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PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE

DR W. MUNDY, Presiding Commissioner
MS A. MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON MONDAY, 2 JUNE 2014, AT 9.45 AM

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DR MUNDY: We might make a start. Good morning, ladies and gentlemen, my name is Warren Mundy and I would like to welcome you to this the first day of hearings for the Access to Justice Inquiry. Before proceeding any further I would like to pay my respects to the elders of the Ngunawal People, the traditional owners of the land upon which we meet today and pay respect to their elders past and present and the elders past and present of all indigenous nations that have inhabited this continent for over 40,000 years.

As you would be aware, we published a draft report in April 2014 and my colleague, Commissioner MacRae and I are responsible to this inquiry and are delighted that you have been able to come and participate and for the assistance you have provided us so far. The purpose of these hearings is to facilitate public scrutiny of the commission's work, to get comments and feedback, particularly from those who wish to be on the record which we may draw on in the final report. Following this hearing there will be hearings in every other capital city in Australia including Tasmania and the Northern Territory. We expect to provide our final report to government in September. Following the delivery of the report the government can take up to 25 parliamentary sitting days to publicly release it by a tabling in the parliament.

We like to conduct these hearings in a relatively informal manner but I remind participants that there is a full transcript being taken so we do not take any comments from the floor because they actually will not be recorded effectively. At the end of the day's proceedings there will be an opportunity for persons who wish to do so to make a brief statement, and obviously people are able to submit further advice to us if they choose to do so as the result of things they hear said today.

Whilst we have a preference to conduct these hearings informally, I would just like to note that under Part 7 of the Productivity Commission Act the commission has certain powers to act in the case of false information or refusal to provide information. As far as I am aware these provisions have yet to be used by the commission and I do not expect to need to use them in relation to this inquiry. Participants are not required to take an oath, but of course should be truthful in their remarks, and participants are welcome to comment on issues raised by other submissions as well as their own. The transcript will be made available and published to the commission on the commission's website along with other submissions to the inquiry.

I am obliged to advise you under Commonwealth Health and Safety Regulations that in the unlikely event of an emergency requiring evacuation of the building, you should follow the green exit signs to the nearest stairwell, do not use the lifts and follow instructions from the floor warden. The assembly area is at the corner of Marcus Clarke and Rudd Streets which is on your right

as you go out the front door. There are the formalities over with.

Our first participant today is the Women's Legal Centre of ACT. Could I just ask you to both state your names and your affiliation for the record and then perhaps make a brief opening statement.

MS YATES (WLC): Thank you, commissioners. Thank you for the opportunity of joining with you this morning. My name is Heidi Yates, I'm the executive director at the Women's Legal Centre ACT and Region.

MS PAYGET (WLC): And my name is Rhonda Payget, I'm a principal solicitor at the Women's Legal Centre.

DR MUNDY: Thank you.

MS YATES (WLC): The Women's Legal Centre has welcomed the commission's inquiry into access to justice, particularly as an opportunity to shine a light on the unmet legal needs of some of the most vulnerable persons in our community and particularly in relation to the draft report, we welcome those parts of the report that acknowledge that whilst increased efficiencies in some sector or form would go some way, they would in no way or they are likely to meet the extent of unmet need that currently exists across Australia, particularly in marginalised communities when it comes to access to justice.

I think you've seen our brief submission in relation to some of the matters that we might wish to raise today and you'd be aware that the Women's Legal Centre is a small community legal centre that's been operating in the ACT for about 18 years now. So we have the equivalent of 2.8 full-time solicitors, two Aboriginal liaison officers and myself and an office manager. We receive approximately 60 per cent of our funding from the Federal government through the CLSP program. I know there were a number of matters that were raised in the report that your staff asked us to speak directly to, so I might hand over to Rhonda to speak specifically about alternative resolution and our work in that area.

MS PAYGET (WLC): So we have a close working relationship with the Family Relationship Centre in ACT. These family relationship centres, as you know, were commenced in 2006 along with legislative change. Initially it was thought that family dispute resolution centres would be a first point of call for all family law clients and that they would effectively filter out those clients who could resolve their matters without needing any legal assistance. Now those first thoughts have kind of developed over time and it has become obvious how important it is to have legal assistance during the process of family dispute resolution. So we've worked with the Family Relationship

Centre to provide assistance to women going through that process and that might be advice before they go into the family dispute resolution process and that's advice specific to them and their circumstance, so we distinguish it from other advice that's available.

There's a lot of family law advice out there and the advice that women are looking for is advice specific to their circumstances. We hope that that assists them in their ability to reach an agreement or even if it's an interim agreement. The way that our advice line works from a practical point of view is we actually take the names of people that we deal with - not all advice lines work like that - and so we keep notes and we tell clients that that's confidential and clients can then ring us back at some later stage in their matter and get that ongoing advice that's specific to them. We think that that's a valuable process for that client.

There are clients that are screened out of the family dispute resolution process and that's often a problem for people if they're in the gap, as we say. They can't really afford a private lawyer and they're not eligible for Legal Aid and so we once again talk to them about their situation and their options and they may then be in a position of doing private negotiation or it may be a matter where they have to be referred to a private solicitor and/or take their matter to court and, once again, we provide assistance along the way. So I guess it kind of fits into that notion these days for talking about unbundled legal services and providing the discrete legal services at various stages of a person's matter.

As well, with the Family Relationship Centre, we work on a relationship with the centre so we both know very clearly what we do. Their workers, family dispute resolution practitioners, know about the value of legal advice and I guess that informs their practice and similarly we also refer clients who might ring us on our advice line. For example, we might be referring them to the Family Relationship Centre.

Just as an aside and drawing from that, I guess it leads into the next issue about - - -

MS YATES (WLC): I might just talk for a moment about the other sort of civil, like our civil dispute resolution services that we work alongside. The centre's core area work is family law and approximately half of the women who have contact with us are either in the midst of experiencing family violence or who have recently experienced family violence. So it's a high proportion of the clients that we deal with. We also work in the areas of employment, discrimination and victims' compensation, so I guess that flexible model of providing advice to clients at the beginning of, during and, indeed, in

formalising any agreements reached in the context of family dispute resolution, also extends to the context of discrimination and employment matters.

We do a lot of work and I guess as gender specialists in the discrimination and employment areas in relation to sexual harassment and pregnancy-related discrimination matters. So, again, we look at maximising the value of, say, the conciliation processes available at the Fair Work Commission, at the Australian Human Rights Commission and our ACT Human Rights Commission in, I guess, being a safe space for women to come in the doors, say, "Look, I've got this issue," and to be able to support them with legal advice through these low-cost processes, which hopefully means their matters don't escalate to litigation.

The flexible model of advice that we provide through that process, we find highly effective in supporting clients to advocate for themselves in circumstances where they wouldn't otherwise have the confidence to do so or knowledge of process to do so.

MS PAYGET (WLC): I guess from that experience we would say that whilst it's attractive to have a single entry point for disadvantaged clients, for example, and the LawAccess model has been talked about and so on, which is a fantastic model, and there is a lot of information there, that it's always important to remember that there are people who aren't going to enter in that way, and I think that's certainly been the experience in the family law space. As I said, it was hoped the Family Relationship Centre would be that one point of access, but seven years down the track we realise that there are lots of different doors that people come in and so we talk about the "no wrong door" approach.

In the family law space the organisations like the Family Law Pathways Network and so on are - all the providers in the family law system are connected so that "no wrong door" can work well, everyone knows what everyone does and those referrals can be made. So I think it's important, as I said, to remember that there are people who aren't going to access like that, and we certainly are aware of clients who come to us in other ways, and that's where we see the benefit of our specialist service, and community connection is really what we would say our most disadvantaged clients tend to come to us through more referrals which may be through the Domestic Violence Crisis Service or community workers. So particularly women of non-English speaking background will come through community organisations that they may have had contact with. Because we would have, for example, women who are isolated in their home and would never have heard of Legal Aid, our advice line or anything like that. It's only through some community connection that they'll know about our service and come to our service.

Privacy is a big issue for women in that situation and also when we have highly vulnerable clients who may be victims of violence and also come from a country where their legal system is very different. There's a lot of caution around using any service and also privacy within their own communities too, small communities in Canberra.

MS YATES (WLC): I guess we're in quite a fortunate position in the ACT in that we are a small jurisdiction and I guess we're accountable not only to our funding bodies through those agreements but also to our colleagues in the legal service sector because of the collaboration that naturally occurs in a small jurisdiction. I think our submission refers to the ACT Legal Assistance Forum which is, you know, a forum of all the free legal service providers including the CLCs and Legal Aid and the Law Society to get together and talk about where we all sit and to be able to map out our services in a practical way, which I guess is making us accountable to one another in ensuring that those gaps of the people that most need our services get those services.

It's interesting that even in a small jurisdiction like ours where arguably, you know, a single door such as, you know, a larger or better funded Legal Aid Commission might be able to service all the need, what we do know in talking about what works for our clients is that having specialist services actually increases the likelihood that those who are perhaps the most vulnerable will get a door into the justice system.

Picking up on those points that Rhonda made about the community connections, I guess what we know is that even that the Rape Crisis Service and at the Domestic Violence Crisis Service can say, "Look, go to Women's as a first point of call. You know, it's a women only space, it's a safe place. They're experts in relation to domestic violence and sexual assault. They'll talk to you about what the options look like, where the best place to go is," and it's that first warm door, I guess, to knock on which allows us to have the conversation about where people are up to and go, "Right. Well, it seems to us you're eligible for Legal Aid," and if they're likely to be eligible we'll always point them in that direction, but ensure that that referral is a warm one, we know, particularly for our Aboriginal clients we run an Aboriginal women's program that they won't call an advice line and they won't rock up at a building where they don't know who's going to be inside.

So, again, we rely on the support of our Aboriginal liaison officers who, I guess, increase the expense of accessing Aboriginal clients, but who we know without we wouldn't be talking to those women. They can say, "Look, my mate Rhonda is in at the office. She's there right now. Let's head on in and talk about, you know, these papers that you've got and what you need to do

about them," and it's those community connections that means we actually are speaking to those women particularly who so often are victims of family violence and don't feel safe enough to (a) identify that they perhaps have a legal issue, but (b) to raise it with someone that they don't know or isn't recommended by a trusted person that they know within community, so it's the strength of those community connections in, you know, making sure that people get in the door. Our submission raises a number of other things, but I guess we'd be keen to reflect back to you and see whether there are any particular issues that are raised from our submissions.

DR MUNDY: You want to start?

MS MacRAE: Yes. So the first thing nearly everybody raises with us is the pressure that you've got on your resources and how difficult that is. How do you manage that? As you say, anyone can ring your advice line and you can get referrals from any number of people. How do you manage your budget through the year and how do you ration - and I'm assuming you're going to have to ration because you can't - you're going to have this unmet need. So how do you ration your services? How do you work out where the priorities are?

MS YATES (WLC): Strategically, and if you'd have a look at page 2 of our submission you will see our rather complex triage system.

MS MacRAE: Yes, I did.

MS YATES (WLC): Which is about - - -

MS MacRAE: I got my glasses out at that point.

MS YATES (WLC): Which is more reasonable in practice. But it's about going, "All right" - so when someone calls up on the advice line how do we know whether you're a client that we want to spend 10 minutes with or perhaps run a case for, and I guess we operate under the CLSP program which uses the CLSIS data collection system. So at the very beginning of a conversation we're required to ask a number of questions about income, about whether someone's been subjected to violence, and that's not a question we sort of say, "Tick the box; Have you been subjected to violence?" but gather that information through that initial conversation. And then I guess we make an assessment about whether the person has capacity to be referred out to a private practitioner, whether they're likely to be eligible for Legal Aid, in which case we can talk to them about that process, or whether they're a client who actually we need to see face to face.

So you'll see on that triage system, which looks quite complex, but I guess once you get a working knowledge of it it works. It's trying to weigh all of that up quite quickly and looking at prioritising women who we don't think will access a legal service elsewhere. So for us, Aboriginal clients are our core priority, if you like, because we know that if they've made contact with us the chances of them making contact with another person, you know, if we send them on their way, are minimal given the research that we all know across the sector in that regard.

So also if they're from a non-English speaking background or they're in immediate crisis and experiencing violence and their safety or their children's safety's at risk they're the matters that we tend to prioritise in terms of face-to-face appointments. But Rhonda, as principal solicitor, you will have something to add there.

MS PAYGET(WLC): Yes. So we developed this triage in 2011 just to - I mean, we - this is how we work but I guess just to kind of put a framework around it, and there is a lot of pressure on the service and it's always a question of priorities and juggling things and calling in extra resources sometimes. For example, before Christmas it's very busy, we might call on our pro bono solicitors who usually give advice at our Tuesday night service and say, "Can you give us some extra time? We're really, really busy at the moment." So it's, once again, trying to use some flexibility around demand, which is constant, and alongside that we also try and do some, I guess, preventative-type early intervention work which is, particularly once again in the Aboriginal community. One of our Aboriginal workers runs community legal education sessions and talking about - and has different organisations come in and talk to people and so on to try and, I guess, capture legal problems early before they come to crisis point when you're really needing to juggle things at the last minute, but - - -

MS MacRAE: Do you ever seek payment from clients?

MS YATES (WLC): No.

MS MacRAE: No?

MS YATES (WLC): We don't.

MS MacRAE: Okay.

MS YATES (WLC): No.

MS MacRAE: And you talked about you having warm referrals and I can

appreciate that that does definitely seem to be the sort of space you're in and that that works well for these groups. It sounds like you're working quite well together and being a small jurisdiction, as you say, makes that easier. Are there any improvements that you could see in the way that you're working as far as that sort of goes, or do you feel like that's all ticking along pretty well from your point of view?

MS YATES WLC): We've been fortunate to establish the Canberra Community Legal Centre hub just this year which all of the community legal centres are now co-located in the one building, so we have shared conference room facilities.

MS MacRAE: You have a conference room?

MS YATES (WLC): Shared kitchen, all those kinds of things, and I guess that has assisted the warm referral process amongst the community legal centres because you can use - - -

DR MUNDY: Not hop on a bus and go to Belconnen or something.

MS YATES (WLC): No, that's right. It's like, "Come upstairs." Well, actually, Genevieve's with a client. Well, let's talk to her PA about, you know, what's going on here." So that has been useful. Our colleagues over at Legal Aid Commission we meet with regularly as - through ACTLAF but also just the fact that we work in the same sector and we bump into each other and all the relevant forums that tend to occur. But I guess often some of the barriers that we come up against around warm referrals are just in terms of the, I guess, particular frameworks that sit around, for example, access to - or eligibility for a grant of Legal Aid. So, you know, you've got to fill in the form and you've got to make sure that goes through a process, obviously, and if it's turned down then you repeal it, so the ability to warm refer a client often has a time lag associated with it where things need to be processed understandably at the Legal Aid Commission's end.

So my experience of working in a Legal Aid Commission versus the Community Legal Centre is that you do have in the first instance a more flexible service model in terms of clients coming in the door, assessing all of their legal problems, perhaps having one solicitor deal with multiple different problems, and if they need to be referred on to Legal Aid it may be that they have a solicitor represent them for their domestic violence order, a solicitor dealing with their civil matter, and a family law solicitor. So I think some of those structures can hinder warm referrals, particularly for vulnerable clients.

DR MUNDY: And you mentioned that about 50 per cent of your clients were

women - family law matters were women experiencing some form of domestic violence. Could I just ask in that family law space more generally, how many women present to seek your assistance in family law matters where there isn't violence involved? Could you characterise them in some way demographically or - - -

MS PAYGET (WLC): That's a tricky question. I'd have to say I can't answer that because, I mean, violence of course is cross-cultural and cross-class, so that would go through all of our clients, and that's why we talk about intersecting vulnerabilities. So, for example, in our triage you might see high income clients who normally, you would say, "Oh, they should just go to a private solicitor."

DR MUNDY: Yes.

MS PAYGET (WLC): But there will be some clients there who are not working or have had to leave the family home no matter how much it's worth and are living in a refuge and things like that who, in the first instance, do require some legal assistance to be put on a pathway and they won't be eligible for Legal Aid because their name is on the family home, for example. So there's a whole range of scenarios and I don't think you could characterise the clients where there isn't violence by their characteristics.

DR MUNDY: I mean, part of the brief and part of one of the issues we've tried to explore in this is how do people get civil disputes resolved which are costly when they don't have access to Legal Aid and they don't have the means, irrespective of where the means are deployed. And we've received a lot of material from women who are in a position where they may be relatively affluent but are suffering violence and have made plans. But I suspect there's a number of women, a not insubstantial number of women who - their relationships end - - -

MS YATES (WLC): Yes.

DR MUNDY: They are not lawyers, they need advice on what their rights are. There's no question of violence, they may even have a partner who's being reasonable and the relationship has been dissolved. Do you see many of them, or where do those women go?

MS YATES (WLC): I think they often ring our advice line. I mean, because they see it as a - - -

DR MUNDY: Yes, I - - -

MS YATES (WLC): - - - first port of call, yes.

DR MUNDY: This is essentially a transactional question, is where do people go for this, which is essentially a grading.

MS PAYGET (WLC): Yes. So they would often ring our advice line and we have a solicitor who answers the advice line and the solicitor can give advice about their particular situation, so when you are the solicitor giving advice it's just trying to sort out of all of those things: What are the next steps? What advice do they need? Are they up to doing their property settlement or are there other steps do they need to go through first? Are they safe? What's happening with the children? Do they need to go to the family relationship centre and sort out the kids? So it's that sort of very specific and individual advice. And then I think many of those women who just need that initial advice and then get on the path with the others connected into the system, if you like, then they're going to be okay, you know, and they may ring back. We have, you know, lots of women who ring back at some later stage and we've still got their notes to say, "Well, this has happened now. This is where we're up to now. What's the next step?" So we can have that initial conversation. If they're at a point where they need to go and see a solicitor, then we can do the referral to a solicitor or the referral maybe to the Family Relationships Centre. But it's often that call of, "I've just separated. What do I do?"

DR MUNDY: In that circumstance where you would refer them to a solicitor - and I don't say there's nothing particular - this is dissolution of marriage, property needs to be dealt with, there's reasonable discussion about the kids. Would you give that woman any indication of what sort of costs she was looking at in going to that solicitor?

MS PAYGET (WLC): What we do is we provide three names and the names we provide are from our list of volunteer solicitors. If it's a family law matter, they're all family law specialists and we say, "You need to ask them about costs," and we have a fact sheet that we send to them called Working Well With a Lawyer which talks about time costing and preparing your documents, and just some tips on how you can work well with a lawyer in private practice, and we leave them to have that conversation. If people say, "How much does a private solicitor cost?" we might say between 350 and 550 an hour - because people have no idea about that and - - -

MS MacRAE: After you've picked them up off the floor, after you've said that.

MS PAYGET (WLC): For many women, that's right. Their first appointment's going to be a thousand dollars or maybe somewhere between

500 and a thousand. Some of our lawyers will give a half hour free to our referrals. But, yes, they've got to come up with that money at a difficult time.

MS YATES (WLC): Which is again why we tend to end up sometimes working with those women on an ongoing basis if they self-represent. So you have that initial conversation, it's followed up by a series of information checks on the website but it's about going, "Well, the first step is to have a think about what you want to have happen. Call us back when you've got a proposal and we can talk you through that proposal." They come back and say, "I've talked to him, he seems all right with this bit, we're not sure about the super," and say, "It sounds like you need some expert advice but maybe you can do these other bits around the kids through a parenting plan at the Family Relationship Centre."

So often talking to them about cost saving measures where they can do some of the work themselves, where they might be able to write it up at the Family Relationship Centre but they need specialist advice, so it's often not affordable for people to go and see a private solicitor to do all the work and I guess part of our role is supporting them through the process to do the bits of it that they can themselves.

DR MUNDY: So certainly helping them unbundle. "Rather than getting the solicitor to do all of it, get it done either yourself or by someone else."

MS YATES (WLC): That's right. "Do a draft of the time line before you go in." You know, we say, "Have your list of assets ready to go, up to date before you turn up, and if a solicitor's talking about photocopying, tell them you want to do your own photocopying." You know, it's one of those really practical things which are cost saving over a period of a year or more of negotiations.

MS MacRAE: In the US they're looking at a limited licence so that lawyers would become specialists in family law and only practise in that area, and they're hoping as a result of that, that they'll reduce the costs. I just wondered - we've got something in our report suggesting that we might look at limited licences or a similar sort of arrangement in Australia. Would you have a view about that?

MS PAYGET (WLC): I don't know enough about it. I don't see how that would work exactly because I guess with all areas of law, it kind of crosses over, so it would be hard to limit it. I think it would be hard to limit it but I don't know enough about it.

MS YATES (WLC): I would be wary about an expectation that that would reduce costs simply because, for example, in the ACT the majority of family

lawyers here are accredited family law specialists only operating family law but their hourly rates are such because they are accredited specialists, that they're inaccessible to the majority of people in the community. So it would be interesting to see how any cost savings could come from that accreditation process but we would certainly welcome any scheme which proposes to reduce the hourly fees of experts in the field.

MS PAYGET (WLC): I think in principle the concept of unbundling is a good principle and probably quite realistic, so if there is a way that can be supported, I think that's good and I equated our service to that and I was just thinking of - if you look at the overall justice system, I had a client just recently who is a Bhutanese client, did speak English but it wasn't easy for her and she received court documents which had been prepared by an accredited family law specialist which froze her bank account - an order had been obtained ex parte and she was in court on Thursday and I talked to her on the Monday, and she had had some limited assistance from an advice line. So I was able to see her and help her prepare her documents in response, because she had a lot of documents and everything, and the matter - she went and represented herself at court but I think having the documents there meant the judge could read her story, which was significantly different to the story that had been put to the court, and that matter's on a good path now.

So just by having that service and having her documents prepared for her, then she can look after herself now. You know, I can just speak on the phone and - what the next step is - to her.

MS MacRAE: Are you aware of barriers to that unbundling? If you were to refer someone to a private solicitor, as you said you do on occasions, we've heard that some in the legal profession say that there's potential conflicts and difficulties with the requirements under the Professions Acts for unbundling that - you know, how can you ensure that the court then doesn't imply that you haven't done your work properly because you only looked at this bit and if you'd looked at that as well, you would have had a different answer. Those sorts of problems. Are you aware of those issues and is there anything you'd like to say about that?

MS PAYGET: I think there are big issues around that and, for example, with our Legal Aid colleagues, a working group under the banner of ACTLAF tried to get up a proposal where small property matters would be dealt with by solicitors on a pro bono basis, so we put this proposal to the Family Law Committee and, you know, you might have a car, a bit of furniture, some debt but it really needed to be sorted out because, you know, the joint names were on there and things like that, so people were stuck in this situation where they couldn't sort it out themselves and we were saying, you know, if there was a

forum where people could fill in all their assets and liabilities, and then you just sort of had an FDR process, came to an agreement and then wrote it up, it would be so many limited hours.

When that went to the Family Law Committee no-one wanted to take that on - family law firms - because they just said you can't be certain that you are getting all the information, "We have obligations about disclosure. What happens if you ask for information and weren't given it, you can't advise your client," and things like that. So those are the concerns of the profession and they're valid concerns as well, because in that particular circumstance non-disclosure of information is common, I guess. So it does then put the solicitor in a difficult position with giving advice when you don't have all of the information.

DR MUNDY: You mentioned that you act for women in discrimination matters and you help them deal with Human Rights Commissions. One of the concerns broadly that have been raised with us about ADR and with respect to some Human Rights Commissions is that whilst you get an outcome, it may be an outcome that would be inferior to that which you might get in court and, indeed, it's been put to us that in some circumstances if you go to court you're less likely to get a positive outcome, but the outcome you get - if you get a positive one - would be better, if you go off to a Human Rights Commission process you're more likely to get a positive outcome but the benefit of the outcome will be less than what you would have got if the matter had have been successfully dealt with in court.

Is that a bit of folklore spread by people who don't think ADR is a good thing or - I mean, because I can see why they would say that. Is that an experience that you've had or do you think that the outcomes that you get in these Human Rights Commission type forums and Fair Work Ombudsman, and other places are of an equal magnitude as you would get in the court?

MS YATES (WLC): I think that if you were looking purely at the dollar figures in terms of what people got in their pocket at the end of litigation versus conciliation, then people tend to get better outcomes in litigation, than the financial compensation that can be sought through conciliation. I think there are other benefits of conciliation, which include clients having the opportunity to put their story where they are able to do so and to speak for themselves directly to the other party, and - - -

DR MUNDY: Cross-examination is - "redress" is the word I'll use and "violent" might be another word.

MS YATES (WLC): And also, for example, in the Human Rights

Commission, to negotiate resolutions that are more creative or more unusual than those that you would see in court orders, for example, apologies or the changes to policies or training in the particular organisation. For example, a lot of the women that come and see us and say, "Look, I wouldn't have brought this matter to you except that I don't want the other 10 women who are pregnant in the office in the next five years to be dealing with the same thing."

They wouldn't necessarily take the matter to court but they want to have the opportunity to sit across the table from the employer, for example, and say, "This is not on and this is the impact it had on me," and to have them sit and have to listen to their experience of what happened in the workplace. Often a result of the first conciliation is perhaps a small amount of financial compensation but significant commitments to changes in culture and practice in the workplace which is actually the core goal of the individual pursuing their complaint.

I guess one of the more difficult issues is if you participate in that conciliation and the other party isn't willing to come to the table in terms of a negotiated outcome and then looking at the client's capacity to represent themselves in the relevant court or tribunal. As a community legal centre we're fortunate to have strong links with pro bono service providers and it's often at that point that they will step in and say, "Look, we'll deal with this matter." I had one matter where a woman wasn't permitted to express breast milk on the premises or store it on the premises because it was a biological hazard.

In a situation like that, which we see as a very black and white answer in terms of what's reasonable, if the employer won't come to the table, then you've really got no choice but to take the matter forward and a breast-feeding mum who's working part-time and may have other children to care for isn't necessarily in a great position to represent themselves against, you know, the large firm that the employer has got on board, so there is a significant issue there around access to justice where a negotiated outcome isn't possible and that's a barrier that our clients hear from time to time.

DR MUNDY: We have made some observations about the model litigant notion for government agencies and I suspect that certainly in the employment space you would probably see more government employees as a percentage than most other women see or sees in the country. Is it not your view that Commonwealth agencies regularly act and behave as model litigants? Or is the outcome - actually I am not asking you to name anyone.

MS YATES (WLC): I think that public service agencies often have excellent frameworks for dispute resolution that would reflect and moving towards model litigant guidelines. I think the thing that we have found most difficult

for our clients is a lack of understanding of those frameworks by management, so potential managers who haven't followed particular processes or who aren't actually willing to engage or implement the very good policies that are printed out and sit on the shelf and are available on the Intranet and all those things. Something we constantly speak to people in the upper echelons of the public service about is it's great to have these particular procedures and polices, but if it's not coming through on the ground it's of no use to your employees.

I think when I started in this practice seven years ago I was incredibly surprised at the mistreatment that women were still experiencing in public sector workplaces around the most simple things like accessing their, you know, parental leave, because the policies look good, but what we saw is the implementation of those weren't so good.

DR MUNDY: Has it got better?

MS YATES (WLC): I'm afraid to say I haven't seen significant improvements and I think that's reflected in the Australian Human Rights Commission's most recent inquiry into the parental leave arrangements for both men and women that we're not seeing a significant improvement. Whilst we are, I think in some areas, around entitlements such as the access to unpaid and paid parental leave, the experience of women trying to access those entitlements in the workplace is still not great and much less so for women who have no advocacy power, you know, if they're on a minimum wage or they are a casual employee, but even right through to women at higher levels of pay and of experience who still feel like they can't ask the question or access the flexible work arrangements because of what will happen as a result which is that, you know, they'll experience disadvantage in the workplace.

So lots of cultural changes for the training we think needs to be done to make sure that the good policies play out on the ground.

DR MUNDY: And you mentioned that you got about 60 per cent of your funding from the Commonwealth. Can I provide you with an opportunity to reflect on recent government funding decisions?

MS YATES (WLC): I'd be happy to provide the commission with the Canberra Times article of last weekend which highlighted our loss of services, so we'll lose $50,000 over two years. It was interesting to do the sums. We have a solicitor who currently costs us approximately $50,000 a year and when we looked at the number of hours she contributed to the centre and also the two pro bono programs that she supervises and we costed that out at a standard, you know, private rate of $350 an hour for the number of hours of work done, you're looking at a cost of over, you know, a cost of over a million dollars of

service hours provided through this one solicitor who's paid - works part-time, but I guess that was just, you know, a particular exercise to illustrate the impact of a small loss of funding to a community legal centre in terms of the number of hours of legal help that are available on the ground.

DR MUNDY: And this person's role was service provision, front line - I mean the motivation has been put that the government wants to focus its legal assistance dollars on service delivery not advocacy in law reform. This person obviously was not involved in advocacy.

MS YATES (WLC): No, her role is as a frontline solicitor. I guess that said, weaving in amongst all of our solicitor's work is the opportunity to participate in providing feedback to government. For example, this woman is an expert in victims' compensation and a number of jurisdictions have been reviewing victims of crime compensation scheme, so it makes sense that we say, "Look, in our experience this works and this doesn't." It's not about saying one government is better than another political party. It's about saying on the ground if you set up a system it's actually going to act as a barrier.

That particular individual did have some role in that kind of work and, for example, she also runs the domestic violence and tenancy training to community workers to better support their clients to access various support, so, yes, that natural collaborative work that community legal centres have done over time around trying to improve systems given that we can't meet the demand without going, "Don't try and fix the hundred, try and fix the system," so from our view it's inefficient to stop that work from happening, because, in fact, we are perhaps best placed to speak to government about whether their policy is being met by the nature of the law.

MS MacRAE: Just then in relation to how the funding for CLSP program works, how is your slice of that determined and how do you see that sort of funding model applying and does it need change? You might see we have made some suggestions in our report about how we would see CLC funding possibly being determined in future. Do you see the funding model as it currently applies, that 60 per cent that comes to you, does that seem reasonable relative to the other CLSP services in the ACT and is that model going forward, does it give you certainty? Are there things that need to be improved or changed around that?

MS PAYGET (WLC): I think that - I mean it's always hard to speak about the amount because we always say that we could provide more services with more money and so it's difficult for us to talk about that. I guess in terms of going forward there's been some suggestion about tendering so on for that. I would like to speak strongly against a kind of commercial tendering process for

lots of reasons and I think part of it is just that culture of competition that tendering engenders amongst organisations who are working together and it's much better to have a cooperative approach. I think that in this sector we already have a cooperative approach and so it would be better to build on that cooperative approach and perhaps focus on accountability and work back from accountability rather than having this competitive tendering process.

There already are a number of organisations, ACTLAF and so on in place that encourages that cooperative service delivery.

MS MacRAE: Just in relation to the accountability question then, one of the problems, you know, that we have encountered and I am sure you have too is that it is very hard to measure the quality of the output and, you know, how do you determine these things. So is the data that you are currently required to collect and what you collect on your own behalf through the IT systems and such that you have, does that help you to measure your own accountability or are there changes there that are required and would you feel like you'd be in a strong position if someone was to knock on your door say, "Well, we're not going to use the historical funding base we had any more, we've decided we really want to look at the value of the service you're providing. Give us some measures of what you've been doing," are you currently, do you think, collecting sufficient data to allow you to do that? Do you think it's the unanswerable question?

MS PAYGET (WLC): Yes, I think this also started, we know who we see, the clients that we see and that helps us target our service, you know, using our triage and so on and so if there were an eligibility criteria that was based, the concept I think that the national association put forward about being based on principles and guidelines, rather than having dollar figures and things like that, I think community legal centres could work well within that kind of system. What we don't measure very well is the unmet need.

For example, we don't know how many people don't get through on our advice line apart from people saying to us it's hard to get through on our advice line, because we don't have the technology. I know the technology is out there. We can't afford it, so we don't measure that on that need and if you knew the landscape, you might be able to target your service better, so knowing the landscape would be helpful to us and I think that's something that the national association talked about as well in their report. Let us know what the landscape actually is. One of the difficulties with accountability, I guess, is that we don't have a consistency across the legal assistant sector. We don't have common goals. We do in a sense, in a broad sense. We do have a common goal, yes, and so it's very hard to compare what different organisations are doing.

DR MUNDY: We might bring it to a close now because I am minded that I am going to get through things on time, Ms Payget. Thanks very much for taking the time basically to make submissions and to come in and speak to us today and we may well be in touch with you.

MS PAYGET (WLC): Thank you.

DR MUNDY: The next participant is the Legal Aid Commission, ACT. Could please state your name and affiliation for the record and then perhaps make a brief opening statement.

DR BOERSIG (LAC): No problem. John Boersig. I'm CEO of the Legal Aid Commission in the ACT.

MS TAYLOR (LAC): Louise Taylor; I'm the deputy CEO for the Legal Aid Commission.

MR SCHILD (LAC): Derek Schild, client service manager, Legal Aid Commission.

DR MUNDY: Over to you.

DR BOERSIG (LAC): Indeed, it would be better to have the questions and answers because I think that went pretty well in the last session and I would be surprised if our answers are that much different. In terms of the provision of Legal Aid, we fundamentally see this as a policy question for government. As was said earlier on, the issue of unmet need has been graphically and clearly described, particularly by the LAW Survey, and I think there's two things we would say about that. One is of course we could do more with more money but the second is that it is incumbent upon us all to find more innovative smart ways of doing business and in particular, we need to be strategic about who we identify as in need of aid and how we provide that aid. No doubt we will talk about this later on but the unbundling of services is something we already do and it's clearly one of the strategies we would be using to do this.

One of the other aspects I would like to mention later on will be the importance of outreach and that's done in a variety of ways, because whilst the quantity, the volume of people that we assist, is extremely important and the statistics we already have show that, it's important to ensure that those areas of a community who have a need do receive the access. And you have already heard some comments about that in relation to Aboriginals and Torres Strait Islanders. We do a lot of work similarly in that area for the very same reasons but there are other areas, you know, young people in particular through our youth law centre, through our dispute resolution services, we run an outreach program at the Aboriginal Medical Service. We run an outreach program at Mount Stromlo for young mothers who are trying to go back to school.

I wouldn't want to see those kinds of services lost in the overall quest to maintain volumes and this of course will link to some of our support facilities, the importance of niche services and specialist services as well. We see ourselves, particularly in the ACT, very much as part of a group of

organisations that are trying to work collectively together. ACTLAF is the title we use but the real issues are how well do we work together, do we refer well, reform referrals and otherwise, do we cooperate in terms of the provision of community legal education and so forth, and those to me are the key issues about the sector needs to work together. Indeed, we have got a meeting to progress in particular about how we might look at some shared services, for example, and how we might support each other more specifically. We can always do that better, I think.

DR MUNDY: You said you might come back to outreach. Perhaps start there. One of things we were asked to do is try and get a handle on unmet needs. Getting a handle on met needs is hard enough but trying to know what isn't met is even harder. Do you have thoughts, irrespective of the measurement problem, and do you have any thoughts about the measurement problem and in particular observations being made about the law survey?

DR BOERSIG (LAC): Yes.

DR MUNDY: But also what can be done essentially to reach out to people who are probably not substantial in number and the community more generally.

DR BOERSIG (LAC): Yes. I think the LAW Survey made the point that there are about 150,000 people above 15 years of age who are likely in the next 12 months to need some form of legal assistance. That would be a broad range of legal assistance, everything from "I'm having a brawl with my neighbour" to some credit and consumer advice to some generally major problems. In many ways, we pick up a lot of that from our help line and information services and the volumes of that speak for themselves. We do need to reflect though. What we do is analyse that information but where we might go and issues around where we provide fairly, who we provide it and what forums come to the fore.

One of the things we are looking for, if I extend the example of the mums in school, is being out in those places, so that we are at least available. Young people in particular are notorious for not coming forward when they have legal problems before the matter gets into crisis, so the kind of things we are looking at there are coming into a range of schools, about doing some skyping, for example, and having sessions where we could base ourselves here in our offices but then skype into classrooms and so forth or Skype into sessions that the teachers have gathered a number of young people together.

The other way I think we do it in particular, and you were asking around the family law and people who had unmet need around that, we run specific CLE, so that when people ring in to get the information and advice, we can refer them to say, "Look, there's a session on divorce" or "on property coming

up at this particular time in our premises," so that for those people who for a whole range of reasons aren't likely to meet the means test, they are able to get some at least some information.

MS TAYLOR (LAC): And that's in a criminal law context as well. For people who might be facing less serious driving matters, for instance, we run a regular session with a criminal lawyer. That can have upwards of 20 people in it sometimes, sometimes less, but that's our way of targeting those people who ordinarily may not receive a grant of aid.

DR BOERSIG (LAC): So there is a whole range of services we are trying to provide, to try and set that up, and then that issue for all of us, I think, about where Legal Aid cuts off and that next group, a whole lot of people, 10 per cent or 20 per cent, which seems to ever be increasing, is an area that we are trying to tackle. We are working with the University of Canberra at the moment to run a small business clinic. That clinic was started by a private firm just recently and hasn't been able to be followed through. They have come to us and said, "Can we start talking with you about running that clinic and we'll properly run it." These aren't traditionally Legal Aid clients. They'll be small business owners but we think that's also an area where Legal Aid needs to be seen to be operating, so that there's a group of need.

DR MUNDY: (indistinct), what sort of matters are they presenting?

DR BOERSIG (LAC): They'll range from bankruptcy of course to employment issues. The advice they'll be getting there will be from volunteer lawyers, so they won't be from commission lawyers. We operate with volunteer lawyers also as well as the CLC, so our Youth Law Centre has five firms that assist that. We're open now because of that five days a week with the Youth Law Centre. Three of them actually put a lawyer in our offices one day a week and the other two firms take referrals for case work and advice.

MS MacRAE: I guess I'd be interested. It's a little bit left field but we're seeing a few people, different people that are particularly interested in people with disabilities. It seems like that is one group that's clearly identified through the law survey and possibly not quite so well identified through the law survey as we'd hoped that do have particular issues. How does Legal Aid - are there things that you think you could do to help people with disabilities? Do you feel particularly restricted in how much help you can offer people that may have particular disabilities that you may not have the expertise to deal with?

DR BOERSIG (LAC): We have a number of protocols around this. In particular we have a protocol based around how lawyers will manage or deal with support persons because in terms of litigation in particular often those

clients with a disability are accompanied by a support person, so we try and encourage that and encourage the way we are linked and work with them in the client's best interests.

We're developing a disability action plan inside the commission now. We've looked at the plans that have been developed in New South Wales and Victoria and we'll hopefully have a consultation basis that enhances that. The model there of course are the reconciliation action plans that have been used elsewhere which we do have.

I think one of the major issues for us to ensure that referral systems also include non-legal referral, so the information referral systems over the helpline seek to ensure that people do have that access. The issue for us often is that the person comes in and they have a cluster of problems.

MS MacRAE: Yes.

DR BOERSIG (LAC): It's not like they're just coming in for their DUI problem. It's quite likely they've lost their job or they've been chronically unemployed or they have mental illness. That's an increasingly documented concern for us. Particularly in the criminal justice system we're seeing that. In terms of the kind of people that are coming before ACAT here locally, again it's the same kind of people who have the rental house problems, who have the guardianship problems, who have the mental health problems. So we're seeing a lot of that same cohort of people.

DR MUNDY: This cohort of problem people and their criminal matters aren't within the terms of reference but we'll leave them in to the scope if we decide it's helpful. It has been suggested to us that a lot of people with civil problems, and there's people who experience this class of problems have both civil and criminal problems. One of the observations that we've made and others have made to us, because of Dietrich, Legal Aid Commissions have to prioritise criminal matters and we have made a recommendation that civil matters - one of the draft recommendations is the funding of civil matters should be considered separate to the criminal matters.

Obviously at the coalface we don't want a circumstance where a person of genuine entrenched need for both civil and criminal - so I said, "No, sorry, I'll talk to you about that but I'm not going to talk to you about those things," when they might be the cause of that. It has been suggested, therefore, that this idea of separate funding is not a good idea. Do you have a view and if your view is, "We really should separately fund them," how would you deal with the interface?

DR BOERSIG (LAC): The issue for us is that there our two main drivers are people who are in jeopardy of their liberty on the one hand, on the other hand it's family matters where children are involved. Those two drivers really soak up the bulk of our work. The unserviced area is the civil area that you identify and from our point of view whatever happens we would need to maintain a priority in relation to those two issues, but clearly we need to better meet those civil needs.

Where we have clients who are connected in either way to those, they do get a service that allows them. So if someone, for example, in the criminal field, and you might talk a bit more about this, in relation to mental health has certain action taken, we follow that client through, through to the ACAT Tribunal when the mental health proceedings are heard. If that person needs civil advice, we do give them that advice, so those people who are in that cohort do get a full range of assistance.

DR MUNDY: So if they've got a problem with car repayments or something like that - - -

DR BOERSIG (LAC): They'll be advised about it.

MS TAYLOR (LAC): They're referred from our criminal area to our civil area and from our civil area to the criminal area, depending on where our intervention with them begins. So I would say in that area actually are a lot of people that we see who have those compounded problems that you speak of and often part of the problem is they don't identify them as a legal problem. It's just part of the complexity of the issues that they're facing. So those people our lawyers are very skilled at identifying, even if they're not criminal lawyers if they're giving advice in relation to civil matters, that this is a criminal issue and drawing on our expertise from our criminal area in that way.

DR MUNDY: So it's a management issue, John. If governments were to come along and say, "We've made an assessment of finding for civil matters," the manifestation of that day to day wouldn't be bureaucratically burdensome if properly - it wouldn't impact on your operation.

DR BOERSIG (LAC): No.

DR MUNDY: You could provide an accounting report (indistinct) outrageous.

DR BOERSIG (LAC): Yes, indeed. I think we could effectively use it from that point of view because a lot of that cohort of people wouldn't necessarily follow into the criminal or the family law sphere and there's the bulk of the

people that you're talking about as well, if you're talking about a snapshot at one time.

DR MUNDY: Can I just ask you briefly, and this is a peculiar to the ACT question because I am an ACT taxpayer, for the record, how do you deal with New South Wales? I guess the first question is how do you deal with Queanbeyan but then do you work with New South Wales to find things you can share and do together and stuff like - given that you're a very late centre within a relatively sparsely populated part of New South Wales?

DR BOERSIG (LAC): Particularly around the family law. We are the main centre of application in relation to family law, so we are dealing with application for Legal Aid throughout the hinterland and we have a cooperative relationship with the Legal Aid Commission. There are protocols about when we fund and when they may fund.

DR MUNDY: So if I had a Legal Aid problem and I was a resident of Yass, I'd be mostly likely to file here.

DR BOERSIG (LAC): You'd probably come here, yes. Subject to whether they - of course there's the LawAccess line but they could ring our information line as well and people locally do. So many of the people who live in Queanbeyan, for example, work in the ACT.

MS MacRAE: Coming back to - you were saying you will get help if you've got a criminal matter or issues with children and family issues. Nevertheless, you're required to have a means test and a merits test for these things. Do you vary how that means test works through the year because you're finding that your budgets is going to run out? How do you manage that situation? I appreciate it must be very difficult.

MR SCHILD (LAC): In a nutshell, it is a difficult rationing exercise essentially. In our legal assistance guidelines which have been determined under the Legal Aid Act and which incorporate significant chunks of the appendices of the NPA in terms of our eligibility criteria, there are general discussions in terms of whether assistance can be granted for someone who has an allowed income amount that's above their own income and whether there should be a greater contribution there and so forth. That ultimately comes back to an availability of funds and whether we can fund someone who doesn't actually meet the means test initially.

MS MacRAE: So if I was an individual, and I'm sorry to pursue this a bit, but I'm living in Western Australia and I have a particular civil problem and I've got income and assets of a certain amount and I apply to the Legal Aid

Commission there to get a grant of assistance, how similar or what likelihood is there, given that income and assets, that I would get the same answer, a yes or a no in WA as I might in the ACT or if I was in Yass and went to New South Wales because ACT said no, could I go to New South Wales? How much similarity is there across the nation? If we said that we were concerned about need nationally, how much consistency is there currently in the way those means and - - -

DR BOERSIG (LAC): In a way I'm making a submission exactly about this. I don't know whether you have received that yet. You have? Yes.

MS MacRAE: I haven't read it - with the other hundred that arrived last night - - -

DR BOERSIG (LAC): Effectively, it exposes exactly the point you make, and there are differences, and sometimes palpable differences, in the way it's applied. Some of the drivers that we have talked about here in the ACT, we have got a more generous housing allowance because in the ACT rents are higher, so we are more like New South Wales.

MS MacRAE: Sure.

DR BOERSIG (LAC): But our income threshold is probably different to that in South Australia or Queensland and, when we are talking about this it's probably - you've got to tailor that to the specific funds, and you picked this up in your report, they are available within each jurisdiction so that we expend the funds in accord with the amount of money we do, so partly it's the historical function of how we are able to ration funding throughout the course of the year, and it's a virtual daily discussion between Derek and I about expenditure. The issues you raised, one interesting issue around the Commonwealth here, that hit us very hard, that we have lost $400,000 from next year, in addition to the loss of another $415,000 from the ACT statutory interest account. That $800,000 was for front-line services and, if you look at the Commonwealth, that two-year contract that was severed, CLCs were affected in a similar way, those numbers that we were able to assist around small property matters that were referred to earlier which were funded too, dispute resolution, all those front-line targets will have to now be pulled back because of it. To achieve that, and with it the lag in delivering of eligibility which we have to manage, we have got to look very closely at our funds and monitor them on a daily basis.

MR MUNDY: Are you able, if you're able to do so today, but if not come back to us, with respect to that 815,000 from the territory and from Commonwealth governments, actually identify the impact on front-line

services?

DR BOERSIG (LAC): Yes, we can do it. I should be clear. Yes, the 400,000 we can specifically identify that. That's the Commonwealth money. The 415 is from the statutory interest account that is administered by the Law Society, and I think you will hear a lot about that as you go around Australia, because all those interest accounts have been - - -

DR MUNDY: We don't have to leave the office to hear it.

DR BOERSIG (LAC): But all that's grants, so that would be - - -

DR MUNDY: So that's more project related?

DR BOERSIG (LAC): Grants of aid, so - - -

MR SCHILD (LAC): Quite a lot of legal representations - - -

DR BOERSIG (LAC): Around 400 - that would be how many, Derek? 180, 160?

MR SCHILD (LAC): It's going to be close to 200 grants of legal assistance that we would have to cut.

DR MUNDY: How many do you grant within the year, roughly?

MR SCHILD (LAC): Roughly 2000 a year.

DR MUNDY: So 10 per cent.

MR SCHILD (LAC): So it's a 10 per cent cut.

DR BOERSIG (LAC): That's on top, then or course there will be the Commonwealth moneys on top of that.

MS MacRAE: You talked a bit about unbundling and your use of unbundling, and I'm kind of repeating what I asked previously, but we have, and you will see in our draft report, we see that as a potential area that might really help in the future in getting better access for people who are in that middle group of not being able to get a grant of aid and not being able to employ a full service. Can I just ask you to elaborate a bit on the work, and you have done it to some extent already, about the extent to which you are able to offer unbundled services and the barriers you might see and are aware of in the private market.

DR BOERSIG (LAC): In the context that you were discussing before, we provide duty services at the Family Court and we provide duty services at the Magistrates Court in relation to domestic violence. In relation to the Family Court, we're seeing people each morning generally, and advising them, irrespective of means, and trying to assist them to get through the matter that day. It's not unusual for people to come back or to be referred from there, either to one of our information sessions, or referred into an application for Legal Aid or referred out to local practitioners, where it's clear that they will need that kind of assistance. Sometimes, we assist them on two or three occasions, as they go through, similar to the way Rhonda described in terms of people getting back to us. That's not unusual.

MS MacRAE: Is that increasing? Is that dipping in and out, coming to you for parts of service, becoming more common?

DR BOERSIG (LAC): The demand is consistent. I mean, there's just a continual demand for assistance like that. I couldn't say exactly if it's increasing or decreasing, but certainly it's strong and consistent. Louise, do you want to say something about the DV unit?

MS TAYLOR (LAC): Yes. We offer a service at the Magistrates Court for people who are wanting to take out a domestic violence order, and that necessarily requires a number of different issues to be identified. It's not uncommon for people who seek that assistance to be in the midst of or beginning proceedings in family law matters, and so our lawyers make an assessment in relation to the order and then also provide advice in relation to where they might need to go. That can include a referral back to our office, to our family law specialists, for advice or referral back to our office to make an application for Legal Aid, or referral to a private practitioner.

It's very common in that space for us to see people on more than one occasion on a duty basis, so people that can't afford to fund assistance for a domestic violence order from a private solicitor come back to our office for the return conference to seek assistance in negotiating that, and often there can be more than one return conference, and so our assistance to those people is largely done on a duty basis, because they wouldn't qualify for a grant of aid. So yes, the return aspect in that work I would say is quite high.

MS MacRAE: Right, okay.

DR BOERSIG (LAC): We see a lot of merit in looking at ways of unbundling services and improving the way people can be assisted throughout those proceedings, so whether it's for information, referral, or whether it's

through getting people into such a position that they are able to make an informed decision is a strong aspect of Legal Aid, because they work.

DR MUNDY: We are reasonably aware that organisations like yourself do offer this bundled service, particularly with duty services and stuff like that, but I guess the wider question and the issue that has been of concern, obviously, for some years to the judiciary is the unbundling of services by private practitioners. Do you have any views on that, and perhaps also if services could be unbundled by private practitioners, would that be of any use to yourselves in servicing people who are at least economically or otherwise disadvantaged?

DR BOERSIG (LAC): I think you referred to some of those issues earlier on in relation to what the United States is doing. One of the key issues is what is your retainer, how to define that retainer. There's an interesting case that we are using now, Bevan v Fortune, which is a Queensland case, which was a Law Society run scheme, which was 20 minutes for $20. The importance of that case, it talks about what is the nature of the retainer, the nature of the service you can provide in X amount of time. We think you can provide that kind of a service, but there are real issues around full disclosure and so forth, that have already been referred to, but we need to provide a system that says, "We can give you this service for this amount of time based on that." For my own view, partly based on an earlier question from you, often the legislative solution is - - -

DR MUNDY: That case was in the Supreme Court of Queensland?

DR BOERSIG (LAC): It was, yes, I can send the reference on. But the solution provided by Canada seems to me the way to go, where they provide that type of legislative support to Legal Aid Commissions and so forth so that they can provide that kind of limited assistance.

DR MUNDY: What about more generally? What if I'm a person who doesn't qualify for Legal Aid or whatever? I really just want a bit of advice. It may well be a family law matter. I just want a bit of advice from a solicitor. I don't want them to prepare documents. I am happy to go to court myself. There is evidence to suggest that when lawyers have done this, the matter has gone a bit hoary. They are beaten up by the judge and therefore won't do it again. Is that an area where you think we will be able to have to unbundling because what we are interested in is this bunch of people, perhaps almost everyone sitting in this room, who may from time to time on a piece of unbundled advice but because of the operation of ethical rules or whatever, if nothing other than the view of the bench, aren't able to access that service? Is that something you think would address what we call the missing middle?

DR BOERSIG (LAC): In relation to advice and information, we are providing that kind of service now. It is not means tested so when people come in they can get that advice, and similar duty work, so they are getting that assistance. Subject to safeguards, we have made a similar argument in relation to paralegals in our original submission to you in relation to what they can do. It's not dissimilar in terms of unbundling services. It's talking about the rate of payment or what service you can provide. Yes, we think that is the case with a licensing regime.

DR MUNDY: We are not suggesting it should just be going--

DR BOERSIG (LAC): Yes.

DR MUNDY: One issue that has been raised with us has been the remuneration of private practitioners by the Legal Aid Commission. Both yourselves and Rhonda have mentioned this, putting matters out to private practitioners. How does ACT Legal Aid set rates where private practitioners are - - -

DR BOERSIG (LAC): It is historically based, the current rates. Originally, as I think you know, the purported figure should have been 80 per cent of scale. Since that time, it is hard to say what the scale is any more. I mean, there is no clarity about what the scale is. I mean, you were quoted some figures earlier on - $350 to $600 - based on the usual hourly rate. Our rates are nowhere near that. In fact, depending on what it was, it would be $240 an hour or it would be $120 an hour.

MR SCHILD (LAC): $160 an hour in family law. It is quite significantly lower than the market rates.

DR BOERSIG (LAC): We made again some submission to you about what could be done in relation to the tax resume and that was a submission that was worked up with us in consultation with Minter Ellison who engaged on advice for that and there is some relief that could - I know that was a bit out there, that proposal, but nevertheless it could provide some relief from that point of view in terms of not increasing the amount of money going out but nothing was - - -

MS MacRAE: We have heard quite a lot in other jurisdictions about that gap in rates for lawyers causing a juniorisation, if I can use that word, of private practitioners who are coming in. Because the rates were low, they were putting their most junior people. As a result, they are feeling that people are operating through private practitioners who are - and they might not be getting the sort of service that they should be expecting. What would you say to that?

DR BOERSIG (LAC): From our point of view, that is why we have panels. That is why we do audits. If a lawyer is on a specialist panel with us, they need to have the qualifications to be able to do that work. The terms of the panel are such - it is a contractual arrangement essentially that they need to fulfil. If they are not providing a service, they shouldn't be on our panel any more. The auditing work that Derek would do is an endeavour to ensure there is quality outside the services. The work inside, the auditing work we do of our own staff, primarily through Louise and her role, is similar to ensure there is a quality service.

DR MUNDY: It has been suggested in other places, not with respect to the ACT, that there are matters that senior counsel, certainly senior junior counsel, should be attending to and because of the Legal Aid rates, they are not, with junior counsel being retained to deal with those matters. Is that something that you have experienced in the ACT or is the Bar more generous here?

DR BOERSIG (LAC): The people we allocate to work - we don't fund people who we don't feel would be capable of doing the work.

DR MUNDY: So you are not - - -

DR BOERSIG (LAC): Senior counsel or junior seniors are people who we think can do the work.

DR MUNDY: So you are not concerned that there is an absence of supply for appropriate counsel.

MS TAYLOR (LAC): No. It's a smaller pool certainly in Canberra obviously. That though necessarily creates specialists in particular areas in my view in practice, particularly criminal law.

DR MUNDY: Does it raise conflict issues for you in civil matters, given that the pool is so small?

MS TAYLOR (LAC): In civil matters?

DR MUNDY: Yes.

DR BOERSIG (LAC): In all our matters there is a potential of conflict but it is big enough so that there are alternative providers generally speaking. There is one significant example in Canberra where that is not the case and that is the Eastman inquiry but that is unusual.

DR MUNDY: Which we believe has come to a merciful end.

DR BOERSIG (LAC): Well, almost but apart from that, there is the capacity in the Bar here and amongst Bar practitioners in the way we run our own practice that allows us to manage that issue of conflict.

DR MUNDY: It is an issue that has been raised with us which relates particularly to family violence issues. There may be a criminal matter outstanding against one member of the family. The other member comes to you for assistance. How do you deal with that conflict?

DR BOERSIG (LAC): It depends on the nature of the assistance that is required. For example, if someone comes in to the DV unit and they are an applicant, there is a preference provided and advice and assistance is provided in the usual way.

DR MUNDY: So the bloke has been brought in.

DR BOERSIG (LAC): If it is a respondent - - -

DR MUNDY: He has been arraigned for assault. The assaulted party comes in and complains. How do you resolve that?

DR BOERSIG (LAC): We have an information barrier between our civil practice and between our criminal and our family practice.

DR MUNDY: So you can manage the conflict internally.

DR BOERSIG (LAC): We can.

DR MUNDY: And you don't have to send the DV - - -

DR BOERSIG (LAC): Generally. I mean, there will be times when we can't.

MS TAYLOR (LAC): And there are thresholds where the conflict must be looked at again to see whether it is material and how it might impact our ability to deal with that matter. It is an issue we are currently wrestling with in terms of our approach to it in-house and how we respond to it by referring matters outside the commission but it is something that all our practitioners are very aware of. We try to manage it in a way that both parties are getting at least advice in terms of putting them on the right pathway to seek further assistance to unbundle whatever is going on.

DR MUNDY: If both parties were eligible for assistance, representational

assistance, and you couldn't get your head around the conflict issue, would you still fund the grant of aid?

MS TAYLOR (LAC): Yes. It would be referred out.

DR BOERSIG (LAC): It would be referred out.

DR MUNDY: That whole space doesn't cause you operational difficulties. It is obviously an issue that concerns you, rightly so.

MS TAYLOR (LAC): It creates lots of conversations between practitioners.

DR MUNDY: It's a management issue.

MS TAYLOR (LAC): Yes.

DR MUNDY: It is not a fundamental structural issue.

MS TAYLOR (LAC): I wouldn't say so, no. It is also an issue of encouraging our practitioners to be able to identify - - -

DR MUNDY: The reason why I ask is that this issue pops up in what one might call small places: large regional communities. It is obviously an issue in indigenous law as well.

MS TAYLOR (LAC): Indeed.

DR MUNDY: I was just interested in how a relatively small city deals with those issues.

DR BOERSIG (LAC): There is a person doing their doctorate in this at ANU, a woman by the name of McGowan. We have been meeting every once in a while to have a chat about this. She is looking at legal conflict in small rural communities. I will get hold of that and make sure she adopts it.

MS MacRAE: Could I just ask? We talked about unbundling of services. I know we have spent quite a lot of time on it but one of the other methods that the legal system generally is looking at is better use of technology and things like automated help tools to fill in forms and that sort of thing. Do you see real scope to do any more of that and do you think that if there was better use or more availability of those sorts of tools, that would reduce some of the stress on your systems?

DR BOERSIG (LAC): The short answer is yes and we think that there will

be technology available that can facilitate this. We have talked about having, for example, a kiosk at our work where people can come in and get certain answers. You have seen similar kiosks from major industries through to health care centres, so you can indemnify, so, yes, the provision of information particularly about that. We are trying in the process a way in which we assist people putting in applications that is fully electronic, so, yes, I think there is ultimately technology that might assist us in the long run. The direction for any kind of Legal Aid service will be multi-pronged delivery of services and that's the direction we will have to go. We have one of our young people in the youth law centre who has just created a DVD and where she is singing about sexting. That's about to hit YouTube and it's the kind of thing we should be doing.

DR MUNDY: Briefly to some structural questions; again, some issues around ADR and particularly in family law. Do you have any observations to make about the effectiveness of ADR, and particularly in family law, but more particularly when it's appropriate and when it's not from a practitioner's point of view?

DR BOERSIG (LAC): We have been running a FDR program now for well over 10 years most successfully. It's well used and it's solution orientated. All the stats show that it's doing what it should do. We have just extended that service now to care and protection matters, particularly where Aboriginal and Torres Strait Islanders are involved, and that's working cooperatively with the courts and the courts are now referring those matters. Instead of running them in the usual way in terms of litigation in the court, they are referring them to us first to try and mediate them. Yes, we have managed so far a trial which is all going very well. In terms of the kinds of matters that are picked, they are generally matters where there is the potential for restitution. We have had funding until July for an Aboriginal or Torres Strait Islander position to help manage that. That's one of the costs, loss of money as well, that position, but that's been very effective in us working with the Aboriginal and Torres Strait Islander community to encourage them to use that service.

DR MUNDY: Without interfering in any confidentiality issues, because it has been put to us by various people that ADR for indigenous communities is a different proposition to let's say white fellows, how is your ADR process for those indigenous people varied or hasn't it?

DR BOERSIG (LAC): The fundamental principles we approach are the same. It's the interaction with the clients which I think is qualitatively different and that's why there has been such value in having the Aboriginal and Torres Strait Islander client support officers involved.

MS TAYLOR (LAC): It has largely, I would say, been successful in encouraging cooperation with the state as it's seen by people who were asking to cooperate with that process, who for very valid reasons are inherently suspicious of any contact with the state where children are concerned, and so our client support officer has been invaluable, without putting too fine a point on it, in being able to encourage that cooperation and see a pathway through to restitution.

DR MUNDY: I'm wanting to use an expression like cultural awareness in crisis.

MS TAYLOR (LAC): I think part of the dynamic operating in that particular area, in the area of child protection in the ACT, is large international recruitment of people from the UK and with that come people who are working in the child protection space who don't necessarily have an appreciation of the history of Aboriginal and Torres Strait Islander people in this country. That has meant that there has been something of that role that you speak of for our client support officer and often that pathway has really just allowed a conversation to occur about what are the legitimate concerns around the parenting and what can the parents do to allay those concerns. It sounds like a simple approach but taking the litigation, the court, out of it and moving it to a conversation about that we think can be and has been very successful so far.

DR BOERSIG (LAC): We have extended that. The challenge for all mainstream services will be in relation to any particular interest group, is to ensure the doors are as wide open as possible, and we have got arrangements in place with the Aboriginal Legal Service again for costs referral and we have acted for young kids there who have been in a lot of difficulty in a multiple number of areas and we don't see a lot of them but we provide a bit of a niche service for them when they can't get those. The stats which I think you have got already show that since 2009, I think there were about 350 Aboriginal and Torres Strait Islander people attending Legal Aid. There are now well over a thousand coming each year for a variety of assistance; not just criminal court but for a variety of assistance. That's what we want to do. We want to keep that going. We are ran a legal expo earlier this year in the ACT which brought all the service providers together. It was funded locally by the Minister for Indigenous Affairs and that was successful and publicised, in the fact that a whole range of service providers by profession were there, as well as CLCs and Legal Aid, to say, "Look, there are all these places you can come for assistance," and that message I think was strongly going out.

DR MUNDY: Just on family law matters more generally, it has been raised with us elsewhere that other than Western Australia, there is this interaction between state and the law when it comes to family law matters, protection,

custody of children and all those. A, is this a significant problem either for the access or perhaps even the administration of justice or the cost and if so, B, what do you think could be done about it? I'm more than happy for you to say it's not a big issue but people have raised it with us.

DR BOERSIG (LAC): Clearly from our point of view, the pre-1996 situation was preferable, because you could swing matters between different areas of law without the complexity that we have now in terms of reporting.

DR MUNDY: This is for funding.

DR BOERSIG (LAC): This is the funding side but on a practical level, we have to report to the Commonwealth where we expend their dollars.

DR MUNDY: Yes.

DR BOERSIG (LAC): So it is complicated for us to desegregate matters where this is occurring, the family law matters and domestic violence matters.

DR MUNDY: Beyond the reporting and accounting issues, I suppose the operation of having to seek various orders in different courts in different jurisdictions and the ability or otherwise of those processes to interact, is there issue you see in that?

DR BOERSIG (LAC): No, once they are our client, we are acting for them in whatever jurisdiction.

DR MUNDY: Yes, but if it was all Commonwealth law, for example, or all territory law, would that affect the processes that the client actually encounters materially or not?

MS MacRAE: We should have asked Heidi this question, obviously.

DR MUNDY: If you don't have a view, that's fine. It's just something that has been raised with us elsewhere.

MS TAYLOR (LAC): Clearly, it can require clients to operate in different forums. That can compound the difficulty of keeping that client engaged because the process is seen as so complicated.

DR MUNDY: Yes.

MS TAYLOR (LAC): Because they are in the Family Law Court one day, in the child protection Magistrates Court regime in another and domestic violence

orders then in a civil process in the Magistrates Court as well, and I think there has been research and reports that speak to the idea of a one stop shop, particularly, for instance, for women suffering domestic violence, that they are having to go through a number of doors when we speak of one door, not being the wrong door. On some occasions, that's the case and I would, in my experience, be able to say that they are often part of the environment in which you are trying to keep people engaged in that system and it seems to me that there could be areas where the idea that someone is going along to one process rather than three could be explored. Child protection is one of those obvious areas if there's family law proceedings going on where the two might have an interest in the outcome of either one.

DR MUNDY: There are two Federal Courts that deal with family law matters. Do you have any observation on the relative merits of the two? Are the right sort of matters going to the Family Court and the right sort of matters going to the circuit court? Do you have any particular views? Is it confusing people or is it basically not a big issue to worry about?

DR BOERSIG (LAC): I'm not getting any reports back from my duty people about that at all. That's fine.

MS MacRAE: I guess the very last question that I have is just in relation to the - you know, you have talked about the collaboration and it does seem to work pretty well in the ACT. Do you see that those arrangements are optimal? So in terms of, you know, having the number of specialist services that are available for things like domestic violence and for women particularly versus the more sort of general scope that you're having and the interactions that you then have with the various courts and things within this jurisdiction, does that sort of fit together as a good whole or are there some obvious gaps? Heidi talked earlier about trying to make sure people don't fall between the cracks. Do the systems work well to try and make sure that people don't fall between cracks in that way?

DR BOERSIG (LAC): I think it would be fair to say that we can always improve on our referral with matters. On the whole, though, each system should operate complementarily and I think that's a question of all the providers ensuring that - avoids duplication. There's a real place for a whole range of specialisations for the very reasons that have been outlined and the plain fact of the matter is there is so much work that we don't need to compete for it. We can all open our doors full-time and be inundated with work.

MS MacRAE: Yes.

DR BOERSIG (LAC): I just endorse the comments earlier on that, you

know, I don't think the competition issue about tendering helps that process at all and I think there were some recent examples both in WA and in Victoria that I think are drawn to your attention which illustrate how you can co-design work. Of course the way governments fund, that is by grants, is also a way in which we can all manage our funding and I think that's another factor we need to put into it.

MS MacRAE: Thank you. I don't have anything more.

DR MUNDY: That's great. Thanks very much.

MS MacRAE: Thank you.

DR MUNDY: I'm about to cause a little bit of chaos and mayhem. Heidi, I would like you to come back and tell me what you think about the division of state and territory law in relation to the Family Law Act; and I'm going to cut morning tea short so we have to close that door again, please. We will have a small morning tea break. The Small Business Commissioner isn't due until 11.50 but you haven't got half an hour. Could you just state your name and affiliation for the record, please.

MS YATES (WLC): Heidi Yates, executive director of the Women's Legal Centre (ACT and Region).

DR MUNDY: Heidi, would you like to share with us any views that you have about the division of family law and family violence matters between the federal jurisdiction and state and territory jurisdiction and what problems this brings for you in dealing with your clients who I suspect are, in this case, women who are being subject to domestic violence.

MS YATES (WLC): Indeed. What we see is that the overlap between those systems, which are often happening in the same time frame, is not effective and not an accessible system for our clients. You might have a client who, as my colleagues have indicated, might be dealing with, for example, a criminal matter and providing evidence in relation to a family violence assault; in a civil process, applying for a domestic violence order; Child Protection intervene because they're concerned about her capacity to care in the context of this crisis; she also is returning to the Family Court to look at issues around parental responsibility.

What we see is not only having to stay engaged, as my colleagues alluded to, in each of those jurisdictions, but also the extraordinarily different frameworks that each of those courts or sets of legislation require the client to comply with. For example, if you're looking at models around the priorities in the Family Court, which as we know the core objectives are for children to maintain a relationship with both parents if it's safe for them to do so, it's very different, for example, if you're looking at the child protection regime where arguments are focused again on the child's best interest but very much often from a permanency planning framework and giving parents a short period of time, for example two years, to get their act together and then it's out of their hands and it's 18-year orders and the chances of having your child returned in this jurisdiction are very low.

You have got clients having to not only get their heads around a whole lot of different processes and court dates and different sets of court documents, but you're also looking at very different legal frameworks for the type of

evidence they're having to provide, for the value or the weight that's given to that evidence. For example, a client can seek a domestic violence order in the ACT Magistrates Court. That may be consented to when it comes to the final hearing on a no admissions basis because the police are already pursuing the assault and there's clear evidence as to the fact that that assault happened, whenever it might be.

The fact that that client has a domestic violence order that was obtained on a no admissions basis means that the weight given to that order in the Family Court is far lower than if the other party hadn't consented and it had been tested. There are good reasons why the applicant shouldn't have to test that evidence in a civil DVO matter, but it means that when she is trying to bring that evidence before the Family Court it's given less weight because there hasn't been clear determinations been made by the court as to the violence and the impact on safety. It's a very difficult maze, I guess, of pathways which doesn't actually mean that the core issue for our clients, which is safety and the safety of the children, remains at the forefront.

MS MacRAE: Is there a solution? Even a partial one?

MS YATES (WLC): I think some jurisdictions - I think it's in Bendigo, is it, or Ballarat, where they have trialed actually a single court that's looking at the intervention orders, the domestic violence or protection orders, the family law matters and the care and protection matters within the one court, so whilst on a legislative basis they maintain their independence as jurisdictions, you have got a single magistrate hearing the evidence and making the decisions in the different jurisdictions.

DR MUNDY: That's a state magistrate effectively administering Commonwealth law?

MS YATES (WLC): Yes, and I'm afraid off the top of my head I can't speak to the particular arrangements in that regard but I think that has to be the way forward for vulnerable clients because in terms of the inefficiency of hearing the same evidence in multiple jurisdictions and the different frameworks which theoretically all refer to the safety of the children as being paramount - get to that in such different ways that they're in fact calling on the client to not just tell their story but to fit into all of these frameworks which actually lead independently to quite different outcomes.

MS MacRAE: Is that a trial in Bendigo or Ballarat or is that a standing sort of process that they have in place now? Do you know?

MS YATES (WLC): I don't know those details so it might be something the

commission wishes to look at. I went to a workshop at a conference in relation to that trial a couple of years back. I would certainly encourage both state and territory governments to look at the opportunity for further pilots in that regard because I think they're going to get cheaper, better, safer outcomes for vulnerable clients.

MS MacRAE: And retelling your story is stressful enough without having to do it more than once.

DR MUNDY: The subnational jurisdiction would be a more desirable place for these things to be resolved than the federal one, presumably.

MS YATES (WLC): Presumably, although having consistency of course nationally is valuable around, for example, women who have to flee domestic violence and are dealing with their family law matters in a different jurisdiction to where the criminal matters are going on, so consistency would be valuable but - - -

DR MUNDY: There is then, I guess, a question of where the appellate jurisdiction belongs.

MS YATES (WLC): Yes, and I wouldn't speak to that off the top of my head.

DR MUNDY: No, I don't expect you to.

MS YATES (WLC): I think it's a very significant issue for our clients on a day-to-day basis and particularly when you're looking at telling that story again and again and again, it's extremely difficult.

MS MacRAE: Thank you. That's very kind of you to come back again.

DR MUNDY: We now will have morning tea and reconvene at 10 to 12.

DR MUNDY: Are we right to recommence proceedings with the Australian Small Business Commissioner? Could you please state, both of you, your names and your affiliations for the record and if you'd then like to make a brief opening statement that's less than 10 minutes.

MR BRENNAN (ASBC): Thank you. Mark Brennan, Australian Small Business Commissioner.

DR LATHAM (ASBC): Craig Latham, Deputy Australian Small Business Commissioner.

DR MUNDY: Off you go, gents.

MR BRENNAN (ASBC): Thank you for the opportunity of meeting with you today. We've got a keen interest in this inquiry because we see dispute resolution as being an important part of an access to justice inquiry and dispute resolution is something which, for small business commissioners, is very much a flagship function.

Just by way of background, when I'm talking about the Small Business Commissioner, I'm talking about the concept of a Small Business Commissioner which first commenced in Victoria in 2003. In fact I was the first appointed Victorian Small Business Commissioner. Subsequently some of the states, New South Wales, Western Australia and South Australia, have adopted the concept of having a Small Business Commissioner. Then from January last year I was appointed the Australian Small Business Commissioner, so it has come to a national level and there is a government policy to transform the Australian Small Business Commissioner into a new statutory office to be entitled the Small Business and Family Enterprise Ombudsman.

Having said all of those mouthfuls the key functions about dispute resolution will be very much to the fore and will be very important going forward for the functions of that office. To our mind when the government intervenes in the business community particularly by way of regulation or by administrative programs, there are two core responsibilities it has an these are enduring. One of them I believe is an education function and I use that in its loosest term. It's about having access to information. We've actually got a mantra in our own office that no small business should fail through lack of access to information.

It is a bit of a take on a familiar catchcry which a former prime minister in Australia had about child poverty but we hope that we will get a more successful outcome. The importance of information is that small businesses

should have access to the right sort of information to make properly informed decisions, so that they can get on with their business. We believe that if they do that, they actually stay out of trouble. If they've got the right sort of information, they'll have less reason to have recourse to the justice system.

That leads me to the second core responsibility which I think government has when it intervenes in the business community and has to provide a system of justice, somewhere where business people can have resolved the concerns they might have about the way other businesses are behaving or the way governments are behaving or disputes that they might have directly with other businesses.

The notion of justice has been around since democracy begun, I suppose. It has always been a plank of government that we have a justice system, even though it started in the early days where we were putting naughty people in prison and that was about the basis of it. It has refined itself over a long period of time. In the area of commercial disputes, which is a matter of our interest, it has very much adopted alternative dispute resolution as a means of providing that justice for the business community.

Particularly over the last 20 years, I'd venture to say, there has been rapid development in commercial disputes being resolved by various forms of alternative dispute resolution, whether they've been by arbitration, conciliation, mediation or another method which we find a very attractive alternative, we call it facilitation, where you have a facilitated meeting which is very similar to a mediation but it has just got a softer name and sometimes is more appealing to the business community; that they're not actually involved in a mediation to resolve a dispute but "Okay, we'll have a meeting with an independent facilitator who might help us sort out whatever the concerns are.

Also, I found it very attractive to government agencies, to agree to a facilitated meeting rather than to a mediation. Bureaucrats love meetings, I guess, and so it has got an attraction when it's put that way. In my experience very much a good measure to use when local governments are involved in disputes with small business or the business community.

That's probably in broad terms the outlook that we've got on this particular inquiry. We really do commend the commission for undertaking it. It's a very worthwhile but extremely expansive. I know it's access to justice in just about every possible form but from our point of view in terms of commercial disputes, we see it as very important and we do appreciate the prominence that has been given to it by the commission in the publications it has made so far.

DR MUNDY: You can start. I've waxed lyrical on small business policy for three years.

MS MacRAE: I'm not going to say any more about it. Warren is the expert. He probably knows it all already, so I'll probably be asking questions and he'll think, "I can answer that." In relation to the new body that you want to transform into, there has sort of been four key objectives that have been identified for it. Do you see those as appropriate and do you think it'll change the way that you'll be able to assist and help small businesses with their legal issues? Will it change the nature of what you do?

MR BRENNAN (ASBC): I don't believe it will. I'm not sure what the form of objectives you're specifically referring to there but I would expect that once legislation is prepared, it will define that they're going to be doing but having said that, I believe that the new ombudsman will operate very much like the Small Business Commissioner but under a different name and that there will be an emphasis on promoting information and education to small business.

There will be an emphasis on making inquiries. I like to use that softer term rather than "investigation". I think it's better received by the business community if you say that you're making inquiries and it's talking about being a concierge for dispute resolution but I think the office will get involved directly in the mediation or other forms of dispute resolution of particular matters and it will have an advocacy role, particularly about getting government agencies to be more small business conscious.

To a considerable extent our current role as the Australian Small Business Commissioner is providing a platform and it will make it quite easy for that transition to happen. We're doing all of those things as at the present, despite not having any statutory authority to do it but credibility can take you a long way and I would expect that in practice either - - -

MS MacRAE: So in many ways it's formalising what has already been captured - - -

MR BRENNAN (ASBC): Yes. That's well put I think, yes.

MS MacRAE: Yes.

MR BRENNAN (ASBC): Because in practice, for example, if I was to continue in the role I would probably continue in a very similar way in which I do now and that is that we try to work with the business community or with government agencies. When we get a complaint or a concern expressed about

the way in which someone is behaving in the business community, we don't run off pointing the finger and shaking a fist and say, "We've heard about you. We've heard about the way you're impacting on small businesses." Rather our approach is to do what we say - to make preliminary inquiries. We say, "This matter has been brought to our attention. We're making preliminary inquiries about it. Can you help us sort it out?"

I put that to the CEO of the business complained about or of the government agency complained about. We always go right to the top because in our experience a lot of the disputes arise because in bigger organisations and government departments it's due to a middle manager getting a little bit ahead of themselves and throwing their weight around, but when the CEO gets alerted to the issue, the CEO will sort of say, "Hold on. That's not us," and they will do something. So that preliminary inquiry function often resolves the matter just with a single letter.

Similarly, if we were to go further and to make further inquiry, again we'd look to do that cooperatively, although it will be very handy to have statutory provisions which might require a business or a government agency to produce documents or to answer questions. In the first instance I would be looking for that to be a voluntary thing to happen and similarly, as we move on too, if the matter is not resolved at that point the inquiry process tends to push the parties towards mediation and I would expect that under a new ombudsman's office that type of modus operandi would continue.

A reason why we like in business disputes to get the parties to mediation is that in the majority of cases a business dispute, a direct business dispute, arises because there was a business relationship in the first place. It might be that someone owes someone money or they didn't do the work they were supposed to do and they haven't produced the goods or whatever it might be, so there was a relationship there. The most satisfactory outcome is if you can maintain that relationship, if you can sort out where the problem was and maintain the relationship. Mediation lends itself to that.

The reason it does that is because at mediation the parties are in control of the outcome. You can make the process confidential, so that in the case of, say, a franchisor or a multi-landlord, they don't have to set a precedent for themselves that might affect the relationship with the other franchisees or other tenants. Confidentiality is very appealing from that point of view. The people who are deciding the outcome are the parties themselves. It's not an independent tribunal or court.

I'll risk again getting into trouble for saying this but I do think it's instructive because I say it to the small business community. You're better to

mediate because if you go on to a tribunal or a court, you might find you've got someone adjudicating who's like an umpire who has never played the game. You might have somebody, a tribunal or a court, who really doesn't understand what it is to be a small business, say, operating in a big shopping centre. I'm not sure when we last had a High Court judge who started out as temp in a shopping centre. So it is better to try and get the matter resolved where you're in charge of the outcome and to then continue to get on with business with the other party.

The other nature of these sorts of inquiries that may not necessarily lead to a mediation is where there's a concern about the behaviour of another business that's affecting smaller business. Again, that ultimately just needs to be brought to the attention of the CEO. You make an appeal to their sense of leadership in the business community and you find that some refinements can be made to the behaviour where there's more consideration given to the impact it's having on smaller businesses.

In my experience, and I do say from my experience, in a statistical sense, when I was the Victorian Commissioner I dealt with over 7000 matters in the seven years I was there. We've continued at almost that sort of rate in the 15 months, no, nearly 18 months now, isn't it, coming up to June, that we've had now and I think that that's a successful way of looking at commercial - we've resolved at a rate of about 80 per cent success rate of those matters we've looked at and I think the business community in Australia does want to have justice settled in the disputes that they have where they're in charge, where they can control the outcome and they can get on with their business quickly, because another thing about this is that instead of waiting in the court list for months and months, you are through the system; generally on average eight weeks after someone might make a complaint, you can generally get the matter to mediation.

MS MacRAE: Of that 20 per cent you said you resolve about 80 per cent of the - - -

MR BRENNAN (ASBC): Yes.

MS MacRAE: Do some of them just get dropped at that point or do most of them proceed to a tribunal or a court? Do you know what happens next?

MR BRENNAN (ASBC): Yes, that's an interesting question because I would say you could overstate the figures. That's why I don't do it that way. The number of matters that go on to something else after the - let's use 80 per cent as the figure. The other 20 per cent, not all of them go on and do anything at all.

MS MacRAE: No.

MR BRENNAN (ASBC): It might only be about 10 or 12 per cent actually then might on to a tribunal or a court. If you really wanted to be ambitious or overstate your successes, you could claim that, okay, about 88 per cent are successful because the parties didn't do anything else. They might have been satisfied having gone through the process. They might have been satisfied with their, in inverted commas, "day in court" because, "I sat down with them and I gave them a mouthful about what I thought about the way they're behaving and got it off my chest," and they're happy about that, but I've tended not to count that because - - -

MS MacRAE: No, sure. You don't know for what reason they might not pursue - - -

MR BRENNAN (ASBC): Exactly.

DR MUNDY: You mentioned that confidentiality characteristic of the mediation. One of the concerns that has been expressed to us during the course of this inquiry is that there is a risk in confidential mediation, if you like, that there may well be some systematic character to the disputes that are turning up. For example, say, industry-based ombudsmen have a clear duty and role to bring forward. Assuming that the government invites you to continue in the role, would you see that part of the ombudsman's role, particularly in relation to matters with government if there is systematic behaviour coming out of the federal bureaucracy in its interaction with small business, whilst protecting the confidentiality of the participants or at least the small businesses, might be to make reports to government in a more public way and say, "I have had 15 of these. This is clearly a public policy problem. You need to do something about it"?

MR BRENNAN (ASBC): That's a really good observation. I would expect that the legislation should have a provision that would say that the ombudsman is to advise the government on emerging trends or issues and one of the ways of informing the ombudsman about that will be through the dispute resolution process. Now, that confidentiality thing: where the first barrier to being able to use information out of that might come from might be from the mediator, him or herself. A number of mediators are very precious about the confidentiality of the mediation. I found when I was the Victorian Commissioner that I was a bit surprised that some mediators wouldn't tell me anything about what happened at the mediation.

The system we operated was that we had private sector mediators sort of

on a panel that we used, rather than in-house mediators. Some of the private sector mediators sort of looked at their ethical position in a very scrupulous way and would not reveal anything. That made it difficult then to be able to be assessing: is there a pattern of behaviour out there which something ought to be done about or that some action should be taken on? What I actually did - I mean, the most practical way of doing it - is that I just didn't engage those mediators who had that attitude but only engaged those who were prepared to feed in the report without revealing the details of the settlement but would report to me, "In, let's just say, a particular shopping centre, there are recurring issues relating to the way outgoings are apportioned or rent negotiations are happening" or whatever it might be. That is all I want.

I think in that sense you don't need to know the names of particular people, although you would know it because it came through your office but in terms of making a report, you don't need to be revealing that. It is only the substance of the matter. In any event, you are going to get to know that before you have actually organised the mediation. You are going to know roughly what the problems are but having said that, mediation often uncovers lots of other issues that were never articulated in the first place. Once you get the parties in a room, what might emerge is that their real gripe was something which was quite different to what the actual dispute was about, but I do think it is important that there be that facility or that role of the new office to be able to report to government about what I would call the emerging trends or systemic issues.

DR MUNDY: As you are probably aware, most Commonwealth agencies have dispute resolution plans. That is obviously an important issue, to try and resolve before they - you know, a good process hopefully solves it. Would you see this new ombudsman having some sort of role in reporting back to government the extent to which those dispute resolution plans - say, for example, AQIS or the Agricultural, Veterinary and Chemicals Agency which deals with a lot of small agricultural businesses face to face. Would you see reporting back on the effectiveness of those sorts of plans is something, if you thought they were going hoary, the ombudsman might do?

MR BRENNAN (ASBC): If I was getting people coming to me because they had no confidence or they had found something wrong with the way a government agency was doing it, I would definitely in the first place have a go at sorting the problem out and if it did appear that the reason why it hadn't been sorted out at first instance by a government agency's own procedures and it had to come to us to sort out, that would be something I would report back to the agency concerned in the first place and have some discussion about why it was that they weren't able to resolve it; but I would be reluctant to be leaping at shadows because what often happens with these things is that the party

complaining or has got the grievance about a government agency, for example, who is put through their dispute resolution processes perceives it as not being independent.

They will go to, say, a body like ours which is stand-alone from the agency that they have got a problem with. It seems that they have little comfort in sort of saying, "I have got a problem with a particular agency and they are going to put on a mediation for us, but they are organising it and we are going to go to it". They can lack confidence in that system. How is it impartial?

DR MUNDY: Let's say, for example, an agency was in dispute - the Civil Aviation Safety Authority - with a small aircraft, a small flying business somewhere in regional Australia. People apparently don't on occasion have confidence in CASA. If an agency said to you, "Would you run this mediation for us?" would that be something that you would see effectively providing a dispute resolution service within government that agencies could refer to you?

MR BRENNAN (ASBC): I would definitely sort of see that we would be the place to go to if agencies were looking for resolution of disputes, on the basis that it seems as though we will be the first time that the government has enacted a position of this nature, so why shouldn't we expect government agencies to use the facility? It is interesting, the use of CASA there. I can't give you the detail but I have got a matter coming in - a complaint about CASA.

DR MUNDY: I know large organisations complain about CASA. I find it interesting that family enterprises is in the title of this proposed office. I mean, one of the consistent themes we have had through this inquiry are issues around disadvantage. Clearly a lot of small businesses and family businesses are operated by people who have a wide range - you know, small business operators aren't rich people and often can be expected to experience all the characteristics of disadvantage that we see in a lot of parts of the community.

Have you thought through and have you got strategies for dealing with particular groups; you know, people with a disability, people who have come from a culturally and linguistically diverse background, indigenous people and so on? How will you deal with those disadvantage issues which, given the almost micro and family nature of this role, whoever it is will have to work through?

MR BRENNAN (ASBC): I'm not daunted at all by that. Just in the first instance, I expect that there might be some attempt to define what a family enterprise is for the purpose of this new office, given that "family enterprise" is

going to be in the title. I would expect it will have some relationship to small businesses. I don't really think it would be - - -

DR MUNDY: You are not expecting the Lowys?

MR BRENNAN (ASBC): No, or the Rineharts or the Packers. I don't expect expenditure of public money for that. Going more broadly, you are talking about ethnic groups and indigenous and the like. We experience those sorts of things all the time. We are very much dealing with disadvantage, whether it be because there is a bigger business with more financial muscle or in the case of ethnic or indigenous. Ethnic matters arise frequently and you learn a bit about them. For example, I found over the period that where there are two Chinese ethnic businesses in dispute, they don't want a Chinese mediator. They would prefer to have a Western mediator and they would prefer if the person had grey hair and had the trappings of age and wisdom. These things you just sort of pick up along the way. I'm not sure about bald people actually.

Indigenous is a really interesting group. In fact next week I am attending a conference where I am on a panel and we're talking about indigenous small businesses and I'm actually focusing on the dispute resolution issue for indigenous small businesses. When I first started to look at this, you google "indigenous small business dispute resolution" and all you get is native title-type returns.

It hasn't been our experience to often have indigenous small businesses come in dispute, but I have done a bit of consultation with the indigenous small business community and the general approach is that indigenous small business do want to resolve things. They don't want to go to court. They don't want to go through formal processes. A mediation could be seen as a formal process so maybe you have to use another thing like a facilitated meeting or whatever.

Family pride or clan or tribal pride is very much to the fore about what position they will take on a particular dispute and in some cases the indigenous small business would walk away from a matter rather than having it resolved because they will have lost trust in the other party who they feel has done the wrong thing by them, but rather than have the thing resolved they will just not have anything more to do with them.

The notion of what we call co-mediation is attractive for the indigenous people where you might have an indigenous mediator and co-mediating with, for want of another word, a western mediator. They're areas of great interest to us and they come along without you having to put up massive advertisements or whatever about it.

DR MUNDY: One of the things the terms of reference ask us to do is come up with an estimate of unmet legal need, which we can do with respect to survey work for individual citizens. Other than some work which we understand was done by the industry department about four or five years ago, are you aware of any research or other material that might give us a sense on the extent to which the legal needs of small businesses I guess in particular are being met or not met, and to the extent that they're not being met, how might that lack of need meeting be characterised?

MR BRENNAN (ASBC): I'm not aware of any sort of particular work that has been done on it. Where there are some indicators, though, that there remains to be an unmet need is I think the growth of matters every year that the state Small Business Commissioners have been having in this area. They're all going up every year, so that suggests to me that as there's a greater awareness that there is a facility available where you can have disputes resolved, there is a greater uptake about it. Coming from the other direction about what is unmet, I don't know really other than that there's an indicator there.

DR MUNDY: We are aware of some research that has been done by your successor in Victoria on costs of small business dispute resolution in VCAT. Bearing in mind the observation you make about the growing volume of work that Small Business Commissioners are doing, do you have any reflection on what that means for - or how you might see that to the extent that small businesses see tribunals like VCAT and perhaps small claims jurisdictions in magistrates courts the extent they're - and/or ombudsmen. I mean, is this growth in the work of Small Business Commission a reflection of failure or difficulty in accessing those other dispute resolution fora?

MR BRENNAN (ASBC): I think there's a couple of issues there. I don't think there's a lack of trust or confidence in the court or tribunal system, but there is a sort of, "Do you have to go through all of that? It's going to take so long," attitude.

DR MUNDY: Is it time or cost?

MR BRENNAN (ASBC): The dispute resolution service of the Small Business Commissioner are going to be quicker, and also the monetary levels aren't there. You know, it's not worth taking the matter to court for sort of smaller amounts, but don't see everything in terms of monetary. A lot of matters involving disputes that Small Business Commissioners deal with are about - I will use the term "specific performance". They're resolved by someone doing something as distinct from a monetary - - -

DR MUNDY: Particularly, presumably, disputes with governments or local

governments.

MR BRENNAN (ASBC): Yes. You don't get the monetary results in government matters really. But also in a lot of business things - so landlord-tenant relationships. They finally fix the leaking ceiling, you know, and that was all that was really required. So there's that aspect to it. I don't think people have got a problem with the integrity of the court system. In fact if they went that way, they would expect that they would get the law right, but it's the time cost involved and the emotional stress, and I never underestimate that.

People do let these things drive them, these disputes, and they might seem to us to be, "Well, it's only a small part of your business," or whatever, but it gets a hold of them and if they can get that out of their system very quickly through a process like a mediation - I used to make the claim in Victoria that within an average of two months we were resolving 80 per cent of disputes and we were saving hundreds of millions of dollars in costs that might have otherwise been transferred through the court system or freed up now into the economy. It might have been stalled while people were arguing the point about things, so therefore there was an impact on the business community.

MS MacRAE: Do you feel that there's a bit of a gaping hole in those states that don't have Small Business Commissioners to do this sort of - - -

MR BRENNAN (ASBC): Yes, I think there is. Not too much to be read into this but there is sort of some significance, I suppose, that of the matters that we have dealt with in the near 18 months that we have been going, where most have come from have been Queensland. When I say don't do too much, it's not as though they're overwhelmingly, but on a statistical basis Queensland is where there has been more and they don't have a Small Business Commissioner.

DR MUNDY: Is that making some adjustment for the fact that of relative size, so it's just disproportionately coming from Queensland, or in absolute terms?

MR BRENNAN (ASBC): It's absolute. It's a number, yes, and a lot of them are matters that if they had a State Commissioner, they would be dealt with - the arrangement we have with the other states that do have Small Business Commissioners is if there's a matter that comes up and it's clearly an intrastate business matter, we give it back to them.

We have had matters that say have involved government agencies, state government agencies from Queensland and businesses there. In the ordinary

course you would expect that to be done by the State Commissioner but we have done it, and with a surprising cooperation from the state government agencies as well. I mean, they haven't sort of said to us, "We don't think you have got any authority in this."

Not that we have had to do it, but not having authority, ostensibly not having statutory powers, you can be persuasive of businesses and government agencies to play ball with you because if they don't, you can just say, "We will do a report which is one-sided. We have only got one side of the story and we're not hearing your side and it mightn't be in your best interest to have a one-sided report out there about you," and they will sort of rethink their position on that.

MS MacRAE: Are those services provided free or do you charge a business for a mediation? How does that work?

MR BRENNAN (ASBC): For a mediation we will charge. In the first instance a complaint or a concern that's expressed is not charged for, and I mentioned earlier that that process of making a preliminary inquiry, that often resolves it, so people get their thing resolved for nothing.

If you go to a mediation, I like the Victorian model because I set it up, I suppose, and I would propose if I remained in the position here to do a similar thing here with the ombudsman and that is to have a panel of private sector operators, but to have part of the process subsidised.

Just by way of background as to why I took that position, I had experienced in other alternative dispute resolution that had been existing in Victoria during the 90s that there were arbitrators of retail lease disputes, retail tenancy disputes, and the arbitrators charged commercial rates. The Act said that they had to go to arbitration and the arbitrators charged people the commercial rates, and we had rather inglorious instances of particular mediators, one with a background of being an architect. I've got nothing against architects but I did object to the way he handled these arbitrations.

He spent the first part of the arbitration insisting that there be legal argument as to whether he had jurisdiction in a particular matter and he's charging - you know, at that time about $4,000 a day. He would tape that, take it away and replay the tape, and that would quick up another four grand, and then he'd come back satisfied on the third day that he had jurisdiction, and then hear the matter. That got on the nose that this was expensive and so when we started the Small Business Commission of Victoria I was adamant that it was going to be inexpensive, just dilute or destroy even the reputation of the whole system, so the process was to set up this panel of mediators.

I said to the people who were registering interest to be on the panel not to do so unless they were prepared to do the mediation at a specified figure, and I think it would be correct at the moment is $900 which is paid by the - no, sorry, I think it might be a little bit more than that at the moment. $900 is paid by the Small Business Commissioner and the parties pay, in the majority of cases, $195 each. So the parties are out of pocket for $195 each, subsidisation to the mediator by the government agency, by the Small Business Commissioner.

The parties might incur additional costs because they can bring lawyers or other experts. They might pay them, but that's up to them, but a sub-subsidisation by the government I think is worth the while and it fits with what I said right at the start about these enduring responsibilities about providing educational justice - they were throwing dollars at, if you're going to be spending money in the business sector, that if you're spending it on educational justice and here you're spending it on justice by subsidising the mediations and I would be strongly of the view that would be the way to proceed here too.

DR MUNDY: Thanks, Mark. We've run out of time but thank you for coming all this way.

MR BRENNAN (ASBC): Thanks for the opportunity and we'll travel back, be a bit weary.

DR MUNDY: Travel back - travel safely.

MR BRENNAN (ASBC): Thank you.

DR MUNDY: Could we have the next participant, please, the ACT Environmental Defender's Office. Could you please state your name and position and affiliation for the record and then perhaps make a brief opening statement?

MS TAYLOR (EDO): My name is Camilla Taylor, I'm the CEO of the EDO in the ACT. Commissioners, we have provided you with two submissions, one late last year and a recent submission which was a very brief submission, and I just want to point out that it's really only a framework, and it was provided in order to facilitate this hearing, so we've spoken to your office. So if you want that to be - - -

DR MUNDY: Yes, we understand all of that.

MS TAYLOR (EDO): So rather than reiterating everything that's in those documents I thought that I'd prefer to just focus on two essential issues and obviously I'd be happy to answer any question to clarify anything. So the first biggest issue and an obvious access to justice issue is that our EDO's funding was cut by the Commonwealth Government late last year, and as a result that's a huge barrier for our clients and our potential clients. We're a network of eight officers across Australia and we're the only public interest environmental lawyers in Australia, so we're highly specialised and obviously we're a community legal centre, so we give that specialised advice and education for free.

So at the moment the future for the smaller offices are very, very uncertain and the fear is that - well, obviously the funding cut is going to affect our three pillars of advice, so - well, our three pillars of work. So firstly it will affect our advice and case work services. I think that we'll be forced to maybe take on more high profile, larger matters in order to engage the community and fundraise, and raise our profile whereas our traditional work has really been working at a community level, working with individuals, working with a lot of - well, being in the ACT a lot of community councils and advising people on a day to day basis of matters that are in the public interest but might not have a huge impact. So we're really concerned that we're going to restrict our services in relation to that.

Another big area of our work is community legal education. So we have fact sheets, handbooks, advising and explanations about the environmental laws across Australia on the website. So that's easily accessible and free, and a wonderful service for many, many people. We also give seminars and workshops which, again, invites people from time to time to come and discuss certain specialised areas, touching on the environmental law and then the last major piece of work that we do is in the law reform and policy work.

So submissions to government and, again, we use the expertise from each office, and we believe that the submissions are balanced, they're fair, they're a valuable tool for government and, as you would know, when there's advocacy there's increased transparency, there's increased community confidence, the chances for litigation might drop if the system has been improved, and I also believe it's important to get those opinions from practitioners in the field, in this specialised area of environmental law. So the first area is basically the effects of the funding cuts which - and I should mention, importantly, that the smaller offices will probably close.

Then the second area which I think is important is the establishment for public interest litigation fund and I note in your draft report that you made mention that there were grounds for a government to play a role to help meet legal costs in environmental disputes involving matters of substantial public interest, as at page 625. So that's another area that I'd like to discuss.

DR MUNDY: Did you want to talk a bit more about the public interest litigation fund to start and then we'll come back to those other matters?

MS TAYLOR (EDO): Yes, so I'm talking on behalf of ANEDO and we believe that the essential obstacles to Access to Justice in public interest litigation is really a lack of resources, a lack of standing which has been referred to in our other submissions in detail - - -

DR MUNDY: I don't know if you're aware - the Commission in its major projects inquiry considered standing at some length, I think in chapter 9. I was one of the Commissioners on that study. So there did appear to be some criticism. We hadn't looked at it, to be frank I think we've done and said all we're likely to say about standing, and also merit in judicial review.

MS TAYLOR (EDO): Yes, and another barrier other than resources is potential costs orders, which are often - as you'd be aware - prohibitive for people or communities who want to potentially put their financial security on the line for the community's interest. So in terms of the specific workings of a public interest litigation fund, we'd recommend the creation of a fund with a reasonable annual budget administered by a board of trustees. It could include representatives from community legal centres, from governments and from the community groups. We believe that that would improve the ability of the community to undertake public interest litigation and it could be modelled on a Legal Aid based model not only for the community or the party having to meet certain financial criteria, but also that it would need to be a matter that is a worthy test case and with that would probably come the requirement for some rules around what is in the public interest and what is not. I think it would be

very helpful if that was clear.

At the moment as far as I'm aware public interest environmental litigation is run by the EDOs and we rely very heavily on the pro bono system - there are a lot of generous lawyers - but that's understandably limited and is always used very, very carefully and I think that if there is a matter that's involving a public interest and it's an environmental matter and potentially a controversial matter that should be tested, that the community shouldn't necessarily have to rely on the generosity of the legal fraternity. We also very strongly believe that public interest litigation leads to better public policy and I have a few cases that I could dig up and send you later if that was of interest to you.

We also believe that administrative law is based on the premise of transparency in public interest - sorry, in public decision making, so the ability to challenge or overturn ill-informed or otherwise bad decisions is really important.

DR MUNDY: I mean there are really two classes of the matter, is there not? There are those matters which is there is a genuine legal public policy question like the (indistinct) case about the extent the (indistinct) act beyond the place, but then there's those matters where essentially because of a collective action problem the affected members of the community - perhaps the Warkworth Coal case is a good example of this, where there is not a particular issue in law that needs to be resolved but it is simply there is a group of people who individually cannot get together and run the matter against a well resourced - well, administrative board case typically if it is an approval matter. It is not something litigation funders presumably will take on because there is no monetary settlement that they can take a cut of.

Would you see the public interest litigation fund - I think from our perspective it was more in that first category that there were substantial external benefits of the litigation that accrued to the community because of precedentiary questions rather than the second, or do you see it covering both of those circumstances, both where the public interest is in the interest to the affected citizens rather than trying some particular legal question. Do you see it as both or one or the other?

MS TAYLOR (EDO): In an ideal world I'd like both. I think that we're starting from nothing, so if we were going to develop something then it would be interesting to see how the first developed and I think that it would be more likely to be supported if it was for limited well-chosen test cases and if that involved specific rules then I think that, again, that would be welcome because it would provide certainty and especially for practitioners like us, we'd be able

to advise our clients if they came within that premise or not, so that would be useful.

DR MUNDY: Just more generally, of the litigation that you bring, how much of it is of the character of really trying issues of law as opposed to solving the needs of a group of people who simply do not have the resources otherwise to bring them matter. Is it fifty-fifty, is it 15:85? What dominates?

MS TAYLOR (EDO): If it's a question of law that's what dominates, so our officers are very much about the enforcement of the existing law, so the number of inquiries versus - not necessarily my office but I know in the large office and for New South Wales they get thousands of inquiries throughout the year, but out of that only about two per cent actually go to court and it's always where a law has been breached. It would never be any other situation because otherwise the case wouldn't have merits.

DR MUNDY: Yes. No, I am more interested though the differentiation between really what are really test cases and there is a significant issue in law that needs to be resolved presumably by, ultimately, a superior court as opposed to those circumstances where a community needs help just to challenge typically a planning decision, an environmental matter. I am just trying to understand where the litigation falls. I accept cases could involve both and that might be the answer.

MS TAYLOR (EDO): It would involve both, but I could get more detail and even statistics.

DR MUNDY: That would be helpful. What also would be helpful to us is perhaps understanding - you identified really a number of areas where the EDOs were active; one was the litigation space, another one was community education and another one was advice. That all sounds a bit like a CLC doing what a CLC is generally understood to do. It would be helpful for us to understand where the resources broadly in the EDO network are actually spread and how much of - I mean you made the observation about the advocacy work, and certainly the commission has over time received a large number of submissions from EDOs which we have generally found helpful, but it would be useful for us to understand where the money goes because at the moment that is something we do not understand both in terms of litigation and advocacy, but these other things of EDOs, because I mean I know from people who I know live in the ACT which will provide advice on neighbourhood tree disputes and things like that, so I think it is important for us to be able to understand where those resources are going.

MS MacRAE: I would just be interested - this is a sort of follow-up question

- but of the work that you do should, for example, if this small office in the ACT was to close, those people with the sorts of issues that they are coming to you with, would they then be able to go to a LAC or a CLC and maybe get help through those avenues or would there really be nowhere for them to go, do you think?

MS TAYLOR (EDO): No. I believe that there's nowhere for them to go. We often have, you know, the other CLCs refer us matters as does the Legal Aid and I don't know - I only have a general idea of those other organisations' structures and what advices they do and don't give, but I'm of the general understanding that the EDOs are the only public interest environmental lawyers and that includes the private practice.

DR MUNDY: So what does Legal Aid refer to you here in the ACT?

MS TAYLOR (EDO): Well, any kind of environmental matters. They wouldn't - - -

DR MUNDY: And by that, including planning matters presumably?

MS TAYLOR (EDO): It would be planning matters, the tree matters - - -

DR MUNDY: Fences - - -

MS TAYLOR (EDO): - - - development applications.

MS MacRAE: If the smaller offices were to close, would it be within the capacity of the New South Wales branch, for example, office to take queries from the ACT of would they not have jurisdiction to cover the issues that you would be covering?

MS TAYLOR (EDO): I think that in theory they could. They have also had a big cutback from not only Commonwealth but state funding. I know that it would be very difficulty for them to absorb the ACT for a couple of reasons, firstly, resources. Secondly, it would require probably a dedicated lawyer to learn the laws and the practices here and I do know that the area south of us, south of New South Wales, is an area where they would like to do more and they have wanted to do more in the years past where economically the times have been better and that has been an issue. So the answer to that is, no, I don't think that New South Wales would have the resources to absorb the ACT.

The other smaller offices that are facing risk is Northern Territory, South Australia, Tasmania and Far North Queensland.

DR MUNDY: You've got an office in Cairns or Townsville.

MS TAYLOR (EDO): There's an office in Cairns and there's an office in Brisbane and they don't have any state funding.

DR MUNDY: So do you receive any funding from the territory government?

MS TAYLOR (EDO): No.

DR MUNDY: Do you know which states do provide funding to the EDOs?

MS TAYLOR (EDO): New South Wales, Western Australia - I know that Queensland was cut, Tasmania was cut, South Australia was cut and several of us receive funding from the statutory interest funds from the respective law societies but in our case that's a very small amount and it won't be enough to keep the office open.

MS MacRAE: Can I just ask you then about cost orders because we talked about those cost awards, that we talked about a little bit and you mentioned at the beginning. We've made some recommendations around protective costs orders. I'm just wondering what your views are. I think you're keen that parties bear their own costs in public interest matters, but we've suggested that that's appropriate where government is involved but where there's a private party that might successfully defend a case that that would seem unreasonable that they bear their own costs in that instance. I just wondered if you had a bit more to say about that. What's the reason for your position in relation to disputes with private parties that may be successful in defending the case.

MS TAYLOR (EDO): The answer to that is I think most costs to litigation are generally prohibitive and that includes the risk of costs and also security for costs orders. So in our practice it now presents a significant barrier to the equality, for people to access the judicial system, and especially as I said before, we take on cases where it's on behalf of a community for the environment, so it's not necessarily where someone is going to gain a direct private advantage. It is more often than not very restrictive for people, so, and this we have not put in our submissions, we would prefer to see for public interest matters that people bear their own costs or that the court is able to drop that security for costs order.

Again, I think it would be really helpful if there were specific rules around what party would qualify for that but I don't see it on a daily basis and I know that New South Wales see it a lot more. When I say New South Wales, I should say all the other states as well. People come to them with their more genuine grievances and matters that could go to court, but other than having a

meritorious case, people often decide not to take it to court, even if they've been given advice that they would be successful, because of that - - -

DR MUNDY: Because concern has been expressed to the commission in other inquiries and studies that if each party were to bear their own costs, there would be an avalanche, outbreak, rush or any word of that nature of unmeritorious litigation. That's the claim that's made. How do you see that risk being mitigated? Is it the judges? What is it?

MS TAYLOR (EDO): I think that the floodgates argument generally shouldn't be accepted. The reason for that is that if people are going to go to court, it's not just the cost. It's the stress. It's the time. If they are advised properly then they won't even end up at the doors. In order to maybe prevent practitioners from taking advantage of that situation then there could be some pre-trial or pre-litigation rules that people would have to abide by, but generally I think that the floodgates argument is not correct.

MS MacRAE: Do you have a reference for that?

MS TAYLOR (EDO): I haven't got it at the top of my head, so I'll send that to you.

DR MUNDY: No, it's a claim that's regularly made by the resources sector.

MS TAYLOR (EDO): Generally a claim is made if there was open-standing and I think in some jurisdictions they found that the doors weren't - - -

MS MacRAE: Yes, I think your average litigators in New South Wales - - -

DR MUNDY: Yes, certainly our view in the past has been the presence of costs largely deals with the standard question and discourage enough people but it's more a costs issue.

MS TAYLOR (EDO): I think in Queensland there is a more relaxed costs provision and that hasn't caused - - -

DR MUNDY: Yes, and in the Land and Environment Court of New South Wales.

MS TAYLOR (EDO): Yes. Also matters pursuant to the EPBC. There hasn't been a rush. I think that people take it very seriously.

DR MUNDY: Litigation is expensive and as you say, it takes some time.

MS MacRAE: I might just jump in.

DR MUNDY: Yes.

MS MacRAE: Only because there's a suggestion in your submission that each jurisdiction should have its own specialist environment court. I guess given the strictures on resources anyway, in particular are there more efficient ways, so could you not have a specialist stream within a tribunal or a court that might give you the same or very similar sort of outcomes but not run the risk of additional expense for a specialist court in its own standing. Why do you go for that model I suppose is what I'm asking. Do you think it runs the risk of being more expensive than alternatives?

MS TAYLOR (EDO): I might reserve on that area for my colleague in Hobart but on one aspect of that, it might be useful for courts to be able to access that knowledge. If a specialist court wasn't set up then it would be useful for a court to access the knowledge of, for example, the Land Environment Court of New South Wales. I've always thought that that could be a relatively efficient cost-effective way of accessing that specialty.

DR MUNDY: I guess the question that leads on from this is - you said a number of courts and tribunals with specialist lists, particularly in the large district, and Supreme Courts of New South Wales, Victoria and to a lesser extent Queensland. Say, it was in the large jurisdiction, how would you see a specialist environment court differ to if there was effectively a specialist list with, say, the Supreme Court? That gets you a lot of the way there.

MS TAYLOR (EDO): Yes, and I think that that would tick some boxes that we've said are still close to the - - -

DR MUNDY: It mightn't be perfect but on a costs basis, it would probably be a lot cheaper and gets you a lot of the benefits without having separate registrars and all that sort of staff.

MS TAYLOR (EDO): Yes, and it would result in - - -

DR MUNDY: Separate courtrooms.

MS TAYLOR (EDO): Yes. You could use the existing infrastructure and it would ultimately resolve in consistency in decision-making.

MS MacRAE: I guess the last thing from me and it's going back to a funding issue again which is so prevalent here, but we have suggested a model for the public interest litigation that may but quite possibly may not be self-funding by

having certain awards paid into the fund. You talked about a preference for unsurprisingly having an annual budget that would be made available for such a fund. How would you determine how large that fund would be? In an ideal world, how would you determine how large that budget would be and how would you best manage that across the jurisdictions?

MS TAYLOR (EDO): I think some research would have to be done on the profiles of each state and territory and where the needs are. Our office would be a starting point and then the various environment departments and attorney-general offices would have to be - - -

MS MacRAE: Would you see that as Commonwealth money always or a combination with the states? I'm just investigating the alternatives, that's all, or maybe you haven't thought that far.

MS TAYLOR (EDO): I would have thought that if it was Commonwealth funded, it would be more likely - but after last week, maybe I'm - - -

DR MUNDY: Careful what you wish for.

MS TAYLOR (EDO): Yes. I think that you'd need to look at the statistics and the needs and the number of inquiries and the number of potential clients who don't take matters to the next step because of an inability or a lack of will, for understandable reasons, but I'm just of a very strong view that for the social fabric and for a healthy social fabric, if there is a controversy to do with the environment and it has been impacted by a government decision then surely the way around that for increased community confidence and transparency is for the judiciary to step in and give certainty. I think that that benefits absolutely the community but the government equally. They're less likely to be criticised and it gives everyone certainty of where they stand.

DR MUNDY: My watch says its lunchtime, so thanks very much for your time. I know Wayne Collis is appearing before us in Hobart on Friday week. If some of that information that you indicated you could try and get for us, if that could be provided to our staff, that would be very good.

MS TAYLOR (EDO): Certainly.

DR MUNDY: The other thing that would be helpful is getting an understanding of how many matters are Commonwealth matters as opposed to state matters. Is there a characterisation in that breakdown? We'll adjourn these proceedings until 1.50.

(Luncheon adjournment)

DR MUNDY: I will reconvene these proceedings. Professor, could you state your name and affiliation for the record, and perhaps make a brief opening statement for us.

PROF CHAPMAN: How brief?

DR MUNDY: Single digit minutes constitutes brief, but if you can be shorter than that, that's even better.

PROF CHAPMAN: So five minutes is okay?

DR MUNDY: That's fine. Off you go.

PROF CHAPMAN: All right. My name is Bruce Chapman. I am an academic economist. I work at the Crawford School of Public Policy at the Australian National University. I know almost nothing about the law, I know almost nothing about Legal Aid, but I do know a lot about financing instruments for public policy and in particular what's known as an income contingent loan.

An income contingent loan entails the government - it doesn't have to be the government but is most often in the applications that I have looked at - involve the government providing finances to help people in particular circumstances and requiring that money to be repaid, so it's a loan, contingent on their future income.

The best example, one of the very few examples actually, is the Higher Education Contribution Scheme. Basically HECS is a situation whereby students don't need to pay any money to enrol in Australian universities. They sign a contract. Essentially the government pays the fee for them and they repay depending on their future income.

That system was the first anywhere to use the Tax Office as a collection agency. I would say that's an institutional necessity because the Tax Office is the only institution with the legal jurisdiction to know somebody's income and is also a very efficient collection mechanism because it's already doing essentially that with income tax.

When this system was designed and implemented, not long after that it became clear to some of us that the advantages of this particular way of having government intervention could be seen in other applications and there have now been about 15 or 20 different modelling exercises motivated by the prospect that the instrument falls into a broad genre of what economists call risk management instrument, so basically - and governments do that a lot.

Governments with occupational health and safety regulation, with pension systems, most obviously in Australia with Medicare, basically take risks away from citizens. They pool the risks and kind of cover them and it's seen in many academic treaties as a pretty important function of government broadly.

An income contingent loan like HECS is just a subset of that and what motivates it is about first of all the market failure in university systems or in higher education or tertiary education broadly financing whereby the private sector is not going to help. The private sector will not stump up the money to a student wanting to enrol in a university and pay because it's too risky and there's no collateral.

That's a classic application, a classic market failure where the commercial sector won't help, but there are many others and when I asked you, commissioner, before about whether or not this inquiry was at all to do with criminal offences, we have actually done quite a lot of modelling on the use of the contingent loan mechanism for the payment of criminal fines, but the application I want to talk to you about today fits fairly simply, although it's quite different in its description, to many other applications.

One was paid parental leave and paid parental leave always seemed to my colleague and I as a classic case of market failure whereby citizens could be given time to spend with an infant and take out debts of maybe 10, 20 thousand to extend the period of the current 18 or 20 weeks to maybe six months, maybe a year. We modelled all of that and I still think it's quite viable.

Another application - when I say there have been 15 or 20, I can talk about any of them if you like, but this one has struck several of us as fitting kind of a model that might imply a welfare gain by the engagement of government. When I said I know very little about the law and very little about Legal Aid but a bit about modelling and a bit about financing instruments, the contribution - I guess you have seen this paper. Have you seen this paper? It was provided I think via Attorney-Generals.

The contribution is very simple. It's to ask the question with reference to the income data and the parameters that we have used to design this system about what it means for budget, basically. It's as simple as that. It's not about this is the solution, the panacea for Legal Aid. It's not about taking into account the circumstances in which Legal Aid should or should no apply. It is really very narrowly defined as a financial exercise to work out, under the given parameters that we have used, is this viable; as if you're the Department

of Finance and what you really, really care about is budget outlays and net revenue and costs of government intervention.

That motivated the whole exercise and we kind of just invented the parameters more or less to see if it was silly or it was not silly. The loans involved - and any of these parameters can be changed, no problem, but we took a couple of loans because we talked to people in Attorney-Generals about property disputes and we needed a figure. "What would it be for a property dispute that you might think could be resolved, not too expensive but also viable, not too silly as in too small?" and they said, "Why don't you start with 20 or 30 thousand dollars and see how you go?" So we did.

We also knew from all our other modelling of these kind of applications that you can't take the HECS parameters because typical citizens don't earn what graduates do. Their incomes over their lifetime are substantially lower, but there was nothing that would stop us taking these schemes, these projects, these interventions, and modelling the contingent rates and the incomes any way we wanted to.

We took a pretty low number. The first number I believe for this exercise was a personal income of 20,000 per year and with a repayment parameter - concomitantly you want it to be lower so it's kind of not too tough and viable and does protect people, so we used 2 per cent. We could have started at 40 and used 3 per cent. We could have started at 15 and used 1. These are just illustrative.

We're not that uncomfortable with looking at contingent requirements for repayment from relatively poor people because the system already does that, this system of Australian government does that, with respect to the noncustodial child maintenance scheme system - the Child Support Agency. So two parents separate and even if a parent is on Newstart and if the other parent is sufficiently low income, they're still owed money out of Newstart which could be as low as - I think it's $7.65 a week is the current level, so whatever that is, about $400 a year. That's the low end of the scheme. The proposal could be seen to be like that but, as I said, they're illustrative only just so see if it's kind of viable.

So we had a couple of scheme designs. One is current HECS or HECS-HELP which is a rate of interest of consumer price index, no surcharge. A second one is called FEE-HELP in which the government provides money to students studying in private universities like Bond and has a surcharge of 25 per cent. In all of these schemes without a real interest rate or the government cost of borrowing or a surcharge, it will always cost the Commonwealth because it's an interest rate subsidy which is equal to the

consumer price index. So we want to know (a) how much would it cost, and (b) if the surcharge kind of sorts this out. A surcharge in effect has been used with HECS-HELP ever since its beginning because the system used to have a discount for an up-front payment, which is tantamount to saying, "If you choose to pay later, you've got a surcharge compared to if you pay at the front door." So its kind of always been there, at least in principle.

So that's kind of the broad story, the broad picture. Methodologically - it's quite sophisticated econometrically because most of the time when people use econometric models they use data which estimates the world at the average. So you've got a lot of dots here and you've got income here, and age there. It's called an age earnings profile and you stick a line through the middle, that's called an ordinary least squares earnings function. But we did it much more disaggregated than that. We used techniques which looked at the distributions and that really matters because there's so much asymmetry in the collection of a contingent line, that people up the top pay 8 per cent of their income, the people with very low incomes pay nothing. So you've got to look at the distributions.

So what we've done here, it's a single cross-section of data but it's got males and females treated separately because their labour force behaviours are quite different and we've looked at the distributions. So we've basically asked the question if we give a group of people characterised or classified by demography such as sex and age, a certain sum of money - say 20 or $30,000 - and we run this through the tax system, and we've got parameters starting at 2 per cent of income, at 20 and then when we get up to the current HECS threshold of repayment, about 52,000, then we replicate HECS. We tried to keep this to people who are fairly disadvantaged.

We didn't want Legal Aid being available to people who are doing just fine in the labour market and we use some arbitrary cut offs from that. For example, if your individual lifetime income was 110,000 you couldn't get it, if you were in a household income with a household income of 150,000 you couldn't get it. Of course, that matters because it affects all the distributions that we take into account. So we've kind of got the low end of the distribution where we're modelling. If we had the entire population it would be more spread out and it would be higher at the top.

So I don't know if you've got the paper there, but there's a couple of ways of thinking about this. The most naive way is to say "how much of the debt doesn't get collected, ever?" That'll give you figures and we've got all of those. It's not that interesting. I mean, it's a bit interesting but it's not the true story - if you've got your department of finance hat on and you're trying to save the true cost of the outlay of the government, because you want to take into

account the full gone interest and there is interest rate subsidies even with the FEE-HELP of the 25 per cent.

So while a simple (indistinct) debt repayment figures are there, unfortunately the story gets more meaningful when it gets really hard to understand because it's the present values that matter in these calculations. There's a couple of figures and I'd make just two or three quick points, and then leave it open for you. We think that this scheme is moderately expensive without a surcharge. It looks pretty realistic, it looks pretty acceptable in revenue terms with a surcharge. There are a couple of parameters that really affect the repayment probabilities and sums of money.

The most important are the level of the debt. So the higher is the debt, the greater is the subsidy because it takes longer to repay it and also, interestingly, the later that people are offered the assistance, the worse deal it is for the government. Because, I mean, in the extreme, if you give these debts to 55-year-old people or 60-year-old people, because HECS is not collected out of an estate and for most people their taxable incomes after age 65 fall considerably - just about always - below the threshold, that's gone. And that meant that the amount of money it would cost the Commonwealth depends on the composition of the people who get the debt. The younger, the better. Slightly advantageous if they're male because male incomes are higher but the costs of delivering it in a gender neutral way are not big and you have to be pretty careful about having these debts available to people over about the age of 45. So I want to stop there.

One issue that has come up in discussion of this data is what I'll call adverse selection. So in all these schemes, particular when they're voluntary - and which this is, people elect to go into them - the people who expect to pay less are the ones most interested. So for example, it's like saying the best time to become a brain surgeon or studying to become a brain surgeon with respect to a HECS debt if you're aged 70 because you pay nothing. What that means is unless it's a mandatory scheme - like kind of HECS is but not by demography - you'll always attract the people who are the worst bets for the revenue office and that means - and, of course, this is clear to me with Legal Aid anyway - you've got to vet the cases. You don't want cases that you can't afford, that you can't have a reasonable probability of working out.

That's true here as well, absolutely, and you need to, in the vetting process, have minimised adverse selection to focus on outlays that are not going to be horrendously expensive and also on people who are more likely to repay. But with that said, you've got a fair amount of flexibility in there. If you use the 25 per cent surcharge you can kind of do trade-offs and all that. So I think it's kind of okay. Why don't I stop. That was more than single digit.

MS MacRAE: That's okay. I might ask a potentially easy question to start with. I guess saying the ATO has to be part of the system means that part of the collection would be relatively low cost and HECS is proof that can be the case. But in relation to defining who should be eligible, it sounds like there might be some fairly politically unattractive choices you'd have to make, unless you think you could work your way around them.

So saying if you're too old you can't have it, for example, might be pretty unattractive. And how you would actually - the administrative cost of working out when a case is meritorious and when it isn't - I know LACs do that already, so I don't know whether you think there might be a chance of sort of piggy backing on some of what they do, or whatever, but that's a cost which - I suppose I'd be interested to know whether you took that into account in your modelling, given that this will always be a cost to the Commonwealth, whether that administrative cost, whether you had any idea of how much more administratively expensive it might be than a HECS-type arrangement, because of this need to have a bit more of a test at the front end?

PROF CHAPMAN: Let's divide the administration into two components. The administration of eligibility doesn't involve the tax office at all and I don't have any information on that. I imagine that there are people who vet prospective clients for Legal Aid and that's time intensive, and information intensive, and I just don't have any way to - - -

MS MacRAE: That cost doesn't reflect in any of your numbers?

PROF CHAPMAN: No, this is all about the implicit subsidies of collection and the parameters that determine sensitivity of the revenue that's collected, not about the overall scheme. So that was sensible for us because we kind of didn't know how all this worked. But I'll say something broadly about the collection costs.

The way it works is the employer takes it out of your pay, and so the employer knows if you've got a HECS debt, and they've got a table, and the table says - just like income tax - "You earn $60,000, you owe this much income tax, we take it out, we garnish it, we send it off to the Tax Office. You've got on top of that a HECS debt, we take out another 4 per cent and we do the same."

The cost for the Tax Office resources are about 3 to 4 per cent of annual revenue. There will be additional costs which we haven't modelled, which are the costs of the employer from taking out something above income tax - in addition to. By the way, you've also got that with child support agency. So

this would be an extra one. I don't know of any estimates of what time is involved for the employer. There haven't been many complaints about it, which must mean something. Like, I presume it's not linked, but I don't know. But I do know, roughly speaking, that collection costs for the Australian Tax Office affects about 4 per cent, something like $40 million a year. And in fact the revenue has got higher and higher and higher, and as costs have not gone up commensurately, it might be less than 4 now. Similarly in the UK they have got a system which looks pretty much like ours. I have looked at all their work in terms of how much it costs their Internal Revenue Service. It is about the same.

On the politics - not exactly on the politics, but on the selection of the eligible groups and how ugly it looks to say, "Not only are you old and therefore miserable, but you can't have all these other things that young people have got. It is not just beauty and fitness and the capacity to walk properly. You can't get this. That is just bad luck". I mean, that looks pretty horrible.

If the debts are not so big - like $20,000 - and you use the surcharge, even giving it to relatively old people is not a big deal; but a high debt of $30,000 without a surcharge - we have got the debts for people aged 50, with a debt of $30,000 and no surcharge. The subsidy to the Commonwealth has two components - the bit they don't pay because they leave the labour force relatively quickly because they are 50 - and we have combined that with the interest rate on the repayment of the debt as well. That's about a 30 per cent subsidy. It is not going to knock you out of the water because if you have got a range of the debts going to people - we start at age 30, 30 to 50 - and you are talking about subsidies for all of those groups with a $30,000 debt and a 25 per cent surcharge, even for the 30-year-olds it is 15 per cent. I am looking at figure 11; but the interesting figure is figure 12.

In all these cases when the debts were low, except for women aged 50 or more - and they will be a pretty small proportion of the group, but for all of these ones, apart from that group, there is virtually no subsidy, even for the old ones. That is because they have got the 25 per cent surcharge on top and the debts are low.

Once the debts get over about $25,000, it starts to be a bigger deal but even with a surcharge of 25 per cent, your bottom line is an aggregate situation, an average subsidy across the board of about 5 per cent or something like that. If you gave all the debt to the 50-year-olds, then that would be about 25, 30. In other words, the composition of the debtors is really critical. You can trade off for some groups. You wouldn't want to say this too loudly but for some groups you actually get more in present value back than you give them because the surcharge is there at the top end of the income distribution. It still, by the way,

might be in their interests to take it because banks aren't going to give you money for this if you haven't got collateral.

DR MUNDY: I guess the context in which we are considering this are circumstances where people would have, let's assume, a better than marginal meritorious legal matter to run. For cash flow or asset reasons or whatever, they are unable to raise the capital through some means to bring the action, whether it be that they can't find a lawyer to do it on a no win, no fee basis or whatever else, or whatever.

Assuming that there would be some not only means testing but merit testing so that the screening process would knock out outrageous claims, it seems that in a substantial number of matters or cases the borrower would be in a position to repay a significant portion of the loan, if you like, within a relatively short period of time; let's say 12 months on average. That's a reasonable estimate of how long it would take. Now, they mightn't retire all of it because we know that costs orders in court don't always meet the actual costs incurred; but have you done any modelling? I mean, I presume your normal modelling assumes some windfall repayment characteristic.

Some people repay their HECS loans after a year and a half because Great Auntie Agnes has fallen off the perch and they get some money from an inheritance or something; but in a circumstance like this, there is a possibility, particularly for older people, that they might decide to repay early or indeed the scheme could be designed in such a way that in the event that you are in possession of at least a costs order - perhaps not a determination of the matter in principle but at least your costs would be immediately devoted to the repayment of the loan. How would that affect the modelling? I presume that would from the point of view of revenue subsidies be a mitigating factor and at least ameliorate these issues about age.

PROF CHAPMAN: We haven't had Auntie Agnes falling off the perch in the modelling. Let me explain how we do this. There was a data set by the name of the household income and labour dynamics in Australia. It is called HILDA, and HILDA is about 18,000 people. It's longitudinal so the same people are in the data all the time but we haven't used the dynamics of it. We haven't looked at the same people because we have found over the many years we have been examining lifetime income projections that there is a very significant stability between years and partly it is because it is very hard to change the composition of a labour force year to year. It takes you 20 years to do much at all so we only use one cross-section.

We didn't follow people and then suddenly they got a big inheritance. They would have had to have had the inheritance as part of their reporting of

income. It would probably not even take the form of a lump sum principal. It would probably be that they have got interest on whatever Auntie Agnes left them and that would be manifested in the income data which we have used very broadly. The reason we have used it very broadly is that we weren't that interested actually in what was wage and salary compared to what was interest on savings because they are all used as factors that condition the loan repayment. It's a very broad sweep here so we haven't got that.

The other point - there are many things we don't have but some people have said that there might be a property dispute going on and as part of the outcome of the case one of the people with the debt might get a sum of money in lieu of superannuation or the value of the house or whatever, and have you taken that into account? The answer is: no, not directly. I mean, these policies are pretty flexible. You could say in the event of a property dispute some proportion of that would be used to pay off the debt, as well as the contingent nature of it all.

The broad conclusion I would draw in general is that if we haven't taken these things into account, we have overstated the cost to the Commonwealth. They are not going to be large negative sums.

DR MUNDY: So any rules that would effectively bring forward repayment must act in the benefit of the Commonwealth.

PROF CHAPMAN: Yes.

DR MUNDY: That's the logic.

PROF CHAPMAN: Yes. They will reduce the subsidy because they will retire the debt earlier. All these subsidies come about because of the time taken to repay. That's the most critical part, particularly for young people. Then there is an additional bit, and this is why it affects older people more: they stop repaying because they have reached retirement. That is right. There is a built-in bias towards making the subsidy appear bigger. I can't tell you how big it is.

DR MUNDY: No. It would depend on the rules.

PROF CHAPMAN: Yes.

MS MacRAE: I know you have used the HILDA data. We are interested in unmet need and how mechanisms might help with that. Do you have any feel for scale of how much there might be take-up of this sort of thing, or is that just really not part of what you are - - -

PROF CHAPMAN: It isn't, but I was hoping that Richard Denniss would appear with me today but he is overseas. Let me tell you about some work that he has done and there may be other work done. Richard himself has said their survey was pretty small but the Australia Institute did do a survey. It is an online survey. All these surveys of course have got selection bias in it, but he asked a question something like - and there were several thousand people in the data - "Did you have need of legal services last year? If you did not acquire legal services, why did you not? Were they to do with property issues, child custody battles, the criminal justice system? What were they?" I don't have the data with me or in my head but it's in Richard's report. That's what motivated Richard's engagement with this, was his view, and I can't substantiate this empirically, that there were a lot of people with property issues that could not get to court because they didn't have the financial resources. And he also believed, and other people in government have confirmed, that there is a subclass - I don't know if it's sub in the empirical sense - people who get taken back to court because it's in the interests of the rich ex-partner to promote a legal issue until the money runs out. I can't substantiate that but it was Richard's view.

DR MUNDY: That conduct has been brought to our attention. The big question is how - - -

PROF CHAPMAN: How big is it?

DR MUNDY: - - - endemic is it, and is that a matter better solved by this mechanism or by judges doing their jobs?

PROF CHAPMAN: Yes, sure. So I'll just refer to Richard's paper and his data. It might be a good idea to actually go beyond his paper and get someone to look at his data for other dimensions because typically what happens in collections of surveys like this, you don't publish everything you have got.

MS MacRAE: Yes.

PROF CHAPMAN: You have got myriads of stuff all in the background but I can't speak for it.

DR MUNDY: Thanks for that, Prof Chapman.

PROF CHAPMAN: My pleasure.

DR MUNDY: That's very helpful and thankyou for taking the time and walking over in the bleakness.

PROF CHAPMAN: Who walks? Just one other point; I'm kind of interested in your point that maybe judges can sort out rather than this mechanism. I always see these mechanisms as kind of complementary and top up rather than replacing the essence of what other parts of the public policies there.

DR MUNDY: My observation is more about that sort of behaviour which the court shouldn't allow to happen - - -

PROF CHAPMAN: Yes.

DR MUNDY: - - - such as conduct of the parties and their representatives. Thank you, Prof Chapman.

DR MUNDY: The final participant for today is Disability Advocacy Network Australia. Could you please state your names and affiliations for the record and then could you, if you want to, make a brief short opening statement.

MS MALLETT (DANA): Mary Mallett, CEO of DANA.

MS CLAIR (DANA): Siobhan Clair, policy officer at DANA, Disability Advocacy Network Australia.

MS MALLETT (DANA): In my very first opening statement, I just have to say is everybody in the disability sector thinks the Productivity Commission is sort of a national hero since the report into disability, care and support that led to the NDIS. So I'd just like to tell you that bit first.

DR MUNDY: We wish everyone thought that.

MS MALLETT (DANA): I think probably leading up to that, lots of people in the disability sector had very little awareness of the Productivity Commission really and that just has such an enormous impact.

DR MUNDY: If you could draw that to Senator Cameron's attention, we would be most grateful.

MS MALLETT (DANA): We will try. I won't go over too much stuff that's reiterating things that are already in the draft report, because you have probably got a lot of reports we don't need to comment on. In the draft report, you have highlighted a whole lot of things that are the bread and butter really of what Disability Advocacy sees. I will just give you a little bit. We represent the disability advocacy organisations around the country. There's about 70 that are members of DANA but there are others that aren't members but who do the same work and I just sort of jotted it down to give a little picture of the work, so this is one small region of the disability advocacy agency and the civil justice issues that they are dealing with just over one short period of time.

The consumer dealing with phone companies was one. Almost all the people that disability advocacy agencies deal with would be people with intellectual disability, acquired brain injury. There will be people who have significant disabilities because if they don't, they don't get to be a priority for the agency. So what that means is they are all are on low incomes, in effect, they would all be on the disability support pension, so there's consumer issues, being exploited. They sign up for contracts they don't understand and telephone companies have no issues, no concerns about that. So in one week, one advocate dealt with two different phone companies, in one case an $1,800 bill and in the other case, a four and a half thousand dollar bill which, by

dealing with the company directly and threatening legal action, they managed to get those bills waived. Quite often, they will get them reduced or a payment plan put in place.

Child protection is a huge issue for advocates, so the attitudes of the child protection system to parents with mild intellectual disabilities, there are significant issues there all around the country. It's not any one jurisdiction. For those parents to get access to their children; usually the children have been removed by the time the advocates get involved. Occasionally, they are able to prevent removal of a baby and there are sometimes those very tense issues where literally they are at the hospital bed when child protection are attempting to take the baby.

Anti-discrimination issues. Again, this is the work of one advocacy agency and a couple of advocates in a small area dealing with these issues in a short space of time. A couple of the anti-discrimination issues and again, these are clients that are not able to - they don't have access to computers. They don't have access to the Internet. Most of them are not literate anyway, so they are not able to just look it up. They don't understand who to talk to other than the advocacy agency who may have supported them in the past. They have no idea who else to contact about these issues. Even processes that are designed to assist them, like anti-discrimination commissions, still don't have the kind of support available to them that will help them navigate their way through the system.

The anti-discrimination issues, the two that again this same small agency was dealing with - one was one that went on for a long time about a man with an acquired brain injury being banned from a shopping centre. In the process, the disability advocate supported that individual to talk through the issues, to write them down in some sensible kind of order, to find how he wanted to proceed and then once the process starts, being in the conciliation. However, on the other side of the desk is the lawyer representing the shopping centre and the security company, where on the side of the client there is the advocate, who isn't a trained legal advocate, and his client. Even the processes that you mention in here, even the processes that are designed to help people, there's an unfairness and a power battle that's still allowed in there.

There was another anti-discrimination issue they were running at the same time which was about a person in an institution who had no access to a doctor and the doctor refused to see him and that turned into another issue dealing with the public trustee. It was more neglect probably than anything else but misusing the individual's money, allowing it to be all used up when they should have been guarding it better. Employment issues about people whose employment is terminated, restraint orders, AVOs and supporting young

women to take those and they do run the other side of it, sometimes support young men with intellectual disabilities who have the orders taken out against and they don't understand them. They continually breach them and then risk criminal issues.

Restrictive practices like unlawful seclusion and a whole lot of other restrictive practices that happen within educational systems actually and in disability support, accommodation support, tenancy issues; and then there's a sort of separate things which are breaches of standards, access to premises standards or transport standards.

That's just one little picture of what one small disability advocacy agency will be dealing with and the employees mostly are not legal advocates. Among the DANA members are - a small number of the community legal centres are members of us, but they also have, I presume - the National Association of Community Legal Centres did respond to this, I think, and you're probably - - -

DR MUNDY: And there's state ones and they have differences.

MS MALLETT (DANA): Yes, that's right, so they have got their own set of people who are looking after their interests. There is a whole lot of models of advocacy and legal advocacy; within our context is one of them, but the majority of the disability advocates are not legally trained so that what they're trying to do when it comes to legal issues is they're like the first response, like the first aid. You know, they're trying to deal with them, like, resolve them first before they get to be a legal matter. That's because they almost always can't get Legal Aid. These are people who can't afford any other form of legal support so either they have to be able to get Legal Aid, which for most of these issues they can't, or the other thing that the advocates spend quite a lot of time doing is trying to source pro bono legal services. There are some fantastic lawyers around the country who really do turn themselves inside out to provide pro bono services for people, especially with the significant child protection and some of those other issues, but it's random, it's ad hoc. You know, you can't guarantee it.

DR MUNDY: These people that you're speaking of would have economic means which would mean that they, if the matter was relevant, would qualify for Legal Aid, but because it's not a matter that is Legal Aid fundable, they - - -

MS MALLETT (DANA): Yes.

DR MUNDY: So it's not that they're rolling in dough. It's that Legal Aid is not supporting these sorts of matters and therefore they don't even get to the means test.

MS MALLETT (DANA): Yes, that's right, because - - -

DR MUNDY: The matter excluded.

MS MALLETT (DANA): Yes. There's mention in one of the recommendations about having a separate fund for - - -

DR MUNDY: Their disability is not such that Legal Aid Services will say, "We know that this isn't a matter we usually provide Legal Aid for but because of your - - -"

MS MALLETT (DANA): Very rarely. The Legal Aid Commissions are so strapped for funding that - you know, what I was trying to keep this to was the civil matters that the advocates are dealing with because at the same time they will have criminal matters that they are dealing with legally.

DR MUNDY: Because we know that Legal Aid will on occasions say, "Look, we have had a look at the means test but because of - we will just put that to one side" - you know, women in immediate danger or children in immediate danger, that sort of thing. So I was just curious as to whether a person's profound disability might be such they will say, "Look, we don't usually help people with this but."

MS MALLETT (DANA): The child protection probably is the one - they're probably the one matter that the Legal Aid Commissions may indeed try and get - - -

DR MUNDY: Because they're worried about them.

MS MALLETT (DANA): But even so, that doesn't always apply.

DR MUNDY: That's where it's most likely to be honoured.

MS MALLETT (DANA): Yes.

DR MUNDY: Okay. Sorry to interrupt.

MS MALLETT (DANA): For us there's a lot of issues in here and there's quite a few that we have no knowledge of or ability to speak about and other people will do that, but there is mention in here of several things that would be helpful and useful for the group of people we represent.

One of them is there's talk about legal health checks and in effect some of

the work that our disability advocates already do is not far off what you would call a legal health check because they will get a referral to deal with someone who is in a crisis of some kind. Usually the advocate discovers actually there's about 10 significant issues happening in that person's life at the one time and they have to do this kind of, in effect, a sort of legal health check because even if the issue the person has been referred in for or that they have got that's most important to them, sometimes the advocate will look at the whole picture and realise that actually there's a legal issue that has a deadline. So they will look at the picture and they, in effect, without being specifically funded for it, are already doing some of that. We hadn't used that term before but it's a useful one to think about and if they could be funded to do it, that would be even better.

DR MUNDY: Is it just a question of funding or is it a question of training?

MS MALLETT (DANA): It's both, and the training - - -

DR MUNDY: It's the question I wanted to ask - - -

MS MALLETT (DANA): Yes, yes. Some of them - we have looked up the kind of training that's available. We run a newsletter that Siobhan puts out every fortnight to the disability advocacy members and it includes all sorts of training that's available and we try and find it and source it and highlight it to people and one of the most recent ones is - - -

MS CLAIR (DANA): Legal Aid New South Wales has been running some good training sessions for community sector workers, so different kinds of law, like the care and protection area, but they're focused on one issue and I think they're rotating between all the different regional areas gradually, so it might take several years until they cover all the topics.

MS MALLETT (DANA): But that's just New South Wales and it's just a very tiny little drip feed way of doing it. There is other training available. PIAC, for Public Interest Advocacy Centre in New South Wales, do a course called something like Law for Non-Lawyers. Certainly the advocacy organisation that I ran in the past, we would love to have been able to send our advocates to it but we couldn't afford it. We couldn't afford to get them there or to bring the PIAC down to run the training. So there is a need for - in effect what happens is the experienced disability advocates over time just learn by doing and they source people and they grab people and they suck up information out of people. They do that, but it would be really good if they could access some training, and it would need to be funded. The advocacy organisations are - and I will mention actually, probably it's useful, how they are funded.

There's a federally funded program called NDAP, the National Disability Advocacy Program. That's funded by what was FaHCSIA and is now DSS. Mitch Fifield is the minister under Kevin Andrews. That program has been around for 20 or so years but it hasn't grown over time and it funds a lot of small organisations that are very significantly underfunded. The states and territories then separately fund some advocacy organisations as well and some of the agencies are funded by both.

Again it's tiny amounts of money. These are mostly very small organisations, maybe three or four people, sometimes only two, and they often have - it's interesting because there's a reference in here in a couple of places in the economic terms that you're looking at about the size of organisations and I know you mention it about the indigenous ones and somewhere else - - -

DR MUNDY: (indistinct) legal service.

MS MacRAE: (indistinct) affairs.

MS MALLETT (DANA): Yes, that's right. So there are arguments for making things bigger. There are significant arguments for keeping things based in a fairly community-minded sort of way. Those services which - and a lot of them have been around for, you know, about 30 years now. They have very good reach. There's a high awareness level of them within their community. People trust them, and that's a significant issue given that they're dealing with groups of people who are very disadvantaged and disempowered and who sometimes don't engage with other services, so both the reach and that trust and rapport is something that's - it's hard to replicate that just by having a branch or something that's a bigger service, so - - -

DR MUNDY: We're aware of that with community legal centres.

MS MALLETT (DANA): Yes, well, it's the same with the advocacy organisations, so bigger isn't always better.

DR MUNDY: Just coming back to this you would have to pay for this training, do you have some sense of what that cost - I mean, is it a couple of hundred dollars a worker? Is it a couple of thousand?

MS MALLETT (DANA): Those courses that I'm thinking of like the PIAC courses would be something in the order of a couple of hundred dollars, but it's - - -

DR MUNDY: But you have to get them there - - -

MS MALLETT (DANA): But you have to get them there, or you have to get the trainers from Sydney to go to Tasmania or Western Australia or wherever it is. There may very well be other people who can deliver that. That's just the one I'm familiar with. There probably are other people who can deliver the same training. So I'm sure there's a way of setting it up.

DR MUNDY: A program to actually fund the development of a - it's probably going to have jurisdictional knobs attached to it but - - -

MS MALLETT (DANA): Yes, and that's the other issue here.

DR MUNDY: But that's not beyond (indistinct).

MS MALLETT (DANA): No.

DR MUNDY: But some sort of scheme whereby there was funding for the development and the training that would create a legal health check for people with a disability.

MS MALLETT (DANA): Yes.

DR MUNDY: And then roll it out would be something that would be welcomed by the disability sector.

MS MALLETT (DANA): It would. Yes, that's right.

DR MUNDY: What would we need to guard against?

MS MALLETT (DANA): What you need to guard against is what you would be - if what you set up was some kind of - - -

DR MUNDY: Let's assume we consult properly and we just don't tell people what they need to know and we actually talk to them about what they do - - -

MS MALLETT (DANA): Yes.

DR MUNDY: - - - to do it properly.

MS MALLETT (DANA): Okay, good, because ideally what you would do is you would fund the existing services who already know how to communicate with this client group, so you'd fund them to do it because if you did something - there's another kind of model you could use which I wouldn't like to see which would be that you would somehow fund a legal health checking agency

where all the people with disability get funnelled into them to go on through a tick box thing.

DR MUNDY: No, no. No, I'm sorry.

MS MALLETT (DANA): Right.

DR MUNDY: What's in my mind is an education program for disability advocates in this space.

MS MALLETT (DANA): Yes, and we're happy to go away and do a bit more work on some of the costings and on who some of the services already could recommend or use already in their - - -

DR MUNDY: I'm surprised my team down the back is still here. There it is. Its head has popped up. The welcome news is that someone will go away and do some costings.

MS MALLETT (DANA): Yes, we'd be happy to - - -

DR MUNDY: Thank you for that offer, we'd love to take you up on it.

MS MALLETT (DANA): - - - facilitate that because I just know that the agencies around the country would appreciate this.

DR MUNDY: I think there's a fair amount of work, I mean, a lot of the CLCs are trying to do work on this. One of the things that characterises a lot of the work we've done in this inquiry around community based services is everyone is trying to do something and there's just not enough joining it up or lots of repeated effort or - - -

MS MALLETT (DANA): Yes, it's not even repeated - yes, in some cases it's not a repeated effort. What it's an indication of is how many people have significant social issues and disability issues, how hard it is really for them to survive and live and thrive in the way the current systems are. They're treated badly as consumers and in my little list of issues I didn't even talk about one of the significant things that happens which is people with disabilities who are exploited deliberately by families. These people are sitting in the back of my mind as I'm talking, you know.

There's a young man who lives in a hovel really at the back of his only relative who has anything to do with him. She marches him to the ATM on the day his pension comes in, withdraws all the money and then feeds him really but that's about it, and he does have a disability advocate who is trying to

support him now to deal with that. But, yes, just using that same example actually, he goes to a day service and another service and the bills from those organisations are in his name, so this relative takes all his money but the bills come to him. So he has these outstanding debts now to these organisations but he doesn't have the money to pay them back.

Anyway, being involved in disability advocacy makes you lose all faith in humanity sometimes. But for those people to get into and get access to the legal system and to try and get redress - they're sitting down here and the legal system is this little pointy bit up the top and they're mostly not getting up there into the system.

We were discussing this earlier on and we were trying to work out - and I think we said probably somewhere that better funding of independent advocacy would save money. In actual fact it might not save money but what it does is improve people's lives because in effect by keeping people out of the system, you save money because you're not spending the money on them. So it's a hard argument for us to make actually ; that you can save lots of money by allowing a system that brings more people in who have needs but in effect that's what the NDIS is doing but that's not going to help their legal needs.

DR MUNDY: Could I ask you the extent to which the problems that advocates see relate to the actions of governments at all levels and the processes which governments have in place to deal with what are disputes make people in the first instance aware of their rights, but also, if a dispute is resolved, do governments have in place appropriate mechanisms to facilitate the resolution of those disputes for people with disabilities? Indeed, I guess the other area I'd be interested in is you mentioned telecommunications before. There are a number of industry based ombudsman services around utilities, that sort of stuff - whether you have a view on the quality of the work they put in for people? Do they recognise and appropriately deal with people who present with a disability, particularly the telecommunications ombudsman? We've also got the financial services one but also the water and electricity one.

MS MALLETT (DANA): That was a long question but the short answer probably is no. The ombudsmen or women don't - you know, the target group we're talking about here, as I've said, are people who really only get information if it's targeted very directly to them. It usually has to be mediated through other people, so that means their families or their service providers or their advocates. Somebody else who has their interests at heart has to be giving them the information, so unless it was some huge enormous campaign which had television ads on every 10 seconds, but on the whole most of these ombudsmen are relatively invisible unless you go hunting hard for them.

DR MUNDY: Let me rephrase the question.

MS MALLETT (DANA): Yes.

DR MUNDY: Do you have a sense that when an advocate rings up Ombudsman X and says, "Person Y has got this problem." do they get shunted away? Do they get dealt with? Is there anything you can make an observation about the way they treat the advocates? I've got no promo on this. It's just - - -

MS MALLETT (DANA): Yes. It's not necessarily the same. There's a variety of ombudsmen/ombudspeople. I don't like calling them ombudsmen all the time. It's not necessarily that they're unwilling to do this. Their processes are a bit slow, so for somebody who actually needs something resolved the advocates through experience will know that if you can wait two years, you might sort it out through the health ombudsman but if you wanted it resolved now, you have to go more directly, so that's one issue.

Their processes are not always very user friendly for people who have low literacy and the other thing that I should have mentioned earlier, all of these issues would be complicated even further if the person with the disability is also from another cultural background, so there's a language barrier as well, as indeed some of these people are.

There was another point about the ombudsman that I was going to make which was, yes, what it is they're responsible for. So one of the issues that we realised when we were thinking about this, the general ombudsman in each state and territory - so leaving aside the telecommunication or the specific ones, the general ones, they are responsible for government services. What that means is specifically in terms of the services people with disabilities receive in the bigger - I'll use where I'm most recently from, Tasmania, so in Tasmania there are no disability services now provided by the government. They've all been devolved to the non-government sector, so the ombudsman is of no value whatsoever for anybody who has an issue with their disability service.

The same is going to happen over the next few years and the state governments all have plans now. As the NDIS comes in they're going to get - maybe 30 per cent or more, it may even be up to 50 per cent, of supported accommodation in both New South Wales and Victoria is supplied by the government. Over the next three to five years they'll tender that out to the non-government sector, and so the ombudsman actually who currently is of some use for that particular issue, and they also do have various versions of disability complaints commissioners, but for the non-government organisations, the ombudsman isn't a threat to them because it is only for

government services. So that is an issue that we realised as we were looking at this and it is something that needs to be considered really. The purview or whatever of the ombudsman is going to be significantly reduced.

DR MUNDY: Because the AAT is getting special funding to deal with complaints and special jurisdiction with respect to the NDIS?

MS MALLETT (DANA): It is.

DR MUNDY: But this is a different issue, isn't it?

MS MALLETT (DANA): It is a different issue. That's right. The AAT is setting up a special part - I can't remember what the word is - of the AAT but that is only for very specific things to do with eligibility or specific issues. It is very tight. Of the people who have complaints about the NDIS and their service, a tiny number will get through to the AAT which is what you would want, I suppose, but you want robust mechanisms for them to be able to deal with their issues in other ways.

MS MacRAE: On the side of the dispute where the person with a disability might have an advocate or a carer who is there to help them, do you also have problems? I mean, is there enough in the way of training for the legal profession itself to be accommodating to what they need to do should they be confronted with a plaintiff who has a disability? Is that another issue?

MS MALLETT (DANA): That's funny. I have just emailed one of the large law companies actually this morning to set up a meeting with them because our organisation thinks no, absolutely, there isn't at all. A lot of the work that the disability advocates do and one of the significant roles they play when they are trying to find legal support or support one of their clients through a legal issue is actually they end up becoming almost acting a bit like an interpreter where they are both explaining what it is - and I have sat in on this process and seen it happen.

This is with a Legal Aid lawyer who actually does deal with a reasonable number of people with significant disabilities but still just automatically uses the legal terms and the advocate has to turn that into plain English or really simple, straightforward English, and has to do a lot of double-checking just because the advocates are familiar with talking to people with disabilities and understand that a lot of people with intellectual disabilities and acquired brain injuries have part of a disability and part of the way they function is that they have compliance with authority, so if a lawyer says to them, "Now, do you know what I'm saying, Jack?" he will say yes even though he hasn't understood a word of it. I mean , they do it to police all the time which is why they then

get into trouble sometimes. I think a lot of lawyers are not aware of that and the Legal Aid lawyers are busy and rushing from - - -

DR MUNDY: We have heard magistrates say similar things, with a range of possibilities.

MS MALLETT (DANA): What the advocate's role is in that space is that they are there to make sure and to keep double-checking that the lawyer slows down a bit, takes a bit more care and is actually understanding what the person means, because somebody with a reduced vocabulary and a particular way of putting things - if you are not experienced in listening to that, then you may not understand what it is they mean and, on the other side, that they actually are understanding what it is the lawyer says and when they are asked a question, what that means. So there is an important function there that needs both time and ideally funding to make it work.

MS CLAIR (DANA): You were saying with this law firm we are hoping to establish a resource?

MS MALLETT (DANA): Yes. What that was about was to try and find a way of getting private funding for a resource that would be available to lawyers and, as well as that, something to do with the credibility I suppose. If a not for profit organisation like ours sends something out to lawyers, they may dismiss it. If it is badged by one of the major law firms, they may pay slightly more attention to it. That is just something that we are attempting to do ourselves.

MS MacRAE: A bit like a how-to sort of guide, the things they should be conscious of and that sort of thing.

MS MALLETT (DANA): Yes. There have been some small little versions of that. We are well aware of course that producing a guide means nothing unless you can get people to read it and pay attention to it.

One of the other sort of last things that I wanted to say was that there is an issue about advocacy at another level. I don't know really where it fits in here but I just wanted to mention it. Some of the organisations are funded to do systemic advocacy. Many of them are not but they do it anyway. What that often means is, what they are trying to do is get a good outcome for people, and they look at that across the systems level. Often that means the government or a government department is the target, I suppose you could say. That is where a lot of the work is done at lots of different levels to try and get systems to change and to meet the needs of people.

Sometimes that has to be done in a legal setting, so sometimes advocacy

organisations have to take the government to court or a government department which is a risky endeavour for an organisation that is funded by government. There are a couple of examples I can think of where we have recently heard back that the particular state minister concerned in one of these issues is saying to all and sundry that he will not refund that organisation and yet the organisation's job I suppose is to do everything within its power to get the changes made that allow the people who we are funded to support to have a reasonable life. I am not sure how that fits into here, but it is an issue.

DR MUNDY: If we raise it in the context of law firms who are doing work for governments, and most of them do, they are providing pro bono services and they are worried whether the provision of the pro bono services constitutes a conflict in the legal and the ethical sense. What you are indicating now is that there might also be a political sense that could be relevant.

MS MALLETT (DANA): Absolutely, and perhaps more so at the current moment than others.

DR MUNDY: That is very helpful. Thank you. That is really, really useful.

MS MALLETT (DANA): This is the start of your - - -

DR MUNDY: Today is day one.

MS MALLETT (DANA): Well, I am hoping you hear from more disability advocates around the country who point out some of these things.

DR MUNDY: We have heard some of you are more legally focused members and - - -

MS MALLETT (DANA): Yes.

DR MUNDY: - - - obviously issues about people with disability will be raised.

MS MALLETT (DANA): Yes. Thank you for your work. It is very good and we are looking forward - - -

DR MUNDY: Just remember when you see Senator Cameron to speak kindly of us. These hearings are adjourned and we will resume in Sydney at 8.30 tomorrow.

AT 2.58 PM THE INQUIRY WAS ADJOURNED UNTIL
TUESDAY, 3 JUNE 2014