PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 6 JUNE 2014, AT 8.32 AM

Continued from 5/6/14 in Adelaide

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DR MUNDY: Good morning, and welcome to these hearings of the Commission's inquiry into Access to Civil Justice Arrangements. My name is Dr Warren Mundy and I am the Presiding Commissioner in this inquiry and with me is my colleague, Commissioner Angela MacRae.

Before proceeding any further, we would like to pay our respects to the original owners of the land on which we meet today, the Noongar people, and indeed our respects to the elders past and present of all indigenous nations who have continuously occupied this continent for over 40,000 years. The purpose of this round of hearings is to facilitate public scrutiny of the Commission's work, to get feedback and comments, invite people to put their views on the record that we may draw on them for our final report.

Following these hearings in Perth today, there will be hearings in Melbourne, Hobart, Darwin and Brisbane. Hearings in Canberra, Sydney and Adelaide have already been completed. This bit gets tricky; it changes day to day. We intend to complete the report and provide it to government some time in September in accordance with the Productivity Commission Act. The government must release the report within 25 sitting days by way of tabling in both houses of the Federal Parliament.

We do like to conduct these hearings in an informal manner, although I would note that under Part 7 of the Productivity Commission Act, the Commission has certain powers in the case of false information or refusal to provide information. The Commission to date has never had occasion to use those powers. As I said, these are informal hearings but we do take a transcript for the record and to ensure full transparency. One of the downsides of that of course is that it is very difficult for us to take comments from the floor and properly reflect them in the transcript, although at the end of the day I will provide a short period of time for any observer to make some brief comments. We do not require you to take an oath but do require you to be truthful at all times and the transcript will be available in a few days after the hearings.

In order to comply with occupational health and safety legislation, I am required to advise you of the evacuation procedures for this building. In the event that there is a "whoop whoop whoop" sound which indicates that there is a hazard in the hotel, an announcement will be made to ask you to immediately proceed to the nearest emergency exit and assemble in the carpark on the corner of Hay and Irwin Streets till the situation has been cleared by Mercure Hotel staff. Do not use the lifts. Wait at the assembly point for further instructions by hotel staff or the Fire and Rescue Service and do not re-enter the building or leave the assembly point until instructed.

DR MUNDY: That is the preliminaries. Could we please have Matthew Keogh of

the Law Society of WA? Once you get yourself settled, could you please for the transcript provide your name and the capacity in which you appear?

MR KEOGH (LSWA): My name is Matthew Keogh and I am the vice-president of the Law Society of Western Australia.

DR MUNDY: Would you like to make a brief opening comment, Mr Keogh?

MR KEOGH (LSWA): If I may. Thank you, Commissioners. I appear here on behalf of the Law Society of Western Australia which is the peak body and the voice of the legal professional in Western Australia. The Law Society is also a constituent body of the Law Council of Australia and I understand that yesterday the Commission will have received the Law Council's substantive submission which the Law Society - - -

DR MUNDY: Yes - about two weeks late, Mr Keogh.

MR KEOGH (LSWA): I understand that. That is something I will address in my remarks if I may. The Law Society had a great deal of input into that submission and so my remarks will be addressed towards that submission, with a particular Western Australian focus.

I thought it may be useful to give you a very brief snapshot of my own career and background in the access to justice space because it may open up some other areas or questions and dialogue with the Commission. My introduction to the law came through my grandfather who ran an outer suburban, semi-rural legal practice. His clients were largely farmers, those working on farms and those moving into the urban fringes of Perth from the 1960s through to the 1990s. Many of his clients were not well off at all and it is through speaking to him, my grandmother and my mother that I got to learn about pro bono and indeed he was a volunteer at one of Perth's first community legal centres, the Gosnells Community Legal Centre. It was not uncommon for him to receive payment in crates of oranges or bags of apples.

My mother ended up taking over that practice and it became mainly a family law practice, working in disputes of child access and the division of what really were the family's net debt position, as well as domestic violence. I ended up working mainly on small commercial matters - leasing of small properties, commercial disputes in the Magistrates Court, criminal matters, wills and probate. I also became involved in Starick Services which is a service in the south-east of Perth which runs women's refuges for victims of domestic violence. It also provides an outreach service, a particular innovative service providing trained officers, not lawyers, at police stations to assist those seeking violence restraining orders. One of those officers was also placed at the Armadale Magistrates Court.

I subsequently moved to work as a prosecutor at the Commonwealth Director of Public Prosecutions. Whilst I focused on commercial crime the office also prosecuted Centrelink defrauders, drug importers and tax evaders. At that time I got involved with the Law Society and have been involved with the Society's Access to Justice Committee which runs its law access program, as well as its Human Rights and Equal Opportunities Committee.

Recently I have been a representative on the Law Society's reference and steering groups to investigate the need for better pro bono and access to justice coordination within Western Australia and to look into the establishment of a public interest law clearing house or PILCH or other mechanism to improve those services. That work involved an externally produced report which the stakeholders agreed with the society should then seek to enhance its existing law access program in a coordinated way with those stakeholders and I am involved in the implementation of that enhancement project at the moment.

Last year I also became the Vice-Chairperson of Street Law in WA. The Street Law Centre is designed to service those who are homeless through an outreach model, meeting with those clients who are needing legal assistance, be it civil or criminal, where they access other services. My day job, however, is a senior associate in the disputes group at Herbert Smith Freehills which is one of the world's largest law firms - we are the largest private legal practice in Perth - working with of course local and multinational energy and resource clients, mainly regarding regulatory disputes and investigations. Across that field of activity, I have personally been exposed to many of the issues confronted by those seeking access to the civil as well as to criminal justice systems, from the very small to the very large scale; matters involving tribunals and Magistrates Courts, all the way through the High Court and international expert determinations.

With that introduction of myself, I just wanted to make a few comments around the draft report and I will start with this, which is that of course article 10 of the Universal Declaration of Human Rights states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of their rights and obligations or of any criminal charges against them.

In this life, it is important to properly position any discussion regarding access to justice around the centrality of the concept of the rule of law, the role of the courts and the importance of equal access to justice for all. Seen from this position, the courts cannot merely be seen as agencies of government left to compete with other branches for finite resources. The courts are a central pillar of the third arm of government in Australia's constitutional democracy. Courts uphold the rule of law and maintain a system of good government, trade, investment, commerce, personal and contractual relationships and many other aspects of our society and personal lives. Indeed, they are an institution in the true sense of the word, not mere dispute

resolution and service providers.

Requiring courts to be self-funding will make the courts inaccessible to most except the very wealthy or the most disadvantaged Australians who may be granted a fee waiver or exemption and those willing to risk significant sums of money to litigate their case, often unrepresented. It will mean those engaged in bitter family disputes, serious commercial disputes, challenges to administrative decisions, and workplace disputes will have an extremely strong disincentive to enforce their rights through the courts. This may be despite the fact that there is no alternative but to litigate. Such a disincentive correspondingly damages the effectiveness of all other dispute resolution processes.

Put simply, courts are the backstop. If they are not accessible, then they are not effective as a way of enforcing legal rights. If they are not effective, then people will not have regard to what the views of courts are, or what a person's legal rights may be, knowing that such rights cannot be enforced by them in any event. If this occurs, it is a breakdown of the rule of law. Further, access to justice also encapsulates notions of equality, equal and fair access based on principles that justice is not a commodity for sale. It is a right. Legal Aid Commissions, community legal centres, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services were all established in recognition of this principle. However, now they can only really help the most disadvantaged, leaving a large number in the middle who cannot afford justice.

An important aspect of this is the quality of justice delivered. The quality of justice is not an economic factor where you pay more for a more just result. It must be binary. The outcome must always be just in order for there to be a justice system. The question then becomes how do we deliver a just resolution of disputes most efficiently, so that all people have access to the justice system. It's important to note, of course, that family law is an important area of the civil law in Australia and for many, their first if not their only interface with the justice system at all. Any consideration of access to justice must have proper regard to access to justice in determining child access and property division disputes in a family law context, which now extend to de facto couples regardless of gender. Of course, another important area of civil justice is that of workplace disputes. Finally, before addressing some more specific topics - - -

DR MUNDY: Mr Keogh, we only have half an hour for you this morning and you have gone through about a third of that already, so we need time to put some questions to you.

MR KEOGH (LSWA): Yes, I was just finishing up. I just wanted to highlight the point in the 2009 PWC report that was highlighted in the Commission's draft report, that the ratio of between 1.6 and 2.25 in every dollar invested in the legal aid system

is a benefit. This must highlight the pressing need to actually significantly increase legal aid funding across the board. I am prepared to address a few specific issues but I thought I would see if there were any questions that you wanted to raise with me first.

DR MUNDY: Thank you. I think it is fair to say that what we intended to say with respect to court fees seems to have caused a number of law societies and indeed his Honour Martin J some concern but our point is this. Courts, whether we like it or not, receive their funding from the executive - well, from the parliament. They get special appropriations and they get them. Court fees are charged. They are levied. I presume that you are not suggesting that they should be abolished.

MR KEOGH (LSWA): No.

DR MUNDY: So, therefore, the question which is begged for us is how should they be structured and how high should they be and upon whom should they be levied. I am sure you are aware of the Bell case and the costs that that imposed upon the Supreme Court of Western Australia and the amount that it was able to recover in fees and the difference is in excess of $14 million.

MR KEOGH (LSWA): Yes.

DR MUNDY: I am sure you don't think that's reasonable, fair or just. Our purpose here is actually, to be frank, to find resources that enable the courts to be less dependent upon government and to improve the quality of services that they provide and therefore the quality of justice. That's what we were trying to get at, so - - -

MR KEOGH (LSWA): Can I just address that one point?

DR MUNDY: These are our hearings. Could you please just reflect on how we perhaps should think about fees being set.

MR KEOGH (LSWA): I think the first point you made a reference there to being less dependent on government. As you pointed out, the costs of the courts are appropriated by parliament. They are one of the three arms of government. They are an essential institution. No-one is suggesting that parliament, for example, have to extract fees in other places. It provides obviously a public good as the legislature.

DR MUNDY: But the government provides many other services that it charges for.

MR KEOGH (LSWA): It does provide many other services, some of which it charges for and a further sub-set of those are charged for on a cost recovery model, driver's licences being an example in this state. It is accepted that courts should charge fees. It is accepted generally that the way in which those fees are charged

should in some way be matched to the nature of the matter being brought and the nature of the tribunal to which they are being brought. That concept I don't think anyone has great difficulty with.

DR MUNDY: Can I just stop you there.

MR KEOGH (LSWA): Yes.

DR MUNDY: We agree, because the nature of the tribunal in fact reflects it in some sense, the justice, will give you some sense - - -

MR KEOGH (LSWA): And the nature of the dispute, yes.

DR MUNDY: The nature of the dispute, yes. Is the character of the litigant relevant and the nature of the matter?

MR KEOGH (LSWA): The nature of the matter and the character of the litigant are going to be relevant. They are not necessarily going to be synonymous with each other.

DR MUNDY: No.

MR KEOGH (LSWA): The classic example really is actually, and one that we see a lot of applications but ones that are usually not able to be assisted in the law access space, are the mum and dad family company. Australia is one of the most corporatised environments in the world. There are pros and cons about that but we have many, many micro businesses that are running on an incorporated basis which means if they run - - -

DR MUNDY: The director and sole shareholder is one of them.

MR KEOGH (LSWA): Yes, there you go. If you were to run into a dispute that had to go to the Federal Court or to the Supreme Court as a Pty Ltd or company of any form, you would be slugged with a corporate fee.

DR MUNDY: Yes.

MR KEOGH (LSWA): No-one is pretending it's easy to slash through and go, "Oh, we can easily distinguish between very wealthy companies and very small ones and companies that are bringing large Bell-like litigation and those that are bringing small litigation."

DR MUNDY: And why should we discriminate between a sole trader on the one hand and for economic purposes an identical entity on the other that happens to be

incorporated? Is that the answer?

MR KEOGH (LSWA): That's the issue I'm drawing. That's right. That is an issue that is not currently properly addressed in the fee structures of the courts. I think the fee structure point that you make and that the Commission has turned its mind to in its draft report in a way is largely ironic, I have to say.

DR MUNDY: Right.

MR KEOGH (LSWA): One of the large geneses of this referral to the commission arising was a concern that the increases in Federal Court fees two years ago, I think it was now, was so high that they posed a barrier to access to justice. The implication of what's in the draft report, that those fees should be higher, seems quite an interesting result and I think quite a contrary result to what was probably intended.

DR MUNDY: We have received no instructions as to what the purpose of this inquiry is, Mr Keogh.

MR KEOGH (LSWA): I understand that, nor should you, but the background genesis of that seems quite interesting. In any event, to address the point, I don't think people have difficulty with the differential fee structures between different types of courts and tribunals and different types of cases and to some extent different entities where the nature of the entity linked with the nature of the case would demonstrate that the cost of the proceeding overall and the potential benefit of the proceeding were justified. That should be appropriate, but to go with what would be some form of full cost recovery model in any circumstance would be so high that it would defeat the purpose of having the courts in the first place in nearly all instances - and would remove, and I should say this, would discount the public good that is derived from the settlement of those resolves, those disputes, both for those parties and the general idea of having the courts as the main determiner of disputes in this country.

DR MUNDY: It may well be the case the courts aren't the main determinator of disputes in this country. Ombudsmen do a lot more work than courts, for example, in resolving disputes. I just want to come back to this question of public benefits.

MR KEOGH (LSWA): I really should say "ultimate" instead of "main".

DR MUNDY: Yes. This question of public benefits, because at the end of the day, if you are what we are, and that's economists, it is a no-brainer for us to say there are a pile of public benefits over here and the private parties shouldn't have to pay for them. That's not a proposition that we struggle with, and indeed that is, if you read the material we have written, the question is what is the extent of the public benefit? It also brings us to questions, as you would no doubt be aware, of issues around

public interest litigation, which we actually suggest the government should provide for.

MR KEOGH (LSWA): Yes.

DR MUNDY: So I think we understand the nature of public and private benefits. I guess the question that's in our mind, particularly in commercial matters, not issues about deportation of immigration violators, all those sort of issues, with children at risk, but in essentially commercial matters of a routine nature. What's the character in these public benefits?

MR KEOGH (LSWA): Okay. To take an off-the-cuff example, landlord-tenant dispute.

DR MUNDY: Yes.

MR KEOGH (LSWA): Whether it's a commercial tenancy or residential, but let's say it's commercial, and a dispute around the tenant has left. They have caused damage to the property. That should be remediated. It hasn't been. It's damage that is more than the bond, so it's not easily recoverable by the landlord. If the cost of pursuing that is too high, it will never be pursued. If that is - and more quickly than it already is within the knowledge of the exiting tenant, they know that they can basically get away with not doing, as long as the damage they caused is not extreme, they just won't be pursued; at the end of the day they won't be pursued, and that is the current situation, and that's not good. We want to see that get better, not worse.

Even when I was a very junior lawyer working in an outer suburban practice, I would often have people come to me about multi-tens of thousand disputes, which had got to an intractable position, by which I mean the other side was just standing there with their arms crossed and saying, "Well, go me." You would have to sit down with them and step out, even in a Magistrates Court, you are outside the small claims jurisdiction, so are more than $10,000 but you are less than 50, or now 75, let's have a look at how much this is going to cost for us to draft the proceeding, send it off, get it back, see what they do. There's a point there where you start going, "Well, is it worth the stress to you? Is it worth - you may not win, but even if you win, you might not all of it. How much are you going to spend on it?" Legal fees are one part of that, court fees are another part of that. There are many points to that.

If that issue doesn't get resolved for them, that's a problem for them, but it becomes a systemic and public issue because it becomes basically known that you can get away with stuff. That's the problem. The courts cease to provide what I described earlier as the backstop of the rule of law. The rule of law only works if it's enforced. If people know it will never get enforced below a certain level - - -

DR MUNDY: So your basic proposition is that if fees are set too high, too many matters aren't brought, then the law begins to lack credibility through an absence of enforcement?

MR KEOGH (LSWA): The law, not only does it lack credibility, you actually develop a state of lawlessness. People know they just don't need to do things.

DR MUNDY: Yes, okay.

MS MacRAE: I guess, just around that discussion out, I think there has been a lot of misrepresentation of what that report actually says about fees. In our discussion here, I think there is very little that we would disagree on. I think it's just a matter of we are looking for, and I guess in some senses in the draft we were keen to incite a response. So, we did want to put a proposition that there is scope for increasing court fees and I think you're right to suggest that our report does imply some level of increase, and I think I would agree with you that things like having fees in particular courts just set at particular levels, and there's no systemic assessment of how do we set these fees and what is a reasonable fee and how should they be adjusted, I think we are all in very firm agreement about that; so I just think the more we can help you to turn your mind to the issue the way that we are trying to address them, rather than full cost recovery is never going to work, because we actually agree with you on that completely, it would really help our cause if it was possible for the Law Society to give us a bit more feedback on what might be possible, rather than what's wrong with full-cost recovery, because we actually do agree about that.

MR KEOGH (LSWA): I suppose, in terms of what may be possible, one of the things that has to sit with that is to what degree do you want courts' administrative wings to be engaged prior to the commencement of a proceeding in sifting through the relative merits of whether someone is or isn't entitled to an exemption, reduction - like there are processes at the moment, and there's very few people that fit into those criteria, and those criteria are - some would argue, not in all cases, but in some cases, they are applied laxly. There are cases where defendants would be asking, "How did this get commenced?" They then have to pay a filing fee, but the court has only got so much resources to spend on that, so they have to deal with that as best as they can, but they are very minimal criteria that they are applying, so it's not too difficult. The more you set up a structure that requires them to make that assessment is an increased cost to the whole system again on having that assessment.

DR MUNDY: Yes.

MR KEOGH (LSWA): It also becomes, not only a delay factor, but an issue of consideration of, "Do I now need to go through four weeks of approval process before I know whether I'm going to get a filing fee exemption or reduction, or if I fit in that category, or this category, before I - - - "

DR MUNDY: We do make the point that it does appear to us, I think our view on the current state of waivers and similar matters is pretty much the one you have just expressed, so we have made recommendations that these waiver arrangements must be really clear, really apparent and simple, with an extraordinary out clause so that there isn't an injustice committed. Generally, I think we agree, it should be some sort of presentation or some sort of healthcare card. Is the person legally aided or - you know, particularly if they're legally aided, because then it's just bits of the state passing money back and forward between each other; so I think we generally agree with the proposition that you don't want the thing to become so complicated you spend more time administering the - - -

MR KEOGH (LSWA): I suppose one of the obvious issues is, okay, heath card or not, you're an individual and you are okay for a fine to a certain level. The question is how do you distinguish between the company that is effectively the incorporation of a sole trader, or mum and dad, and Westpac?

DR MUNDY: I think we can agree that probably where the difficulty is is probably in those small commercial disputes, perhaps minor planning, the things that have an economic rather than an individual character to them, and where they are relatively. We are not talking about Bell or C7 or the Reinhart family trying to sort out the family trust, we are talking about what we might - and maybe the definition shouldn't be on their legal character, but on some basis of - we hate this - what is a small business? That sort of - looking forward past the corporate form.

MR KEOGH (LSWA): Yes, and gets into all those other difficulties of his making - - -

DR MUNDY: There is always going to be a boundary and there's always going to be someone who falls over the line. Can we take you on to some other matters - - -

MR KEOGH (LSWA): Yes, of course.

DR MUNDY: - - - in the couple of minutes we have left.

MS MacRAE: I would be interested, just given that the pro bono sector is still sort of becoming more coordinated, and I appreciate there has been a lot of work done here to try and get the pro bono sector working in a more coordinated fashion.

MR KEOGH (LSWA): Yes.

MS MacRAE: We have had a bit of a difference of view from various parties about how - well, the first thing is we are suggesting is that where pro bono clients, or where are clients represented pro bono, that costs orders should be able to be

provided for.

MR KEOGH (LSWA): Yes, and they are in Western Australia.

MS MacRAE: Where do you think that money - I would be interested in where does the money go?

MR KEOGH (LSWA): Where does the money go?

MS MacRAE: Where the money goes, is that appropriate?

DR MUNDY: So if you act for someone pro bono and you win - - -

MR KEOGH (LSWA): The law is costs can be recovered.

DR MUNDY: Where do they go?

MR KEOGH (LSWA): To the lawyer.

DR MUNDY: To the lawyer.

MR KEOGH (LSWA): I think it's important in a discussion of costs to realise what costs are. Costs are the costs of the lawyer and disbursements. The costs of the party's time is completely irrelevant to the discussion of costs, so if there's a lawyer, there's costs. If there's no lawyer, there are no what I call costs in the system, other than filing fees and disbursements and experts' reports. So there is a provision in Western Australia that allows for a person to be represented pro bono, but if they are successful to claim costs from the other side, which will only be to whatever level the lawyer would have charged if they had been charging.

DR MUNDY: Yes.

MR KEOGH (LSWA): So no-one is ahead, and at the end of the day if you look at what the costs scale that you get under costs versus what would be privately charged fees, no lawyer would regard themselves as ahead.

DR MUNDY: It has been suggested to us, forgive me, I can't remember by whom, but it has been suggested that in those circumstances, say a lawyer who works for a firm such as yours, which has a well-established pro bono scheme, I presume - - -

MR KEOGH (LSWA): Yes.

DR MUNDY: It has been suggested that the pro bono fees that you might earn in that regard should be paid into whatever the firm does to support its pro bono

activities. Obviously, if that's what Freehills wanted to do, they would do it.

MR KEOGH (LSWA): I think that is actually what we do. To take our firm as an example, we have an organisation which is called the Freehills Foundation, which is what funds the sort of pro bono work that the firm does and it takes in the funds, so that's I think a reasonably common set-up across the large firms.

DR MUNDY: The smaller - I mean, it has also been - - -

MR KEOGH (LSWA): The smaller firms, if they got money in costs, effectively that is going to fund their pro bono work.

DR MUNDY: Yes. Yes, the incentives all sort of work the same way, irrespective of whether - junior barristers are doing work pro bono, I guess is another one.

MR KEOGH (LSWA): Yes.

DR MUNDY: As you would be aware the situation isn't the same in all jurisdictions.

MR KEOGH (LSWA): No.

DR MUNDY: One of the reasons why we were coming at this issue was about the relative incentives of the parties in the event that one party was represented pro bono in the absence of - so not in the West Australian circumstances. Obviously, the same behavioural incentive for the other side exists if the person is self-representing, because they won't have the costs. It's the incentive to settle. Do you have a view that in the event that a self-represented litigant, and they can get their disbursements - - -

MR KEOGH (LSWA): The self-represented can always get disbursements.

DR MUNDY: Yes, but I guess the question is not so much from the equity but the incentive characteristic. The suggestion is that if the litigant is self-represented and there is an incentive on the other side to drag the matter out because there is no fear of a costs order.

MR KEOGH (LSWA): No, I completely understand the question, and that's one of the rationales for why that order exists in Western Australia, is that it puts - there's a few reasons. It means that where you've got a matter, the represented, the non pro bono client is not advantaged by the fact that there won't be any costs against them if they decide to do exactly that, so they are going to take a more commercial approach to the overall litigation. The other fact is that overall, both for the non pro bono party and for the courts, and therefore for society, everyone is better off if

there's a lawyer on both sides. It will just run more quickly. It will be more efficient, and points that shouldn't be taken won't get taken; so whilst it to some degree incentivises getting a lawyer involved in the first place, it's in no way compensatory, but it does serve exactly that purpose in terms of the incentive of both parties to reach agreement, because of course the pro bono client is always exposed to the potential costs order from the other side, other party.

DR MUNDY: As is the self-represented?

MR KEOGH (LSWA): That's what I mean, yes.

DR MUNDY: So in Western Australia if I turn up and represent myself and I win, will I get a costs order?

MR KEOGH (LSWA): You will only get a costs order for any disbursements, but if you are represented pro bono, then there's an opportunity to claim costs.

DR MUNDY: So the incentive for the self-represented to get a pro bono lawyer? If I can't get one, that may be a reflection on the merit of my case.

MR KEOGH (LSWA): It may be.

DR MUNDY: What if I can't get one - - -

MR KEOGH (LSWA): That's one of the fundamental issues, so to be fair, that's what the law access system the Law Society runs, is set up to try and avoid, and we run a system where, I mean we do look at the financial background of the applicant, but also what's the merit of the case. We're not going to send a member of the profession a case, take this on, without having looked at it. We have a panel that will assess it, say, "We think this at least is an arguable case." It may be at the end of the day that it doesn't, but then a lawyer will at least have said, "Well, the society says it looks okay"; and then when they sit down with a client say, "Look, this has nowhere to go". That actually is quite effective as well in terms of taking people who shouldn't be in the system out of it.

DR MUNDY: Yes, it acts as a screen.

MR KEOGH (LSWA): Yes, but we can only provide so much of that service.

DR MUNDY: No, we understand. Can we just ask you about, I guess continuing on self-representation. Again, I think there has been a little bit of misunderstanding inasmuch as we made some recommendations about creeping legalism, particularly in the context of tribunals.

MR KEOGH (LSWA): Yes.

DR MUNDY: It was meant to be an expression of there are, as you know, some tribunals that are set up with the purpose of being self-representing places, small claims, some other known sort of matters, but they are quite common in Victoria.

MR KEOGH (LSWA): Yes. I understand what was being put.

DR MUNDY: I guess what we were trying to explore there was the circumstances where it does appear to us and has been put to us by tribunal members, both judicial and non, that leave, which is provided in those fora is possibly being given more often than it should, and it's picking away under that. The proposition that's advanced is that the presence of representation, it need not necessarily be legal representation, we might add, is slowing these processes down. One of the suggestions that has been made to us about tribunals more broadly has been making it very clear in the tribunal rules, placing a duty on all parties to assist the tribunal in fair, fast, equitable, and I understand many of the court rules have those propositions in them as well, is that something that you would be uncomfortable with?

MR KEOGH (LSWA): As a starting proposition, we are uncomfortable with the idea that lawyers are not allowed to represent someone in any jurisdiction.

DR MUNDY: But the fact remains that they are.

MR KEOGH (LSWA): They are in some jurisdictions, that's right, that remains a fact, and it's something that we continue to remain uncomfortable about, and as a general proposition we don't believe lawyers slow up any of those processes, indeed we think they probably result in them being resolved more quickly, not in all cases, and, like every profession, there are people that don't operate in the way that would be as conducive as others.

DR MUNDY: And lawyers, when they turn up and act may correct an injustice, which may slow the process down?

MR KEOGH (LSWA): The next point I was going to make was one about this idea of justice, and lawyers are going to stand up to make sure that the process does act in a just fashion. We are not opposed to any tribunals or courts being set up in a way that is an user-friendly to an unrepresented person as possible. I will make the observation that where people are assisted or represented by non-lawyers, quite often that can result in the slowing down and the bogging down of those matters. For the exact reason that you draw attention to, lawyers will work to resolve the matter, and that is their obligation whether they are in a tribunal or some other body, their obligation to the court as a professional lawyer is to do that; others, that is not, and it's not their training. It's just not their default mode necessarily, and that is why you

will see other representatives have difficulty.

DR MUNDY: I think we would in this space encourage any recommendation to be in the language of all participants, rather than just representatives.

MR KEOGH (LSWA): Yes, of course. All participants in any system that is driving towards the resolution of a dispute should work towards the resolution of the dispute; we have no problem with that at all.

MS MacRAE: Can I just ask, you would have seen in our report that we've suggested that it would be helpful, given the difficulty that consumers have in accessing what they can reasonably expect as a fee from a lawyer for various sorts of cases - again there seems to have been a little bit of misunderstanding around what we're proposing here, so we certainly weren't suggesting that we have a web site where we would look at a particular point estimate of a fee for a particular kind of case.

What we wanted to do was to look at, you know, "I'm Joe Blow. I've never had an interaction with the legal system before. I have a case now that I'm thinking I might want to bring" - and it might be a tenancy matter, or it might be a small claim for a business loss or debt - "but I have no idea what it's likely to cost me," and what we were looking at was trying to get a centralised web site that might be able to give me a range of potential costs for a typical kind of case that has these kinds of features, obviously heavily caveated and obviously given as a guide rather than, "This is what you should necessarily expect." But trying really to give people some ballpark kind of idea so that when they make their first inquiries they've got some idea about what they might reasonably expect. Do you think that's a reasonable proposition?

MR KEOGH (LSWA): Yes.

MS MacRAE: We've had differences of view about whether that's something that would be helpful.

MR KEOGH (LSWA): I don't think anyone - so everyone hears that idea, and I think it's a great idea. The first concern that I think arises for us generally is, to use this as an example, when I first started practice I used to do a lot of what we call standard wills. Charged $110. In that 18 months I don't think I did a standard will, but I only ever charged $110 for the will because we told everyone our standard will was $110. In theory it sounds great to say, "Oh yes, standard case on this will be in a range of this to this." There is no standard case. Everyone will think theirs is the standard case and you can put as many caveats on any web site as you like, it's still going to be difficult to get - the concern is really one of misunderstanding and one of false expectation, and that will lead to more cost disputes, more references to complaints bodies which are not justified than the current sit. But as a general

proposition it sounds fine, though working out what those costs would be, good luck.

MR MUNDY: Yes. The difficulty we have, and I'm sure it's a problem, talking to the complaints bodies is that people go into litigation, they're given information under the disclosure rules. The information under the disclosure rules looks like a mobile phone contract, and old product description document from - it's too - it's not meaningful. It's data, not information.

MR KEOGH (LSWA): Yes.

MR MUNDY: What the complaint bodies tell us is indeed exactly the point you raised, Mr Keogh, that it's about expectations. Most of their work is ticket shop, pardon my aviation parlance, but that's what it is. It's the expectation that they have relative to the outcome, and I guess what we're - and I guess the other observation that you'd probably make on this base is given the notion of information asymmetry, people do these things rarely, they have no sense of judgment about them, if anyone has got judgment about this, it's going to be the lawyer.

MR KEOGH (LSWA): Yes.

MR MUNDY: That goes on to the question of well why shouldn't we have fixed fees because the only people able to manage the risk, I accept possibly not very well, but the only ones who have got hope are the lawyers. So that's what we're trying to get at, is trying to actually help people understand. Now, we know that there's disclosure arrangements in all jurisdictions, and I guess our sense is some benefit, but more meaningful to consumers than others. That's what we're trying to get.

MR KEOGH (LSWA): Yes. I don't think anyone has a problem with trying to do as much as possible to alleviate that misunderstanding issue, and I suppose there's two issues - concerns. One is how do you describe the matter? So if you're going to say, "Okay. Well, this matter will cost in the range of X to Y," how do you describe what the matter is?

MR MUNDY: It's not a bag of apples.

MR KEOGH (LSWA): Yes, and make it quite clear that it's only this to this, and it's not - and it goes this way or that way. Only if your matter fits exactly in that square are we talking about, and then okay that range." Now, if you can narrow that down very clearly, you can probably get a range out this end, but the warnings across the top and at the bottom and at the side would need to be so very clear. It's something that could be worked towards, but I think it would be - you can do it. The other - but the thing I want to add to that is this might go to your bundling of services, but quality of service. Not quality of service per se in terms of are they doing the right thing or wrong thing by the client, or are they doing what is required

to get the matter done, but what a number of I would imagine the boutique and larger firms would say is, "Yeah, that's a range, but we're not going to do it for that." Well, why? Well, we provide a very different all-encompassing service for what you get for our fees. Now, that's a commercial issue for those firms to have to discuss, but it's one that at the moment is discussed with the potential client on the basis of the client having said, "This is my matter. These are the issues I'm confronting," and then that response of, "This is where we think the fees will be," tailored to that client. Having this sitting off on the side will make that a very different conversation.

MR MUNDY: Yes. All right. Look, I think - - -

MR KEOGH (LSWA): It's not a - some of the services are, but it's really not a commoditised service.

MR MUNDY: Yes. No, we understand that. Look, we are going to have to draw it to a close.

MR KEOGH (LSWA): Yes.

MR MUNDY: Thank you very much for your time, and I hope your recovery is going reasonably well.

MR KEOGH (LSWA): Thank you. Sorry. I had the surgery last week, which is affecting my nose. But can I just make - - -

MS MacRAE: Believe me I do understand that very well.

MR KEOGH (LSWA): Can I just make one point which goes to a number of the comments you have made, which is about why have submissions focused on particular areas. The professional bodies were the main responders, whether they're from not for profit areas or law societies or the Law Council. Whilst they do have some employed staff, are volunteer organisations and no submission leaves anywhere without it being signed off by those volunteers who run those organisations, like myself. Particularly for the Law Council, which is a federal body, it has to collate all of our views before it can do anything with it, and then have, you know, as with all federal bodies, an interesting fight around what the agreed position is.

At 900 pages, and I think I printed it four pages per A4, it's pretty thick. It's a lot of - you know, no-one is criticising the quality of the work, but the time given to respond to it, given the nature of the bodies that were going to be the respondents to it, will lead and has led to people focusing on the stand-out points or, "If we take that to the extreme, it might mean this." So just in relation to those comments you were making, I think that's why you found that approach taken, because of the very limited time for people to give it full and proper consideration. Having said that, the

Society, and I'm sure the Law Council, are very happy to continue to engage and work with the Commission on all of these issues, and would really like to see not just issues we've canvassed today but particularly funding for Legal Aid services addressed more clearly and really made a focus as well going forward. Thank you.

MR MUNDY: All right. Thank you, Mr Keogh.

MS MacRAE: Thank you.

MR MUNDY: Can we please now have the Northern Suburbs Legal Centre. Could you please for the record state your name and the capacity in which you appear today?

MS MERRIN (NSCLC): Yes. Good morning, and thank you, and I'd also like to acknowledge the Noongar people of this land and pay respect to their elders. My name is Karen Merrin. I've also got a thing in the throat this morning. I'm the manager of the Northern Suburbs Community Legal Centre, a member of the Community Legal Centres Association, and a member of the National Association of Community Legal Centres. But today I'm here in the capacity from - my point what I'm trying to talk about today is about preventative education in access to justice and how important that is, and also partnerships. I acknowledged the National Association of Community Legal Centres have submitted and will appear. I also acknowledge - - -

MR MUNDY: Has appeared.

MS MERRIN (NSCLC): Has appeared, and the Community Legal Centres Association of WA will be appearing here today. Just a little bit about my background. I'm probably in the twilight years of working in community legal centres. My background is I came out of the Pilbara some 20 years ago where I worked in family violence in the indigenous communities. I moved to Perth and moved into a small community legal centre, and then was the project officer for setting up the Northern Suburbs Community Legal Centre, which is now one of the biggest in Western Australia. So that's my background, and I'm very passionate about community legal centres, and I have seen so many reviews, so many inquiries into access to the law over my time that I thought this time I'm going to come and speak, so here I am today.

MS MacRAE: Well, thank you for doing that.

MS MERRIN (NSCLC): So today I really wanted to talk about where we came from firstly. The Northern Suburbs Community Legal Centre was established in 1995 from the social justice statement. There was two in WA was established at the same time. We're a generous community legal centre, and we have responsibility for eight local government areas, which starts in Perth, ends in Yanchep in the north, goes into the Swan and out to the coast, and in the 2003 review of community legal centres, our area was 30 per cent of the state's population. So it was quite big.

We have two offices, one located in Mirrabooka, which is a very ethnic diverse area, and one at Joondalup, which is also diverse, but diverse in a different way because it's mostly European migrants and English migrants, whereas in Mirrabooka we have really ethnic diverse Africans, Macedonians, Italians, and Vietnamese, and Chinese, and huge diversity.

When we started we had an annual income of $200,000 which was community legal centre program Commonwealth, and now we have an average income of about $1.5 million, of which the Commonwealth community legal centre program is a small amount, rather than a larger amount as it used to be. So we also have a number of partnerships, and we are funded also by the McCusker Charitable Foundation for one of our programs, funded by the Department of Commerce, the Department for Communities and Local Government. We have had partnerships with Legal Aid, and we're funded by Legal Aid, and we're funded by the Legal Contributions Trust Fund.

But what I wanted to really talk about today was the importance of those partnerships and in particular some partnerships like for instance the Edith Cowan University. We went into partnership when we were seeking accommodation in Joondalup, and a member of the Edith Cowan University was on our board, and they suggested that we talk to the school of law and justice at the university, and so we did, and we were able to secure a very small office for one day a week. We now actually have an office on site. We have six staff in that office, and we also have the program. We run a program with the university for students from the school.

So they do a placement at our office, and we're very proud of the fact that over the years we have developed such a good program with the university that we now have a number of students, some who are - one who is here today, who have graduated, done their school of law placements with us, and are now lawyers working with the agency. In fact I think there are only two lawyers of the nine that work in our organisation who were not graduates from university, students or volunteers at the agency. So we've done a lot of work on that.

So in about 2009, I think it was, we recognised that we couldn't cope. We could not cope with the demand or the requirements, particularly of our ethnic communities, and we had some very good examples, one of which I've written in my submission, about some young people who - or people who were newly arrived migrants, and they had come in to see us at various times and over a series of weeks we were finding more and more of these people who were signing up for Internet access to a very big Internet provider, and none of them had computers we discovered. None of them had computers at all, but they had signed up because they saw these people with suits and thought they were government people, and they had to sign these documents.

So we developed a very big education program, and this program has now really got extremely large, and so we are working on that as being some sort of self-sufficiency for the agency because it's really difficult to be able to find support to develop those education materials. I think what's important is that I read in the report that there seemed to be some thoughts that community legal centres perhaps were reinventing the wheel when Legal Aid were providing some materials, and that's not the case.

The sorts of education that we develop are totally different, and a lot of that is interactive education where we have difficulties with languages, and we also develop a lot of DVDs. So we've got visual presence around what it is that our clients can view.

We work in partnership, and I think this is really important, in partnership with so many agencies, so many, and more recently we've just developed a partnership with the WA Police and they are funding us for some work in education around family violence in African communities, and you may - or violence in African communities, and you may have seen only this week that - you may not have, but it was rather a large ethnic violence riot in Mirrabooka where we're located, and we're involved with the police in solving issues around that all the time.

So I guess my submission today is all about working in partnership. We also have this partnership with Anglicare WA where we were the first ever community legal centre to go into partnership in a family relationship centre, and that's based in Joondalup, and we work in that family relationship centre giving advice to their staff, as also giving advice to the clients when it's required. We encourage mediation, but we also give advice as to their rights and responsibilities.

So I think that's all I really want to address today, is that I think that access to justice has not considered the more preventative models. We talks about courts at one end, but most of our clients, unless they have support or they have representation, really do have a difficulty in accessing the justice system, and I was interested in what Matthew was saying because one of the big areas for all of community legal centres is property in marriage. Property in marriage is a huge area in terms of people not being able to access the system, and I'm happy to talk about that if you want to.

MR MUNDY: We had some evidence yesterday in Adelaide, and the day before in Sydney which was essentially a family matter, but at the time of the passing of a member of the family and the dealing with wills, and it struck us that there seemed to be a lot of - well, the question that struck us is why these matters are immediately in the Supreme Court, but beyond that there seemed to be matters which are very much of a family character, brothers and sisters fighting with each other, and we're just wondering whether what we've learnt through family relationship centres and mediation in the family context more generally might actually be able to be brought to bear on disputes within families about wills because the stories we heard were really quite - one was about members of family debating an indigenous burial site, and we just didn't - and some poor old chief - some poor old justice, Supreme Court judge in South Australia had to sort this out.

MS MERRIN (NSCLC): Yes.

MR MUNDY: Clearly not what he's trained to do, probably not what he wants to do almost certainly. So it just struck us that given these mediation processes are now - no-one tells us they're not working, everyone tells us they're the best way to go, whether the remit could be extended and provide some assistance to people who are at a pretty unhappy time of their lives probably.

MS MERRIN (NSCLC): Okay. I probably need to answer that in - there's two parts to that. In terms of indigenous families and burials, we recently represented one side in a dispute over a burial of a young person and it's something that we all avoid doing, I have to say. Everybody avoids doing it, I think, in the sector - in the legal sector, and it's very time-consuming, it's very emotional, and I don't think there's a satisfactory outcome for anybody in the court system.

DR MUNDY: No.

MS MERRIN (NSCLC): I think mediation probably is the way, but I'm not sure that would always work, and the Department of Justice used to have a mediation - I'm not sure whether it still exists here, but it had a mediation centre for indigenous families and burials. But the other part of that when you talk about wills, we also have a unit in our office which is the Older Person's Rights Centre and we have - it's on elder abuse. It's about elder abuse and elder abuse is defined as the same as family violence, so it's physical, it's mental, it's social, it's isolation, it's all of those things, and financial.

But elder abuse is a growing industry in this country and it is about family members taking advantage of an older person, and I think it's 5 per cent - approximately 5 per cent of West Australian older people over 60 years of age are abused by a relative or a carer. So we have 1.2 lawyers and two students, I think, and a social worker working in that area and it's - there is no outcome quite often. Quite often it's about mum who said, "I will help you out now and I will give you some money or I'll sell my house and you build the granny flat" and I shiver when I hear about granny flats, and I - "We'll build the granny flat and then you can move in for life and we'll all be happy."

It doesn't work like that and more often than not quite often the couple will break up and they're in the family law dispute or they - you know, they will fall out, or a daughter-in-law or son-in-law will fall out with grandma and then grandma gets moved out and I often relate the story of one day we were about to leave the office and it was about 5.30 in the afternoon and an old lady turned up in a bowling outfit and she'd been locked out of her house by her son and wasn't allowed to go back there and we had to get her into a women's refuge.

So one of those issues are they're all Supreme Court actions. Most of them would end up - financially would end up in Supreme Court actions. They can't

afford it. We can't represent them, so we really heavily rely on pro bono, which is not always - - -

DR MUNDY: I guess one of the things we're trying to get out heads around is do the - given the nature of these things do they really - because the Supreme Court is an expensive place to be and whatever the assets are you can chew through.

MS MERRIN (NSCLC): Yes. Yes.

DR MUNDY: Is there some sort of less expensive, less formal arrangement that might be worth thinking - we've thought about it in all sorts of other interactions between people.

MS MERRIN (NSCLC): Yes. I think mediation is probably the answer and we've often talked about needing a mediation service for these - because quite often there is no legal recourse to the client because often they've freely given the money, you know, they've gifted the money and/or gifted their house and to get understandings and without any agreements in place and not being able to get them back, you know, so quite often it is about the best way to do it is to mediate it, and I think also in a lot of other areas mediation is the way to go and we quite often do that, and a lot of our cases end up in the tribunals, the State Administrative Tribunals, which are - - -

DR MUNDY: Less formal.

MS MERRIN (NSCLC): Less - yes, they're less formal and they're more able to be managed, yes.

MS MacRAE: Did you have a view just about the earlier evidence we had in relation to representation in tribunals? Did you have a view about the necessity for representation and whether in some cases it does tend to - I mean, one of the things we've heard, I suppose - if I can describe it as the prisoner's dilemma - that one side gets represented and so the other side then feels that even though they were going to come along unrepresented, oh, we've now got to at least match that because if we don't, you know, we're going to be disadvantaged and both sides end up with many more costs than they otherwise might have.

MS MERRIN (NSCLC): Yes. It's interesting. When I first came to Perth I actually worked in the - what's now Centrelink, but it was the Social Security Tribunal - well, worked - I worked for Community Legal Centre and we represented - and I'm not a lawyer, and so I was able to represent in the Social Securities Tribunal and I thought that paralegal did a very good job of that sort of representation. Very committed to their work and were, you know, often up against lawyers who were working for social security, but in terms of - I was listening with interest in Matthews reference to the Tenancy Court.

In the Tenancy Court in this state - and we have advocates in court nearly every day - in the Tenancy Court in this state if you're - you're not allowed to in some cases attend if you are a lawyer, but if one side's saying we want to bring a lawyer then the other side has to agree that that's okay. So in the case of - say, the Department of Housing versus Tenants and we represent Tenants, we've been employing young graduates who are not lawyers, who have not been admitted, but unable to get positions or, you know, and they're just doing their graduates, but the Department of Housing won't allow us to have them appear in court because they are graduates so they have a legal qualification so they can't appear.

DR MUNDY: And what's the nature of the people who appear for the Department?

MS MERRIN (NSCLC): Well, the Department has two ways of appearing. If we say that we're going to have a graduate appear then they will put it to their legal department and they will have a lawyer appear which means then we have to go through all the affidavits and the evidence, et cetera, but if we say we've got an advocate appearing then a person from the Department will appear who's also an advocate for them. So it's very interesting, so in the Tenancy Court here it's something we've been trying to address, but what it means is that if - we can employ paralegals but they can't be graduates.

DR MUNDY: I mean, is there any difference in the outcomes from when you've got lawyer against lawyer as opposed to advocate against advocate?

MS MERRIN (NSCLC): No, none at all.

DR MUNDY: Other than cost.

MS MERRIN (NSCLC): Other than cost, yes. Yes, it's a very interesting - because the advocates are well-trained. They're well-trained, and they do a lot of work. That's their job. That's Tenancy. They know the work.

DR MUNDY: And, presumably, the people representing the Housing or Homes West or whatever it's called - - -

MS MERRIN (NSCLC): Know their work as well.

DR MUNDY: They do it as well and - - -

MS MERRIN (NSCLC): Yes, they do, and so we have this - at the moment we have the three strikes policy in WA. We've got - we're in court two or three times a week representing our tenants and, you know, they're backed up. We're backed up by lawyers, so our lawyers will check their work, make sure that they're doing the

work - but they also just represent on a daily basis in the courts.

Our advocates, in fact, are on duty at the duty Joondalup courts and shortly to be on duty at the Perth courts for the Tenancy Courts, and they give advice on a daily basis.

MS MacRAE: Yes. So what, ideally, would be the rules of that court then in terms of representation, do you think?

MS MERRIN (NSCLC): Well, I think it - for us it's about what is legally qualified.

MS MacRAE: Right.

MS MERRIN (NSCLC): Do you have to be admitted to be legally qualified or not? That's our argument that if you're a graduate and you know the law are you legally qualified and should you be able to represent as a paralegal?

MS MacRAE: Yes.

MS MERRIN (NSCLC): But I think, ideally, for me, ideally I think it would be that you don't have lawyers in that court. That would be my view. Probably not the view of my lawyers who work with me, but it's certainly my view.

MS MacRAE: Yes. Thank you.

DR MUNDY: You've mentioned that you partner with a lot of organisations.

MS MERRIN (NSCLC): Yes.

DR MUNDY: And one of the issues that we've bridged in exploring is the whole notion of referrals so that other people who work in community-based organisations they - in South Australia they actually have a TAFE program specifically to provide legal training for community workers who are not lawyers.

MS MERRIN (NSCLC): Yes.

DR MUNDY: Is that something that happens in WA?

MS MERRIN (NSCLC): We did have one. Legal Aid certainly had one, and there was one - a very successful one - that ran out of Geraldton Resource Centre and it was quite a few people throughout the industry actually accessed that remotely, but at the moment, no, it doesn't. It relies on each agency to train their own. But there is some very successful training within the community legal centre sector. We do some very good training. For instance, today there's some tenancy training on for

advocates so, yes, there is some really good training and it's usually run by lawyers and we even have court days where they learn how to develop their skills for court advocacy and probably two or three times a year those courses are run.

MS MacRAE: In your opening address you talked about the importance of prevention and preventative education.

MS MERRIN (NSCLC): Yes.

MS MacRAE: How as an organisation, given that you're always going to be very strapped for resources, do you determine what sort of proportion of work goes into your preventative work, and what sort of methods do you use knowing how difficult it is in those cases, how do you try and measure the success of what works and what doesn't in relation to that sort of education?

MS MERRIN (NSCLC): Most of our preventative education is developed around our CALD communities, culturally and linguistically diverse because they're a very captive audience at the moment because they're newly arrived migrants. So we work with our partners like MercyCare and the TAFEs. We deliver education into two TAFEs, three actually, but one in Thornlie, the central one in Perth, and one in Balga, so there's three TAFE organisations or Polytechnic north, Polytechnics they're called. So part of the development is we talk to our community organisations.

We have meetings, regular meetings and we discuss about what it is that we need to develop, how do we deliver that education, who was our target audience, and probably one really good example is a program called our four-day rental course, rental ready course and we do that with MercyCare. It's a MercyCare program and they actually pay us to do part of that course. So it's a four-day course where people coming out of refugee camps, now they may come from Burma where they're born in a refugee camp or, you know, some African nations where they're, you know, Kenya, they're born in the refugee camp, and they come out and they don't have the skills to rent properties in Australia. They don't understand what are the standards that you need.

So during that course, for the first two days of the course, it's about the practical side of it, and MercyCare run that course, and so it's about how you even clean, how do you clean, you know, how you can make products that are cheaper, et cetera, et cetera, and the last two days of the course is about their rights and responsibilities in the tenancy and we run that part of it. The feedback from that then comes from the clients themselves who, you know, interact with both agencies over a period of time. So we keep an eye on what's happening within the tenancies. So that's probably a good example of how it works.

MS MacRAE: Yes, okay. Thank you. What sort of governance arrangements do

you have when you have a partnership? What sort of arrangement do you have? Is it a sort of formal contract that you enter into, or is it a - - -

MS MERRIN (NSCLC): No, not normally. With some it is. Well, you know, for instance this partnership we've got with the WA Police at the moment, that is an informal partnership but it's funded by the WA Police. So the WA Police have funded us quite significantly and the Department of Child Protection are about to put some more money into that in terms of doing some translation. So the partnership is informal but every week there is a meeting between all the groups that are involved and they have Department of Child Protection, the WA Police, us, MercyCare, a number of psychologists and, you know, just a whole range of people involved in it on a daily basis.

MS MacRAE: Right.

DR MUNDY: You mentioned funding there. I guess one of the issues or one of the issues we're asked to bring our mind to is the funding of legal assistance broadly. Can you just give us a rough outline of what your different funding sources are.

MS MERRIN (NSCLC): Yes, okay. So we have Commonwealth Community Legal Centre funding and then we have funding for our Joondalup office which comes out of the state contribution's legal trust fund which is actually a grant, so it's usually - it's not a funding agreement as such, so it's more of a grant that comes each year and depends on the interest raised on where it comes from.

DR MUNDY: Yes, we understand.

MS MERRIN (NSCLC): Department of Commerce funds us for our tenancy program, it's probably the better funded program of all of them, and that's part of a tenancy network which I think is really important to understand about Community Legal Centres. We're very good at making a little go a long way. So we have - there's two really good partnerships around that and one is tenancy, the tenancy network which is like a hub and spoke model which we developed many years ago with the Department of Commerce, and the other one is the family relationship Community Legal Centre partnership which was a small amount of funding that came from the Commonwealth and we managed to, rather than fight one another for it, we set up this whole huge network which works very well.

So the Department of Commerce, Department for Communities which funds, believe it or not, a legal program for the Older Person's Rights Service, McCusker Foundation, WA Police, and until recently we had a partnership with Legal Aid WA where they referred all their family law conflict issues to us, but that ran out in February due to lack of funding and now they have developed another way of doing that and that's through paying us on an hourly rate.

DR MUNDY: The Commonwealth has recently withdrawn some funding for Community Legal Centres. Are you able to give us a sense of the impact that that has had on yours.

MS MERRIN (NSCLC): This is amazing. I think having been around for 20 years I knew it was coming. I think I have to say that. Change of governments brings changes to Community Legal Centres which is unfortunate because there's no stability in the way in which we can move forward. We were one of the agencies that lost funding. We gained it and it finishes in 2015. It makes a big difference to you. We will lose at least one staff, probably one and a half staff out of nine lawyers at the end of 2015 so we can't commit beyond that. So it does make a difference. It's a huge difference.

DR MUNDY: So when you lose a staff, what won't happen that is happening today?

MS MERRIN (NSCLC): Well, then we will need to drop the amount - we were funded for family violence and for family law children's issues and so that will mean we will be down probably 1.5 staff in that program, so that will be 1.5.

DR MUNDY: You will do less of it.

MS MERRIN (NSCLC): Less of it.

MS MacRAE: Out of how many would you have now, how many now?

MS MERRIN (NSCLC): In family lawyers we have four.

MS MacRAE: Okay. So you're losing one and a half out of four, so nearly - - -

MS MERRIN (NSCLC): Yes. So we would do less of it, and it's never ending, our waiting list is huge for appointments. I don't think anybody who has not worked in the community understands just what a waiting list is like. It's huge. We would have on a daily basis probably 10 to 12 appointments on a daily basis in each office on family law alone, and you can only do so much. So we work on a program where we do advice, and if they meet merit then we do minor assistance in a lot of cases, and sometimes representation and we do represent in courts a lot. But minor assistance can be quite time consuming as well because it's about preparing documentation for the court, teaching them how to go to court, answering their calls when they ring up and they're in court and they say, "What do I do now? This has happened. I didn't know that was going to happen."

DR MUNDY: So that minor assistance services really is sort of an unbundled

service.

MS MERRIN (NSCLC): It's definitely unbundled service and it's probably the biggest part of Community Legal Centres' work, yes. But also I think changing direction, when we decided to do the education program, changing direction is not easy when you decide to do something when you're funded because normally we need to put in long-term planning, you know, three to five-year planning, and when you say, "I want to change direction and do more education and preventative work," you have then got to negotiate with everybody so that you can change figures and come back to a reasonable figure.

MS MacRAE: I can understand if you've got these big waiting lists it's hard then to - - -

MS MERRIN (NSCLC): Yes, it's very hard. It's very hard, yes.

MS MacRAE: - - - ask everyone that even though you might say that, given the outcomes here, we think we're really helping more people in total, but it's harder to demonstrate that when you're against a big queue.

MS MERRIN (NSCLC): That's why one of the reasons, I think, when we're talking about access to justice, we must talk about education, it's a big part of it because it's so important that people understand it, and I'm not talking about education as just being pamphlets because most people can't read half the stuff that comes out. I mean, most of our clients are what I call "formaphobic", they have no idea. You know, you put something in front of them and they just freeze, they have no idea.

DR MUNDY: Has anyone done any evaluations of your effectiveness and the outcomes and the benefits of your education programs?

MS MERRIN (NSCLC): We have in terms of with feedback from clients and feedback from the agencies that we work with, and it's really very interesting because we've had a drop-off in the number and particularly in the number of small debts and particularly in traffic was a big issue. I think - to understand just how bad the traffic issues could be for some of these emerging communities is to understand some spin-offs that have happened in some of our programs. We were working with the Migrant Resource Centre, Metropolitan Migrant Resource Centre, and we were teaching women how to - ethnic women on how to read and understand the learner driver's forms that you have to pass the test for the learner's driver, and then through a number of weeks we found out that, in fact, most of them when they got their licence were going to go from the house to the shop and house to the shop and back again and they would never do anything else and we were asking them why and we found that none of them could read a map, none of them could read a map.

So we then had to do some work around driving and, you know, getting around your suburbs, et cetera, which is an interesting thing because those people now are the people that are the responsible drivers in our area, you know. Now we don't have those people rocking up at the front door with learner's permits and driving their own car without another person in the car. So it's really interesting, but there has been some work done around it, but I think that what Community Legal Centres are so good at doing is tailoring education to meet their communities.

So you know in bigger organisations you might - government organisations put out blank and they put it into different languages but what they don't understand is that a lot of people can't even read their own language let alone - they can't write it or read it, they can speak it but can't write it or read it. So we're very good at working with the communities that surround us and that's how we develop our programs.

DR MUNDY: All right. We probably need to draw this discussion to a close.

MS MERRIN (NSCLC): Yes.

DR MUNDY: But thank you very much for coming down from the northern suburbs and we wish you well.

MS MacRAE: Thank you.

MS MERRIN (NSCLC): I'm going to hang around.

DR MUNDY: Could we now have Zak Crafford, please.

MR CRAFFORD (LA): Good morning, Commissioners, and thank you.

DR MUNDY: Could you please state your name and the capacity in which you appear, please.

MR CRAFFORD (LA): Fair enough. My name is Zak Crafford and I'm the founder and chief executive officer of a company called Legalwise South Africa which has established a subsidiary here called Legalwise Australia.

DR MUNDY: Okay. Would you like to make a brief opening statement, and you don't have to if you don't want to, and then we'll put some questions to you.

MR CRAFFORD (LA): I think as an opening statement that might work best, not having been aware exactly what the process would involve and who would have read the submissions is perhaps to explain a comment I made in my submission, or one of them, that it's currently an Australian owned company, abroad being South Africa, that does legal expenses insurance which has been mooted by a number of people in the submissions. So currently Australia owns a legal expenses insurance company in South Africa and the statement I made in the submissions perhaps which also for clarification is why we say it's an Australian owned company and it will also explain my accent to an extent, which might surprise a couple of people.

So while I'm not born and bred Australian, I am now an Australian and I own control of that company which means the company is now owned by Australia. So I guess it might be a good idea also as an opening statement to explain legal expenses insurance which is a bit of a cinderella in the insurance world and often misunderstood. Legal expenses insurance can be a pretty technical type of insurance or a very - for lack of a better phrase, emotional kind of insurance. If it's technical it's as simple as a householder's policy containing a clause to the effect that a person has legal expenses insurance for a couple of matters.

When that person does have a problem the person goes to a lawyer, the lawyer does the work and gets paid. Now, that model does not work well and it only works in one country in the world because of their regulatory environment and that's Germany. The model that works best which is the one that we have in South Africa and we tried in Australia, we tried to set up the company, it was not successful, but that model is what I would call the interactive model where the insurer through its own band of paralegals pretty much the same as community legal centre would be the first port of call for a customer.

So a customer would phone the insurance company or the vision of it with a legal problem and what would happen now, which is quite different from community legal

centres, is because it's a commercial entity with a profit motive, the insurer, like any insurance company, would try to mitigate their losses. So it happens with all insurance, a motor car insurer would do certain things like get a couple of quotes from different panel beaters, to ensure that they are managing the loss. So what a legal expenses insurer does to manage the loss, when the customer makes contact initially they look at the problem, and in order to make sure, as I've said in some submissions, that that small problem does not turn into a massive problem, they would intervene on behalf of the customer or the policyholder.

By intervening they would do similar things to what the people who work for community legal centres or legal aid would do, and that is get in touch with the third parties, "This is the problem. Can we resolve it?" The big difference though between a legal expenses provider and a community legal service centre, for instance, is that there's now financial muscle behind this policyholder and eventually society knows, the private sector knows, that a person with such an insurance policy, if it can't get resolved through their own paralegal people that that company will eventually send the customer to a lawyer and now it becomes a full-blown adversarial situation.

In society by and large not many people are interested in adversarial situations. So invariably when people are faced with a prospect, let's say the opponent of a customer is faced with a prospect of either resolving the matter there when it's still a small problem or allowing that matter to go to lawyers, invariably that person would want to settle the matter and that would get settled. I think I cannot say more for a opening statement. I am also going to try to be short to try to help you make up some time.

DR MUNDY: Thank you very much.

MS MacRAE: Could you just say a little bit more about why the German model does work in Germany and why it wouldn't work here?

MR CRAFFORD (LA): The reason the model in Germany I wouldn't say doesn't work because it's very big the insurance there, but their regulation environment prohibits - it's probably the most prohibitive in the world in terms of what is defined as legal services and who can provide it, and even so strict as to say that the insurance company cannot even negotiate with the insurer, with the lawyer, around fees. So in Germany fundamentally lawyers can charge what they like. A customer cannot go to a third party to ask a third party to negotiate with a lawyer for lower fees because the Germans say that interferes with the freedom of choice.

So every single thing - there the insurance company is not involved at all. A customer's only contact is with a lawyer. Now that gets very expensive because the insurance company has absolutely no control over the lawyer, so it gets very

expensive, but the product is still popular there, and it's still bought notwithstanding the fact that it's very expensive. Perhaps in the German economy there are flexibilities that allow people - notwithstanding the expense of the policies there, they're still buying, because the business is huge in Germany.

DR MUNDY: Is that the jurisdiction where the policies typically attach to household insurance, or is it a discrete - - -

MR CRAFFORD (LA): No, in Germany - I put it in my submission, but for the benefit of other people, very interesting - this insurance started in France, and it started as a result of the Le Mans motor car race going on. There was a horrific accident, very serious injuries, a number of people dying, and the victims, in order to get compensation from the insurance company, were not successful, and they formed a pool of spectators and people who were injured. They formed a pool, and with that pool they sued the insurance companies, and they were eventually successful. The original name for legal expenses insurance, because of that incident, was in fact called "insurance against insurance companies". So it was primarily aimed at helping people against insurance companies repudiating claims.

So it started not in Germany, but it then took off in Germany after that. Perhaps because of how it started in Germany, the first product was a product that helped people with motor car related offences. At the time in Germany, it was still pretty much a Sunday sport. I guess one could call it moon driving but in really fancy Porsches and Mercedes-Benzes and stuff on their very sophisticated highways. Obviously there would be accidents and people would get prosecuted, and the first insurance office that got started in Germany was only for motor car related prosecutions. Because of how it started, they then expanded, then they had a policy for home owners' legal protection, and then for this, and then for that, and then for that. So they started off with that and eventually branched out.

MS MacRAE: So as a consumer, then, in that instance, do you get a choice of which of those kinds of insurance you take out, or you just buy your legal expenses insurance and it covers the lot?

MR CRAFFORD (LA): Generally they will select.

MS MacRAE: Right.

MR CRAFFORD (LA): They will select one for motor prosecutions, or household - - -

MS MacRAE: Is that what you do in South Africa?

MR CRAFFORD (LA): In South Africa we have exactly the opposite way. We

bundle everything together. Everything that a person could conceivably have a legal problem with, bundled it together, and it's just one product.

MS MacRAE: And it's civil - you don't cover criminal matters?

MR CRAFFORD (LA): Yes.

MS MacRAE: Criminal as well?

MR CRAFFORD (LA): Yes.

MS MacRAE: Okay.

DR MUNDY: You can insure against criminal fees, you can't insure against fines. When I was in the UK at some point, I can't remember when, I had a discussion with the insurance association there about before and after the event insurance. It was largely around personally negligent matters, I think that was the issue. I guess what we're interested in understanding is, given these legal insurance products seem to have got a foothold in other jurisdictions, and seeing that we have struggled to find any regulatory barriers for the establishment here, I mean, what's really going on here? Why haven't we seen the emergence of the products here? It can't be because of the presence of a common law as opposed to civil law system, because these products are available in the United Kingdom and Canada, so that's not the issue. Ditto costs orders. So what is it that you think is driving this, or not driving it, probably more to the point?

MR CRAFFORD (LA): My view is that Australia is unique, and it's unique in the sense of it having extensive services that the public has access to, like the lady who spoke earlier, legal aid, all these community legal centres, the complaints facilities, private enterprise for people who have problems. It's very extensive. Of course there's a history in Australia of legal aid perhaps having been very elaborate in days gone by. It might become a little bit more restrictive now with economic pressures. But I think a number of factors have led Australia to arrive at a point of people perhaps not needing this kind of an insurance, because there are so many other things available.

Whether things are going to change or not is a moot question, but I think there is scope. Even for the sorts of matters that are dealt with currently by legal aid and community legal centres, if there was an alternative available, many people who are currently trying to use those services might be inclined to just pay the premium and have the legal expenses insurance and have a choice of where they go to and how their problems get resolved. So I think Australia is pretty unique, probably similar to Norwegian countries, Sweden, where legal expenses insurance is almost virtually nonexistent, and it's a question of whether things will change in Australia.

DR MUNDY: Do you know whether legal - I take your point, I mean, I perhaps observe that the United Kingdom, particularly until recently, has had a much more generous legal aid system, and particularly Scotland, and Scotland continues to have - you can get legal aid to run a defamation case in Scotland. I mean, I'm wondering whether - I mean, the nature of the matters that are legally assisted in Australia which aren't criminal matters primarily relate around family law issues and, in the broad, protection of children, violence in the home, not so much to what you might call suing the builder for a dodgy kitchen reno. So are they the sort of matters that are getting pursued in insurance typically, those more - I'm trying to say more economic matters, or consumer protection matters - or is it in the broad?

MR CRAFFORD (LA): No, I think it's in the broad. I think - often what is misinterpreted, what is visible and what people see, patterns of usage, and that can be quite misleading. What one sees when you have legal expenses insurance that's freely available and sold by virtue of mass marketing to consumers publicly, then it becomes clear only what the need in fact is amongst consumers. The need amongst consumers, if one looks at the patterns, is not for those big things that go wrong, it's for the everyday stuff. You've got a problem with a neighbour, you need somebody to just maybe write a letter, not too threatening, but some sort of a letter. Nobody can go to a lawyer for that, it's just not practical, it's too expensive. Often in the day-to-day environment of such an operation, one sees that 90 per cent of the matters that come to you are, for the insurer, very small problems, but for the end user, perhaps a more significant one.

DR MUNDY: You mentioned paralegals before. So what you're saying is that in many cases, these disputes, the service that's being provided to the insured consumer is actually the service of a paralegal, it's not the deployment of - properly supervised, but not the deployment of - - -

MR CRAFFORD (LA): You're absolutely correct.

DR MUNDY: Okay. So obviously for such a market to develop and make sense, there needs to be a framework by which paralegals are allowed to do this work. I presume there's some form of training or some sort of - one of the things we've been suggesting is that a lot of what we call broad legal work mightn't need a fully qualified, admitted solicitor to do. So that's the sort of service that's being provided by the insurer as well as what you might call a traditional insurance service in the event that you do have to incur substantial costs.

MR CRAFFORD (LA): You've summarised it exactly a hundred per cent correctly. So the paralegal work - and I saw in the submission I think the Law Council appeared negative towards the idea of this other layer of people performing legal services. I think that's a very good idea to formalise that. It's easy enough to

put in place professional indemnity products et cetera and to control such a - - -

DR MUNDY: It's a bit like the debate between doctors and nurses.

MS MacRAE: I guess the other question: you talked about the need for a sufficiently large insurance pool. When you were looking to try and establish a market in Australia, did you have a sort of target of how much sort of capital might be involved and what sort of coverage you might require just to make it viable?

MR CRAFFORD (LA): Yes. In Australia anybody doing this as one company would need at least 10,000 customers in a short space of time.

DR MUNDY: What would the annual premiums be, roughly, if you had to get - - -

MR CRAFFORD (LA): In the order of $300, $360, $400 maybe.

DR MUNDY: Three or four hundred bucks a year?

MR CRAFFORD (LA): Yes.

MS MacRAE: What sort of arrangements are there - if we take the South African example, do you have a kind of - the word has gone out of my head. You know, when you make a payment, when you make a claim. What's the word? An excess. Or is there a limit on how many claims you can make in a year, if you had multiple - - -

MR CRAFFORD (LA): No, there's no excess. We used to have it to prevent people from getting two lawyers with two legal issues, if you like. But it soon became apparent that it's not the kind of insurance that's abused. There's no real incentive. There's no real tangible benefit, if you like, by abusing this. All sorts of other forms of insurance, there's a tangible benefit by abusing it. Either you're going to get a TV set replaced or get some tangible benefit. With this environment, with legal expenses insurance, there's no benefit other than having to get into your car and go and sit in front of a lawyer, which is not exactly - - -

MS MacRAE: Part of the problem - it's bigger than it is, doesn't help you.

MR CRAFFORD (LA): Yes.

MS MacRAE: It's not like the money is going to come to you if you somehow manage to inflate a fee or something.

MR CRAFFORD (LA): Exactly. The money doesn't - it goes through the lawyers to the end beneficiary. So we have it, but it's not a requirement, generally speaking,

anywhere at all.

DR MUNDY: So presumably, if I'm a policy holder, I've got a claim, I need to ring you first and talk about that matter, as opposed to, say, with health insurance, I'll go to the doctor or the surgeon or whatever and I'll just present you with the bill and you'll pay on it. So you've got to see it before I go to - - -

MR CRAFFORD (LA): Absolutely. That's the trick.

DR MUNDY: Because that's the way you manage your risk.

MR CRAFFORD (LA): Yes.

MS MacRAE: Sorry, just to be clear, some of the earlier discussion from Dr Mundy, would you have in-house paralegals that would do some of that work directly, or would it always go out - - -

MR CRAFFORD (LA): No, absolutely in-house.

MS MacRAE: In-house. Okay.

MR CRAFFORD (LA): Just to give you an idea, in South Africa, for instance, we've got a million customers, roughly, just short of a million, and 600 legal advisers servicing those customers. So they are in the sort of situation of a fully admitted lawyer being in charge of a team.

MS MacRAE: Okay.

DR MUNDY: Bearing in mind my periodic discussions with my mobile phone company, is there scope for there to be - if it could emerge here, is there scope, or are the jurisdictional issues too great, that the paralegal management could be dealt with offshore? But I guess the laws are just so different you'd have to do it here, wouldn't you? I'm just thinking of, do you need to - you could service all of Australia from Perth, presumably. How would you get around the jurisdictional issues between states, because a lot of these smaller claims matters, particularly - it might be a tenancy matter which is quite jurisdictionally specific. How would you get around that?

MR CRAFFORD (LA): Well, one way we had to establish one in each state, to get around those state-bound laws. It's a problematic thing, I think, for the Australian economy as a whole, the fact that every state has different laws for everything.

DR MUNDY: So these workers that are providing these paralegal services effectively work in a call centre, so they would be located and supervised by the one

person, so you would need multiple sites around the country?

MR CRAFFORD (LA): Yes.

DR MUNDY: It's phone based, or you can go into the office?

MR CRAFFORD (LA): In South Africa they're offices, but I think what we started exploring is to in fact - because the number of people who qualify as lawyers and only lasts for a year or two in the profession apparently is very significant, whatever the reasons are. So there's a huge pool of suitably qualified people sitting at home, if you like, who could be utilised, because for this kind of a service, a person doesn't have to sit in an office, doesn't have to work certain hours. It would be easier to have a band of people, with their three hours available, this one, this one, all operating from home.

DR MUNDY: And they, depending on technology, can do it by Skype or something like - - -

MR CRAFFORD (LA): Exactly.

DR MUNDY: All right. Thank you very much for coming along. This is one of the conundrums we face as to - we can't make any recommendations about why it's not happening but, anyway, thank you very much.

MS MacRAE: Thank you.

DR MUNDY: We might briefly adjourn for five minutes.

DR MUNDY: We'll recommence. Could you please state your names and the capacity in which you appear for the record, please?

MS GULDBAEK (WLSA): I'm Heidi Guldbaek and this is my colleague Arlia Fleming and we're attending on behalf of Women's Legal Services Australia.

DR MUNDY: Would you like to make a brief opening statement?

MS GULDBAEK (WLSA): Yes, please.

DR MUNDY: Could I just ask you to speak up a little bit?

MS GULDBAEK (WLSA): Sure.

DR MUNDY: Because I'm a bit deaf, particularly when I've got noise at my back.

MS GULDBAEK (WLSA): I can relate. Okay. We'd like to start by thanking the Commission for this opportunity today and we commend the Commission on the work it's undertaking to improve access to justice for Australians who face disadvantage. We'd also like to take this opportunity to acknowledge that we're really humbled to be meeting on the land of the oldest living culture on Earth. Accordingly, we pay deep respect to the Whadjuk elders of the Noongar nation, past and present, and to all Aboriginal people facing the ongoing effects of colonisation of this country.

Women's Legal Services Australia is a national network of community legal centres specialising in areas of law that disproportionately affect women and children in accessing justice. Members of WLSA regularly provide advice, information, case work and legal education to women and service providers on a range of topics in the areas of law that women and children are most susceptible to, including family law, child protection, domestic violence and personal protection orders, reproductive health rights and discrimination matters.

We exist to promote powerful and effective advocacy for women who are disadvantaged in their access to justice. We have a particular interest in the intersection of violence against women and the law, and ensuring that disadvantaged women such as Aboriginal or Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women with disabilities, rural women, women from lesbian, gay, bisexual, transgender or intergenderal or queer communities, young women, older women and women in prison, are not further disadvantaged by the system.

Our respected specialist legal centres provide holistic, high quality and responsive legal services to women from a feminist framework that places the client

at the centre of our interactions and responds to them as a whole person rather than just a legal problem that needs a solution. Some of our members have been in existence for over 30 years, and we have members in each state and territory. We also encompass members who are not specialist CLCs but who support our aims of achieving access to justice for women. We are a network of the National Association of Community Legal Centres, also known as NACLC, which they will be providing a response to the draft report on access to justice arrangements and - - -

DR MUNDY: They have.

MS GULDBAEK (WLSA): They have, yes - and we support and endorse their submission, and our submission provides supplementary information specifically in relation to improving access to justice for women. In our submission we highlight three key principles that we consider necessary for breaking down systemic disadvantage and discrimination against women to ensure equal access to justice for Australian women, namely; increase funding for legal assistance service providers assisting women, and for all legal assistance service providers, reforming policies and laws that hinder access to justice for women and perpetuate gender inequality and better recognition of women's systemic disadvantage and their legal needs in the provision of legal aid.

Our submission outlines the barriers women face in accessing justice because of their gender and how those barriers intersect with barriers created due to other vulnerabilities, such as belonging to the different marginalised groups I mentioned earlier. We highlight the importance and the need to continue funding and increase funding for women's specialist legal service. We provide an overview of the work Women's Legal Services undertake.

We address some of the misunderstandings or generalisations within the draft report in relation to legal assistance service providers. We highlight the importance and the necessity for CLCs to be funded to undertake policy and law reform. That's particularly important to us given the existence of our network. It's about advocating for access to justice. We provide examples of some particular areas of law in which women struggle to access justice.

We advocate for better recognition of the systemic disadvantages experienced by women in navigating a justice system that's inherently gender biased, the legal needs of women to be better identified and prioritised in the granting of legal aid and the funding of women's legal services and we provide case studies to assist us in conveying these arguments, and we also provide some suggestions in relation to the collection of data. I'm the national law reform coordinator for Women's Legal Services Australia and my colleague, Ms Fleming, is a case worker from the Women's Law Centre of WA. So we hope to assist you today with any queries you have in relation to our submission and also the typical services provided by Women's

Legal Service.

DR MUNDY: Okay, thank you.

MS FLEMING (WLSA): I'd just like to briefly add, if I may; it may assist yourselves to understand sort of where I'm coming from. I've worked in the sector since 2005 where I started off as a volunteer in a community legal centre doing my undergraduate law degree. I've since then worked in the sector and have now been six years in practice, mainly in civil and family law. So I think I do have a different perspective, coming from that background, and feel very passionate about working in the community centre because, as Heidi mentioned, our core business is increasing access to justice.

DR MUNDY: Okay, thank you. You mentioned issues around advocacy and law reform and your submission deals with this at some length. You're probably aware of recent - we'll call them realignments of Commonwealth funding priorities - to what I think have been referred to as "frontline services." Are you able to give us a sense of what those funding realignments - the real impacts that they will have on the work of the organisations that you represent, and I guess also the people that those organisations - the women and children that those organisations seek to support and protect?

MS GULDBAEK (WLSA): I'll try my best. I think that because there's no - I guess community legal centres operate differently and it can be rare to have a worker that solely undertakes policy and law reform, and because of that often case workers are cramming that in with everything else that they do, and I think the spirit of the caveat that's being put on the national partnership agreement is to increase these frontline services that CLCs undertake, but unfortunately the existence of CLCs is three prongs and one of those prongs is policy and law reform in terms of really being able to - as Karen was saying, access to just about court representation and minor assistance. It's really about other preventative strategies.

To see those kind of services cut out I think will have a substantial impact, because in relation to one of the case studies we provided in our submission, it actually can be - besides the fact that actually it keeps women and children safe by identifying barriers to accessing justice, it saves the government money in the long-term by actually recognising laws that are disadvantaging people early on in the piece.

MS FLEMING (WLSA): Sorry, just to expand on that; the specific example I think that Heidi is referring to is in relation to the Violence Restraining Order Act in WA that underwent quite a lot of amendments, and unfortunately there were some unintended consequences that parliament didn't really realise that were going to happen, and so when the legislation is being interpreted by the courts Heidi's submissions to parliament have ended up in subsequent amendments to address these

issues which saw women going to two different courts to seek a violence restraining order; one for themselves in the Magistrates Court, then heading off to the Children's Court to seek a violence restraining order to cover their children as well.

Both courts dealing with exactly the same matters, potentially going to trials on the same issues in two separate courts. Now, that's clearly an incredible cost to the system, let alone an injustice to those particular individuals. So I think that's a really clear example of why law reform and policy advocacy is needed. We need to be able to address the systemic issues that our case workers identify.

DR MUNDY: So if the government persists on it's apparent current course of action, what will that actually mean? I mean, will your position become defunded, Heidi, or will frontline workers such as Arlia just not do this or it's been suggested you'll do it on your time, or how?

MS GULDBAEK (WLSA): There's a number of strategies that we have to explore and, you know, it's hard. We have to look at perhaps lobbying for different funding sources to undertake the work we do or perhaps we have to, as Karen had alluded to before, restrategise the directions which we take. So maybe we have to be more focussed on community legal education and educating the government in relation to access to justice.

MS FLEMING (WLSA): I think it's just important to note too that the large amount of law reform and policy work that is done is about responding to government inquiries such as this.

MS GULDBAEK (WLSA): Yes, we are very aware of it.

DR MUNDY: I think our draft recommendation in this space gives you a pretty fair idea of the value that we place upon people who bring us evidence. Without that we may as well not exist, frankly. You mentioned this issue about two courts, and you of course are in the fortunate position of not having to deal with two - at least courts in different jurisdictions, and I guess it's - I mean, I don't know the extent to which you're able to comment on matters elsewhere.

But we have raised this question of a number of women's CLCs that have appeared before us. So I guess we're both interested in the Western Australian perspective and also Heidi perhaps what the national perspective is across the board, if you have any oversight of that. What are the consequences of matters being dealt with in different jurisdictions? You have some matters being dealt with in the Federal Family Court, other matters are being dealt with in the jurisdictional courts. I mean, do you I guess particular have any sense from your colleagues interstate whether you've got it easier and the people you represent are getting better outcomes than your colleagues in the east?

MS FLEMING (WLSA): Well, just to clarify - I did mean to mention this - I am actually from New South Wales. I have worked in generalist centres as well as at Womens New South Wales as well.

DR MUNDY: How long have you been here for?

MS FLEMING (WLSA): Almost three years.

DR MUNDY: You've got a long way to go before you're accepted.

MS FLEMING (WLSA): Yes, exactly. So I do have a perspective.

DR MUNDY: Yes. Well, that would be very interesting if you could share it with us.

MS FLEMING (WLSA): Yes, so quite simply, I think what happens when women, particularly who have been in family violence situations, they're retraumatised by going through the system, having to go to different services, different courts, retell their story over and over again. It's simply horrendous for them to do.

MS GULDBAEK (WLSA): Secondary victimisation.

MS FLEMING (WLSA): Yes, and there's a lot of emerging work coming through around trauma informed practice, which we're all quite interested in and taking steps to implement that in our own services, and I know that government departments, such as in WA the Department of Child Protection and different other agencies are doing work around this area to ensure that we are providing appropriate responses to people. We're not sending them off to a million different services and asking them to retell their story, but we're trying to link in together, we're working together. There has been quite a lot of work done around the intersection between child protection and family violence and family law and there's some interesting academic work being done around single court to deal with the whole - - -

DR MUNDY: Where is that work being done? If you could shoot us some links to that work, that would be very helpful.

MS FLEMING (WLSA): I believe one of our colleagues from Legal Aid did a study through the Churchill Fellowship a few years ago, I think.

MS GULDBAEK (WLSA): We can take it on notice and provide that - - -

DR MUNDY: Yes, if you could send it to us.

MS FLEMING (WLSA): Yes. But it is a very, very interesting point. But I think there's a lot more work that needs to be done in terms of creating one court to deal with all these different issues.

MS MacRAE: Would you say that it does seem to work better in the Western Australian jurisdiction where you don't have that speak to the Family Court, to the national level, or you're not able to say.

MS FLEMING (WLSA): So we do have a separate Family Court though in WA.

MS MacRAE: Yes, sorry, but having it in the same jurisdiction, does that give you an easier - - -

DR MUNDY: The fact that it's a state court or a federal court, does it make any material difference?

MS FLEMING (WLSA): I would say not.

MS GULDBAEK (WLSA): I think there's pros and cons for both models.

MS FLEMING (WLSA): Not really a material difference in my experience, coming from New South Wales. It is still a separate court. There is some efforts being made to talk about information sharing and protocols around that kind of thing. But it's still at very, very early stages.

DR MUNDY: So the solution possibly relies more in courts and protection agencies talking with each other rather than worrying about some sort of jurisdictional question?

MS FLEMING (WLSA): Yes, potentially. But there is a lot of work that needs to be done around that and consultation.

MS GULDBAEK (WLSA): Ideally, like the national sense from WLSA, I think we had set that out in our previous submission, is ideally a one-shop court would profound, but provided it's consultative.

DR MUNDY: We understand there was a trial done in Bendigo I think - lots of things seem to happen in Bendigo - whereby I think the magistrate was sitting and dealing with child protection and family violence matters, but was also dealing with Family Law Act CTH matters as well, because they can.

MS FLEMING (WLSA): Yes, that's right, and similarly in New South Wales the local courts can hear family law matters, depending on the circumstances. However,

in WA we have country circuits, so the Family Court will travel down to Bunbury and regional areas. But the Magistrates Courts here don't hear family law matters, and unfortunately restraining order proceedings sometimes there is this pressure on parents to make agreements about potentially the father who's subject to a violence restraining order, having contact with the children and they're pressured to make those agreements going through the violence restraining order process in the Magistrates Court, and clearly those proceedings are properly dealt with in the Family Court.

DR MUNDY: So there's no jurisdiction for the magistrate sitting in Kununurra, which I presume doesn't get visited by the Family Court on circuit particularly regularly.

MS FLEMING (WLSA): There is some circuits. I can't remember off the top of my head, I don't practice that far.

DR MUNDY: Yes, but basically the Magistrates Court is the best they're going to get, so they've got to come to some sort of outcome in that arrangement?

MS FLEMING (WLSA): Yes, but the Magistrates Court doesn't have the same powers to make parenting orders that the Family Court does. So we're seeing a problem and this is a national problem, it does happen in New South Wales as well, where magistrates are concerned about the contact with the children and there's just a pressure put on parents to make an agreement, and sometimes that's written up outside of the court if there's some lawyers in assistance. But other times parents just sort of make really ad hoc arrangements without proper legal advice.

DR MUNDY: Okay. Ange?

MS MacRAE: You talk a little bit about the problems and the - if I'm not putting words in your mouth - the sort of gender bias sometimes in the way that grants of legal assistance are given. What sort of training do you think might be required for LAC panel lawyers to help them improve the way that they make their decisions and who would pay for that, how would it be provided?

MS GULDBAEK (WLSA): Well, there's probably a number of options that could happen and it probably would need to be consulted with various stakeholders to work out precisely how that would operate on the ground. But in terms of some of the issues that they would need training on, there's probably a range. We're specifically concerned about, I guess, on a fundamental level understanding family and domestic violence and the impact that that can have on a person, and as Arlia had alluded to previously, perhaps trauma informed approach to practicing as well.

DR MUNDY: Could you just explain for the ignorant Commission what a trauma

informed approach actually is?

MS FLEMING (WLSA): So at its essential core, and it is quite an involved area, but it's about understanding people's behaviour and why they might be behaving in certain ways and seeing that through a trauma lens. So many of our clients have experienced trauma from quite a young age and from our perspective, and I know many other services are interested, rather than turning people away because they're difficult to work with, have complex issues, we try to understand where they're coming from, and we put measures in place, try to provide that holistic kind of service.

As is mentioned in the submission, we don't just focus on people's legal issue as a discrete kind of thing. We know, particularly in family law, there needs to be a range of supports in place for families and children. So we work very well with other services in informal and formal partnerships to ensure that people have a range of support services around them. I'm not sure if that really answered your question.

DR MUNDY: No.

MS MacRAE: Yes, that's fine. Are there some jurisdictions where you find that's easier to do than others? I assume for example in the Legal Aid Commission's defence, and you'd probably accept this, that they would say that sometimes it's a matter of funding and they'd like to take a more holistic view for the people that come in the door, but the queue is so long that they're really forced to look at a narrower - - -

MS GULDBAEK (WLSA): Well, I think that in-house lawyers probably do have this kind of training. But when I referred to the panel, I mean the private lawyers that sign up might not necessarily be exposed to training, that includes understanding these kind of social problems and how to work with clients on the fundamental level because I guess what we sometimes worry about is seeing good intentions lead to consequences that - - -

MS MacRAE: Bad outcomes.

MS GULDBAEK: - - - put women and children at risk.

DR MUNDY: I guess the flip side of that, as probably both of you mentioned, that a lot of your members work quite closely with a range of other community sector workers and one of the things that I think we talk about a bit of length is this idea of training of those people to recognise legal problems when they see them and warm refer them on.

MS FLEMING: Yes.

DR MUNDY: We noted - we learned yesterday - we might have learned from the submission, but in South Australia, they actually have training courses, you know, certain TAFE courses, for community workers. Is that something that, nationally, people would think was a useful idea?

MS FLEMING: I believe so on the whole and, in actual fact, we already do quite a lot of that sort of thing. So the service providers that I work with on a daily basis, and I manage a prison outreach program, I work with them all the time about identifying legal issues. We haven't got a formal tool in place and, in some circumstances, that does work quite well and we're familiar with the Homeless Persons Legal Service format with the legal health checks. It's a very, very interesting thing and I think it would increase access to justice more broadly. However, there are some concerns around that, in terms of training and quality assurance, that sort of thing. I think if it was pursued, those would be the main kind of concerns.

DR MUNDY: If done properly, it would be a good thing.

MS FLEMING: Yes, of course, to have someone helping an individual identify their legal issues because we do encounter that all the time. People might tell you a story, but then not necessarily identify that it is a legal issue, or that there is a legal remedy there.

MS GULDBAEK: And that's something that Women's Legal Services regularly do, as Arlia said, and I just wanted to provide you with a quick example maybe of that. So this is a toolkit for GPs in New South Wales. It's been developed by the Women's Legal Service of New South Wales. It basically helps GPs to understand what family and domestic violence is, different indicators, initial safety planning, how to ask a patient about family and domestic violence, and then it provides a bit of information in relation to different legal problems that might be arising and, I guess, how to get it into the case notes as well, and information on what's going to happen if they'll be subpoenaed, and different tactics for dealing with this clients and referrals and support. That's, kind of, a partnership and it's been recognised by the New South Wales Medical - - -

MS MacRAE: The AMA, the Australian Medical Association.

MS GULDBAEK: The Australian one, yes.

DR MUNDY: So the AMA, and presumably the division of general practices as well, are supportive of that. They do not find it threatening or, "How dare you lawyers tell us doctors what to do?"

MS FLEMING: I don't believe so. I think lawyers and doctors are both in helping professions. We generally want to assist our clients to improve their lives of their families, as well as themselves.

MS MacRAE: Just as far as that goes, I imagine that the other reason, I suppose, for reticence might be that doctors do have a concern that, "If I get involved in this, am I somehow going to get involved into the dispute later on and I'd rather not be." So you mentioned that, you know, you are helping them in terms of what would happen if you are subpoenaed and that sort of thing. Are you able to comment on how much, in a community worker's mind, that concern around, "I'm going to get dragged into something here that I don't want to become a part of, but maybe for very good reason I'm worried about the impact that's going to come back on me," how much of that is a barrier and whether there's other ways to address that?

MS FLEMING: It is a huge barrier and I believe that the development of that toolkit was in response to that. There was another publication that Women's Legal Services New South Wales has about counsellors and subpoenas, particularly around family violence. It is quite common for the Family Court to want records from people to give them some independent information rather than just hearing it from the parties that are very emotionally involved. It's important on another range of legal issues that we are able to access records from doctors, and part of the problem that we have as lawyers is that sometimes those records aren't quite as good as they could be and I think GPs generally are, as I said, wanting to assist people.

So when we explain, "This would really help us and it would in turn then help the client," then I think that we can then overcome those issues, but it is a huge barrier. I hear it from the people that I work with in non-legal services, that they're concerned about providing their notes and going to Court. Obviously, they get very little training around those issues.

DR MUNDY: I guess the point is, in part, that their notes are essentially for their own purposes and, therefore, they are not put together for subsequently being used as evidence, but can I - sorry?

MS MacRAE: I just had one further thing. Is there conversely a concern that if women feel that what they are divulging to their medical practitioner might become part of a legal proceeding and there is some concerned that, "If I voice these issues and it somehow then comes public" - for those that are in a threatening and violent relationship, that they are then concerned to raise those issues with other professionals?

MS FLEMING: I think the aim of particularly the counsellors and subpoenas and this GP toolkit is to alert medical professionals to the fact that they have the right to claim privilege and protect their client's information and interests. But obviously, in

some circumstances, it's going to be helpful. We hear from - and I think it makes logical sense that many, many people go to speak to their GPs about their issues, whatever they may be. If GPs can assist that person, as I was saying before, to identify that legal problem that might not be exactly clear to begin with and make appropriate referrals, early intervention, prevention stuff, I think the pathway is quite clear.

DR MUNDY: I guess, the data from the law survey would tend to suggest that, outside family members, medical practitioners are typically the place where people are most likely to go to get assistance. Can I just - I am just mindful of time, but NAPLC has suggested that, in Western Australia, there is a good collaborative model for sorting out legal assistance priorities in the broad, and it involves the Commonwealth, Legal Aid WA, and the CLC sector. Is that a process that you are in a position just to give a thumbnail sketch of how it works for your organisation? Is it really beneficial?

MS FLEMING: Absolutely, it's beneficial. We, on a daily basis, would make warm referrals to other services. Our service is incredibly stretched. We turn people away on a daily basis, so we necessarily - we need to have those relationships with other organisations and we don't make clients just call around other places. We do in some circumstances, obviously, if they're in a position to be able to do that, but we try to prevent people from repeating their story and being re-traumatised. So quite often, a receptionist will be calling other services, saying, "I've got this person who needs this kind of assistance. Are you able to help her?" I think Karen mentioned earlier that there's a program with Legal Aid where they refer conflicts of interest to different community legal centres, depending on where the client lives, yes.

DR MUNDY: I guess what we are interested in, also, is the extent to which that forum, if you like, is involved in determining consistent priorities for assistance across the state. Is that something you are able to comment on?

MS GULDBAEK: We are probably not able to comment on that, but we could take it on notice and get back to you.

MS MacRAE: I think you are going to hear from the state CLC association.

DR MUNDY: Sometimes we find that organisations and their associations have different views. That is when our job gets fun. Just bear with us. I guess just finishing up, we know that family law matters - I do not think you were here earlier, but it does seem to us that good progress has been made with respect to non-Court-based forms of dispute resolution. Call them ADR, call them what you like. Without going through that, and there is a significant body of work, what more do you think needs to be done to facilitate better outcomes, particularly for women who are suffering some form of additional disadvantage? Mental health issues

perhaps and so on, and then secondly we've heard a bit of evidence around the place about disputes regarding wills. We're just interested whether that is a matter that you see very regularly and if so might non-court based resolution processes to those disputes be an improvement on having to trot down and bother the Supreme Court?

MS FLEMING: The latter part of the question might be a little bit outside of our area of expertise. Wills and estates don't fall within our case work areas.

DR MUNDY: What do you do if you get a woman who comes in and says, "I've got this problem, I've been caring for my mother, she's passed away, my siblings are now - the will is" - where do you send them?

MS FLEMING: We would try and refer them either to a general CLC who does have some experience in that area or potentially the Legal Aid.

DR MUNDY: The first question?

MS GULDBAEK: So in relation to what more needs to be done to assisting women outside of court in relation to family law - - -

DR MUNDY: Yes,. what more needs to be done in the ADR space? Do we need to do more for women with mental health challenges, do we need to do more for Indigenous women? That's the sort of - - -

MS FLEMING: Shall we answer yes? We do need to do a lot more.

DR MUNDY: My next question is what?

MS FLEMING: Yes, so we do already have partnerships with family relationship centres where we regularly go and provide legal advice to those people. I think there is potential for that to be expanded. We - I think all of our members, really, operate from an area of trying to assist women to resolve their issues. We have a lot of skills in negotiation, we often are assisting people to resolve things outside of court already. I think if we were provided with more funding we could do more of that and maybe I could just provide you with a short example; I was at the Womens Prison yesterday. I encountered a lady who has been refused Legal Aid for her family law matter. It's been programmed to trial already. She will be left without representation. The father has legal representation, from what's known to be quite a litigious law firm in Perth and she'll be incredibly disadvantaged.

While she's sitting in prison, she will be able to appear via phone in the Family Court. She won't have anyone to assist her to prepare documents, which is of no assistance to the court and they will be left in a very difficult situation trying to decide about her contact with her children. She's due for release in November, so it's

not that far away and what I will be doing for her is trying to assist her to make some arrangements for contact while she's in prison, and potentially if we can avoid a trial and give her some time and space to readjust to being back in the community, link in with some services to address the issues that you've been referring to and essentially we try and encourage people to build up a relationship of trust where that's possible, and increase communication and cooperation, which we would talk about in family law as being the best for children. So I hope that was a little bit of a good example.

DR MUNDY: That's helpful.

MS MacRAE: Sorry, could I just ask you to be a little bit more specific? How will you avoid getting to court if the other party's sort of insisting that's required? What options do you have available?

MS FLEMING: So at the moment it seems like there hasn't been any attempts really at negotiating. It's at the father's instigation that the Family Court proceedings have commenced, so I will be doing my very best to say that this is just not the best thing. It would be a ridiculous situation to end up with some final orders for her contact with her children when she's going to be released in November. So of course, the situation is going to change and it's just impractical.

MS MacRAE: So in the absence of your assistance in that case, her only option then would be to try and make that negotiation herself, which would be - I assume - very awkward for her.

MS FLEMING: Actually, she's not really in a position to be able to do that. Her knowledge of the family law system is very low, her literacy skills are not that great and we see people all the time who are quite confused around terminology, the things that they write in their court documents are then quite confusing for the court, has to try and clarify exactly what they're trying to ask for. It's a very frustrating thing for the court to be dealing with self-represented litigants.

MS MacRAE: Thank you.

DR MUNDY: We might leave it there. Thank you very much for your submissions and your time coming here today.

MS GULDBAEK: Thank you.

DR MUNDY: We will now adjourn for a cup of tea until 5 past 11.

DR MUNDY: We will reconvene, thank you. Could you please state your name and the capacity in which you appear for the transcript?

MS KANE (CLCAWA): Sara Kane, the Deputy Chairperson of the Community Legal Centre Association Western Australia.

MR KIERAN (CLCAWA): And Philip Kieran, Deputy Director of the Community Legal Centre Association of Western Australia.

DR MUNDY: Would one of you like to make a brief opening statement?

MS KANE (CLCAWA): Yes, that would be me. Thank you .

DR MUNDY: Off you go.

MS KANE (CLCAWA): The Community Legal Centre Association is the peak organisation representing 28 community legal centres and family violence prevention legal services throughout Western Australia. All CLCs in Western Australia have participated in a national industry-based certification process that supports good practice in the delivery of quality community legal services. All WA CLCs are located in areas of most need. Two major reviews of CLCs have been completed in Western Australia, the first being in 2003 and the second in 2009. Both of these reviews provided evidence-based legal means assessments.

Those two reviews drove funding, planning and location of community legal centres in Western Australia for at least the last decade. We would like to respond directly to some of the recommendations made in the draft report, in particular, regard to the funding arrangements. The Community Legal Centre Association of WA supports a funding model that is equitable, transparent, accountable and needs based. We do not agree with the Commission's premise that the CLSP funding does not link with needs, is not responsive to demographic changes and does not incorporate evidence-based considerations, particularly in Western Australia.

We do not support the procurement process for legal assistance that creates a conflict of interest, for example, where a government agency is the program administrator and also potential bidder for the funding and we would caution with the use of an open tender process as being the best option without further consideration of the pros and cons of such a system. There are a range of procurement options that the WA government currently use in partnership with not-for-profit for the delivery of community services. These include preferred providers, direct negotiation, project grants and open tender, all of which are based on clear criteria, consultation, research, market testing and what will deliver the best outcomes for the community receiving the services.

Procurement options should also consider the true costs of delivering such services, particularly in rural, regional and remote areas with costs such as travel, salaries, infrastructure, housing and maintenance significantly high than the Perth metro area. Similarly, Western Australia costs are generally higher than other states. The Association supports a collaborative approach to distributing legal needs assistance funding based on needs, such as using the results - the recommendations - from the 2003 and 2009 reviews. We also support using the mechanism of the WA Community Legal Stakeholder Consultative Committee to decide where this funding is allocated.

Membership of that committee includes the Community Legal Association of WA, Legal Aid WA, the Law Society of WA, the Commonwealth Attorney-Generals Department and the WA Department of the Attorney-General. We feel that this model would promote collaboration and not hinder it. The ability to participate in law reform and policy work is also absolutely essential to the work of community legal centres in advocating for just and fair laws for vulnerable Australians. This work is often completed in partnership with government or when government calls for legislative or policy review submissions such as this report and review or by regular funding meetings to report on trends.

Law reform work assists community, the government and the economy. We also acknowledge the need and the importance of economies of scale to maximise efficiencies and promote agency collaboration. Currently the CLCs - the specialist CLCs - are investigating a co-location project. We also have a national shared professional indemnity insurance scheme, reciprocal training and mentoring, shared research and mutual policy sharing. The Association continues to investigate more collaborative cost saving projects going forward.

Finally, an independent economic cost benefit analysis of community legal centres shows there was a return of $18 in benefits to the community for every dollar invested in the community legal centres as they're currently funded. Moving on to pro bono and volunteer support recommendations. CLCs attract, as you may be aware, significant pro bono and volunteer support to deliver a range of legal and non-legal services and this support can range from lawyers providing direct services to clients, lawyers providing advice to the centre or law firms picking up matters on behalf of a community legal centre, also research, publications, printing, admin, fund raising and university students and people from the general community volunteer on our boards.

This enormous support would not be provided to government nor to a for-profit commercial entity. In some cases the value of volunteer and pro bono support matches or even exceeds our funded budgets. The financial value of pro bono and volunteer support is in excess of millions per year. In terms of the eligibility

recommendations the Community Legal Centre Association will welcome any opportunity to collaborate in defining priority and developing an assessment framework. Criteria should consider though the lived experience of a person and not be too rigid.

This would encourage people to engage and be willing to tell their story. Best practice involves an assessment of the interplay between disadvantaged and vulnerability indicators rather than a red tape approach and these factors can include income, capacity of the client to self-advocate, severity of the legal issue, the impact to the individual and community if no legal assistance is provided and personal circumstances of the clients such as language, age, disability and also let other legal options that may be available. Further marginalisation, discrimination and alienation of people should be avoided if common eligibility criteria are established.

We also want to ensure that if an eligibility criteria is established it doesn't worsen the already high turn-away rates that CLCs experience due to restricted funding and resources. In regards to the single point of contact, CLCs of WA support any initiative that simplifies and increases legal assistance access and referral for people. Phone and web-based services can complement our existing services but shouldn't replace locally-based points of contact or further legal assistance. The resources for these centralised contact points should also not come from existing already over-stretched legal funding.

A best practice model in relation to complex social problems and high need clients is of a no wrong door approach. This is where service providers can work towards greater integration in the entry assessment processes to minimise the need for clients to re-tell their story and to refer people to the most relevant and responsive agencies. In regards to the idea of legal health checks, they're useful in two forms; firstly, for lawyers and non-lawyers within the legal assistance framework to assess and plan for legal need. Secondly, they're a good tool for general agencies to identify if a referral into a legal assistance agency is required.

WA CLCs already work in partnership with referring agencies to facilitate early identification of legal need. If legal health checks are used, the tools must be developed with legal assistance agencies. It's not appropriate for non-legal agencies to develop legal health checks. All people using these legal health checks should be trained and supervised in understanding the background, context and use of such legal health check. Moving on to the data systems recommendation. The Community Legal Centre Association supports the reform to the collection and reporting of data and, again, welcomes any opportunity to participate in the design and development of this data system.

Any new data that's collected needs to be de-identified and ensured that does not breach confidentiality. The system must also recognise multiple sources of funding

and collaboration will be required between major funders at a state and national level. CLCs must also be able to access their own data securely and in a timely manner. Peak bodies such as the Association should also be able to access regional, state and national aggregated data to assist with our policy planning and training needs. And, finally, in regards to the use of non-lawyers with limited licences to deliver services, we, again, support this measure that enhances the ability of non-lawyers with specific training and legal supervision to provide services as part of the legal assistance framework.

However, this must occur within a properly established and supervised legal practice. CLCs already use this multi-disciplinary practice to provide better, more comprehensive services to a range of people and link it to the local community to improve service, access and referrals. Quality training, mentoring and supervision is essential to better utilise these services of non-lawyers. In conclusion, clearly we do have an access to justice crisis in our country and I think the government acknowledges this crisis by requesting the review.

CLCs strive to better meet demand, ensure access to justice, attract and retain capable staff, create innovative services, are responsive and work in a balanced way, however, to ensure that this essential work can be done and continue in the best possible way we need more guaranteed, long term, accessible investment from the Federal Government.

DR MUNDY: Thank you. Can I briefly bring you to something that was in the NACLC submission with regard to what was referred to as collaborate approach that is being used in Western Australia in order to determine priorities and principles for allocation of funding across the state? Now, what I am not asking here is about referrals and things like that, but as establishing the broad approach. We are probably attracted to a model where the states - that funding is provided by the Commonwealth at state level and then people on the ground in the states do further work with whatever resources the states are prepared to put in. So can you just explain to us how that model in WA works?

MS KANE (CLCAWA): Yes, I think it's regarding those two major reviews that I mentioned in 2003 and recently - well, the most recent being in 2009 and we've revisited those reviews and they're still quite relevant in terms of addressing where the areas of most legal need are, and that was done in collaboration with the WA stakeholders committee - no?

MS MacRAE: Yes.

MS KANE (CLCAWA): Yes. So that was a partnership between the association, Legal Aid and a range of other government organisations to look, with the use of an external consultant - so it was an unbiased approach - of researching what the legal

needs are in our local community - well, our state - and looking where the priority areas of the areas of law and also the geographic areas that were requiring legal services and that's how we helped map out where the areas of need are and where the funding should be prioritised.

DR MUNDY: Is this just a one off event or is it an ongoing review and follow up, and tweaking sort of arrangement?

MS KANE (CLCAWA): Yes, well because we've done two now in 03 and 09 we're probably due to do another one soon, so I think it would just be - I would foresee that as an Association, we would like to see that as an ongoing arrangement and good practice to be able to work with, yes, the federal and state governments in terms of how to best use that funding.

MS MacRAE: What happens then in relation to that review? Say the 2009 review said "look, we've got a growing need, we've heard earlier that the migrant groups are coming now to particular areas and there's a different sort of need here than what there was six years ago or whatever. How do you transition away? One of the issues we've had - and it might be more of an issue in some of the other jurisdictions, perhaps more so than WA - but sometimes the location of CLCs in particular will have a particular community focus as you'd expect, and there's volunteers and pro bono resources all linked to the location of that CLC and yet you might say that the real need for some of those services has now moved. How do you sort of marry those issues?

MS KANE (CLCAWA): I think just - I mean, at the moment we've got - like, we're always assessing where centres are based and if there is an area emerging of needs, such for us it's in the eastern corridor out through Midland, and further north beyond Joondalup now there's a legal need stretching - poor northern suburbs, who I think you heard from before, they service - - -

MS MacRAE: They keep stretching.

MS KANE (CLCAWA): Yes, moving on. Similarly, the southern corridor. So we're - as an association, definitely, and that all is in those reviews about that is the predicted area. So it's working with government and this is part of the process, is looking at how do we get funding to service those needs? And at the moment in Western Australia, all the centres that are currently based in geographic areas are where the area is of most need. I mean, we've got them in Gosnells, Midland, Fremantle, Mirrabooka, Joondalup, Victoria Park. So they really are entrenched in those areas where there's most need and I think yes, there's areas of more emerging needs as it moves forward, absolutely, geographically. We just probably need the funding to - - -

DR MUNDY: Do you get money from the state government as well as the Commonwealth?

MS KANE (CLCAWA): Yes.

DR MUNDY: Roughly how does it look?

MS KANE (CLCAWA): I'm not sure. I might have to take that on notice in terms of the percentage which I can get you.

DR MUNDY: I mean, even if it's aggregated across the state, or whatever, I'm just interested because some jurisdictions do provide funding and others don't, but I'm - - -

MS KANE (CLCAWA): I think Western Australia does, yes, but it's certainly a smaller portion than the federal government.

DR MUNDY: You mentioned advocacy and law reform.

MS KANE (CLCAWA): Pardon?

DR MUNDY: You mentioned advocacy and law reform, and you'll no doubt have noticed that we make some recommendations in support of advocacy and law reform. The Commonwealth appears to be shifting its focus away from advocacy and law reform. How is that going to affect your members on the ground in Western Australia and are the funding reductions that are apparently associated with this refocussing actually falling on advocacy and law reform, or are they actually falling on online services? Sorry, front line services.

MS KANE (CLCAWA): Front line services. Absolutely.

DR MUNDY: Well, maybe online services.

MS KANE (CLCAWA): Yes, well both. Absolutely. Any funding that we receive - I'm pretty confident to say this - I don't know of any community legal centre in Western Australia that has a dedicated funded policy position. All the funding that I'm aware of goes directly to frontline services. So if they're talking about any cuts, I don't know where any of that money would be coming from. Any law reform that I'm aware of that is done by centres is generally on top of the casework and client work with the support of pro bono volunteers, and it's generally in response to government court inquiries such as this. So, you know, minimum wage reviews, access to justice, anything that's called - equal opportunity, Australian Human Rights Commission.

So it's really important for our clients because we're the ones that are directly delivering services at the coal face and we're hearing where the laws are working and where they're not, and we're best placed to be able to work with government in partnership to talk about what are the emerging areas of legal need, what are the trends, how best would it be to meet that need? I think that's part of that advocacy and law reform process, and it can be done in partnership and collaboration, and it's certainly not done with any threat or malice, it's always done in partnership with the best intentions of the laws being accessible and fair.

So any funding cuts would directly affect our frontline services and we would strongly encourage the importance of that work, just to better Australia. Better access to laws, better understanding of laws and also if we can see where improvements can be made, not just in the legislation but the policy around how that legislation is delivered or practiced, then yes, I just think that improves the situation for everyone.

DR MUNDY: Just one other question on these more recent cuts; are you aware of what the impact will be in particular on the WA EDO?

MS KANE (CLCAWA): Yes.

DR MUNDY: Can you tell me what it is?

MS KANE (CLCAWA): I think they will be - - -

DR MUNDY: Because they're not appearing because us, so I can't ask them and you're the closest thing I've got.

MS KANE (CLCAWA): Yes, look I think it's going to have a pretty huge impact and I think - only because they've got - they've lost their federal funding as far as I'm aware and they've got state funding to perhaps get them across the line for another year, and then they're - then that's it, unless they can find funding elsewhere.

DR MUNDY: What do you think the consequences of - I presume in that year their activities will contract but moreover - if they were to shut up shop?

MS KANE (CLCAWA): Well, it will be huge in Western Australia because we've got such a huge mining culture and I think their office is really important in maintaining the community - sorry, representing the community responses in environmental protection, and we've got a few big issues in Western Australia at the moment that the EDO are working on and have a lot of community support behind them. So if that office goes, that will be a huge impact on our community and the environment in Western Australia.

DR MUNDY: Would you characterise their work as case law or as law reform? Given there's those three areas that - - -

MS KANE (CLCAWA): I think it covers everything, to be honest. I think it is case work for people that are obviously approaching them and communities that are approaching them, but also what they're identifying is certainly going to assist in law reform, and their role is certainly education through that process. I think it covers all three areas.

DR MUNDY: Thank you.

MR KIERAN (CLCAWA): Would you like me to pass on to the EDO that - - -

DR MUNDY: We would be more than happy to receive a submission from them. They have been very helpful to the Commission in the past and we'd be happy to hear from them again.

MS KANE (CLCAWA): Yes, we'll pass that on. I just think they're probably under resourced and under the pump at the moment.

DR MUNDY: We appreciate that.

MS KANE (CLCAWA): Yes, so - but we will take that on notice.

MS MacRAE: Even just a page, you know?

MS KANE (CLCAWA): Yes.

MS MacRAE: If that's all they had time for, just on the key impacts that they're likely to see would be helpful.

DR MUNDY: We had evidence from the ACT EDO on Monday, they indicated they will probably close their doors.

MS KANE (CLCAWA): Yes, EDO WA are pretty confident that would be the track within a year.

DR MUNDY: Yes, the suggestion was that the smaller - the women who appeared before us wasn't quite sure about New South Wales and Victoria, and maybe Queensland but the rest - the one she was really not sure about was WA. But Tassie, South Australia are probably gone.

MS KANE (CLCAWA): Yes.

MS MacRAE: Sorry, can I just turn very briefly, just back to these 2003 and 2009 reviews? The reason I return to them is because people keep mentioning them as though - - -

MS KANE (CLCAWA): Yes. Sure.

MS MacRAE: This the nirvana. So those reviews are publicly available, are they, or not?

MS KANE (CLCAWA): I think so. They certainly were available on the consultants' website, but we can forward that to the Commission, both those reviews and - - -

MS MacRAE: Okay. That would be helpful.

MS KANE (CLCAWA): Yes.

MS MacRAE: Because we've heard quite a lot about what they do.

MS KANE (CLCAWA): Yes.

MS MacRAE: But it's very hard to really get a handle on it.

DR MUNDY: And if you're concerned that they're not entirely publicly available we're more than happy to accept them on a confidential basis.

MS KANE (CLCAWA): Yes.

DR MUNDY: So if we want to use any material from them we'll come back to you.

MS KANE (CLCAWA): Yes. Wonderful. Yes, that should be fine. I'll get them today.

MS MacRAE: Okay. That would be helpful. And, sorry, just to clarify what the review was doing, it was looking just at the CLCs or that collaborative approach was looking at legal need generally and so it considered LACS and those things as well in the - - -

MS KANE (CLCAWA): Absolutely. Yes.

MS MacRAE: Yes. So it was the whole - - -

MS KANE (CLCAWA): Absolutely.

MS MacRAE: So it was the whole legal assistance - - -

MS KANE (CLCAWA): Framework.

MS MacRAE: Framework for the whole of WA.

MS KANE (CLCAWA): Yes. Yes.

MS MacRAE: Yes. Okay.

MS KANE (CLCAWA): And anything - you know, even - - -

MS MacRAE: All right. That's what I thought. I just wanted to clarify.

MS KANE (CLCAWA): - - - areas that weren't covered that, you know, that aren't currently covered by funding and that's where those areas of need, I think, consumer - and there was a few other specialist areas of law but also at the time it was wheatbelt and Joondalup and a few other areas - - -

MS MacRAE: And in relation then to those areas where they could see there was additional need, was there - did the recommendations in those reviews go as far as saying this would be an area well served by a CLC or this would be well-served by a LAC office or did it just - was it a higher level - there's an area of need here? We need to sort of sort it out.

MS KANE (CLCAWA): Probably firstly identifying the need and that where, if it was very much community based and supported then generally a Community Legal Centre.

MS MacRAE: Right.

MS KANE (CLCAWA): Because they're more connected with the community at a grass roots level and supported and volunteer - - -

MS MacRAE: Yes.

MS KANE (CLCAWA): So I think generally it would be always Community Legal Centre.

MS MacRAE: Okay. Thank you for that. I just wanted to clarify.

DR MUNDY: You were just talking about some specialist CLCs. My recollection is there was once a mental health CLC in Western Australia.

MS KANE (CLCAWA): Yes. Yes.

DR MUNDY: Is it still ongoing or - - -

MS KANE (CLCAWA): Yes. Absolutely.

DR MUNDY: It had some funding reductions recently but it's obviously got through that somehow.

MS KANE (CLCAWA): Yes, like all of us. We've all had shavings off our budgets, so yes, they're certainly very much - very active and - - -

DR MUNDY: NACLC in their submission to us gave us a - what they call a minimum based funding level when they're sort of presumption was a staff of about five is the sort of the minimum that you need.

MS KANE (CLCAWA): Yes.

DR MUNDY: And obviously some CLCs are much larger.

MS KANE (CLCAWA): Yes.

DR MUNDY: Do any of your members fall below that - what - if that were the critical mass, do any of yours fall below that?

MS KANE (CLCAWA): Yes, I think there'd be a few. I'd have to take it on notice to actually do some - and actually ask some of the centres, but I would imagine there'd be a couple definitely.

DR MUNDY: Would they be regionally based ones or would they be - - -

MS KANE (CLCAWA): Yes, both, and there'd be a couple of metro, particularly in the areas of community legal education. It's always one of those roles that I think gets cut back first and not funded so, yes, absolutely, and I can - I'll take that on notice and - - -

DR MUNDY: And do you think that five is - is that a reasonable guess at what a sustained -minimally sustainable organisation looks like?

MS KANE (CLCAWA): Yes. I mean, I'd hesitate to say yes or no.

DR MUNDY: Well, let me put it to you another way.

MS KANE (CLCAWA): Yes.

DR MUNDY: The minimum number isn't 20.

MS KANE (CLCAWA): No.

DR MUNDY: And it's not none on this, so it's - if it's not five it might be seven, is that the sort of - - -

MS KANE (CLCAWA): Yes, that's right. Yes, I'd say, like, I mean, you'd want a couple of solicitors and community legal education, admin.

DR MUNDY: Yes.

MS KANE (CLCAWA): I think that's from - I'm just looking over to my colleague. I think from memory that - I know the NACLC's report that they've got a base framework of funding as well.

DR MUNDY: Yes.

MS KANE (CLCAWA): And the minimum number.

DR MUNDY: No, no, that's - - -

MS KANE (CLCAWA): Which we'd support.

DR MUNDY: That's fine.

MS MacRAE: But part of the way of getting scale, if I understand your submission correctly, is to - you've developed some of these complementary services that you're providing, so things like financial counselling and disability advocacy.

MS KANE (CLCAWA): Yes.

MS MacRAE: Can you just tell us a little bit more about that and how successful that's been and whether you've got sort of plans to develop those sorts of services further.

MS KANE (CLCAWA): Sure. Sure. They're mainly in the generalist centres and, for example, Tenancy is - have - a lot of the generalist community legal centres within the metro area and regional centres have tenancy advocates that are supported by our specialist service. Our - - -

MS MacRAE: We heard a little bit from Karen earlier about the one there so that's good.

MS KANE (CLCAWA): Good. Great.

MS MacRAE: So that was good. Yes.

MS KANE (CLCA): Sorry. Yes, so - and they're supported by the Tenancy Service, Community Legal Centre in Perth and the other ones are disability, I know, have a disability advocacy service at Sussex Street in Victoria Park and a lot of generalists have the financial counsellors as well, and it's really important - I know in Gosnells, for example, they've got that multi-services approach where they've got the legal teams but they've also got tenancy advocates, financial counsellors, mediators, and what is important about that is that is when a client comes through the door then they can bundle that - they can provide that person with a multitude of support.

So, yes, it's really important that that continues to get funded, and I think it's really important for prevention of unnecessary legal litigation and things that we may be able to sort out locally in a couple of appointments and proper referrals and support rather than going through that litigious process and costing the costs and them and everyone emotional and financial impact.

MS MacRAE: And does it mean that you can use - some of your resources can be lower level trained, so you can use sort of paralegals and advocates rather than fully-trained lawyers for some services where that's more appropriate?

MS KANE (CLCAWA): Yes. Yes. But I would - like, yes, to use that model and a lot of the community legal centres are, but they all are supervised by solicitors.

MS MacRAE: Sure. Sure.

MS KANE (CLCAWA): And I think that would be something that we'd want to emphasise that if - and we support the model of using, like the non-licensed or non-lawyer - sorry - the licensed non-lawyers model which we already do, but they're all very much within a legal practice framework and supervised by solicitors.

DR MUNDY: Yes, I think there's been a little confusion around that question - that bit of the report because we're actually - what we had in mind was something that's done in Washington State.

MS KANE (CLCAWA): Okay.

DR MUNDY: Where people have a limited practicing licence within family law.

MS KANE (CLCAWA): Okay.

DR MUNDY: So they're not in any sense undertrained or lesser trained but they're just trained in that box.

MS KANE (CLCAWA): Right.

DR MUNDY: So they don't have all this other - you know, they probably haven't done property or whatever. So it's a different model of legal training. You drew attention in your submission and in your comments today about this model for partnership procurement, if you like, in WA.

MS KANE (CLCAWA): Yes. Sure.

DR MUNDY: And I - again, I think I am absolutely certain we didn't say that competitive tendering was the preferred approach. We were very deliberate in saying that.

MS KANE (CLCAWA): Okay.

DR MUNDY: I think our staff might have preferred us to say that but we didn't. Can you perhaps just flesh out how that works, how it deals with conflict of interest and how it deals with value for money?

MS KANE (CLCAWA): Yes. Sure. Well, I know it was through the Economic Audit Committee within Western Australia that - and a partnership forum that was established that they looked at - that involved government departments and also community agencies - that looked at developing this procurement model and it has worked, as far as I'm aware, so far where, particularly where there's preferred providers, so I know, for example, at our centre we do a particular area of law that provides support to the Department of Commerce and we're the only ones that do it so we've got a preferred provider type - - -

DR MUNDY: So you've been doing it. They're happy with it.

MS KANE (CLCAWA): They're happy with it.

DR MUNDY: Yes.

MS KANE (CLCAWA): We do - we've got a track record for effectiveness but also efficiency, so we become a preferred provider and we negotiate a contract with - directly with the Department of Commerce for that. In terms of - and obviously there's project grants. In terms of open tender I know that the tenancy, we've just been through that process, the Association with the new tenancy service with the Department of Commerce and, yes, I think because we had such a good track record in delivering the services that did factor in, but I think there was involvement - I'm

not sure - about any of the tender process that actually went through, but I know there was different agencies that applied for that contract and the commerce managed that conflict. I'm not sure how they would have - - -

DR MUNDY: So what were the character of those other agencies? I mean, were they - - -

MS KANE (CLCAWA): They were not-for-profits.

DR MUNDY: Yes.

MS KANE (CLCAWA): And there was also - I don't know in this particular process - in that particular tender, sorry - if there were for profits, but I know there was a number of for profits in the housing sector that applied.

DR MUNDY: Okay.

MS KANE (CLCAWA): But you might need to speak to commerce about more of the information about that, but yes, I think there is in Western Australia - and it might be worthwhile speaking to finance department about that new procurement set-up because it's quite unique and it seems to be working in partnership with agencies rather than - - -

DR MUNDY: Because certain the case is that we recognise the community nature of these services and the last thing we want to do is to destroy all of that, but you know, it is an ongoing and legitimate public policy concern about value for money and how do we test that we are getting it, although I do not think we have seen an awful lot of CLCs that look like they have got a lot of fat on them.

MS KANE (CLCAWA): No, no, and also, like I mentioned, a lot of community legal centres' funded budgets are matched by pro bono and volunteer support.

DR MUNDY: We appreciate that. Sorry, one of the problems of being in front of us on day five is I am never quite sure whether I have asked you this question today, or whether I have asked somebody in Sydney on Wednesday. We have found a new issue, and when the staff read the transcript of these proceedings they were tearing their hair out. It seems to us at the moment that the vast bulk of matters dealing with disputes about wills and the issues around the end of people's lives end up pretty rapidly down at the Supreme Court, not a place known for speedy resolution of matters or also simple, apparent procedures.

We have heard a couple of really quite tragic stories, one about an indigenous family who were having a fight about burial sites, another about a man who cared for his mother and there was a dispute with the siblings and stuff. We just wonder whether,

when we have made such apparently to us, I think, good progress on the use of non-Court-based dispute resolution processes dealing with disputes - other disputes - within families, with and without violence, but whether there is any recommendations we could make about this. You know, I was the executor of both my parents' estates. It was pretty straight forward because there was only me, but it did seem to me a bit odd that I had to trouble with the Supreme Court as the executor of my father's will so that I could give all the money to me and still put on all the liabilities of the estate going forward, and that is the vast bulk of them.

There are only about 150 disputed estate matters in the country and I suspect a lot of them are resolvable through mediation. Is this something in your normal - your members see - the general CLCs because people will come in, they might not be able to afford a lawyer. They might have worked out to start to dispute the thing in the Supreme Court is going to destroy the value in the estate pretty quickly. I am just wondering if there is something useful we could recommend- because this goes to our issue about people not being able to access advice and services of moderate means. There might be house involved and they could chew through a quarter of the value of the estate without much trouble.

MS KANE (CLCAWA): Yes, I mean, I think - I might have to take some of that notice. I know, generally - - -

DR MUNDY: If I could ask you, how many of these sorts of relatively low-grade familial disputes at the end of someone's life do you see?

MS KANE (CLCAWA): It might be something we could take on - - -

DR MUNDY: They might be isolated and we have just seen two of them because these people are really angry about them.

MS KANE (CLCAWA): Yes, because it would be interesting to actually ask the members, particularly the generalist centres, about how many inquiries they're actually getting. I know there are not anything that - or many - well, I am on Hansard, but I don't know how many generalist centres actually provide any advice on that because I do understand that it's quite a particularly complicated area and it's very specialist and centres certainly don't have the resources to spend on that at the moment within their current funding contracts. We could ask them how many inquiries they're receiving - - -

DR MUNDY: That would just be really it.

MS KANE (CLCAWA): - - - and we're they're getting referred.

DR MUNDY: I mean, I appreciate it is not within their funding contracts. I guess

what has motivated us, in part, is: is the Supreme Court really the right place for this in the first instance. A lot of it is essentially administrative and a decent ADR process sitting on the side. There will always be the things that raise issues of law and equity in estates, but I do not think it is a lot. Some people are having a shocking time.

MS KANE (CLCAWA): We can certainly ask the members about how many inquiries they receive.

DR MUNDY: If it is too difficult to answer, that is fine. It is just something we have come across. Look, I think that is about all we have. So thank you very much - - -

MS KANE (CLCAWA): No, thank you for the opportunity.

DR MUNDY: - - - for your submissions. We look forward to - I would just hold off a couple of days because, when the staff read the transcript, they might tell Angela and I, "Yes, we have got them," but we will get in touch earlier next week and let you know.

MS KANE (CLCAWA): Sure, about those questions on notice?

DR MUNDY: No, about those two reviews.

MS KANE (CLCAWA): Yes, sure.

DR MUNDY: Angela is sure they have not got them.

MS MacRAE: I am pretty sure they do not.

DR MUNDY: So why do you not just send them?

MS KANE (CLCAWA): Yes.

DR MUNDY: Thank you very much.

MS KANE (CLCAWA): No, thank you for the opportunity.

DR MUNDY: We will now have WA Dispute Resolution Association. Good morning. Could you please state your name and the capacity in which you appear?

MS CIFFOLILLI (WADRA): My name is Nicoletta Ciffolilli and I appear as a member of WADRA.

DR MUNDY: Thank you. Would you like to make a brief opening statement?

MS CIFFOLILLI (WADRA): Possibly to introduce WADRA because it wasn't in the submission, so to let you know that WADRA is a not-for-profit body and it's incorporated and composed mainly of member organisations that are involved with representing dispute resolution educators, practitioners, and supporters. To give you an idea of some of the membership, we have many of the state and federal courts as members, also providers of dispute resolution services, and many of those are funded agencies, and also some organisations that might not immediately come to mind, for example, the Institute of Chartered Accountants and the Australian Property Institute is also a member. So it is quite a broad membership.

I suppose, as a member organisation, as a body of those types of members, we support the use of ADR, in terms of improving equity and access to justice and civil dispute resolution processes, but with the proviso that ADR may not always be appropriate and so it is important that citizens in a civil society also have access to courts and tribunals.

DR MUNDY: Angela, do you want to start?

MS MacRAE: I guess one of the key questions that always comes up in ADR is: when is it appropriate and when is it not? I think I would be interested in your views about how far we have gone along the road, to the extent that it is used now. I think you'd agree it is being increasingly used. Are there areas we have gone too far? Are there areas we have still got a long way to go? If you would like to comment on that in general terms, I think that would be helpful.

MS CIFFOLILLI (WADRA): In terms of when it is appropriate, timing is an important issue there as well because sometimes it can happen to early and sometimes too late. It was interesting to hear your comment about some tragic cases that you have heard about and, when they have been familial disputes, how filing in Court is not always the most appropriate way to resolve the dispute. Certainly, in those cases, where there is an ongoing relationship, commencing proceedings in Court can actually create more tension, more aggression, and bring the parties further apart.

Often, the other types of processes like mediation are overlooked and, in those situations, if they happen at an earlier point, then much of the tension that is created

as a result of going through Court proceedings and interlocutory processes over a period of time is dissipated; it does not happen. We would say - I mean, I think in your report, you talk about triage and that is clearly very important because that could be one of the elements of working out, "Is this a case that's suitable for other processes, dispute resolution processes," and an ongoing relationship would certainly be an indicator in favour of other dispute resolution processes.

MS MacRAE: Does that work quite well, do you think, in the institutional arrangements we have in place now?

MS CIFFOLILLI (WADRA): In different states and territories I think the set-up is different. In WA mediation happens within the courtroom pretty much. I mean, there are private providers of those services but often the public may not be aware of those services, so their first port of call would be the court and that's the difficulty. It continues to break down the relationship because people aren't aware that they can go elsewhere to resolve the particular dispute that they have; but that is not to say that when it does get to court, it can't be resolved in a better way for that family as a result of having gone through mediation within the courts because of the mediators at court, some of the registrars, do adopt and follow a facilitative-style of mediation which allows relationships to be healed and restored.

MS MacRAE: Is there a case, do you think, for more pre-action protocols that might require that mediation happen? I guess I would be interested in your views about the Civil Dispute Resolution Act and the requirements that there be genuine steps and those sorts of things - whether that has been successful and should be rolled out more generally.

MS CIFFOLILLI (WADRA): I don't know how the federal legislation is working so I can't comment on that. Certainly in terms of pre-action procedures in the Family Court - and I suppose there is a distinction between using pre-action as a sanction or a mandatory format as opposed to an incentive. With parenting matters, as you would be aware, the requirement in order to file at court is that parties need to have a certificate. They must undergo family dispute resolution. That is different to the property set-up where if they go through mediation or other form of alternative dispute resolution process, then they get benefits. They still have to then file at court, which is that they don't need to go to a conciliation conference so that saves them time and effort. I suppose it depends on which approach - the carrot or the stick - you ought to take, as to how you might legislate for pre-action or mandatory ADR before filing.

MS MacRAE: Are you aware of any research that has been done to measure the effectiveness and benefits of ADR and what sort of factors should we be considering if you are wanting to do some of that?

MS CIFFOLILLI (WADRA): There is quite a bit of research that has been done on the benefits and the success and effectiveness of ADR. They tend to have been done in particular jurisdictions in the sense of the geographical jurisdiction and also the subject matter. I can certainly email you some of those references if you are interested.

MS MacRAE: Okay. What was that for?

MS CIFFOLILLI (WADRA): They tend to come to more or less the same conclusion: that ADR is useful. It has many benefits, but the type of benefit that it achieves depends on what the particular study or research was looking for. Is it looking for reduced hearing time? Is it looking for the number of cases settled? Is it looking for satisfaction amongst the participants? It just depends on how you're measuring the particular success of that process, what outcomes it provides.

MS MacRAE: One of the suggestions I guess is that where you have a major power imbalance between parties, ADR may not be the most appropriate method. Would you have a view on that? Where there is an imbalance, what are the best sort of methods to try and reduce the influence that might have in a mediated outcome?

MS CIFFOLILLI (WADRA): Again there are different views on that between different practitioners so it is difficult to represent everybody, to give you one answer to that, but generally a triage - or if the mediation includes a pre-mediation step, then that's the point at which that could be assessed. Ultimately most mediators would agree that in order for mediation to be appropriate, it is important that all participants are able to participate in a way that allows them to be able to speak their mind and say what is important to them so they don't feel that they are under duress or being made to agree to something that they wouldn't ordinarily agree to.

Power imbalance is only one of the factors in determining whether ADR or mediation is appropriate. The fact that there is a power imbalance isn't of itself a reason for it not to be successful. There are other things that can be brought into account to make sure that that power imbalance doesn't have an impact of a kind that would basically destroy or nullify any benefits that could come out of that process. The intake or the assessment process is really important to determine: is this something that is suitable for mediation or ADR or really is it something that belongs elsewhere, like in the court system?

MS MacRAE: Just in relation to the qualifications of the mediators themselves, do you see value in a national system of accreditation? What form should that take? Are there things in the training that might be required? For example, we have heard from advocates in the disability area and others from the Aboriginal and Torres Strait Islander communities saying that mediation requirements for those sorts of specialist groups can be quite different and that there can be very special skills that you need to

give a good mediation for groups that might have those special needs. Is there anything you would like to say about the forms of training and where that might lead to in terms of accreditation and use of mediation services?

MS CIFFOLILLI (WADRA): The national mediation and accreditation standards, as you know, are not mandatory but well informed purchasers of ADR services would generally be aware of them and would ask for that accreditation as part of their requirements when engaging ADR providers. The difficulty is that in the community which is not so well informed about ADR services they may not be aware that such a thing exists and they should be looking for this when they are searching for a mediator, for example. You might have, as has happened in the eastern states, some flamboyant figures who have held themselves out as mediators when they actually have no training, no qualifications and are probably on the other side of the law, as has been reported in some newspapers.

It is important for there to be a system of accreditation and in many ways that really should be mandatory in order, one would say, for public certainty, for ensuring that the public can be assured of a quality of service and know that the person who is providing the service knows what they are doing. Then there needs to be a system of accreditation and one that is mandatory.

As to the different nuances, I think there is a strong difference there as well as to whether a provider of ADR services needs to have specialist knowledge or skills, whether it is in legalities, in procedural matters or in cultural matters; but that could be accommodated, one would think, in terms of sort of having subheadings of accreditation or types of qualifications. They may have experience having done some extra work or training in cultural knowledge of particular areas or tribes or whatever was required there or particular areas of law, if that was thought important.

Some users of ADR services or mediation services feel that sometimes those qualifications can be a hindrance to providing the service because that knowledge gets in the way of a truly facilitative-style of delivery of a service, so rather than being open and impartial, some of that assessment or thinking of using their own knowledge is brought to bear and that can actually be a deterrent, not helpful.

MS MacRAE: Okay.

MS CIFFOLILLI (WADRA): So that's where the tension lies, in the sense of, yes, it is good to have those qualifications or maybe not. If it's a process driven service then is that really necessary.

DR MUNDY: In matters which I've been involved in there have clearly been cases where it was to the benefit of the parties that the mediator started out with this base level - sorry, it's probably unfair. A significant body of knowledge about how the

matter in broad was dealt with but I see your point. It really is then ultimately up to the consumer really - you probably want to be able to access both, I would have thought.

MS CIFFOLILLI (WADRA): It would be up to the consumer and I suppose that's the important point; that if the consumer knows then the consumer can decide for themselves, "Is this what we want?" With family dispute resolution practitioners, it's understood that they have a certain knowledge of developmental psychology, those kinds of things.

DR MUNDY: Yes, there's a guy in the Magistrates Court in South Australia who mediates small building matters. He is a builder.

MS CIFFOLILLI (WADRA): Yes.

DR MUNDY: I wanted to just touch on this issue about mandatory registration. I'm just interested in how we might do this. Would we do it by reservation of the use of the word "mediator", "arbitrator", but I can see that word reservation probably becomes problematic. I don't disagree with the proposition. I'm just trying to think through how we'd do it. Would we do it nationally or would some states want to do it themselves? Don't know if any of them mind. If we were to think that was a good idea, we will help governments out by making recommendations to them about how to achieve it because otherwise they'll flap around. How do you think it should work? I take your point about having subsequent lists as well.

MS CIFFOLILLI (WADRA): So how to achieve accreditation, say, of mediators or an arbitrator?

DR MUNDY: Yes, and I take your point. For the protection of consumers, they want to know that this person has got some sort of skills even if they don't - you're on the list. How does the list get administered because if it's going to be mandatory, it has got to be enforced by law.

MS CIFFOLILLI (WADRA): At the moment there is a non-mandatory accreditation system which is different to a regulatory system.

DR MUNDY: Yes.

MS CIFFOLILLI (WADRA): It's administered by registration or accreditation bodies, so then you have these different organisations that accredit their members if they comply with certain requirements.

DR MUNDY: But at the moment I can go out and offer mediation services.

MS CIFFOLILLI (WADRA): You can, exactly.

DR MUNDY: That's the circumstance we might wish to prevent.

MS CIFFOLILLI (WADRA): So that's where as in other professions you can't hold yourself out to be doctor or a lawyer because it's governed by legislation that provides certain sanctions for those things.

DR MUNDY: Yes. The trick I'm having here is I can define in legal terms what a lawyer is. It's a person admitted to practice and we know what that is. I'm not quite sure how we do that with mediators. Is it just accreditation by someone? Is that enough do you think?

MS CIFFOLILLI (WADRA): There are different ways to go about it.

DR MUNDY: Yes. No, I'm just trying to think through what they might be.

MS CIFFOLILLI (WADRA): If you were to perhaps have a group of individuals who were recognised in that field or organisations that are now accrediting that could give advice in terms of how that could happen, so if you were after a centralised system they could give advice in terms of how that could happen. There might be a broad definition that could be used as to what mediation is or what a mediator is. It could be governed by certain qualifications because at the moment, in order to be a doctor you have to meet certain criteria, so it could be based on that, a sense of if you had these qualifications, these number of hours, whatever that is, then you can call yourself a mediator and if you haven't met that criteria then you can't.

DR MUNDY: Given there does seem to me to be a bit of overlap between people who act as mediators, conciliators, arbitrators if nothing other than probably administrative purposes, would you see that we want to run that. Rather than having someone who deals with mediator accreditation, you might have someone who deals - you may have a body that deals with ADR practitioner - a bit like we've amalgamated a lot of the registration of paramedical professions into one place. Would that be a problem, do you think, other than the fact that the mediators and the arbitrators could have a squabble?

MS CIFFOLILLI (WADRA): Nationally you've got the Australian Health Practitioner Registration Regulation Scheme and so that seems to work in the sense of if you're a chiropractor, you get registered under that. If you're a doctor or a psychologist, so you could do - - -

DR MUNDY: Yes. So that would be a model for ADR practitioners?

MS CIFFOLILLI (WADRA): That could be a model that might be appropriate,

but obviously if you're not a doctor, you can't be registered as one, as a chiropractor, and then be a doctor, so there's, yes, defined headings.

DR MUNDY: Can I just take you to summarise? We've been mindful in various places that there are a lot of what are effectively business disputes which because of costs and things lead to access issues. The Commission has done a number of pieces of work suggesting that small business commissions are organisations of some merit and use in the resolution of these matters. Could you just give us any insight from an ADR's practitioner's perspective perhaps how you see the work that's done by the Small Business Commissioner and the Small Business Development Corporation here?

MS CIFFOLILLI (WADRA): I think they've been successful to the extent that when they've been used, and they would be able to give you the figures on that, most of them end up being resolved reasonably quickly at a very reasonable costs. I think it's something less than $200 filing fee. So I would have thought for any business person. when you consider that, I think the filing fee in the courts - I think just the Supreme Court is about $900 or something like that.

DR MUNDY: Yes.

MS CIFFOLILLI (WADRA): If you could have a dispute resolved in a matter of a month or some months at such a reduced fee and hopefully still maintain a good relationship. Let's say if it's a leasehold dispute then I would think that that must be a positive outcome.

DR MUNDY: There have been some observations made around a similar Commonwealth body that has been formed, and that it is not only a dispute resolution arrangement but it is also an advocacy and policy entity. The institution having multiple roles, is that something you think is highly problematic or is it something that if the institution is run on a sensible systematic basis people shouldn't be all that worried?

MS CIFFOLILLI (WADRA): I suppose if an institution is providing information and advice then if we take the Small Business Development Corporation then the consumer or the customer can decide once they've got that information, "This is something that I would like to have resolved here as part of mediation," or I think, "No, I need to go and file somewhere else." So they have that option. Whether then the services are provided I suppose it seems to work here. I don't know what - - -

DR MUNDY: No, you've got no sense that people are thinking there's some sort of profound conflict within what is a longstanding structure of the Small Business Corporation..

MS CIFFOLILLI (WADRA): Not there, no. I haven't heard that, no.

DR MUNDY: Are there any other areas of government where you think this sort of specialist functional mediation for small business or for something else would be quite useful because one of the things we're concerned about is actually the prevention of disputes and dispute resolution arrangements within government, but also particularly with local government where a lot of business and trees and dogs and all sorts of things happen. Is that an area you think that is an area which people could look at as a way of reducing - we certainly found significant issues with engagement with local government by businesses?

MS CIFFOLILLI (WADRA): I think that's a very important area where ADR could be introduced. At the moment anecdotally I think it's done on an ad hoc basis according to different councils have different rules about that. Some of them provide ADR services or mediation services, some don't, and then they disappear and then they come back. So there's no concerted effort or any organised effort in terms of having these kinds of services available to ratepayers, whether they be residents or businesses. I would imagine that probably the Local Government Association, the overall body, might be something - might be interested in looking at something like that, but they would need to speak for themselves about that.

MR MUNDY: Okay.

MS CIFFOLILLI (WADRA): Yes.

MS MacRAE: Just one of the other things which we've raised with a couple of other participants is just that there's obviously public benefit sometimes in having something decided in a court, it's public and on the record, and precedent can be set. Where things are mediated, that can often be done privately and without anything on the public record. Do you see any innovative ways to try and deal with that so that where there might be something usefully reported - I think there's an example in your - might have been some of the material that you provided to us, that vocational matters in the State Administrative Tribunal that take mediation outcomes, that the tribunal can turn them into consent orders and make them public if they think there's something there in the public interest. Are you aware of that in the - think of ways it might be able to be broadened out, or are there - or, you know, do you see this as an issue that should be pursued?

MS CIFFOLILLI (WADRA): I suppose the question is whether it is an issue, and I think it's assumed that it is important, but I'd be wondering why it's important. Certainly it's important for a civil society to have a rule of law and for people to know about that rule of law, and in civil disputes to understand what the expectations are, but then within that knowledge and understanding and context for people to come to their own decisions about contractual matters and what have you. So I think

certainly for the purposes of professional regulation, it's important that members understand what the expectations of them are as a practitioner in that particular field, and I think that's why the SAT model is a particularly useful one in contractual matters.

I'm not sure how important it is for the general public to know that a particular dispute between X Corporation and Y Corporation was resolved for X number of dollars, whether that really makes a difference or not, and I know that the chief justice is coming this afternoon, and I know he's written and spoken about the issue of there are those cases that have to go to court because they make, you know, public policy and law, and precedent, and so I think he's better placed to talk about that aspect.

MR MUNDY: Yes. I guess the other issue, and this is probably a bit more - well, it's probably of a bit more concern to us is people concerned about public policy rather than the rule of law and his Honour is much more learned in that regard than we are, is that services like Ombudsman have a particular public policy attraction in that they see a range of matters, and without having to deal with the character and the nature of each one of them, they're able to identify systemic problems.

Now, we can - you get a less - a capacity to some extent in some lists and tribunals for that if they're quite specialist. You get it from the courts if you trawl published decisions, but in mediated outcomes where the matter - the ability to identify systemic public problems is significantly reduced, and this is in fact a point that's been made by some of the consumer advocacy CLCs, and we just sort of - we absolutely get the - I mean I guess it comes back to the question of well, yeah, but how many of these sorts of issues do you think are really going to pop up, whereas if we're talking about phone bills, it's a different story. Do you have any views because that's - I guess we're as much concerned about the identification of public policy problems and their resolution as you establish a precedentary law.

MS CIFFOLILLI (WADRA): I suppose if I can distinguish between disputes between members of the public, and disputes between a member of the public and, say, a government agency.

MR MUNDY: Yes, sure.

MS CIFFOLILLI (WADRA): So let's say for example the AAT. There are conciliation conferences in the AAT and mediations there. So matters are resolved at that point without going to a hearing. Now, it may be that in the course of doing many of these conferences and mediations at the AAT a conference registrar may see a systemic issue that keeps appearing. Question is what ability does that conference registrar have to do anything about that, or to report that, or to take action as a result?

To an extent that would probably also apply in the case, say, of a mediator who is perhaps involved in a number of mediations where it's with the same, say, company and the same issue arises. What can that mediator do about that? So one of the questions may be for your group of people who perhaps are going to be working on an accreditation system is should there be as part of ethics or the regulation of mediators that when these things come up, that that seemed to be an exception to the rule of confidentiality and that they may be able to report those things to a body, or whatever action needs to take place.

MR MUNDY: Or even in a de-identified way if they see - - -

MS CIFFOLILLI (WADRA): However it happens, yes.

MR MUNDY: Okay.

MS CIFFOLILLI (WADRA): I mean that's just - - -

MR MUNDY: Now, it's just an issue that's - I think there are some - particularly the AAT, I think, does perhaps informally, if they see a lot of something, ring up the ACCC and say, "Oi."

MS CIFFOLILLI (WADRA): I only raised the AAT - I didn't mean anything about that.

MR MUNDY: No.

MS CIFFOLILLI (WADRA): It was just an example.

MR MUNDY: No. But I know in certain special tribunals - specially some VCAT, that - - -

MS CIFFOLILLI (WADRA): Yes, and I suppose that's where the Ombudsman - their particular role is to look for those things, and they're very - yes, they're open about - - -

MR MUNDY: Well, that's their statutory duty.

MS CIFFOLILLI (WADRA): That's what they do, yes.

MR MUNDY: Yes, their statute requires it.

MS CIFFOLILLI (WADRA): Yes.

MR MUNDY: All right. Well, look, that was very helpful. Thanks for coming

along today.

MS CIFFOLILLI (WADRA): Thank you.

MR MUNDY: And thank you for the material you've provided to us.

MS CIFFOLILLI (WADRA): Thank you.

MR MUNDY: Can we have Legal Aid WA, please? Could be our budget cuts come through and we'll only be able to afford three chairs next year. Once you're all settled, could you please state your names and the capacity that you appear for the benefit of the transcript?

MR TURNBULL (LAWA): George Turnbull, Director of Legal Aid for Western Australia.

MR BRADSHAW (LAWA): Malcolm Bradshaw, Director of Business Services, Legal Aid WA.

MR PAYNE (LAWA): Lex Payne, Director of Regions, Legal Aid WA.

MS STEWART (LAWA): Jane Stewart, Director of Legal Practice Development, Legal Aid WA.

MS HARRIS (LAWA): Allison Harris, CLC State Program Manager, Legal Aid WA.

MR MUNDY: Thank you. Mr Turnbull, would you like to make - or at least one of your colleagues is going to make an opening statement on your behalf. Would you like to make a brief - and that's "brief" means single digit here in minutes.

MR TURNBULL (LAWA): Okay. All right. Well, look, I think the main issue that we saw arising out of the draft report was the endorsement that the Commission appeared to have given to the distribution model that the Commonwealth has adopted for the allocation of funds to Legal Aid Commissions around the country. We don't agree that it is - I think it's described as a model way of distributing these funds. We don't agree that it's a fair distribution certainly in its application, and I suppose we would suggest that the Commission might want to review its position in relation to that.

One of the recommendations in fact, I think it's 21, recommendation 21.4, recommends that the Commonwealth should adopt that particular formula for distributing the community legal services program funding. Now, if that were to be adopted, on my reckoning that would mean that the CLC sector in WA would suffer a 30 per cent reduction in funding. So certainly that's the main issue that we would want to canvass with the Commission. We've also mentioned in our latest submission the difficulties associated with delivering services in regional Western Australia and on the positive side we've suggested a profit base that we've developed which would, in effect, overcome some of the difficulties in recruiting and retaining lawyers in country Western Australia and we've also suggested that in relation to the CLC sector that we have no interest in tendering for any of that business, but rather we would see the sort of processes that we've had in place in the past, which,

effectively, a collaborative approach to determining the areas of high need and where the, you know, appropriate funding should be placed. Essentially that's in a nutshell what we would like to convey to the Commission.

DR MUNDY: Thank you for that. Look, I think it is fair to say that we have done a fair bit more work now on our thinking with respect to funding because we obviously left unanswered the question of what level of funding might be required and we are still working on that, but I guess as a broader principle - and I do understand that Western Australia always has issues with the distribution of funding from the commonwealth. I was a treasury officer in this state under Mr Bradshaw. I guess the question comes to this: is how should the commonwealth, whatever amount of money it is prepared to allocate to legal assistance - and let us leave aside for the moment the different institutions performs in - how in the broad should the commonwealth think about the allocation of legal assistance between jurisdictions? I mean obviously the Northern Territory, Queensland and, to a lesser extent, New South Wales and South Australia, do we experience a lesser degree of what you might call geographic disadvantage.

How should we think about that? Should we recommend that the commonwealth allocate it on a per capita basis or - - -

MR TURNBALL (LAWA): Well, if you were to do that, of course, that would assist us considerably, but we would say that that's probably not the appropriate way.

DR MUNDY: So help me out here.

MR TURNBALL (LAWA): Well, I mean you'd take account of, I suppose, what are the obvious issues, factors such as the level of indigenous clients that we have in our client base. It's approaching 20 per cent in our case. I think you'd take account of the remoteness and the costs associated with delivering services in regional and remote Western Australia. It's quite expensive, as you can appreciate. There are parts of the state where just the cost of living is quite high.

DR MUNDY: Yes. That would go to the question of the costs of staff.

MR TURNBALL (LAWA): Yes, indeed. Yes, indeed. So I mean I don't think there's any kind of - I think there's no particular magic solution but I think all of the usual sort of indicators of - - -

DR MUNDY: So on the other side, some jurisdictions would perhaps suggest that they should be given, if you like, consideration for lower than national average incomes given that economic outcomes can be an indicator of disadvantage as well, so that broader - all the things we understand that cause cost disadvantage and service provision is the sort of thing you have a view of.

MR TURNBALL (LAWA): That would be a factor, but I think you'd need to look more closely at the sort of services that you're providing and the sorts of clients that you're actually dealing with.

DR MUNDY: So we would need to think about the services, how much it costs to provide them and I guess indicators of disadvantage which might tell us about levels of demand.

MR TURNBALL (LAWA): Yes, except I'll qualify it this way: the demand is - it's, in a way, demand can be a little bit misleading because frankly we're so far short of being in a position to meet demand that we have to prioritise what we do and it's really a supply-driven process that we operate under. It's not demanded. So you've got to look quite closely I think at the sorts of priorities that you have when you are determining who you'll assist.

MR BRADSHAW (LAWA): Commissioner, if I could make the point, I think it's important that in determining the allocation of resources, commonwealth resources, there's a more detailed consideration given to particular regions within a state rather than considering averages across the state. In a jurisdiction like ours we have massive differences and so in a region such as the south-west or the metropolitan area, the level of disadvantage or the intensity of service delivery is nowhere near the level of intensity as it is in, say, The Kimberley.

I think our submission referred to child protection matters which fall under the civil jurisdiction and if you dig into the reports of the Department for Child Protection you'll see that the number of applications as a proportion of the Aboriginal population is absolutely massive and so that level of intensity creates a level of demand and a level of cost which far outweighs and has a far greater impact than any sort of state-wide average would indicate.

DR MUNDY: I think we understand that averages are misleading.

MS MacRAE: I mean I guess one of the reasons for choosing the Grants Commission determinance is that they are tasked with looking at a very much finer detail on a lot of these areas of both service delivery and revenue raising capacity. In one sense they seem the obvious choice because they do do a level of detail across the states for a whole range of things. Would it help, do you think, as a start for you to be given more detail of exactly how that formula works and I appreciate it's presenting the Grants Commission, but is it a place to start to just better understand how the current formula works and then you might find that quite a few of the factors that we are talking about here are actually already taken into account and then find out where is it lacking and where is it - is that helpful?

MR BRADSHAW (LAWA): That would be a brilliant place to start. It's been difficult for us to determine what the elements are of that.

MS MacRAE: I just remember from the tenor of the discussion before I am thinking, oh, we might be building a whole new range of effectively Grants Commission relativities here.

DR MUNDY: And I think perhaps the other issue, Angela, is that a lot of the issues that plague the Grants Commission are actually on the revenue side. That is always where Western Australia is taken in there, and it may well be there is an appropriate way to proceed. Now, there is a disadvantage in the expenditure model and if you would carve that out it might - - -

MR TURNBALL (LAWA): Can I just point out, perhaps what I was trying to say earlier - you've got to look closely at what your service priorities are because if you look at what we actually assist, what we actually aid people with, it's primarily family law matters - if we're talking about commonwealth - primarily family law, predominantly, and it's therefore, I think, more relevant to look at the circumstances where families are in disarray, if you like, all sorts of - rather than just the broad indices of poverty, for example.

DR MUNDY: And presuming such data is available nationally, let us assume for the sake of discussion is a notion where the commonwealth said, "Look, we're funding family law matters because it's a federal matter, the revenue capacity of the states in that consideration is irrelevant because we're talking about citizens and the commonwealth, so what we need to do is bring our mind as to how to distribute money for the family law needs of Australian citizens on the basis of their needs."

MR TURNBALL (LAWA): Yes.

DR MUNDY: That sort of approach would be something and that would lead to pockets all over the place of - okay. No, I think we understand. Just on that question, do you think as a matter of principle the commonwealth should fund legal assistance to its citizens or should it fund its citizens to undertake matters within its own jurisdiction putting aside the issue of family law and the quirk of that, let us assume for the funding sake it is a commonwealth matter?

MR TURNBALL (LAWA): Well, I think we would certainly prefer the system of pooled funding where the commonwealth actually took a broader share of the responsibility for all of the legal needs.

DR MUNDY: We make a recommendation that the civil law needs when commonwealth considering - well, indeed, the states as well - are considering the funding of organisations such as yours that the civil law funding should, essentially,

be cut out and ring-fenced and clearly identified. Subject to the caveat that this does not mean reducing funding for civil law or for criminal law, what would be the impact on your clients and operationally of such an arrangement?

MR TURNBULL (LAWA): If we quarantine funding - - -

DR MUNDY: Well, if the commonwealth came along and said - or the state, "If you're funding was identified as civil and criminal would that have any particular impact, particularly if you couldn't shift money between the two?"

MR TURNBULL (LAWA): I'm not sure if - - -

DR MUNDY: Or is there so precious little civil money that - - -

MR TURNBULL (LAWA): There is previous little civil money. I think, you know, I think it's - nationally it's about 2 per cent of our grant of funding at least.

DR MUNDY: Pick a number like that.

MR TURNBULL (LAWA): Yes.

DR MUNDY: Yes.

MR TURNBULL (LAWA): That's not to say we don't have civil.

DR MUNDY: No, I understand.

MR TURNBULL (LAWA): Yes. Yes.

MR BRADSHAW (LAWA): I suppose the general concept of ring-fencing creates a level of organisational inflexibility and we, you know, pull the levers backwards and forwards in response to demand for certain services.

DR MUNDY: Yes. Would it create a risk for dealing with clients with particular complex needs which were both of a civil and criminal nature, given that we understand that a lot of people with particularly complex clients - and certainly this is the point that Mr Grant in New South Wales has made to us - that, you know, they present with a whole bundle of needs. Would that sort of ring-fencing demarcation need to be thought through at an operational - well, client management level?

MR TURNBULL (LAWA): Yes. Well - - -

DR MUNDY: The last thing we want to do is to create a whole bureaucracy over 2 per cent of the expenditure.

MR TURNBULL (LAWA): Well, you know, it comes down, I think, basically to the question of how much funds you've got available. I mean, the reality is that if you take our broad - you know, our overall position, it's dominated really by criminal law matters and family law matters.

DR MUNDY: Yes.

MR TURNBULL (LAWA): And even in the criminal law area we're really sailing very close to the wind, very close to the wind, particularly in relation to Magistrates' Courts' work where people are being left without representation in circumstances where they're likely to go to prison. Now, that seems to me to be very very - a very unfortunate circumstance. So, you know, we've still got a long way to go in terms of if we had had just the one pool of funding, I think, to seriously weigh up whether or not we should be putting more funds into the criminal law system rather than the civil law system.

DR MUNDY: Yes. Sadly, that isn't a matter with the Attorney referred to us. Can we talk a bit about the lawyers? I guess probably one of the issues - the point's been made was that the rates for legal aid work. Now, they have diverged over time. Do you have any views on mechanism that could be put in place which, I guess, to some extent, if they were put in place would lead to an objective basis for a funding model, but how one might peg legal aid rates to something that's objective and, if so, how might that work?

MR TURNBULL (LAWA): Well, of course, scale rates do exist in some jurisdictions.

DR MUNDY: Yes.

MR TURNBULL (LAWA): And I suppose you could use that as a benchmark.

DR MUNDY: We're told 80 per cent of scale used to be the rule.

MR TURNBULL (LAWA): That was the original circumstance. You could look at the possibility of what - the commonwealth, for example, or governments fund their own legal services.

DR MUNDY: Yes.

MR TURNBULL (LAWA): And perhaps use that, again, as a mark.

DR MUNDY: Yes.

MR TURNBULL (LAWA): You could - - -

DR MUNDY: So, effectively, take you on to the panel.

MR TURNBULL (LAWA): Yes.

DR MUNDY: And fund you as according to panel. Okay.

MR TURNBULL (LAWA): Of course, our underlying rate here is about $140 an hour, which is - - -

DR MUNDY: And what's the panel rate, do you know?

MR TURNBULL (LAWA): I wouldn't know the answer to that, I'm sorry, but it is - - -

MR BRADSHAW (LAWA): Yes. But the scale rates - we'll provide them to you, but my recollection is we are well below half of scale at this point.

DR MUNDY: It'd just be interesting for us to know, say, if you went to 80 per cent of scale what would be the additional costs per annum?

MR BRADSHAW (LAWA): Okay. We, in our submission that we've been preparing for Treasury, it was going to be our suggestion that we went to nothing more than, say, 50 per cent of scale, but the scale pegged - or out rates pegged to the rate of increase of scale.

DR MUNDY: Yes. So you pegged it at 50 per cent of the scale and they went up with scale.

MR BRADSHAW (LAWA): Yes. So at the moment the differential between scale and our rates gets bigger and bigger.

DR MUNDY: Yes.

MS MacRAE: And can you comment a little bit about the - how you do attract lawyers into your rural and remote areas and what sort of shortages you're still seeing there?

MR TURNBULL (LAWA): Sorry, if you were?

MS MacRAE: Attracting lawyers to rural and remote areas, what sort of - - -

MR TURNBULL (LAWA): Yes. Yes. Well, Jane Stewart, who has come with

me today, she actually was instrumental in developing this scheme that we call a country lawyers' program, which we thought - well, which does, in fact, work quite well. It's kind of a - it's a proven success story and maybe Jane might like to just give you a bit of a rundown on that particular approach.

MS STEWART (LAWA): So the model that we adopted for country lawyers was a one employer model because one of the problems for lawyers going out into the regions is that each public sector agency has a different rate of payment and different conditions. So we chose the Legal Aid rate because it's the higher rate and has housing options attached to it because the other major problem, particularly in the north west of WA is housing.

MS MacRAE: Yes.

MS STEWART (LAWA): You know, at its peak, $2000 a week for a house, which is more than some of these lawyers' salaries.

DR MUNDY: It certainly was more than what we paid aviation fire fighters when we sent them to Karratha.

MS MacRAE: Yes.

MS STEWART (LAWA): So we found if we had a model where there was one employer with portable conditions over your rotations and subsidised housing that - and professional development opportunities and networks was the third key cornerstone of the program.

MS MacRAE: Yes.

MS STEWART (LAWA): So that younger lawyers coming into the program spent six or 12 months in Perth in the Legal Aid Commission before they went out, so that all of their professional networks were established. More senior lawyers spent a shorter time in Perth, maybe a month, so that they could at least have someone to call and have professional networks established, and then a model which allowed portability of cross-rotations through community legal centres through Aboriginal Family Violence Prevention Services through Legal Aid Commissions and through Aboriginal Legal Service so that you had portability of your conditions, the same salary and government housing, and our experience was that if you provided all of those things and professional support that we could fill all of the gaps in Western Australia and did while the program was in full flight.

MS MacRAE: And is it the sort of thing that's transferable across jurisdictions?

MS STEWART (LAWA): Yes. We've certainly looked at that, particularly in the

north west. There - yes, and a lot of our lawyers who were interested in coming to WA are actually from other jurisdictions. So we've had a large influx of lawyers from the east coast coming across to get the opportunity to actually do appearance work in WA because we have a peers profession and there's a lot more opportunity to actually appear and get runs on the ground. So we've had a - not only a lot of interest nationally, we've also had a very significant retention rate in the regions after the program has finished for the particular lawyers. I think it was 57 per cent, was it? Yes, 57 per cent of lawyers going through the program have actually stayed in the regions once they've finished their contracted time.

DR MUNDY: Is that a function of the region they're in?

MS STEWART (LAWA): Sorry?

DR MUNDY: Is that a function of the region they're in? Are they more likely to stay in Margaret River than they are in Port Hedland?

MS STEWART (LAWA): No, it doesn't operate that way, and what - one thing that we discovered in the program within the first year or two, initially lawyers were wanting to go to Margaret River to Broome, but very quickly that changed to where you were going to get the best legal work and where you were going to get the best professional support.

DR MUNDY: Okay.

MS STEWART (LAWA): So there was a very clear shift from I want to go to Albany, I want to go - - -

DR MUNDY: So when you say they - so when the program finishes they obviously finish somewhere.

MS STEWART (LAWA): Yes.

DR MUNDY: And, like you say, 57 per cent of them stay where they are.

MS STEWART (LAWA): They either stayed where they are or they stayed in the region.

DR MUNDY: Regions. Okay.

MS STEWART (LAWA): Whether they put their own shingle up or whether they worked in another centre, but they're practising in regional WA.

DR MUNDY: Okay.

MS MacRAE: And so how long have you had the program running?

MS STEWART (LAWA): Six years.

MS MacRAE: Okay. Okay. And do you think then that's giving you a sort of systemic base now, is it getting easier, given that more of those people are staying, is that making it easier for you to - - -

MS STEWART (LAWA): Well, it was until the funding was significantly cut and now for the first time this year we're coming back to vacancies which can't be filled again. The funding model relied on a team based at Legal Aid in Perth to administrate and facilitate the program and there were some additional incentives for community legal centres and Aboriginal Legal Service Family Violence at the beginning to take lawyers, and the funding has been cut significantly now, so the program has still got lawyers running through it but the funding from the Commonwealth has significantly dropped and we're now starting to see the gaps coming back.

MS MacRAE: So you're maintaining the payments software for individual positions but the number of positions has been cut. Is that how it's worked.

MS STEWART (LAWA): Yes.

MS MacRAE: Yes, okay. So what sort of proportion of vacancies have you got now? How much are you - - -

MS STEWART (LAWA): We've got at least six - or six to eight in the family violences.

MR PAYNE (LAWA): Yes. We've got six to eight, but most of them are in the family violence legal protection program and they're uncertain at the moment as to whether they would like to fill a vacancy from the country lawyers program or employ direct, or what is going to happen because their future funding is uncertain.

MS STEWART (LAWA): It's very difficult for us to broker the attraction of these lawyers where the funding model is six months. So the position that they can be offered is only for six months because the agency doesn't know whether they're going to be funded.

MS MacRAE: You're asking someone to move to a remote or a rural area so we can only guarantee that we'd be able to fund you for six months.

MS STEWART (LAWA): Yes. That's a very, very big ask.

MS MacRAE: Yes. I can imagine that would be.

MS STEWART (LAWA): For the lawyer to uproot and do that for such a short - - -

MS MacRAE: Yes, of course.

MS STEWART (LAWA): Whereas when they were in the program in its full swing, the lawyer was guaranteed four years or three years as a contract.

MS MacRAE: In dollar terms then, how much has that funding been cut? What sort of - - -

MS STEWART (LAWA): Significantly. What are you down to now? We can certainly let you know.

MS MacRAE: Okay. Thank you.

DR MUNDY: Just while we're on the question of funding cuts, when we had your colleagues from the ACT before us on Monday in Canberra, they were able to indicate to us the on the ground consequences of the recent budgetary decisions of the Commonwealth. New South Wales was a little bit less able to be precise because I think they're a much bigger organisation so money - funding and expenditures are probably not as closely tied up together as each other. Are you able to give us a sense of what will be the impact on yourselves and also whether the view that these reductions are a refocussing on outcomes rather than perhaps advocacy and law reform?

MR TURNBULL (LAWA): Well, in our case, I don't think it had anything to do with the latter. We directed those funds towards independent children's lawyer appointments in the Family Court primarily. We set aside some of the funding for the employment of an Aboriginal liaison officer in the Kimberley. In relation to what we've committed already, we've committed pretty much fully the funding that was provided.

It's uncertain to what extent we will need to adjust our future plans in the sense that where we've made these commitments to independent children's lawyer it's a long-term situation. These cases will sometimes drag on for years and so the initial funding that we provided might well be expected to be followed by further applications for further funding. So if that were to occur, then we would need to adjust what we call our commitment budget for next year.

DR MUNDY: So these independent children's lawyers presumably will stay with

these children potentially - - -

MR TURNBULL (LAWA): For years.

DR MUNDY: - - - for a long time so at some point you will need to make a decision whether you continue to provide that or whether you resource if from somewhere else.

MR TURNBULL (LAWA): We will continue to provide what we've already committed to, but the effect of that will be that it will reduce our ability to be able to fund further matters.

DR MUNDY: So those kids with those independent children's lawyers, they're there, but if kids were to present in future they might not be able to be supported in the same way.

MR TURNBULL (LAWA): That's right.

MS MacRAE: We've talked a bit about the Commonwealth level of funding for jurisdictions. We're also interested obviously in the funding within the jurisdiction and we've heard in quite a few submissions about some reviews that happened in Western Australia in 2003 and 2009 and they have been held up as a bit of a model that we might want to look at closely because it seems to have been a very well received distribution method or methodology that seems to have got support across the sector. We did ask our previous participants about those reports and they thought they were public but weren't entirely sure. Are you able to advise us if they are?

MS HARRIS (LAWA): Yes, we have brought them with us today to hand up to you.

MS MacRAE: Okay, great. Thank you.

DR MUNDY: Did they send you a text message or something?

MS MacRAE: I guess if you could just in broad terms talk about what you like about that method, whether you see - I mean, there's been one in 2003, 2009. Is there one on the horizon? Would you support one on the horizon, and what it means for you on the ground in the way services are funded here?

MS HARRIS (LAWA): There's a link on the Legal Aid web site as well, all the reports are up on our web site and the demographic study and that's in our additional - - -

DR MUNDY: Yes.

MS HARRIS (LAWA): I think it's in the footnote, you just have to look for it there. The first review was initiated by the Commonwealth under the CLC program and agreed with the state. So it was between the Commonwealth and state attorney-general in 2003, the very first one, so it was a joint Commonwealth state review and was chaired by the director of Legal Aid, so George was the chair in our state, and it had representatives - - -

MS MacRAE: So every state had one at that time, did they?

MS HARRIS (LAWA): It was a rolling plan for it to go round Australia.

MS MacRAE: Rolling state?

MS HARRIS (LAWA): It was rolled out in varying degrees of success or how it worked, I think. In WA it was very successful. So we were - - -

DR MUNDY: Was Mr Williams the Commonwealth attorney then?

MS HARRIS (LAWA): Gerald Williams. We took in WA a very cooperative approach and I think that was the key to our success. We spent a lot of time in getting the terms of reference right and agreed, and we probably spent more time up-front doing that than other states did, so that made it much more enduring, I think.

MS MacRAE: So was it effectively a repeat exercise in 2009?

MS HARRIS (LAWA): What happened is we got our recommendations coming out of that review and one of the recommendations was to set up a CLC stakeholder committee. So to give the review life beyond the review report. So we then established a CLC stakeholder committee that mirrored the representation of the review committee. So we then had a body that looked at how the recommendations were implemented and had the same level of representation. The key to that, we had the state government, the Commonwealth government, the Law Society and the sector represented and Legal Aid. We then engaged in an update report. That committee determined, by the time we got to 2009, it was time to revisit the report and see how we were tracking and we did the update report. We've got that here as well.

MS MacRAE: Yes, okay. Obviously we're some years on from that now. So has that committee remained established and still doing work relative to implementation of that - - -

MS HARRIS (LAWA): Yes. The brief is to meet twice a year and according to need. So we have met more frequently when things have been happening. Clearly

we're probably going to be having a lot more frequent meetings after we get your report. Big issues that are affecting the sector.

DR MUNDY: I guess what we're attracted to is that this model in Western Australia has been held out by the CLC's association in New South Wales as the way to go and I think it's fair to say that we're attracted to the notion that the most efficient use of scarce resources will usually be determined on the ground not from an office in Barton, and so I guess what we're trying to find is an institutional framework which if the Commonwealth was prepared to allow this degree of flexibility to the states we probably as responsible Commonwealth officers we want to mandate a structure for that process and this seems to be the best cab on the rank at the moment.

I guess the question I'd have for you is that if the framework that you're talking about and the liaison work you're dealing with was to become an accountable mechanism for the disbursement of Commonwealth money, what else do you think would need to be done with it to satisfy sceptical officers in the Commonwealth Department of Finance?

MS HARRIS (LAWA): Part of the initial review we did a very detailed demographic analysis. So we engaged consultants and we looked at all 124 local government areas in WA and we mapped this advantage. We used CIFA as the basis which is very popular. At that time it was not as popular, and then we also engaged the WA Crime Research Centre to add in variables of disadvantage, so domestic violence report statistics, and we got a very good tool that worked for WA and then we mapped areas and then we overlaid centres and that's how we got our gaps and our existing locations.

The recommendations we ended up with were a blueprint for services that we have used since 2003 and in cooperation with the Commonwealth, so when the Commonwealth has had one-off money - I think in your report you had varying views from different states about whether it was haphazard and money going - when the Commonwealth rolled out one-off money. Well, in WA it really wasn't haphazard because we had our blueprint and we knew what we were asking for and the Commonwealth was on the same page. Talking about funding cuts, we only talked about the Legal Aid impact of funding cuts, but there is coming cuts to CLCs as well where we're going to lose in 2015 a million dollars off that new funding that rolled out.

DR MUNDY: That's what is euphemistically called the Dreyfus money.

MS HARRIS (LAWA): Yes, that's it. For CLCs in WA, that's 1.185 million and will take funding down from 5 million to 4 million. It's really significant.

MS STEWART (LAWA): What Allison is also not saying is that in WA, in the country lawyers' model and in the CLC stakeholder model, there's a really high level of collaboration between all of the various agencies and all of the agencies are actually able to get together and work together to create a better whole and solve a problem holistically than perhaps some of the other states have been able to achieve.

DR MUNDY: Is it fair to say that at least as far as the Commonwealth Attorney's Department is probably concerned, the model that you have is - they will use it, it's credible to them, they're comfortable with the outcomes that it's seeking to deliver and its processes.

MS HARRIS (LAWA): I think so. I think definitely they have had representation on the committee and they endorse it and they haven't been involved at all levels. There's probably a few levels in terms of funding models. There's the distribution, identification of need and location of centres, and then there's the funding model per centre which is another issue that sits outside that, so there's really levels of funding models. There's the global distribution - - -

DR MUNDY: That's what we're trying to find, somehow the structure whereby local needs and the interaction between the services you provide and the CLCs can be dealt with in a sensible way by people that know what they're doing and it's adaptable and stuff, rather than recommending hard and rigid rules which inevitably won't work across the country.

MS HARRIS (LAWA): I think in our submission we gave Geraldton as an example, but in all our regional areas that really works with all, so we have a mix model, so we have Legal Aid, the CLC, a family violence and an ALS and they're not mutually exclusive. In Albany and in the Goldfields, you really need all of them and, as George said, they don't meet the demand even with all of them, so the mix model is very important in WA and works really well.

MS MacRAE: Just in a practical sense, it sounds like the CLCs are effectively going to lose 20 per cent of their funding. Would you go back to the sort of model of need and look at that within the sort of parameters that are set out in that report? Is that one of the ways you would look at it, or is that report a little bit too high-level for that?

MS HARRIS (LAWA): Certainly the funding that is going to be lost - one centre that is hugely at risk is the Pilbara CLC, so they are potentially facing a double hit because they're losing their additional money which funded a lawyer that they really needed. There has also been an administrative change, which I don't know if you're aware of, within the AGD of transferring the indigenous money back to the Department of Prime Minister and Cabinet.

MS MacRAE: We have heard about that.

DR MUNDY: I thought the ATSILS will stay in AGD.

MS HARRIS (LAWA): This is a little pocket of indigenous money for CLCs.

DR MUNDY: Yes. See, this is why we find this all very - there are all these little pockets of money.

MS HARRIS (LAWA): Yes, but for the Pilbara this pocket of money is really significant because that has been cut 5 per cent in that transfer, so straightaway they lost 5 per cent for the transfer, and that money is at risk, so if they then lose - so that's potentially another lawyer. If in 2015 they get a double hit, the sustainability of that - we are going to have to look at what's happening for them. They can't afford to absorb that.

DR MUNDY: That's the Pilbara. Is that just a general community based Pilbara CLC?

MS HARRIS (LAWA): Yes.

DR MUNDY: It's not an indigenous - - -

MS HARRIS (LAWA): No, but it has a lot of indigenous programs.

DR MUNDY: Yes, I know. I appreciate that.

MS HARRIS (LAWA): Yes, but it's a generalist centre. It's not indigenous specific. That's the issue about whether that money was legal money or indigenous money and all of those questions that you're probably really aware of. They're the unintended consequences of moving money around that have big impacts for agencies that aren't multi million dollar agencies, but on the ground big consequences.

So, yes, there will be a bit of that. The committee can look at that. Then when we have these kind of issues, it might be looking at funding to supplement, so we do have a bit of trust funding - which you have probably heard about the Public Purposes Trust and the Legal Contribution Trust. Never reliable money, never consistent, not government money, but it can save centres. It can tide them over. So there will be a bit of that going on, I think. We're already working with the EDO. Their funding cut commences on 30 June.

DR MUNDY: Yes, we did ask questions - I mean, we have certainly been told that the EDO in the ACT would have most certainly closed and that most other small

jurisdictions will go. I asked the CLC Association their view on the EDO. It wasn't a particularly encouraging one.

MS HARRIS (LAWA): No, but we definitely are working with them as a centre of - yes.

DR MUNDY: Can we perhaps move on to some other issues other than funding which are probably marginally cheerier. We had the Disability Advocates Network of Australia before us in Canberra on Monday and they raised some issues about the way in which people with a disability, particularly I guess people who are disadvantaged more generally, deal with unbundled services, be they minor advice or those sorts of things. We're very in favour of unbundling and we appreciate the Legal Aid Commissions do it all the time.

I guess one of the things we would be interested in your thoughts of is the extent to which those models might be able to be moved into a private provision context, so people who need those services but perhaps can't access them through Legal Aid can still access unbundled services. Particularly we're interested in the issues around the ethical questions about unbundling and the negligence questions about unbundling because we're not sure where the truth lies.

MR TURNBULL (LAWA): It is a difficult question.

DR MUNDY: That's what I'm paid to do.

MR TURNBULL (LAWA): I mean, you're absolutely right. We do it all the time; you know, assist people with preparing letters of negotiation or court documents or you name it. It's not in a solicitor-client context but I can see that it maybe is a fine line at times.

DR MUNDY: We have had examples given to us of a solicitor helping someone prepare a court document, really trying to do the right thing. The client goes in, isn't particularly articulate. The poor solicitor gets dragged in and gets berated from the bench. Therefore, that solicitor won't help again.

MR TURNBULL (LAWA): Yes.

DR MUNDY: Do you self-insure or do you commercially insure?

MR TURNBULL (LAWA): It's the state government that effectively insures us.

DR MUNDY: The government. So claims of negligence against your lawyers?

MR TURNBULL (LAWA): Yes, the Commission assumes responsibility and the

Commission - - -

DR MUNDY: Okay. It's probably not something we can proceed - but do you find that people with disadvantages, be they mental health, indigeneity, disability, need special care and attention assistance when they're using unbundled services?

MR TURNBULL (LAWA): Absolutely.

DR MUNDY: How do you address those issues?

MR TURNBULL (LAWA): In a variety of ways. If it's a language issue, obviously you need some ability to engage an interpreter.

DR MUNDY: Yes.

MR BRADSHAW (LAWA): There's also the issue of staff training. Do you want to talk about that, Jane, because I suppose we don't have the resources - - -

DR MUNDY: I think that's getting to the point I'm trying to get to.

MR TURNBULL (LAWA): We don't have the resource capacity to have specialist areas that deal with people with particular problems, so our approach is to train our lawyers to deal with a variety of situations but, Jane, you can probably talk more about that.

MS STEWART (LAWA): Yes. We do a lot of work in the professional development of lawyers across all of the special circumstance areas because they are fundamentally our core client group. It is not only about having skills to be able to deal with those particular groups; it is having skills as a lawyer yourself to be resilient enough to be able to keep going and to be able to provide those sort of services day in, day out.

We do look at the professional wellbeing of the lawyers and we have done a lot of work in this space in the last four years. We look at having rotation policies for junior lawyers to make sure that they are not burning out. We do certainly have lawyers in specialist skills areas in therapeutic courts, for example. We have a star court which is a mental health court. We have intellectual disability courts, Drug Courts and family violence courts where lawyers are specialising in those groups but their rotations through those positions will be short. They might be there for six or 12 months and then they will move on and do something else, because you can't be a lawyer working in family violence forever. It is too emotionally and mentally draining on the lawyer.

We spend a lot of time professionally developing. We have spent a lot of time in the

last six years since continuing professional development became compulsory in Western Australia to make sure that there are really good in-person and online materials, not just for Legal Aid lawyers but for all lawyers practising in the areas of family and criminal law predominantly to be able to get really good training in all aspects.

We have an annual conference every year that we run and the last summer series had a double session on resilience for family lawyers in particular, helping them to recognise how to work in the context of constant demand and constant pressure on your own health.

DR MUNDY: Despite the reactions of some, we are also quite interested in public interest litigation and we do recognise the public benefits that the legal system and the courts provide, although you mightn't tell that from some people's commentary. We have proposed or at least given consideration to the creation of a public interest fund for public interest litigation. I guess my first question in this regard is: if such a fund were to be established, and let's assume it was a state-based fund, would you see yourselves as the appropriate body or somebody else, or just a fund with a board of trustees providing advice to the attorney perhaps?

MR TURNBULL (LAWA): I'm not sure that we would particularly welcome a view about that.

DR MUNDY: You don't particularly welcome it because it would be another administrative burden.

MR TURNBULL (LAWA): Yes.

MS HARRIS (LAWA): And WA is unique in that we don't have a PILCH. We don't have a public interest law clearing house. It has been mooted and it has been in development but we don't have one in our state, as exists in other states.

DR MUNDY: I think we are probably about done. Thank you for bringing those documents. We will now adjourn these proceedings until 1.45 when we will have the chief justice.

(Luncheon adjournment)

DR MUNDY: We'll reconvene these proceedings. Could the next participant please state his name and the capacity in which he appears.

MARTIN AC: My name is Wayne Martin, and I appear in my capacity as Chief Justice of Western Australia.

DR MUNDY: Your Honour, thank you for taking the time to be with us here today. We really do appreciate it. We note that you are the only member of the judiciary who has been able, but hopefully this may set a precedent and some of your brother and sister judges may also assist us in this inquiry. Would you like to make - - -

MARTIN AC: Yes, certainly. There's a few topics I'd like to address. But first, at the risk of sounding sycophantic, can I commend the Commission on its draft report, which I think is an exceptional piece of work produced in a relatively short period of time and which will, I think, make an enormous contribution to discussion and debate in these important areas. The first topic I want to address is really to make similar remarks in relation to the Commission's recommendations with respect to the improved provision of information to consumers, which I think is a very, very important area.

I think the notion that there be a central point to which people who are in a dispute can go for information about the most appropriate means of resolving that dispute, a kind of advice as to triage, I think is very, very important, and I think greater consumer information about legal services is also very important. We have a very ill-informed market on the part of consumers with respect to legal services. They don't know the nature of the services they need, they don't know the nature of the services that are provided, they don't know the basis upon which they're going to be charged very often, and they don't know the quality of that service. So anything we can do to improve a proper functioning market in the market for legal services I think is enormously worthwhile.

The second topic I wanted to address concerns self-represented litigants. There is, I think, a tendency amongst some members of the judiciary to regard self-represented litigants as a threat. When we're talking about access to justice, I think they are an opportunity, and we need to see them as an opportunity, in the sense that they are the people who, if you like, have the courage to take on the system without the assistance of legal representation. That, I think, should be encouraged and it's incumbent upon us to do everything we can to assist them in exercising their right of access to the courts.

The reason I think that some judges tend to regard them as a threat is in part because of a failure to distinguish between self-represented litigants and what we now call querulous litigants, and what we used to call vexatious litigants. There's a vast difference between the two, of course. Virtually all querulous litigants are

self-represented, but only a very small proportion of self-represented litigants are querulous. But it's the querulous ones who cause all the trouble, attract all the attention of the judges, cause them great frustration, and so they tend to give the rest of the cohort of self-represented litigants a bad name.

So leaving aside the querulous, I think in terms of the self-represented litigants who genuinely wish to exercise their right of access to the court, it seems to me that we can do much better in providing assistance to them. The Internet these days provides an enormous opportunity for the provision of information to prospective litigants about how they can exercise their right of access to the courts, and it provides us with the opportunity to provide forms in user-friendly ways, which can be completed online and submitted to the courts, making the whole process easier. That also has an aspect for another topic I want to address, which is regional disadvantage.

So I think the courts can do much better about making ourselves accessible to self-represented litigants. Also, the Internet can of course provide information about the substantive legal issues. It can be provided in a simplified form, there's an awful lot of information on the Internet now about the law and legal subjects. It's written usually in a form that's intended for digestion by lawyers. I think we can do better about providing that in a way in which it's more readily understood by ordinary members of the public.

The other thing I think we could do is provide greater assistance at court counters and in court offices to people who wish to exercise the system. I visited the subordinate courts of Singapore a little while ago and they have a self-represented litigants' office, and you go in there and they've got an array of counters, about four or five people behind the counter, you take a number, go and sit and you wait your turn, your number comes up, and they'll go and give you assistance about negotiating the system.

Of course that requires the application of resources, but from a total cost of courts perspective, if you look at the cost that is being consumed by the extra time absorbed by self-represented litigants at the moment, it seems to be that a little bit of investment and provision of assistance would first of all have an economic dividend, but also a very significant access to justice dividend in terms of really improving the capacity of people to use the system without legal representation, because the reality is, whatever we do, legal representation will remain out of reach for many ordinary Australians. So I think there is a lot we can do there. Returning to that small group of querulous, I think there's something - and I'll come back to this - we ought to be a little more active about barring their access to the courts, because they are a serious problem and they are consuming resources that we could better make available to other people. I'll come back to that in a minute.

The next topic I wanted to address was costs awards; that is, costs awards by courts

in front of one party against another, and particularly the Commission's recommendation that there might be means for capping the awards on costs. The point I want to make there is that experience shows that the costs that are awarded by one party against another are not a particularly effective means of maintaining the costs that are charged by a lawyer to their client. At the moment there is a large gap already between the costs which you recover if you're successful and the costs you pay to the lawyer. Usually you might get half back if you're lucky, two-thirds if you're really lucky, but you wouldn't get any more than that. So you're always going to be a third out of pocket under the current regime.

So the market forces haven't encouraged litigants to say, "I'm only going to let you charge me what I'm going to recover from the other party." Perhaps the best example of that is the United States, where there is no capacity to recover costs, and yet legal expenses are still out of control. So placing a cap on recoverable costs doesn't seem to me to be very likely to actually have a flow-on effect of reducing the costs that are charged by lawyers, and the effect of the cap is that you would simply - if that doesn't have that effect, then you're just increasing the gap between the costs paid by the successful litigant and the amount they recover. That's to the disadvantage of the successful litigant and to the advantage of the party in the wrong. So I'd caution that sort of approach, attractive though it might seem.

In relation to pro bono costs, certainly in our court, and I think in the Federal Court, there are mechanisms for lawyers acting pro bono to recover costs in the event successful, and I think that's a good thing. In relation to awarding costs in front of self-represented litigants, as the Commission proposes, I wouldn't support that. The award of costs in somebody's favour is meant as a form of indemnity against costs they've actually incurred, it's not meant as a form of reward for success or for the time they have invested into the process.

So it doesn't fit ideologically into the concept, but my real concern is that it could work to the disadvantage of losing self-represented litigants, so that if you've got, as you commonly do, one self-represented litigant moving against another, it could be to the enormous disadvantage of the unsuccessful self-represented litigant if the other party has an award of costs even though they're not legally represented. So that could discourage participation from the other self-represented litigant. The next topic I wanted to address was court fees. Commissioner Mundy, you've had the misfortune of hearing me speak on that subject before, and it's all in a paper that's on the Internet, so I won't repeat what I said.

DR MUNDY: We have studied it closely, your Honour.

MARTIN AC: Yes. I won't repeat what I said there. Put shortly, my concern is that courts are not just another dispute resolution service provider, we have a constitutional role. But moving on from that proposition, which I know has been fed

up to you by the judicial conference and others. When you look at court fees, it's hard to devise a solution that fits all litigants and all types of litigation.

If you give an example from our court, the Bell case ran through our court, it was the second-longest-running trial in the history of the state, it consumed enormous resources of the court - on a conservative estimate, it cost us $15 million to run that case, we recovered probably around between $700,000 and $800,000 in fees. So the taxpayer of Western Australia subsidised the parties to that case, who were on one side an insurer, and on the other side a whole lot of banks, to the tune of $14 million, and that's $14 million that the legal system of this state could have invested much better than in that case.

There are other cases in our court between very substantial - sometimes corporate enterprises, big mining companies, fighting each other, big families who have substantial incomes. You can probably guess the people I'm talking about. I struggle to see why the taxpayer of Western Australia should subsidise litigation of that kind at all. So I think there's a lot to be said for a regime in which there is a capacity to full cost recover from those sorts of litigants, and I have proposed in the past that there be a discretionary scale on a full costs recovery basis. But it's not been attractive, and as far as I'm aware it's not going anywhere.

The other end of the scale, if you have, as we currently have and most courts have, complete fee waiver for anybody with a pension card, then you really are encouraging the querulous litigants, because they have a free go and not uncommonly you find people have structured their affairs so that they don't have assets so they do get a pension. They might be retired, they've got time on their hands, they're looking for a hobby and their hobby becomes litigation.

Because they don't have any assets they're not at risk at an adverse costs order. By presenting the pension card they can come into court and bring as many applications as they like until their heart's content. I think we need some kind of a mechanism to provide a modest discouragement to all people so that what we've proposed and what I think - I hope - the government will come up with is that there should be a modest fee payable by everybody. What we've proposed and what I've proposed in this state is that that fee should be set at one-third of the fee otherwise payable up to a cap of $100, so that there is - you've got to at least pay something so that even people with a pension a hundred dollars shouldn't be beyond the reach of even a pensioner when you look at the cost that the taxpayer pays.

There should be some mechanism that discourages and I'll just mention there was a joint report of the House of Lords and House of Commons committee on human rights, 9 April 2014, where they observed that: restrictions on access to justice are, in principle, capable of justification - discouraging weak applications and reducing unnecessary delay and expense.

So I think a modest curtailment, because we do have litigants who just endlessly - litigate endlessly and the process for having them declared querulous is not terribly sensitive or is quite cumbersome.

Between the top end and the bottom end there's a big gap in the middle and I think that is most of our cases. If we were to go to full cost recovery for that big gap in the middle in the case of our court we'd have to increase fees by 500 per cent and I think that would be a substantial disincentive. The second last topic I wanted to address - and I know I'm trespassing on your time - but in regional and remote Western Australia, in this state, of course, we're very - well, we ought to be more sensitive and I hope I am sensitive to the needs of the vast regions of this state - I am well aware that it's very difficult for people outside the metropolitan area to access to the civil justice system.

I think we need to get smarter about better use of information technology in that regard. Electronic filing, I've already mentioned - the provision of virtual hearings. We use AV a lot in our court system but we ought to get better at offering virtual hearings to people outside the metropolitan area and, again, the provision of information by Internet, by electronic means, because the reality is, for example, if you're looking at civil law, there are no private lawyers resident anywhere in the state between Geraldton and Broome, so that the only lawyers - which is a vast area of coastline if you know the geography of this state - so there's no private lawyer resident in Karratha, there's no private lawyer resident in Port Hedland, notwithstanding that they are substantial centre in their own right.

For the folk of those regions it's very difficult to get access to legal advice, so we need to get better about giving them information which they can access by the Internet. The lawyers in those towns, if you take Port Hedland for an example - and this goes back to the issue of the funding of the legal aid services providers which the Commission has addressed - in Port Hedland there is - or at least there was last time I was there - there's the Western Australian Legal Aid Commission, there's the Aboriginal Legal Service of Western Australia and there's the Family and Domestic Violence Service. Three separate organisations, three separate offices, three separate telephones, three separate human resource agencies and when the magistrate is in Port Hedland they'll go down to Port Hedland and the bailess lawyer will deal with 65, 70 per cent of the cases, the legal aid lawyer will deal with 20 per cent of the cases and the domestic violence lawyer will deal with five or seven per cent of the cases.

The Aboriginal Legal Service lawyer is worked off his or her feet and really can't cope and can't provide the same sort of level of service as we ought to be able to provide to those folk and I say that with no disrespect to the Aboriginal Legal Service who I think do a great job. All three agencies are taxpayer funded. We

ought to find a better way of spreading the load of representing the people of that region, but I think it's capable of being - there are conflict of interest issues, there's specialisation issues, but I think they are all capable of being addressed. Chinese walls can be built, legislation can solve conflict of interest problems.

If you accept, as I think we all must, that there is a very limited amount of funding available in the legal aid sector, we've got to get smarter I think in getting better value for that money and I have to say I've promoted that proposition in legal aid circles before and it's been very unpopular, so I have to disclose that right away.

DR MUNDY: It probably leads to less legal aid bureaucrats as well.

MARTIN AC: Well, yes, I don't know what it is but it seems to me to be I just get concerned that we're missing opportunities. The final thing I'd like to address before I invite questions is an alternative dispute resolution, which, as I said before, is something of a misnomer because that is the predominant means by which most disputes in our court are resolved. Less than three per cent of our lodgments go to trial and that's pretty standard across the system. I think it has a lot of - provides a lot of opportunities that litigation doesn't provide. It provides the opportunity to add value, it provides flexibility, it provides opportunities for cheaper, quicker, more sensitive, more sensible resolutions.

We strongly encourage it in our court. We subsidise it. We offer mediation at a fee of $222 from one party only, but if we didn't offer that service our backlog would have broken our back years ago, so, you know, I think it is - all the courts of this state offer court-based mediation services and I think it's worked very well. There is a slight problem with it because, of course, we're offering that mediation service in a context - in an adversarial context - so at the same time as we're offering a mediation service we're running a case management stream in which the parties are adopting adversarial and protagonist positions and there's a terrible tension there.

We do our best to try and resolve that, but, again, I think it'd be good if we could think of better ways of resolving that. Maybe by providing mediation - subsidised mediation - prior to the commencement of litigation would be a good thing, but, again, you'd need government to invest in the resources to do that and I haven't done the economic feasibility of that, but certainly ADR is, I think, a very, very important part of the dispute resolution framework. Now, that's all I wanted to say and I can take any questions.

DR MUNDY: Thank you, your Honour. We will just start with ADR. It has been expressed to us through a range of people from different backgrounds that one of the downfalls of ADR is that the outcomes occur in private. I guess we would be interested in your views in a number of contexts. I mean one of the attractions, for example, of ADR, perceived by the statutory or industry ombudsman is that it

identifies problems in public policy which can be then aired where they are systemic and dealt with in a way which is better than leaving these matters to be resolved ultimately in the courts and then for it to be discovered the parliament needs to get on its skates.

The other issue and we are very mindful of the role that the courts play in the establishment of precedent and development and the law and I am just wondering whether you have got any views of is there a risk in the rollout of ADR that in some way the development of the law characteristic of the courts, particularly the superior courts, I guess not so much the Magistrates Court or the tribunals, is it somehow put at risk or is there something we can do to mediate those issues?

MARTIN AC: I think, of course, the more cases that go to court the more precedent there will be and so the law will be augmented every time a case is decided. I think it possibly depends a bit upon your perspective so that if your perspective is that of a lawyer looking at the structured development of the common law then you probably think the court decision is wonderful and if you view it from the perspective of the party, you might say, "Well, why should I pay a lot of money and devote years of my life to the development of precedent which next year is likely to be changed by legislation anyway?"

From the perspective of the party, confidentiality is a key bonus, I think, to mediation because they don't have to air their dirty linen in public. There are, I think, undoubtedly there are competing interests here. Even though only three per cent of our cases go to adjudication that's still a sufficient chunk, I think, to enable the law to develop incrementally. The other point, I guess, I'd make is that without disparaging in any way the business in which I'm engaged, the role of the common law and precedent has diminished significantly over the time I've been in the law because of the intrusion of the legislature.

If you look at the areas of the law now that are truly common law, there are very few left. The law of contract is about the only one that I can think of that hasn't been the subject of significant legislative inroad. Even the law of tort is now very subject to statutory inroads through the civil liability legislation and virtually every other area of the law has been the subject of significant statutory inroads. In those areas of the law the primary function of the courts is statutory interpretation, and of course if the courts come up with an interpretation of a statute the legislature doesn't like, they change it. So it's an expensive - from a party's perspective, saying to them, "Well, you must go through 48, 24 months of trauma and great expense to explain what the legislature meant in this provision of a statute," they'd probably say, "Well, that's not a very attractive proposition for me.

DR MUNDY: Can we just, whilst we're on the broader question of the development of law and I guess law reform, from your perspective of a presiding

judicial officer, and obviously watching this over a long period of time, how important is the role of community legal centres and other advocacy bodies for the development of public policy and ultimately the development of law?

MARTIN AC: I think the CLCs have been an enormously advantageous development across a whole range of fronts. For a start, they provide a shop front that wasn't previous available, so people can go down there, and get an immediate response, which I think is enormous advantageous. But also, because they are seeing people who wouldn't otherwise be seen by lawyers, they're identifying problems that wouldn't otherwise come to the surface, particularly the specialty CLCs that we've got, like the Homeless Peoples' Law Centre in Perth that I'm involved with, the Mental Health Law Centre that I'm involved with.

Because they are seeing people with those particular problems, and the problems caused by being either homeless or mentally ill in terms of access to the legal system are profound. So they are powerful advocates for people who suffer from those disadvantages. I don't think they get listened to quite enough, but at least they are there advocating, and even Law Reform Commissions have a very patchy record in terms of actually achieving change, because of course it's dependant upon acceptance by the legislature. But at least they do - they gather information, they look at things from the perspective of those groups that otherwise wouldn't be represented in our society, and I think that's very, very important, and I think when you're looking at the significance of those groups I think that's often underestimated, the contribution which they make as advocates.

MS MacRAE: Are we right in understanding that the mental health CLC nearly went under recently?

MARTIN AC: Yes, that's true.

MS MacRAE: So what saved the day?

MARTIN AC: I'm not exactly sure. Sandy Bolter would know, she's the principle legal officer there. But it was a fine run thing. They were on a funding cycle, like a lot of these groups are, including money from - it wasn't just Legal Aid Commission, there was another source of funding. It might have been the Health Department.

MS MacRAE: Right, okay.

MARTIN AC: And that cycle wasn't - we created a Mental Health Court in this state about a year ago and funds were made available for representation of people in that court by reference to a competitive tender. They didn't get the tender, the Legal Aid Commission did, and that made it difficult for them to continue. But last I heard from Sandy, they are still going on.

MS MacRAE: Right, and I guess it would seem to me - and you'd know better from your experience - but quite a lot of the problems that you experience with querulous litigants are probably also related to mental health.

MARTIN AC: Yes.

MS MacRAE: Are there ways that services from the mental health sector and the way that courts interact with them - is there some sort of structuring there that might give an outward path for - - -

MARTIN AC: Well, querulous litigant is now I think referred to in the American diagnostic manual. It's actually a recognisable condition, recognisable psychological condition, and you see it and it's very tragic. It becomes a real obsession for people and it can dominate and ruin their lives. It's very difficult to treat though, as I understand it, and for some of the people that I've dealt with, the worst thing you can do is give them a trial. Because once there's a trial then subject to the appeal process they can see the end in sight, and that's the last thing they want.

So, you know, it's very difficult - they want this thing to just keep on going and going and going. In terms of provision of assistance, I'm afraid that in the competition for scarce mental health resources, querulous litigants are probably not going to be on the top of the pile, when you've got - in the criminal justice system mental health is a much more significant issue, where you've got at least one third of the people in Western Australia's prisons have a recognised mental or cognitive disability, and that's probably an under diagnosis. It's probably more like half. Understandably, the authorities are going to direct the resources, I think, more in that direction rather than in easing the burden of the civil courts, and I wouldn't quarrel with that allocation of resources.

MS MacRAE: So you talked about maybe dealing with those matters. I guess the question is, do you have sufficient powers to deal with those people - - -

MARTIN AC: It ought to be a little easier. We had new legislation about 12 or 13 years ago. It's still a bit clunky. It's cumbersome in the sense that we often initiate the process because there's no one other party that has a sufficient interest in having these persons declared querulous, because they see lots of different people. I mean, there is power under the act for us to simply declare somebody, but that is a bad look, because we can't be both the accuser and the determiner.

So what we do is we send it to the state solicitor's office and say he should apply on behalf of the attorney-general for an order and then the judge who's involved in that process doesn't involve themselves in the process after that. But it takes a long time and it's quite cumbersome. Victoria, as I understand it, has new

legislation that's going through the parliament there that I think makes it easier, and enables the orders to be more targeted, so that you can constrain people in certain areas from doing certain things, not just generally declaring. So I think we'll have a look at that Victorian legislation and maybe make some recommendations to government about that. But the short answer is, it ought to be easier and it ought to be quicker.

MS MacRAE: Just if I could just come back to ADR just for a moment, we've received a number of - or a fair amount of evidence around wills and probate and estates, and we weren't really expecting to because in one sense it doesn't really sit within our terms of reference. But I think it's an area where people have indicated that there's been matters that they felt that it's been unfortunate that those things have gone immediately to the Supreme Court and that very often these are familial matters and it would be much better to deal with them in something more like an FDR sort of context. Do you have a view on that?

MARTIN AC: Well, I agree entirely with that and it would be good if there was a service available to enable that to happen before they got to the door of the court and maybe the CLCs provide that, Legal Aid Commission maybe if they're eligible. But very often there would be people with not insignificant resources - not wealthy people, but with resources. In recognition of that, we've now modified our procedure. The most common form of dispute is under what used to be called Testated Family Provision Inheritance Act, so that the allegation is that the deceased did not make adequate provision for one or other family member out of their estate, and so somebody will (indistinct) "I was wrongly treated."

We now have a process which we've implemented whereby we say that the only evidence that parties to that dispute are allowed to file is evidence identifying financial value of the estate and the financial position of each of the prospective claimants on the estate. Because that's all you need to know to resolve those cases. If you don't do that then they'll file affidavits about who was rude to Auntie Nelly and who didn't go and visit her in the hospital and who was good to her and who did what and to whom, and it's all irrelevant, and once those affidavits get filed, the case assumes a life of its own and it's not about the money any more, it's all about vindicating the dispute within the family - a particular party's position of the dispute within the family.

As soon as those affidavits are in, as soon as we know what the value of the estate is, what the financial position of each party is, they go straight to mediation, and the settlement rate at those mediations is very, very high. The other thing we've done is that the default position used to be that the costs would be borne out of the estate, so that people could, as it were, have a go, make a claim in the knowledge that they probably weren't going to have to pay for it. We've changed that default position. The default position now is loser pays out of their own pocket. So both of those

things have contributed to - as I say, the settlement rate is very, very high, we hardly ever have any of those cases go to trial. So we're doing the best we can to provide an early mediation as soon as possible to mitigate the sort of problem you mention.

MS MacRAE: But it would be a case, from what you're saying, that you have a preference if it was possible (indistinct) to allow the mediation to occur before it gets to court.

MARTIN AC: Absolutely, and, you know, families ought to be able to go and say, "Look, we've got this problem. We think dad didn't do the right thing. Is there somewhere where you can go to get this sorted out sensibly?"

DR MUNDY: Is the traditional institutional form of wills being in probate, even in non contested matters, having to be dealt with in the Supreme Court part of bringing these matters to you? Given we know that the vast bulk of wills are uncontested and it does strike me that it's bordering on an administrative - - -

MARTIN AC: It is, it's purely administrative.

DR MUNDY: Is your view that your court is the best administrative vehicle to deal with this?

MARTIN AC: I think it is because although it is purely administrative, our role is to be ever vigilant for the problem case, and when there is the problem case, you've got to have the skills to deal with it, and I think our court is the place that has the skills to deal with it, and I say that - 98 per cent of the probate cases dealt with by our court are dealt with by administrative clerks who are very lowly classified, and in my view under-remunerated. So shifting that function to another court wouldn't save any money because it would still be clerks at the same level.

But when there is a problem - it's all signed off by one of our registrars. So if there is a problem, we have a registrar who is trained to spot the problem, and then if there is a problem, they can elevate it to a judge, and we have judges who are specialists in that area who know how to deal with it. So I don't think shifting it down the judicial hierarchy would actually save money for the vast majority of cases, and when there is a problem it's important that it be in our court to have it sorted.

MR MUNDY: So it's not a burden on you.

MARTIN AC: Well, one of the problems we've had recently is that because of staff shortages our processing time has blown out to times that I find unacceptable. Our target time is two weeks. It's now between nine and 10 weeks, and for families that are in grief and might need access to funds to put food on the table, that's too long. But shifting it to another court won't improve that situation.

MR MUNDY: That's simply a processing issue.

MARTIN AC: That's just processing issues.

MR MUNDY: That's not matters in dispute.

MARTIN AC: Yes, not matters in - that's non-contentious probate.

MR MUNDY: Can we bring you back to this vexing issue of court fees?

MARTIN AC: Yes.

MR MUNDY: I saw during the course of the week where his Honour Justice Rares of the Federal Court has appeared to hop on your cart. I think it's fair to say that I don't think that we and the judiciary and the legal profession are actually very far apart on what we're trying to achieve.

MARTIN AC: Good.

MR MUNDY: I think perhaps we may have - perhaps we need to undertake a redrafting exercise, but I think we are - I mean we are coming at this from an analysis that there are public goods and private goods produced in legislation, in litigation, and we acknowledge both. We suspect there are more private goods generated in some matters than others, and I think the issue for us is really making sure that the community isn't providing a heavily subsidised service for people who could have gone and had it sorted by ADR anyway.

MARTIN AC: Yes. Look, I agree entirely with that and, as I say, the problem is that you've got a spectrum, a whole spectrum of cases dealt with in any individual court.

MR MUNDY: Yes, and I guess the other thing now thinking it's sort of moving this way is really at the end of the day I mean it's the total cost of the litigation that actually is going to influence whether people proceed or not.

MARTIN AC: Yes.

MR MUNDY: Who gets the bickies in that process, whether it's the courts or the lawyers, is not going to determine years of behaviour. I was interested in the comments you made about cost awards. The sense I was getting almost was that you didn't think that tinkering around the margins with issues around trying to restructure the nature of costs awards - and some courts have been trying to do this around the - South Australia seem to be particularly innovative in this space. I'm not trying to put

words in your mouth, but I'm just trying to understand. Do you think those activities are ultimately not going to do an awful lot for - because what we're trying to do is find incentives to get matters resolved more quickly.

MARTIN AC: Yes. I think putting a cap on the costs that you can recover from the other side won't have any impact on the costs that lawyers charge their client and because you don't know whether you're going to win or you're going to lose, it's the cost that you're going to be charged by your lawyer that's going to determine whether you go on or not, although if there is a cap on the costs that you might be ordered to pay, then that might have the perverse opposite effect of what you're intending because you won't then be as discouraged as you might otherwise would. You might pursue a hopeless claim.

So for me the focus ought to be on the costs that lawyers charge clients. We have a scale of costs in most courts that sets out what the scale ought to be, but we also allow lawyers and clients to contract out of that scale, and invariably they do. So unless you're going to enforce a regulated market for legal costs, which I think would - if want to pick a fight with the Law Council, that would be a good way to do it but - - -

MR MUNDY: Regulating prices is not something that the Commission is known for.

MARTIN AC: No. So unless you're going to go to that level, then I think all you can do is encourage market structures that will improve competitiveness within the market for legal services, as I mentioned earlier. Greater information, encouraging unbundling of legal services, which is one of your recommendations and I think very important enabling people to say, "Well, all I want you to do is draft the statement of claim. I can do the rest," or, "All I want you to do is take me up to this point, and I want a quote for this amount," and I think the market is already encouraging more lawyers to move to fixed fee pricing, which I think is helpful, and I don't really understand why the legal profession has been so slow to move into that area. If somebody can agree to build a 35-storey building for a fixed price, you would have thought that it would be within the wit and ingenuity of mankind to do a legal case for a fixed fee too, but it doesn't seem to happen.

MR MUNDY: Of course the people with the greatest capacity to understand and manage the risk - - -

MARTIN AC: Indeed.

MR MUNDY: - - - in the transaction are the lawyers.

MARTIN AC: Yes, quite.

MR MUNDY: One of the recommendations that we make, and I'm pleased that we have your support in relation to better consumer information, is an idea that there should be information made available that would give people some idea of the costs they might expect to incur in various types of litigation. I mean I understand that this is a difficult thing. The Law Councils - law societies I think in general advance the proposition that this is simply not possible, and they refer to medical matters as a comparator. We note that in America these sorts of things are done. Do you think this is an imponderable?

MARTIN AC: No. I think it has to be possible. There are many other sectors of commerce in which fees are set on the basis that there will be overs and unders, and over the overall scheme of things then they will even themselves out, and if you take, for example, we were talking earlier about non-contentious probate, with our encouragement the legal costs committee of this state has basically set a fixed - a flat fee for non-contentious probate matters. I think it's $1500.

That's, I think, very sensible because then people know when they go in to see their lawyer, they say, "How much is it going to cost?" Well, the scale fee is 1500 bucks and, you know, unless there's some real contention to it I think - it gets harder the higher up you go in the legal system, but if you take, and I don't know a whole lot about family law, but there must be cases for example within the Family Court in which - and of course costs aren't generally awarded party-party in the Family Court, but there must be a certain sameness to a lot of the cases in the family law jurisdiction, you would have thought, that would enable fees to be set on the basis that the lawyer will win some and the lawyer will lose some, but at least the client will know what the cost is going to be.

MR MUNDY: I mean it is not our intention that these issues should apply to major commercial development. What we are talking about is providing information to the ordinary citizen, not to BHP.

MARTIN AC: I think there is a massive problem with clients being required to go into litigation on a completely open-ended basis where they do not know how much they are going to be asked to spend. You would never build a house on that basis. You would not buy a car on the basis that we will order the car now and they will tell you when it gets delivered how much it is going to cost. Why do we expect litigants to do that? It is just unreasonable, I think. I really think the profession ought to get a bit smarter about pricing its services, and I can not see why it can not be done.

MS MacRAE: Can I just ask a little bit? I was very interested in your comments about the distribution within jurisdiction between the various legal assistance services. I had the impression from your comments about CLCs that, if anything your feeling would be that they are in the general landscape under-funded. Well, the

whole landscape is under-funded.

MARTIN AC: Well, the whole legal - - -

MS MacRAE: The whole legal landscape of course.

MARTIN AC: I mean we're talking about civil law here.

MS MacRAE: Yes.

MARTIN AC: Aside from the CLCs there is virtually no legal aid. CLCs and some family law, there's virtually no legal assistance in the civil area pretty much.

MS MacRAE: Yes. But just in relation to that particular sort of town example that you gave us, is there a sort of a model that we might look at that would give us a better handle on how those things should apply?

MARTIN AC: Not that I can conjure to mind. I mean the reality is that if you've got a civil problem in Port Hedland, none of those services are going to be of any use to you. Possibly for the Aboriginal people, they might get some civil assistance from the Aboriginal Legal Service, but the reality is they are so under-resourced these days they can't service their criminal clients adequately, so they have had to make the decision. In terms of the allocation of resources, I'm sure they would be focusing on crime rather than civil.

MS MacRAE: Yes.

MARTIN AC: And that's, I think, the current trend with most legal aid providers these days. The whole focus is on crime.

MR MUNDY: Perhaps just in closing, we've made some recommendations about litigation funding and the ways in which lawyers charge, and particularly contingency fees.

MARTIN AC: Yes.

MR MUNDY: One of the issues particularly with respect to contingency fees is that it puts the lawyer in effect in the role of both the financier of the transaction and the administrator of the litigation, whereas in a funded arrangement there's a different set of roles. It's an issue of some notoriety and has been a matter of comment by the Commonwealth Attorney. I guess I'd be interested in your views both as a practitioner at the bar but then in your judicial capacity about the reality of the incentives that people talk about in this space and your view as to whether there is a huge danger here or not and perhaps any other comments. The kernel of the debate

seems to be around securities based class actions and whether there's something peculiar there about the securities law that could be dealt with rather than a blanket approach.

MARTIN AC: It seems to me that the critical thing in either contingency funding or litigation funding is that you have to ensure that whatever arrangements entered into, the decision to settle is made by the client not by the funder. So that's true in either system. It has to be the client's decision as to whether or not they'll settle, so the funders, whether that be the lawyer who's targeting a contingency arrangement or a litigation funder has to accept that they are in the hands of the client because otherwise you're effectively selling the action to the litigation funder and the potential for conflict which you identify becomes very real.

Having said that, the reality is that although we don't have contingency funding in any jurisdiction in Australia of which I'm aware, no-win no-fee funding has been around forever and is very prominent in the field of personal injury. In that area the lawyers very often in a big personal injury case will have put out tens, perhaps hundreds of thousands of fees in getting expert reports, their own time and so on and so forth. They have a very real commercial stake in the outcome of that case and they bring that stake to bear when they're advising their client in the settlement negotiations which always precede the trial.

As far as I'm aware, that hasn't been a problem. As far as I'm aware, the lawyers have been and the clients have been able to manage that. I'm not aware of a lot of evidence to suggest that lawyers have overborne their clients into taking an inappropriate settlement in order to mitigate their own personal risk of an unsuccessful outcome. So the risk is certainly there. I think you're mitigated by making sure that any acceptance is subject to client approval.

Ultimately the courts as supervisors of the actions of its officers as lawyers, have a supervisory capacity there. So any client who was unhappy with the services of a lawyer could ultimately take the issue to the court and say, "I want you to rule upon whether or not this settlement is appropriate," but you wouldn't have to because if you preserve the client's right of determination at all times then that issue would never arise.

DR MUNDY: So the only thing that we might really be concerned of from a consumer protection perspective, if you like, is that clients aren't being overborne; they're not being - - -

MARTIN AC: Yes, I think that's the real issue.

DR MUNDY: And perhaps information - like we do in so many other things.

MARTIN AC: Yes.

DR MUNDY: Mandatory information as to what your rights are, "If you become aggrieved in this matter, you have an absolute right to draw this matter to the court's attention if you feel you're being" - would not, you think, place an unreasonable burden upon the judiciary.

MARTIN AC: No, I think that would be entirely appropriate. In relation to litigation funding, I read your recommendations with interest. I think litigation funding is a good thing because it's one of those things that augments the capacity of people to take cases to court. I know the Commission is not wildly enthusiastic about over-regulation and I don't propose that it would, but I really think the only thing you need in that area is to ensure that the funders meet solvency requirements.

DR MUNDY: That's what we suggest; they hold a financial services licence.

MARTIN AC: Yes, that's all. You don't need any more regulation than that. I think anything else would be an interference.

DR MUNDY: And anything else we need, the courts have got already.

MARTIN AC: Exactly.

DR MUNDY: So really all we need to do perhaps is some sort of interim - so that the users of this - - -

MARTIN AC: Yes. So long as they've got the capacity to meet an adverse costs order, that's all you need to know I think, but otherwise they're a good thing. I can understand people who've been sued by people who are funded by litigation funders don't like them and that's understandable but they do, I think, augment the very limited means by which people who can't otherwise afford to go to court can have their cases properly presented.

DR MUNDY: You wouldn't be concerned as some appear to be that freeing up these arrangements, particularly with contingency fees which might look like other forms of billing arrangements we allow, and litigation funding - you're not concerned that freeing up those arrangements would lead to a rush of non-meritorious blackmail, or email type litigation?

MARTIN AC: No, I'd be very surprised if that happened. Ultimately there is a professional obligation on every lawyer in Australia to only bring cases before the courts that are meritorious. If lawyers don't comply with that professional obligation, they can be sanctioned. It's unprofessional conduct to bring an unmeritorious claim or to bring a claim for an improper purpose. I think that's the ultimate sanction. I

think litigation funding and those - I guess with contingency there ought to be a capacity for the court to review the nature of the arrangement, so that if the reward for the lawyer is disproportionate to the risk then there ought to be - - -

DR MUNDY: We had suggested that maybe there should be a cap on the percentage.

MARTIN AC: Yes, sure.

DR MUNDY: Or alternatively, perhaps one device is that such arrangements must be lodged with the court.

MARTIN AC: I think a fee uplift, that is to say, if you win you get a percentage of the fee otherwise payable, rather than a share of the proceeds is preferable rather than the American model which you get a share of - - -

DR MUNDY: The winnings.

MARTIN AC: - - - the winnings and I think that's - - -

DR MUNDY: Probably in smaller matters they look like the same thing anyway.

MARTIN AC: Yes. I think uplift is better than contingency.

DR MUNDY: I think we'll probably draw it to a close. Thank you very much for your time today.

MARTIN AC: Thank you very much for your time. It's been an absolute pleasure.

DR MUNDY: These proceedings are adjourned until 8.30 am next Tuesday in Melbourne.

AT 2.37 PM THE INQUIRY WAS ADJOURNED UNTIL
TUESDAY, 10 JUNE 2014