuing professional negligence claims against solicitors.

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.*

QPILCH supports draft recommendation 7.1. Such a review should focus on ways that access to justice can be improved through more practical and pragmatic education while retaining the important theoretical and historical basis of legal education.

QPILCH strongly supports clinical legal education become an integral component of a law degree. We run a number of clinics supporting the legal education of students. These clinics are 'grafted' on to existing programs and services which QPILCH provides. QPILCH, and similar organisations, benefit from assistance of law students because it allows QPILCH to service more clients and in some cases the students provide a vital element in the establishment of the services itself, for example the Mental Health Law Clinic.

QPILCH notes that:

- Clinics give students access to experienced practitioners and practical legal work to support the development of critical practical skills including team work and working with non-legal staff to address some of the needs of vulnerable and disadvantaged clients ;
- QPILCH supports greater integration of law school curricula (and practical legal training) with pro bono and other clinics.
- Providing clinical legal education can be expensive and QPILCH relies on the universities to assist in funding the programs. A better approach to funding for clinics is needed if this approach is to be widely adopted.

QPILCH would also support increased recognition of the pro bono work that law students undertake outside of their degrees.

QPILCH also supports a greater focus by educators on ADR and other practical skills rather than a focus on academic learning. Such skills are vital to the success of QPILCH's work.

QPILCH agrees there is a need to maintain the high standard for admission to legal practice but considers that admission and registration for practitioners can be streamlined. For example, some lawyers do not require practicing certificates to work in legal practice but nonetheless are involved in 'legal work', which could be recognised some other way.

Information request 7.1

Which aspects of legal professional regulation present the greatest obstacles to the profession? Are there 'best practice' jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?

QPILCH does not believe that fewer regulations on the legal profession would translate to increased access to justice.

However, there are practices adopted by individual states that QPILCH would support the implementation of nationally. For example, the Queensland Law Society includes an optional question in the annual practicing certificate renewal process asking members to estimate the number of pro bono hours worked in the year. QPILCH would support the national implementation of such a measure, as it could further draw attention to the pro bono contributions of individual lawyers as well as to assist in quantifying annual pro bono contributions. QPILCH notes that in some international jurisdictions for example some States in the United States of America recognise pro-bono work for the purposes of continuing professional development.

Information request 7.2

Does the inability to operate as a limited liability partnership represent a significant cost to or barrier to entry for, law firms? What are the potential benefits of allowing this particular business structure and to whom do the benefits accrue? What are the potential costs of allowing this structure and who bears those costs?

QPILCH believes that it is unlikely that fewer restrictions on lawyers' business structures and models would translate to increased access to justice, particularly where legal fees remain high (see page 55 of QPILCH's Submission to the Issues Paper).

Information Request 7.3

To what extent would harmonising accounting standards and mutually recognising audits between jurisdictions reduce the compliance burden on firms from maintaining trust accounts in each jurisdiction? Are there alternative ways to ' earmark' interest earned from the account as arising in particular jurisdictions? Is it possible to develop funding formulas to redistribute funds if national trust accounts are adopted? If so, what should these formulas be based on — legal activity or legal need in each jurisdiction?

QPILCH believes that it is unlikely that nationalisation will be a significant factor in enabling access to legal assistance services, as it will not address the financial barrier of paying for legal advice (see page 55 of QPILCH's Submission to the Issues Paper).

Information Request 7.4

How should money from 'public purposes' funds be most efficiently used?

QPILCH strongly believes that money from public purposes funds should continue to be distributed to community legal centers, as these funds provide invaluable assistance to such organisations.

Information Request 7.5

In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that

would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?

QPILCH does not consider that lifting restrictions on the provision of legal advice is appropriate, as the complexities of the law and the ramifications of incorrect advice mean that this is best left to qualified lawyers (see page 56 of QPILCH's Submission to the Issues Paper).

However, QPILCH recognises that certain categories of legal work may be efficiently provided by non-lawyers. QPILCH supports appropriately qualified and supervised non-lawyers providing services in discrete and relatively simple areas such as tenancy disputes and a range of other areas. Such advice could be provided by paralegals or appropriately trained social workers.

For example, QPILCH operates an advocacy service staffed by well-trained law students and social work students in the Mental Health Review Tribunal. In this therapeutic jurisdiction, less than 3% of people subject to intensive treatment orders are represented. Applicants are triaged so that matters involving legal issues are undertaken by lawyers whilst others are assisted by lay advocates.

This could potentially ease the pressure on clearing houses and CLC's, given the only recourse for individuals who cannot afford to pay lawyers for legal advice is to approach a community legal Centre.

Additionally, a greater range of individuals would be qualified to volunteer at clinics, and provide advice on routine cases.

Chapter 8 – Alternative dispute resolution

QPILCH supports each of the key points in Chapter 8, and strongly agrees with the steps that can be taken to encourage greater uptake of ADR.

Draft Recommendation 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

QPILCH supports this recommendation and notes the implications this recommendation has for the development of appropriate data collection and statistical measures and models to monitor the effectiveness of the civil dispute resolution system broadly for this recommendation to be effective.

Information request 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to \$50 000).

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

We see merit in considering early mediation for disputes of up to \$50,000. However any move to make mediation compulsory for contested disputes of relatively low value should be approached with significant caution. Notwithstanding the potential impact pre-action ADR may have on any particular dispute, it seems likely that pre-action ADR could result in a net reduction in the costs of resolving disputes generally.

In Queensland, disputes of up to \$50,000 can be heard either as Minor Civil Disputes in QCAT or in Magistrates Courts.

QCAT has an active case management system including the use of compulsory settlement (and directions) conferences, and Chapter 13 Part 9 Division 3 of the *Uniform Civil Procedure Rules 1999* provides for settlement conferences in cases before Magistrates Courts.

The Dispute Resolution Service of the Department of Justice and Attorney General in Queensland offers a free mediation service (a fee is charged for facilitations and workplace mediations). The most common issues dealt with by that service are:

- neighborhood disputes involving fences, noise, children, pets and overhanging trees;
- family and intergenerational disputes;
- workplace disputes;
- commercial disputes;
- relationship separation;
- property settlement matters; and
- multi-party disputes, sometimes whole communities.

An example of a successful model of targeted referral and ADR process for minor civil disputes is the free mediation service run by QPILCH through the Self Representation Service. QPILCH has a panel of

pro bono accredited mediators who are available to undertake mediation for vulnerable clients (usually unrepresented parties). Through that service, if mediation is agreed by the parties, QPILCH suggests a list of independent pro bono mediators and arranges for a conference room to be made available by the Queensland Bar Association free of charge. However, a difficulty that QPILCH has encountered is whether mediators are willing to act on a pro bono basis where one of the parties can afford to pay for the cost of mediation. Although to date this has not impeded any referral and has worked effectively to encourage the experienced party to mediate.

In addition, QPILCH's Self Representation Service in the federal courts is coordinating a Settlement Conference Service for small claims (matters concerning unpaid entitlements up to an amount of \$20,000) commenced in the Federal Circuit Court under the *Fair Work Act 2009*. The service was also provided during the pilot in the federal courts in 2011-12 and was commenced at the request of the Federal Circuit Court.

The Settlement Conference Service has created a roster of accredited mediators and members of the bar who are willing to conduct settlement conferences on a pro bono basis when the parties attend court on the first return date. The parties attend the court for call-over and if the presiding judge determines that ADR is appropriate, the matter is referred to QPILCH. A settlement conference is then conducted. If resolved, the parties are assisted to prepare a deed of settlement or consent order, depending on their preference. If the matter is unresolved, the mediator prepares a list of the matters in dispute between the parties which is provided to the court. The parties then return to court that day and the matter proceeds as normal.

The service has conducted a total of 28 conferences, both during the pilot and since re-commencing operations on 24 February 2014. 50% of the matters have settled through that process. There has been no opportunity to evaluate the effectiveness of the service in terms of party satisfaction with outcome or procedure, though this information is being collected for current matters and will be reported on to determine whether the service is a viable option in the long-term.

This shows that ADR processes, including mediation has the potential to provide significant benefits for parties if it is used in the right type of dispute.

ADR and mediation in particular has some significant and acknowledged limitations. Compulsory mediation has, in some cases, the potential to make a dispute more difficult to resolve.

Mediation will not be appropriate for all disputes and the imposition of a further, mandatory and potentially costly step in the dispute resolution process can result in a reduction in access to justice for some parties as their ability to finally sustain the action is undermined by a further step which incurs costs.

On page 258 of Chapter 8 the Commission examines the use of ADR as part of pre-action requirements.

Firstly, in QPILCH's experience there may be instances where a legislative requirement to engage in ADR before commencing proceedings may not be appropriate – for example, when time is a critical factor to obtaining relief (e.g. an injunction to stop a disputed action) or where there is a significant public interest element involved. This could include where parties seek clarification of the impact, extent or application of new or newly amended legislation or common law doctrines. In some instances the precedent value of gaining a publicly adjudicated outcome will be significant.

Secondly, in the case of any particular dispute which is not resolved in pre-action ADR, it seems that the requirement to undertake pre-action ADR results in additional costs being incurred in the resolution of the dispute.

Draft Recommendation 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

QPILCH supports this recommendation.

Draft Recommendation 8.3

Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.

QPILCH supports this recommendation.

Draft Recommendation 8.4

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

QPILCH supports this recommendation.

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.

QPILCH supports this recommendation.

Draft Recommendation 8.6

Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

QPILCH supports this recommendation.

QPILCH would also encourage such bodies should develop initiatives to encourage members to provide pro bono support through organisations such as QPILCH and other CLC's.

Chapter 10 – Tribunals

Information Request 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

QPILCH does not have substantive quantitative or qualitative data collected by the Self Representation Service in respect of ADR processes in QCAT settings.

However, evaluation forms for the period 2013-2014 indicate that out of 14 clients who answered questions regarding ADR options, 6 indicated that they were not offered mediation or conciliation at any stage of their proceedings.

We also direct the Commission to our response to Chapter 8 of the Commission’s Draft Report.

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.

QPILCH supports the recommendation, especially the elements in relation to greater cross jurisdictional reporting.

In QPILCH’s experience there are differences between the ways individual tribunals operate.

QCAT in Queensland already “rigorously applies” its restrictions on legal representation in hearings and there is a body of case law that details the “guidelines” that will apply when leave is granted.

Draft Recommendation 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

Overall QPILCH provides qualified support for this recommendation. QPILCH notes that the Federal Courts have the ability to award costs against practitioners (reg 21.07 of the Federal Circuit Court Rules 2001 and reg 40.07 of the Federal Court Rules 2011). Views from the Federal Court on the effectiveness, or otherwise of these rules could be valuable for the Commission’s further consideration.

This recommendation falls short of addressing QPILCH’s concerns about the conduct of lawyers outside of hearing rooms and in correspondence with parties in no-cost jurisdictions. A more fulsome response to this issue requires three elements:

- Costs orders directly against practitioners – as foreshadowed in this recommendation;
- Professional practice consequences for individual practitioners administered by relevant standards bodies; and
- Advice and support available to participants in these processes to ensure they are not intimidated by unjustified or misrepresented costs threats.

Information Request 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

QPILCH has significant experience in relation to the operation of QCAT and the appeals process from this Tribunal. At the outset it is important to state that in general the QCAT process is a highly effective civil dispute resolution avenue.

In relation to the prospects of appeals from QCAT decisions a number of problems can arise particularly in relation to the provision of statements of reasons. In essence we see these problems through the prism of QCAT's competing goals. In these cases there is a conflict between the speed of the decision making – a clear benefit of QCAT's approach and the challenge of delivering fairness between the parties and the opportunity to consider appeal options.

The availability of reasons, particularly for elderly people, do not have a computer or strong computer skills or the ability to listen to a CD and transcribe reasons provided in an audio format can be an issue. These applicants often have to request a written transcript from Auscript which can be very expensive.

Access to early advice for appeals is crucial. Appeals are more legalistic aspect of QCAT work and people need to understand the grounds on which an appeal can be made, their prospects of success and the risks factors involved in appealing a decision. It is often very difficult to determine the merits of an appeal if a full transcript of the hearing is not available, in particular for minor matters as parties usually present their evidence and oral arguments on the day of the hearing and no written material is available to consult.

These issues demonstrate some of the tensions between pursuing a quick resolution and pursuing a fair resolution.

Legalistic or strictly enforced time periods can be a significant problem for inexperienced parties. We urge the Commission to recommend that all courts and tribunals review their time periods, with a view to achieving reasonable and consistent periods. We note that Monash University is currently undertaking a project in this area.

Chapter 11 – Court Processes

Draft Recommendation 11.1

Courts should apply the following elements of the Federal Court’s Fast Track model more broadly:

- *the abolition of formal pleadings*
- *a focus on early identification of the real issues in dispute*
- *more tightly controlling the number of pre-trial appearances*
- *requiring strict observance of time limits.*

QPILCH supports draft recommendation 11.1, although suggests that there is benefit in the courts retaining a strong discretion about the application of fast track procedures in cases, guided by fundamental principles such as:

- the need to focus a case on the key issues in dispute;
- to resolve disputes efficiently;
- to encourage the parties to resolve disputes by agreement; and
- the need to ensure a just and fair decision.

Draft Recommendation 11.2

There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction. The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).

QPILCH supports draft recommendation 11.2. There is a lack of quantitative data on how cases in Court actually progress. This data would also help in evaluating issues relating to self-represented litigants.

QPILCH’s position continues to be that there is a lack of information as to how effective the different case management systems used in Queensland are. The only data available is the number of cases dealt within a year (see p 50 of the QPILCH submission).

QPILCH is concerned that any performance comparison of case management systems must account for:

- the differences in court jurisdictions; and
- the use of specialist courts and tribunals

These factors can influence the seriousness and complexity of cases heard in each jurisdiction’s equivalent court.

In our original submission we outlined the new Queensland Supreme Court case list Practice Direction for self represented litigants. We commend this process.

In addition to draft recommendation 11.2, QPILCH recommends:

- That any evaluation of case management systems include an inquiry into the extent to which the systems involve self-represented litigants and address access to justice arrangements; and
- A separate case management system for cases involving one or more self represented litigants be established; and
- self-represented litigants are included on the Supervised Case List; and
- A practice direction relating to self-represented litigants is drafted and implemented.

Information request 11.1

The Commission seeks feedback on the most appropriate body for coordinating analysis and evaluation of the different case management approaches and techniques available to Australian courts.

QPILCH recommends that the body coordinating the analysis should be willing to inquire into the adequacy of case management systems in providing access to justice for self-represented litigants.

Draft Recommendation 11.3

The National Judicial College of Australia and other judicial education bodies should continue to develop and deliver training in effective case management techniques drawing from empirical evaluations to the extent that these are available.

QPILCH supports draft recommendation 11.3.

QPILCH notes that there is a lack of quantitative data on how cases in Court actually progress and which case management systems are effective. The success of this recommendation will be strongly influenced by the quality of the empirical data that is collected to support it.

Draft Recommendation 11.4

Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.

QPILCH notes that the Queensland Supreme Court's system, in which one Judge has responsibility for the Commercial List, one Judge has responsibility for the Caseflow Management List, and two Judges share responsibility for the Supervised Case List, seems to work well. Other Judges of the Court share the Applications and Trial Lists.

Information request 11.2

The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration.

Where litigation involves the discovery of a large number of electronic files, this has particularly significant implications for access to justice.

Self-represented litigants will rarely, if ever, have access to the sophisticated software required to carry out large scale electronic discovery, or to sift through a large number of documents received electronically from the other party. In cases which involve significant discovery further consideration of the impacts on SRLs should be undertaken.

Draft Recommendation 11.5

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:

- *court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available*
- *courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly*
- *court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate*
- *courts should be expressly empowered to make targeted cost orders in respect of discovery.*

QPILCH supports this recommendation.

Discovery can be problematic for self-represented litigants. Attempting to successfully identify a directly relevant document can be difficult even for trained lawyers.

A particular scenario that our Self Representation Service observes arises when an SRL may perceive a gap in the documents that have been disclosed, and seeks to bring an application to court, which is ultimately unsuccessful because the SRL is not able to point to evidence substantiating the relevance or existence of the document or the represented party can demonstrate that they no longer have possession or control of the document.

It is QPILCH's position that simply limiting discovery to information of "direct relevance" and giving courts discretion to relieve parties of cumbersome discovery requirements might not be enough to safeguard against cost inflation associated with discovery. The further measures of practice directions or court rules that promote tailored discovery and limit the searches to be undertaken by parties are also required (see p 48 of our submissions).

Information request 11.3

The Commission seeks feedback on the effectiveness and access to justice implications of the approach to discovery in Practice Note No. SC Eq 11 of the Supreme Court of NSW under which the Court will not make orders for disclosure of documents until the parties to proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.

There is merit in a broader application of Practice Note No. SC Eq 11.

QPILCH notes that such an approach would require a change to the Uniform Civil Procedure Rules 1999 (Queensland) which at present does not make any particular requirement on the exchange of affidavit evidence by the parties before a hearing. QPILCH notes however that this is something that the courts have the power to order.

Draft Recommendation 11.6

All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently.

All jurisdictions should ensure that, at a minimum, these checklists cover:

- *scope of discovery and what constitutes a reasonable search of electronic documents;*
- *a strategy for the identification, collection, processing, analysis and review of electronic documents;*
- *the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data);*
- *a timetable and estimated costs for discovery of electronic documents; and*
- *an appropriate document management protocol.*

It is QPILCH's view that electronic documents and electronic discovery creates problems for access to justice as outlined in our response to Information Request 11.2.

QPILCH supports increased guidance and oversight in relation to electronic discovery by the courts but notes that access to justice issues need to be addressed as part of this oversight.

Draft Recommendation 11.7

Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.

QPILCH partly support this recommendation.

QPILCH does agree that the practice direction used in relation to the Supervised Case List in Queensland is an improvement in the area of discovery – the benefit is found mainly in the Discovery Guidelines attached to the practice direction which encourage parties to agree early upon a document production plan and allow the court to make tailored directions regarding discovery (see p 49 of our submissions)

However, QPILCH's position in relation to early exchange of critical documents is that this does not address the cost-intensive process of document review as, often, it is not until the lengthy process of document review has been completed and pleadings refined that it becomes apparent which documents are going to be critical in a proceeding (see p 48 of our submissions)

Information Request 11.4

The Commission seeks feedback on the impact of the pre-disclosure requirements in section 26 of the Civil Procedure Act 2010 (Vic) on the conduct of litigation in that jurisdiction.

Draft Recommendation 11.8

Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:

- *a requirement on parties to seek directions before adducing expert evidence*
- *broad powers on the part of the court to make directions about expert evidence, including appointing a single expert or a court appointed expert.*

Draft Recommendation 11.9

Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether:

- *a single joint expert or court appointed expert would be appropriate in a particular case*
- *to use concurrent evidence, and if so, how the procedure is to be conducted.*

Draft Recommendation 11.10

All courts should:

- *explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia*
- *facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.*

In relation to draft recommendations 11.8, 11.9 and 11.10 QPILCH notes that disclosure and provision of Expert Evidence can be a particularly difficult, expensive and time consuming process for SRLs.

QPILCH supports any moves to make this element of the litigation process more accessible for litigants who lack significant means to enforce their rights.

Also see comments in relation to Information Request 11.2.

Chapter 12 - Duties on parties

Information Request 12.1

The Commission seeks feedback on the effectiveness of current overarching obligations imposed on parties and their legal representatives in litigation processes. In particular, how might the detection of non-compliance and the enforcement of these obligations be improved?

QPILCH notes that overarching obligations are more effective in jurisdictions where the obligations are based in statute, rather than in unenforceable 'principles'.

Draft Recommendation 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

QPILCH supports this recommendation.

Information Request 12.2

The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.

QPILCH notes that ADR is appropriate for many civil matters, but has acknowledged limitations, particularly in relation to family law matters. QPILCH notes:

- QPILCH's response to information Request 8.1 above;
- That generally speaking ADR mandated by legislation as a prerequisite step to court action seems to be more successful than courts order disputing parties to ADR;

All practitioners delivering ADR services should be trained, accredited and regulated in some way. In deciding which types of dispute would most benefit from targeted pre-action protocols, it is important to keep in mind that ADR is not suitable in all cases. Some cases which might benefit from it include:

- minor disputes;
- disputes within and between not-for-profit organisations; and
- disputes involving self-represented litigants.

The costs of ADR need to be addressed in any scheme, mediators can be expensive, particularly where they are experienced barristers.

Draft Recommendation 12.2

Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

QPILCH supports this recommendation but invites the Commission to consider strengthening its recommendation to improve enforcement by recommending the enactment of a statutory compliance system by states and territories for its model litigant guidelines.

The Queensland Model Litigant Rules emanate from a formal statement of Cabinet and take the form of policy guidelines.

In contrast, the Commonwealth Model Litigant Rules have their statutory basis in Part VIIIIC of the Judiciary Act 1903 (Cth) and empower the Attorney-General to impose sanctions for non-compliance.

However, as noted by the Commission, even where the obligations are based in statute, they are seldom enforced. Currently, under both the Commonwealth and the Queensland regimes, a failure to comply

with the Model Litigant Rules does not generally allow a party to challenge the other party's behaviour. A formal avenue of complaint would be beneficial for enforcement.

In addition to greater enforcement mechanisms, QPILCH recommends the model litigant rules be extended to apply to legal representatives hired on behalf of the Queensland government and agencies.

For example, in Victoria, where the model litigant rules are, like in Queensland, policy-based, the model litigant guidelines have now been incorporated in the Standard Legal Services to Governmental Panel Contract, so that they are binding on external providers of legal services to Victorian Government agencies. This includes private lawyers, in-house government lawyers and the Victorian Government Solicitor's Office. Under the Governmental Panel Contract, sanctions may be imposed on a Panel firm, including removal from the Panel. There are no comparable obligations on legal representatives hired on behalf of the Queensland government.

Information Request 12.3

The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?

The application of Model Litigant guidelines to Local Government is a good policy goal.

They could be enforced through State Government legislation or through similar means to the process set out in QPILCH's response to draft recommendation 12.2.

QPILCH notes that different local councils will have different capacities to comply with an extension of model litigant rules. A staged approach to the adoption of such guidelines would be appropriate.

Information request 12.4

The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?

QPILCH recommends that the principles be administered under a statutory compliance system, coupled with a formal complaint mechanism. This could be done under the supervision of an Ombudsman but it would be better to have judges empowered to make decisions on compliance in the course of matters before the court.

The obligation to exhaust Alternative Dispute Resolution mechanisms prior to engaging in litigation was added to the Queensland Rules in 2012, thus bringing the Queensland Rules into line with ADR-specific obligations in the Commonwealth rules.

Information request 12.5

The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?

QPILCH supports the view that the model litigant rules should operate in cases of power and resources imbalance so far as fairness to both parties is maintained. If armed with some guidelines, Judges could monitor the conduct of litigation to ensure that the weaker party is not bullied.

Information request 12.6

The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on earlier intervention with more graduated responses to manage vexatious

behaviour reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?

In relation to vexatious claimants, QPILCH notes that prevention will always be better than cure. Identifying people with a genuine grievance and ensuring they have access to support, advice and guidance early in their dispute can significantly reduce the need for strong action later in the process.

It is QPILCH's view that the process currently in place in Queensland (detailed at pages 44 to 45 of QPILCH's submissions) adequately deals with vexatious litigants.

This process could be used as a framework for application in other jurisdictions.

Chapter 14 – Self represented litigants

QPILCH makes the following general observations in relation the area of self-represented litigants and the Self Represented Litigants service QPILCH provides.

QPILCH notes three developments since our initial submission:

- In February 2014: the Queensland Supreme Court issued Practice Direction 10 of 2014, that deals specifically with case management for cases with one or more SRLs;
- An evaluation in the Self Representation Service at the Queensland District and Supreme Courts has been published: Professor Jeff Giddings, Associate Professor Blake McKimmie, Dr Cate Banks and Tamara Butler *Evaluation of the Queensland Public Interest Law Clearing House Self Representation Service* (Griffith University and University of Queensland) 2014 located at http://qpilch.org.au/dbase_upl/SRS_Evaluation_Final.pdf; and
- The Chancery Modernisation Review was finalised in December 2013 in the United Kingdom. Lord Justice Briggs *Chancery Modernisation Review Final Report* December 2013 located at <http://www.judiciary.gov.uk/Resources/JCO/Documents/CMR/cmr-final-report-dec2013.pdf>

The Service

At page 430 the Draft Report states that the Service is publicly funded, and at pages 447- 448 the Draft Report distinguishes publicly funded unbundled legal services with pro bono unbundled services.

QPILCH's Self Representation Service is funded through the Legal Practitioners Interest on Trust Account Fund; however the Service also coordinates volunteer lawyers from 25 partner firms, which provide the time and assistance of staff members on a pro bono basis.

In 2012/13 the firm contribution was estimated at \$631,060 (QPILCH Annual Report 2012/13 page 32).

The QPILCH Service uses both non-consolidated revenue funds and a pro bono contribution from the profession. The Service's operation is directly dependent on both elements.

Reasons for self-representation

Page 428 of the Draft Report raises the possibility that some litigants self-represent by choice to obtain a tactical advantage over a represented party. In QPILCH's experience, only a very small number of clients (no more than 2%) have ever expressed this as a motivating factor in their conduct of the litigation.

Clients of the Service surveyed for the Evaluation cited above, identified that seeking legal advice or directly approaching the other party was their first response to the emergence of a legal problem, and most identified a willingness to compromise in order to bring the legal dispute to an end (Giddings, McKimmie, Banks and Butler at 22).

Impact of SRLs

The Chancery Modernisation Review (Chapter 9) includes a detailed Chapter on self represented litigants in the Chancery Courts that endorses much of the information placed before the Commission by QPILCH.

Information request 14.1

What is the most effective and efficient way of assisting self-represented litigants to understand their rights and obligations at law? How can the growing complexity in the law best be addressed?

One method QPILCH has found effective to assist self-represented litigants to understand their rights and obligations at law, and more specifically as users of a court or tribunal, is through the provision of factsheets. QPILCH has developed a suite of factsheets addressing various aspects of the litigation process in the state courts, federal courts and QCAT. The factsheets are drafted in plain English and used to supplement and reiterate advice to people during appointments.

Possible methods of making the law less complex for SRLs include:

- In civil procedure specifically, the rules (for example the Uniform Civil Procedure Rules 1999) might be made more prescriptive, rather than essentially leaving it to the parties and providing a number of options. This would involve a fairly radical change in the rules and would also mean a loss of flexibility.
- Legislative drafting could make greater use of Plain English principles. QPILCH agrees with the comments of Justice Duncan Kerr noted by the Commission on page 439 that the complexity of legislation is a particular problem for SRLs (as defined by the Commission) before tribunals. QPILCH's Self Representation Service in QCAT was established on the basis that the outcome of QCAT proceedings will often have serious consequences on the welfare, dignity and daily living of the people involved and those who cannot afford private legal assistance would be at a particular disadvantage. Many of the acts that come under QCAT's jurisdiction are complex, for example the Residential Tenancies and Rooming Accommodation Act 2009 is difficult for many lawyers to navigate, let alone a lay person. It is unrealistic to expect a person to be able to apply the legislation to their legal problem when the rules set out in the legislation are only discernable by reading the entire piece of legislation.
- A re-write of at least the most heavily amended legislation (e.g. the Crimes Act, Family Law Act, Income Tax Assessment Act 1936, Family Law Act) and some of the older legislation to make them more readable.

Draft Recommendation 14.1

Courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case.

All court and tribunal forms should be written in plain language with no unnecessary legal jargon.

- *Court and tribunal staff should assist self-represented litigants to understand all time-critical events in their case.*
- *Courts and tribunals should examine the potential benefits of technologies such as personalised computer-generated timelines.*
- *Courts and tribunals should examine their case management practices to improve outcomes where self-represented litigants are involved.*

QPILCH supports this recommendation. The experience we have gained through our Self Representation Service suggests that those courts and tribunals that engage in active case management (such as the federal courts have been doing for a number of decades through the provision of directions and which the Supreme Court of Queensland is starting to undertake after the implementation of Practice Direction 10/2014) are easier for SRLs to navigate.

Draft Recommendation 14.2

Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.

Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.

QPILCH supports this recommendation. The key issues for members of the profession is to emphasise that there are ways of advancing a client's interests, while at the same time "assisting" an SRL, in the sense of spelling out to the SRL exactly what objection is taken to an SRL's case or document that doesn't comply with the rules.

The key issue for court staff would be to either grant a qualified immunity from suit for advice given (see e.g. Chief Justice De Jersey Keynote Address to Legal Educators State Conference 13 August 2003

<http://archive.sclqld.org.au/judgepub/2004/dj130804.pdf> at p 14) or to clearly spell out the distinction between legal advice (forbidden) and legal information (allowed).

The key issue for the decision-maker is to remain impartial. It is noted that on page 441 of the report, the Commission states that “the SRLs position of disadvantage can be ameliorated by the trial judge’s duty to ensure a fair trial.” QPILCH considers that this may not be an accurate statement. There will always be a limit to the assistance a judge can provide to one side of the dispute they are adjudicating and for particularly disadvantaged people, this guidance will not be sufficient to overcome the barriers that exist in the complex set of rules that must be navigated to progress litigation, particularly in superior courts. It should also be noted that as far as possible the Courts and Tribunals should consult with SRLs in formulating guidelines and other publications.

QPILCH has published with the Queensland Law Society, guidelines for dealing with self represented litigants and is in the process of drafting the a set of guidelines with the Queensland Bar Association to assist the profession better interact with this type of litigant.

Information request 14.2

There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?

QPILCH considers that there are grounds for extending unbundled services for self-represented litigants. Following the Federal Government’s recent announcement that funding for the provision of some civil law assistance by LACs will be withdrawn, employment law may be considered a priority area for extension of these services. However, argument may be made for prioritising other areas, including minor civil disputes in the Magistrates and County Court jurisdictions.

QPILCH’s Self Representation Service does not operate in isolation and its success is largely dependent on the strong relationships that exist between QPILCH, Legal Aid Queensland, other CLCs, and the private profession. These relationships must be developed and maintained on a larger scale for any existing and additional unbundled services to form part of a cohesive legal assistance landscape. The QPILCH Self Representation Service often receives referrals of clients from other CLCs which have provided a one-off advice to a client and identified that the client requires further and more substantive assistance with existing or prospective court or tribunal proceedings. At the other end of the spectrum, QPILCH may refer clients of the Self Representation Service to the private profession for full pro bono representation where it has been determined that such legal assistance is warranted.

The Commission refers to the cost of operating the QPILCH Self Representation Service and the estimated savings derived from the diversion of litigants from the court system. Other benefits, including social benefits for self-represented-litigants and social and economic benefits for opposing parties, must not be ignored. Whilst difficult to quantify, in our experience, the benefits of providing unbundled legal services to self-represented litigants far outweigh the costs.

QPILCH agrees that where self-represented litigants have means to pay for unbundled legal services, a financial contribution for those services may be sought. However, the costs of administering a contribution scheme may outweigh the benefits, particularly where most self-represented litigants will not be in a position to pay more than a small fee.

There have been occasions when clients of the QPILCH Self Representation Service have offered to make some payment for services provided, but our policy is to decline such offers and if a client insists, invite them to instead make a donation to QPILCH, for which we have infrastructure (a gift fund) in place.

Information request 14.3

How widespread are problems around conflicts of interest for providers offering unbundled services? Do provisions that deal with conflicts of interest need to be refined so as not to prevent people benefitting from discrete, one-off forms of advice from assistance services and if so, how might this best be done?

Anecdotal evidence suggests that conflict of interest problems are widespread, and can prevent a person from receiving *any* legal assistance.

QPILCH considers that the rules concerning conflicts of interest need to be revised to enable agencies providing unbundled legal services to assist in cases that may raise a perceived conflict of interest.

A new exception to the current ASCR rule 11.2 could be added to enable an agency to state in its 'terms and conditions', (to which the client should consent prior to receiving assistance), a clear explanation of its right to assist the other party in circumstances where it can be assured that any real conflict will be avoided. Peak professional bodies could develop model terms and conditions and guidelines for development of conflict-avoidance procedures to assist agencies.

Further, professional regulators could, through their decisions, give reassurance to agencies that assisting multiple parties (in a responsible way) is unlikely to amount to unprofessional conduct or professional misconduct.

QPILCH also refers to our comments in relation the draft recommendation 19.1 and 19.2.

Draft Recommendation 14.3

Governments, courts and tribunals should work together to implement consistent rules and guidelines on lay assistance for self-represented litigants.

QPILCH supports this recommendation.

The UK Civil Justice Council recommended the adoption of a code of conduct for lay advocates, (Civil Justice Council report pages 73-74, and 90-92).

Chapter 16 – Court and Tribunal Fees

Draft Recommendation 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

- *In cases concerning personal safety or the protection of children;*
- *For matters that seek to clarify an untested or uncertain area of law – or are otherwise of significant public benefit – where the court considers that charging court fees would unduly suppress the litigation.*
- *Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged clients.*

QPILCH supports this recommendation.

QPILCH agrees that these categories of cases should not be subject to a fee increase. Further discussion is needed of when a case concerns public safety or the protection of vulnerable parties.

In our experience, this could encompass a broad range of legal matters and further clarification may be needed. The ‘public benefit’ test explained by the Commission is similar to the ‘public interest’ test adopted by QPILCH and in our view, could be expanded. For example, there may be scope to include matters which:

- effect a significant number of people;
- raise matters of broad public concern;
- require legal intervention to avoid a significant avoidable injustice; or
- particularly impacts disadvantaged or marginalised groups.

The Commission discusses cost recovery in Tribunals and suggests that for some disputes before Tribunals, it would not be appropriate to increase fees. The examples given are matters concerning guardianship, mental health, human rights or migration.

QPILCH agrees with this approach, particularly for matters before the Mental Health Review Tribunal, the Refugee Review Tribunal and the Queensland Civil and Administrative Tribunal (particularly in its tenancy, guardianship, administration, small claims and consumer and trader dispute jurisdictions).

It should be recognised that many financially disadvantaged litigants cannot afford even small amounts so an option to waive fees should be maintained at the discretion of the registrar.

Draft Recommendation 16.2

Fees charged by Australian courts – except for those excluded case types alluded to in draft recommendation 16.1 – should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts. The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute.

Relevant factors should include:

- *Whether the parties are an individual, a not-for-profit organisation or small business or a large corporation or government body;*
- *The amount in dispute; and*
- *Hearing fees based on the number of hearing days undertaken.*

QPILCH agrees with this recommendation generally, but would advocate for an approach similar to the Federal Court or Federal Circuit Court.

In these Courts, publicly listed companies are differentiated from public authorities, not-for-profit organisations and small businesses. This approach seems more equitable, particularly as in our experience, the ability of different types of organisations to afford Court fees varies significantly.

We also agree with the Commission's comment that a simple distinction between corporations and individuals can be blunt as entities within the umbrella term of a corporation can differ greatly in their size, complexity and resources.

In our view, the ability of a small family owned corporation to afford Court fees would vary significantly with the ability of a large corporation. In short, QPILCH supports the proposal to adopt defined disputant categories as has been done in the Federal Court and Federal Circuit Court.

In addition any change should be clearly monitored to ensure that court fees do not unnecessarily restrict in access to courts and tribunals. The maintenance of a healthy and affordable justice system is also a public responsibility.

Information Request 16.1

The Commission invites views on the most appropriate means of determining fee contributions to indirect costs based on the economic value at stake, in cases where a monetary outcome is not being sought, such as a major planning dispute.

The Commission suggests that one approach to determining fee contributions in these cases would be to charge fees in non-monetary disputes at the highest rate for monetary disputes, similar to the approach currently used by some Magistrates Courts.

In QPILCH's submission this seems unfair, particularly where a substantial injustice may have occurred or the client is trying to protect a public good.

QPILCH's preferred approach would be to determine the parties' contributions to indirect costs based on other factors such as litigant types and the length of proceedings.

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.

QPILCH supports the use of waivers and fee reductions to ensure that financially disadvantaged and vulnerable clients have access to the court system.

QPILCH supports the need for increased transparency in the granting of fee relief and waivers. QPILCH strongly supports the need to ensure that some discretion is retained in the decision-making process

about whether to grant fee relief. Any standard eligibility criteria that are developed must be flexible enough to take into account other vulnerabilities.

QPILCH also supports the granting of automatic fee relief to parties represented by a legal aid commission and CLC's where the party is in receipt of full government benefits.

QPILCH does not support the Commission's position in relation CLC's and pro bono lawyers not exclusively servicing disadvantaged clients.

Information Request 16.2

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

- *The possession of a Commonwealth concession card 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; or*
- *The receipt of a full rate government pension or allowance.*

QPILCH supports this approach in general however notes that strict formulaic criteria such as those suggested are not able to take account of individual circumstances.

For example, is an individual receiving slightly less than a full rate disability pension, due to a regular employed role in a charity really in a better financial position to afford court fees than someone receiving a full pension?

If the Commission is minded to make recommendations in this regard QPILCH recommends the commission allow for a catch all hardship provision that can be applied to individual circumstances.

Chapter 17: Courts Technology, specialisation and governance

Draft Recommendation 17.1

Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate, and examine whether there should be a presumption in favour of telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.

QPILCH supports this recommendation but it remains concerned about the accessibility of such technologies for regional Australians.

QPILCH agrees that the increased use of technologies such as video conferencing and telephone services in the legal sector can assist in overcoming some geographical barriers and may increase the range of locations from which legal assistance is available.

However, QPILCH maintains that these technologies are no substitute for face-to-face contact with legal professionals. In particular, these technologies can be an inappropriate and ineffective tool for achieving beneficial legal resolutions with marginalised groups, including those living in remote communities or those with poor communication skills. This is because these groups either do not have access to the technology, or are unable to use it effectively.

Draft Recommendation 17.2

Australian governments and courts should examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, to reduce court administrative costs and to support improved data collection and performance measurement.

QPILCH agrees with this recommendation, with the increasingly sophisticated technology widely available to the public, the justice system should ensure that modern management and communication practices are implemented and are available to enhance access to justice.

In particular, the administrative benefits of eTrials should be extended to all cases, allowing people to file court documents online. This would benefit a number of people (including people from regional and remote areas) who are unable to attend the court to file these documents and might enhance access to justice arrangements.

There are also significant potential costs savings in terms of document production and storage that could be realised by moving to electronic document retention by registries.

Chapter 19: Bridging the gap

Draft Recommendation 19.1

The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:

- *how to define the scope of retainers*
- *the liability of legal practitioners*
- *inclusion and removal of legal practitioners from the court record*
- *disclosure and communication with clients, including obtaining their informed consent to the arrangement.*

Draft Recommendation 19.2

The private legal profession should work with referral agencies to publicise the availability of their unbundled services.

At QPILCH, we process a large number of applications for pro bono assistance in civil law cases and regularly see the ‘justice gap’ described by the Commission. We consider unbundling to a viable option to bridge this gap and support draft recommendations 19.1 and 19.2.

Although it is possible to limit the scope of a retainer in current practice, the Commission rightly notes that there is reluctance on the part of many solicitors to do so due to concerns of liability. We therefore agree that changes to professional conduct rules be required to facilitate greater uptake of unbundling by Australian legal practitioners. Such changes, coupled with an agreement between a client and practitioner, which clearly spells out the scope of the limited representation, and to which the client has provided their informed consent, would go some way toward protecting practitioners providing unbundled legal services.

In addition, we endorse the comments made by Affording Justice by email to the Commission on 13 May 2014. Specifically, that professional associations could provide guidance and develop resources to assist lawyers to provide unbundled services and increase community awareness of the availability of unbundled legal services.

We note the Commission’s reference to our suggestion that statutory immunity should apply to exempt lawyers and legal service providers from liability where clients have agreed by informed consent to limited representation. Since publishing the paper to which the Commission has referred, we consider that a minimalist approach – one that does not limit a practitioner’s liability – is preferable at this time.

QPILCH is currently part of a Queensland Law Society lead working group, which is considering this issue. We would recommend that a working party be appointed by the LAC’s to monitor developments in this issue.

Information request 19.1

The Commission seeks feedback on the prospects of legal insurance being offered by private providers and whether there are any public policy impediments to such an offering.

QPILCH does not consider that there are any public policy impediments to private providers offering legal expense insurance. However, QPILCH considers that, for the reasons described by the Commission in the draft report, the prospects of legal expense insurance being successfully adopted in Australia at this current time are limited.

Information request 19.2

The Commission seeks feedback on the strength of the case for a Legal Expenses Contribution Scheme and views on any relevant design features, including what legal expenses should be covered and whether it should be limited to particular matters.

QPILCH does not support the universal introduction of a legal expenses contribution scheme (LECS). It is proposed that people earning below the top-tax bracket would be able to qualify for a loan, however the costs of civil litigation would mean that even middle-income earners would likely be burdened by loan repayments. There is also the risk (which increases with loan value) that if interest is not charged, the real cost to LACs of providing services is likely to be far greater than the amount recovered over a long period. A LECS may be appropriate in particular categories of cases – where legal expenses can be reasonably predicted and loan values capped.

Information request 19.3

The Commission seeks feedback on whether there are any policy barriers that unnecessarily obstruct not-for-profit provision of legal services.

QPILCH considers that while the Salvos Legal model has proven successful, the viability and practical benefit to be gained by adoption of this model on a broader scale is limited. Part of the success of the Salvos Legal model is undoubtedly due to the widespread knowledge of, and goodwill held by, the 'Salvos' name. It is unlikely that this model would be viable for lesser-known organisations.

Further, the benefit derived through this model is comparable to that derived by existing private practices which run parallel pro bono practices. Adoption of this model by other agencies would introduce competition with the private profession, the very practices that provide the pro bono services on which the system also relies.

Chapter 20 – The Legal Assistance Landscape

CLCs work alongside the LACs

The draft report describes CLCs as:

- community-based not-for-profit organisations.
- playing a distinct role in the legal assistance landscape assisting Australians who cannot afford a private lawyer but who are unable to obtain a grant of legal aid.
- providing mainly civil and family legal assistance.
- prioritising services towards those on low income and otherwise disadvantaged individuals and groups in the local community, as well as those with special needs and whose interests should be protected as a matter of public interest.
- diverse organisations, both generalist and specialist services.

Of relevance to the discussion in the next chapter, it is important to recognise that CLCs have more active features than described by the Commission.

CLCs are:

- more flexible and nimble and less bureaucratic than LACs and significantly more creative and innovative than LAC's or private legal practices
- responsive to the needs of their local communities, particularly emerging needs, such as providing out of hours services and working with other community workers
- independent legal entities with management committees drawn from the community and profession
- faster at adapting to changing social conditions
- more cost effective than LACs because of the use of volunteers and lower wage structures;
- have the ability to work more closely with community agencies and charitable organisations and funders and draw in resources from outside of government;
- less likely to work in silos; and
- more likely to assist with multiple problems than LACs.

These features should not be underestimated, especially when considering issues of responsibility and funding.

Mix of Services

The Commission's discussion in chapter 20 and chapter 21 about the mix of services to suit the needs of clients (e.g. advice, education and casework) fails to consider which providers do what best and there is insufficient discussion on the needs of particular clients. We take up these issues in Chapter 21.

Focus

We are not sure that the Commission's claim that "LACs also have the flexibility, subject to funding, to provide civil law assistance relevant for acute situations, for example, providing legal assistance to the public as part of natural disaster recovery (National Legal Aid, sub. 123)" is entirely accurate. The recent flood response, though funded by LAQ, was a broad based partnership delivered by a network of services including CLCs.

The Commission records that "CLCs' primary focus is in civil and family law. Many of their clients are those who miss out on legal aid and it is here where CLCs can focus their efforts."

It should be noted that the specialist pro bono coordinating bodies (the PILCHs) are also CLCs and were not established as an alternative to legal aid. They were established after funding for non-family civil law was withdrawn from legal aid in the 1990's. In many cases, the LACs still do limited civil law work.

QPILCH alone facilitates more civil law work than is undertaken by LAQ. Combined, Queensland CLCs would do far more civil law work, not just in advice and assistance, but also in casework, than LAQ.

In addition, LAQ has traditionally not involved itself in a number of civil law areas, e.g. mental health, refugees, even prisoners, when comparing LAQ's assistance for prisoners with the services offered by the Prisoners Legal Service. Much civil law casework is undertaken by specialist community legal centres.

Importantly, the Commission appears to focus more on the problem type (figure 20.3) than the circumstances of the client. We think that a focus on the client is a far better way of determining the nature, extent, substance and method of targeting appropriate services.

Holistic

We support the submission of NACLCL that CLCs 'have been at the forefront of developing both targeted and integrated models of service delivery' and that they collaborate with other community service providers, homeless shelters, community centres and hospitals. CLCs also identify and respond to multiple problems, for example the Legal Health Check.

In summary, CLCs provide services (information, advice, casework) that are holistic, targeted, collaborative, broad-ranging (generalist and specialist), and responsive.

In order to provide these services CLCs access a range of supports including:

- pro bono secondments and referrals;
- legal and non-legal volunteers;
- student clinics;
- retired and career-brake practitioners;
- charitable input; and
- non-legal caseworker involvement.

Governance and Structure

As the Commission points out, "LACs are independent statutory bodies whose broad policies and strategic plans are generally established by a board and have employees who are state or territory government public servants."

It adds "Governance arrangements for CLCs are varied and complex; operating at the government, industry and centre level."

In our view, the Commission does not adequately deal with this CLC issue in the context of the broader legal assistance landscape.

CLCs are incorporated legal entities with responsible management committees, often dominated by lawyers. They are accredited under the NACLCL national accreditation scheme. They are highly accountable bodies that are regulated pursuant to funding guidelines, a service agreement, local incorporation laws, state and territory justice department requirements, government priorities and often the requirements of other government departments that contribute funding.

The 'red tape' and level of accountability reporting for CLCs has not been adequately examined by the Commission.

As discussed in chapter 1 of this paper, we recommend that the issue of accountability and red tape be fully considered.

Coordination

The issue of coordination is briefly discussed in this section of Chapter 20 dealing with the 'landscape', referring to the Australian Legal Assistance Forum which is comprised of the four national peak bodies, and as mentioned a number of other times in Chapter 23.

In our view, the importance of coordination has not been recognised by the Commission, particularly at the state and territory and local levels.

We discuss this in chapter 1 of this paper and again in chapter 21 later.

Funding for CLCs

One issue not addressed by the Commission is the legacy resulting from low funding for CLCs over many years before the recent spike in funding, which occasional and ad hoc funding injections cannot cure.

Chapter 21 - Reforming legal assistance services

General comments

An initial comment by the Commission on p. 610 of the draft report points to the importance of establishing that legal assistance dollars are well spent because taxpayers' funds are limited "and dollars spent on legal assistance services are dollars not spent on other services". However, in other places in this chapter, the Commission recounts research that a dollar spent on legal services is a dollar saved in other government services (p. 614, Box 21.2, Box 21.4, p. 631, p.663). In our view, the final report would benefit from an acknowledgment of this research at the start of this chapter.

Components of an effective legal assistance system

The Commission outlines in Figure 21.1 what it considers are the key components of an effective legal assistance system and discusses these components in the chapter:

- The right mix of services, where the discussion seems to refer to the different methods of service – information, advice, assistance, casework
- The right areas of law, where discussion seems to refer to the areas of law needed – consumer law etc
- The right people can access the services, which seems to mean that services are provided according to disadvantage
- High quality services are provided, which seems to suggest that providers
- Taxpayer funds are managed effectively, providing value for money.

We submit that there are omissions from this list, namely, effective coordination mechanisms and the nature of the services.

Coordination

Coordination is the linchpin upon which funding can be best directed and targeted where it is most needed within the broader policy framework set by government. Later in this chapter, the Commission suggests ways that funding distribution according to need can be better accomplished. However, the proposed model to achieve it does not contemplate jurisdictional coordinating mechanisms, which involve all stakeholders, not just government and LAC representatives. Only in recent years, have state and regional coordination methods been established. They are beginning to work but are unresourced or poorly resourced in some jurisdictions.

Coordination mechanisms need to be resourced to play an effective role in the distribution model adopted, and those resources will be repaid in funds saved through avoided duplication and better targeting.

Strengths of service providers

We suggest that a further component of the system needs to be included that recognises the right type of provider to meet the need. Not just when information or casework is required, but who is best placed to provide that type of service:

- General advice by telephone or interview are best met by LACs and generalist CLCs
- Response to emerging needs, specialist minor assistance for the highly vulnerable and the development of innovative responses is best met by CLCs.
- Casework services are best met but LACs, specialist CLCs and pro bono

Recognising the strengths of providers will better match need with service. For example, CLCs, which are flexible, dynamic and responsive to their communities, and client focused, that is, aware of all the circumstances of clients, not just the presented legal case, and are particularly well-placed to address legal needs holistically. On the other hand, LACs have greater capacity to churn through the cases. These roles should not be under-estimated.

21.1 Are the right mix of services being provided?

QPILCH supports the view that “the ‘right’ mix of services in the different areas of law and taxpayers are getting value for money” is essential. However, we do not believe there is currently enough information to determine how funds should be distributed based on ‘a comparison of benefits relative to costs’. Of course, resources should ‘be deployed where legal needs are greatest, legal problems have the most significant consequences , ... and where the market does not provide services’, but it is not that simple to allocate according to these needs when also considering the different types of service or the location and type of provider.

Information, education and minor advice

We fully agree that “the law can be complex (including the language used) and difficult for anyone not trained in the law to understand. Not being familiar with procedures and institutions can also make accessing the justice system daunting for some people.”

However, as stated in our introduction to this response, the Commission has not addressed a primary cause of this complexity, the parliament itself. As discussed in chapter 1 of this paper, we suggest that the Commission recommend that parliamentary counsel around Australia examine new statutory structures to make laws and rules more accessible to the public.

Nonetheless, we support the view that good quality information about the law and how to navigate the justice system is required. We also agree that ‘governments have a clear and important role to play in providing general public information and community education about the law and the legal system’.

However, we disagree that ‘the LACs are the best resourced, and have demonstrated that they have the capabilities to be the main information providers’ and are therefore the best placed to undertake such work.

Specialist services are best placed in our view to prepare needed information. Many CLCs have prepared information materials, often with pro bono assistance, of the highest quality as have the LACs.

Some of this work has been funded in the last two years by the LAQ CLE Fund. This fund is the best approach as it requires applicants for CLE funding to justify need and why they are best placed to do it through a coordinated system.

This fund is also funding evaluation of publications and stands as a best practice process for developing needed information and CLE.

It is true that there has been duplication in the past but the LAQ CLE initiative has begun a process that is enabling all providers with the skills to contribute to the necessary CLE database.

It is also true that some ‘CLCs are small with limited capacity to produce original information and to keep up to date with legislative changes’. But closing off this aspect of a CLCs role will stifle the energy and creativity of small centres, many of which nonetheless have significant specialist skills. The LAQ CLE fund has the ability to provide resources to those centres to contribute.

Information and CLE is also shared, and the QLAF central repository will ensure that it is available for use by all providers.

Most providers neglect the use of clients to help inform development and content of legal information for the public. In developing the Legal Health Check, clients helped design it and also test it. As recommended in chapter 1 of this paper, whether writing factsheets or reviewing laws or rules, the people most affected by a law or procedure are often best placed to give input into how the law and rule and the explanation of it could be communicated most effectively.

The LAQ CLE funding model should be considered and supported.

Awareness of legal assistance providers

While we agree that information about providers needs to be communicated to the public so that they can readily access the help they need, the conclusions of the Commission in this section need to be considered in light of the following information.

An organisation like QPILCH relies almost entirely on referrals from LAQ, other CLCs, government, members of parliament, community agencies, and the private profession. To an unquantified extent, some clients find QPILCH by Google. Because we place a high value on partnerships with welfare agencies and others that support our clients, there is high awareness of QPILCH in this sector, rather than the public at large.

In addition, QPILCH has rarely advertised our services. When we have, we have received a spike in applications for assistance that has been difficult to address.

Every year, like many other CLCs, client numbers in targeted services increase without any appreciable increase in funding. Staff just work harder to attend to more clients. This is unsustainable in the longer-term. When those limits are crossed, CLCs then alter their guidelines to be able to reduce the demand. For that reason, as discussed later, guideline flexibility is required so that the service can function at a manageable level.

It is true that the LACs have the highest profile. It is also true that they have the greatest budgets for advertising and the greatest budgets to meet demand and are the principle source of assistance for the important areas of crime and family, but they too change their guidelines for the same reasons as CLCs – an inability to meet demand with reducing budgets.

In this context, contracting CLCs and increasing the size of LACs will not address these problems and will likely reduce the outreach provided by the presence of CLCs in various locations in cities and RRR areas.

If the Commission questions the value of CLCs, particularly those clustered in cities, it should ask the LACs if they would welcome adding to their workload the hundreds of thousands of requests for advice given by CLCs by phone or in after hours sessions across Australia every year.

If greater community awareness about CLCs is expected, then resources will have to be provided to match the increase in demand that will inevitably flow.

Accordingly, we believe that the Commission's comment that 'limited awareness of legal assistance services points to the need to raise awareness about the services available and 'who' the services are targeted at' requires either more thought or more money.

In QPILCH's view, a response to these concerns is being driven by increased cooperation of all stakeholders through QLAF and regional forums and networks.

More intensive services

The Commission found that 'CLCs, on the other hand, focus on providing legal information, minor advice and community education.' This is not entirely accurate.

The Commission should be aware of a number of specialist CLCs that provide extensive casework services. For example, in Queensland, the Prisoners Legal Service, the Refugee and Immigration Legal Service, the Youth Advocacy Centre, the Environmental Defenders Office provide high quality representational casework of a relatively high volume considering their resources and are the main and in some cases sole provider of these services.

It is true however that casework is not regarded as the sole driver of generalist community legal centres because they mainly focus on high volume information, advice and referral services and undertake selected casework to address systemic issues. Some centres also have a mix of generalist and specialist services.

Strategic advocacy and law reform

We strongly support this discussion and finding.

This submission could be construed as advocacy for a particular perspective, but the effectiveness of the Commission's inquiry is dependent upon obtaining broad community sector views.

Much of our work in preparing this submission has been done outside work hours. It is rare that CLCs have dedicated funding for policy work.

QPILCH has one funded part-time position to undertake homelessness research. Such initiatives as the Legal Health Check, LegalPod and advocacy for reform of laws to prevent homeless people spiralling into more debt through fines, has resulted from this work.

If the law permits the wealthy to access the courts, people without funds should not be denied such an opportunity by removal of funding from specialist legal services such as the EDO. When a service is closed or truncated, clients do not just give up: they self-represent or seek assistance from other providers, which usually do not have the specialist knowledge to assist, or these use other means to air their grievances.

21.2 Is the 'balance' right?

Civil law matters — the poor cousin in the family

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.

Information request 21.1: The Commission seeks views on whether the above demarcation of funds would be sufficient to ensure that appropriate resources are directed towards non-criminal, non-family law matters.

In relation to civil law (as opposed to crime and family), the Commission quoted the Attorney-General's Department:

As a result of other service priorities for legal representation, Legal Aid Commissions (LACs) and Aboriginal and Torres Strait Islander Legal Services (ATSILS) are more likely to offer advice and minor assistance in civil law matters. Community legal centres (CLCs) are often better placed to assist those with civil law matters who require more in-depth assistance.

Yet this seems at odds with findings of the Commission (see *More intensive services* earlier and *A more efficient way ...* later).

Otherwise, we agree with the findings of the Commission in this section regarding civil law need and clustering of problems and the demands on people as a result of the intrusion of government into every aspect of life. The growing economic gap between the rich and poor is also a contributor to the rising catalogue of civil law needs faced by lower socio-economic groups. Until this structural problem is

addressed, multiple and complex problems will continue to rise and the need for legal services will continue to increase.

QPILCH supports the finding of the Commission that the ‘Commonwealth and states and territories should seek to agree (as part of the next NPA) to national objectives and ‘core’ priorities for legal assistance services (rather than separate Commonwealth and state priorities).’

For too long, competing objectives and priorities have prevented service providers from getting on with the job and has enabled both levels of government to blame the other for gaps and inconsistent approaches.

However, we urge the Commission to ensure:

- That state and territory and regional differences can be accommodated.
- That there can be some flexibility, or as mentioned in our initial submission, ‘freedom within bounds’ so that providers on the ground can respond fairly and equitably to demands. A strict approach can result in injustice.

In short, while government undeniably has responsibility for setting objectives and priorities, it should also trust its expert, responsible and dedicated service providers to make decisions in the light of experience.

We have recommended in Chapter 1 a review of the accountability system. A more sophisticated accountability regime could be put in place to make sure that service providers did the right thing and did not stray out of bounds.

The Commission adds that “determining ‘core’ priorities should be based on where the community-wide benefits are the greatest, taking into account the extent to which unresolved legal problems impact on a person’s life and the community more broadly.”

Service providers are fully aware of these determinants and make decisions every day to ensure the greatest benefits are achieved. However, effective responses are constrained just as much by inadequate funding as by current separate Commonwealth and state priorities and funding arrangements.

We agree that separate funds should be earmarked for civil law matters, so long as the process for distributing such funds is flexible, measured and transparent (see later).

A more efficient way to provide legal assistance for civil law matters?

The Commission’s finding that ‘government funding for civil law cases has effectively been earmarked in the form of funding for CLCs’ is not accurate.

It is true that a large proportion of funding is earmarked for CLCs under the CLSP. However, there has not been, as far as we are aware, a conscious decision that this is the government’s contribution for civil law assistance. On the contrary:

- There was a CLSP before governments withdrew funding for civil law from legal aid commissions from the early 1990s.
- The CLSP was devised as the funding program for CLCs, recognising the important role and unique features of CLCs in the infrastructure of justice.

CLCs are not just mini legal aid offices. They perform a discrete and essential role in the system. The Commission does not appear to appreciate this fact. The differences between LACs and CLCs needs to be recognised and their respective roles and features valued.

Not only are CLCs the harnesser of pro bono and volunteer resources, they play a significant role in the provision of specialist legal services that LACs have never been able to perform. The Prisoners Legal Service in Brisbane was established because, while the then Legal Aid Office had a 'prisoners legal service', it had no expertise or indeed interest in assisting prisoners with problems that arose as a consequence of imprisonment, nor did it involve itself in systemic issues facing the Queensland prison system.

A large bureaucratic organisation has much more difficulty in responding to smaller issues but no less important problems than nimble and flexible community based services.

We disagree in part with the view that 'while CLCs are able to assist people with early and minor advice on civil matters, many are small in scale and may not have the expertise (particularly those specialising in particular areas of law) to undertake complex civil matters.'

Those CLCs that do specialise usually have the ability, subject only to funding, to do important complex casework. To use the Prisoners Legal Service again as an example, it has run many cases in the Queensland Supreme Court testing prisons department decisions. It is an acknowledged and awarded expert in administrative law. It has done this work with a variable workforce of between two to four lawyers and much student and pro bono assistance. It also provides an extensive parole service with the aid of a national law firm.

There are other small centres that can only provide advice and intervention services, but these too are important and location relevant. Depending on their location, they may be able to play a greater role in adversarial proceedings if referral and self-representation services are possible, that is, they can use partnerships and discrete task approaches to meet local need.

The draft report quotes QPILCH's submission about the different strengths of CLCs and LACs:

CLCs are generally more flexible, and are well placed to get information out to target groups, provide preliminary advice, develop community relationships to facilitate multiagency approaches and conduct targeted research. Legal Aid and pro bono services are, on the other hand, better resourced for case work. The current funding model does not capitalise on these strengths, resulting in inefficient delivery of services. (sub. 58, p. 57)

Our point here contributed to the confusion mentioned at the start of 21.2 (above) and needs to be clarified. Purely generalist CLCs tend not to be geared up for casework. Many specialist centres, however, have the experience, skills and expertise to conduct complex casework.

In this discussion it is important to bear in mind that litigation is not the only form of complex legal assistance that providers supply.

The Commission then comments on 'the 'mismatch' between the skills and knowledge of pro bono lawyers and the services typically required for disadvantaged clients (chapter 23). Pro bono assistance for people experiencing disadvantage can also require specific communication and client management skills to be able to assist them effectively (The National Pro Bono Resource Centre, sub. 73).'

This finding is not accurate for several reasons. QPILCH, like the other PILCHs, is assiduous in providing members with training not only in relevant substantive law but also in interviewing techniques. This is valued by young lawyers in our member firms. It is our experience from the clinics overseen by QPILCH and from client feedback in our homeless persons' legal clinics and self-representation service that pro bono volunteers are almost universally sensitive and compassionate legal professionals.

It should also be noted that a number of CLCs have co-counselled with private firms to undertake large and complex matters, which incidentally would not be undertaken by LACs.

The Commission considered that “LACs are also better able (than the CLCs) to achieve economies of scale through high volume service delivery (NLA, sub. 123). Evidence presented to the Commission suggests that the LACs are more efficient in terms of the number of cases held per civil law lawyers when compared with the CLCs.”

However, the Commission has been clear that a key element of the inquiry is that it is concerned not only with efficiency but also with cost-efficiency.

As this evidence has not been included in the draft report it is difficult to contest. But there are several comments to make. If ‘cases’ means all types of work, advice and minor assistance would in our view be far more cost-efficiently provided by generalist CLCs. The majority of this work is provided by volunteers in CLCs at the cost of coordination.

If ‘cases’ means full representation, it is our estimate that through pro bono referrals, QPILCH facilitates more civil law casework than Legal Aid Queensland through in-house and private firm outsourcing, again at the cost of facilitation. However, this only applies currently in the area of civil casework (excluding family law).

The Commission mentions here that it is ‘seeking feedback on a model where LACs are able to compete (via competitive tendering) for civil law funding based on identified need’ on the basis that:

The proposed tendering of civil services offers the potential to better understand the costs of providing such services and ensures that scarce legal assistance dollars are used efficiently and effectively, delivering overall value for money.

It is hard to see how LACs could compete against CLCs for advice and minor assistance work, given that CLCs are able to access enormous volunteer resources.

In specialist areas, like administrative law for prisoners, if LAQ competed for this work and won, not only would a vast knowledge base be lost, but an important independent voice, which operates as a safety valve for prisoners, would be compromised.

Who would generate the services for the homeless and people with intensive treatment orders that have been needed for decades but not delivered until CLCs took the initiative and which are now recognised as among the areas of greatest need.

Up until five years ago, there was competition between LAQ and CLCs in Queensland. After years of hard work, a more cooperative spirit has now developed, which is reaping efficiencies and savings. It would be a great pity if the negative approach of the past was restored.

If the respective strengths of LACs and CLCs are recognised and capitalised on through cooperation and coordination, many problems identified by this inquiry can be addressed.

Adoption of a competitive approach could also have the impact of LACs cherry picking and thus weakening CLCs and undermining the holistic service approach they take (see further discussion in 21.6).

21.3 Are legal assistance services in the right locations?

LACs’ locations are informed by an assessment of legal need... but there is no model to determine placement of CLCs

The Commission has found that the ‘placement of CLCs, however, is largely based on history — CLCs were traditionally established on the initiative of their communities in response to a lack of access to legal services.’

This is only part of the story. Some centres and services have been established by government to meet electoral needs and some have been established to meet a recognised general need, for example, mental health law services.

The Queensland LPITAF review emphasised the need to extend specialist CLC services across the state. It also identified locations of need based on available data.

Some centres, such as Caxton Legal Centre, sees people from all over Brisbane, and further afield in some legal areas, so its location in a higher socio-economic area is not particularly relevant. It is located near public transport and close to its main source of volunteers, the CBD.

Nonetheless, we agree that new services should be targeted to those areas with the highest level of need. That may also include the extension of existing services through other means, such as the use of technology and outreach clinics through non-legal service providers.

We don’t agree that services should necessarily be re-located without an assessment of their current service profile. We agree that in considering the location of services, all four legal assistance providers should be considered.

21.4 Are assistance services targeting the ‘right’ people?

Efficient targeting

Draft recommendation 21.2: The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the national partnership agreement on legal assistance services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

Legal service providers make judgments in these sorts of circumstance everyday within the broad priorities, agreements and requirements of government. We agree with this recommendation, but stress that some degree of discretion needs to be built into the system. Either government trusts the institutions it has created to perform these services or it doesn’t. It either trusts the people who in many cases devote their lives to helping others, or it doesn’t (with acceptable accountability measures to prevent abuse). If it does have confidence in the system and the people in it, then it needs to let services get on with the job. Micro-managing and constricting policies will inhibit what the system is set up to achieve.

We agree with the submission of Redfern Legal Centre that CLCs complement the LACs as a more flexible option not limited by strict means and merit tests. Limiting discretion leads to injustice.

A consistent eligibility criteria?

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.

Again we broadly agree with this recommendation, but so long as flexibility is maintained.

We do not agree that the CLC approach to determining their own eligibility criteria lacks transparency. CLCs go through detailed processes to determine their eligibility criteria, which also change because of funding and demand pressures. CLC missions and objections are set out in their constitutions and strategic plans that are updated annually and provided to program managers as part of voluminous reporting requirements. We are not aware of forum shopping that occurs as a result of different eligibility tests.

The Commission acknowledges that the majority of CLC clients are from disadvantaged groups. However, it adds that the evidence 'suggests that where clients live can affect their access to assistance from a CLC.'

This suggests that there is scope to improve horizontal equity (that is, that people in equal circumstances are treated the same way) (p.644).

In our view, while there may be some scope to improve horizontal equity, there will always be communities and groups whose ready access to legal assistance will be impinged by their location and circumstances.

The Commission acknowledges the need for flexibility but suggests that financial eligibility tests be linked to 'some established measure of disadvantage. Without further elaboration, it is difficult to comment further.

But it should be borne in mind that in litigation at least, great injustices can occur if people are not assisted and the high cost of litigation would prevent many people from obtaining help if the bar is set too high and there is no flexibility to help where hardship will result.

Are the current eligibility criteria for LACs too mean?

We reiterate our earlier point of the need for flexibility and for LACs and CLCs to be trusted to make good decisions in appropriate cases within budget for the benefit of disadvantaged clients experiencing hardship.

We are not aware of any CLC with criteria that is 'too lax'. However, if the Commission is talking about an example like QPILCH's Self Representation Service, where we will give any self represented litigant, no matter how wealthy, one appointment, it misunderstands one benefit of this Service. If a client has sufficient funds, we encourage them to obtain private representation and can also point out the difficulties they face in the litigation. This can refer them for paid assistance or divert them from the system. In both ways helping to reduce pressure on the courts.

21.5 Is the service delivery model the right one?

There is strong support for the current mixed model

The Commission acknowledges mixed service delivery models: 'the LACs utilise a mix of in-house and private practitioners, and the CLCs a mix of in-house and pro bono and volunteer services.' The PILCHs are also CLCs.

The Commission refers to research in other jurisdictions that shows that legal aid bureaucracies are more efficient providers than private lawyers, but acknowledges the benefit in addressing conflicts. Approaching this issue purely in economic terms could see private firms withdrawing from this market (as has occurred at other times), resulting in the loss of the important involvement of the profession in areas of law that impact on disadvantaged people. There is considerable cross-fertilisation between the LACs, CLCs and the private profession that adds value to the work of all and exploits the best skills available.

By reserving more complex casework that require specialist assistance for CLCs and LACs and outsourcing other matters to the private profession, costs should be able to be appropriately apportioned to obtain the greatest efficiencies and retain the good features of the mix.

... but there are some recruiting and retention issues

It can be true that CLCs have retention problems (the LACs and private profession can have similar problems), though it varies usually as a result of external circumstances. QPILCH for example currently has a relatively stable workforce. Most of the deficiencies highlighted on p. 650 of the draft report are counterbalanced by an enthusiasm and dedication to service that characterises most CLC employees. While this is also true for most people who work in the legal assistance sector generally, there is definitely a greater preparedness to put up with the deficiencies in order to “make a difference”. The energy and enthusiasm of CLC staff members should be captured and retained, not discounted as unimportant.

As the Commission acknowledges, legal aid rates are determined by government funding. While a graduated scale based on complexity may attract more private practitioners, there will still be limits. For example, it is difficult to see the private profession assisting extensively in mental health law, where client needs are particularly variable and challenging.

21.6 Does the distribution of funds need changing?

The Commission states at p. 653:

Commonwealth funding for LACs is distributed between the states and territories based on a model that attempts to reflect legal need and the costs of providing services in particular jurisdictions/areas. However, as discussed in section 21.3, the distribution of CLC funding is largely based on history, with the added feature of ad-hoc grants.

For the reasons outlined earlier, we disagree that CLC funding has been largely based on history. However, we do agree that additional grant funding has occurred on an ad hoc basis. Nonetheless, we support an allocation based on need, but suggest that location should be just one element of the assessment process.

Distribution of CLC funding — historical rather than needs based

The Commission’s discussion in this section ignores the importance of on-the-ground knowledge, suggests there has been waste and duplication and unnecessary servicing as a result of this ‘historical’ funding. In our view, this is far from the case.

Most CLCs are very targeted, very efficient, cost effective and in great demand.

The Commission considers that ‘history-based funding has meant that funders have not needed to consider whether the funding allocations are appropriate (except when there is ‘new’ money)’ but acknowledges this is not now the case at the Commonwealth level. This has also changed in Queensland following the review of LPITAF in 2012-13.

As stated earlier, for the record, priorities have always been determined by government and many locations have also been determined by politicians. For many years, QAILS has recommended needs based funding and individual CLCs have lobbied for services based on observation of need if not clearly accessible data.

Importantly, the Commission states:

Without a consistent and coordinated approach to distributing legal assistance dollars, it is likely that there will be both duplication of services and gaps in services.

We agree with and support this view. The Commission then concludes:

A new funding allocation model for CLSP funding is required to better reflect need. The Commission considers that it is better to approach this issue systematically rather than continue to rely on a 'bottom up' approach which depends on a motivated individual or group of individuals first identifying need and then applying for a grant to the CLSP.

In response, we suggest that there is need for both top down and bottom up approaches that work on a cooperative basis through the new coordinating mechanisms discussed in this paper.

Reform options

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.

The Commission is highly critical of the historical approach as if it alone is the cause of duplication and gaps. The current array of CLCs around Australia is not bad per se. There may be need for some tweaking, but most are fulfilling essential services for their communities and for the most disadvantaged in those communities.

What is good needs to be preserved, so we support the continuation of the recurrent funding of CLCs that meet community and government expectations.

Gaps in services cannot be addressed by simply diverting funds from allegedly bloated areas to under-served places or issues. To do so will potentially leave those communities under-served.

We do not believe that NALC or any CLC is wedded to the historical funding model. But we are wedded to the idea of consistent and sufficient funding in order to meet the legal needs of our communities, whether state-focused or local community or community of interest.

There is clear room in our view for the retention of a separate funding pool that maintains existing CLC services, subject to review, and permits the funding of new services to fill gaps when funding becomes available.

We also reiterate our suggestion, which appears to mirror the NALC approach, for the establishment of a new funding pool to address demonstrated unmet need and to promote innovation in service delivery.

We had initially made this suggestion to AGD when it was considering the nationalisation of the profession. The establishment of such a fund, with input to decisions from all four providers is consistent with our view that only through cooperation and coordination can the most effective use of scarce funds be maximised. Our view is that the group that makes recommendations for distribution of this project fund could also be the national level body that coordinates other aspects of the system, including making recommendations in relation to the main CLC pool, having input into priority development, working with state and territory coordinating bodies and coordinating research about legal need to feed into the funding process.

We agree that with input from the body referred to in the preceding paragraph, the LAC funding allocation model could assist in the allocation of CLSP funding across jurisdictions.

We support the option where the Commonwealth's CLSP funding could be diverted into the NPA to allow the state and territory governments to directly manage the CLSP, however with required input from the state and territory based coordinating bodies. It is imperative however that the CLSP is separated from LAC funding.

How do you decide 'who' represents the best value for limited dollars?

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.

The Commission states:

One approach to deciding which organisations should get access to the limited amount of funding available to provide public legal assistance services is to develop 'collaborative partnerships' between community-based providers and governments to enable them to take joint responsibility for successfully delivering services efficiently and effectively (Shergold 2013). This service sector reform canvassed by Shergold involves progressively consolidating (or linking) multiple funding streams to give service providers greater flexibility to pursue integrated outcomes. A 'collaborative partnerships' approach would be underpinned by an outcomes framework that would establish benchmarks against which performance would be audited, monitored, measured and reported over time.

We support this approach.

The Queensland Government has already undertaken a review of Queensland CLCs through its review of LPITAF. Existing services should be maintained until they are shown to be ineffective. Services should not be closed other than if they do not meet the needs for which they were established or are no longer needed in their community.

We strongly reject the idea of competitive tendering. It has not worked in the past and has prevented cooperation, the linchpin of an effective system.

On p. 18 of the draft report, the Commission acknowledges that because the justice "system is adversarial, so there is little incentive to cooperate". In the same vein, if it becomes policy that service providers must compete for funding, then cooperation will suffer.

Commodifying free legal services will lead to a two-tiered system where services that can produce a profit or undertake large volume work will be capitalised and prioritised, leaving individuals with complex and special needs without sensitive holistic assistance.

Legal services are a necessity in that they protect the necessities of housing, employment, opportunity and environmental protection among others. Opening legal assistance services to the profit maximising market will destroy the heart of legal services, which while struggling to meet demand are responding creatively. The energy and creativity of CLC employees needs to be harnessed.

While the amalgamation of services may have been useful in SA, Queensland is too large for such an approach to have easy application. It also suggests that big is always best. There may be other less

disruptive ways to increase efficiency for smaller centres through co-location etc. Developing partnerships and extending specialist services to new places and finding innovative responses is a far better option.

The Commission stated:

The historic community support base, and the ongoing in-kind contributions via pro bono and volunteers that have been developed by many CLCs may also warrant the longer-term model of engagement, which is inherent in a joint venture approach. However, joint venture models can be resource-intensive, require a high degree of flexibility, funding certainty and agreed evaluation protocols (chapter 22).

With funding certainty through a modified but stronger CLSP, CLCs are well suited to the partnership and joint venture approach.

As stated earlier, competition between LAQ and CLCs has already occurred in Queensland, creating a suspicious and uncooperative culture which has taken years to mend. We believe that implementation of Commission's view to permit such competition would undermine cooperation and turn back the clock.

We repeat that big is not necessarily better (or more efficient) in the provision of sensitive legal assistance for disadvantaged people and importantly, the forced amalgamation of CLCs into larger bureaucracies will damage many of the important features that CLCs offer.

21.7 Is the quantum of funding adequate?

Information request 21.4: The Commission seeks feedback on the extent of, and the costs associated with, meeting the civil legal needs of disadvantaged Australians, and the benefits that would result.

As mentioned above, we support retention of the current indexed CLSP pool with provision for an increase in the size of the pool based on the range of indicators used to assess the level of funding for the LACs. Of course adopting this approach does not bind governments, which will reduce the size of the pool from time to time. However, as discussed earlier, the establishment of a managed project fund can permit the seeding of research to consider new services, help buttress against economic vagaries, help establish new services and develop innovative ideas, through a structured process - a legal services futures fund.

21.8 How well do the governance arrangements work?

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.

Subject to what we have said earlier in relation to 'aligned eligibility tests' and our submission that representatives of all service providers should be included in these negotiations, we also strongly recommend that the Productivity Commission adds to this process the review of the current accountability reporting requirements as outlined in chapter 1 of this paper, many of which add cost and are voluminous, unnecessary and pointless for accountability purposes. The current processes have not changed for years and have built up in an ad hoc way. They can be simpler and achieve greater accountability at the same time if service providers have an opportunity to contribute to the discussion of this issue.

Chapter 23: Pro bono services

Draft Recommendation 23.1

Where they have not already, all jurisdictions should allow holders of all classes of practicing certificate to work on a volunteer basis. Further, those jurisdictions that have not done so already should introduce free practicing 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.*

QPILCH supports this draft recommendation.

Information request 23.1

Would there be merit in exploring further options for expanding the volunteering pool for Community Legal Centres (CLCs)? For example, are there individuals with specialised knowledge that could provide advice in their past area of expertise such as retired public servants or retired migration agents, that CLCs could draw on in the relevant area? Are there currently any barriers to prevent this?

A key barrier to participation has been continued maintenance of registrations and qualifications.

This could to some extent be addressed through Draft Recommendation 23.1 but could also be expanded to include Migration Agent and any other relevant registrations.

QPILCH has made several attempts to attract retired legal practitioners and professionals from other fields such as accountants. This is a resource which has been under utilised. So far QPILCH has had only limited success.

Draft Recommendation 23.2

The Commonwealth Government, and the remaining states and territories, should adopt the Victorian Government's use of a pro bono 'coordinator' to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.

QPILCH supports this draft recommendation.

Information Request 23.5

The Commission is seeking views on methods to implement data collection on pro bono services without increasing unnecessary reporting burdens. Are there ways to better utilise existing sources? Can reporting be standardised? Are there existing social impact metrics (or categories of outcome) that should be adopted? How would data collection best be done in a systemic manner? Who should collect the data?

The pro-bono coordinators – the PILCHs - collect information on the services, facilitated by them. The PILCHs are mostly also CLS's and report the voluminously on what they do and on the pro bono work they coordinate. This reporting uses the same systems as is used by all CLC's and data is collected CELS. The PILCH annual reports also provide extensive quantitative and qualitative information about the pro bono work of the profession as does the National Pro bono Resource Centre.

Chapter 24: Data and Evidence

Draft Recommendation 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- *adopting common definitions, measures and collection protocols*
- *linking databases and investing in de-identification of new data sets*
- *Developing, where practicable, outcomes based data standards as a better measure of service effectiveness.*

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

Draft recommendation 24.2

As part of draft recommendation 24.1, existing data systems should be overhauled so that providers can track outcomes for intensive users of legal assistance services over time.

Draft Recommendation 24.3

The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.

QPILCH supports draft recommendations 24.1, 24.2, 24.3

Information request 24.1

The Commission seeks feedback on where a data clearinghouse for data on legal services should be located. Such a clearinghouse needs to be able to coordinate data collection from multiple civil justice stakeholders and disseminate the information in a timely fashion. It should also have some expertise in linking, using and presenting data, especially administrative data. Ideally, the clearinghouse should also have experience in liaising with legal service providers and different levels of government, have an understanding of the operation of the civil justice system and understand the principles behind benchmarking.

QPILCH recommends that the body, recommended by QPILCH earlier supported by a unit within AGD be charged with data collection analysis and dissemination.