Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT ADELAIDE ON THURSDAY, 5 JUNE 2014, AT 8.30 AM

Continued from 4/6/14 in Sydney

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DR MUNDY: I will convene these proceedings. Good morning, ladies and gentlemen. My name is Warren Mundy. I am the presiding commissioner on this inquiry and the other commissioner on this inquiry is Angela MacRae. Before going any further, I would like to pay my respects to the elders past and present of the Kaurna people and also pay my respects to the elders past and present of all indigenous nations who have continuously occupied this land for the last 40,000 years.

The purpose of these hearings is to facilitate public scrutiny of the commission's work, to receive comments and feedback on the draft report and particularly to get people on the record, so that we may draw upon their comments in finalising the report. Following these hearings today, there will be hearings in Perth, Melbourne, Hobart, Darwin and Brisbane. Hearings have been concluded in Canberra and Sydney. We expect to provide the government with our final report in December and in accordance with the Productivity Commission Act, the government has 25 parliamentary sitting days to release the report by way of tabling in both houses of the Commonwealth Parliament.

Whilst we like to conduct these proceedings in an informal manner, I would 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 the refusal to provide information. As far as we are aware, the commission has never had to use those powers and I expect it won't be necessary to use them in the course of this inquiry. As I said, we like to conduct these hearings in an informal manner but we will be making a complete transcript, so we don't take comments from the floor, as we cannot record them properly. The transcript will be available on the commission's web site shortly. Participants are not required to take an oath but are required to be truthful in their remarks. We do welcome them making comment on submissions made by others.

I am required to advise you of the emergency procedures in the event that we need to evacuate the building. In the event of an emergency, alarms will be activated and you will be advised by the Mercure Grosvenor Hotel staff of any action to be taken. Conference and events staff will direct you to the nearest emergency exit. Emergency exits are located on the east side of the foyer area and the main stairs to the ground floor foyer. The emergency marshalling area for this hotel is in front of the convenience store which is on the east of North Terrace, next to the Strathmore Hotel. The ladies toilets are located on the western side of the conference foyer, the gentlemen's and disabled toilets on the eastern side. This is a non-smoking hotel. However, smoking is permitted in the outdoor dining area on the north terrace.

With those formalities concluded, could I ask you to state your name and the capacity in which you are here today and perhaps ask you to make a brief opening statement.

MR JOHNSON: Thank you, Dr Mundy. My name is Peter Johnson and I am here in my capacity as a private citizen and I made a submission, which you have probably seen. I will just speak briefly to my submission, which I think was fairly detailed, and I won't go over it again in the same level of detail but I will make a couple of brief comments, if I can, summarising what I have said there. I have read a lot of submissions from what I would call vested interests, saying that the system of regulation is South Australia is satisfactory with the Legal Practitioners Conduct Board. My experience leads me to disagree with those suggestions and as I have said, I have explained that in fairly great detail in my submission.

I would like to just maybe quote from some the board's guidelines to illustrate my point and it deals with conduct of practitioners. I guess the thing that I found most surprising under the Legal Practitioners Act, under section 77AB, and I quote from a publication from the Legal Practitioners web site:

> The board can only make orders and deal with a matter pursuant to section 77AB if the practitioner consents. This has been taken by the board to mean that the practitioner must not only consent to the board dealing with the matter under section 77AB but also to the proposed orders of the board. Written consent is required.

Now, as I said in my paper, why would any practitioner consent to that, because if he doesn't, then it has to be considered under the much higher test of misconduct and that's virtually impossible. It has to be a very extreme case for that to be taken, so that just seems to be a bit unusual. I have numerous pieces of correspondence from the board telling me the board does not have power to adjudicate to make binding determinations in respect of legal costs.

> Parties who wish to obtain a binding determination may apply to the Supreme Court for adjudication of costs pursuant to rule 272 of the Supreme Court.

I rang the Supreme Court and they were not very helpful. I took some legal advice, managed to find somebody who specialises in taxing of bills, and was quoted about $10,000 to do that, so that's a significant impediment and I note in fact in one of the submissions that one of the people submitting quoted statistics of people who were getting bills taxed and said that's evidence that there is not a problem. I suggest that it's actually evidence that it's an impossible situation and people just don't bother, like I'm not going to bother.

As I say, I can read other comments from the board and it seems to me, having read all of them, the board is very forthcoming in telling me what they can't do but I actually haven't been able to find anything they can do, to be perfectly honest, but I do contrast that to the approach or the position taken by the Australian Taxation

Office and, as I said in my discussion paper, I found them to be particularly helpful and I will just quote from an extract from a letter that was sent to me when I put in a claim for compensation for defective administration and I quote:

> In the circumstances of the audit, I consider that the requirement to afford you procedural fairness means that the auditor was required to put information upon which he intended to rely to you before making a decision adverse to your interests.

Then he goes on to say:

> I am satisfied that there was a breach of procedural fairness in relation to the valuation of the Westbourne Park investment property which was sufficiently unreasonable as to constitute defective administration for the purposes of the CDDA scheme.

I found that quite refreshing and it really was in contrast to not only the position that I had been led to believe that Taxation took and in that regard, I will quote from the practitioner's response to the Legal Practitioners Board. It says:

> The ATO did mention that she would be happy for us to provide a draft objection decision and make submissions in relation to that draft. This is not the process the ATO generally follows.

I will just pause there. Subsequently inquiries and what was said to me in my claim for compensation, that appears not to be the case but that certainly was what I was led to believe, that we had to get everything all organised and get really ready for everything, but in fact the position was entirely the opposite. My problem, and one of the complaints I put, was that instead of the practitioner telling me that - and this is what he said in the submission to the board, "I thought it was an excellent opportunity to finalise our position on the various issues, obtain the final valuations" - and there were four being chased, which was surprising to me - "and forward our letter and submissions to the ATO by way of response."

As I said, you mention in the position paper or the preliminary draft report says, "Chasing rabbits down rabbit holes." That's a classic example of what was happening. I put that position to the board and the board essentially found no fault with that and basically, the board actually said, "It's not our role to determine. The role of the board" - and I quote - "is not to make a determination in relation to the manner in which the legal practitioner resolves a legal problem." I ask the question, well, if they are not going to do it, who does? I suspect nobody does. That's been my experience.

The only other thing I would say, and I didn't put it into my submission, I did

consider seeking, in fact I did seek a copy of the report that was put by the board's staff to the board in relation to my complaint. Contrary to the Tax Office definition of procedural fairness, in other words I should be aware of everything that's been put to a deciding authority on which they are going to make a decision, the board claimed legal professional privilege and said, "No, we're not going to tell you what we're saying to the board and, you know, that's it." I thought about seeking that information under freedom of information, which I decided not to, because I figured they would be making the same response. In fact I noticed in the paper this morning an article about paranoia, bureaucrats keeping vital information from the public, a paranoia culture in relation to freedom of information and I suspect that's endemic or that's essentially what I think is happening in the Legal Practitioners Conduct Board as well.

Just to reiterate, summarising my conclusion, my concerns can be summarised: the Legal Practitioners Act contains the loopholes that allow practitioners to avoid scrutiny for relatively minor misconduct. The board has limited power to intervene in all but the most blatant cases. The lay observer was ineffective and the ombudsman's power, who looked at it as well, I found them to be quite helpful but they said all they can do is look at administrative processes. They can't actually substitute and say, "You have made a wrong decision. We disagree with your decision." All they seem to be able to do is to say, "Have you filled in this piece of paper and have you gone through the proper process?" The final thing is that the cost of taxation of bills acts as a severe deterrent to justice.

DR MUNDY: Thank you very much for that. Just to clarify the record, we understand that you are a fellow of the Institute of Chartered Accountants and have been a CPA for over 40 years.

MR JOHNSON: Yes.

DR MUNDY: Thank you. I just wanted that on the record. My colleague Commissioner MacRae knows a little bit about tax. Maybe she can start.

MS MacRAE: I guess one of the things, you did say a little bit in your opening comments but more so in your submission about how relatively more effective the ATO was than dealing through your lawyer. Can you just give me a little bit more detail about how you found them in relation to disputes generally? Did you get a sense that that sort of process would be applied? Did you feel like it was a systemic thing; that they would be more helpful I guess in these sorts of matters than you might have otherwise - - -

MR JOHNSON: Yes, in a former life when I first qualified as a chartered accountant I actually practised in tax. I did it for about 10 years. That was 30-odd years ago, so I think the Tax Act was about that thick then. It's now that thick, I

think, so - - -

MS MacRAE: Or both of them.

MR JOHNSON: Hence I didn't feel confident and I've always had professional assistance in lodging tax returns for our business which we sold back in 2007 which led to this tax dispute, capital gains tax issue, but all through that whole process I obviously thought it important to get the best tax advice we could and that's why I engaged legal and the Big Four Accounting Firms, a big A accounting firm advice through the whole process.

I had no problem with the process. Obviously it went off the rails when the tax auditor made an interesting finding. If you want me to quote from his determination, I've brought it with me. I can explain that further if you wish but it seemed that the tax auditor was perhaps a little aggressive and I remember seeing in the paper at the time that that was a bit of a systemic thing in the Tax Office.

I did engage professional assistance through the process. The firm of lawyers who were handling the objection, it got to the stage after six or eight weeks that things were not - I just actually said, "No, I'm not going to put up with this." That was a tough decision to make because I was very concerned about how that would be viewed by the Tax Office, knowing that you've got a certain firm of lawyers handling it and then suddenly you jump ship. I thought that may send some sort of message to the ATO that perhaps I didn't like the advice of the first lawyer, so I'm going somewhere else.

Despite that, I bit the bullet when bills started coming in an no action was being taken except a 15-minute phone call to the Tax Office which should have stopped all the work being done by the lawyer at that time but it just continued on. That led me to change ship. The new lawyer was a breath of fresh air. He basically made a couple of phone calls, was told by the Tax Office that they've sent the substantive issue to the centre of expertise or a centre of excellence to get a ruling on it. "You don't need to do anything until that happens. We'll let you know," which is what he did and they came back and said, "Look, we were wrong. The auditor was wrong," and that was the end of that.

It was at that stage that I said, "Look, I can take it from here because it involved getting refunds and chasing up calculations and the like." and that was just what I did. I found that the staff of the ATO office which was three or four people, firstly, the particular officer who handled the objection, very helpful. The Tax Office were going through some significant difficulties at the time with computer systems and that was well publicised in the media at the time. They kept me informed of what was happening. They made sure that I wasn't - I lost interest, not at the sort of rate that I would have expected but it was a statutory rate and I found that they were

particularly helpful in running that to earth.

In fact it was one of the people I was talking to that alerted me to the fact that I might have a claim for compensation for defective administration. I said, "Are you sure you should be telling me this?" They said, "No, you've got a right to know what your rights are," and I actually did that submission myself. It took me about six months of quite an extensive process but again that was well received by the Tax Office and considered fairly and, as I said, they agreed with paying some of the claim. They refused to pay any of the first legal fees because they said they couldn't see anything to show for it. I said, "I can't argue with that. I agree with you."

I also did see in the submission from the Tax Office to this commission hearing that the ATO have introduced a system of checks and balances on the audit side of it. I think that's an excellent initiative and I think if that had been a case in place six or seven years ago, I don't think I'd be sitting here today.

MS MacRAE: Yes. I must say we really appreciate you coming here today because I can see that from your perspective there's probably not much in for you now because you've through the mill.

MR JOHNSON: Yes.

MS MacRAE: But you're trying to protect other people from having to go through what you have.

MR JOHNSON: Exactly.

MS MacRAE: So I appreciate your time today. You've talked about even some of the improvements on the ATO systems that were in place from when you first started. Do you feel there's anything else? Obviously you've got some major problems with the Legal Practitioners Conduct Board but in terms of your dealings with the ATO - we've had pretty positive feedback and I think they've been very helpful to us and the extent of their submission has been helpful to us in relation to government instrumentalities. More generally I think the ATO is generally held out as the stand-out kind of best performer really. They do seem to have gone out of their way to have their dispute resolution made widely available and well known.

I guess one of the other questions, given that you were not aware of some of your rights there, do you know, given the higher profile I suppose given to these things now, whether you might have been aware of that had this dispute come up more contemporarily than it did?

MR JOHNSON: I don't think so. I guess - - -

MS MacRAE: It's great that someone did tell you but I suppose you're relying on the goodwill there.

MR JOHNSON: Are you talking about the complaint for compensation?

MS MacRAE: Yes.

MR JOHNSON: Yes. No, in fact the professionals that I spoke to thought it was surprising that they even knew about it, to be honest. They sort of thought I was being a bit silly and wasting my time and said, "Haven't you got anything better to do with your time?" I took great pleasure in actually pursuing it.

MS MacRAE: I'm sure you did. Finally, someone is listening and might actually get some of this money back.

MR JOHNSON: It was good to get that acknowledgment that the processes were wrong and they were prepared to take it on the chin.

MS MacRAE: Yes.

MR JOHNSON: That meant a lot to me.

MS MacRAE: Yes, and you did go back to the board, didn't you, with that information?

MR JOHNSON: Yes.

MS MacRAE: That the Tax Office had said that they themselves couldn't see value in that initial stage and it made no difference to their decision.

MR JOHNSON: Yes, and they basically said the Tax Office weren't aware of what was going on behind the scenes and whatever. That's probably a fair comment. There was a lot of stuff that I thought was unnecessary at the time but was advised that it was. I guess that leads me to another thing that amazes me in this whole process; that it seems to me that you trot along to a lawyer and you've got a problem and the lawyer says, "My advice is this." You go down that track and you say, "Okay. Let's do that." Suddenly they become my instructions to the lawyer and I take full responsibility for that course of action and there seems to be no obligation for the lawyer to say, "Look, yeah, I advised you to do that and if that was wrong then I should suffer the consequences." It just seems to me that your instructions are X, Y, Z. Therefore, you're the only one that has to take responsibility.

DR MUNDY: They're not accountable for the advice that they give that leads to their instructions et cetera.

MR JOHNSON: I guess it's cute. I guess ultimately they would be accountable if I took it to the courts et cetera and I guess it's fair to say that the situation was fairly tense with that first firm of lawyers because I was acting under their advice in setting the structure up. It was one of those issues that they had advised me about that was being challenged by the Tax Office. I had that advice in writing and they knew that they were under a bit of pressure, so it made things a little bit tense, I must say, so perhaps in hindsight I should have gone to somewhere totally independently, but also in hindsight maybe they should have said they had a conflict of interest.

MS MacRAE: Yes.

DR MUNDY: Can we bring you on to the Legal Practitioners Conduct Board who probably haven't covered themselves in glory in the way the ATO has in this matter. Coming from a professional services background yourself, I think that is helpful, but what do you think you reasonably could have expected from the Legal Practitioners Conduct Board, dealing with essentially a question of professional conduct and service provision?

MR JOHNSON: Firstly, I note that in the board's website and all their discussion papers, they talk about mediation, and that was talked about right at the outset, but it was never proceeded any further with, and I know the ombudsman, in his draft report, challenged them on that and the board were able to produce a note of a phone conversation to both parties where, right at the outset, the board decided not to go down the track. I guess certainly - I know the board can only talk about mediation when it comes to fee disputes, and that was one aspect of my complaint. The other aspect was methodology, et cetera, et cetera, and the fact that information appropriate to making appropriate decisions was withheld from me. Like, the full extent of that Tax Office's position, as disclosed to the practitioner, about, "We don't need to do anything." I was told - in fact, it wasn't withheld from me; I was actually told we need to do something totally different, totally inappropriate.

MS MacRAE: Yes, and quickly, so the chances of finding out - - -

MR JOHNSON: Yes, "And we need to act quickly because your interests are going to be prejudiced." I was really misled.

DR MUNDY: So in a sense, the advice was just wrong?

MR JOHNSON: Maybe not wrong. It was - I guess it was consistent with a position taken by that practitioner and to change that situation would have meant eating a bit of humble pie, which I can - I don't accept was - I think that's his responsibility - would have been his responsibility to do that and, if he'd done that, I would have been pleased. He could have easily said to me, "Look, I've got some

great news. We've got a good AT officer here and they're going to do this, that, and we don't have to do any more." He could have easily said, "Look, what I was doing now was based upon my experience, but this is great news. Let's wait till they come back," and again, we wouldn't be sitting here today.

DR MUNDY: But he did not even get to the point of saying, "Look, we have had this discussion with the ATO. They seem to be saying this, but we still think you should do this. What do you really want to do?"

MR JOHNSON: Yes.

DR MUNDY: You were not even given that choice?

MR JOHNSON: Exactly right, yes, exactly. We have got away from your question a bit.

DR MUNDY: What could you have expected from the board?

MR JOHNSON: From the board, I could have expected - the thing I found difficult was - and I've had dealings - for the last 20 years prior to retirement, I was the part owner of a retirement village business and that's what we sold. I've had quite a bit of dealings with the regulatory authorities in that area, and that's a highly regulated industry. The thing I found surprising was that the board refused to talk to me. Everything had to be in writing. They wouldn't answer the phone. They'd say, "Send me an email." When I asked to see, "Look, you're putting your report forward" - this is the final report they did - "can I see what you are saying?" because I'd like the opportunity to put my spin on it, or correct things that I might disagree with, so the board have got my opinion; not just yours. That didn't happen.

DR MUNDY: So it wasn't a particularly transparent or open process?

MR JOHNSON: I guess they would argue that because everything had to be in writing, that is transparent enough, and I was certainly given copies of the responses from the legal practitioner. I was given the opportunity to put written comments back and that is, I guess, maybe too legalistic way of going about it and maybe that just goes with the territory, doesn't it? We're dealing with lawyers.

MS MacRAE: Would you have wanted to have seen some level of compensation from the board, or do you think there should have been some sort of - - -

MR JOHNSON: No.

MS MacRAE: - - - penalty put on the practitioner in that case, or were you looking for an apology? What was the outcome that you might have - - -

MR JOHNSON: I guess I was looking for some - I mean, part of - from a commercial point of view, my biggest complaint from the legal practitioner's point of view was that I had a succession of practitioners within that firm taking it on. That was not their fault, but it certainly was not my fault. The first practitioner who was the one who gave the tax advice was unable to carry on for family reasons and I understood that and was prepared to obviously allow someone to pick - I was assured that I wouldn't be charged for that new person getting up to speed and, the first time, that actually happened and I was happy, but then that person didn't stay. She was only there for a six-month contract, then I was told a new partner's coming on board and I was given the same assurance, both verbally in writing, that I wouldn't be charged for that new person getting up to speed.

That's where it started to run off the rails because bills started to come in where, looking at the work done, it was obviously somebody coming into a new firm, getting totally cold to a very complex situation. The bills quite clearly showed that I was being charged for work that can only be described as getting up to speed. I put that case to the board and they basically said - they said - they did a totality look at the bills for the three practitioners, and certainly there was a write off of that in relation to that second practitioner getting up to speed, and I accepted that, and that was, in fact, probably generous, but then, you know, if I'd actually drawn a line in the sand there and gone somewhere else, that would have been the end of that and I would have been no, I guess, better off or no worse off, but I was assured, "Look, we're in this with you. If the third practitioner comes in and sends in - the third person - any work that's needed to be done getting up to speed, that won't be charged for."

It would be my opinion - and I will go to my grave knowing that this is the case - I was. The board didn't seem to be terribly interested in that, so there was that aspect. I guess I wasn't expecting - I've never alleged that there was gross and wilful misconduct or anything like that. I was not happy about not being told in advance about the extent of the fees. I've got a file note from the practitioner saying that we don't need to devote many resources to it at this stage, yet bills get coming in. I kept being given position papers setting out transactions. Yes, I did go through them and send them back because they were wrong and, obviously, if the practitioner wanted to get a detailed background I needed to correct them, and that might have happened two or three or four times.

We got involved in, I guess, really technically arguments which weren't relevant to the situation, for example, the Tax Office had determined that the date of the CGT event was 24 December, or January, say, which was the date was signed the share transfers. Out of the blue, the practitioner went through the paperwork and found that there'd been an option agreement exercised the day before and he said - then called for property valuations, a different date to what the date of the CGT event

that we'd already agreed upon. We got involved in, I guess, a heated exchange, all of which was billed to me, about something that shouldn't have even been an issue. I thought, "Why are we doing this?" That was not challenged by the board. I guess I was surprised that the board said, "Look, we don't believe there's misconduct, but if we wanted to say that some of the aspects are unsatisfactory, we can't do that unless the practitioner agrees to it." Where do you go with that?

DR MUNDY: The problem is really, unless they have done something grotesquely bad - - -

MR JOHNSON: That seems to be the case, yes.

DR MUNDY: - - - there is nothing to deal with what might be - - -

MR JOHNSON: The bit on the edge, yes.

DR MUNDY: Thank you very much for your time, Mr Johnson. We do appreciate the effort you have gone to in putting this material to us and coming in and seeing us today.

MR JOHNSON: Thank you.

DR MUNDY: Could we now please have the Legal Services Commission of South Australia. Would you each please state your names and the capacity in which you appear?

MS LEHMANN (LSCSA): Karen Lehmann. I'm the deputy director of Legal Services Commission.

MS CANNY (LSCSA): I'm Gabrielle Canny. I'm the director at the Legal Services Commission. I'll sort of open with a summary.

DR MUNDY: Could we just - if the others are going to speak, it just helps with the transcription of the hearing.

MR BOUNDY (LSCSA): I'm Christopher Boundy. I'm the manager of access services at the Legal Services Commission.

MR RUSSELL (LSCSA): I'm Graham Russell. I'm the manager of the family law program at the commission.

DR MUNDY: Ms Canny?

MS CANNY (LSCSA): Yes. I thought the way that we'd run it, subject to you being happy with that, is I'd have a five-minute chat summarising things and then we're here to answer your questions. I've bought the team so that we can have the best advice for you. Thank you very much for the opportunity to appear today to provide any further details that may assist you with the inquiry.

The Legal Services Commission of South Australia has a long and proud history of assisting clients who are not able to afford the cost of legal representation to access the courts and for all South Australian to understand the law and where to seek help when they are faced with legal issues. The founding legislation is the Legal Services Commission Act 1977, set as a function of the commission, among others, to provide legal assistance but also to educate the public and especially those sections of the public who have special needs of their rights, powers, privileges and duties under the laws of the Commonwealth or the state

Today that is exactly what our commission does. The commission is a vibrant, innovative organisation performing its functions to the fullest extent possible with the finding provided by the state government, the Commonwealth government, the Legal Practitioner Act receipts and self-generated income. I want to tell you a little bit more about self-generated income as I think that's relevant to the inquiry.

The commission has imposed statutory charges over property owned by Legal Aid recipients or their financially associated persons since 1992 and had

collected almost $10 million since that time with almost 500,000 collected in the last financial year. Statutory charges enable many applicants to qualify for legal aid even though they have an interest in real estate. The benefit of a grant of legal aid is that their legal fees are costed at Legal Aid rates and they do not need to pay the amount owing until they sell or refinance that property.

There is no interest levied on that debt, and so for some people who are in a very difficult state of their lives, particularly in relation to family law, they may have a property that they've bought and they're paying off together and that on the face of it might knock them out for a grant of legal aid but because we're able to impose a state charge which is in fact the extent of the total legal bill but at Legal Aid rates it means that they can get a grant of legal aid. There's no obligation to pay that debt until some other time in their life when they're actually getting the cash back in through the house.

By expanding funding to Legal Aid Commissions this model in fact would allow more applicants to qualify for legal aid and contribute to their legal expenses through state charges, so at the moment we have to balance our funding with those receipts but if that was expanded, I think it would be a way for more people in the community to actually be able to manage their legal expense but not at commercial rates? As I think you know, and there's an enormous amount of evidence in relation to it, that's a very big difference between Legal Aid rates and commercial rates.

Expanding on this concept, the Productivity Commission has been provided with information regarding the Public Service Association Legal Expenses Scheme that's run here also in South Australia. This is a unique and very successful insurance type scheme assisting members of the PSA, the union, to fund their legal expense. Although members are obviously in employment because they're in the union, most would not be able to afford the legal representation required but for this scheme.

The Legal Services Commission in South Australia is an integral part of that scheme, in the sense that we manage the assignments to private practitioners to ensure cost effectiveness and merit assessment. There is a similar scheme in the sense that there are fees that are monitored by the administrators of the scheme and merit is checked every stage through the proceedings. That's the role that we play as the commission. That role is completely separately funded by the PSA but through that scheme and doesn't impact on our government funding at all, but it again opens the door to legal representation for another group in the community.

The Legal Services Commission in South Australia runs a large and productive advice and education function in addition to its representation function. We provide a comprehensive legal advice service through online, face-to-face and telephone services. The numbers I'm sure have been quoted before but they run to 65,000

telephone advises dropping down to 28,000 face-to-face advices, 15,000 duty solicitor services. So you sort of get a feel for the triaging that happens and then the reduction in the number of the more expensive services. We've had 2 million web site page views on our very popular web site.

The Legal Services Commission legal help line and associated law handbook online which is a planning explanation of the laws are recognised in South Australia as the first point of contact for legal advice. There are no equivalent services in South Australia and the commission takes very seriously its responsibility to efficiently and effectively refer inquiries to the most appropriate service provider in South Australia..

For many, that may well be a referral to private practitioners, to the Aboriginal Legal Rights Movement in South Australia and to of course the CLCs here but you can tell by the numbers of those 65,000 calls coming in that it is a well recognised and well known service and it's a service that we publicise. We use our scarce resources to make sure that the public know that they have an entitlement to make a call.

Sector cooperation and collaboration and the practice of more referrals to the legal assistance sector in South Australia was an attribute of service delivery well before it became a requirement in the National Partnership Agreement on legal assistance services. That's just how we did business here. In fact we were pleased when it was validated by the National Partnership Agreement but we've been doing it for a very long time and, in our view, we're very good at that.

The Legal Services Commission of South Australia also runs a very successful family dispute resolution program. It's conferencing family law dispute. I think the information I've given you about this again is very relevant to some of the issues raised in the inquiry. Our main program runs in relation to disputes involving children and children only. It's both before court proceedings commence but also much more over the last couple of years, during court proceedings by referral from the court and that can be at any stage during the proceedings.

There is no reason, apart from funding as to why this program which is incredibly successful couldn't be rolled out to other aspects of litigation. I think we've given you quite a bit of information about the success of the program and I won't go there but really what we're saying is if it's a model that's working in one area, why can't we expand it to other areas. We're actually currently trialing a small asset pool dispute resolution program for clients who are negotiating settlement of joint property in a matrimonial dispute where that property may be of a very low value or, in some cases, allocating debt. It's quite the other end of a property settlement where some people are very disadvantaged because of the lack of assistance and we are trialing that at the moment.

Our commission recognises that one of the biggest challenges for the justice system is the emergence of the litigant in person. There are many documented reasons for this and no easy answers or solutions to the difficult issues raised by self-representation but our commission has responded to the need in the Magistrates Court in South Australia by out-placing our legal advisers to the court to provide an instant advice service. This is in addition to our duty solicitor service, so what we are basically recognising here is that the resident in South Australia for whatever reason goes to the court to solve their legal problem.

Even though they may not actually commence proceedings, in their mind that's the logical spot to go to get help, so we are saying, "We have our body of advice. Let's put one over there." We have done that without any increase of funding, just out-placed somebody, and we are also, like many of the commissions, at the AAT and at other spots but this is a newer service that we have provided very much because in South Australia, the jurisdiction for the Magistrates Court for civil claims increased in small claims from 6,000 to 25,000, so we now have tumbled into a small claims environment where no legal representation is allowed, many much more complicated disputes, and so our adviser sits basically outside the door of the court to assist. It's not a duty solicitor service because that's more a representation service. We just don't have the resources for that because of the numbers, the number of litigants in that court.

There needs to be a recognition that litigants in person are legitimate users of the court system set up to resolve disputes. We are working with the criminal and Family Court judges and courts in South Australia to produce resources aimed directly at assisting litigants to help themselves. We see this as part of the role of Legal Aid. There will never be sufficient funding for everyone to afford legal representation but there should be sufficient resources dedicated to assisting a proper knowledge of the law and how to get assistance when needed. For high priority clients, this will extend to representation but for many others, it will be something less. As I say, I am here with my team ready to answer any questions that you might have.

DR MUNDY: Where shall we start? I will start where I started with Mr Grant in Sydney on Tuesday. You will no doubt be aware that the Commonwealth has recently changed its position on funding for legal assistance in the broad, particularly in relation to wanting to focus its efforts on what I think the Attorney describes as frontline services. I asked Mr Grant this question in Sydney and I asked your colleague from the ACT, whose name just escapes me for the moment but I know it's Dr John something.

MS CANNY (LSCSA): John Boersig, yes.

DR MUNDY: Both Mr Grant and Dr Boersig were able to give us some sense of what the immediate impacts of the recent funding decisions of the Commonwealth were on their operations. I think it's fair to say the ACT was held to be quite explicit and I think that's a reflection of their scale more than anything.

MS CANNY (LSCSA): Yes.

DR MUNDY: Mr Grant was somewhat less able to be quite specific but are you able to give us a sense in specifics or in general how the recent funding decisions will affect the provision of legal assistance in South Australia?

MS CANNY (LSCSA): Just to clarify, I'm assuming you are meaning that there was additional funding that was provided to the commissions before a change of government and it's that funding that we're talking about that was withdrawn.

DR MUNDY: Correct.

MS CANNY (LSCSA): Absolutely; our commission was delighted to receive extra money. We got about 2.23 million, I think it was. It was one of those situations with legal aid that rarely happens and so we were delighted and we obviously monitored where our pressure points were in relation to Commonwealth funded law, because it was Commonwealth funded money and in fact family law was an area where in South Australia, we have obviously the pressure of activity levels in family law and we have our guidelines and we try to provide aid for those who qualify in relation to children's disputes. We don't go anywhere near property settlements except for what I will tell you in a second.

We all have the role of allocating independent children's lawyers to many family law matters. We have prided ourselves in South Australia that we have been able to honour each request of the court for an ICL appointment and our budgeting showed us that we were getting pretty close to running out of money for that activity or those appointments and so we allocated some money for that and obviously the cutting back of the money means that that we will have to much more carefully watch our budget in relation to those items. It all depends. We are a demand driven organisation and so it's just careful monitoring but that was one area we looked it and we increased our service, made sure that we would be able to honour each application made.

What we also had wanted to do for a very long time was to step into this space of small value property settlement we see through our advice area and we provide an enormous amount of advice to people in relation to property settlements where they can't afford to go off to a private lawyer and many a time, our advice is, "You have sufficient assets to go and pay for someone, because you will get a worse situation without getting good advice," but many times we recognise there's not even

sufficient assets to justify going to spend even a thousand dollars on legal advice. There are many power issues that come with that sort of dilemma and so we had worked between our advice area, being able to give advice, but we stopped at the point of any form of representation or even mediation. As soon as this money came, we thought that's we are going to do. We are going to provide a pilot program. Grant, could you just talk about the effect that will have on that pilot program?

MR RUSSELL (LSCSA): I guess setting up a new program is always a little difficult, especially in an area we hadn't looked at before. We tried to model it on the success of the program we had in relation to children's disputes, so I guess we spent a lot of time trying to work out the types of cases we would assist, the guidelines and the protocols and how we would deliver that service. We have found it difficult in one respect, because people who have the more advantageous position were less inclined to engage in this sort of dispute resolution. There was a bit of brinkmanship, in that they would often be saying, "Well, take me to court," and I suppose that was an issue that we have had to face. I guess the difficulty with the funding is that we think that are able to continue that program to a certain level but certainly not the level that we had hoped we would be running at for the second year of that funding and I think that's where the decision is probably going to have an impact on us.

MS CANNY (LSCSA): Yes, absolutely. Yes, that's right. The other area where we were very pleased as well to receive this extra funding was in relation to us providing advice down at the Administrative Appeals Tribunal. We had always had a presence down there but only one day a week. We had wanted to increase our presence and so we used the money to increase our presence. We of course now will have to cut that back. It's at a particularly bad time, because the national disability scheme has commenced and even though there is a small fund that's available for very particular test cases, which we are part of and we are running one of those at the moment, there is just the general advice that's required by people before they get selected for their test case and so we were going to put someone down there almost every day of the week to give advice for that and any issue that arose at the AAT and we are just going to have to take that back. That was one we targeted for. We were sort of creeping forward whenever we had any money, so that's coming off.

The other thing we did do, and this is something that is an absolute recognition of the sector here in South Australia, is we set up a fund for community legal centres to have access to for like a briefing out and so they might run a case as a solicitor for someone who doesn't get legal aid but is still disadvantaged. If they are in litigation and they need to pay for a barrister to present the case, that has very serious repercussions on their very small funding and so we set a fund up where they could apply to the commission and say, "Will you just pay the barrister's fees," which meant that that money was distributed further into the community. The good news on that one is we set up about 100,000, I think it was. I haven't got all the details. I'm pretty sure it was around 100,000 and the claims on that haven't exhausted that

fund, so because the Commonwealth allowed us to now stretch our sort of targets for two years rather than one, we will continue using that money. Really in summary, it was civil law programs that we could never give priority that we were just going to use the money for, so we did find it disappointing.

DR MUNDY: One of the recommendations that we are contemplating making is the providing of assistance for civil matters should be identified and managed separately to the broader issues. We understand the issues around Dietrich and the pressures that come from organisations like yourself. Do you think that would assist you in maintaining those sorts of, with the obvious caveat that - I guess what's in our mind is that there would be an assessment of assistance for civil matters and then it would be provided rather than, "There's a dollar for dough," and give priority to criminal matters.

MS CANNY (LSCSA): Absolutely the issue that you've identified. We have certain constraints that we can't move away from but, as you say, if it was a separately funded program somehow then certainly we would be quick smart, exactly as we had been with that money, off the mark. There's much, much more we would do. This outplacing program, as we say, that we have down at the Magistrates Court, that's ready for an absolute expansion. The Elizabeth Magistrates Court is calling for it at the moment because the disadvantaged out at Elizabeth is actually the highest in South Australia and it's going to get much, much worse with the closing of Holden and some of the other mining disappointments that we've had in South Australia. So that area is just crying out for the same service. So if we had money, pure civil law money, that's what we'd be doing. It's very successful, that model.

DR MUNDY: Perhaps, almost finishing up on funding issues, you mention that you're a demand based organisation. I presume that demand doesn't manifest itself evenly all the time, every year in the same way.

MS CANNY (LSCSA): That's right.

DR MUNDY: In the event that you get to a point, say February or so, whatever, that there has been an unusually high level of demand and you start to think, "Have we got the resources for the rest of the year?" how do you manage that? Do you have the capacity effectively to smooth that cash flow issue with the treasury or do you reconsider your eligibility criteria or how do you do it?

MS CANNY (LSCSA): We have a very tight budget forecasting process. We monitor our demand and the cash effect of the demand monthly. We do that in conjunction with our board. The aim of course is not to have the lumpiness so as to affect the next future funding. We are assisted in South Australia in the sense that we have access to an expensive criminal cases fund for state matters and until there was a funding change in the Commonwealth, we also had access to that fund. So for

those matters that are very lumpy, anything over $60,000 in relation to a single accused on a criminal law matter or 120,000 for joint accused on a criminal matter, the state government picks that up.

So in our budgeting we know that that's the maximum that we're going to have to pay. It's a little bit lumpy because it's a matter of us paying it and them paying us back, but that sort of settles throughout the year, so it is very unusual for us to have to change any of our guidelines in response to concern around funding. In fact, Karen, do you want to add to that? Karen has been in the hot seat for this for a lot of years, having management our assignments function.

MS LEHMANN (LSCSA): Yes, I was in the assignments section, I suppose I'll confess, for 20 years. It was a long time. In that time we have had only - I think there were two instances, it's pretty good for 20 years, of recognising that the budget that we were running was at risk. We were given notice, I suppose, of the risks that we were running because we have what we call a commitment report and that shows how much, I suppose, we anticipate that we'll have to pay for our matters. If that commitment starts to fly out of control then we realise that we have quite a long lead-in time to get read in case we do have to honour all those commitments. So that actual commitment report that we get is just excellent and we do look at that monthly. It is amazing that we are able to predict pretty well, because on a monthly basis we are given charts of commitment and it runs almost identically to the year before. One month might be a bit high but the next month it will be lower.

MS CANNY (LSCSA): Yes, that's right.

DR MUNDY: Just coming back to the recent change for the Commonwealth Serious Cases Fund, how will those changes impact on you?

MS CANNY (LSCSA): The way that that will impact on us is that if we have a Commonwealth complex crime and we're providing representation for that, we used to have access to that once it was over 40,000, I think that's right, and so once we recognise it, we identified it as that, we would then seek reimbursement. If I'm right on that scheme, we actually got full reimbursement.

MS LEHMANN (LSCSA): Yes, we do.

MS CANNY (LSCSA): Yes. We don't have to spend the 40,000 like with 60,000 in the South Australian. We actually get a full reimbursement, and so - - -

DR MUNDY: So the South Australian tops yours effectively as a cap and then pays the rest, whereas the Commonwealth paid the lot.

MS CANNY (LSCSA): The whole lot, that's right.

MS LEHMANN (LSCSA): Yes.

MS CANNY (LSCSA): And the 40 and 60. So we in fact have one or two at the moment, I think, that we're concerned about budget you have to fund and then you monitor until it gets to that rate but by that time you've already spent your $40,000 and so we'll make a claim and the fund is just shrinking. As I understand it, this year's request for funding will be honoured but it will run out as quickly as the claims are made.

There will be a stage where once that has been extinguished or close to being extinguished, we won't be able to make the grounds and that's going to be a problem because you have a similar Dietrich problem, because if we've foreshadowed there's no money in that expensive criminal cases fund and that we're identifying early that that would be a suitable matter for reimbursement, then we've got to decide whether we can fund it at all.

DR MUNDY: So it won't be a position that you would miss because of issues around Dietrich that you wouldn't necessarily try to find the resource elsewhere, particularly in civil law matters, given that's what our terms of reference bring up. That's what my concern is; that you may be forced to divert resources from civil programs to meet those complex Commonwealth crime matters which I presume are primarily drug related.

MS LEHMANN (LSCSA): Yes, they are, almost exclusively. We do get the occasional big fraud. We have had one of those this year but that's rare. We are lucky in South Australia that we don't seem to have a port that's attractive for the unloading of large amounts.

DR MUNDY: Of stuff.

MS LEHMANN (LSCSA): Yes.

MS CANNY (LSCSA): That's right but we don't really have the capacity to take it out of civil law because there's really no money in civil law. The only money that's in civil law is through in fact what Chris looks after, the access services program, which is our advice and my assistance program. That is in fact a funded half-half Commonwealth/state. It's not funded according to law as the representation program is but when you rollover to the representation program on the Commonwealth side, where basically 99 per cent of our work is family law, it would come out of the family law budget.

DR MUNDY: Okay.

MS MacRAE: Could I just ask: in your opening comments you made some reference to the statutory charges. I had the impression and I might be wrong but from what you said, you'd like to expand that but there might be some regulatory barrier for you doing so.

MS CANNY (LSCSA): No, it's much more that the general funding would need to be expanded, so that we're able to almost lower the bar slightly so that more people would be funded.

MS MacRAE: I see.

MS CANNY (LSCSA): And then of those people, those that had property, we would collect income.

MS MacRAE: Because of the effective subsidy that you're providing on those - - -

MS CANNY (LSCSA): Yes.

MS MacRAE: Yes, okay.

DR MUNDY: You simply don't have the cash to?

MS MacRAE: Yes.

MS CANNY (LSCSA): Yes, that's right and as much as we're very pleased with our receipts, they're of course unpredictable because it depends - if there's a joint property where we've put the charge on in relation to a debt of one and that one dies, from memory, we don't collect at all. Then of course there's many of these properties, unfortunately, that are sold up through the sheriff's action because of debt and we're ranking second for payment out but it turned into be a very good revenue raiser.

MS LEHMANN (LSCSA): Can I just add that we don't take the statutory charge until the costs reach a threshold of $2,200. So a lot of what we fund is finalised under that threshold.

MS MacRAE: Right.

MS CANNY (LSCSA): So we take the charge in those circumstances.

MS MacRAE: It's a bit of side track but it has some similarities in a way to the legal expenses contribution scheme that we have also had put to us. Would you like to just express a view about that, whether you think that's something - - -

MS CANNY (LSCSA): The South Australian legal expenses - - -

MS MacRAE: Sorry, no, it's a proposal like the HECS, so you have - - -

MS CANNY (LSCSA): That's all right. I do know slightly, having had a read of it. As you say, it's like a HECS scheme. In fact I thought the South Australian Law Society was going to present in relation to that but I'm not sure that their submission did in fact end up with that. I suppose we have good experience of that union based scheme, which is not a HECS scheme but is a facility for people to cover an unexpected expense through legal expenses. My comment in relation to that, and I suppose it's the particular circumstances that have continued in South Australia, but that has been an incredibly successful program and the PSA would be able to tell you more. I think in the report, it's labelled that scheme as being associated with the Law Society but that was just incorrect. It's associated with us but Chris sits on that board and it's a very efficient system.

DR MUNDY: In relation to PSA schemes.

MS CANNY (LSCSA): But that's more of an insurance sort of pay up front, have an expense and then it then covers you. That's okay. I don't want to advert to issues that aren't in substance to you, so that's fine.

DR MUNDY: Just before we move off the PSA, does the union fund the claim? Is it a proper insurance scheme in the sense that there are moneys put aside and reserves or is it essentially a funded scheme whereby claims are made and the union - - -

MR BOUNDS (LSCSA): It's a properly funded indemnity scheme in the sense that there are funds set aside.

DR MUNDY: Yes.

MR BOUNDS (LSCSA): And there is a board of trustees that I meet with on a monthly basis and it is that board of trustees that take reports from me as to the substantial merit of the matter and they determine how that money will be allocated to matters that we put up for funding.

DR MUNDY: Thank you.

MS MacRAE: What sort of matters does it cover typically?

MR BOUNDS (LSCSA): A typical matter that we have dealt with recently is a Department of Corrective Services employee who was charged with assaulting an inmate in a scuffle in a correctional centre. He disputed that and because his reputation and his job were at risk, he asked if a criminal lawyer could be funded to

face the criminal charges and he was acquitted of the charges, reinstated to his job, so that was a matter where the union saw that there was considerable merit in having these looked after but representation at arm's length. They could give industrial advice but felt that they wanted to be transparent in the process and have an independent legal assessment of that member's position.

MS CANNY (LSCSA): They also fund civil law matters, quite a few civil law matters.

DR MUNDY: Presumably, this corrections officer, because he is a person in regular employment by the state, would have come nowhere near qualification under the means test.

MS CANNY (LSCSA): Yes, absolutely. That's right.

DR MUNDY: Otherwise absent that scheme, he would have presumably had to have funded his own defence, which in a serious matter, not part of a trivial referral process.

MS CANNY (LSCSA): Absolutely.

MS MacRAE: Do you want to ask about small claims?

DR MUNDY: We have made an observation with respect to tribunals but it extends to small claims that you talked about as well. There are a number of forums where representation is by leave. Our observation, which I think has been slightly misconstrued, is that with those provisions, leave is pretty easy to get and that the level of representation is such that it's perhaps starting to colour the purpose for that forum. You mentioned small claims in the Magistrates Court and that representation is not allowed. I guess my question is, is it allowed by leave, for example, for somebody who may suffer some sort of disadvantage? They may have some sort of disability or mental impairment or something like that but moreover, how does that absence of representation seen to be functioning? I know it is relatively new.

MS CANNY (LSCSA): Yes, it is.

MR BOUNDS (LSCSA): I think it's fair to say that in exceptional cases, representation is allowed by leave and consent and that it's the agreement of the other party that's important. How it works in unfairness in our experience is that experienced creditors will send an experienced employee who has had experience of many similar situations and knows the procedure, is not as daunted by the process and has an army of precedents to support their claim. Our out-posted duty lawyers see the debtor in those situations to try and appraise them of their rights, to familiarise themselves with the procedure and to empower them to request an

adjournment of the encroaching proceedings if they need more time to consider their position and the unfairness primarily stems from the fact that we have a very experienced litigant, albeit not represented, against someone who might have only a very occasional contact with the court system.

DR MUNDY: This is analogous to the circumstance where an ordinary citizen say makes an appeal against a planning matter, ends up in a planning tribunal and encounters the council planning officer, who is probably more useful than most general solicitors in planning law, or tenancy matters where you encounter a professional real estate agent, who again is probably in that foray as useful as a lawyer, if not more so, because they are probably there every second week.

MS CANNY (LSCSA): Yes, absolutely. That's the situation.

MR BOUNDS (LSCSA): The other interesting observation, if I may, is that quite unexpectedly, in my view, we have seen an increase in the number of litigants in person who are prepared to go and take on a matter. When the small claims jurisdiction was 6,000 or less, if they felt daunted by going to court at all, there wasn't as much at stake but once there could be up to $25,000, many people are electing to go and contest the matter, because it means so much more to them, so we are seeing a greater demand on the court service.

DR MUNDY: How are these self-represented litigants going? Are they given a fair crack I guess is what I'm trying to get at.

MR BOUNDS (LSCSA): By and large; our service is designed for litigants in person who are there with business in court on the day and it is still a surprise to me how many people float into court on the day not having obtained advice from us before that and one of our indicators that we need to do more to advertise the availability of free advice before we get to that stage but the Magistrates Court is starting to develop the ability to divert matters away and there is a suggestion at large, hasn't been implemented yet, that there may be scope to divert away for some sort or conciliation or mediation and that's certainly, based upon our experience in the last 12 months, something that we would be advocating.

DR MUNDY: So in the case of let's say a small trader or tradesman or something and they come along with a matter, they by the sound of it periodically say, "Just go in and get thing adjourned and get some advice." Where does that advice subsequently come from? Would you then refer them off to someone, because they are obviously not going to meet your means test in many circumstances.

MS CANNY (LSCSA): I think the distinction that is often not clearly understood in relation to legal aid, because it's so traditionally reviewed as only representation, is that for those people who are getting what we would call minor assistance, it is not

allocating a lawyer to their matter but it is allocating a lawyer to talk to them for half an hour about that matter. Any of those people can really come to us.

DR MUNDY: Yes.

MS CANNY (LSCSA): So our first referral will be back to our vigour set-up where we do our interviewing and they would get their half hour of advice. I have to say that in some specialised areas, we are not the best referral. As you say, small business matters, tax matters, certainly, then there might be. Personal injuries, we can give a certain amount but we don't go too far but all of them get that sort of half an hour. That half an hour is spent either trying to assist the person to take the next step in the proceedings for themselves or to find a better referral.

Small business, unfortunately, is not well place in South Australia to get legal advice without paying for it. There are other matters where it might be worthwhile to go off and get a private lawyer, even to just give advice, even if they are not they going to represent. We can make that assessment for them, client, and let them know approximately how much they will have to pay and how much they might benefit, but the biggest issue, I think the biggest benefit of our service, even though we can't take it to the extent that it's needed for representation, is that we can have a real reality check on merit and about prospects of success. We can say pretty early, "Look, you are just not going to get anywhere with this. If you want to take it on principle, off you go, but I'm telling you it's going to cost you X amount of time." It's going to roll out. For example, there are disbursements in the sense of there might be experts that will be called by the other side. You know if you lose you are going to have to pay the expert. You know, there are repercussions.

There was a very recent claim decision which, unfortunately, was in the District Court because of the nature of it and it was a litigant in person. If that person, you are all reading it with horror, had got even the half an hour advice from us, they would have been told that the course of action that were embarking on would not lead to damages, even if they were successful; so they would have then ended up with, at least it must have been a two-day trial in the District Court, and even the judge involved in the transcript said, "I wish you guys had gone outside the court and talked about this." That was directly as a result of not getting any decent legal advice at an early stage.

DR MUNDY: Just to finish up, just for clarity, the small claims division, if you like, you face the prospect of adverse costs orders?

MS CANNY (LSCSA): No, only in relation to any disbursements, not in relation to - because of course there's no legal representation allowed. If someone by leave gets assistance, sometimes it might be, you know, the McKenzie friend.

DR MUNDY: Yes.

MS CANNY (LSCSA): It might be that capacity rather than legal representation, pretty unusual in South Australia at that level to get leave for legal representation.

DR MUNDY: Okay, so the problem that we're concerned with, and the problem that has been expressed is actually in relation to tribunals and I think particularly in Victoria.

MS CANNY (LSCSA): Yes. We are not seeing that in South Australia.

DR MUNDY: You are not seeing that? Okay, so it's not as widespread a problem as perhaps we thought it might be?

MS CANNY (LSCSA): No.

DR MUNDY: Okay, thank you.

MS CANNY (LSCSA): I think you will probably learn as you go through, the Victorian situation is not reflected in South Australia in many areas.

DR MUNDY: Yes.

MS CANNY (LSCSA): We are quite different.

MS MacRAE: Can I just ask then whether you think the lifting of the threshold of 25,000 has been helpful or not? It sounds like more people are pursuing what you might say is their rights, and that's appropriate, but - - -

MR BOUNDY (LSCSA): I think it was helpful to lift it from 6000 - originally, it was proposed that it would double to 12, and through a quirk of happenings in parliament it became - - -

MS MacRAE: It happens.

DR MUNDY: You can ask for a lamb and get a sheep.

MR BOUNDY (LSCSA): I think in our view 12 would have been a good staging post. Taking it to 25 meant that there not only is a larger pool of litigants in person who are affected, but it has appeared to put a great stress on the lower divisions of the Magistrates Civil Court, and I think, in fairness, it should be pointed out that there is a great imperative for magistrates to deal quickly with the cases, and in that setting it is even more important that litigants feel that they can get advice, and get appropriate time in which to formulate their views and opinions without being

railroaded into, "Your case is on, and it's got to be decided", so I think that extra jump in the limit has actually put more pressure on people and is not particularly helpful in getting a just result.

MS MacRAE: No.

MR BOUNDY (LSCSA): The other thing, if I may, is that there is a suggestion abroad that perhaps there should be consideration to the introduction of a scale costs order against an unsuccessful plaintiff, litigant, in that jurisdiction, not to do anything more than say, "If you bring something that is found to be unmeritorious, the litigant in person will get a set fee. It might be $200, but there's some disincentive to simply grind on with, say it's a debt collection, if you've got the wrong person or you don't have the jurisdiction.

MS MacRAE: Okay, thank you.

MS CANNY (LSCSA): I think also, to add to that, by raising it to the 25,000 it has brought in much more complex legal issues, because when it was six, it would be very unusual to have defamation matters sitting in there, unusual to have a personal injury matter. Usually, you know, they are more motor vehicle accident stuff, the much more complex building cases, you know, they are all ending up in there, where very often it's necessary to bring expertise to the court to assist, and so the litigants generally are just not in a position to even understand that they should prepare their matter that way; so exactly what Chris has said, it then causes frustration for the magistrates who are trying to run these really quite complex matters, even though the awards may well be, you know, 25,000 worth of - if there are specialist damages, like defamation.

DR MUNDY: You mentioned building. My recollection when we met with some judicial officers here, many months ago now, was that they actually have, I think it's in the Magistrates Court, but there are a couple of people who are essentially hangers on, for want of a better expression, hang around the court, who are ex builders, and facilitate that. I don't know the extent to which you have had any experience with that, but is that a process that, you know, the court having its own expert essentially, particularly on small matters.

MS CANNY (LSCSA): That's right, they do. In fact, that works very well here in South Australia, that's a course they've been really pleased with. They said in fact if they could expand that in a way, that would be much more useful because, as you say, the expert understands their role, they are accessible, and I don't actually know who pays for it. I'm not sure if the court pays for it, or whether the litigants pay for it. I just don't know that.

DR MUNDY: Okay. One of the issues that we have made some observations

around is about legal training for people who work broadly in the welfare sector. In your submission you note that there's a Cert IV course run by TAFE in South Australia that seems to do this job. I guess, two questions, one on which you might want to get back to us, if you could speak to the right people at TAFE, is how much does it cost to run this thing?

MS CANNY (LSCSA): From TAFE's perspective?

DR MUNDY: Yes. How much does it cost them, how many people do it, so therefore we can work out costs per student, and what benefits do you see come from it? That's the bit I want you to answer.

MS CANNY (LSCSA): You want to talk about that? It's Chris's area.

MR BOUNDY (LSCSA): Starting with the last point first, the benefit that I see in the law for community workers course is that we take them through quite a structured course where experts, including my colleague Graham Russell in family law, come down from the commission and give very practically orientated discussions. They are three-hour sessions. It's quite interactive, and what we are doing is empowering people who work amongst the community to have a better ability to recognise when there is a legal issue. We are not trying to make them into lawyers, we are just opening their eyes to the possibility that they will have constituents or clients who are in trouble and need some legal advice to enable early intervention, and that is a very empowering thing.

The other thing is that the scope of the course is good because, whilst it is run from the Adelaide TAFE here, many of the participants come in by video-link from rural areas, particularly in Aboriginal communities, and so we are getting a very effective spread of information, and the information is not just about legal issues, but about where to get good advice and referral centres, and that can include domestic violence shelters, financial counselling and other adjunct services, not just purely legal services.

DR MUNDY: You mentioned indigenous people, so obviously it brings - there's some material around the particular issues that face indigenous people.

MR BOUNDY (LSCSA): Yes.

DR MUNDY: What about other people who experience disadvantage, particularly I'm thinking we had some evidence yesterday from disability groups. Is that another issue that's - I would have thought mental health in particular?

MR BOUNDY (LSCSA): I do the presentation at the end of the course, and I can remember stepping over the guide dog for the blind participant, but it is drawn from

a very broad quarter with many languages, many dress codes, and I have to be quickly instructed - there are about 25 to 30 participants in each course - how not to offer a handshake to Muslim women, how to stand respectfully for photographs and so forth. So it's a very diverse gathering of people and we are very proud of the very broad reach that it has. But there's a very active campaign conducted by the Legal Services Commission to advertise and to push and prod community organisations to nominate people to come and do the course. I will need to check up on the actual cost to the participant.

DR MUNDY: No. If you could just send it by way of notes - before we recommend things we like to know how much it costs.

MS CANNY (LSCSA): The other interesting thing with that and something that we have been running now - my memory is probably six years - is we give a little scholarship linked with the diverse students, who may wish to go through the course, be admitted to the course but don't even have the small fee that is a TAFE fee. Does anyone remember how much it is? I can't remember, but anyway the commission itself has decided that we will fund six students a year so that they're able to come into the program.

That program actually started as - it's actually a requirement for the field officers who work for the Aboriginal Legal Rights Movement. They must have done the course to be able to perform that role and so we set it up with that in mind and then expanded it out for other community workers.

MS MacRAE: But people have to be doing the full Certificate IV to access that course or can they just do that element?

MR BOUNDY (LSCSA): Now it has changed so that they can do the parts that they do with us and plug them into other accredited courses at TAFE.

MS MacRAE: Right. Are you aware whether similar things are available in other jurisdictions or is it - - -

MS CANNY (LSCSA): I remember being asked that. My answer is probably I don't think so because when I have had a discussion at a sort of national Legal Aid level it has been of sort of unique interest to the other commissions. So I don't think so; in fact there's one other area that I would like to tell you about that if they could roll it out through the whole of Australia it would also be very useful, and that's the service we provide to English language schools. The very new arrivals all are entitled to X number of hours, a hundred hours - it's a lot - of English language tuition when they arrive in Australia.

They go to the centres where it's being taught and our legal education officers

go to the classes to introduce them to the English language. The conversation is about common legal issues they're going to face because they have just arrived. So the conversation is around buying a mobile telephone or leasing a house or you need a driver's licence to drive here. So from day one, if you have to learn English you may as well learn English about something you also need in your life, and we run that program constantly through the year. As I said, if you can roll that out through Australia, it's very efficient.

DR MUNDY: That's interesting because we heard yesterday from the Redfern Legal Centre they effectively now have a CLC program, for want of a better phrase, for overseas students which they deliver throughout New South Wales.

MS CANNY (LSCSA): Those people are really vulnerable. They're here in Australia; new laws, no realisation about the strictness that we sort of apply to conformance with laws and they get themselves into trouble quick smart. It's a really good scheme.

MS MacRAE: Can I just ask one last question? Partway through the discussion you were talking about how helpful it can be for people just in that half hour to get an idea of whether they will be successful or not and what the cost might be if they wanted to continue with a case. I'm thinking for what we call the missing middle, those people who might never think to come to you for that kind of advice because they think, "Well, I'm never going to meet the means test," and they don't realise there's this other service, one of the things that we have suggested is to try and have a resource so people would go to an online one to give them an idea of, "What's a ballpark number for the sort of case that I'm looking at maybe running?"

We have had quite a lot of resistance from the professions about it, saying, you know, "That's just not possible. They're all too different. Even if you put up a range, it would be too hard." I suppose our view is, "Well, it's better that people have got an idea about which ballpark they're entering." They have got absolutely no idea which would be I think a pretty strong view we would have that most people don't deal with the legal sector much and if they have a problem, they have just got no idea except that it's probably going to be very expensive and it might be out of the fund range. Do you think that's something that we should continue to pursue and is it a realistic goal or is it just too hard?

MS CANNY (LSCSA): No. I genuinely think it's realistic. Obviously there are always riders that are put on these services but, I mean, costs are incredibly difficult in law. It should not be and there needs to be much more work done on that, but I suppose it could have been the same thing that might have been said when a number of years ago we set up this online service which is the Law Handbook Online. That's a summary of the laws applicable to people who live in South Australia but, you know, Australia-wide laws.

MS MacRAE: Yes.

MS CANNY (LSCSA): So the same criticism could almost have been said about that. You really just can't write down how people, you know, are to manage once they get charged with a criminal offence because it depends on the circumstances and the penalties would depend upon the submissions that are put about the person but you can, you can.

It has been an incredibly successful service and so it's the same thing, you have to put riders around it. You have to explain the background to the way legal costs are formulated and you have to explain about the very complex court scales and party-party costs and, you know, it is a complicated process but there's no reason why you can't turn that into simple English language so people have got a gut feel for it.

DR MUNDY: What you were describing before - which is something which hadn't occurred to me to be frank but the idea that people come in for half an hour, you know, small business come in for half an hour if they have not gone down to the Small Business Commission and get that sort of advice. How many of those sorts of advices would you give in a year? Are there lots of them?

MS CANNY (LSCSA): Yes. That's the 28,000 face to face.

DR MUNDY: But within that context this is essentially advice about an economic civil law matter. It might be a large scale, you know, it might be, "I've been dudded by my builder," or you know - - -

MS CANNY (LSCSA): Yeah. We do lots of it, absolutely.

DR MUNDY: Because I suspect a lot of people don't think they can come down to Legal Aid and get - and even if they get no resolution, "Well, it's going to cost you 15 grand to run, to be honest."

MS CANNY (LSCSA): That's right, yes.

DR MUNDY: "And if it's only worth eight, sorry."

MS CANNY (LSCSA): That's exactly right. Traditionally about a third of our advices for that face-to-face of that 27,000, or whatever I said, would be those civil law matters.

DR MUNDY: Yes.

MS CANNY (LSCSA): In fact we find sometimes it's slightly more because it's almost less criminal law, which you wouldn't think, so because they're easy. They go straight through to a grant, you know, and some of the family law matters, because we know they're involving children, they're straight through to a grant. It's those others that people actually don't think Legal Aid could help them with that we would actually spend all that time on.

DR MUNDY: I have done a lot of work recently in relation to small business regulation appeals and stuff. Would there be occasions where you would look at a matter and you would say - your people would say, "Look, go down and see the small business commissioner because they might be able to sort this for you?" I think they have mediation powers here, I'm not sure, but that sort of thing is obviously - - -

MS CANNY (LSCSA): Absolutely. Our people who give this advice both on the phone and face to face have these sort of reams of resources. They get very good at knowing what is the appropriate referral and, you know, it's good to be able to say, "Now, normally you would be able to go to this X resource but because of the circumstances you have just described to me, you're not going to be able to go that way." So that's the benefit of having legally qualified practitioners who - that's their only job. They answer the phone and they provide the face-to-face advice and so you have got this sort of referral going on and so often on the phone they will say - I remember in my very early days I was answering the phone when a fellow said to me, "I've just bought six pubs. What do you think I should do?" "I'm going to give you advice, accountants" - you know, but let's just say I've got this really bad dispute and you would say, "Okay. Now, I understand your issue. Why don't you make an appointment. I'll put you through to the right people. You can see me in three days time, you know, at 4 o'clock." I will remember - - -

DR MUNDY: So you have spoken to the guy on the phone and he doesn't get someone else, so you don't waste the first 10 minutes talking about what you have just spoken on the phone about.

MS CANNY (LSCSA): That's right. Retelling their story and we all know ourselves that you don't want to keep retelling and retelling and retelling a story because many a time it's quite traumatic. It's not just as simple as, you know, a fencing dispute. That's a real benefit of the way that we run our service.

DR MUNDY: Just in the last couple of minutes we have got waiting; obviously family law and associated matters are a very important part of the work we are doing. Are there any observations you would like to make, firstly, on the success of mediated dispute settlement but the other question which we are sort of passing the interest in is any observations you would like to make about the overlap between the Commonwealth jurisdiction to do primarily with the Family Law Act and all the

associated matters of child protection and family violence. I guess the question of me is, do you think there is merit in somebody sitting down and taking a hard look at - it is not a matter we can resolve - but having a hard look at that or are there better things that we could make recommendations about the future investigations on that issue?

MR RUSSELL (LSCSA): Certainly the concept of resolving a dispute outside of court has almost been a cornerstone of legal aid since legal aid was invented. The formalisation of that into the requirement now that parties have to go through family dispute resolution before they can issue court proceedings has tapped in very much to the way that we have done things. That's been the philosophy that we've always worked on. I think it's been very successful. Our success rate in resolving disputes through our lawyer-assisted conferencing and mediation services is about 80 per cent of matters.

Interestingly, the success rate in matters that are not pre-litigation, but are actually matters that have bypassed that and gone straight to court and then been referred back to us by the court is about the same level. Same level of settlement rates. I think that we must be personally reducing the amount of costs and angst for those parties who otherwise would have gone through the system and I guess we've also then meant that the court system, by default, dealt with the more serious, difficult matters which has, you know, probably helped the whole system.

I think in terms of mediation and family law it's a perfect fit and we do it, as I said - as Gabrielle just said - about trying to expand it into other areas is something we've seen. In our new accommodation we've actually purpose-built some mediation suites, if you like, so that we can provide that service with safety for people because the beauty of having lawyer-assisted mediation means that you are able to provide a service to people who may be in fear of violence or there may be other issues which might have screened them out of ordinary mediation, so I think it's worked very well.

In relation to the interaction between Commonwealth and state, there has been an attempt to try to bring those two jurisdictions together in Australia. In South Australia we have a pilot project, for example, where when you do lodge an application in the Family Court you have to complete a form which sets out the areas of risk that you're alleging are occurring within the family, so whether that's violence or child abuse or bad behaviour. Those notices are then sent to our local - our state Families SA, which is the child protection agency, who are then able to, before that first hearing or just after that first hearing, at least, to send information back to the Family Courts as to what involvement the state has had in the child protection area.

That sort of thing is happening and something, I think, family lawyers are very aware of that there is that two systems.

DR MUNDY: We hear very different - I mean obviously it is profoundly different in Western Australia, but there seems to be a multitude of ways that different jurisdictions are dealing - just interested. We'll draw this discussion to a close. Thank you very much for both the time of coming here today but also the submissions you have made to us today. Thanks very much.

MS MacRAE: Thank you.

DR MUNDY: Thank you. We will re-commence these proceedings. Sorry for the slight delay, Mr Snow. When you get settled could you state your name and the capacity in which you appear today and then perhaps if you could make a brief opening statement.

MR SNOW: Thank you. Chris Snow. I'm a journalist and a public relations practitioner and a research consultant. The latter two I haven't been practising for quite a few years mainly because the journalism has been reporting on the beer, wine and spirits industries and that's been much more palatable.

DR MUNDY: I noticed that in your CV and we will have a career development discussion later.

MR SNOW: Yes. Okay. I've also, I suppose, almost a fourth occupation that I've been for nine years advocating for consumer rights in the legal regulatory system as a result of having been a victim of the Magarey Farlam lawyers fraud case here in 2005 and I should also say that as of March I've been a member of the executive of the Consumers Association of South Australia. That wasn't mentioned earlier in my background papers. I should first apologise, I think, for the fragmented way in which I put the material to you. As you can gather, having been through the rigours of the uniform law, which followed hard on the heels of the South Australian amendments last year, it's been information overload and the information I provided I just made it confidential simply because it was not couched in accordance with terms or reference.

DR MUNDY: Yes. No, that is fine.

MR SNOW: I'll just amend those opening comments that I made there and truncate them because they're replicated in some of the points of discussion, but I concentrate mainly on legal regulation because of the Magarey Farlam affair and it exposed a pretty Draconian trust account and fidelity fund system, but then broadened into what I think is a pretty oppressive regulatory system for clients. I think that legal regulation in Australia is largely about lawyers. That's endorsed by the Consumers Federation of Australia policy.

Just as an indicator you can - this is a client being very sensitive, but you can see in the nomenclature that it's the legal profession uniform law. It's the Legal Practitioners Act, the Legal Practitioners Miscellaneous Amendments Act, when it really, to my way of thinking, should be the Legal Clients Protection Act. So it is more about lawyers than it is about our clients. It's highly monopolistic; that's a term I use. It's not a monopoly, but it's monopolistic. I don't know whether you can be a little bit monopolistic or a little bit of monopoly or not. Think that one through.

DR MUNDY: It is one of the challenges I make for my staff regularly about the use

of the word "monopoly".

MR SNOW: Yes. So I'll leave my opening remarks at that because these main points for discussion cover off.

DR MUNDY: Thank you and I notice you were here earlier when Mr Johnson gave us evidence and perhaps I could start there. Do you have any views about the way in which the regulators of legal services seem to have been - I mean there has historically been - it was - there was a self-regulatory framework where the law societies and the bar essentially regulated themselves, very much like the medical specialities do and then there's been this progression through to now the bodies like the Legal Services Board and whatever names that they might come up with around the country.

As a person who advocates on behalf of consumers, what is your view of the quality of the organisations and the quality of redress and what consumers should be able to, on the one hand, expect from these organisations and on the other, what do they get?

MR SNOW: It's a pretty broad question. I think that, as I've just said, I think the regulation is largely for lawyers. The main - as in the development of legal regulation it's all done by lawyers. It's the lawyers of government supported largely by the lawyers of opposition and they are - and the lawyer associations and then that legislation is marshalled through the parliament by lawyers. Now, the clients have had negligible contribution to it, so that's the first thing, I think, that we just don't have an appropriate say and there are many areas where I think consumer can contribute markedly to improving the whole system and you can start with education admissions where I don't think any of the education admissions committees or councils or whatever they're called have a client - a consumer component.

Your consumers, I think, in my case communication would be one of the things, but I notice in the South Australian Law Society's submission they give a rundown of what units are taught in the courses; communication, client practitioner relationships are just not mentioned. I mean that's one thing we could expect. I think - and this is giving a rundown of the whole thing - I think on business structures we don't have any say there. We could expect, I think, to be able to have a say to say these are the types of law firms we'd like to see and particularly when you have ILPs and the multi-disciplinary practices coming in, particularly when you've got structures as in the UK now. The alternative is the structures where anyone can own a law firm.

Do consumers want to see that here? Are we concerned about the fact that, well, the friendly family lawyer might be disappearing? I would much rather go to my friendly family lawyer just down the street who has been dealing with family

affairs for years rather than go to a huge multi-disciplinary practice. On the other hand, I can see the advantages of a multi-disciplinary and I think that's particularly been shown in the UK recently with some, you know, quite interesting structures there.

DR MUNDY: I guess it is a bit of the challenge of the corner store versus the supermarket.

MR SNOW: Yes. When they did call it in the UK, they were calling it the Tesco law.

DR MUNDY: Yes.

MR SNOW: I think Isobel Redmond here, she called it the Coles law, but I think the - and one of those structures that's worth mentioning I think was - with an alternative business structure - was Eddie Stobart, the truck company. It's a huge truck company. Linfox here would be the equivalent.

DR MUNDY: Yes.

MR SNOW: They had an internal legal team which had worked out a way where they can access barristers directly at a cost saving of 50 per cent. When the ABSs came in they got one pretty smartly and they were offering that right around the country in every area of the law and a 50 per cent cost saving sounds pretty good to me. That actually has just folded because they've made some changes a couple of weeks ago and I haven't caught up with why.

DR MUNDY: Just coming back to your point about consumer representatives, you would seen then, I guess - I am not wanting to put words in your mouth - so these legal practitioners boards should have, by their constitution, have consumer representatives on them rather than - we know certainly there is actually a non-lawyer who runs the board in Queensland.

MR SNOW: He's the ombudsman, yes.

DR MUNDY: Yes, the legal services ombudsman.

MR SNOW: Yes.

DR MUNDY: Well, they are all a bit different in different places but - - -

MR SNOW: He left last week.

DR MUNDY: He left last week, yes. He will probably be replaced by a lawyer.

MR SNOW: Yes.

DR MUNDY: Is that something though by way of statutory construction should be encouraged?

MR SNOW: Well, my overall position, as you'll see there, is I believe that we should have in Australia what - the system that they have in the UK and that is a lay controlled regulatory system and on that particular point I think that the commissioners - ombudsmen they should be called - should be independent. Independent of the legal occupation. Caesar must not - - -

DR MUNDY: We had the Australian New Zealand Ombudsmen's Association before us yesterday and the president of that organisation said to us that the use of the word "ombudsman" is much abused these days and independence is the first question you have got to be able to tick, so I think we would probably agree with you about that.

MR SNOW: I think also - and not reflecting on you - but I think the term "commissioner" is overused these days. When you say a legal services commissioner, what does that mean to the public?

DR MUNDY: Yes.

MR SNOW: It means nothing. Ombudsman has some meaning and probably to most people would mean something and it's the same as - it's nomenclature again - I think the same as QCs. What does that mean to the public? Some people have - Fred Nile said in the New South Wales parliament, "Everyone knows what a QC is." I don't think everyone knows what a QC is.

MS MacRAE: No. It goes a little bit outside the particular issues you have raised, but do you see the possibility of non-lawyers doing work that now is the preserve of lawyers being one area that you might be able to get a bit more consumer leverage on, on the sort of style and nature of services that are offered?

MR SNOW: Look, I'm probably very conservative on that. That's coming into also self-representation, if you bring those two together. But I do think that the professional input is vital in the legal system. I'm all in favour of ombudsmen but I would like ombudsmen trained and I don't know if there is any training for ombudsmen. Tribunal members - and I'm speaking from bitter experience of one ombudsman and one tribunal member - part-time lawyers being tribunal members, I'm not in favour of that. I think that if you're going to be dealing with issues that are traumatic for people, to use a very broad term, that you need professionals dealing with it. So in getting non-lawyers in, if they are trained properly. I think if we're

going to accept them, there must be formal qualifications required for those sorts of matters that I think you've got in mind, which might be conveyancing and wills, that sort of thing.

DR MUNDY: Well certainly conveyancing and wills to some extent are beyond our terms of reference because they don't actually go to disputes, they're more transactional in their character, but certainly it is the case that - certainly in my adult lifetime the nature of conveyancing has fundamentally changed, although it was always fundamentally different in Western Australia, but it's probably more, I guess, inherent in the recommendations and the general trends, I guess, also to alternative forms of dispute. Well, non-court-based forms of dispute resolution, if you like. They're not that alternative but a lot of that work's being undertaken by people appropriately trained but not necessarily legally qualified. So that's the sort of position and presumably following on from that your view would be that if you're going to be a tribunal member you should trot off to something that's the equivalent of the judicial college where you trot off to learn to be a judge properly, to do that sort of thing.

MS MacRAE: Can I just ask you more specifically around trust accounts and fidelity funds, because you've obviously had a lot of experience with those - Victoria and New South Wales, under the new uniform laws have decided not to go for a single trust account. Do you think that's sub-optimal or would it have been better for them to have a - - -

MR SNOW: I think that's very, very wrong. I think trust accounts are an appalling - they're run appallingly. They are - I don't like to use the word "scam", and I use that very advisedly, not emotively. They are a scam and people are - clients are forced under the legislation at times to put money in lawyer's trust accounts. They're not told that money is not safe. They're not told that the interest on that money is stripped and used to fund the whole regulatory system. They're not told that there are controlled money accounts into which they can put their money and at least get the interest on it. Yet major clients - the mega millions - they know about these controlled money accounts and also the lawyers, I believe, will advise them about that.

So what I call the SMCs - the small medium clients - get him with the cost of the whole regulatory system or it varies. I think it's, on my figures, 95 per cent in New South Wales, 85 per cent Victoria and South Australia and then from those trust accounts you then come to the fidelity funds, and they are structured so that a client may get nothing. There are various reasons but there are caps, there are grounds on self-sufficiency in New South Wales and Victoria now, and in South Australia as we found in Magarey Farlam, the system - it's a fund of last resort which means that before you can claim from the fidelity fund in which clients have contributed most of the funds, you have to go off and sue everybody under the sun before you come back

to the fidelity fund and say, "Please can I have my money? I haven't been able to get it," and they'll say, "Well, hang on, it's capped." And in the Magarey Farlam case it was capped at 5 per cent of the balance of the fund which was set by a formula, it was about 20 million, so 5 per cent of 20 million was 1 million and the Magarey Farlam victims had four and a half million stolen. They would have had to share that 1 million.

That's been changed under the amendments, where there are now two first resort provisions. One is on hardship - the society can recommend a payment and the attorney-general has to authorise the payments. The second one is if no ordinarily prudent self-funded litigant would pursue further action to get their money. Now, those provisions sound okay, except that it will be the society that determines it and in debating it, the attorney-general, John Rowe, said both he who has to authorise all these payments and the society which determines them are vehemently opposed to first resort payments. So in other words, "Don't bother asking us." It was cynical, just a - and I will get emotive going on about that, I mean, the treatment of clients is just appalling.

MS MacRAE: How would you best reform them?

MR SNOW: A single national statutory, fully insured trust account into which clients would deposit their funds without going through lawyers hands. But that is all dependent on the other point I'd make about trust money. I have never seen anything I've read - and I have not widely read, but I certainly have never seen anything about why is up-front money justified? It seems to have been traditional and Murray Thompson, the member for Sandringham in Victoria said that the historical maxima of legal practice has been money up front, money up front and money up front. I don't know what the justification is. Why can't lawyers, like anybody else - you come to an agreement on costs, they do the work, you pay the bill and if you don't pay the bill you take the consequences.

DR MUNDY: You can sue for it like everyone else.

MR SNOW: Sorry?

DR MUNDY: They can sue for the debt like every other professional service provider.

MR SNOW: This is legislated for. I mean, it's in the legislation and also there's legislation whereunder liens can be taken out against costs. To me, this is just oppressive stuff. I did put to one lawyer/politician, "Why is it so?" and he sort of gave what I'd call a very smug grin, and he said, "It's just to make certain we get paid."

DR MUNDY: There was a time when trust accounts - you know, there were performed transactional settlement type function but that's - - -

MR SNOW: That's housing?

DR MUNDY: Yes, to a large extent now that's passed on. I mean, the way we move money between - technology has passed a lot of the transactional trusts issues away.

MR SNOW: I should say that single trust account has been put into effect in France and in the UK last year by the barristers. In France, it was initially done and has been successful I'm told in eliminating money laundering. I don't have any evidence of any money laundering here but if it's happening there, there's a fair chance but that system apparently is working very well in France and it was only introduced in the UK last year, so I guess it's a bit early to tell.

DR MUNDY: Just before we move off fidelity funds, we've made some recommendations about license fees for pro bono lawyers - people who are mid-career, women who are taking a break from work or retired practitioners who want to work in community legal centres and so on, and one of the issues that was raised with us by the New South Wales Law Society was that you couldn't possibly have free certificates because then they wouldn't have to pay into the fidelity fund. These are people who are giving it their time of free.

Given your experience with fidelity funds, you probably think no-one should pay the fidelity fund and they should go away, but would you see any problem with people who are working on a limited basis, essentially for free, to assist disadvantaged members of the community as people who should perhaps be exempt from the fidelity fund, given that the very nature of their work is that they're not holding moneys and trusts on for anyone?

MR SNOW: Yes - no I think that's entirely justified but can I - when you mentioned pro bono, my other hot topic is the funding of - and I'm sorry, I missed the beginning of the Legal Services Commission presentation - but in there, I've put my proposal for funding legal aid is that it should be funded by lawyers, and the scheme that I've put forward to you is that lawyers should make an up-front payment, an annual up-front payment, as up-front payments seem to be the perennial flavour, and that amount could be set at the required amount to cover all legal aid, but it could be recouped by the lawyers doing legal aid work. They could set the fee level at the fee level they want because that's apparently a big grizzle. I think that one of the figures I saw was that the fee for legal aid work is about the half the fee for normal practice.

DR MUNDY: Yes, something. It varies.

MR SNOW: It varies, but - - -

DR MUNDY: And certainly, the gap has widened over time.

MR SNOW: I certainly don't like that, but I mean, anybody who works far less than they should be is not ever going to really do the job and I don't think it's a good practice. I did some quick calculations on the figures I got from National Legal Aid, and I think the budget last year in 12-13 was 602 million - sorry, that was expenditure. Now, the Commonwealth contribution was around about just under 500 million and the states - sorry, that was the combination of the two, states and Commonwealth. Its clients were about 90 million.

If you worked out - took the number of lawyers - take the number of lawyers in Australia, about 60,000 - and I didn't get a - I can't get a split of how many of those are private practice and how many are court or government lawyers, how many are legal services, but about 60,000. If you multiply that by the 35 hours, which is the recommended pro bono contribution each year, multiply that by $350 an hour, which I think is around about a mid point - I'm not certain there - that comes out around about 750 million. You add that to the Commonwealth contribution and you've got 1.2 billion.

If the Legal Aid expenditure last year was 602 - but I've only ever seen - I can't find out what the loan is except for one comment last year that it should be doubled, but if you double 602 million, you get 1.2 billion. I was quite pleased with that calculation. I think, certainly, I do think that what I put forward ought to be looked at quite seriously. It seems to me that the smart lawyers who make this contribution are going to dash out and do some legal aid work and recoup it all in the first month and will probably go on and make enough to cover their contribution the next year.

MS MacRAE: Do you have any more?

DR MUNDY: Thank you for that. That has been very helpful. We do appreciate the notes you have provided to us and look forward to - I think there is another version coming, but if you do not want to go to that effort and you are comfortable with that, we are happy to take that as it and place that on the public record, if that is easier. If there is more that you want to add, feel free.

MR SNOW: Yes, okay. Thank you.

DR MUNDY: These proceedings are now adjourned for 15 or 20 minutes.

DR MUNDY: We will reconvene these proceedings now with the Law Society of South Australia. Could each of the witnesses, please, to assist the transcript, state their name and the capacity in which they appear.

MR BAILES (LSSA): My full name is Charles Moreland Bailes, known as Morry Bailes, President of the Society.

MS HO: My name is Yan-Li Ho. I'm the Policy and Projects Officer at the Law Society.

MR HODDER (LSSA): Stephen Hodder, Executive Director of the Law Society.

MS PRIDMORE (LSSA): Rosemary Pridmore, Executive Officer at the Law Society.

DR MUNDY: Thank you for that. Would somebody like to make a brief opening statement. If you could perhaps keep it to about five minutes, that would be helpful.

MR BAILES (LSSA): Yes, I will just run over a couple of points. The first is to reflect on the concept of access to justice. You've probably heard it from others. Our view about access to justice is it's not, as it were, an economic theory; it's a fundamental, democratic right that each citizen should have. It's important to underscore the importance of law in civilised society and the rule of law. So access to justice is very important. Within that, of course, are economic considerations, which is why we are sitting. In relation to Chapter 6 of the interim report, Information on Redress for Consumers, we make the following points.

The suggestion that there should be a central website publishing lawyers' fees and rates is not something we support. In this state, we've been under the auspices of the Legal Practitioners Act 1981 for over 30 years. On 1 July, there will be proclaimed a new Act and regulations. There are accompanying cost disclosure rules that bring us into line with other jurisdictions. That, in our view, is sufficient. In terms of the publication of rates, we compare ourselves to, say, the medical industry where one can inquire about rates and so forth, but where there's no compulsion to publish them centrally. Also, lawyers' rates, depending upon the jurisdiction, are complex. They need explaining. There's actually a potential for the publication of rates to be misleading if they are not accompanied by explanation, in the same way that the rates of medical practitioners are complex and require explanation.

If I move onto Chapter 7, A Responsive Legal Profession, and if I address the National Trust Account concept. Our concern about that is simply that, in 2010, there was an attempt to nationalise the profession, so called, and one of the stumbling blocks was working out how a National Trust Account would work. On a recent

visit by the LIV president to - sorry, chief executive - to South Australia, we have learned that the conundrum has not been resolved, in as far as a uniform profession is concerned as between New South Wales and Victoria. The difficulties appear to be how to work out how to apply the proceeds of the combined trust account fairly amongst jurisdictions and the formula to be used because, between jurisdictions, the use of the combined trust account moneys is applied in different ways within the jurisdiction and, essentially, no-one has been able to put in front of us, despite repeated requests over many years, a formula for how that is to operate.

I'll say something briefly about the idea of limited licenses and unbundling of legal services, which is also contained in that chapter. We fundamentally agree that the idea of unbundled legal services is probably a wise thing to think about. The problem that seems to arise in that discussion is insurance, so the idea of going in and doing a bit of a job but not all of a job gives rise to risk. If there is legislative protection for lawyers to do that, then that is viable, if there is not, risk considerations may stand in the way. Chapter 10, Tribunals. The suggestions that tribunals should not be accompanied or allowed legal representations we do not support, at least not as a universal concept. There are obviously some tribunals where simple matters can be dealt with without representation. I will turn to the question of representation later in my remarks, but, essentially, tribunals can deal with complex issues of law and, in our view, they will be assisted by representatives but I'll say more on the question of unrepresented litigants and the problems they represent to the system.

Chapter 12, Duties on Parties. In South Australia we have just - we're at the verge of introducing pre-action protocols for two areas of law; building and construction and medical negligence. These are experimental and so we are unable to remark on whether or not they will lead to success or otherwise. The idea in those pre-action protocols is that an emphasis is placed on the compulsory conciliation before you institute legal proceedings and, in theory, that would seem sensible but we have yet to gather empirical evidence about how that may work. We have also adopted or we're about to adopt the fast track stream which runs through our Supreme Court, District Court and Magistrates Court.

Those in the Magistrates Court have remarked that they have, as it were, a fast-tracked stream of justice anyway, but it's quite applicable to our District Court. Again, that hasn't been rolled out. It's been modelled on the Federal Court fast-tracked streaming system and it's, again, experimental, so it's probably fair to ask us in another year or so how that's gone. Both of those are slated to commence in October of this year. In that chapter there's also the question of model litigant guidelines. Without being self-defeatist, model litigant guidelines are an interesting concept.

We can't point to a method by which model litigant guidelines are enforced

unless you are before the court and we've told you before, in informal sessions last year, that in some areas of law we would estimate that 95 per cent of matters are dealt outside of the formal justice resolution system, in other words, outside of the courts, so if a model litigant disregards their obligations, there is no third party to whence one can go to complain of the breach of the model litigant guidelines. That probably is something that ought to be available to a prospective litigant because at the moment there's nothing there.

I said I'd say something about self-represented litigants which is your chapter 14. Self-represented litigants are a problem for the justice system. In a notable judgment in Thomas v Nash 210 SASR or SASC reports at p 143, our former chief justice, Chief Justice Doyle, made some remarks. Perhaps I'll read them in to the transcript briefly. His Honour, the Chief Justice said:

> I want to record some aspect of the trial. Mr Nash has acted for himself throughout. The trial has been estimated to last three days. My assessment is that it should have taken no more than two or three days. In fact, it took about nine days. The additional time substantially increased the cost of the case to the plaintiffs and the cost to the public through the use of the court and its resources. The additional time is attributable to Mr Nash's inability to present his case sufficiently, although I gave him such help as I was able to give him. On many occasions I had to sort out what it was that Mr Nash was interested in and then formulate questions for him.
>
> Mr Nash had numerous documents upon which he wanted to rely. I considered many of them to be irrelevant. His documents were in a disorganised state. Often the court had to wait while Mr Nash found a particular document upon which he relied. All of these things contributed to the length of the case. I do not record this to criticise Mr Nash. It is not uncommon for unrepresented litigants to cause problems of this kind. I record these details to draw attention to the private and public cost that is incurred in cases like this.
>
> This happens in other cases from time to time. I expect that it happens more often in the District Court and more often again in the Magistrates Court. The answer it not to deny to members of the public like Mr Nash the right to appear without representation nor can judicial supervision be the complete answer. The case was prolonged despite my best efforts. In might be in the interests of the state to provide legal assistance under tight conditions to persons like Mr Nash. The time save in court would go a reasonable way toward recouping the costs of legal assistance.
>
> In South Australia the Magistrates Court now has, I think, the highest

jurisdictional limit for minor civil claims, $25,000, with an accompanying, essentially, prohibition because of the rules of court on the appearance of advocates. I can't speak for the court but a number of magistrates have expressed to me personally concerns about that. The concern is that unrepresented litigants are highly inefficient at litigation, understand little about what's to occur in the most fundamental way and can seriously clog up the system. The more there are the more difficult it becomes.

I'll return to my remarks about tribunals. If the tribunal was going to deal with anything of particular substance it is aided by having a legal representative not the reverse. Chapter 16, Court and Tribunals. The concept of a user pays systems is an affront to us. The affront is not caused in the circumstance where someone can afford the luxury of a user pay system. There are examples in the Federal Court of corporations, business versus business disputes where it's actually quite costly to use the court, but arguably those corporations have the capacity - the financial capacity - to do so.

Our concern is purely about the fact that access to justice or justice itself should not be a preserve of the wealthy. The idea that someone could not use our justice system or have access to our justice system because of their means or that their means forbid them is an affront to us and I return to my original remarks which is to say that justice is a democratic right not a privilege to be afforded by those who can afford it. Chapter 19, Legal Expenses Insurance. We've spoken to you about this before. When we look at Europe and when we look at some matters that make our way before our courts, legal insurance is either at play or at play in a de facto way.

Being a member of a trade union, for example, can sometimes get you legal representation. Having directors and officers insurance if you sit on a board gets you legal representation, so we insure against the risk of litigation in a variety of circumstances. Our view is that that should be a broader - that should have broader application as it does in Europe. We have for you - and I won't go into detail on the transcript - details of our legal assistance fund run by the Law Society. In fact, I'll ask to tender an extract of a publication of our law society bulletin entitled "The Litigation Assistance Fund, What You Need to Know," which is, essentially, a summary of how our LAF, as it's become known, has successfully operated over a long period of time, so I'll hand that up now or at the conclusion of the hearing.

We also have an interest in conditional fees and contingency fees, but the Law Council of Australia is doing extensive work in relation to that area and I'd rather not pre-empt what it's got to say about it.

DR MUNDY: Yes, that is work which as of last night the Commission has yet to receive.

MR BAILES (LSSA): I see. Right. Noted. I can only say that I hope that you - - -

DR MUNDY: It has caused us some significant inconvenience.

MR BAILES (LSSA): Well, I'll pass that back because I'd like very much for you to be in possession of it.

DR MUNDY: So would we.

MR BAILES (LSSA): Noted. So those are our submissions.

DR MUNDY: Okay. Can I start perhaps on the question of court fees?

MR BAILES (LSSA): Yes.

DR MUNDY: I will take you to page 78 of your submissions.

MR BAILES (LSSA): Yes.

DR MUNDY: You say that, "We note the commissioner suggests recovering the actual costs of providing the service in cases - and I quote in your submission - in cases of personal safety or the protection of children." You were quoting us there. I take you page 77 of your submission to us in the left-hand column and I will read this for the record:

> The commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost providing the service for which the fee is charged except -

and I note the word "except" -

> - in cases concerning personal safety or the protection of children.

So it's clear that the commission's intention is to preclude. So I would invite you to make your submission again and correct that because it's clearly misrepresenting the commission's position.

MR BAILES (LSSA): I see.

DR MUNDY: Your submission to us suggests that we are recommending or proposing to recommend - in fact, we are proposing to exclude.

MR BAILES (LSSA): I apologise and correct the record.

DR MUNDY: You may reflect, there are some other inconsistencies in your citation of the commission's recommendation, which I won't belabour now but I'd invite you to thoroughly check them and - - -

MR BAILES (LSSA): Yes, I apologise and mean no disrespect to the Commission.

DR MUNDY: Having said that or corrected that, I think it is unfair to characterise the Commission's view as in the way that has been and I think that's perhaps - in part we've contributed to that by the manner that we've set these questions out, but the reality is today that courts charge fees. The reality is, is that individuals - particularly in major cases and corporations - receive significant private benefits in actions well above the costs of the courts providing that they pay in court fees let alone what their costs - I think his Honour Justice Martin of the Supreme Court of Western Australia is known to the Bell litigation cost that court $15 million and they didn't recover one 15th of that, for a matter for which I'd suggest had very little public benefit and very little to do with the constitutional questions of the judiciary or with the creation of other important public benefits.

So I guess the question is how should court fees be structured and who should they be levied against? Because what we're actually trying to do here, in all honesty, is trying to find a bit more revenue for the courts because you will note that our recommendations say that these moneys could be put - we might get stronger than that - but could be put to correcting a lot of the funding problems which I know the Law Society and your equivalent bodies also were concerned about.

MR BAILES (LSSA): Yes, well look, I've dwelt on that very point, because it flies in the face of logic that a litigant that can afford to use the formal dispute resolution process and, in fact, may actively choose to, should not have to pay the accompanying fees. So the best I can offer is that given by earlier submission, is that there ought to be some type of means testing because what we want to preclude is the disadvantaged not getting access, but I don't want to say that I don't have a care for those who can afford access but - I mean, comparisons could be made with the medical system where if you were meant to have a particular procedure and can afford to pay that or private insure against that, then you're entitled to do it. So I can only offer that it would be sensible to have a means test method.

DR MUNDY: Corporations don't go to hospital, though.

MR BAILES (LSSA): Agreed. Perhaps it's an incomplete comparison but we are certainly less troubled by - I mean, we're less troubled by a litigant who can genuinely afford to pay it than we are holding someone out of the justice system who can't - - -

DR MUNDY: So perhaps the notion that we tried to develop in the draft report of fees relating to the amounts - you know, if the litigation is a small claim over 20 grand in the Magistrates Court that would see a different fee structure than a much larger claim being run, say, in the Supreme Court.

MR BAILES (LSSA): At the moment, there's just no discrimination. So just take a filing fee, for example; it's 1,200 or $1,500, something like that, in our Supreme Court or District Court. Don't quote me on it, but it's around about the mark. Irrespective of your means, your capacity to pay it or the nature of the matter, that's just to get it rolling. So it would seem - - -

DR MUNDY: Do you think those three things - however the conundrum's to be resolved - they're the three things that are in consideration?

MR BAILES (LSSA): I think so. So the - and then, of course, in some courts there's the idea of a daily fee, a transcript itself is quite expensive. Our Coroner's Court, for example, has no fee associated with appearing in it, getting transcript and getting statements because it's seen as a public service, I suppose, and in certain circumstances that's probably proper for Coroner's Court.

DR MUNDY: Because of certain litigants?

MR BAILES (LSSA): That's right. Given the nature of the court but also in private litigation it might be proper. On other occasions, a party can afford it and should afford it, and as you say business to business litigation is sometimes something chosen by parties rather than their being forced to commence it. A claimant who sues an underwriter may be essentially obliged to do that because their financial wherewithal might rest upon it whereas a business to business dispute might be different in nature.

MS MacRAE: I guess if we could just then perhaps conclude by putting on the record that I think we're actually in a large level of agreement here. You would accept that a level of court fees is appropriate, that it should be subject to the factors which we've just talked about broadly and that there is reason for differentiation and I think I'd also want to put on the record that in no way were we - and I don't think we should even have been seen to imply in any way that we would want court fees to become a barrier to access to justice. That is completely contrary to what we're trying to do here - - -

MR BAILES (LSSA): It is - I'm sorry for interrupting - in as far our submission might represent it in that way, I retract that and refer to this exchange.

DR MUNDY: Perhaps you might reflect on that in the tone and perhaps some other comments when you come back with those directions that I've drawn your attention

to.

MS MacRAE: Can I just come back then to a particular issue that we talked about with the Legal Service Commission?

MR BAILES (LSSA): Yes.

MS MacRAE: Just in relation to this change in limit for small claims in South Australia, again I think we've - and again I'm happy to say that in an 800 page report we probably didn't write down everything quite as clearly as we might have. Our intention was never, again, to suggest that there would be complete exclusion of representation within Tribunals. We had it put it put to us that in some Tribunals that were intended to be dealing with lower level matters, that there had been an increase in or a creeping legalism and a concern that what was supposed to be quick, cheap and easy is no longer that way and that in some instances, legal representation in some of these forums where it wasn't originally intended to be the norm is becoming increasingly the norm. So that was the issue we're trying to address.

Having said that, we had an interesting discussion with the Legal Service Commission this morning and they were a little concerned that the $25,000 limit was pushing into areas that were more technical and more complex, and that representation might be required in some of those cases, and had a suggestion that perhaps a staged increase in that threshold might be more appropriate. Would you have a view about that?

MR BAILES (LSSA): Yes, I do. The jurisdictional limit is at odds with other jurisdictions. I've got a feeling that some of the jurisdictions it might 12 and a half, so just sort of off the top of the head, I wonder whether there ought to be an allowance of representation at 12,500 to 25. I mean, $25,000 for a person on an average income who might have a personal injuries claim, for example, it might be a quite significant thing. If I can make a comparison, lawyers work for Workers Compensation claimants obtaining lump sums of money for permanent impairment claims in this state through the Industrial Relations Court and Commission where there's fairly limited costs, at least until you get to a trial and claimants are charged an appropriate level, and they are better off represented, so I think we add to the process rather than take from it.

So the idea that it would be sensible to be represented in a Workers Compensation claim worth $20,000 but not in a Magistrates Court where it's worth 25 would seem to be odd. The other thing is in other jurisdictions - I understand in Victoria, for example, there might be an entitlement to have someone appear as of right. Costs don't follow the event in that jurisdiction but you can have representation. So here the problem is not only do costs not follow the event, but representation is not allowed.

DR MUNDY: I think there are some - and I think they're typically of a small claims character where - and the point we were trying to make was that some considerable thought had been given to those for where representation was not allowed, and we're not suggestion that representation should be banned in tribunals and, clearly, that's a logical absurdity, for example, in matters such as guardianship.

MR BAILES (LSSA): Yes, indeed.

DR MUNDY: But there are fora lists, if you like, where the fora itself has been constructed on the presumption of non-representation except by leave. Leave was meant to be given for people with particular disadvantage. They might be mentally ill or something like that. What we would try to suggest was that perhaps leave had been granted a bit more often than leave was meant to be granted.

MR BAILES (LSSA): Understood. If I could turn it around and say that legislatures, however, have a habit of sometimes wanting to hold lawyers out of it and our argument is these might be significant matters, notwithstanding the fact that it is before a tribunal and we should not be precluded.

DR MUNDY: Certainly, there are - I mean, we'd be of the view there are circumstances where, for example, a person - a tenancy matter, a real estate matter, for example, a person is coming - the defendant, if you like, is represented by an officer of the company who is probably in the tribunal three days a week and, in those sorts of circumstances, a person experience disadvantage may actually - the scale may be balanced through representative.

MR BAILES (LSSA): We agree with that, as well as insurance company representatives.

DR MUNDY: Indeed, and council planning officers. You've made some observations about the new mega super tribunal that's going to be formed in South Australia. We aren't actually aware of what those proposals are, so if there's any material that you could provide to us, that would be helpful, but - - -

MR BAILES (LSSA): Certainly.

DR MUNDY: My sense was that you expressed a preference over a model that looked more like the State Administrative Tribunal in Western Australia rather than VCAT.

MR BAILES (LSSA): That's right.

DR MUNDY: Do you want to explain to us essentially why you have that

preference? I have always found the administrative tribunal in Western Australia a bit of an odd thing to understand.

MR BAILES (LSSA): Perhaps we've actually taken a leaf out of the Attorney's book here because the problem, as I understand it, with the VCAT was that a large number of jurisdictions were put in it to begin with. The result was that it got clogged up and there was a long time getting to hearing.

DR MUNDY: Yes, it is really big.

MR BAILES (LSSA): So the approach in South Australia, having learned from that lesson, is that only a few jurisdictions are going to be put into it to begin with. Guardianship, I think, is touted to be one. What is the other?

MS HO (LSSA): I think the other one may be residential tenancies.

MR BAILES (LSSA): Our model simply - - -

DR MUNDY: Sorry, just for clarification, presumably general administrative law appeals will go there as well, so it will do the state job of the AAT as well. Is that the intent?

MS HO (LSSA): I think the bill, the legislation to get the tribunal going, is sort of in two stages. They've only completed the first bill, which is just the general establishment of it, and then the functions and bodies that will go in there is the second bill and that hasn't been tabled yet in parliament. So we don't know.

DR MUNDY: Because my understanding of SAT in Western Australia - and obviously it's a bit old now - is it deals with planning-type matters, environment-type matters, and those sorts of appeals which are administrative appeals in nature. Is that going to be covered there as well, do you know?

MR BAILES (LSSA): I think the short answer is, we don't know.

DR MUNDY: You do not know.

MR BAILES (LSSA): We would like to know, a bit like you and contingency fees. We are sort of waiting to see what the attorney puts in, but I think it is to look a bit more like Western Australia than it is Victoria. I cannot really take it any further than that.

MS MacRAE: So basically, to summarise, I think you say you prefer to, sort of, start small, have a few things in that are going to fall within that mega tribunal, and if it works well, look to maybe adding to it over time rather than starting with

something that is all encompassing?

MR BAILES (LSSA): That's exactly right.

DR MUNDY: Which is really what New South Wales did as well.

MR BAILES (LSSA): In making those remarks, I'm not actually claiming to be the originator of that idea. I think that's what our attorney has signalled to us he intends, and we thought that was commonsense.

MS PRIDMORE (LSSA): We've actually a person who as the Crown - was he Crown Solicitor?

MR BAILES (LSSA): Yes, Parker J is a Supreme Court judge, relatively recently appointed, who's part time in the SACAT, South Australian Civil Administrative Tribunal.

DR MUNDY: So he will effectively be the president, or the - - -

MR BAILES (LSSA): The president, that's right.

DR MUNDY: It is being constructed at the Supreme Court justice level - - -

MS PRIDMORE (LSSA): That's right.

DR MUNDY: - - - not District Court judge?

MR BAILES (LSSA): I think the Act actually provides that it can be either a Supreme Court or a District Court judge, but a Supreme Court judge has been appointed.

DR MUNDY: At least at the start.

MS MacRAE: Could I perhaps ask about the idea that we had about having a centralised, online resource, and I appreciate your comments in your submission and your opening statement that you feel that, as long as there is adequate cost disclosure when someone fronts up for their that that should be sufficient. I guess our concern is that, given the nature of legal services, we know that it is very difficult for people who might typically only come into contact with the system, you know, once or twice in a lifetime even to have any idea at all - any idea - about what sort of legal costs they might be facing for a particular kind of matter that they have never dealt with before and may never deal with again.

Our intention here was to try and come up with something that would give

people, really, just a ball park guide. We feel pretty strongly that people commonly have absolutely no idea about what they might face. We are not suggesting that this resource would offer any level of precision, and it would not be put up as a "you should always expect that the nature of your case would fall within this range", you might have extenuating circumstances that would give you a different thing. When we put this question to the Legal Service Commission this morning, what prompted it, really, was they said, "We'll commonly have people come and talk to us for half an hour and we'll give them an idea of what their likely success rate is and what sort of cost it might be."

I said, "What do you think about putting something that's much more general up to give people an idea of costs," because they were saying how helpful that is to people. They said, "Look, certainly, the data would have to be caveated, but yes, it's doable and we think it would be a good resource for consumers." I just wondered if you'd like to respond to that?

MR BAILES (LSSA): Yes. I think the idea of a general guide is very sensible. I agree that litigation can visit someone once in a lifetime so, going back to the medical example, when you regularly see medical practitioners, that becomes common place, whereas - - -

DR MUNDY: You know it is going to cost 70 bucks to go to the doctor.

MR BAILES (LSSA): Exactly. So I think a general guide is entirely sensible. I think what we were picturing is the horror scenario of having exact hourly rates compared with exact hourly rates and attracting a potential rush to the bottom.

DR MUNDY: What we have in mind is certainly nothing that identifies individual providers. It would be of a nature of: within this jurisdiction, if you have this sort of matter, you can expect to pay something in this range with all the suitable caveats. So the person does not turn up and find out it is five grand - you know, discover it is five grand when they might have thought it was 250 bucks. That is the sort of thing we would - you know, it would need to be - it would not be totally identified and it would be averaged in ranges.

MR BAILES (LSSA): I just can't see a problem in that because, like the Legal Services Commission say, quite often, as legal practitioners, we are giving that type of advice to people anyway in a preliminary way, saying, "This is what it's going to look like."

DR MUNDY: The sort of feedback that we've had from consumer groups and the legal regulators, if you like, is that quite often the nature of complaint is about - - -

MS HO (LSSA): Overcharging. Unexpected - - -

DR MUNDY: It is not necessarily, "I'm outraged about the how much," it is actually, "I just did not know it was going to cost that."

MR BAILES (LSSA): Can I just remark on that? That is, without doubt, the most common cause of complaint: the failure to set expectations and then - because I suppose human nature tries to make someone feel good or comfortable at the beginning and then reality starts to stride in. I, having practised for over a quarter of a century, am now a believer in the fact that the bad needs to come squarely and up front and that, of course, is what our new costs regime requires. I have to agree entirely with that suggested - - -

DR MUNDY: I am not familiar with the new regime in South Australia specifically, but what has been I guess reflected back to us on this general question of disclosure in a number of jurisdictions is that it is a bit like the debate we had around product disclosure forms for financial services. To reduce complexity, we ended up reducing the font to get it on the one page. People are getting documents that are a dozen pages long. The mobile phone contract is used as another comparator.

MR BAILES (LSSA): Yes, that's right.

DR MUNDY: Are there useful things for us to say? A lot of consumer representatives say to us, "Look, it's data. It's not information."

MR BAILES (LSSA): Yes, exactly. The one concern that I have about our new cost disclosure regime is the length and nature of the statutory notice which may discourage someone to understand, rather than encourage them to understand. A straight-shooting legal practitioner sitting down with a client being frank ought to be able to convey the necessary information. One worries that you can now hide behind a statutory notice that an average person is simply not going to read. I can speak for myself. The longer the document and the smaller the font, the less chance there is that you bother with it. I also agree with that.

As to how to cure it, it is very hard, isn't it, to deal with what might be a quite complex costs question in a completely simple way but straight-speaking honourable legal practitioners can convey a complex message very simply with a great deal of practice and build that expertise up over time. I'm unsure whether that skill can be distilled into a statutory notice.

MS HO (LSSA): The society is also developing several fact sheets that are quite short and they are designed to go with the standard form I believe. That can give consumers more information about what their rights are for billing and things like that. They have been written in a very sort of easy, plain language manner.

MS MacRAE: We did hear from one of our earlier contributors that perhaps there is a place in legal education itself for a section on communication, particularly client communication. Do you think that this issue is one that is big enough to allow for that or that would warrant that? We have spoken to some of the complaints boards. They have said that very often the person might be dissatisfied with the cost but the biggest frustration is that they haven't been updated so they have been given a number at the beginning and then no-one tells them, "Sorry. We've actually worked from that now and there is something else coming." Is there, do you think, a place in the education of legal practitioners, a communication consumer sort of focus, so that that part - knowing the law is one thing; being able to deal with clients and managing that side of the business is also important.

MR BAILES (LSSA): I suppose it probably has to go into the various PLT courses that bridge getting the degree and being admitted, because we are probably employing less than 30 per cent of the legal graduates here so if it went into the substantive law degree, it might be learnt and forgotten pretty quickly; whereas if it goes into the PLT course which immediately precedes starting to practice, then it might be more valuable. We do teach ethics and practice, but I think part of the difficulty is that the PLT course is an obligatory diploma that you need to obtain to get admitted. I'm not sure that undergraduates necessarily view it as anything more than a ticket to get their ticket.

Real instruction probably ought to come when they are actually practising. The law didn't really make any sense to me until I started in a firm and then suddenly it all started to make sense, so it is probably it is that point in time. We have gone away from the old articles system. There used to be a far more robust way in which we appointed a supervisor. It was a master and servant style of relationship I suppose. Articles in the old days went for some years, so you just weren't released on the unsuspecting public until you knew what you were doing. Teaching on the job might be a very smart thing to do. You can possibly incorporate that in to making it a mandatory requirement for CPD, perhaps for a practising certificate under five years or something like that on a per annum basis. You could get it in there.

DR MUNDY: Whilst we are on the question I guess about education, we just don't see this as what happens in the university but elsewhere as well. It has been suggested to us that given the way that dispute resolution in particular is developing, there needs to be specific training in ADR and mediation. I guess the question is twofold. Do you have any views about the extent of what that should be and what that might look at and then, secondly, this other thing: where should it be? Should it be - you know, some suggest, "Turn it into the 12 apostles, rather than a priestly 11" or alternatively it is something that people really should get tickled up every three or four years in the CPD to keep them current about developments. Do you have a

view? I think everyone who we have spoken to thinks it is a good idea that we do more of it.

MR BAILES (LSSA): Yes.

DR MUNDY: The question is: where are we going to do it and what sort of character does it have?

MR BAILES (LSSA): Can I start by just making this observation because it sort of goes to the philosophy of that the formal dispute resolution system is there for? Are the courts there in order to deal with the intractable dispute or are they there at the front end to help people resolve things? I know that some judges probably under cost pressure are trying to push people away from the court into alternate dispute resolution - and I mention pre-action protocols in this state - before they institute proceedings. Another school of thought is that that is a denial of a right; that is, a right of a citizen to go to a court and require a remedy, so it's the deprivation of a right. It's an almost intractable question but the emphasis on dispute resolution is an extremely good one. I favour - - -

DR MUNDY: Our focus on this is of course that this is what our inquiry is actually about.

MR BAILES (LSSA): Yes.

DR MUNDY: That is not the court's.

MR BAILES (LSSA): I favour an approach to alternate dispute resolution which is in some way overseen by the court. I know that is not agreed to by everyone but in my personal experience, better results are achieved when the parties are driven together through some sort of formal mechanism than if they are left flapping in the breeze with a suggestion that they should go and try and sort it out themselves.

As to education, again if I can go to our Industrial Relations Commission and our Workers Compensation Tribunal, that has been very successful in dispute resolution before a matter gets to a hearing through a formal process of conciliation. I think the first thing you get to these days is actually a short hearing to define the issues but you get to a conciliation conference immediately. That is the very first thing that happens. you can't escape the process of conciliation. That's a learn-on-the-job thing, but if you are in that jurisdiction you learn pretty quickly how to resolve matters pragmatically because it is the first thing that ever happens to you.

DR MUNDY: I find your observation interesting because I used to in a previous life be an executive at a very large airport company and I was responsible for taking money from airlines and every contractual arrangement that we entered into but

worth many, many, many millions of dollars had an ADR clause so the matter never got to court.

MR BAILES (LSSA): Exactly.

DR MUNDY: Because they were largely disputes about what was in the contract. We made some observations about protective cost orders and you make the observation that the existing body of jurisprudence should be adequate to deal with it and you cite the Blue Wedges case. I presume you are talking about the one that was before his Honour, Mr Justice North in the Federal Court, the first Blue Wedges case?

MS HO (LSSA): Which recommendation is this?

DR MUNDY: 13.6.

MS HO (LSSA): 13.6. Thank you.

DR MUNDY: And you note that there is an existing body of case law which normally applies to public interest matters and you cite Blue Wedges.

MR BAILES (LSSA): Yes.

DR MUNDY: So I presume what you are actually talking about, in fact, is Oshlack v Richmond Council which was applied by his Honour, Justice North in the first Blue Wedges case. There were actually two Blue Wedges cases.

MR BAILES (LSSA): Yes.

DR MUNDY: If you would have a look at that.

MR BAILES (LSSA): Yes, we'll come back to you soon. I can't off the top of my head answer that.

DR MUNDY: No, that is fine. We are aware of the existing case law and we are not quite sure that it is clear because of issues around particularly having to give guarantees against applicant's costs which in that matter related to demurrage on a dredge that was sitting in Port Phillip Bay. But I guess the wider question is - and this is a broader question - is that there are a number of vehicles both within the courts but more broadly in which law reform is supported and brought forward and one of those is through the CLC movement. Do you have a view about the importance of good law reform identification and bringing matters forward for resolution and then how that may be of benefit to your clients to avoid matters rather than things having to be systematically picked through in court, because there is a

concern that has been raised with us by a number of people?

We had the financial services CLC before us in Sydney yesterday and they were observing, "Well, we solved a lot of problems because we see a lot of them and we go to governments and regulators and say, 'You need to fix this.'" Now, the proposition now is that that activity is not going to be funded, so a resolution to these matters may be some form of court-based advocacy which on face is less uncertain and more costly in my mind.

MR BAILES (LSSA): Yes, there's two ways to look at that. The first is that we - and I'll perhaps reference it to the earlier comments about alternate dispute resolution - the one risk is we lose jurisprudence is that if we never litigate we never know what the law is. There's substantially less cases on areas of the law in this state than probably others to tell us what the law is these days than there were 20 years ago, so that's a risk. I think the reason for that is because cases take a lot longer and cost a lot more and that's not something we laud at all. For some reason when I started practising judges banged heads together and got results a hell of a lot quicker than they do now. That's not a comment about judges but perhaps parties.

However, it is extremely expensive to privately litigate in order to arrive at a solution in law and from time to time of course applications on a contested point of law are actually supported and paid for by the state because the issue needs to be resolved, but there's a dichotomy of thought; we can't not litigate because we won't have law. If there's an ability to get cases stated and for that to be funded and for that to be done in the general public interest so that everyone knows where they stand, that's again laudable.

DR MUNDY: If I can perhaps bring you to the issue of litigation funding and contingency fees. We see them as being pups out of the same litter from an in-principle perspective. What seems to be different to us is who's putting up the capital.

MR BAILES (LSSA): Yes.

DR MUNDY: I guess there is a number of issues that we could come at this and I would just ask you to quarantine your thinking to the general. I mean it may well be that ultimately you would just simply carve out certain matters; personal injury or family or something, but as a general proposition I guess what we are trying to work out is, is should, as a matter of public policy and regulation, which we are recommending, there be a distinction drawn between the provider of capital, so, on the one hand, the litigation funder and, on the other hand, a contingency based fees arrangement and if so why and how might those issues be addressed other than a blanket ban as we have today?

MR BAILES (LSSA): Yes. Well, I'm not sure if this is a direct answer to your question but I find it illogical that there should be no regulation on a litigation funder that can effectively run a contingency based matter, but the regulated professional who runs it - - -

DR MUNDY: As does the largest funder in Australia funnily enough - - -

MR BAILES (LSSA): Right. Yes.

DR MUNDY: - - - and we are recommending that they should be regulated.

MR BAILES (LSSA): Right. Whereas the highly regulated profession that runs the litigation cannot itself do it. Also, as an economic theory, it's got the touch of the bizarre about it and the opposite to that is that in a purest economic way the idea of contingency fees just works on every level. The concern is the opening of the flood gates in terms of litigation and the answer to that I don't have, but when we're talking about access to justice and the ability to get there, it to me - I speak personally rather than it being entirely a representative position - I just simply cannot understand why we would not be embracing that concept perhaps with the necessary limitations that you've identified, but you asked me to speak in a broader way.

DR MUNDY: Perhaps one of the distinctions we can see is in that when the litigation fund was providing the capital the litigation fund was there, so the clarity - the lawyers are getting paid so the ethic questions are different, whereas - I mean so is there - I mean because we see that with an appropriate set of arrangements contingency based fees would, in fact, provide or compete at least at the margin and probably more than the margin with the funders and that as a general proposition is no bad thing.

MR BAILES (LSSA): Yes.

DR MUNDY: Do you have any thoughts about how - and if you want to come back to us on this that would be fine - but just on how those ethical questions with respect to contingency fees might be addressed in the first instance and the other thing, lots of claims are made about, "Well, look what happens in the US," and what does not happen in the US is adverse cost orders.

MR BAILES (LSSA): Yes, that's right.

DR MUNDY: And I reckon that focuses the minds of both funders' lawyers.

MR BAILES (LSSA): Yes, agreed.

DR MUNDY: So are there any observations with those?

MR BAILES (LSSA): Yes, there is. The first is that I mean a litigation funder is just merely another entity, so I mean a legal practitioner or a legal firm may set up another entity to fund, so I'm - - -

DR MUNDY: Which is I think what Maurice Blackburn does.

MR BAILES (LSSA): Right. Okay. So I'm not sure that that - I mean it might, on paper, relieve the ethical problem but - - -

DR MUNDY: I think it changes the nature of economic incentives - - -

MR BAILES (LSSA): Yes.

DR MUNDY: - - - because the lawyers are getting paid on general fees whereas they are not getting a cut of the winnings.

MR BAILES (LSSA): Sure. But if you look behind that arrangement then, you know, you might not be as comforted. The second thing is that we do it every day of the week really in - when you're seeing someone who's got a questionable claim, quite often we are carrying the contingency without openly saying it. There's no uplift because we're not entitled to, so we now carry all the risk and none of the gain and so my view is that there ought to be an entitlement to something of the gain because in an ethical sense, you know, we're exposing ourselves to the risk - - -

DR MUNDY: Of not getting paid.

MR BAILES (LSSA): Yes. Every day of the week.

DR MUNDY: So it is your view particularly in smaller type matters that conditional fees, on the one hand, and contingency fees, on the other, are likely to end up in essentially pretty much the same sort of space seeing it is only in these really large matters?

MR BAILES (LSSA): Yes. Well, in this state until the proclamation of the new act our conditional fee uplift was actually 100 per cent, whereas in interstate and under our new act it's 25 per cent, I'm somewhat dismayed by that because I think that it was not abused.

DR MUNDY: I think it is zero in some parts of the jurisdiction in New South Wales.

MR BAILES (LSSA): Well, our experience in this state was it was not abused and it allowed the claimants with questionable claims to access justice and people were

able to enter the justice system where they - - -

DR MUNDY: Because one of the questions we are asking ourselves is should there be a cap or not, so if there is any material that you may have on that particular question we would actually find that very helpful.

MR BAILES (LSSA): But I agree with you, I mean on paper conditional fees and contingency fees are, in theory, different, but in my mind they tend to merge into a very similar concept.

DR MUNDY: Yes, I think what has been put to us is that certainly in small matters they do, but if you have got a situation where the fees might - the matter might be worth a million bucks and the fees are 10 grand, then it starts to move once the matters get - - -

MR BAILES (LSSA): And the remedy of that, as you just mentioned, may be capping it at a particular point. I mean, you know the arguments, no doubt. Uncapped means that the market place determines what's a fair thing, but it might be open to abuse. Capping means that you can't go past a particular point, but people will generally lift the fees to the cap when the market may actually have a downward pressure.

DR MUNDY: From your experience in South Australia, was that, in fact, the case? Did the market go to the 100 per cent?

MR BAILES (LSSA): Yes, it did. It did, but you see, our Supreme Court rate's a bit over $300. That meant you were charging $600 an hour, or something like that, or whatever the double was. That's not so much out of the ball park that that's ridiculous - - -

DR MUNDY: And you were getting - - -

MR BAILES (LSSA): - - - on a risky matter. If you're carrying all the risk, you know, it does permit people - and they understand that. It does permit people to have a go. The other thing is that quite often it will be disbursements as well that are carried, so it's not just the fees. There will actually be a capital outlay of many thousands of dollars because a person just can't otherwise do it.

DR MUNDY: Just finally, so it is fair to say that, despite what we have read, particularly coming out of certain commercial firms in Sydney, that reform in this space is - the likelihood of a flood of litigation, I think, is particularly in relation to securities actions rather than other forms of actions.

MR BAILES (LSSA): Yes.

DR MUNDY: Is something that should be of passing concern, but not of - I am just trying to get an understanding. I mean, I have perhaps a naive view that unmeritorious matters brought in front of judges get dealt with in a robust way.

MR BAILES (LSSA): In Australia they do, so I think the comparison with the U.S. goes so far. I think we have got a fundamentally different culture and that's reflected in our damages claims, and so I actually have faith in the system. I think you're right. I don't think it's a misplaced faith. That said, what may spring up in relation to securities is specialist firms who look at every utterance that a publicly listed company makes versus its share movement. Is that fair game? It's probably outside my personal area of expertise. It will be prosecuted by plaintiff law firms and perhaps it should be. Perhaps it should be?

DR MUNDY: Is perhaps a way forward to 'suck it and see' and review it in, say, five years time?

MR BAILES (LSSA): I always like a review, sir. Very prudent.

DR MUNDY: So do we. We do it for a living. Thank you very much for your time and we look forward to getting that other material.

MS HO (LSSA): Thank you.

MR HODDER (LSSA): Sorry, can I just add one thing? The thought occurred to me while discussion was going on about the website in relation to fees and charges and in relation to the fact sheets and costs disclosure. I was just wondering whether, in terms of that central website, it might be worth considering having a list of questions you should ask before engaging your lawyer in a particular matter.

DR MUNDY: One of the challenges in doing that is to actually collect the data, cut off the outliers, get rid of the cheapies. You know, if you are going to talk about a dispute with the builder, we will not ask him, you know - - -

MS MacRAE: It is questions and answers.

DR MUNDY: Yes, that is quite useful. Thank you very much.

MR BAILES (LSSA): Thanks very much.

DR MUNDY: Could we please have the Family Relationships Centre of Port Augusta. I have not been to Port Augusta for years. The last time I did, I had the pleasure of meeting with the then mayor, Ms Baluch.

MS MacRAE: Who has subsequently deceased.

DR MUNDY: Yes, I think she lived a hard life. Could you please state for the record your name and the capacity in which you appear here today?

DR RYAN (FRCPA): My name's Dr Sherrie Ryan. I have a PhD, I was also a criminal and family lawyer with Legal Aid for eight years and I'm currently the manager, senior family dispute resolution practitioner and also the child consultant with the Family Relationship Centre in Port Augusta.

DR MUNDY: Thank you, Dr Ryan. We do not hold having a PhD against people here. Would you like to make a brief opening statement?

DR RYAN (FRCPA): I would. I have just been reflecting a little bit on this morning, the things I have been listening to this morning. One of the things that I think has really hit me that I would like to start with is, when you are talking about access to justice and, basically, it says that it is about how you perceive access to justice. I think I was listening this morning to different what I would say almost philosophical bents about what it means to access justice before various people. I suppose my paper particularly addresses access to justice for some of the most impoverished people in our community, but I do not want to only restrict my submission to Aboriginal people in regional and remote areas, although I think, when you look at their ability to access justice, you could almost say that - if it is seen as somebody said it is about a right of a citizen to access justice, as Mr Bailes rightly said, but I would also argue that in principle, of course, that's the most important thing in a democratic society.

However, particularly working in family dispute resolution and working in Legal Aid in the northern, remote regions of South Australia, I can categorically say that many people cannot access justice for a whole lot of reasons. There are a lot of barriers which I have addressed in my submission as well. So I suppose that is my starting point. The only other thing I would like to add is, yes, some lawyers continue to see alternative dispute resolution or family dispute resolution, when you're talking about dispute resolution in families, as something like flapping in the breeze and leaving people to sort out their own disputes. I think my paper addresses that and grounds that, in fact, that it's not flapping in the breeze at all; it's about families empowering themselves, taking responsibility, and having an obligation to their children and opening up communication, and moving forward with their family.

As a criminal and family lawyer, often I felt like I was flapping in the breeze

when I was dealing with families and their dispute and representing one client with very little thought to outcomes for those children. It was more representing my client, so I think I am totally committed to alternative dispute resolution in all its forms. I uphold the ideas in the report that it could very much be extended into the civil courts. I think it is a great idea and would even say that, even with respect to disputes over wills and estates, just from experience, I think that would be a really good thing to look at as well, just as an aside. That comes from personal experience. I suppose that's where I come from, from a position as a lawyer and also as a dispute resolution practitioner.

DR MUNDY: Could we perhaps start at wills and estates? We had quite some - moving I think is probably the right word - testimony in Sydney yesterday, which you can read when it goes up on our website in the transcript, but it does seem to us that, on the one hand, the whole will and probate system is essentially, in the vast bulk of cases, an administrative exercise and why do we need to trouble Supreme Courts with it, I guess. But in those matters where there are disputes other than putting aside very high profile ones by very right people, which are perhaps different - but in the vast bulk of these matters, they are really disputes within families. They are no different to, in many senses, the circumstances of a dissolution or the ending of a marriage and there is property that has to be sewn up. Do you think there would be - would there be any observations you would make about how the experience with FDR in the case of matrimonial termination might be thought about, in the sense of the resolution of, you know, Granny's fallen off the perch and the kids aren't quite - and dealing with those sorts of - and it might be different because there may well be interested parties in the will outside the family, but is that something that you could give us some insight with?

DR RYAN (FRCPA): Once again, the position I always come from because of my work up in Port Augusta and Whyalla, which is the town over 70 K from Port Augusta, but these are - they're towns that have been based over the years on manufacturing and, more recently, mining, but basically, working class, under class, impoverished. What I see, you know, in my role as a legal adviser with legal services and also just from my experiences there that, yes, you're right, wills and estates are often about families contesting the estate.

More recently, I was dealing with a person that I knew very well. She was in her 70s, very poor - very poor - lost her husband, second husband. She was his second wife and his daughter contested the will. The will was very badly prepared, in my opinion, and I warned the lawyer that it was likely to be contested, but that was ignored, so it was contested. Seven years later, there are no funds left in the estate. She's had to move out of the estate. She's still trying to sell it. The agreement that was made at the Court door, she had no capacity - because of her grief, absolute grief, she had no capacity to make any decisions with respect to any agreement and, of course, then she had Court orders that she didn't understand, she couldn't

understand. She had very little understanding, but I think her capacity was also limited and she had very little education.

When I saw the orders that were made that she had to carry out, I realised immediately that she would be left poverty stricken and couldn't remain in the home long term and that, at the end of the day, she had a major breakdown, couldn't afford any more lawyers, and there was almost nothing left in the estate after the legal fees were paid. She could have, of course, appealed to the Law Society Professional Conduct Board, but her mental state - and she had no funds in order to do that. So she was left penniless. You know, in my capacity as a legal adviser, there are a lot of people that came to me wanting advice with respect to estates and wills and it was nearly always about family swooping in, and that includes families where one child or two children had been made executors of the will and, of course, abused that role.

Yes, I think - and you know, with respect to the person that I was just telling you about, at no time was that family given the option of alternative dispute resolution, which I would have thought, for two impoverished families, any ethical lawyer or lawyers, that would have been the first thing they would said, "Let's try and sort this out through dispute resolution," and that wasn't made available.

DR MUNDY: This matter was presumably resolved in the Supreme Court in Adelaide?

DR RYAN (FRCPA): Yes.

DR MUNDY: So add that to the problem, they've had to trek down from Port Augusta.

DR RYAN (FRCPA): Absolutely, the costs associated with getting down to Adelaide.

DR MUNDY: And appropriately resourced organisations like your own in regional centres could perhaps not resolve all of those matters, but take a good few of them out, because I presume the skills required to solve that sort of discussion are not particularly different to the skills that you deal with in the work that you do now?

DR RYAN (FRCPA): No, they're skills that carry right across the sector. So once you have developed skills in mediation, they can be transported to a whole range of mediations.

DR MUNDY: Mediation and understanding about how families work with each other?

DR RYAN (FRCPA): That's right.

DR MUNDY: Thank you for that. That is very helpful. Do you want to - - -

MS MacRAE: One of the questions we have asked a number of participants has been in relation to the intersection between having the family law at the federal level and the intersection that there is with state and territory family violence and child protection issues. In the ACT, for example, the Women's Legal Service there was talking about the problems that can present in having to present in a range of different fora the same sort of - you have got the same basic facts, but things have to be presented in a different way and the evidence is different in different courts and how difficult that can be for women to have to - well, typically women - present in those various fora. Do you have comments about how that works in South Australia and are there things that could be done to better manage the problems that can present by having that state/commonwealth split of responsibility?

DR MUNDY: You mean within the Family Court?

MS MacRAE: Yes.

DR MUNDY: I think that proceeding to Family Court for a lot of people, particularly women, is very daunting. Proceeding to the Family Court for Aboriginal people is a non-event almost, and that's nobody's fault except that, as I said in my submission, it's totally foreign to them, the idea of heading to Adelaide from the APY Lands into the Family Court. I think that, with respect, one of the things that we get really frustrated with, as mandated reporters, is reporting to Child Welfare or Families SA. It leaves us generally feeling very, very frustrated, extremely time consuming and often takes an hour and a half over the phone, but also, if you try and go online, it generally crashes.

I know there has been many attempts to try and streamline that, but in my opinion, at this stage, it's still something that's a real barrier to efficient service. My real concern is, just with respect to child safety, that I can't imagine most people I know, most of our clients - firstly, they don't have credit; secondly, they all have mobile phones. So to sit on a mobile phone for an hour and a half to report your neighbour abusing or neglecting a child is just a non-event, too. So I think that they really need to consider how best people can access those services that need to - secondly, the other thing that really concerns me, because we have a lot of child-at-risk matters is that there's no uniform Commonwealth system of child reporting.

For instance, a lot of people who are involved with neglect and abuse of children are very transient, quite often, because they can't pay their rent and they move out, or family violence very often. So they'll move interstate. They're move

through town to town and then often they'll move interstate and they'll get lost in the system because there's no - my understanding is there's no central reporting mechanism. Probably the highest risk can be lost in the system, without any doubt at all. I have real concerns for the reporting of child abuse, real concerns, and I have real concerns about - and I know that it's all streamlined, but I have real concerns about the three-tiered approach, too, because I think then the top tier, which is the most urgent, imminent danger, is - you know, because of resources, they're the ones that are tended to and then, underneath that, you're building the case for those that are developing into something possibly quite serious.

I find that really concerning. So just as far as child abuse and child reporting, that's something that has worried me for a while. With respect to family violence, whether there's a history or a pattern of family violence, we have to make decisions as to whether it's suitable for mediation. Because we're in a remote region, we don't have the amount of services and safety mechanisms that you might find in the city, so we tend to be more conservative in our approach to family violence. I think I was saying in my submission that we case manage. A lot of FRCs have a more segmented approach, in the fact that they might three or four practitioners moving through with their clients into the different part of the process, but from the very beginning, right through the process to mediation, if it goes ahead, and then any reviews after that and then any extensions of that matter will always come back to the one practitioner, so that - and I think as I was saying before, that client doesn't have to tell their story more than once, you know, because that's very stressful, particularly if there's family violence.

So we have a - which is more along the lines of the legal services, where they also case manage. So a practitioner will get the file and then they will do the intake and assessments, make decisions on that file as to whether it should go back to Legal Aid. We do warm referrals, help them fill out their Legal Aid form and then we say, this is better having legally assisted mediation. So we're very open to other ways of dealing with a matter. We don't hesitate to refer them into lawyers if we, in our opinion, think it should go to court. We never take risks because, you know, taking risks can come back on you and that family, and we found that the case management way of dealing with matters is much more constructive and protects families. What we also are dealing with - you know, we've been up and running for seven years, and each file and then a re-partnering of either of those partners - we're onto what I call the fourth generation of partnering and, of course, as you realise family dispute resolution is about children so each of those generations have had children.

So in that way, what we've learnt to do also is that gives us a cross-check of that whole family, so we don't leave a family in isolation. We'll be able to track, say, a woman if she's going into violent relationships. The other really good thing is with my work across the region in law I tend to often identify some of the other parties as

being some of my Legal Aid clients. They still remain in the system but I think file management is a really good idea to track those families and to offer the necessary referrals, and to track any patterns of violence. So we are a bit more conservative, I think, because as I said - because we certainly have access to wrap around services but not at the level that you might get in the city, particularly with family violence. So I think that's probably where women in the country struggle a little bit.

Firstly, a lot of them - as I once again said in my submission - a lot of them don't recognise family violence at all and I'm not just talking generally here. They have no concept about emotional or financial, or social - anything like that. They may not even see family violence as pushing and shoving. They will tend to see family violence as up against the wall, hands around the neck, possibly. So there's a real lack of awareness of family violence and I think one of the things with the family relationship centres is we put a lot of energy into identifying, raising awareness, parenting education and then going up into the more remote regions we've got Aboriginal staff and we do a lot of stuff about showing them DVDs, talking about conflict. You know, "Dads, this is what the impact on your family" - so in that way, FDR or family dispute resolution is much more suitable to many families than proceeding to litigation.

MS MacRAE: You said you've been there for seven years.

DR RYAN (FRCPA): In the FRC?

MS MacRAE: Yes. What happened in these cases before you were there?

DR RYAN (FRCPA): Before the FRCs were set up in 2006 - the first round of FRCs started in 2006, we were in 2007 round and then there was a 2008 round so all in all, there's 65 centres and obviously under the Family Law Act but also we're funded through the Attorney General's department.

MS MacRAE: Was there something in Port Augusta before you were established there?

DR RYAN (FRCPA): No, it was just Legal Aid.

MS MacRAE: That's really my question. So people were really very isolated at that point.

DR RYAN (FRCPA): Yes, they generally - as a family lawyer, they were often very demanding. Sometimes they'd come in every day but going to court once generally didn't do it. Often they would come back and they were restricted about how many times they could come back because they might not have merit, but it wasn't the need for litigation, it was the need to resolve the dispute I think, but

litigation was the only avenue for them.

MS MacRAE: And one that many wouldn't take, from what you said. So there was nowhere really for people to go.

DR RYAN (FRCPA): No, and often they would come in and this is why I think FDR is really good because they'd come in and you'd immediately file an application and then, you know, you'd ask for it to be withdrawn the next day because the child was back or everything was back, so there was a lot of time wasting or eating up resources.

DR MUNDY: These applications - I mean, are you dealing with these matters in the Magistrates Court in Port Augusta or are you having to do it remotely to Adelaide?

DR RYAN (FRCPA): We don't do it at the Magistrates Court. There was some talk that we would be part of a diversion program for perpetrators of family violence, but my understanding is that didn't go ahead, there was just talk about that and we would be part of the support services if they initiated a diversion court for them, but other than that we basically deal under the family law with separating families to make arrangements for their children.

The other thing that we do is we generally always encourage - because they're often newly separated or because of the tension and the conflict, part of the service is that we offer three or six month reviews, so we don't leave them flapping in the wind, we always put into a parenting plan that we will facilitate the family coming back in three to six months time, and then reviewing the parenting plan. So in that way, it's not a final order it's about adjusting the arrangements and the parenting plan to suit the changing circumstances of a post-separation family, really.

DR MUNDY: You described before a relatively socioeconomically depressed region in which you work, so I suspect the people that you see often have multiple civil law problems, there's probably debts, there's all that sort of - are you able to support them in the resolution of those sorts of disputes which may actually, I guess, either be a contributory cause to the family relationship problem or I guess - - -

DR RYAN (FRCPA): Exacerbate - - -

DR MUNDY: Or exacerbating it, or indeed probably in some, a consequence of that problem. Are you able to assist people? Are there services where you are to assist?

DR RYAN (FRCPA): All the FRCs have auspicing agencies and many of them are faith-based, but Relationships Australia obviously isn't, but our auspicing agency is

Centacare, Port Pirie diocese. So the whole idea about family relationship services is they were situated within auspicing agencies who could provide the wrap around services. So in that way - and many of them are - you know, they share the building. What's the word?

DR MUNDY: They're co-located.

DR RYAN (FRCPA): Yes, they're co-located. So with respect to our FRC Centacare in Port Pirie diocese, which stretches from Ceduna over in the west coast, right down to near Adelaide and right up north. We have a whole lot of other wrap around services to - you know, just for families. We've got quite a large Aboriginal staff and so they can often address - they often come out of the nearby towns or in the town that the Centacare office is located, so they can often identify the specific issues, family connections, kinship ties and some traditions and customs of that particular region, and the same in Port Augusta.

So that's something that people aren't aware of when they talk about Aboriginal. They see this holistic notion but the Aboriginal culture and Aboriginal society is highly fragmented and there's no concept of wholeness at all. Without any doubt at all, their first obligation and foremost is to their families, and then everything else comes from there. So it's really important that you do employ Aboriginal staff who can advise you to give you the cultural context in which you're trying to work or you'll come horribly unstuck very, very quickly because you'll behave inappropriately even though you think that's not the case.

MS MacRAE: Do you find that getting staff that have that skill and knowledge difficult?

DR RYAN (FRCPA): Yes, it is. You know, they don't have to be professionals but they have to have come out of the communities, or they can often be invaluable to locating you into the community, to integrating you into the community, to giving you legitimacy in the community because you can't just bring your organisation, particularly if it's government funded, plonk it in the middle of a community, an Aboriginal community, and say, "You beaut, here we are."

MS MacRAE: "Here we are."

DR RYAN (FRCPA): Because it just - - -

MS MacRAE: "Why aren't you coming?"

DR RYAN (FRCPA): Yes, it won't happen. So seven years later, we haven't - we don't really any more push our centre for FDR; we push our centre as this is somewhere you can go for a whole lot of reasons, including just a public space if you

need to have some quiet time and need to engage with - you know, have a cuppa. They come and they use our conference room for meetings and morning teas and afternoon teas and get together and yarning and all this. So you don't target specifically - I think I was saying you do it - you have a very low - you know, you keep under the radar and have a very low key, backdoor approach, so they sort of don't see you coming, really, because if they see you coming, they just think, "God, here we go again. Another one."

MS MacRAE: "Another authority telling me what to do."

DR RYAN (FRCPA): Yes, so what we do is, through community engagement, we get really involved in Aboriginal community events, including NAIDOC, which is huge up there, and we have developed legitimacy and credibility through our community engagement rather than, "Here we are. We can help you sort out your disputes."

DR MUNDY: In your submission, you mentioned there is actually a number of models of family dispute resolution throughout Australia. Can you give us a bit of a sense of the spectrum and perhaps why they are different? I can possibly have a guess why, but - - -

DR RYAN (FRCPA): Basically, when the FRCs all started, the reason that I'm fairly aware of what goes on across Australia was that all the new managers were brought together about three times to Canberra for training in the overall model and all expectations, the protocols, and processes. So out of that, the different models developed. Initially, it's been an interesting, sort of, evolution, I suppose, because initially there was that real expectation that they would run along, you know, basically the social work model; that the social workers would be at the helm, they would be the practitioners, because they used to do the mediations and they have traditionally before this.

So there was that expectation that you would have people who worked in transformative analysis, or social workers, or a few people who had done conflict resolution and things like that, and then, you know, they would sort of develop these models, but I would say, within a couple of years, there was a real sense that - and particularly the accreditation, where you had to know the law and you had to know family violence, you know, the acts and legislations, there was a real sense then that this really isn't very social-worky; this is really quite legalistic. I can't speak for all FRCs, but what happened, basically, across South Australia, because we collaborate quite a lot, is that more and more lawyers got involved and more and more FRCs were looking for lawyers to give them that direction and guidance with respect to where the FRCs sat with the law.

So when we first started seven years ago, I was the only lawyer in all the FRCs,

but now most FRCs, I think, would either be looking for lawyers or would have lawyers on board, family lawyers, and we've got all family lawyers and that's just coincidental. So that's the first part. You were given the brief and then you were told, "Off you go. Develop your centre." So with us, because I'd come from a Legal Aid background, the only thing I knew was the family conferencing that Legal Aid had. Myself and another retired senior family lawyer from Legal Aid, we developed our model because that's what we were comfortable with and also, as lawyers, we were also comfortable with that aspect, marrying it up with - but I think, without any doubt at all, it's shifted very much into the shadow of the Family Court and there's a direct line between us through the pathways into the Family Court and vice versa. Orders come down from the Family Court to the FRCs.

That's basically how it's worked. So as I said, we manage because it's very much a Legal Aid approach to mediation. That's what they do. Other FRCs, like the bigger ones, Relationships Australia, they'll have what I call a segmented approach. So you'll do a first contact, then another practitioner will be - probably a family adviser will pick up and do the intake and assessments and referrals, and then it will move into maybe a pre-review and then a mediator will come along and mediate. That's segmented, so they have people slotted into various roles. That works just as well. It's just a different approach and it's very suitable, where you've got a lot of clients feeding through.

You have to get much more production line and then you - you know, but the other FRCs, most of them, I think, do have a more segmented approach. I don't know anybody else that has our strict file management approach other than Legal Aid, but it was just who was on board, who understood, who was better, you know, qualified to set up something that they would - - -

MS MacRAE: But it sounds like the nature of your client bases as well, where you said you might get, you know, four families, effectively. That file management approach would work very well for you because you need that whole, much broader picture of what's going on. It might look like an individual family, but there's all this history which would help you in addressing those issues, so - - -

DR RYAN (FRCPA): One of the reasons that I'm really strict on it, a couple of years ago, we had a matter about a year earlier to that, where we deemed the matter unsuitable because of family violence and then she re-partnered and I - the files didn't run together then, three years ago, even though - so that one had been filed, but it was deemed inappropriate because of family violence. She re-partnered, but I was dealing with a file with her new partner, who, for all intents and purposes, looked perfectly normally, and he was mediating with his maternal mother in law about the children.

The mother was in the Riverland and one of the things that she was to have no

dealing with the children at all. Anyway, as it turned out, I'd done two mediations with him and the mother in law, for her to have some time with the children, and then shortly after that he murdered the current partner. If you go back through the files, you'll see the pattern of her re-partnering in violent relationships. That's why I really like our approach because we always pull the files together and you go back and, you know, you'll always be able to see what's happened in the past because, just on the face of it, you'd never know that had happened unless you'd brought the files together.

DR MUNDY: Thank you very much for your submission and thank you very much for coming down from Port Augusta.

DR RYAN (FRCPA): Thank you. It's been a pleasure.

DR MUNDY: Again, thank you very much for your time.

DR MUNDY: Could we have Mr Tim Graham, please? Could you please state your name and affiliation for the record, please, and then perhaps make a short opening statement?

MR GRAHAM (JSA): Tim Graham, and I'm the Executive Director of JusticeNet SA, which is a pro bono legal coordination service based in South Australia, obviously. Look, I wanted to just come along today to make a few points that I didn't make in my submission. Those are, at the broadest level, I think that it's important that this inquiry is about the efficient use of public resources, at the end of the day, and there should be provision for those resources to be used strategically, with flexibility in the delivery of those services. Innovation should be encouraged, collaboration and partnerships. I guess that is where pro bono service delivery fits in well. Also in my experience it is important that services that promote access to justice should be available at all stages of a legal dispute, if you like.

Although it is very important, particularly in the civil area, for early intervention and indeed there is a lot of resources put in that area, my concern is that there is an element that leads people stranded when going to court becomes inevitable, particular in the civil area. It leaves people stranded. There are very few - negligible - services available for people with civil law disputes where court is inevitable. Indeed that is where our self-representation service comes in.

I would like to put on the record, if you like, my general support for the three recommendations in chapter 23 in relation to pro bono services or at least three of the four; namely, support for volunteer practising certificates - I referred to that in my submission; the flexibility of aspirational targets and the importance of that, particularly for South Australia and those smaller jurisdictions. Anything that can be done to support services such as the one I run in the smaller jurisdictions I think should be encouraged. We don't have the critical mass, if you like, of the larger east coast jurisdictions that enable us to fund the service easily and sustainably without government support, and certainly I support the proposal about evaluation of pro bono programs that are funded by government, even though it doesn't affect me because largely I am not.

Quickly moving on to self-represented litigants, I was reflecting while I was listening to the other speakers that my message is that when someone faces court without a lawyer and 99 per cent of the time they are not really electing to do so - they are there because they have no other option - what is happening to them, what they are facing, is that on the one hand it is an alien world. They are completely overwhelmed. I daily come across people who have no idea what they are doing, what is going on.

At the other end of the spectrum, there are those people for whom that alien world becomes their entire world. It can become all-consuming. It becomes an

obsession in extreme cases - a minority of extreme cases - but understandably it also just becomes all-consuming because so much is at stake. Again my mind it really emphasises the importance of those tailored services like the self-representation service which we are operating to provide more than just information for people. It just doesn't cut it at the end of the day for those people who find themselves facing court.

I support recommendations 14.1, 2 and 3 generally. I have words of caution about the use of SRL coordinators. Generally I think it is a great thing to have those systemic changes within the court system. I just have some concern about that proposal for them to be able to step beyond impartiality and beyond legal information or just getting information and procedural information. I have a concern about stepping over into providing legal advice. I think it is very difficult, potentially difficult, and puts those staff members in a difficult situation where they might feel like they need to be responsible to their employer - ie, the court - in terms of getting certain outcomes, diverting clients out of the courts; where in actual fact it is important that they don't overstep the line.

I have made some comments in my submissions about my concern or perhaps some of the limitations with the duty lawyer services that are right at the very end of the process but I think I can leave my opening comments at that - if you have any questions.

MS MacRAE: You talk in your submission that you would have a preference to extend the self-representation service to South Australia's District Court. Could you talk a little bit about the costs and benefits that would be involved in doing that?

MR GRAHAM (JSA): The benefits would be that the unmet need is greater in the District Court. From our research that we have done, there are more self-represented litigants in the civil side of the District Court than the Supreme Court. The proportion is greater and the overall numbers are greater, substantially greater. There is simply greater unmet need. That's the benefit. The costs - well, we have got no way to fund that at the moment. Obviously it would require more funding to be able to provide that service.

MS MacRAE: Would you see that ideally coming from the South Australia government?

MR GRAHAM (JSA): It's a state court so I think ultimately it has to.

DR MUNDY: What does the current service in the Supreme Court cost?

MR GRAHAM (JSA): The funding for the pilot was about $25,000, so it is not much.

DR MUNDY: How long was it?

MR GRAHAM (JSA): 12 months. It is effectively one day a week for one staff member and a bit of admin and so forth. It is not much. To be honest, it is not enough. For the service to be sustainable, one of the things that I will be saying at the end of the day is that it really needs a little bit more. The coordinator needs an extra half a day at least. It operates much more leanly than the service in Queensland does. I think it is a bit too late at the moment, but from my perspective it was important to get a pilot up and running. I wanted to show - - -

DR MUNDY: If the pilot cost 25 grand for 12 months, the slightly extended, more sustainable version, might be 40.

MR GRAHAM (JSA): That's right.

MS MacRAE: Would you say the one day was sufficient or are you saying you think another half day - - -

MR GRAHAM (JSA): Another half day for the Supreme Court. If it was expanded to the District Court, it would need to be sort of three days a week. Mind you, there are additional costs that have gone in because of the set-up and because it was a pilot. If you were to extrapolate it out over three days, say, it wouldn't be - - -

DR MUNDY: Three times.

MR GRAHAM (JSA): - - - three times that.

DR MUNDY: But there are some fixed costs in it, we understand.

MS MacRAE: Just in relation to pro bono, unfortunately we ran out of time with the Law Society but they weren't keen on pro bono. If there were cost awards for a pro bono case, the lawyer that was representing in that case - their argument was that the money shouldn't go to the pro bono lawyer because that would look like a contingency fee arrangement and that is not appropriate.

On the other hand, we heard from Redfern Legal Centre yesterday and other CLCs - "If we could get some cost orders for our pro bono lawyers, that would mean we could put more money back into our pro bono fund and that would allow us to do more and it may make it more attractive for some of our junior barristers in particular and solicitors to do more pro bono work." I wonder if you have got a view on how you would see that, whether it is appropriate for them to have cost orders made and where that money should go.

MR GRAHAM (JSA): I definitely think it is appropriate that cost orders should be made. We would like to see the law in that area clarified a bit. I think it pretty much leans towards that cost orders can be made.

MS MacRAE: The uncertainty I think from what we have heard creates just a administrative burden, to make sure you have got everything set out in a certain manner.

DR MUNDY: There are really two issues in this. One is the incentives provided to the other party on the basis that they know they can litigate in the absence of a cost order to face them.

MR GRAHAM (JSA): Absolutely.

DR MUNDY: That's one issue which I think most people have agreed.

MS MacRAE: It's not appropriate.

DR MUNDY: It's not appropriate. The question then goes to, well, okay, where does the costs order go? You can deal with all the disbursements and stuff and then what is left? Where does it go?

MR GRAHAM (JSA): I don't have a problem with it going to the provider. I tend to agree with Redfern Legal Centre and also agree with the comments I think made in the Ashurst quite new submission, generally speaking. At the end of the day, pro bono matters rarely involve costs, being taken on where there is no expectation of a fee. They are not commercial matters. That's a way to distinguish them from conditional contingency arrangements. They might look similar if you think of costs at the end but they are not commercial matters and there's the fairness question about the other side doesn't face costs. To my mind - - -

DR MUNDY: And what does that mean for their behaviour as well.

MR GRAHAM (JSA): Exactly; to my mind, the important thing is that the client isn't out of pocket.

MS MacRAE: Yes.

MR GRAHAM (JSA): That preserves the pro bono nature of it.

DR MUNDY: I guess one of the submissions suggested that pro bono means it remains with the firm and the money goes back to the firm. It seems to me if the money goes to the pro bono lawyer, then their employment arrangement will see where the money goes at the end of the day and there was a point made that perhaps

more junior barristers, in particular sole practitioner junior barristers, might actually get the amount. It might not be necessarily a tremendously bad thing. Is that something you would be - - -

MR GRAHAM (JSA): That's right and I would think it would encourage more pro bono work down the track.

MS MacRAE: Yes.

DR MUNDY: We had a discussion yesterday with the Law Society of New South Wales and they were most concerned about pro bono lawyers, limited pre-practising licences and issues about appropriate payments into fidelity funds on the one hand but also issues around insurance, especially negligence insurance and things like that. Do you have any views on those two particular questions?

MR GRAHAM (JSA): Look, it's a bit outside my - - -

DR MUNDY: Particularly for people who had career breaks or they are not working for a firm who can extend their insurance to the pro bono activity.

MR GRAHAM (JSA): Yes. I take their concern. If it's a free practising certificate, then the insurance cost has got to be borne by the rest who are paying the premium, presumably. I think the risk is very low. I think it has cost benefits of encouraging people into the profession, you know, back to do pro bono work outweigh those other costs. I haven't seen their submission but - - -

DR MUNDY: So your view wouldn't be that the person being represented by the pro bono lawyer shouldn't have the protection of the indemnity insurance that a lawyer would normally be expected to have but rather, that perhaps the industry as a whole could pool the risk and spread it around, so that the pro bono certificate came with indemnity insurance.

MR GRAHAM (JSA): Yes, that's right. I think that's sounds like a proposal I would support, definitely.

MS MacRAE: I guess the one other issue they raised was if we were looking at providing free certificates for retired people who might have expertise but may not have practised for some years, whether there would be any requirements if they were to apply for a free certificate for some ongoing education of some sort or would supervision be sufficient.

DR MUNDY: How would their CPD be covered?

MR GRAHAM (JSA): Well, I think there should be requirements to undertake

CPD, for them to be able to renew the certificate. They are providing legal services like anybody else, albeit pro bono, and it's important that the recipients receive the same level of - - -

DR MUNDY: The clients, that they are getting - - -

MR GRAHAM (JSA): Exactly, yes.

DR MUNDY: - - - the full Monty not a cutdown version.

MR GRAHAM (JSA): Yes.

DR MUNDY: You mentioned briefly you don't have access in South Australia to the large firms that perhaps are available in particularly Sydney and Melbourne, I guess.

MR GRAHAM (JSA): Yes.

DR MUNDY: To a lesser extent Perth and Brisbane, I suspect, certainly not Hobart. Where do the bulk of the pro bono lawyers come from for you, so - - -

MR GRAHAM (JSA): In South Australia?

DR MUNDY: Yes.

MR GRAHAM (JSA): In the profession, the commercial firms in Adelaide, which are from the biggest here down to some of the smallest. Most of the large to medium commercial firms would be members of JusticeNet and they may provide a significant part of that money.

DR MUNDY: Government agencies, the Attorney-General's Department: the government agencies that might employ lawyers, do they participate?

MR GRAHAM (JSA): They participate in informal ways. It's interesting, the comments in the submission about encouraging the aspirational target and the way for making that a condition of government legal services. That's not really a model or something that works so well in Adelaide. There is not a lot of Commonwealth work in South Australia and - - -

DR MUNDY: I thought the whole state was Commonwealth work.

MR GRAHAM (JSA): Well, it doesn't really provide a substantial incentive here and the Crown Solicitor's Office in South Australia is very large. It's actually the largest law firm in South Australia. There is not a lot of briefing out, unlike a lot of

jurisdictions, so there is sort of the opportunity for getting some incentive around government making pro bono work a requirement for attendance. Really they are as much - - -

DR MUNDY: It should say attendance to attach.

MR GRAHAM (JSA): Exactly, but truth be said, we have got good relationships with the attorney-general and the Crown Solicitors Office. The Crown Solicitor's Office has actually adopted a formal pro bono policy. I think it's the first of its kind in Australia and they allow their employees to provide pro bono services up to the aspiration target and that works well for us, so I guess there are ways in which it works.

DR MUNDY: That obviously is readily available on the Crown Solicitor's web site.

MR GRAHAM (JSA): I'm not sure it's freely available but I am sure I can get a copy for you.

DR MUNDY: Is that something you can provide us with?

MR GRAHAM (JSA): I am sure I can.

DR MUNDY: That's a reflection of the fact that they don't put the work out in the same way that others do, so that structural issue has been to some extent ameliorated, because presumably the Commonwealth probably does most of South Australian work in Melbourne or something.

MR GRAHAM (JSA): Yes. That being said, anything that could be done to facilitate, you know, the sort of critical mass of funding for a service like ours in South Australia or other small jurisdictions is welcome. Certainly one of my concerns - I'm not sure how relevant this is for your purposes because it's about essentially state money - but a number of states, particularly Queensland, New South Wales and Victoria, have access to public purpose funding through interest on solicitors' trust accounts.

DR MUNDY: Yes.

MR GRAHAM (JSA): In South Australia, it's very limited. It mostly goes to certain sources, to certain legal service providers and there is only a relatively small amount which goes into a foundation and that's not able to provide for current funding. It's sort of a one-off thing, so we don't have the flexibility there for services like JusticeNet or new services that want to do remunerative work as there is in some other states.

MS MacRAE: Just in relation to the nature then of the services that you are able to provide - and I appreciate it's potentially more limited here, given the access to resources that you have - you have got the services that you provide in court. What's the nature of the other services that you might provide and are you able to provide unbundled services and are there barriers to that at all that are of concern to you?

MR GRAHAM (JSA): There are essentially two services. There is the court-based service for self-representation, the service which does provide the unbundled services, and we also have our referral service, which has an emphasis on representation and unless it's a referral for advice, it's generally not an unbundled arrangement. That being said, we like to try and limit the scope of a referral, so that it will be a referral, for example, to take something up to a mediation but no further, unless the firm agrees or we come back and we reconsider it.

MS MacRAE: Would you have a feel for how much unmet demand there is for that? I'm assuming you have to make some different choices about where those referrals go.

MR GRAHAM (JSA): There is definitely unmet demand and indeed, that's why we opened the court-based service and although the numbers are relatively small and it's early days, we haven't robbed Peter to pay Paul. By having people access the court, it hasn't meant a drop-off in demand for the other service and having the two services is very efficient, to be able to refer matters back and forth, and we see clients that come to us in court, repossession matters. We rarely saw those types of clients at our referral service and we are seeing quite a few at the court-based service.

DR MUNDY: I guess funding is always a challenge. I hate this language but have you given any thought to what in current popular parlance might be called a co-payment or is it just, A, that people aren't going to have the dough and, B, it's too hard to collect? Is it something that is worth considering or is there a better way of finding that funding source when matters go to court, pro bono lawyers getting paid?

MR GRAHAM (JSA): I think that's the preferred way. It would be very difficult to have some sort of co-payment arrangement.

DR MUNDY: You would have to raise money and - - -

MR GRAHAM (JSA): That's right. I mean, we couldn't do it administratively. That being said, I mean, I have often thought that I would like to see, as well as the pro bono service that we have, a low bono service, which is those firms that are willing to accept reduced fees but again, that's not a co-payment.

MS MacRAE: It's a good phrase though.

DR MUNDY: If there were a range of matters for which monetary settlements were substantial and they were more commercial - I am not talking about particularly personal injury type matters but other matters - some sort of contingency fee arrangement, would that be something you would find attractive or would you tend to work on costs only, prefer to work on a conditional fee basis rather than a contingency fee basis?

MR GRAHAM (JSA): Look, my argument is we wouldn't, because if someone is going to do it on a contingency basis, there would be someone out there in the market who will do it.

DR MUNDY: Who will do it on a contingency basis, yes.

MR GRAHAM (JSA): We do that. If there is a matter that comes to us and we think, well, someone can do this on a contingency basis, then we won't help them. We will refer them to someone who can. Mind you, there's not a lot of those outside personal injuries.

DR MUNDY: Yes, and I accept that there may be ethical reasons that personal injury and family matters might not be appropriate for contingency fees. I think we have got that message. Thank you very much for your time and your submissions and these proceedings are adjourned until 1.40.

(Luncheon adjournment)

DR MUNDY: I will reconvene these proceedings. We will now have the Women's Legal Service of South Australia. Could you please, for the record, state your name and the capacity in which you appear and then perhaps make an opening introductory statement.

MS NGOR (WLSSA): Good afternoon. My name is Zita Ngor and I'm the Director of the Women's Legal Service, and we'd like to thank the Commission for giving us the opportunity to present this afternoon. As you would have received in our submission, the Women's Legal Service is a community legal centre based here in Adelaide, but we do provide a state-wide service to vulnerable groups of women and we cover the whole of South Australia. So pretty much north, west, east and south of Adelaide. We prioritise our services to Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, particularly women from emerging communities, and also women living in rural, regional, and remote areas of South Australia.

You would have seen in our submission that we have quite an extensive outreach calendar so that we can provide services to women who live outside of greater metropolitan Adelaide. We believe that the opportunity to have face-to-face appointments and interviews with solicitors is an invaluable service that women, particularly in rural, regional and remote areas value greatly, as there are very limited services available outside of metropolitan Adelaide. The reason why we felt it was really important to appear before the Commission was to get the Commission to hear a little bit about our service and the work that we do, and the role that community legal centres play and how we can feed into some of the draft recommendations in the Commission's draft report.

MS MacRAE: I guess, perhaps, if you could open then with giving us a little bit more of an idea about your outreach services in particular. As you will see in our report, we did have concerns at the time of writing the draft about the location of some CLCs. I have to say, we have increasingly heard about the outreach services that many CLCs provide, but we would be particularly interested in that if you would like to expand on that for us.

MS NGOR (WLSSA): The Women's Legal Services - I should probably set the parameters of the funding that we receive. We receive funding - we used to exclusively receive funding from the Federal Attorney General's department, but now we receive funding from the Attorney General's department and also from the Office of the Prime Minister and Cabinet. So the funding has been split between two different departments. We are located - our main office is located in Adelaide and that was a strategic decision by the management committee of the Women's Legal Service. The majority of the South Australian population - the vast majority - do live in metropolitan Adelaide. So being located in Adelaide allows women who might rely on public transport to be able to get to our office easily.

Since we're located near the central markets, which is a major shopping hub, we often find that it's a really good opportunity for women, if they're going shopping, if they're attending to medical appointments in the city, visiting other services, that they can then pop into our office here. We did, in the past, used to also have a satellite office in Port Augusta. We've had to close that office because we found that having a physical, permanent presence was limiting the amount of outreaches that we could actually do. Since we closed that Port Augusta office, we have increased significantly our outreaches and, in the outreach calendar, you would see that we do visit a wide range of locations across South Australia. So we do outreaches regularly to Port Augusta, Coober Pedy.

We also have done outreaches for the first time last year to Ceduna and surrounding Aboriginal communities such as Yalata and Oak Valley. We also covered Port Lincoln. We do have a regular outreach to Murray Bridge, which has a large Aboriginal community nearby. We also have conducted outreaches in the last 12 months to Mount Gambier and surrounding regions in the South East. We also have an extensive outreach to the APY Lands, which we collaborate with the APY Women's Council in delivering services to Aboriginal women living in the APY Lands.

MS MacRAE: In relation to that funding that you now get from two sources, is there a level of certainty in both of those forms of finance for you, or is it a year-to-year proposition?

MS NGOR (WLSSA): We used to have triennial funding agreements. Unfortunately, over the last two years, we haven't had the triennial funding agreements and they've been rolled over on a 12-month basis. Looking forward for the services - and I did allude to it in our submission - we are looking at probably a 50 per cent reduction in the current funding that we get, which will significantly change the service that we provide to women at the moment because we do actually have a reasonable case load that we take on. With a 50 per cent reduction, we may potentially be looking at reducing the case load and not taking on any cases and becoming more of an advice and referral service.

DR MUNDY: We understand that the intention of the Commonwealth is to encourage CLCs broadly, I guess, or legal systems providers, to focus on what, I think, the attorney general describes - what have been described as front line services. By the sound of things, the reduction in funding is going to lead to - - -

MS NGOR (WLSSA): To impact - - -

DR MUNDY: - - - a reduction in front-line services.

MS NGOR (WLSSA): Definitely. For us - I mean, I suppose, for us, the biggest challenge is balancing our desire to provide a continuous service to women outside of metropolitan Adelaide whilst balancing that with taking on case work, which entails significant expenditure on our part as well because to manage cases, particularly if they do go to a trial stage, you've got briefing fees that you would incur - briefing and filing fees.

DR MUNDY: Briefly, are the character of these cases that would probably fall by the wayside?

MS NGOR (WLSSA): We predominantly do specialise in civil law areas. Family law does provide a major component of the work that we do, but we also do child protection. Consumer credit issues have been rising, and I think that's probably as a result of the current economic climate, so we have been having an increasing number of women coming to us with regards to issues around mortgages and bank re-possessions, also being left unfortunately after the break down of a relationship with debts from the relationship. We also do assist women with criminal injuries compensation, particularly where the injuries have been received as a result of either a sexual assault or domestic and/or family violence.

DR MUNDY: Quite often, these women that you are seeing - - -

MS NGOR (WLSSA): Would have a multitude - - -

DR MUNDY: - - - would have multiple and fairly complex needs and probably are not the most happy people in the world?

MS NGOR (WLSSA): No, and the reality is for our organisation, increasingly, we are finding that we are becoming the last place of resort for a lot of women. So when women come to us, we are not able to refer women to other organisations because often we're the last resort for those women. So if we don't take them on, or offer some form of assistance, whether it's just looking over the documents and not actually assisting them with representation, those women then don't have anywhere to go and if they do pursue the legal matters they do end up, I think, as either self represented litigants in the courts or a lot of times - or a significant minority of the women that we assist may not take steps to effectively either protect themselves or their children, or to seek fairer outcomes in negotiations for themselves.

MS MacRAE: How does the work that you do relate - we just heard from the Relationships Centre in Port Augusta. How does the work that you do coordinate with the work that they do.

MS NGOR (WLSSA): We do get a lot of referrals from various Family Relationships Centres, both the Port Augusta one and other Family Relationship

Centres. A lot of the time, mediators may send women over to us to get some legal advice about a parenting plan that they're considering agreeing to, just to make sure that the women understand any potential obligations that might arise and alternative options, and we do get a lot of referrals from mediators, particularly where they're wanting to cover off the basis if there have been allegations of either family violence or child abuse to make sure that the women are making informed decisions before entering into agreements, and we also do receive referrals from them in instances where matters may not be appropriate for mediation, and we in turn do refer clients to family relationship dispute resolution practitioners and the major reason is because we do often say to women who access our service if you can resolve disputes amicably that is often the best possible way to deal with matters and court should always be the last resort.

MS MacRAE: We heard from the FRC in Port Augusta that, in fact, for many Aboriginal and Torres Straight Islanders, that they actually just find the whole court process - - -

MS NGOR (WLSSA): Very daunting.

MS MacRAE: - - - very uncomfortable, and unapproachable, and so I guess if I can maybe not put words in your mouth directly, but if women aren't able to come to you for your service then the percentage that may then choose not to pursue because their only other option is going to be court could well be higher because there won't be a place for them to go.

MS NGOR (WLSSA): Yes, and I mean that is a major concern that we do have, and also because we do take on women with complex needs or who have multiple barriers to accessing justice, and one of the most obvious is if a woman is from a non-English speaking background. The current Legal Aid funding that is provided to private practitioners to take on Legal Aid matters doesn't enable them to hire interpreters and as you well understand when it comes to legal documents, it is really crucial that women who don't speak English have the opportunity to have that material interpreted into a language that they understand, so that they can participate effectively in the process and provide the court with the right information.

MS MacRAE: Just wondering then if you could also perhaps elaborate - we've heard quite a lot and we've heard from a number of disability service support organisations about the difficulties that women with multiple disadvantage might have with both mental and physical disabilities. Have you got anything you'd like to tell us about not just language barriers, but the other sorts of barriers that women might face, that you're involved with?

MS NGOR (WLSSA): Women with disability - unfortunately I think that's one of the vulnerable groups within our society who often don't receive an adequate service

and it's an area where Women's Legal Services long had an interest, and we definitely would like to improve the way that we work and are accessible for women living with disabilities, and currently women with disabilities make up about 14 per cent of our client group but we are aware anecdotally that there are a vast number of women living with disabilities who don't access or access a very limited amount of support services, and in many of the cases where we have assisted women with disabilities, whether it's mental health issues, whether the disabilities arise due to mental illness or a physical disability, there are extra hurdles or barriers that these women face.

They often find the legal system extremely daunting and sometimes because of their disabilities there are a number of negative assumptions made about - well, there are a number of negative assumptions that can be made by the legal system about their credibility as witnesses and it does impact on their ability to achieve fair and just outcomes, and to give you an example we assisted a woman and with this particular matter there was no legal avenues available for her at the end, but just going through the process of getting the information was of great assistance to this woman and enabled her to move forward. But in this situation, there was a woman who was deaf and she was sexually assaulted, and she came to us because she didn't understand why there was nothing going on with her criminal investigation.

So this was more of an advocacy role that we took on in terms of getting the information, speaking with the police to find out why the prosecution did not proceed and we were able then to, with the use of a sign interpreter, to relay that information to the woman and to provide her with that information. She chose not to pursue any other avenues but for her it was just about finding out why things had happened and having somebody take the time to explain to her.

MS MacRAE: Is there anything - I know you already are constrained financially in what you're doing, but are there particular strategies that you think would - what would sort of be the first cabs of the rank, I suppose - if I can put it that way - that might help you assist those women more if you had funding available, I guess, or is that too big a question, and it might be?

MS NGOR (WLSSA): In an ideal situation I think for us as an organisation we would wish that we could maintain the current funding levels that we have because the funding that we currently have has enabled us to - particularly in the last few years, to make great strides and being able to interact with diverse groups of women, and particularly women who traditionally have been really difficult for the organisation to access, and I think for other service providers to access, and one of our greatest concerns is that with the reduction of funding, some of those activities that we've utilised to make those connections and develop rapports may not be able to continue, and then that will impact on the numbers of women from particularly vulnerable groups accessing services, and - - -

DR MUNDY: So these are relationships with women's health centres and - - -

MS NGOR (WLSSA): Women's health centres and even directly with various women's community organisations. So we have a number of different strategies with engaging with women and for some of the target groups of women it is about going to places that those women feel comfortable in going to, and being there, and engaging with them, and sometimes it does take a number of interactions before they do trust you, and to give you an example we established quite a close partnership with a group of women from one of the Muslin communities here in Adelaide, and these particular group of women, due to their religious and cultural beliefs don't readily access outside services.

They have their own doctors that they see, their own health providers that they see within the community, so it's quite a closed community to access but we were able to engage with that community and develop a relationship where they've asked us on a number of occasions to do community legal education sessions for them on a wide range of different issues.

DR MUNDY: You mentioned before that if there was a reduction of your ability to take on case work that some of these women would walk away but some of them would probably go and self represent. Do you have any views about the services provided by other legal systems providers, I'm thinking primarily of Legal Aid type services, duty solicitor services and the extent to which they're responsive to the needs of women in general, responsive to the needs of women who suffer from some sort of disadvantage and what might be able to be done, particularly at relatively little cost, to improve those outcomes?

MS NGOR (WLSSA): I'd probably start off by saying that over the last couple of years we've seen a change within the duty solicitor role. Previously the duty solicitors used to in the Family Court play quite a significant role in terms of they would look over documents and may make a one-off appearance on behalf of self-represented litigants.

All those things are really important and crucial roles and recently there has been a reduction in services that they do provide to self-represented litigants. I do think that it is having an effect in terms of dragging out court processes and using limited court resources. One of the reasons why we place such a great value on our legal advice, our legal information help line, is that enabling people to have information, and particularly legal information, helps them to make better choices about what their avenues are and whether it's worth pursuing a matter.

If those options to gain legal information are not available, then people don't have any guidelines to assess whether their matter has legal merit. So we do believe

that the duty solicitor roles are crucial but we would like to probably see a return to the roles that the duty solicitors used to play previously within the court system.

DR MUNDY: Is your sense the reason why this role has changed is simply increased burden and decreased resources?

MS NGOR (WLSSA): I think that would be the major reason. Definitely within the Family Court, which is a court that we attend at often, there is a lot more self-represented litigants appearing before the courts, a lot more than we would have seen 10 years ago.

DR MUNDY: And?

MS NGOR (WLSSA): And at the same time there is also less private solicitors who are doing Legal Aid work and a lot of the private legal practitioners are of the opinion that the amount provided under the Legal Aid funding guidelines is not enough to meet the cost of adequately representing people in court. So a lot less private solicitors are - - -

DR MUNDY: Is your sense this increase in self-represented litigants is a flow-on effect to slowing down the court; judges have to spend more time, registrars have to spend more time, matters get adjourned.

MS NGOR (WLSSA): Yes. The judges have been extremely patient and the court staff have been extremely patient with self-represented litigants. When I have been in court judges have given self-represented litigants an enormous amount of their time by providing information and general legal information about the court process, about what they need to do next in terms of, "You need to file this document. You need to set out in this document what orders you're seeking from the court." So actually giving self-represented litigants who are before the court information and instructions about how they manage their cases.

Whilst I do commend the court for taking that time out and assisting self-represented litigants, I think that that kind of work should probably be picked up either via community legal centres or by the Legal Services Commission.

DR MUNDY: So the courts are doing something and someone else's time would be better spent and they could get on doing the business of the court?

MS NGOR (WLSSA): Yes. I do mention vexatious litigants. I do provide some case studies about some of the matters that the courts are dealing with. We are seeing an increasing amount of matters of those natures where sometimes as legal practitioners you're thinking that these are not really appropriate to be brought before the court and I did put a case there that was - we shook our heads when we had to

deal with this particular matter because it did basically hinge on doorhandles on a cupboard which was the whole basis for the application. This matter was listed three times before the court before we were able to get a summary dismissal, but that's utilising court time and court resources unnecessarily.

DR MUNDY: These vexatious matters - presumably in family disputes I presume is what you're referring to?

MS NGOR (WLSSA): Yes.

DR MUNDY: They are being brought by - I presume they are being brought by male self-represented litigants.

MS NGOR (WLSSA): Yes.

DR MUNDY: If these men were represented there would be someone there that the judge would look at and say, "Mr X or Ms X, why are you here?"

MS NGOR (WLSSA): Yes.

DR MUNDY: Whereas they don't feel that they can just - - -

MS NGOR (WLSSA): Pursue that.

DR MUNDY: If they were represented they would probably get struck out on day 1?

MS NGOR (WLSSA): Yes.

DR MUNDY: Okay. Angela?

MS MacRAE: We have asked some of the other women's legal services about the intersection between the federal family law and the state-based children protection and domestic violence laws. Does that divide between the Commonwealth and the states create any particular problems for your clients and, if so, is there anything that we could recommend might reduce some of those problems?

MS NGOR (WLSSA): I think one of the things that Women's Legal Services have always campaigned for is some harmonisation between the family law system, child protection and the protection order system because for a lot of our clients there are intersections between all of those different legal arenas and it's not uncommon that you would have a woman who is dealing with a children's matter in the family law courts. At the same time there might be assault charges that are pending, intervention order proceedings and there may potentially have been involvement

with Families SA, which is our child protection agency here in South Australia.

MS MacRAE: Yes.

MS NGOR (WLSSA): What we often find quite difficult to deal with is because our child protection agency states that it has limited resources, it often relies on our clients to make applications to the Family Court to seek orders that protect the children.

In some of these matters it is our opinion that they should really be dealt with in the realm of child protection proceedings, because we have subpoenaed documents where the department has made it abundantly clear that if the other party has access to the children, that they would then act to remove the children but because of resources and because the woman has told them that she had got legal advice from Women's Legal Service, they then say, "Okay. Well, we're going to not take any action if you're going into the Family Court arena." The Family Court then has to deal with issues that should probably be dealt in the child protection arena and so there is quite a considerable amount of overlap between those three jurisdictions.

One of the things that we have highlighted, and I think was highlighted in the Women's Legal Services Australia submission, particularly with the way that the Legal Aid eligibility criteria is administered and the way that the funding is structured, you sometimes would have a woman who might be represented by the Legal Aid Commission or a private solicitor who has obtained Legal Aid funding in regards to the children's matter but in regards to either any potential child protection proceedings or the intervention order, they could be assisted by a community legal centre such as ourselves.

So sometimes women are dealing with up to two solicitors at a time in regards to their legal matters, whereas in actual fact it probably should be dealt with by the one solicitor because it's all based on the same individual, the same family dynamics, the same issues.

DR MUNDY: It's the same problem?

MS NGOR (WLSSA): Yes.

DR MUNDY: I'm just mindful of the time. There's one thing we have asked a number of CLCs through the course of the hearings today and that is what do you see as the importance of CLCs broadly, and your own in particular I guess, in advocacy and law reform issues and what other benefits that you see that those activities bring benefits in the sense of access to justice and perhaps also they may, at the end of the day, be cheaper ways of dealing with systemic problems than having to build up a body of case law until it fills the room?

MS NGOR (WLSSA): I mean, I think that CLCs in terms of the legal landscape play quite a crucial role in filling in the gaps and picking up vulnerable victims that fall between the gaps and the law reform work that we do feeds into that ethos. So in terms of law reform, community legal centres take on law reform initiatives that will have an impact not just for one person or one small segment of the community but for the wider community. We can do that in many different ways and I will give you some examples from law reform initiatives that Women's Legal Services South Australia has been involved in.

One of the law reform initiatives that we have been involved in is the campaign with other agencies and services to have a coronial domestic violence homicide review process here in South Australia and the reason why we campaigned about that was looking at trying to build up - trying to get through the coronial process some recommendations that would deal with systemic issues and particularly for us as an organisation we were passionate about this because through our work with the APY Lands we noticed during a three-year period that there was quite a significant increase in the number of Aboriginal women would were being killed in the APY Lands.

The APY Lands, there are a number of small communities there. The population group is not that large and so for the number of women who are dying as a result of domestic violence homicide, the impact on the APY Lands was enormous because it's not just impacting on their immediate families but also the family within the wider kinship structure and also within the wider community and so we were particularly interested in looking at what kind of systemic changes could occur within the system to prevent other deaths from happening and so that's just a small initiative that we took in collaboration with many other organisations here in South Australia.

Because of that campaign we were able to - for a limited time the South Australian government actually engaged a policy officer to work within the coroner's office to look at domestic violence homicides and from that we've had a number of coronial inquests which have made some major systemic recommendations and our hope is that through that process we can prevent other women from dying needlessly. I think that's the power of law reform initiatives is that it does enable us to work beyond the individual and to have a broader - to make broader changes to the system that better protect not just vulnerable people with - or vulnerable people groups within our community but also you have a long term benefit to the wider community.

DR MUNDY: In the absence of funding to support CLCs in undertaking this work, how do you think it will happen or do you think that it will not?

MS NGOR (WLSSA): Well, we've just done a stakeholder engagement

consultation this year and one of the things that a lot of the stakeholders highlighted as the strength of the Women's Legal Service was our work around law reform initiatives and policy. Even though law reform forms quite a small part of the work that we do we probably only spent about 20 per cent or even less than that on law reform. The impact of the amount of time and resources that we do put into it, that far exceeds the amount of resources that we spend on law reform.

For us, to be truthfully honest, I think that because we are often looked at at the organisation with specialist legal knowledge about domestic violence and family violence a lot of that work probably will not be picked up once we're no longer in a position to undertake law reform and so then it becomes about Woman's Legal Service, if I can say, being creative and supporting the broader community to try and pick up, if you like, and fill the gap that's been left.

DR MUNDY: Thank you very much for the time you've put in putting a submission to us and coming along here today and participating in an advocacy based public policy reform process.

MS MacRAE: Thank you very much.

MS NGOR (WLSSA): Thank you.

DR MUNDY: Could we now please have Drs Appleby and Le Mire? Thanks very much. When you are settled and all ready to go could you please state your names and the capacities in which you appear today for the transcript?

DR APPLEBY (UA): So my name is Dr Gabrielle Appleby and I'm a senior lecturer at the University of Adelaide.

DR LE MIRE (UA): I'm Susan Le Mire, Dr Susan Le Mire, also at the Adelaide law school at a senior lecturer.

DR MUNDY: Would you like to make a brief introductory comment or two?

DR APPLEBY (UA): I'm just going to make a very short statement on behalf of us both and then we'll both be available to answer all your questions.

DR MUNDY: Sure.

DR APPLEBY (UA): We made submissions only in relation to your inquiries in the model litigant obligations and so that's what I'll be speaking to. The main point that we want to stress in relation to reform across all level of governments is the need for greater clarity and transparency in this area. This will obviously assist the non-government litigant involved in litigation against the government but we think it will also provide a more certainty to government litigants and those advising government and it will also provide a proactive side by a government about the importance of the obligation.

So the detail of all of our recommendations is in our submissions. I just wanted to note four areas in which we think greater clarity and transparency would be helpful. First of all - and this is something that was picked up in the draft report by the commission - is the need to clarify who is bound by the model litigant obligations and to what extent. We think that this is probably best done through the publication of guidelines and information on the obligation, certainly at the commonwealth level this is done well and in some states and territories but in other states and territories this isn't published and there's nothing in regard to the extent to which local government is bound by the obligation.

The second point is in relation to the content of the model litigation obligations. The current articulation of the obligation in the Commonwealth Legal Services direction indicates that whilst there's an obligation to act honestly and fairly on the one hand, there's also the right to defend firmly and properly the rights of government. The issue that we have is there's no real clarity in terms of when these two areas contradict as to how they're balanced up and we think that clarity could be achieved in this aspect through illustrations, through case studies and this would clarify, again, for those involved, government and non-government alike.

Thirdly, we think there needs to be greater clarity in relation to the role of government versus the courts in enforcing the model litigant obligation. At the moment it seems that both the government and the courts are involved in enforcing the model litigant obligation, although the courts aren't necessarily limited in doing so and it's very unclear as to how they interact and overlap and we think that the roles of the government, the different branches, their powers, their enforcement powers, the level of co-operation between the two should be clarified and formalised.

Fourthly, we think there needs to be greater clarity in relation to the ability to bring a complaint and what happens with a complaint, so for non-government parties involved in litigation and feels that the government party has acted not in accordance with the model litigant obligations, we think that there needs to be a transparent, independent complaints system established. At least the Federal level at the moment, complaints, as we understand, are forwarded to the agency involved for them to deal with, to manage, resolve and then report back to the Attorney-General's department and we think that it's unacceptable insofar as best practice of dealing with complaint systems. It really doesn't tick any of the criteria.

DR MUNDY: I will not ask you to tell me which states are bad. You can just tell me which ones are good. We will work out the others.

DR APPLEBY (UA): Well, certainly those states that have acted to bring some sort of transparency as to the guidelines have really followed in the footsteps of the commonwealth, so you have in the ACT they've actually enacted something very similar to legal services' direction so it's in legislation, delegated legislation. At New South Wales and Victoria there are guidelines that have been issued, I believe by cabinet, that have come from government and then there's something a little less formal in Queensland and South Australia.

I think in South Australia the situation is there's been a crown solicitor's note that's been circulated about what the obligations are so that really actually holds, you know, no weight or formality.

DR MUNDY: We can draw conclusions about the others. Local governments and conduct of local governments as a regulator is actually something that I presided on a very extensive study of a couple of years ago for the commission and it did seem that there was no systematic way. There might be local government ombudsmen somewhere but they're typically worried about corruption rather than the way people are being treated, but one of the points that was drawn to our attention and this is a broader thing, I guess - is that it is well and good to have a system of model litigant arrangements, but perhaps by the stage that the litigation has happened, the horse has bolted, and what is really required - and I cannot remember who suggested this to us in Sydney - but what we actually need is model dispute arrangements so that, perhaps

if we could guide the disputing resolution behaviour of government agencies, we could cut off some of the litigation before had to even worry about the model litigant rules, and this goes to a whole range of issues.

I guess I am wondering, do you see a relationship between these litigant rules and - certainly, the Commonwealth has dispute resolution guidelines. Do you see these two things should - to what extent do you think they are, in practice, related and should they be?

DR LE MIRE (UA): I think within the existing Commonwealth model litigant rules, there are some gestures in that direction already, in that they are not supposed to be taking disputes that are against the public interest and so on. So I think they are clearly - there is a relationship. The existing ones gesture in that direction, but I think, as Gabrielle has stated, they need more articulating, which would then address that concern as well, I think.

DR MUNDY: Would you see that such articulation might create, if not an obligation, a presumption for some sort of mediation or other ADR process prior to litigation? This point was made to us in Sydney yesterday; that whilst obviously not all matters are amenable to mediation, a lot of particularly what you might call "regulatory disputes", where there is a profound breach, could be better resolved through some sort of obligation to mediate or conciliate prior?

DR LE MIRE (UA): I would have thought that was something that should be thought about and, even if it does proceed to litigation, there is also a number of court-sanctioned processes that would try and divert it before it actually gets to trial as well.

DR MUNDY: And the Civil Procedure Act of the Commonwealth as well, obviously.

DR APPLEBY (UA): There's certainly been some comments by the judges around the model litigant obligations as well when matters have come to Court, that the government should have acted in another way to resolve it so it didn't have to come to Court. Certainly, at the common law level, this idea of the model litigant extending, just in terms of where there's a dispute, not where there's necessarily litigation yet, it's not outside the boundaries.

DR MUNDY: Is any of that case law referred to in your submission? Pardon me for not being able to recall.

DR APPLEBY (UA): Yes, I can't recall the case off the top of my head. It's the case from Queensland.

DR MUNDY: Could you just send us an email? That would be most helpful.

MS MacRAE: You mentioned in your opening comments about content and how important it is to illustrate, where you might have conflicting objectives to work out where the balance might lie. If I can just cheekily give you - one of our participants in Sydney had said, "It's all very well having these model litigant rules, but to be honest, I've never seen it have any impact in practice on any case I've ever been involved in. Whether they're there or not hasn't made a blind bit of difference." Are you able to comment on that? He was particularly involved in personal injury cases and so was dealing with the other side being very big players. Would you have a view about that? So there's the content, in terms of clarifying what's there now, but would you say that the rules themselves provide sufficient strength, I suppose, that it will make a difference where you have a power imbalance?

DR LE MIRE (UA): I think there's a number of parts to that. How much are they - in a sense, you're not going to see the disputes come forward necessarily where they're working; you're only going to see them come forward where they don't work, I suppose. So he probably is perhaps seeing a bit of a skewed view of matters come forward, but the second issue is: can they change behaviour, I suppose, is at the heart of that. I don't see why they can't. I mean, I think policy is - if you say policy can't change behaviour, then you're kind of throwing in everything that we do. Laws, rules have the capacity to change behaviour, but I think that one of our points is that these are probably inadequate, imperfect ways to try and change behaviour. So I don't know that I'd go as far as saying that it's impossible that they can work, but I think, as they stand, both the problems with enforcement and the problems with articulation undermine the primary goal. So if they're not making a difference, it might be partly due to those, not because the aim is imperfect.

DR APPLEBY (UA): Just one point, just picking up on what Suzanne said, is the idea of enforcement and really the message that's being put out there by the current model litigant obligations is itself enforcement, self regulation, and self resolution of disputes, and that's not really putting a sign out there that these things are taken seriously by government. The other point I would like to make, too, is that I think it really depends on the area in which you're working. Okay?

So you might be working with a statutory authority that may be engaging private solicitors who otherwise don't work for government. You may be engaging a government department who always briefs the Crown Solicitor's office, or the AGS, who are very cognisant of the model litigant guidelines and adhere very strongly to them. So I think there is a large disparity across government in terms of compliance. I don't know what the personal injury sector is like, but it would strike me that might be a sector where there is low compliance.

DR MUNDY: I think his reflection was particularly in relation to some statutory

insurers in New South Wales. Of course, there is one notorious case in relation to enforcement of the national electricity law, where the ACCC claimed it could not pursue an electricity company because of the constraints placed upon it by the Commonwealth's model litigant rules. Putting that all - we did not quite understand that one, but apparently - with respect to enforcement, the model you - the model that is the case does seem not to be laced with transparency, but what is the alternative?

I mean, not wanting to recommend the establishment of yet another Commonwealth agency, is this something - given, I presume, the number of complaints of serious breaches of the guidelines is probably not very many each year, will the ombudsman be an appropriate place? We are talking about the conduct and the behaviour of public officials. We are not actually talking about a decision that they are making, which is perhaps better addressed by the AAT or some other merit review body. Would you see that the ombudsman - given its existing statutory capacity to do the job and perhaps an arrangement whereby aggrieved persons or judges, in the event that they see this behaviour - could simply refer it? It could then be published. It could be subject to the scrutiny of parliament. Would that be a framework that you think would work?

DR APPLEBY (UA): Look, I think that's a very workable idea. I think, whilst there's a lot of emphasis placed on the importance of having an independent complaints system, as opposed to the system we currently have, you don't want to over-egg the pudding. You don't want to create a brand new authority to deal with - - -

DR MUNDY: Half a dozen, or 20 complaints a year.

DR APPLEBY (UA): - - - a relatively small number of complaints every year, particularly when the type of complaints system that we're looking for, independent from the agency involved, that's got a system of sorting complaints, that has a transparent way in which it operates, already exists in the statutory authorities of the ombudsman. The other beauty of thinking about the ombudsman is we know the states and territories take their cue from the Commonwealth. You know, the guidelines in the states and territories are largely modelled on the Commonwealth. So the ombudsman exists in all of these different jurisdictions, so it could be something that could be modelled across Australia and local governments are also subject to the jurisdiction of the ombudsman.

DR MUNDY: I guess the other attraction is the ombudsman is not a creature of the executive; it is a creature of the parliament.

DR LE MIRE (UA): Can I just add one further point that I think that reporting mechanism for judges is really important because that's where we're seeing someone picking up on problems with adherence to the litigant rules, and yet there is not

necessarily any formal reporting except in the judgments themselves.

DR MUNDY: Would we need to provide some sort of statutory basis for judges to do that, or would it be simply enough - I mean, I guess the question is: what process then exists by way of - let us assume it goes to the ombudsman. What process exists or needs to exist for judges to be able to pass these matters on? Is it simply a judge writes a letter saying, "Dear Ombudsman, This is pretty crook, have a look at it." Should that communication between the judge and the ombudsman be a public communication, or should it become public only after the ombudsman has formed a view that the guidelines haven't been complied with. We are asking judges - I know that they don't like being asked to do things, and they will think about chapter 3 of the constitution, I'm sure, and how do we make this work? I'm attracted to it, I just want to understand how we might be able to frame a recommendation without the need to - - -

DR APPLEBY (UA): I think that in a sense there is already a public avenue for judges to express their complaints. If you read through transcripts or you read through judgments, there is quite often a statement of disappointment in terms of the way which a government litigant has conducted itself in the course of litigation. Certainly, one of the possibilities that I have explored is that, in fact it's not the judges reporting to the ombudsman, but it's a much better system whereby an ombudsman officer is keeping track of these comments that are made by the judiciary, and maybe the judgments are referred by the courts to the ombudsman. It's a public comment, it's available in the transcript or in the judgment, and it's just a matter of the ombudsman collating them.

I have to think it through a little bit further, but you would have to be careful about placing a reporting obligation on a judge, particularly if it wasn't in a public sphere, not in the exercise of judicial power. I think it might be easier if it was just picked up on judgments that were already occurring.

DR MUNDY: If you want to come back to us with a short note or something on that, if you want to have a think about that. I mean, what worries me on the flip side is that some poor sod in the ombudsman's office is going to be sitting there, rooting through judgments and odds and sods, and if it extends then to local government, does it extend to their conduct, for example, in a planning tribunal? You know, what are the issues there, because not all decisions in planning tribunals are reported. So I'm interested in the data capture and how the ombudsman, they say they are going to do it, et cetera. Pretty clear - - -

DR APPLEBY (UA): There certainly could be some more cooperation in terms of the courts alerting the ombudsman, rather than a data crawl - - -

DR MUNDY: That's right. It may well simply be there's a bit a note goes round the

courts saying, "If a judge or a tribunal member makes an obligation of this type, could you please just ring a bell and let us know."

DR LE MIRE (UA): It might be that by creating the gateway, being the ombudsman, that that will do something to give them - - -

DR MUNDY: Yes.

DR LE MIRE (UA): At the moment they go only to the parties and are reported publicly, but there's no sanctioned complaints.

DR MUNDY: I wouldn't want to be the New South Wales ombudsman getting every judgment that came in and to have a squiz at it. We made some observations about the underlying rationale from what the litigant rules being about asymmetries and power; obviously the state has a peculiar characteristic to it, but what it also has, in common with other powerful litigants, is its economic capacity. We made some observations about whether it might be a good idea to extend the model litigant rules to, for example, say insurers who, when they're dealing with a personal injury claim, are clearly in an asymmetric power relationship. Do you have any thoughts on that sort of approach?

DR LE MIRE (UA): I think there's probably two reasons why I would be very cautious on that front. The first is that those private parties have different - essentially, the model litigant rules are partly founded on the fact that government has not just an economic and repeat player advantage, but also because they are supposed to act in the public interest. That's not the case for the insurer; their interest is private, so it doesn't have the same foundation.

I think that one of the arguments we have made about the model litigant rules is that they do focus a bit too much on the economic disparity and a bit less on some of the other things that should be considered in the public interest. Obviously, that is not going to work so well if you start expanding the groups. I think making these more effective might involve having another look at what other obligations government litigants have because of their public interest role as apart from their economic might, if you like. The other thing I think is, if you make these too generally applicable, then there's a danger that they just become part of the landscape and no-one pays any attention; so I think that the knowledge that they apply to government lawyers gives them some greater force than they might have than if they apply to lawyers in large organisations, say.

DR MUNDY: And, presumably, they should equally apply to all activities conducted on behalf of government when the matters are briefed out.

DR LE MIRE (UA): Exactly, yes. If the complaints mechanism was made more

robust, what sort of penalties - if "penalty" is the right word - for transgressions do you think might be appropriate?

DR APPLEBY (UA): I think if they are talking about the ombudsman, you would feed into the ombudsman's jurisdiction in terms of making recommendations for redress, and I think that you shouldn't try to limit - the beauty of the ombudsman is the flexibility. It can range from coordinating an apology and sort of a mediation between the parties, if it feels there has been a wrong, all the way to recommendation for payment of compensation, if that's where the wrong has occurred; so I think that perhaps the beauty of the ombudsman is the remedies, or the recommendations for remedies could be very broad, and I think that that would be appropriate, and it just needs to be tailored to the transgressions.

One of the problems with leaving it with the courts in the way that it's currently enforced is they have very blunt tools. It's costs orders or staying of proceedings, and that's all that has been able to be used up until this point.

DR MUNDY: So really the ombudsman is pretty well set up to do this job, other than the fact that the ombudsman can never do more than recommend. At least the court, if it makes a costs order, can enforce it, whereas the advice of the ombudsman is - a bit like the advice of the commission really - government agencies and governments can take it or leave it; so that would be the downside. Is a report of the ombudsman of any value in subsequent litigation to a party who felt they had been sufficiently aggrieved that they would have a cause of action?

DR APPLEBY (UA): I'm not sure whether, it would depend how legislation was drafted where a cause of action might arise for a breach of the model litigant obligation.

DR MUNDY: So it's currently a creature of delegator, a legal services direction is a - - -

DR APPLEBY (UA): It's a creature of delegated legislation, and it doesn't give rise to a cause of action, so it specifically states that, so that would have to change if that sort of redress were available.

DR MUNDY: And that would mean it would presumably need to find its way into primary legislation to be given that capacity.

DR APPLEBY (UA): Certainly, the prohibition on it being a cause of action at the moment is in the Judiciary Act in the primary legislation, so that would have to be amended. I think it's about 55Z(h) or something like that.

DR MUNDY: All of those, all those Zs.

DR APPLEBY (UA): The ombudsman makes recommendations, the reports are public. Generally speaking, there is a large amount of cooperation between government agencies and the ombudsman in relation to making sure those recommendations come to fruition, so even though it's a toothless tiger in a formal sense, it has been a very effective tiger in a practical sense, and I don't think we should underplay that aspect of the ombudsman.

DR MUNDY: And the information is in there and, presumably, will come to the attention of one of the senators in the estimates committee and that will cause a particular agency grief.

DR APPLEBY (UA): Or the attention of the media. It's a publicity transparency, it's not within the agency.

DR MUNDY: Anything else?

DR APPLEBY (UA): I don't think so.

DR MUNDY: Thank you so much for coming all this way.

DR APPLEBY (UA): Thank you.

DR MUNDY: You have come even further than the small business commission. Thanks very much. Thanks for your submission, and if there's anything on reflection that comes out today, just shoot us an email and - - -

DR APPLEBY (UA): I will send you an email at least with that case name.

DR MUNDY: Yes, that will be very good. Thank you.

DR APPLEBY (UA): Thank you.

DR MUNDY: Could we now have the Aboriginal Legal Rights Movement, if I'm not too far ahead of time to inconvenience you. We have a plane to catch to Perth this evening, you see. Thank you for being here early. When you get settled, could you please state your name and the capacity in which you appear and perhaps make a short opening statement.

MS AXLEBY (ALRM): My name is Cheryl Axleby. I am the chief executive officer of the Aboriginal Legal Rights Movement.

MR CHARLES (ALRM): And my name is Christopher Charles. I am the director of legal services. I am the chief lawyer of the Aboriginal Legal Rights Movement also. We are an Aboriginal Legal Service funded by the Commonwealth Attorney-General's Department as part of the NATSILS umbrella.

DR MUNDY: Or now the Department of Primary Industry?

MR CHARLES (ALRM): I'm sorry?

DR MUNDY: Are you still with the - - -

MR CHARLES (ALRM): We are still with the Attorney-General's Department.

DR MUNDY: Still with AGs, okay.

MS AXLEBY (ALRM): We have been told that we will remain with the Department of the Attorney-General.

DR MUNDY: I'm glad you understand that. Would you like to make a brief opening statement?

MR CHARLES (ALRM): We endorse the overall NATSILS' submission which obviously you have received as a broad response to the draft report. We also refer to our earlier November 2013 submission which was in more detail perhaps in relation to the same topics. We have put in a number of things that we think it will be helpful for you to hear from us about specific topics which affect us and which concern us.

You have asked for detailed explanations about good cooperation between state and Commonwealth officials and Aboriginal Legal Services. We are glad to tell you that we have an example of that. In the middle of last month, the Aboriginal Legal Rights Movement was responsible for putting on what was called a dry communities summit which was funded by Prime Minister and Cabinet, the liquor and gambling commissioner and the State Department of Aboriginal Affairs. We had representatives from most Aboriginal communities. We had the deputy coroner. We had the liquor and gambling commissioner, senior police, ALRM and doctors from

the Aboriginal Medical Service all talking about issues that arise from excessive alcohol consumption in remote communities and how to deal with it and how to get effective remedies against it through using the legal system.

Of course you would have noted also from the National Partnership Agreement report that ALRM is actually cited in that report for the work that we have been doing in the civil jurisdiction since the 1990s, working in the licensing court to get restrictive licence conditions to stop takeaway getting to remote communities. We think that is an overall benefit and a good use of the legal system by an Aboriginal Legal Service for the benefit of Aboriginal people and for a whole lot of other reasons as well. That's a generalised opening statement.

We also endorse what the NATSILS have said generally about the need for the continued recognition of Aboriginal Legal Services and for increased cooperation by the states and territories with the work we do for all of the reasons which were stated in the NATSILS' submission. That is just a generalised observation.

MS MacRAE: I guess one of the things that we have talked about a lot with many of the organisations that have come before us is the balance of work that you do between direct case work type assistance, education and information, and what you do in what might be termed the sort of law reform space and whether you see the funding pressures that you on you now necessarily changing the balance of that, particularly given statements from the Commonwealth that they are wanting to look more at frontline services and less at law reform.

MS AXLEBY (ALRM): I suppose from the perspective of the Aboriginal Legal Rights Movement board, we are very concerned about the proposed cuts to law reform and advocacy. Aboriginal Legal Services have a history of I suppose being the key agency in many states to highlight the needs and the struggles of Aboriginal people within the justice system and also across the board. Our perspective is that we are very concerned that there is a focus on that but from the Aboriginal Legal Rights Movement perspective, we don't actually have specific positions that do that. We actually share that within the responsibilities of many positions within the organisation.

I suppose from my own personal experience, I have got a history of being with Aboriginal Legal Rights for over 20 years on and off. To see key significant inquiries such as the Royal Commission into Aboriginal Deaths in Custody, the removal of Aboriginal children inquiry - there have been many significant reports that have actually commenced with Aboriginal Legal Services actually highlighting a lot of those concerns from an Aboriginal community perspective. I'm not really sure whether the government in its current context is trying to pare that back, whether it is about not having funding for services that might in some sense go against current government policies and positions. I think that is probably what a lot of Aboriginal

Legal Services feel and Aboriginal communities feel that and we see that currently in the current manner in which a lot of our services are being heavily cut.

In that context, we also get a lot of invitations by the state government to provide input into legislation and we quite constantly do that through many of the legislative changes that happen throughout the state government here in South Australia. We actually do that by invitation. We are happy to participate and to continue to participate because we feel it is very important that the government understands the impact of its legislation as it currently does in regards to incarceration rates of Aboriginal people, which we are seeing ever increasing.

MR CHARLES (ALRM): Obviously we endorse that. That is very much the strength and tenor of what the NATSILS' submission says really, particular about the importance of the states being held accountable by your commission, which is what you have done in your draft report and we are very grateful that you did state those things about the need for states to take some responsibility for the areas of legislation where they have a huge impact upon basically making our services almost untenable because there is so much more to do; there is so much more demand; there is so much more severe consequences for Aboriginal people, particularly with changes to the criminal law legislation, bail legislation and so on and so forth.

The consequence is that we have little accountability but massive results for us. The incarceration rates speak for themselves. The rates at which Aboriginal children are taken away in the need of care jurisdiction speak for themselves. Again those are matters which were covered in detail in our November submission and in the NATSILS' submission.

MS AXLEBY (ALRM): I suppose my position on that is that we are seeing a great trend in regard to Aboriginal funding being put through a lot of mainstream agencies. Our concern is also that a lot of those agencies are not meeting their targets and yet are not subjected to the same level of scrutiny that Aboriginal services are. I suppose we would like you in that context as a commission to actually look into that in that context because it is important for the self-determination of Aboriginal communities where good programs have been running for many years and have been pared back because of the cuts in funding. It is not because of governments. It is that the current policies of the government of the day really impact - to be able to improve the quality of services to Aboriginal people.

What that in a sense does - it means that a lot of non-Aboriginal services are getting increased funding to provide these services and yet are not able to do it to the same quality that Aboriginal services can deliver.

MR CHARLES (ALRM): May I provide a specific example of what Cheryl is talking about? As a result of the last government - we try not to be party political

about this but it is just a fact. As a result of the last government, we got a little bit of extra money which meant we were able to employ another civil lawyer and another child protection lawyer - enormously important because we had one person attempting to do the whole thing; let's say all of the child protection work. Now we have got two other lawyers to help her to do that work and it means that the burden is not so great. All of those positions will be closed by the end of this year because what has been euphemistically called the Dreyfus money which came to us to enable us to employ those extra lawyers ran out or will run out and the second tranche of it has been taken away.

We say that for all of the reasons specified in our first submission, the child protection work is terribly important in the context of the Aboriginal community. It is about protecting and preventing children from being chewed up through the child protection system and then the youth justice system because we have seen enough of that. Children who start in need of care then wind up in the juvenile court and wind up in the adult court. It is a commonplace. We say, look, we actually had the resources to deal with that, to begin to deal with that more effectively, and it was that particular new money which was of enormous importance to us, which has been taken away. We think that's most unfortunate. We're not being party political about that. We just say it needs to be seen into the context of how we're running our services and what we've like to be able to do.

DR MUNDY: You mentioned that you had hired someone to do civil law work and that is the primary focus of our inquiry.

MR CHARLES (ALRM): Yes, well, that's why we mentioned it.

DR MUNDY: We are interested in particularly the way that the need to meet criminal matters, particularly with legal assistance bodies, impacts on those issues. As you would be aware, and we acknowledge readily throughout the report, at the end of the day, the really intensive uses of the civil justice system will quite often present with criminal matters as well.

MS AXLEBY (ALRM): Correct.

DR MUNDY: I am sure that is probably even more so the case with profoundly disadvantaged indigenous people. But one of the many civil disputes - and I think there is a general rule - are amenable to other forms of resolution other than the courts, and one of the observations that has been made to us is that the various approaches - we will call it ADR in the broad - which might be acceptable in many contexts do not often work for indigenous people. I am interested in any views that you have on that, and are there any particular circumstances where they might work? It might be family matters as opposed to solving a consumer dispute, say, and whether there are particular groups of indigenous people for whom those things - for

example, people who live in remote areas as opposed to indigenous people who, say, might live in an urban context?

MR CHARLES (ALRM): We've got a very clear example of that, sir. Recently, we were called down to the Supreme Court by a judge because proceedings had been entered by the Crown because there was an application for some money to be spent on a funeral. There were two sides of the family who disagreed about where the deceased should be buried. It was a most unfortunate situation. There was not going to be any winner or loser, but the matter had been languishing for so long that the Department had simply taken it to Court and said, "The Court must make a declaration as to who should have the right to bury," essentially, and there were two disputing Aboriginal parties.

Eventually, the Aboriginal Legal Rights movements gave limited funding through our briefing budget to both parties, because we didn't want to be seen to be party to the dispute by acting for one party and not the other, so we funded both sides. Eventually, the judge had to make a decision. The case is The State of South Australia v Smith and Another [2014] SASC, Nicholson J. It might be worth your while to have a look at that judgment, in my submission, because it really highlights this point that the litigation was forced by the Crown because nobody could resolve it. What we say about that dispute is that cried out for mediation and that - - -

DR MUNDY: I think we have heard a couple of matters of non-indigenous people in estates which were ripe for mediation, and why these matters are being dealt with in the Supreme Court is beginning - - -

MR CHARLES (ALRM): Absolutely.

DR MUNDY: - - - to beggar belief for us.

MR CHARLES (ALRM): Absolutely. What we say is that culturally-specific, culturally-trained mediators who are able to deal with these very distressed families, obviously, because there has been a death and to get them to come to a solution which they would find acceptable is obviously much better than an unfortunate Supreme Court justice having to make an impossible decision. I mean, it is really the Judgment of Solomon. What on Earth do you do?

DR MUNDY: Just while we are on this whole general question of the resolution of people's affairs after they pass, it is something I think we may have to say something about. Are these sorts of disputes - perhaps not to the extreme resolution of having to trouble one of the Supreme Court bench members - but are these relatively common occurrences which could be better dealt with in some form of - - -

MR CHARLES (ALRM): Absolutely.

DR MUNDY: - - - I do not want to say "administrative", but that is close to the mark - some sort of administrative or tribunal process whereby formality is much less important and the resolution of the matter is all that really counts?

MR CHARLES (ALRM): There's another answer to that, sir, and it is a simple point. Although the judgment did not give a great priority to the question of people making a point, we point to the fact that it's not the ultimate determination. Even if somebody makes a will saying, "I want to be buried at X place," that's not going to be determinative of the matter, ultimately, but what we say is that it will be a big help. So we are, in fact, through the Aboriginal Legal Rights Movement, through our newsletter, making specific recommendations to the Aboriginal community at large, "For goodness sake, make a will and in your will specify, on your decease, where you want to be buried."

DR MUNDY: Does that at least give someone a - - -

MR CHARLES (ALRM): Precisely. That's a partial solution to it.

MS AXLEBY (ALRM): But on the other side of that coin is that we're restricted by service delivery directions to be able to provide support services for people to be able to make wills, which we find frustrating in that context as well. So our service delivery directions tell us that we're not able to provide that support - - -

MR CHARLES (ALRM): Exactly.

MS AXLEBY (ALRM): - - - to assist people in the community in regards to assistance with wills and actually helping them to actually develop the wills whereas, in the past, Aboriginal Legal Rights used to do that very well.

DR MUNDY: When did that occur?

MS AXLEBY (ALRM): I'm not sure. Chris, you might be able to answer that?

MR CHARLES (ALRM): It was essentially around the time when the tenders took place. It was early to mid 2000s, when the Commonwealth really became very strong in determining what kind of cases we could and couldn't do.

DR MUNDY: Presumably, I would have thought, the cost of providing such advice is relatively small. It is the sort of thing you would expect was amenable to some sort of standardisation and so on, and would it be your view that matters like the one Mr Charles outlined to us, but more broadly, could be - not perhaps in all cases, but certainly in many - avoided at significant cost to your limited budget and also the time of the Court?

MS AXLEBY (ALRM): Absolutely, and we are a very strong advocate in regards to looking at developing, you know, culturally safe mediation support services for our community because we think that not just only with wills and death, et cetera, you know, family law cases. There's a whole range of areas that we think that would greatly benefit our community. I know that when Native Title came into being that there was a consultancy in Queensland, an Aboriginal mediation consultancy, that went around the whole of Australia and trained up Aboriginal mediators and it was a very good program. I think it was about a six-week run program - it might have even been a 12-week run program, I think - but it was a very good program and the aim of that program, that training, was to actually train facilitators in regards to negotiating and talking to people about the native title legislation, and particularly to be involved in helping claim groups with disputes.

That was a very good program, and we still see some of the mediators around doing that kind of work today. That's the sort of level I think that we need in regards to actually having trained mediators within our community because I think there's also a role of Aboriginal elders to be trained up, so that it is more culturally specific, to actually do that, similarly as they do here in South Australia with the courts, where they actually have Aboriginal elders doing representation, support representation, and providing advice to magistrates in the Nunga courts here in South Australia.

MR CHARLES (ALRM): May I mention, just to further Cheryl's point, there was this organisation called NADRAC, the National Alternative Dispute Resolution Aboriginal Corporation, or whatever it was. That put out wonderful reports, which we endorsed with great enthusiasm. It was terrific, and yet the Commonwealth funding to facilitate it and make it happen never occurred, but the impulse from the Commonwealth, having recognised the importance of it, having written reports about it, seen the virtue of it, was all done, and yet the impulse to put it into practice lamentably was lacking. We say, look, again, your Commission might want to have a look at this. Let's revisit NADRAC and let's revisit the need to create effective alternative dispute resolution - - -

DR MUNDY: I think it is fair to say that NADRAC is dead, but its constituent individual parts continue to be vibrantly alive.

MS AXLEBY (ALRM): Yes, there you go.

DR MUNDY: We have had significant engagement, particularly with Professor Sourdin and Gormley SC of the Sydney bar.

MS AXLEBY (ALRM): I suppose, just also getting back to the question where you were talking about the child protection context, prior to coming back to Aboriginal Legal Rights, I worked 10 years in child protection and also in youth

justice. So from my experiences, and particularly when we're looking at Aboriginal families and at the point of removal of children, there already is legislation in place within the state for a process in the context of actually have family conference meetings with families to actually look at the best opportunities for children, looking at and exploring, I suppose, the opportunity for families to actually have a voice. I can say that from my experience that I have not seen that work to the flavour of the context of the legislation that it was developed under and hence I feel that having an external independent context for that would be really valuable, because I think having them sit under the one state body, it doesn't allow for those departments to, I suppose - well, not for Aboriginal families in particular to actually be able to have an independent voice and a representative at that level, ensuring that the departments are sticking by their relative policies and processes as well.

MS MacRAE: Just since you have raised child protection, when we were talking to the Family Relationship Centre in Port Augusta, they were talking to us or raised a concern around the lack of a national register in relation to child protection and their concerns that people might move interstate and fall through the cracks and disappear and have some very distressing consequences as a result. Would you have a view about that? Is that a concern you would share?

MS AXLEBY (ALRM): Well, I can only talk about from my experience when I was manager of a (indistinct) office in that context, and I know that there were a couple of cases and one similar case here in South Australia where had that been in place, at least for the children, what was discovered here in South Australia wouldn't have been the case.

MS MacRAE: Are there other issues that you would like to speak to around the intersection of Commonwealth law and state and territory law in family law and then child protection and domestic violence? Do those issues around the crossover between Commonwealth and state responsibilities impact on on-the-ground services and how women in particular fare in legal proceedings and other dispute resolution?

MS AXLEBY (ALRM): Yes. Again from my experience - I was working in the Public Service for over 10 years - family violence, child protection, youth justice were probably key areas that I was fairly involved in and what I have seen is there has been a lot of goodwill by the Commonwealth to try and get a national focus on these issues within the states. I think some of the dilemmas about that is - well, if we look at the Aboriginal Legal Rights Movement as a classic example, where other legal services in other states do get state support. Here in South Australia, it's unfortunate that we don't get that same support by the Attorney-General's Department here and it's not a criticism of the Attorney-General's Department but it's a reality in that context where there could be a lot more collaboration and looking at, I suppose, working more effectively together to try and address some of the key pressure point areas that we are currently facing here in South Australia. In the

context of some of the experience I have seen with Commonwealth funding coming through state agencies - my experience again - that a lot of the Commonwealth money that's put in there doesn't really get to reach the target group from my experience.

MR CHARLES (ALRM): Another example of that, I think, is from our tragic experience in the State Coroner's Court in 2002 and you can find it on the coroner's web site, the case of the death of Kunmanara Hunt, who was a young Pinjarra woman who tragically died from the effect of sniffing petrol eventually. She had a number of children who were probably affected by in-utero petrol which made it even more complex as a case. She was unable to look after them. The Welfare Department knew nothing and it relied upon the APY Women's Council to do all the child protection work to look after those babies.

MS MacRAE: Yes.

MR CHARLES (ALRM): And obviously there were cases that cried out for attention and yet the state bureaucracy was not dealing with it and the Women's Council did the whole lot. I think that case speaks for itself and not even inter-state. That's within the State of South Australia and I just simply refer you to the State Coroner's Court findings, the 2002 findings in the matter of Kunmanara Hunt. It speaks for itself. Further than that, obviously there were always going to be overlaps and confusions as between Family Court orders and, for example, state restraining orders. That system frankly needs to be rationalised and it never has been. We note that there is the inter-state or intra-state legislation now in relation to the tri-state cross-border legislation that hasn't had a lot of impact yet, I think because it's such complex legislation actually.

DR MUNDY: This question of multiple orders that relate essentially to the same matter, the same set of people - and Angela and I both have a close association with Western Australia, where these problems don't seem to be as prevalent. They still happen but they are not as prevalent. Is there something that can be done by way of state judicial officers exercising authority under Commonwealth law as they do, and particularly in the superior courts, every day of the week? We seem to be able to trust - - -

MR CHARLES (ALRM): There's nothing in the constitution, sir, which prevents a state court from being vested with the jurisdiction.

DR MUNDY: And indeed all Commonwealth criminal matters are brought from the Supreme Courts.

MR CHARLES (ALRM): There are other areas where state courts are vested with federal jurisdiction. It's not just - - -

DR MUNDY: Would a set of circumstances where these matters could be dealt with collectively by one judicial officer significantly improve outcomes for people?

MR CHARLES (ALRM): One would think that the confusion that occurs at the moment between state restraining orders and Family Court orders speaks for itself and the resolution to that would appear to be possible by vesting state courts with federal jurisdiction to a certain point.

DR MUNDY: It would mean if there were two orders, they would be issued by the same person at the same time.

MR CHARLES (ALRM): Precisely.

DR MUNDY: There is no question of malfeasance on behalf of these judicial officers but you have two people doing something similar at different places.

MS AXLEBY (ALRM): That's correct.

MR CHARLES (ALRM): You have the interaction of the two orders and then the obvious example is the Family Court order makes allowance for visitation rights upon the child and then there's a blanket state restraint order which makes no such rights or puts no such allowances, even though the federal officer has thought about it very carefully and made a very careful decision on it, and that's the sort of example which speaks for itself.

DR MUNDY: In those circumstances, is access then made available of the - - -

MR CHARLES (ALRM): Eventually people work it out and seek a variation to the state order and it's very complicated and it takes for ever and it's a gross duplication of effort.

DR MUNDY: And presumably causes no end of distress and confusion to the parties.

MR CHARLES (ALRM): Precisely.

DR MUNDY: Who probably find the whole judicial process somewhat alien to them and very threatening.

MR CHARLES (ALRM): Precisely.

MS AXLEBY (ALRM): That's right and in saying that, like when I think about the difference between the family law context court system, which I think from my own

experience again is probably a better system to actually - even with some of the child protection issues in that context because you have got, you know, the Commonwealth being a little bit more removed from the state agencies who are actually performing that role. Hence there's a lot more again, I think, balance in regard to decision making being made about family's rights if that were the case.

DR MUNDY: I will just mention the NATSILS submission. I think it's fair to say that NATSILS was relatively comfortable with the notion that culturally appropriate ADR wasn't a bad thing.

MR CHARLES (ALRM): Absolutely.

DR MUNDY: They do note at page 5, I understand, that this would lead to an increased demand for the provision of Legal Aid services.

MS AXLEBY (ALRM): That's correct.

DR MUNDY: Is this because your view is that a legally assisted form of ADR is probably the most appropriate?

MS AXLEBY (ALRM): I think it's also about the confidence that the Aboriginal community has within Aboriginal legal services to be able to play that advocacy in a support role.

DR MUNDY: The natural agency to do it, so why go and skill up someone else.

MS AXLEBY (ALRM): Yes, absolutely and in that context, you know, you would probably get a lot more Aboriginal people willing to undergo that process if there was that support and opportunity there.

DR MUNDY: It's your view that those people doing that work would necessarily need to be lawyers or simply appropriately trained ADR practitioners employed by yourselves. It's what are we here with: are we looking to put the brand of your organisation, with its trust and its reputation, in the room or do we need to put your lawyers in the room? Because I'm just trying to understand. It's not to say we are going to put anyone in the room but an appropriately trained ADR practitioner who may not be a lawyer.

MR CHARLES (ALRM): The simple answer is this. I suspect that having regard to the demand that we get at the moment, you could just about have a full-time highly qualified ADR person to resolve the South Australian disputed funerals. We're getting a lot of them. Not all of them get into the Supreme Court but we are getting them in the office quite frequently. As I say, we can deal with it partly by if we were given the means to do more about wills, that would help. That would help,

but the demand is there now and there are, I suspect, a good deal of other kinds of disputes between families which are really not amenable to legal resolution but which are better resolved by properly skilled mediators.

DR MUNDY: Indeed, I think it was a question we put to the Family Relationships Centre at Port Augusta, would they be - a natural organisation, if we wanted to get these sort of wills and probate matters - you know, will, state matters - out of the courts and into some facilitated place, would they be an appropriate organisation to deal with it, and their answer was "well, we deal with families". They're mostly - not always, but a large number of them - - -

MR CHARLES (ALRM): We point to the very specific need which Cheryl is very strong about, about culturally trained to deal with specific issues within Aboriginal families, between Aboriginal families and it's very culturally specific, it needs a lot of extra learning to do it properly.

MS AXLEBY (ALRM): Just on that point, just going back to the question that you raised, I think you'd have a balance of both. You know, legally qualified practitioners and in Aboriginal Legal Services, one of the reasons that we're so unique is that we actually have Aboriginal field officers who are that connection and they're paralegally trained, and maybe getting them skilled up in the mediation processes would be ideal. So you've got again - and again, there is a really important CLE, Community Legal Education, context that should go with that.

DR MUNDY: We probably need to draw this discussion to a close but - - -

MR CHARLES (ALRM): Could I raise one more topic, sir?

DR MUNDY: Yes, certainly.

MR CHARLES (ALRM): One matter which we thought was very important was your draft report said a lot about ombudsmen. That's terrific. What we say is that there's a specific context where it needs to be extended and the state ombudsman of South Australia has a jurisdiction which covers prisons and Aboriginal prisoners by implication. So also prison inspectors under the Correction Services Act have powers to inspect prisons. Their jurisdiction is dramatically limited, however, to whether or not the discretions under the existing Act are being properly administered, which means it is a very narrow focus and the department can get away with an awful lot, to be quite blunt.

What we say is that the Western Australia model of a prison inspector with specific Aboriginal prison inspection standards is a much better result and a much better outcome for Aboriginal people in particular and for prisoners we suspect in general, and for the improvement of the standard of the prison administration, and we

say there is a process of implementation of the optional protocol and the convention against torture. The obvious model for that in Australia is the Western Australia Prisons Inspectorate and we say that would provide independent standards of consideration of whether or not prison administration is acting properly, whether or not the particular needs of Aboriginal prisoners in particular are being properly met.

For example, we note that the Western Australia inspector has written specific Aboriginal inspection standards about the particular cultural needs of Aboriginal prisoners. Now in South Australia it's all banged in together, frankly, and it's unsatisfactory. Look, when we say that we are not criticising the state ombudsman. We are simply saying that it could be done better by a Western Australia style prison inspectorate and we site the example, for example, in South Australian the state ombudsman has recently done quite a lot of work on the appalling standards whereby prisoners who are being hospitalised are shackled to their beds, and the South Australian ombudsman did a big report on it, and looked at it in great detail, and came up with strong recommendations and some strong observations. That's got to be of some narrow focus, but it doesn't deal with the systemic question as an inspector-style model could do.

DR MUNDY: Just on the discussion we had about wills and similar, if you'd like to reflect on that discussion, perhaps discuss it with some of your colleague organisations elsewhere, we'd be very happy to receive a subsequent because it's an issue that's only come - - -

MS MacRAE: Come to use from the hearings, really.

DR MUNDY: - - - come across and we think it may lead to much better outcomes for people and much less costs to the system.

MR CHARLES (ALRM): I know from talking to my colleagues that the other Aboriginal legal services have the same problem with these very distressing cases of contested funerals. It's not just South Australia where they happen, but the South Australian Supreme Court reports have got, to my knowledge, three Supreme Court judgments. One went to the Full Court, for goodness sake, about the contested funeral. It's not as though there are - other than emotional and family distress issues which are being litigated, it's not as though there's going to be a big damages claim which is appropriate use for a civil court. It's putting a judge in the impossible position of having to make Solomon's judgement.

MS AXLEBY (ALRM): And also the cultural context of it does get lost within the legal system.

MR CHARLES (ALRM): Absolutely.

DR MUNDY: It's an issue particularly in Indigenous communities but also a lot of other people, too. Thank you very much for your submissions and your time today.

MS AXLEBY (ALRM): Thank you.

DR MUNDY: We are going to have a brief pause while the next witness comes up.

DR MUNDY: Could you please state your name and the capacity in which you appear and then perhaps make a brief opening statement.

MR LINDSAY (SABA): Sure. My name is Alan Lindsay and I'm appearing as a representative of the South Australian Bar Association. I think I emailed through just some dot points yesterday and there are a small number of points that I would like to address in relation to your draft report. My understanding is that you have or will receive responses from the Australian Bar Association and from the New South Wales Bar.

DR MUNDY: We have certainly seen the New South Wales Bar Association submission and them in person. We haven't seen the national Bar. I'm looking at Mr Smith and he is going to tell me we will see them in Melbourne next week.

MR LINDSAY (SABA): Understanding what those associations have said to you, there are a couple of additional points that I wanted to make, some of which are about local conditions in South Australia. Others aren't. The first one is in relation to draft recommendations 10 and 10.1. The underlying theme is the distinction between an adversarial process and adversarial behaviour and it emerges in those draft recommendations, in particular draft recommendation 10.1, the restrictions on the use of legal representation in tribunals, which as I read it is based significantly on what's described as creeping legalism, but the draft report has at least an anecdote of a judicial officer recording occasions when he was not particularly assisted - - -

DR MUNDY: We didn't feel the need to use all of them.

MR LINDSAY (SABA): Yes, but equally I understand there are anecdotes of judgments where they did receive assistance. The point I wanted to make about that is that - and although it's implied in the draft report, it doesn't seem to be expressed; that is, the nature of the adversarial system which assumes that where there are disputes of fact or opinion, that a particularly good way of getting to the bottom of those is to test each version and for a neutral person to make an assessment.

It, one has to accept, can be an expensive way of doing that but it's an issue of the quality of the ultimate decision and that is an accepted advantage of the adversarial system. The SSAT is used as an analogue for tribunals. It really does have a more inquisitorial role than a number of other tribunals.

DR MUNDY: If I might interrupt, the issue we have here - and we perhaps didn't express it as well as we could have - was there are a number of if not tribunals then certainly lists within tribunals that have been set up deliberately so that they would not be adversarial, that they would be more inquisitorial, typically led by a tribunal member but sometimes a judicial officer working within that tribunal.

The issue here - and we will correct our language and make it much more apparent - is that there does appear to have been in those foras which have been deliberately established to operate in that way with a capacity for the presiding officer, whatever the nature of that office might be, to allow by leave representation, not necessarily by a lawyer but probably more often than not by a lawyer, where one party might be disadvantaged. They might suffer some form of disability or something.

The only observation we were seeking to make is that the characteristics of those fora which were established to be non-adversarial and participant-driven - the leave has been easier to get over time and that's the point we're trying to make. We're not trying to make a blanket observation about the merits or otherwise of adversarial systems, but rather in those foras which for apparently good reasons have been established to not be of that character, they appear to be creeping that way.

MR LINDSAY (SABA): Yes.

DR MUNDY: I think our point would be if you want them to be adversarial, make them adversarial by virtue of their design, because it leads to expectations of people and things like that.

MR LINDSAY (SABA): Yes, I understand that. The point I'm making is that if I think as it's proposed one of the filters for whether or not legal representation might be allowed is whether it would be of assistance - then the point I'm making is that that process of testing the evidence will almost always be argued to be of assistance, so it's quite a coarse filter.

The second point I make about it is to the extent that that criticism, if you like, is aimed at adversarial behaviour as opposed to the adversarial system - that is, representatives perhaps going outside of their duty. At least in South Australia and I think nationally our bar rules already impose duties of getting to the heart of the matter and getting only to the heart of the matter so far as that can be - - -

DR MUNDY: I think, though, you will concede by virtue of your experiences that some adversarial behaviour, particularly seen not necessarily by members of the bar but by other persons who may not necessarily even be solicitors, is not always directed at getting to the matter.

MR LINDSAY (SABA): Yes. I recognise the problem. The point I'm suggesting is that in relation to at least the Bar Association a remedy is an existing one and it's a remedy that can be used and managed by those controlling the tribunal. It doesn't require a systematic change from our point of view.

DR MUNDY: Okay. I take your point.

MR LINDSAY (SABA): The second issue that I wanted to address is recommendation 11.1 and 2, the fast-track recommendations. The point that I wanted to make on the basis of our local experience is that there is a significant relationship between funding and case management. As you probably know, in the District Court and Supreme Court in South Australia the case management is done by masters. Most of the loads of each of those courts are crime; 90 per cent of thereabouts. The judges do not have control of their calendars. They come to civil cases irregularly and for short stints.

So all of the problems that are listed in the draft report emerging from case management we experience a lot when we're managed by masters. Masters exercise interlocutory caution and judges, when the case gets to them in our jurisdiction a day or a couple of days before the trial commences, might bring a different perspective to it. The uncertainty of case management, the repeated attendances, all of those problems, in our experience even with a sufficient number of qualified masters ends up in producing a number of those problems and the issue - it has been raised repeatedly over a decade.

The profession has expressed its preference for docket management and case flow management but in a system where the civil work is the minority of it, the response we get is, "We don't have the funding for it. We don't have the funding for judges to do it." Our experience has been that intermediate management by masters is very difficult to improve upon, so we think in our jurisdiction there is quite a connection to funding.

DR MUNDY: Would you expect that this could be a common issue - I guess what I'm trying to get to is, is this fundamentally a question of size and scale inasmuch as where there is both civil and criminal matters, the criminal matters are going to predominate. They typically will, for good reason perhaps, get brought on more quickly. That makes the docket system harder to manage. An absence of framework of a specific list of civil judges - you're probably going to really struggle. The point that has been made to us by presiding officers of some of the more specialist environment courts is that they're relatively small and they just have to work in a different way. Is that essentially what you're - - -

MR LINDSAY (SABA): Yes, I think so. I can give you another example I'm familiar with; for example, the Northern Territory, which has intermediate management by masters, predominantly a criminal case load. It experiences the problem less than we do because it has a smaller number of judges and it has one master and more predictability in the way those things are handled.

DR MUNDY: It's so small that it actually makes it easier, in a sense.

MR LINDSAY (SABA): Yes, that's right. We are a jurisdiction that's bigger than that. We have a much larger number of judges, very broad experience, no selection criteria for judges, no specialists lists, no performance indicators for judges.

DR MUNDY: A bit like commissioners.

MR LINDSAY (SABA): Yes. In our size jurisdiction it's a significant problem.

DR MUNDY: Okay, yes, and I think it's probably fair to say that the Federal Court is peculiar in its own right and may actually be very well set up for this - it may be a horses for courses matter.

MR LINDSAY (SABA): The Federal Court not having a criminal jurisdiction has that advantage. I have always been struck by the fact that I think it's now the last four heads of the rules committee that used to manage civil procedure reform in South Australia in the state, the last four of them have ended up as Federal Court judges.

DR MUNDY: All right. We do take your point. I think your point basically is that circumstances might rule the case.

MR LINDSAY (SABA): Yes, and so with all the will in the world in our jurisdiction we need more funding to be able to achieve that.

DR MUNDY: Yes. I think you had some comments you made about chapter 12?

MR LINDSAY (SABA): Yes.

DR MUNDY: Sorry, I hope you're happy just to deal with these as we go and have a bit of a chat about them.

MR LINDSAY (SABA): Yes. I did also want to make a comment about draft recommendation 11.2 and it's a general comment as well. It's hard to speak against the idea that more data should be gathered, but our experience is that it has been tremendously difficult just gathering data from courts and courts administration. Adding the task of putting private data into that we would expect will be slow. Even if one gathers much more data, the analysis of it is never, in our area, going to do much more than assist what is generally robust trial and error, is our approach to change. The data is subject to any kind of analysis. We are ultimately a trial and error area and the issue is the robustness with which we approach change.

DR MUNDY: We probably better than most agencies understand these challenges.

MR LINDSAY (SABA): Yes. So I think that's a priorities issue. No doubt extra

data will be valuable but one wouldn't want to delay waiting for that.

DR MUNDY: No. Welcome to our world.

MR LINDSAY (SABA): Yes. I think the commission understands also the issue of not being able to measure quality pursuant to the RoGS Report.

DR MUNDY: Yes. We have received some robust advice from the former chief justice of New South Wales on this point and more recently from the chief justice of Western Australia who I'm sure will give us another serve tomorrow.

MR LINDSAY (SABA): Yes. I have followed in the RoGS Report the inability to define quality indicators for about a decade now I think. So 12.1, the pre-action protocol, some local information I guess, there is a committee that has developed some pre-action protocols, as the draft suggested, targeted to particular areas and developed with the assistance of members of the profession in those areas. So there's one in medical negligence and one in building and construction. They are the two targeted ones. They will be run somewhat experimentally.

DR MUNDY: Is it possible for us to get copies of those?

MR LINDSAY (SABA): Yes. They are in what's now called - it used to be called Practice Directions. It's now called the Civil Supplementary Rules. They come into force on 1 October. I will email them to your staff.

DR MUNDY: Yes, if you could email them to our staff, that would be helpful.

MR LINDSAY (SABA): So that is a result of discussions about trying it and trying it in target areas and each of those have been developed by looking at the Wolff report, the Jackson analysis of the Wolff Report, and comparing it to local conditions.

DR MUNDY: So picking these two areas, would I be right in saying you have landed on them because quite often there's a lot of argy-bargy at the start about facts and documents and evidence and they seem to be areas in which it would be both rich in those sorts of questions.

MR LINDSAY (SABA): Probably slightly different reasons for each. Building and construction, because they are disputes and if they go off the rails are terrible, so there is a serious impetus to get at it early and to have a structure for getting at it early and it's a rich area for disputes, and also because in our jurisdiction there are a relatively small number of people that practice in that area, so the chances of getting them to abide by a protocol is high.

DR MUNDY: They have all got an interest in this.

MR LINDSAY (SABA): Yes. In medical negligence it's slightly different and one of the reasons we chose that was because there are probably only one or two insurers and we engaged them in the process as well as plaintiffs and we're rather hoping that they will collect private data about the effectiveness of the pre-action protocols.

DR MUNDY: Is there an expectation - I mean, in a sense pre-action protocols act a bit like ADR in that they hopefully narrow the matters ultimately and at least seek to get a starting point on fact. I mean, presumably going forward, medical negligence claims which are ultimately insurance matters, we know that there has been some arrangements put in place in Victoria - not for medical negligence matters but I think motor accident matters and WorkCover matters - - -

MR LINDSAY (SABA): Yes.

DR MUNDY: - - - where there is a single statutory insurer.

MR LINDSAY (SABA): Yes.

DR MUNDY: That they have been able to work on a pile of pre-action protocols which have actually seen many more matters settle early, in fact settle without having to trouble the bench. Is that an expectation of this process that you have, that perhaps there will be less matters that ultimately go to trial?

MR LINDSAY (SABA): Yes. That's the entire point of it, yes.

DR MUNDY: Obviously those matters that do go, the expectation is that they will be dealt with more expeditiously.

MR LINDSAY (SABA): Yes. We have got a couple of slightly different features in our jurisdiction. There is an issue like a dual pre-action protocol in our rule 33 which is an obligation for parties to exchange contractual standard offers and counteroffers prior to the issue of proceedings. That has been around for a long time, it's relatively commonly breached and it doesn't have a component that requires people after they have exchanged offers to talk to each other.

So part of the medical negligence protocols in the building ones, it builds on that, it adds more substance to it and it adds a very specific ADR component. Our ADR component under the rules is a settlement conference that happens after institution of proceedings which is rather a waste of time and money to go from pleadings to a settlement.

DR MUNDY: The horse has bolted really, hasn't it?

MR LINDSAY (SABA): Yes. The intermediate step of converting the dispute into pleadings takes resources but doesn't add to being able to solve it. I guess the other thing I would say about that, and it's experimental, is we have now a thing called a litigation plan which is not well regarded yet by the profession, the idea being that if proceedings are instituted, the ability to manage it will have, first of all, the failed pre-action protocols plus a litigation plan that describes how the parties plan to run it from there and that might assist with the - - -

DR MUNDY: It's not well regarded because it's not well understood?

MR LINDSAY (SABA): Regarded as additional work and not well understood, yes.

DR MUNDY: All right.

MR LINDSAY (SABA): Otherwise I have one general comment about costs which fits in in I think recommendation 13.2. It's specific to barristers in civil litigation which is: the alternatives to time costing for us are limited, if they exist at all. We only have our time. We don't have repeat clients and we can't share any result.

DR MUNDY: I think our thinking has generally been around - this is really about solicitors rather than barristers and, without meaning any disrespect, I think our economic approach is that barristers are really another cost to solicitors in a disbursement sense. No, I don't think we had any - there have been some members of the Sydney bar who have reflected to us that they do charge on a fixed fee per matter basis because they have got a pretty good idea - and to the extent that it's - but no-one has really raised with us the billing or charging issues; in fact there have been virtually no issues I think about the bar really at all.

MR LINDSAY (SABA): Yes.

DR MUNDY: I think to be fair we had expected to get some at the start but I guess the issues about reform of the bar seemed to have been much more expeditious than long-held issues about reform of the other legal profession.

MR LINDSAY (SABA): Yes. The other issues that the commission looked at don't apply so much to us either in that we sell only to solicitors who are sophisticated purchasers and in our jurisdiction no prices and check prices and understand value - and they're the ones that make the decision.

DR MUNDY: Do you have direct briefing in South Australia?

MR LINDSAY (SABA): We do in theory but I'm not sure of the extent of it in

practice.

DR MUNDY: I know when I was in private enterprise it was no uncommon, particularly technical matters around building contracts, that the company secretary would turn up, who happened to have a practising certificate, and introduce you to the relevant barrister and that was the last the company secretary would see the barrister because the instructions had been issued and Mr Smith was going to provide the rest of the detail.

MR LINDSAY (SABA): Yes. That happens but I wouldn't think it was a big part of the business here.

DR MUNDY: All right.

MR LINDSAY (SABA): They're the matters I think that I wanted to - - -

DR MUNDY: Thank you very much for taking the time to come and speak with us today. Are there any members of the audience who wish to make a comment? Yes? You will need to come up and speak but it needs to be very brief. Thank you. If you could state your name and the capacity in which you appear for the record please?

MR SNOW (CA): Chris Snow, Consumer Advocate. Following this morning's submission you made a very tempting offer this morning not to put anything more in but I think I have to just on the grounds of transparencies - - -

DR MUNDY: Yes, that's fine.

MR SNOW (CA): - - - seeing I have been rather critical of people; secondly, I did have a conversation with Mr Johnson this morning and I'm hopeful that we will be able to give you some professional accountancy figures rather than the rather rubbery ones that I have submitted. In light of what Mr Bailes said about the reason for the national trust account idea falling through, I think I will be strengthening what I said about that. They are the only two points for the submission but can just one question you asked this morning, I said it was a broad question about what consumers expect. I tried to give you a detailed answer rather than a broad one which was that consumers should expect lay control of the system with an awful of lay involvement in it.

DR MUNDY: All right. Thank you very much.

MR SNOW (CA): Thank you.

MS MacRAE: Thank you.

DR MUNDY: There being no further comments I adjourn these proceedings until 8.30 am tomorrow morning in Perth.

AT 3.41 PM THE INQUIRY WAS ADJOURNED UNTIL
FRIDAY, 6 JUNE 2014