PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON WEDNESDAY, 11 JUNE 2014, AT 9 AM

Continued from 10/6/14

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DR MUNDY: All right. We might make a start. Good morning, ladies and gentlemen, and welcome to these public hearings for the Commission's Access to Justice Inquiry. My name's Dr Warren Mundy and I'm the Presiding Commissioner and with me is Commissioner Angela MacRae and together we exercise the authority of the Commission in this matter.

Before proceeding any further, we'd like to acknowledge the traditional owners of the land on which we meet, the Wurundjeri people of the Kulin nation and pay our respects to their elders past and present, and the elders past and present of all other indigenous nations who have continuously occupied this continent for over 40,000 years.

The purpose of this inquiry is to facilitate public scrutiny of the Commission's draft report that was issued in April. We are looking to gather comments and feedback on that report, particularly from people who wish to make comments on the record, from which we may draw upon in a final report. We intend after today to hold hearings in Hobart, Darwin, and Brisbane, having already held hearings in Canberra, Sydney, Adelaide, and Perth.

Following those hearings and the completion of our work and consideration of any more written material we will provide a copy of the final report to government in September and they will have 25 parliamentary sitting days to make it public by way of tabling in both houses of the federal parliament. The Commission will then publish the report on its web site.

We do like to conduct these hearings in an informal manner, but I do remind participants that under part 7 of the Commission's Act we have certain powers to act in the case of false information or refusal to provide information. Since the Act was promulgated, the Commission has not had occasion to use these powers.

As I said, we like to conduct these proceedings in an informal manner, however in order to facilitate transparency we will be taking a full transcript of these proceedings and that transcript will be made publicly available on our web site. As such, it's quite difficult for us to facilitate the taking of comments and questions from the floor, but we will provide an opportunity for people to do so at the end of these proceedings this afternoon, which I suspect will be around about 5 o'clock.

Participants are not required to take an oath but are required to be truthful. I'm obliged to advise you under commonwealth health and safety legislation that in the unlikely event of an emergency requiring evacuation of this building you should follow the green exit signs to the nearest stairwell, don't use the lifts, follow the instructions of the floor wardens. The assembly

area is Enterprize Park situated at the end of William Street on the bank of the Yarra, which is out there, turn left. That's the preliminaries dealt with. We now have our first witness, Victoria Legal Aid. Could you please state your names and the capacity in which you are appearing today.

MR WARNER (VLA): Yes. Thank you. My name's Bevan Warner. I'm the managing director of Victoria Legal Aid. It might help if I introduce my colleagues.

DR MUNDY: It would be helpful if they'd introduce themselves.

MR WARNER (VLA): Okay. Sure.

DR MUNDY: It helps the person doing the transcription.

MR HUME (VLA): Cameron Hume, director of research and communications.

MR NICHOLSON (VLA): Dan Nicholson, the director of civil justice access and equity.

DR MUNDY: Thank you. Mr Warner, if you could make a brief statement - by brief I mean less than five minutes.

MR WARNER (VLA): Sure.

DR MUNDY: As we have a large number of questions we wish to put to you and we have had the opportunity to read your submission and see your commentary in the newspaper this morning.

MR WARNER (VLA): Thank you. So just three key points that we'll make in addition to the two submissions we've contributed in our own right and, of course, the national Legal Aid submission which we endorse, we think the Commission's work is very important. We stand ready to help you in whichever way we can to quantify a fairer means test.

We've acknowledged that the OECD as a starting point, it's not an end point, and we recognise that there would be different ways to approach the question of financial eligibility or someone's lack of capacity to meet the full cost of their own legal representation for very severe life-affecting issues. We would simply say that if the OECD estimate of households that were experiencing poverty was a base for financial eligibility that on our rough calculation some 60,000 people would be eligible on financial grounds for legal aid that don't currently receive it. At the moment we can explain some

of the thinking about that.

We also - our second key point is to caution against the demarcation of legal problems into hard segments. We've included in our second submission some ABS research on factors associated with high crime rates, for instance, which identify unemployment, low levels of education and, importantly, family relationship issues as drivers for people's contact with the criminal justice system, and we've also included some research on child maltreatment and adolescent offending which gives you a sense of offender trajectories because of the circumstances perhaps in which they're born into or the circumstances they experience in their formative stages of life.

There's also research that we've referenced around the social determinatives of health which suggest that segmenting people's legal needs or life problems into crime only or family only or civil only don't reflect the actual experience of the way in which we respond to people with particular issues, and our third point is that Victoria is progressively adopting and adapting the mixed model in dialogue with the players in Victoria.

We agree with the subsidiary principle that the lowest level of government should be doing the doing and we think that the independent statutory board model works particularly well and that we would see that as the - an enlivened independent statutory board model as a way of dealing with some of the fragmentation issues that you report otherwise addresses, and beyond those three key points I think I'm happy to open up for questions.

DR MUNDY: Okay. Thank you, Mr Warner, and we do appreciate the assistance you've provided us through the course of this inquiry. We do note your comments about criminal matters, but you'll understand that our terms of reference don't bring us to criminal matters.

MR WARNER (VLA): Yes.

DR MUNDY: And that, really, this is about civil disputes. We seem to end up in civil legal action more readily than disputes because that's where the weight of the participants seem to want to take us, but we are mindful that there's more than that.

Just before we come more directly to your points, are you able to advise the Commission of the direct impacts that recent cuts - or recent funding reallocations we might describe them as - within the commonwealth's legal assistance budget have had directly on the provision of the services and activities of your organisation?

MR WARNER (VLA): The reduction in the second year of - well, we had a two-year funding approved of seven million dollars over two years. We will receive the first three and a half million in full and we won't receive the second three and a half million dollars. The impact of that on the ground will be that we won't expand our services in the direction we were planning to, but we won't be reducing any existing services.

DR MUNDY: What direction was that expansion intended to take?

MR WARNER (VLA): We were intending to move into - address problems in the family law and family violence field.

DR MUNDY: So they were, essentially, commonwealth matters or commonwealth-related matters?

MR WARNER (VLA): That's right, and the money was always time limited, so we were always cautious about building it into a recurrent sort of service profile.

DR MUNDY: Okay. You mention that - and I don't think we need to go into the details of the calculations - but you mention that using the OECDs test of disadvantage - something which the Commission is, I can assure you, very familiar with - some 60,000 people would qualify for legal aid that wouldn't under the current tests. Do you have any sense of how much it would cost to meet the legal aid needs of those 60,000 - I presume that's Victorians.

MR WARNER (VLA): No, that would be 60,000 people nationally.

DR MUNDY: National. Okay. How much - do you have a rough guess on how much it would cost to meet those needs?

MR WARNER (VLA): Well, working backwards from the calculation, it's suggesting that if there were 44 per cent more households qualifying for grants of aid only, which are not all that we deliver but our most expensive and intensive service, then the starting point would be - it would be at least an extra 44 per cent on the total legal aid budget across the country, but we've also made the point that we don't think the task stops at relaxing the means test.

It's also about recognising that there are other categories of law for which we're not currently responding and that there are places in which legal aid is hard to access and that there are existing services that we'd be concerned about because the current limitations on service design, which is principally the amount of time that lawyers and professionals can spend with people to address the underlying issues, or perhaps follow through in a more meaningful way

with a client, the time-poor nature of some of our services we would want to address as well.

So we think there's at least four tasks in responding to unmet need. It's getting the right - a fairer test of financial eligibility. Then there's looking at areas of law in which we're not adequately meeting unmet need. Particularly in the civil law space we accept that we will never be able to cover the field, but in running effective niche civil law practices which can spotlight systemic problems and tackle issues at their source that we can contribute to the avoidance of legal problems for other people who will never actually be a client. I have mentioned then geography and the service intensity of some existing services that we think are falling short of what would be an ideal service, and I can give some examples of those.

MS MacRAE: I am particularly interested in the time factor because we have had quiet a lot of evidence from people who are representing people with a disability, and they are saying that one of the main problems is that often, if you have got someone with a severe impairment of some sort, that the time required to obviously get the message across to these people and have it understood, including if you are going through an interpreter, but also for people with other physical and mental disabilities, that time can be a real issue. Would that be a group that you would be particularly concerned about under the current arrangements because of that?

MR WARNER (VLA): Yes and no. I mean, I think our greatest concern at the moment, both in terms of volume, projected increases in volume, the severity of the legal issues people face, and the time poor nature of the service we are currently able to offer, would be in the family violence space and the time that is required to do more than band-aid people who are coming to the state courts for an initial band-aid solution, or holding pattern, in terms of the incidents of violence and the safety notices that need to take place.

If we could spend more time both with the applicants or the victims of family violence, the people who are experiencing family violence, the respondents or the people who are committing these offences than we currently are able to, then we think we could provide a better service and actually tackle some of the underlying issues and the consequences and flow-on consequences into the Commonwealth Family Law system, where the heart of these disputes is often the resolution of children's contact issues, or the way in which children are going to be move between the care of both sets of parents if that's appropriate.

But that's something that's going to occurring in the aftermath of an incident which has brought somebody to a state magistrates court, often at the

request of police, for an interim family violence order. If we are not assisting those people properly, which is often a function of time, then we're part of a system that's actually not doing as good a job as it could and the volume of increase through the positive policing of family violence in Victoria over the last few years has been quite staggering and it's projected to continue to increase.

MS MacRAE: Just while we are on that, we understand that your guidelines have changed fairly recently so that if one party to family law proceedings is unrepresented at trial, then the other party is not eligible for legal aid. Does that restriction apply in cases involving family violence?

MR WARNER (VLA): Yes, so that there are some limited exceptions. The police choice there is really a neat example of the moral quandaries around designing legal aid services because we've got people in an existing service stream and we've got people who aren't getting a service at all. The question is: how much do you invest in one party's legal problem to the exclusion of somebody else entirely? Whilst we're not happy with the way we've currently got that service operating, the philosophy behind ensuring that there's equal representation or no representation recognises that people have been assisted through the family law grant of aid through successive court stages, where the court itself has had dispute resolution phases associated with their case management right up to the point of trial and that the legal aid fund has invested in the complete preparation of papers for the conduct of that trial by the judicial officer.

It's a question of saying, do you continue to assist a lucky group who are in that legally-aided space, all the way through, or do you spread your funds more broadly at the bottom to extend the coverage you're able to provide to people who wouldn't otherwise be getting a service?

MS MacRAE: As far as you know, is that kind of rule applied in any other jurisdiction?

MR WARNER (VLA): The restrictions on family law trial funding are not replicated in other states, but the philosophy of putting downward pressure, or merits tests, on the reasonableness of continuing to fund somebody where the issues may not be substantial, for instance, has been a long-standing philosophy on the design of the family law, legal aid service.

MS MacRAE: Do you get problems - and one of the things that we have heard is that there could be problems requiring victims of family violence to be cross-examined by the alleged perpetrators and that can be particularly distressing. Are there measures in place to try and - is that a problem, I guess,

and are there ways you can alleviate it?

MR WARNER (VLA): It certainly is a problem. It is also a problem for the Court, who has a duty to conduct a fair hearing and to take measures to deal with the manner in which parties engage with each other and also engage with the Court, but it's not a desirable situation in the state sphere in relation to violence restraining orders provides a legislative prohibition on people cross-examining victims of violence in that situation. In fact, there is a provision there for the Court to order that legal aid must be provided to a person who has committed acts of violence to prevent them cross-examining that person, irrespective of their means.

There is a situation in Victoria in the state sphere, where the parliament has seen fit to set up a framework to effectively have the Court order legal aid to provide something that we would not provide on the basis of someone's financial circumstances to prevent the vicarious trauma to the person from experiencing that cross-examination. That is a very different situation that is occurring in mainstream Commonwealth Family Law courts around the country.

DR MUNDY: Mr Warner, how long has that legislation been in place?

MR WARNER (VLA): The legislation would have been in place for at least five years.

DR MUNDY: Is it possible for you - and I appreciate you will not have this off the top of your head - but to come back to us with how many such orders the courts have made and that you have had to respond to, and can you also come back to us with the number of persons who, because of the policy you just described - and I presume they are predominantly women - who have had legal aid denied them under that policy since it was implemented.

MR WARNER (VLA): You mean in the mainstream Commonwealth?

DR MUNDY: Yes, in the policy that my colleague was referring to and you outlined for us.

MR WARNER (VLA): Sure.

DR MUNDY: Could I just bring you back to funding. Could you give us an idea of how the government of Victoria allocated funding to the Legal Aid Commission; how it determines how much money is required and what restrictions it puts on you about where it must be deployed?

MR WARNER (VLA): There are not any restrictions on how it must be deployed.

DR MUNDY: So it just X million dollars and off you go and it is left to you?

MR WARNER (VLA): Essentially, yes.

DR MUNDY: How do they arrive at that quantum of money?

MR WARNER (VLA): I think it has evolved historically, and then it gets supplemented in relation to, I guess, the quality and the contestability of our annual budget submissions through the state's budget process about where we would say we need additional funds to address increases in demand or problems that we are experiencing in other parts of the justice system.

DR MUNDY: Would it be fair to say that it already is not essentially based on an assessment of legal need within the state?

MR WARNER (VLA): I think it is a combination of where history has led us and a patchwork of subsequent decisions in response to pressure points.

DR MUNDY: So in other words, "to some extent"?

MR WARNER (VLA): Yes.

DR MUNDY: Thanks. You mentioned before the 60,000-odd who would qualify for legal aid, nationally, under the OECD's recognised measure of disadvantage, but can we bring you back to how you construct your eligibility criteria and how fundable are they - I mean, how impacted are they on the availability of funds. Are they criteria that are essentially demand driven, or are they based on an objective assessment of need and circumstance?

MR WARNER (VLA): There's more than one test, so financial eligibility and the assessment of someone's capacity to contribute.

DR MUNDY: Let's talk about the financial bit.

MR WARNER (VLA): There are some exceptions. So children, for instance, are exempt. There are certain categories of criminal offending that are exempt from the means test in the interests of - so legislative encouragement in the interests of justice to ensure that trials proceed, for instance.

DR MUNDY: This is recognition of Dietrich, amongst other things?

MR WARNER (VLA): More crimes, mental impairment, other sorts of categories that we can supply you some information about that. But, in essence, there's an assessment about income, there's an assessment about household expenditure or dependents, there's an assessment of assets, there's an assessment about the likely cost of the legal representation they're applying for and then all of those factors together produce a decision about whether someone's financially eligible or not.

MR NICHOLSON (VLA): Financial eligibility applies to grants. There's a range of other services. One is that advice for minor issues can be provided which aren't means tested in the same way.

DR MUNDY: We understand that. It had been suggested to us by some that there is a perverse - and may well be unavoidable - but there is a perverse interaction, particularly with the assets test, and people have their assets assessed, but the disposal of the asset to realise effectively the economic character of the means test would involve denying them livelihood say they lived in a regional area and if they had to sell their car they would not be able to get to work or that they cannot access the asset. Perhaps it is tied up in a family law matter and it is jointly owned with a non-co-operative partner. Is this a common occurrence of is it an outlier which people are concerned with?

MR WARNER (VLA): I think people would be - people who have no need for legal aid would be shocked and surprised at the circumstances in which we seek to recover the costs of the legal aid that we're providing from people and the circumstance that that creates for people.

DR MUNDY: Do you want to expand on that?

MR WARNER (VLA): Well, you've mentioned the vehicle situation. We've had to - and in terms of recovering the substantial cost for the expensive cases and this includes in the criminal sphere, but in other spheres as well, caveats on property and then reverse mortgages and eating into people's equity at the later stages of their life. People would be surprise to think that that was a sort of a fair way of providing a government service, but that's the way the service is currently provided.

DR MUNDY: I think it might have been Mr Grant from New South Wales was able to give us some idea of the revenues that they - I think it was New South Wales but it may have been someone else, but certainly one of your sibling organisations in another jurisdiction was able to give us an estimate of how much money you recover annually from those sorts of - we'll call them - charges for want of a better word. Are you able to provide us with that

information on those?

MR WARNER (VLA): It would be within the three to four million dollar range.

DR MUNDY: That is great, that is all we need.

MR WARNER (VLA): What's important to understand about financial eligibility is that it's so varied across the country that it can't be said that there's uniform access to justice in Australia and the best example I could give you would be Albury Wodonga. The allowable assets threshold in Victoria is $300,000, so if you're honest enough to submit an application for aid indicating that you've got home equity worth $301,000 you'll be denied legal aid. If you live on the other side of the river the allowable assets threshold is $525,000 in New South Wales, so someone who lives on the other side of the river could be getting a commonwealth-funded legal aid service to deal with a family law matter who has substantially more material wealth behind them than someone on the other side of the river who would be denied a service and that is a, I think, a problem that needs to be addressed in the way in which financial eligibility is designed.

DR MUNDY: Particularly with respect to commonwealth money.

MR WARNER (VLA): Yes.

DR MUNDY: Good thing it is not a tax.

MS MacRAE: Just in relation to the way the income and assets test, if that is what I can call them, work, do you have an assessment that says, "Well, you've passed the income test, now we'll look at your assets and if you pass the assets test and so you're in" or do you combine those things and say your combined - is it a combined test or more like the aged pension arrangement where you test under one or the other and if you meet one you're in?

MR WARNER (VLA): If you're out on either you're out.

MS MacRAE: Okay. Which of your tests do you think would rule people out more often? Would it be the income test or your assets test?

MR WARNER (VLA): It depends on the area of law that they're applying for.

MS MacRAE: Okay.

MR WARNER (VLA): A lot of our duty lawyers who are operating at sort of the front line at courts would say that the income test is too harsh and that there are people who are working in spasmodic employment and insecure employment who have a got a pay slip or have admitted to earning a bit of money last month which exceeds the income test and that where our rules are a bit too blunt or strict and they're being excluded from a service where, in fact, they are more deserving than somebody who has, you know, not passed our other tests.

MS MacRAE: The OECD benchmark that you referred to would be solely an income test. Is that right? If we were to adopt that.

MR WARNER (VLA): I think it's mainly the income test, yes.

DR MUNDY: I mean given there is - I mean the Commission has published a staff paper on the measurement of disadvantage. Why did you land on the OECD and not any other?

MR WARNER (VLA): Well, we're not recommending it as the solution. We're simply saying if we use that as the marker that's what it would produce, but we recognise nothing. We referred to that deep and persistent disadvantage report that the Productivity Commission has authored itself.

DR MUNDY: Okay. So it is just really a benchmark. Is a reasonable benchmark. At the end of the day someone has to make an arbitrary decision about this. Can I just while we are on it - and it is coming back to me the comments you made about application of an income test - how do you deal with someone who is recently unemployed? So they may have had an income, they may have lost their job six weeks ago and now they have no income prospectively, but they may have earned a reasonable income previously. They have relatively little savings. Does the fact that they might have earned a hundred grand last year and now they've got no savings - how does that work?

MR WARNER (VLA): It's income at the time they applied but they'd have to declare their savings, the value of their vehicle - - -

DR MUNDY: So a person recently unemployed would probably be more likely to be caught by the assets test than the income test?

MR WARNER (VLA): That's correct.

MS MacRAE: Just coming back to that issue of the asset test difference between New South Wales and Victoria, it brings us back again to how do you determine the levels that you put them at and how does New South Wales

determine theirs and what's the cause of that disparity?

MR WARNER (VLA): Well, the history has been to look at, effectively, someone's capacity to pay and to even out the assets test to recognise the greater cost of servicing mortgages but also equity and particularly capital city pricing, so if you go back into the origins there's some clear thinking but what's happened over time is that as our demand and the costs of letting demand through additional complexity in the law has ratcheted it up but our revenue hasn't or we've experience deficiency dividends that other government agencies have experienced. We've had to leave assets tests where they are and not move them over time, so in Victoria, for instance, one of the last big - like other legal aid commission has experienced a bit of boom and bust cycle with legal aid funding and demand.

Early in 2008 the then board reacted to a very significant deficit or financial crisis not by interfering with service design but by slashing the assets test, so it reduced financial eligibility by - in order to limit the number of people who would qualify and who would have to - funds would have to be paid to meet the life of their case by halving the allowable assets threshold from 300,000 to 150,000. Now, it was a very crude way of reducing demand on the legal aid fund but it didn't interfere with any of the service design that practitioners or courts were experiencing.

When funds became available four years later the board reversed that decision and returned the allowable assets threshold to $300,000, but if you go back in time the $300,000 allowable assets threshold was probably set in the early 2000s. It's now 2014. The allowable assets threshold hasn't moved with the times and what we have had is a policy response that's seen the means test become progressively meaner.

MS MacRAE: Has New South Wales been able to keep their assets test somewhat higher? Obviously, from what you're saying, it started at a higher base because of the difference in servicing equity in homes and such, but is that as a result of the New South Wales government potentially putting more in or keeping their levels more stable than you've had in Victoria?

MR WARNER (VLA): Look, I think there's different policy responses about how you control entrance into the scheme, but the total funding pool in New South Wales, if you just took it per capita, look at it with all source income, commonwealth, state, statutory interest would greatly exceed the total funding pool in Victoria.

MS MacRAE: Per capita.

MR WARNER (VLA): Yes.

MS MacRAE: Yes. Okay.

DR MUNDY: So we presume you receive revenues from some sort of public purpose fund.

MR WARNER (VLA): That's right.

DR MUNDY: What percentage, roughly, of your total income do they constitute?

MR WARNER (VLA): It's about 26 million dollars per year.

DR MUNDY: Yes.

MR WARNER (VLA): And it's about 15 to 18 per cent.

DR MUNDY: Okay. Are the purposes for which you can put that money prescribed or it is essentially general revenue?

MR WARNER (VLA): No, there's no conditions attached.

DR MUNDY: No conditions. How is that amount set? Who determines that and what's that amount based on?

MR WARNER (VLA): The attorney has the final approval. There's - the legislation provides for a maximum of 35 per cent of the residue in the fund, if you like, or the free money that's left in the fund.

DR MUNDY: Yes.

MR WARNER (VLA): And he can approve up to 35 per cent of that amount annually. Some years ago there was a decision to try to stabilise Legal Aid's funding in relation to some state government supplementation and it's been capped at 26 million dollars for the last few years.

DR MUNDY: Okay.

MS MacRAE: So in relation - you mentioned before that, you know, altering the - especially halving the assets tests threshold was a bit of a shock to the system, what other means would you have - because you said there are other ways that you might be able to adjust some of your parameters to meet a budget that might be blowing out. You talked about not changing any of the

way the services are delivered. Would you see that as a baseline essential, that you not touch those things, or - - -

MR WARNER (VLA): No, I think we need to constantly review our services to make sure they continue to be relevant and appropriate and meeting and targeting the most acute need. So on a sort of a different example, yes, we made some fairly contentious changes to eligibility guidelines about 18 months ago, but one of the ways we made a positive decision to preference an area of law ahead of an existing area of law and to do it more economically was to limit grants of aid for some minor summary criminal offences.

So best example would be to say we raised the bar for seriousness in summary offences, took traffic matters out of the remit of a grant of aid, left it with the duty lawyer if there were certain characteristics that meant that traffic matter carried a real risk of imprisonment, and took the savings and invested in an expansion of our mental health services, and the philosophy behind that was that, you know, that there's two key bits of thinking in services and one is the legal response ought to be proportionate to the problem that someone's experiencing.

MS MacRAE: Yes.

MR WARNER (VLA): And the impact of providing the service or not. It should be high impact rather than low impact, so when we looked at minor traffic matters with the sentencing restrictions that are placed on magistrates by parliaments and the facts speaking for themselves, providing a grant of aid or a thousand dollars for somebody to argue a traffic matter before a magistrate where the case disposition's unlikely to significantly be impacted by having a lawyer or not seemed to be not only wasteful but a poor targeting of resources to need, whereas people in involuntary psychiatric settings subjected to unwanted medical treatment who have rights of review before mental health review tribunals - what we know is that - what we knew was that we were only covering 7 per cent of people who were going before tribunals in those settings, and we also knew that the impact of having a lawyer was quite profound because people who had a lawyer to speak for them in those settings were four times more likely to get an outcome that they were happy with.

So from a public policy point of view, as a legal aid provider, we thought we had our priorities wrong. But once you make a decision to limit or withdraw a service from one area and to positively preference it in another our experience has been that neither the magistrate nor the lawyers who are doing that work move to the new jurisdiction, so they experience a loss and predictably complain about it, and we understand that. They don't experience the gain because they're no the same judicial officer and they're not the same

legal provider doing that new work.

MS MacRAE: Yes.

MR WARNER (VLA): And it's our job as a legal aid provider representing the community's interest to balance that competing need and to explain why we've made that positive choice to preference one area of activity over another.

MS MacRAE: And I guess, ultimately, you'd say you'd rather not have to make that choice but your budget constraints require you to do that.

MR WARNER (VLA): Well, somebody has to make the choice and we would agree with the - both, I think, your comment in your draft report and I think the New South Wales Legal Aid Commission's submission that the lowest level of government closest to the coal face should be empowered to make these difficult choices because it's informed by the real life practice wisdom of staff who are delivering the service.

MS MacRAE: I understand.

DR MUNDY: Can we bring you to those - a broader question, and we've had this discussion both with your colleagues in New South Wales and in Western Australia, and this is around - I mean, I guess part of our concern is, if not the reality, certainly potential overlap between CLCs and Legal Aid Commissions, and perhaps not a - probably a sub-optimal prioritisation of expenditure that's at play, and I guess where we're going and the proposition we've tested in New South Wales and Western Australia was this notion that the commonwealth would provide its money on block and essentially get out of the business of program management, would allocate that money on some basis.

And you'll understand that the Western Australians - being Western Australians have a different view about the allocation of commonwealth money to any others - I suspect Tasmanians have a similar challenge - but to allocate this money to a body to then work collaboratively across the legal system sector to lead to optimal priorities that reflect the priorities of the jurisdiction - again bearing in mind that issues in Tasmania may be different to issues in Western Australia - is that a model that sort of exists in a form in Victoria already and, if not, is it a model that you would encourage?

MR WARNER (VLA): I will get Dan to answer my comments, but the first point I'd say it's a model that is present in Victoria in a more enlivened way than in any other state, and whilst I promised to my interstate colleagues that I

wouldn't get parochial, I think your reference to Western Australia is that they are relatively a low-funded state. On a per capita basis, of course, Victoria is the lowest, so I'll leave it at that, but in relation to your - the question about whether the commonwealth should get out of the business of program managing the commonwealth component of the community legal services program I think that would be a good thing.

I don't think that despite the good intentions and the calibre of the individuals involved in Canberra performing that function, I don't think, with respect, that they're adding a lot of value, and in fact, they're the outlier because in relation to state funding for CLCs - and Victoria's the only state where state funding for CLCs exceeds that of the commonwealth, so the commonwealth is the junior partner in Victoria - that money is not managed by the state department equivalent, it's managed by the board and the board makes decisions to add or subtract money from the Legal Aid fund positively to grow new CLCs or to encourage CLCs to move in other directions and it equally takes up its responsibility of holding CLCs to account where services aren't being provided well, so we have a history of defunding CLCs but we equally have a history of making positive decisions to inject new money into the CLC program and the government department or the attorneys are making those decisions where our board is and that's one of the functions that Dan oversees in his role in the department - - -

DR MUNDY: And just before we hear from Dan - I'm sure Ms Buchanan will have a view on this - but is there - it's been suggested, and I can't remember by who and I suspect it's by more than one participant - that the model you describe leads to a fundamental conflict of interest because in some sense there's a competition between CLCs and Legal Aid Commissions.

MR WARNER (VLA): Yes. Well, we've set out a response to that in our submission. What we would simply say is that no conflict exists because for a conflict to exist it would presume that the independent statutory board has an in-built preference in its DNA to preference its staff practice ahead of its statutory obligations to administer the mixed model which includes grants of aid through the private profession, a staff practice to give it some exposure to the coal face and a CLC program and the facts aren't borne out in the way in which the funds are currently distributed, so in Victoria we have the best funded, most vibrant CLC sector of all of the states, we have private practitioner involvement in Legal Aid in a proportion that's pretty consistent with other states, so the evidence isn't in that somehow the staff practice is better bettered or preferenced ahead of the other two supply types.

The key thing here is I think the greater conflict lies with those funding decisions being made by public servants who are bound to follow the policy

priorities of the government of the day because the independent statutory model equips Legal Aid with a legislative protection to sue and be sued and we must do things under section 25 notwithstanding that they're adverse to the interests of the government of the day. Most of the legal disputes that citizens have in the poverty law space or many of them involve government or government agencies on the other side.

To have a situation where well intentioned public servants are administering funds to CLCs and perhaps putting conditions on what they can and can't do to reflect the policy priorities of the government of the day, there's a greater conflict there than actually interfering with the basic raison d'etre of having CLCs holding governments to account by the actions in which they are supporting ordinary citizens in their disputes with government. So it seems to me that this whole conflict scenario is just sort of misconceived.

DR MUNDY: I take your point and I think the commission has recently opined on the benefits of such models for the funding of roads. I take your point it may well be. I would say though, that an explanation could be that these conflicts haven't emerged because you are relatively well resourced, as you point out. But is there anything that could be done which would not be substantially disruptive that might allay - I mean part of the business of public policy is accept it is a policy change and sometimes you do things that are not necessary to allay concerns which may be important, held by important stakeholder groups even if you do not think the problem is real.

Is there anything that could be done without significantly disrupting the operation of your organisation that could allay the concerns that those people might have, perhaps putting a separate governance framework around your own group provision or something like that, because it does seem that the governance model is slightly - there are independent governance arrangements with CLCs but there is a much more direct relationship with the board and your own provision?

MR WARNER (VLA): Well, of course, the board's accountable under its enabling legislation but all of this sort of usual rigmarole that goes with statutory bodies. So annual reports and - - -

DR MUNDY: I've been a director of a number of statutory authorities.

MR WARNER (VLA): - - - auditors. So the accountability on Legal Aid in terms of public disclosure is far more acute than it is on CLCs. The proportions of money make that entirely appropriate. One of the things that's unique about Victoria from other legal aid commissions is that other legal aid commissions still carry the governance framework from inception which

provides for independent boards of varying size. I think New South Wales is a commission of 12 where the attorneys typically appoint commissioners but there is provision in most other states for a list of names or nominees from the stakeholder fraternity, so nominees from the Law Institute and of two of those four the attorney will select. So you end up with a governance board that is inclusive of stakeholder interests, although once appointed your obligation is to the entity not to where you come from.

That's quite different in Victoria because in Victoria in the 1990s there was a big review and the board was restructured. They deliberately set apart that representative model and created a small skills based board, so what's unique about Victoria Legal Aid is its four independent directors and myself as the fifth full-time managing director and there is a community consultative committee which is a feature of the act which was designed to compensate for the absence of representatives on the commission to make sure that the board's independence was complemented by a mechanism for community input into its decisions.

It's community input, it's not just stakeholder input and the composition of that community consultative committee which we're committed to ensuring works effectively is broader than simply supplier interests who have an interest in either looking after their constituency and certainly looking after the interests of clients, but have a focus on what their constituent - - -

DR MUNDY: Surely you're not suggesting that the Law Institute of Victoria has a pecuniary interest of its members sometimes in mind?

MR WARNER (VLA): I'm sure that it does and I think that is entirely appropriate.

MS MacRAE: Just in relation then to how the CLC - and this might be more appropriate for people that are appearing next - but it would seem from your submission that through the board structure you keep quite an eye on the functioning of CLCs and you talk about high functioning CLCs and others and the movement of resources within CLCs. One of the issues that we struck in our report is the difficulty where you have a CLC that is well connected in its particular location and as a result of that location it has access to pro bono services and volunteers that it may not have if you moved it to another location of greater need and so there is this sort of tension between keeping a CLC in a location where it is very well connected and might have access to resources but maybe not in such a high need area any more because the nature of, you know, changing suburbs over time.

How does your model sort of deal with those sorts of challenges and

would you say it is more effective at providing services in areas of greatest need compared to maybe CLC structures elsewhere?

MR WARNER (VLA): I'll get Dan to give you some examples but I think in a word it's about having an honest conversation.

MR NICHOLSON (VLA): Yes, I mean so I think some of the key elements are - I mean our board is actively involved in choices about CLC funding, so we've set out guiding principles for where we're going to prioritise additional funding. We're working collaboratively on some joint projects with CLCs and Legal Aid officers to look at where need is, where the most need in certain regions is and to try and meet it together, but also where we've got nothing, the example given in our submission and the federation one is about the western CLC project, so that's a classic case. There's four CLCs in an area in the western suburbs that demographics of that area are changing, there's enormous growth out further and rather than disrupting the model or tendering or things like we're doing is working with the four centres to work out we can together best allocate resources and change the governance and management model of those CLCs to better reflect where the need is now.

What that is, the direction that is moving in is that three of those centres have agreed to, in principle, to amalgamate and that would enable them to, without losing the connection that those centres have for their local communities, also shift resources much more easily to the areas of really high population growth further out but also it continued to a service to the areas of disadvantage even in the relatively kind of gentrifying inner city areas where there does remain some legal - - -

MS MacRAE: Yes, pockets of disadvantage.

DR MUNDY: I lived in Footscray for a decade so I have some idea of the demographics there. Which three are amalgamating?

MR NICHOLSON (VLA): So the in principle agreement that three of the centres have passed through the committees are Wyndham in Werribee, western suburbs in Newport and Footscray.

DR MUNDY: What are the benefits that are going to flow from the survey, essentially administrative in character or - - -

MR NICHOLSON (VLA): Yes, I mean it's a number of things. Firstly, there are administrative benefits, so more efficiency but also a more even management of risks around the organisations.

DR MUNDY: It would be easier to cover annual leave and stuff as well - - -

MR NICHOLSON (VLA): Exactly.

DR MUNDY: - - - given that people could move between them.

MR NICHOLSON (VLA): Yes, the research tend to show that people don't easily just go to their nearest service so the idea of a specific kind of suburb or LGA catchment is not really borne out in that data so people tend to move around to where there are particular specialisations amongst the CLCs so, again, you can move those specialisations around more easily. It also creates a much better career path for the lawyers coming through those organisations and addresses the problem of retention. But perhaps the most important one is, you know, we have two of the five fastest growing LGAs in Australia in the west and the ability to move resources to service those areas without disrupting or shutting CLCs, and disrupting their connection to their community and their ability to community is also - - -

DR MUNDY: So essentially what you are doing is effectively developing a model of a larger CLC for essentially the Western suburbs of Melbourne, which is more adaptive and flexible and, as you say, a better place for - I mean, an issue about attraction and retention of lawyers plus CLCs has been an issue and the scale of the organisation presumably means it is more attractive.

MR NICHOLSON (VLA): So you will end up with two larger CLCs that cooperate a lot more rather than four that perhaps don't.

DR MUNDY: We are running out of time, but there is just one issue we have not touched on we would like your view on, and that is this issue of juniorisation within the part of the profession you retain to do work for you. I guess the question is: do you have a view on how remuneration for lawyers retained by legal aid commissions should be set? The myth is 80 per cent of scale. Do you have a view of where an appropriate benchmark could be struck, other than full commercial fees?

MR WARNER (VLA): I don't think - I think the greatest problem with juniorisation lies in family law rather than criminal law. I think that criminal law firms, legal aid is the market and the fact that there's no shortage of criminal lawyers willing to undertake legal aid work and involvement that we have in terms of the way the work's structured and designed, I think they - I don't say that it's easy being in business, but I think they are surviving. It's what they do.

DR MUNDY: It's what they do and what they get paid.

MR WARNER (VLA): I think in family law it's quite different. I think the family law firms who do legal aid work are doing a very - sorry, the criminal law firms, our private, fee-paying clients, have got the same problems as a legally-aided client In family law, the private, fee-paying client is subsidising the legally-aided client because I think that family law firms would be loss leading on the time taking to do the work for the legally-aided client. The legally-aided client would have, in comparison to the private fee-paying client, more vexed issues. The presentation of violence or dysfunction, or alcohol or mental health issues in the client cohort would make for a more difficult client cohort, and family lawyers don't need legal aid clients to run a practice and turn a profit whereas criminal laws do.

So I think you've got all the ingredients for the family law firm, as well intentioned as they are, to stay delivering family law services for legal aid, to juniorise the work, and to not spend sufficient time doing the work well because they're not getting paid for it. So I think the way the lump sum fee structure works is that there is a comprehension of an allowance for hours, about how many hours you would need to do a reasonable job for that particular stage of a matter, with an underlying hourly rate of about $150 an hour. So I don't think it's the import hourly rate that's the problem - - -

DR MUNDY: It is a recognition of the task?

MR WARNER (VLA): It is the allowance for hours is undercooked, and I think what that means is that our pressure to keep volume of services up means that we will end up under providing for the true amount of time that is required to do the job well. I think that is a problem in the way in which the family law service is currently being delivered.

DR MUNDY: Putting aside the issue of availability of funding, would it be - how significant would the administrative burden be for yourselves if you had a system whereby you know you had A through D, being a severity or a complexity-type measure, for someone in your office to say, "Look, it is probably a C and therefore it needs this lump sum, whereas an A might be a much" - would that be a particularly onerous administrative burden for you.

MR WARNER (VLA): It's all in the design, so - - -

DR MUNDY: But it would not be beyond the wit of your organisation to design something that was not particularly administratively onerous?

MR WARNER (VLA): No, we do that at the moment. We think we run pretty lean. So we spend less than $10 for every $100 of legal representation

we supply. We spend less than $10 arranging or administering it. If you added staff overhead a gatekeeper, or as a more - making better decisions about exactly what that client needed, then you would be spending more money to get more nuanced decisions, but if we are already designing services that are very skinny in nature, it is not going to be any positive effect unless there is actually a total increase in resources.

DR MUNDY: We have run out of time, thank you very much.

MS MacRAE Thank you.

DR MUNDY: Could we have the Federation of Victorian CLCs, please. Could you please state your names and the capacity in which you appear?

MS BUCHANAN (FCLCV): Liana Buchanan, Executive Officer from the Federation of Community Legal Centres.

DR ATMORE (FCLCV): Dr Chris Atmore, senior policy adviser, also for the federation.

DR MUNDY: Would one of you, or both of you, like to make a brief statement totalling no more than five minutes, as we have some questions.

MS BUCHANAN (FCLCV): Certainly, look, I will keep it very brief, and I will really seek to reiterate three of the main points from the written submission that we provided. Firstly is to restate our encouragement to the commission that you undertake as part of this inquiry the work that you are looking at already, in terms of quantifying the extent of under resourcing of the legal assistance sector. We very much welcomed this inquiry when it was announced last year. As you will well know, there have been many inquiries over the years into access to justice, including in the civil justice space, but none of those inquiries to date, although they have repeatedly reached findings about under resourcing in the system, have been able to make firm recommendations about what the modelling for that resourcing should look for.

So we were very hopeful, and remain very hopeful, that the commission will be able to apply its expertise to that effort. To be frank, within community legal centres, whilst we very much believe that work is important, we simply don't have the resources to do it and we are very firmly of the view that the commission is well placed to do it, as you have done in relation to some very significant areas of social service. The second point that I woke make really relates to the role and the particularly important role, we think, of community legal centres as part of the mixed model of legal service delivery. I will not detail what we describe as some of the defining features of the CLC service delivery model other than to say it very much aligns with what the research now tells us is effective good practice, legal service responses to people who are disadvantaged and who are vulnerable.

We caution the commission against any recommendations, ultimately, that would reduce the community legal centre contribution to the legal assistance system, or that would remove it entirely, because we think the impact of that would be incredibly damaging, in terms of access to justice in Australia. The final point that I would make is in relation to law reform and systemic advocacy. We welcomed the commission's draft finding that law reform and systemic work is core activity for community legal centres.

Certainly from the first community legal centres, when they opened over 40 years ago, we have always seen that on some issues it's far more effective, far more efficient, will manage to help far more people, if we work to change laws and policies and practices that impact negatively or unfairly on our client groups. We continue to see that as critical and, of course, are very concerned about some proposals by the commonwealth government to restrict the use of commonwealth funds for those purposes, and so we really make an offer to the Commission that if there's anything further that would be useful from us to support any further consideration that you plan to give to that issue we very much would be keen to assist you in that way.

DR MUNDY: Thank you. We might start on the last point. What would be helpful for us is evidence of - and it's probably by way of case study, but of where - particularly where active advocacy and law reform has led to policy change which was efficient in the sense that it just stopped a whole pile of problems from happening, and the other area in which we're quite interested is - and we see a challenge is understanding the extent to which in the event that CLCs were to somehow - and I'm not saying this should be - because I think the draft recommendation indicates the contrary - but in the event that CLCs were to cease undertaking this sort of activity, how would the information that they capture through their day-to-day client interaction be captured and then turned into meaningful information for policymakers?

It's been suggested to us that that could happen, that the Law Institute of Victoria might do that, or some other body. I won't reflect my view on that proposition, merely to say it's been put to us by someone who's got some exposure to these issues. So if you can bring information to us that would be very helpful. Is it possible for you to give us a brief outline of the impacts of the recently announced re-prioritisation of commonwealth expenditure to frontline services and how that's impacted on your members?

MS BUCHANAN (FCLCV): There's a few things that I would say. Firstly, what's important to understand about the re-prioritisation which is, in effect, cuts to community legal centres is that, whilst all of the public commentary by the government about those cuts has indicated that those cuts are intended not to impact frontline services but to reduce the policy work that's happening in community legal centres, the opposite is true.

So in the budget week, although separate to the federal budget being handed down, there were some decisions communicated about those cuts to a number of centres across the country - 14 in Victoria - those centres learned what portion of their funding would be reduced and in every case that funding is being used for direct service delivery. It's not being used in any centre

primarily for policy or advocacy purposes. So that's one thing that's important to clarify.

DR MUNDY: Without delaying the discussion today, could you take on notice and perhaps document what the impacts on those 14 centres are?

MS BUCHANAN (FCLCV): Indeed.

DR MUNDY: And we'd also be interested in the extent to which an analysis was undertaken of the consequences of those funding reductions. I guess what I'm interested in ascertaining is whether there was an efficient decision-making process. Much as I'm interested in efficient decision-making processes for the allocation of new money I'm interested in efficient decision-making processes for the removal of it.

MS BUCHANAN (FCLCV): Indeed.

DR MUNDY: And just on one other issue, we heard evidence in Canberra from the ACT EDO - I presume the Victorian EDO is a member of yours.

MS BUCHANAN (FCLCV): Yes. Indeed.

DR MUNDY: The ACT EDO indicated that as a result of the re-prioritisation decisions of the commonwealth government they would in all likelihood close. Are you able to give the Commission any idea of what the state of the Victorian EDO would be post the re-prioritisation of funding?

MS BUCHANAN (FCLCV): The Victorian EDO, I think, based on the information I have, is relatively well-placed compared to some other EDOs around the country. They had already prior to the decisions sought to diversify their funding sources with some foresight, I think, and so have been able to do some quick work and some fairly strategic work to try and shift their approach and move to a situation where they are less reliant on government funding. So they are going to be relying heavily on private donations which, of course, is a very unreliable or uncertain source.

DR MUNDY: Yes.

MS BUCHANAN (FCLCV): So for them, I think it is a bold and brave experiment, but one that I think they're fairly well-placed to embark upon because they have very good reputation and value in the - - -

DR MUNDY: And, presumably, they were in a slightly better position given their relative size and also the more generous funding from the Victorian

government, I would presume some of which does end up with them.

MS BUCHANAN (FCLCV): Indeed. They do receive a portion and, as I understand, there's no indication that the portion of funding they'll receive from the state will cease, so they will be able to continue to provide some legal services using that funding.

DR MUNDY: And just on this re-prioritisation notion, is that a policy proposition that's being, to your knowledge, advanced by the Victorian government as well as the commonwealth, or do they seem less concerned about your members doing - you know, we'll call it law reform work broadly.

MS BUCHANAN (FCLCV): To my knowledge, the state government continues to be supportive that community legal centres have a role not only in providing direct services to clients but also communicating issues and having a role to play in effecting good public policy.

DR MUNDY: And they're relaxed about some of the funding they provide being used for those purposes.

MS BUCHANAN (FCLCV): To my knowledge, yes, and certainly the indications that we've heard from the state attorney-general is that he sees some value in some of the law reform work that is done by community legal centres. For example, he has fairly recently introduced some infringements reform, some fairly significant reforms, and was certainly very keen to make sure that community legal centres who of course have contact with lots of clients on infringements matters, that we fed into that process. So that's just one example.

DR MUNDY: Yes, I think it's fair to say that - fair to the commonwealth - their view is that CLCs shouldn’t - it's not that they shouldn’t be doing this work, it's just that within the commonwealth's budgetary framework and stringency it's not a priority for the commonwealth to fund.

MS BUCHANAN (FCLCV): And we would say we think that's misguided because systemic work can be some of the most efficient use of very, very scant resources in community legal centres and we're very, very well accustomed to working within scant resources.

DR ATMORE (FCLCV): If I could give a very brief example. The federal actually led a coalition of family violence organisations to make a very extensive submission to the Australian Law Reform Commission and New South Wales Law Reform Commission inquiry into family violence and reading the final report it's clear that that submission had quite an impact on the

Commission, so that's just one example.

DR MUNDY: Okay. Angela.

MS MacRAE: Could we then turn to the other issues of funding. I just wonder if you'd like to comment - we've just heard from the Legal Aid Commission about how funds are distributed to CLCs, and would you like to comment on how you see those current arrangements, so under this sort of board structure, whether you see a conflict there and whether that's problematic for you, and if it is whether you'd have a preferred model.

MS BUCHANAN (FCLCV): So you may have noted this from our submission. Our submission is silent on this particular issue in part because as a federation we represent 51 member centres. We haven't reached a definite or agreed view, so certainly some member centres who would share the view that others have clearly expressed to you that there's some conflict inherent in the different roles that Victoria Legal Aid play. There are other members who feel fairly strongly that the decisions about funding allocation to community legal centres are going to be better made by a body that has more direct understanding of legal assistance and legal assistance services and the communities with whom we work.

So I think that it's fair to say we would see there is a theoretical conflict, but in practice in the main that does not bear out. There have been certainly some situations where the issues have been more apparent, but we, as I say, we don't have an agreed position on what would be the preferable option.

DR MUNDY: But there's no - without wanting to put words in your mouth - there's no screaming angst coming from your membership that the current arrangement is fundamentally broken and must be changed.

MS BUCHANAN (FCLCV): At the moment, no. I think there would be a view that there's scope for improvement and so what I would say is regardless of whether the funding decisions are made by the state government and a state government department, or by the Board of Victoria Legal Aid, there's scope to strengthen the input that all parts of the legal assistance sector have into those decision. So I think the draft report of the Commission referenced the Peter Shergold work that's been done in Victoria. That hasn't been extensively discussed in relation to the legal assistance sector, but certainly in terms of strengthening what collaboration and co-design looks like in respect of community legal services, there's scope to strengthen that, and our members would say that that's the case regardless of whether the current arrangements stay in place or whether there's a move and funding were administered by the state department.

DR MUNDY: Okay. So but a model where the needs and the funding of all legal assistance providers are considered at a state level is something which isn't problematic. It's a question of what's the governance arrangements?

MS BUCHANAN (FCLCV): Correct. Correct.

MS MacRAE: So are you familiar with the West Australian review, because this is - there's some reviews that have happened in WA and the way that they've collaborated each - when they've looked - areas of need and how resources are allocated in Western Australia between the legal service providers seems to us as being set up as a good model that might be replicated elsewhere. Are you familiar with that model and do you see that it might suit Victorian conditions?

MS BUCHANAN (FCLCV): I'm probably not familiar enough to make a well-informed comment, I'm afraid.

MS MacRAE: Sure. Okay.

MS BUCHANAN (FCLCV): I'm happy to that on notice.

MS MacRAE: Yes, that would be helpful if you could.

MS BUCHANAN (FCLCV): And give it some consideration.

MS MacRAE: Okay. Thank you.

MS BUCHANAN (FCLCV): And then come back to you.

MS MacRAE: They had reports in 2003 and 2009.

MS BUCHANAN (FCLCV): I'm aware of the different reviews.

MS MacRAE: Yes.

MS BUCHANAN (FCLCV): But in terms of the way that model's operating in practice, no. I know from my contact with my former counterpart in WA that there have been some really positive aspects to that and some more troubling aspects, and I'm certainly happy to come back to you.

MS MacRAE: Sure. Okay. Thank you. That'd be helpful.

DR MUNDY: Excuse me. Just bear with us.

MS MacRAE: I just - the other questions that we were putting to Legal Aid was in relation to means tests and income tests and how you ration resources. Can you tell us about how CLCs decide what sort of work they do and how do you allocate what sort of rationing - because obviously you're going to have to ration - - -

MS BUCHANAN (FCLCV): Yes. Indeed.

MS MacRAE: - - - the resources that are available to you?

MS BUCHANAN (FCLCV): So there's a few points that are important to make. One is, of course - and I think the commission appreciates this when you were trying to understand what eligibility criteria and means tests look like across the community legal sector - but of course because each community legal centre is independent and focuses on a particular client group, be that within a geographic location or a particular demographic, each centre applies their own process currently to those decisions.

So I'd say within Victoria, 51 community legal centres, there will be a whole range of approaches that are taken, but in the main community legal centres will assess the evidence. So that might include very rigorous data analysis and certainly community legal centres over time I would say are increasingly engaging in data analysis and, you know, a review of what the data tells them about legal need, as well as combining that with the information and the evidence they get from their connection to community.

So one of the defining features of community legal centres is that connection to community, so the fact that community legal centres, the workers in the centre, often the boards of the centre are very much engaged in the community and different community organisations and have a very good mechanism to stay connected to and on top of emerging issues and changing legal needs.

So that combination of the quantitative data analysis and the information and evidence that the centres get from their connection to community together go to an assessment about where the centre should be directing its resources. Now, we in our submission included several examples of casework guidelines and, again, every centre will have their own. They have their own procedures and protocols and guidelines that set out where they're going to direct their resources and how they'll make the decisions about what cases they take on, in what kinds of matters, and to what kinds of clients. So it's not a simple answer in that there's no one answer for all community legal centres, and the process might look a bit different and does look a bit different for different centres, but

that's the general approach across the community legal centre.

DR MUNDY: I think our concern in raising this was not a mindless Orwellian quest for uniformity, but rather some mechanism by which governments could be assured that funding was being allocated, scarce resources were being allocated broadly for the purposes for which they were meant, and I think your colleagues in New South Wales - if I can cast my mind back to the past week - suggested that the notion of broad overarching principles by which these decisions might be made would be something that would not only be acceptable but in some cases may actually prove to be helpful.

MS BUCHANAN (FCLCV): Yes.

DR MUNDY: And that would then help align governance frameworks back to performance and so that governments - and one of the concerns that our commission always has is how do we ascertain the purpose for which money and scarce resources being provided is meeting the purposes? So that sort of general principles framework would not be something that would cause you difficulty?

MS BUCHANAN (FCLCV): No, indeed. And so we support that and certainly our response to the relevant draft recommendation in the report is that we support that. So the idea that government has a role appropriately informed by the other players in setting some of the priority groups and setting in place some of the frameworks to guide those decisions is entirely - is one that we're entirely comfortable with.

The point that we want to emphasise is that we think the notion of that resulting in standard eligibility criteria, for example, across all community legal centres, or across community legal centres and Legal Aid, would be incredibly problematic, and there needs to be some capacity for community legal centres to identify what the local community needs are. So whilst there may be some high level identification by government of here are the priority target groups for legal assistance services, what that looks like on a local basis may vary slightly and there needs to be some capacity for centres to make some flexible decisions based on the needs that are apparent to them as well.

DR MUNDY: And, you know, a community legal centre servicing the general community in Geelong will have very different issues with, for example, the national CLC that looks after issues around insurance.

MS BUCHANAN (FCLCV): Indeed. Indeed. And the - - -

DR MUNDY: And their delivery methods are different.

MS BUCHANAN (FCLCV): Exactly, and that diversity and that capacity to tailor the services to the local need and the - you know, identify and really keep on top of the emerging needs as they present and as they shift, as they do when communities change and the environment changes, that's absolutely one of the strengths of the community legal sector. So losing that would be incredibly detrimental.

DR MUNDY: Can I ask just briefly - I just mentioned the insurance CLC that operates nationally out of Sydney - did - and this is probably a question that is more easily asked in Victoria than anywhere else - but is there more scope for national - for something like an insurance - something like insurance, which is national in its character, and probably financial services are national in their character more broadly - is there scope for more national based services or - it's just an open question because there does - you know, consumer credit would seem to be another one, particularly where they're increasingly delivered not face-to-face over a desk.

MS BUCHANAN (FCLCV): I think - I mean, that's not a proposition that we've considered a great deal in part, I think, because the community legal centre model has such strength - - -

DR MUNDY: And it's got that community word - - -

MS BUCHANAN (FCLCV): - - - in responding to community on the ground.

DR MUNDY: It's got that community word in it.

MS BUCHANAN (FCLCV): The community word in it but also the community aspects to the service delivery and service direction.

DR MUNDY: Yes.

MS BUCHANAN (FCLCV): The service planning aspect of the services. So I mean, and you know, you mentioned the consumer credit and the consumer areas of law, as you would know, Consumer Action Law Centre is a Victorian Centre. They work very closely with their counterparts in other states, and that's the same for lots of specialist legal centres. So there is absolutely already networks of legal services that work on a particular area or with a particular demographic and they join forces fairly effectively at a national level to tackle national issues whilst retaining that local state-based focus and some of the strengths that come with that.

DR MUNDY: Yes. I was just curious because we were quite taken by the fact that very limited resources are supporting a national service for insurance.

MS BUCHANAN (FCLCV): Yes.

MS MacRAE: Just in relation to the scale of CLCs, are you able to give us an idea of the sort of size of them here, and we heard previously from - again, from your colleagues at Legal Aid - about some amalgamation that's happening. Do you see that as a positive, and is there scope, or would there be benefits, in increasing the scale of some of the CLCs because we have had some evidence from various people that scale can be a bit of an issue, especially if you are looking at centres of only two or three people perhaps.

MS BUCHANAN (FCLCV): We certainly think that there would be benefit in increased scale to community legal centres. In the submission that was submitted by the National Association of Community Legal Centres and jointly with ourselves and our other state counterparts, I think we referred in that submission to the National Association funding principles for community legal centres, and the modelling that is done there to suggest the minimum level of funding for a sustainable community legal centre is in the order of $626,000 per annum. If you look at Victorian centres and the government funding that Victorian centres attract, there would be more than 20 centres in Victoria who would not meet that criteria, who are currently operating, in some cases, significantly under what we say is the sustainable level. There is no question that, for small centres, there are a number of extra challenges over and above the challenges for larger centres.

You asked whether, in our view, the amalgamations or what is happening in the Western Community Legal Centres Reform Project is positive. From our point of view, one of the most positive elements of that project is that the community legal centres are, themselves, around the table. They have formed the view that there might be better ways to work. They've formed the view that perhaps not all of the services they're providing in the western region in the Western region are being provided in the optimal area, or at least, looking at what's likely to happen in the future, they will face some real challenges in meeting changing need in their current form.

They've seen that there might be some efficiencies that can be gained from working together in different ways. They didn't set out in that project necessarily to look at amalgamation. They left the door open to look at whether they might share some back office or corporate functions and a whole raft of other kinds of changes, certainly in terms of where it seems to be heading. The centres involved seem to have agreed that amalgamation for

them, and shared governance, is a good option. For me, certainly, that project seems that it will be delivering very good outcomes, good outcomes for the centres, good outcomes ultimately for the communities the centres provide services to. The fact that community legal centres have been around the table with Victoria Legal Aid, working through that together, really is a strength of that approach.

DR MUNDY: To the extent that efficiencies are realised from this, will they be held within that group of CLCs?

MS BUCHANAN (FCLCV): Absolutely.

DR MUNDY: Legal Aid is not going to harvest - - -

MS BUCHANAN (FCLCV): That's exactly right, so any inefficiencies - - -

DR MUNDY: So what they generate - - -

MS BUCHANAN (FCLCV): - - - can be used for more client service and to generate ultimate benefit to the community.

DR MUNDY: You mentioned, I think, that about 20 CLCs in Victoria fell below this.

MS BUCHANAN (FCLCV): I believe slightly more than 20, but yes.

DR MUNDY: Whatever the number is. Whilst these sorts of benefits are probably relatively easily realised in metropolitan areas, or more readily realised, it is probably not the case in regional areas. To what extent are those sub-scale things in regional centres rather than in a metropolitan area?

MS BUCHANAN (FCLCV): Certainly, some of the regional centres are very close to what the national association has set as the minimum. Some would be slightly under, but there's - - -

DR MUNDY: What sort of communities are at risk? Are we talking about Bendigos and Ballarats, or are we talking about Sales? You know, what sort of places are talking about?

MS BUCHANAN (FCLCV): The Central Highlands area, Gippsland area, would be some examples.

DR MUNDY: The opportunities to, through some sort of institutional reform to support that, is, in your view, less available than would be in the western

suburbs?

MS BUCHANAN (FCLCV): It's virtually non-existent, I would suggest. I think the reality is, if you look at regional Victoria, then what you will see is very limited community legal services. So the notion there simply are no, in most areas, legal services with whom a CLC can work to find efficiencies and, already, those services are vastly inadequate in terms of the resourcing they have to meet the legal needs of the communities in which they are based. So the notion that there is any genuine efficiencies to be found and that there is any other answer beyond, to be frank, additional resourcing would be a flawed one.

DR MUNDY: There is no fat and they are starving, basically?

MS BUCHANAN (FCLCV): Indeed. We say this fairly clearly in the response and it was implicit in the very first point that I made, but even within metropolitan Melbourne, whilst there are a large number of centres and whilst there are certainly some small centres that we say their current level carries some challenges in terms of sustainability, we caution very strongly against assuming that any of those centres are based in areas where there's no need. If you look at the service data of most of those centres, or all of those centres, we would say they are all meeting very serious legal need, usually amongst very disadvantaged client groups.

Even - and I go into this in some detail in the submission - the centres that are placed in inner Melbourne in areas that seem to be in more advantage, better-off areas, when you look at the data and you look at those centres' own analysis of who they're servicing, then you can see fairly readily that they are still meeting the needs of highly vulnerable client groups and there are enormous risks with removing the services from those areas.

DR MUNDY: From personal experience, I understand that. Specialist CLCs, we came across one the other day that - granted it was in the ACT - had one employee. The specialist CLCs in Victoria, are they well - well, relatively - none of them are of that ilk, I presume?

MS BUCHANAN (FCLCV): I can't think of any centres that have just one staff member.

DR MUNDY: No, but - - -

MS BUCHANAN (FCLCV): Again, there is a variety, so there are some specialist centres that are large centres, that are relatively - compared to other community legal centres - well resourced and have been successful in

maintaining funding and attracting funding, and there are some specialist centres that are fairly small. Overall, I would say - I mean, we have some very strong and effective specialist community legal centres.

DR MUNDY: Specialist centres are largely CBD, inner suburbs based?

MS BUCHANAN (FCLCV): Yes.

DR MUNDY: Redfern Legal Service pointed out to us - and I think there is some interesting data that has been drawn to our attention by Clayton Utz and Ashurst - that there is this preponderance of CLCs, including the specialist ones, and the point was made: the specialist ones need to be somewhere and the CBD seems to be not an unsensible place for them to be.

MS BUCHANAN (FCLCV): Indeed.

DR MUNDY: Another point that was made to us is the advantage of a location close to the CBD, and the larger, more successful ones, certainly in New South Wales and Victoria, to be a significant - of that ilk - is access to pro bono assistance rather than having to trip it out to Sunshine to provide your pro bono, it's easier to hop up to Fitzroy, particularly if you live in Fitzroy. Is that your experience?

MS BUCHANAN (FCLCV): That certainly bears out, based on the information that we get from members. We haven't done the analysis of pro bono and volunteer contributions, so I can't say that based on data analysis, but certainly the information that we get from centres is that the centres that are further out in different parts of suburban Melbourne, they absolutely can still attract volunteers. They can still attract pro bono, but there are some extra challenges in doing that. Having said that, most of those centres are still very effective in attracting volunteers, so I don't know that that's - - -

DR MUNDY: I guess it was more on the point of particularly large firms with large pro bono programs. I think the suggestion basically was they're more likely to deploy their resources close to the office than they are three-quarters of an hour on public transport away.

MS BUCHANAN (FCLCV): I think there's some truth in that. What that means for centres that are based closer to the city is that they have an advantage in terms of developing pro bono partnerships, and I think in the main centres close to the city in Melbourne make the most of that and have incredibly strong pro bono partnerships.

DR MUNDY: The Redfern Legal Service has developed an overseas students

service and I think their ability to leverage pro bono into that is locational.

MS MacRAE: We did make some suggestions around trying to make the pool of volunteers more readily available for CLCs through things like practising certificates for recently retired people and I note that that's something that you didn't support. Are you able to discuss a little bit the problems that you would see with that and whether there's other mechanisms, or whether in fact you think that you're already accessing the volunteers in really the best ways you can and there's not barriers that we need to address there.

MS BUCHANAN (FCLCV): I will answer the second part of that question first. The feedback that we receive from member centres is that in the main they have no challenges attracting volunteers. That's one of the strengths of the Community Legal Centres, as you found in the draft report, but volunteers are generally very willing to contribute their time and their expertise into the Community Legal Centre. In the main the challenges that we hear about from centres is about how centres can be best equipped and best resourced to kind of make the most of those volunteer contributions.

We said in our initial joint submission I think with the national association - we made the point that Community Legal Centres need very zoned infrastructure to attract and manage and supervise volunteers well and really those questions are the questions that we hear more about from centres rather than challenges in attracting volunteers. There's certainly some centres I know that have long waiting lists for people who are keen to be volunteers and that simply reflects their staffing levels and the resources that they get from government and other sources don't enable them to provide the staff supervision to meet the demand, if you like, of the volunteers who would be prepared to come and work there.

In terms of the concerns around relaxing the capacity for volunteers to come in and assist, our main point, our main premise, is that the level of quality that Community Legal Centre clients get from a volunteer practitioner should not in any way be compromised and so the rigour that applies to volunteers requiring a practising certificate and a current practising certificate is an important part of that. It means that the supervision needs to be in place and needs to be of good quality, but the supervising staff of the centre can assume a level of knowledge and a level of currency of that knowledge. The points that we made in the submission were really to caution against anything that would affect those kinds of principles.

DR MUNDY: I don't think it was our intention to produce a sort of "grey lawyer light" or something. Your views about availability are different to other

jurisdictions and I guess what our intention was really was to reduce the financial barriers to people properly qualified, so our intention was that they would still need to do CPD, they would need to have appropriate insurance and we suspect indemnity insurance could perhaps provide assistance in that regard, but it wasn't in any sense to provide a lesser quality of - and it is essentially around recently retired practitioners and also practitioners, predominantly women, who want to do a bit of volunteer work while they might be taking career breaks. That was really what we were getting at. It wasn't a second string - - -

MS BUCHANAN (FCLCV): To clarify the point we were making in our submission, certainly provided there could be some provisions and mechanisms put in place to make sure that volunteers had the kind of requisite level of current practising knowledge and the kind of elements that come with a current practising certificate, then we would be open to that.

DR MUNDY: They should look like all other lawyers.

MS BUCHANAN (FCLCV): Indeed. I should say, going back to our previous point, whilst many centres find it easy to attract volunteers, there certainly are some issues for some and particularly in regional centres, so I think that's an important point for me to make as well. It's not that all centres have volunteers clamouring to join the waiting list. There are some centres that find it easier than others and of course centres in regional areas and some areas further out from the CBD find it harder than others.

DR MUNDY: Thank you very much.

MS BUCHANAN (FCLCV): Thank you.

DR MUNDY: We will now take a break for 15 minutes and recommence at 10 to 11.

DR MUNDY: We will recommence these hearings. Could you please state your names and the capacity in which you appear for the benefit of the transcript.

MR LIVESEY (ABA): Certainly. My name is Mark Livesey. I'm the current president of the Australian Bar Association. With me is Jacqueline Stone who is the executive officer for the Australian Bar Association.

DR MUNDY: Could I ask you to make a brief opening statement. By "brief" - I know it's a challenge for barristers - no more than five minutes.

MR LIVESEY (ABA): I would be delighted to, and I would also be delighted to break the mould. One of the key concerns that the Australian Bar Association has with the current draft is the idea that the courts should be recognised as a form of profit centre which should be determined according to whether they are or are not profitable. With respect, we see there is a serious misunderstanding of the role of the courts and the public role that the courts provide which is pervasive and influential across Australian society.

The courts aren't there simply just to resolve disputes as between particular litigants, although that's an important part of the function of the courts. The courts are there as an essential mechanism which ensures that our society continues as it does. The fact that the courts are there has an influence on commerce and on the conduct of people in our society and it's something which the ABA believes governments should continue to provide and not put the cost of that on the shoulders of the individual litigants.

The second thing that I would like to emphasise is that whilst alternative dispute resolution and the use of these kinds of ombudsmen is very important, these should be seen as filters to the courts rather than ways of diverting matters from the courts. The courts have, certainly in the time I have been in practice for around 25 years, embraced alternative dispute resolution, but the challenge is to ensure that cases don't get to the courts. Once cases get to the courts, they should be dealt with quickly and expeditiously and getting a result, getting a case heard and determined, is an important part of the process.

Finally, in relation to legal training, we agree that the Priestley 11 should be reviewed. It is timely to look at the way in which legal training is proceeding around the country. That really occurs against a backdrop of two things. One is the failure of the national profession to proceed. That was a regrettable thing but it's really something which is probably beyond the scope of reference of the commission, but it's because of that that there is still scope for individual variations across the jurisdictions.

Finally, in relation to legal education, it's a mistake, with respect, to think that alternative dispute resolution isn't part of legal training. It was part of the legal training when I was being trained as a lawyer and it continues to be an important part of legal training, and indeed it's an important part of a lawyer's ethical responsibilities to look to resolving disputes rather than litigating them. I think those matters have been lost sight of in the draft report.

DR MUNDY: Three minutes. Well done. I don't think the word "profit" is actually used in the report. I'm a classically trained economist. I know a lot about profit and its sources. I don't think we suggested the courts should be run for profit. I think what we suggest - and we acknowledge readily and frequently that the courts provide a number of roles, including clarification of the law and the resolution of disputes.

I think to say that the commission's view is that they should be treated as profit centres is an inadvertent misreading of the document, but it does come to the point - His Honour Chief Justice Martin graced us with his presence in Western Australia on Friday and he pointed out to us that in the Bell matter that court spent somewhere in the order of $15 million of public money and recovered somewhere around about 700, 750 thousand, so somewhere north of $14 million of public money was devoted to the resolution of a dispute which clarified virtually no points of law and was essentially a fight between a pile of banks and a couple of insurers.

What the commission is concerned about is that public benefits are paid for by the public; private benefits are paid for by private citizens. We can have a debate where they start and end and that's an interesting debate, but I guess the question is this: if full cost recovery is not something that's appropriate, and we don't think it is and perhaps our language was a bit defective in that regard, and accepting that people do pay court fees, they have paid court fees for a long time, the question is how do we strike those fees, what should be the relevant considerations and who should pay them?

We have indicated that certain classes of matters should be carved out, but thinking about those larger commercial matters, what would be the view of the Bar Association as an appropriate basis for - let's take the Bell case, for example. Without trying to put numbers on it, how should we think about the setting of fees because if those fees in those matters could be set - one of our interests is of course to perhaps influence the behaviour of litigants and therefore not have the courts clogged up with matters which could perhaps be dealt with privately. We're invited to say something about the setting of court fees. What is your view?

MR LIVESEY (ABA): Can I, rather than commence positively, commence negatively. The court fees currently set in the Federal Court are generally regarded as prohibitively high and it's a matter of concern - - -

DR MUNDY: Can I stop you there and say prohibitively high for whom?

MR LIVESEY (ABA): For ordinary litigants.

DR MUNDY: Could you give me a definition of "ordinary"? Are we talking about you and me or are we talking about the Commonwealth Bank?

MR LIVESEY (ABA): We can talk about you and me and we can talk about companies, ordinary companies; businesses.

DR MUNDY: Yes.

MR LIVESEY (ABA): That's an example of something which I think is too high.

DR MUNDY: Yes.

MR LIVESEY (ABA): You have raised the Bell litigation and I think it's dangerous to raise a very unique piece of litigation and try and draw general - - -

DR MUNDY: I can find others.

MR LIVESEY (ABA): I know there are others. I have been involved in some myself over the years, particularly audit cases, but it's a mistake to think that those cases don't resolve any points of law or don't have any impact on the broader community, and by that I mean the legal and business commercial corporate communities. The fact that these cases are being litigated has an effect, and so I think it's not just about what that case cost that court in that situation. It's about the effect of having a court there. That's the first thing.

DR MUNDY: I'm also concerned about what the $14 million of Western Australian taxpayers' money could otherwise have been devoted to.

MR LIVESEY (ABA): Perhaps. I haven't spoken to the chief justice about this but I think if there was a question as to which court would get the choice to hear that case, I would be surprised if Western Australia wasn't keen to put its hat in the ring if it was open to a selection as to who would get that case because it's an important piece of litigation that nearly went to a full hearing in the High Court and was widely followed. I understand it was expensive. I

understand that there is a question about the extent to which that money might have been spent elsewhere but I think it's an extreme example. There are many, many other cases which might run for a few weeks, perhaps a few months and down to a few days which are expensive and prohibitively expensive because of court fees both to commence the case and to continue the case on a daily basis. A full user pays system, which I think was the terminology that the commission was looking at - - -

DR MUNDY: I think we used the language "moved towards" full cost recovery. It was a direction on the statement and the words were carefully chosen.

MR LIVESEY (ABA): I accept that. I would speak against that for the reasons I've already articulated. I think in an extreme example such as the Bell case. For example, I was involved in the Arthur Andersen audit case involving the Southern Equities Group and that case was scheduled to run for two years. It ran for six months and what happened is that the parties themselves funded the computer equipment used for transcription, used for the paperless court room - the publication of documents in the court room and so forth. That's an example of something where I can see there is a genuine role for parties to fund the expense associated with running litigation. I don't know to what extent that happened in the Bell case, I wasn't that closely involved with it.

DR MUNDY: Given its time, I suspect there wasn't much IT support going on at that time.

MR LIVESEY (ABA): Yes, but it should be and that's something that the parties can shoulder themselves, and in that sense I think what courts need to do is provide the service, that there is a judge highly skilled, a trained individual, a court room and its infrastructure and the parties, to the extent that they are able to, can add on things like computer support.

DR MUNDY: Can I ask you this question; our research indicates - and no-one's disputed this - that court fees in Australia constitute around about 10 per cent of litigation costs and it's probably higher for smaller matters

MR LIVESEY (ABA): Yes.

DR MUNDY: Smaller matters in higher courts. Is it your experience, obviously as a commercial litigator, that the parties bring their mind when deciding to proceed with litigation or not as to the total cost that they're likely to encounter rather than the bits? That, to me, would be a reasonable economic assumption.

MR LIVESEY (ABA): Yes, and that's backed up by a number of things. First, the professional ethical responsibility traditionally reposed in solicitors to advise about all of those matters and secondly, particularly in commercial cases, you're dealing with people who are making commercial decisions whether to litigate or not.

DR MUNDY: So there's experts and there's solicitor's time, and all that sort of stuff, and their own time in attending court, and the disruption at litigation invariably has on the business.

MR LIVESEY (ABA): That's so.

DR MUNDY: So it's no real different to you and I going to buy a plane ticket and it's going to cost us $500 to fly to Sydney, and whether Qantas gets a bit and the airport gets a bit, and air traffic, we don't actually care. It's how much it costs us to get there, that's the real point of the decision.

MR LIVESEY (ABA): I would disagree with you about the product but as to the commercial decision of the litigant - - -

DR MUNDY: As far as we look at the cost.

MR LIVESEY (ABA): Sure.

DR MUNDY: So if that's the issue, an increase in court fees - let's say, a modest increase of 10 per cent and given they constitute let's say 1 per cent of 10 per cent of the total costs, so that would leave 1 per cent increase in the cost of the litigation. So the marginal litigant would proceed or not proceed, but there may be a tendency in which the litigation would still proceed and the 1 per cent would actually compress the fees. It would either lead to increase the efficiency on the part of those running the litigation or perhaps lead to a reduction in, let's say, the returns to the equity providers of the litigation which let's just say are the law firms and the private barristers.

So in a sense, a relatively modest increase in court fees across the board may actually just lead to a redistribution of rent within the litigation process between the state - who everyone thinks should provide more resources for the legal system, I think we're all agreed on that and mainly to a marginal reduction returns to the providers of legal services.

MR LIVESEY (ABA): Respectfully, I don't see there's a contest between whether the lawyers would do better out of no increase as distinct from an increase. I don't see it in that way at all.

DR MUNDY: I'm trying to work out who's going to bear the cost of an increase and it seems to me that the marginal litigant won't pursue the matter or the litigant will pay, or the service providers will take a reduction in rent.

MR LIVESEY (ABA): I think it's more complicated than that. I think what's happening is that by and large the litigants are wearing the increased cost. I can't think of law firms that would wear that sort of expenditure, apart from perhaps the truly contingent arrangement cases and I don't think that sort of - the context is they are already high and so the disincentive to litigate is already there, and so you're dealing with people who are prepared to litigate in any event, by and large. You're just making it more difficult to get access to the court.

DR MUNDY: That argument all makes sense to me, providing you assume that the market for the legal service which constitute the bulk of the cost is competitive?

MR LIVESEY (ABA): That's true and I think what we're dealing with is to take a case which - let's say it's a standard business acquisition and there's been a concern that there's misrepresentation about the turnover of that business and allegations of misleading conduct under the old Trade Practices, now Consumer Law. Fairly stock standard piece of litigation for the Federal Court. The disgruntled purchaser will seek legal advice and go to a law firm, and presumably that decision is made on the basis of cost, reputation, skill set, et cetera.

DR MUNDY: Assuming they have that knowledge, which the literature generally suggests unless they're a regular litigant, they don't.

MR LIVESEY (ABA): Yes. Can I come back to that?

DR MUNDY: Sure.

MR LIVESEY (ABA): Because for the purposes of my illustration we can assume that person's made a genuinely - - -

DR MUNDY: It's more likely if it's a business transaction than a punter.

MR LIVESEY (ABA): Yes. So what happens is that person will be considering an array of options, probably advised, as to how to claim redress for a business that is not as profitable as promised. So those range of options will include court action. What's happening at the moment is that the Federal Court is missing out on those cases because the Federal Court is a more expensive place to litigate. So those cases will go to other fora such as a

Supreme Court or a District Court. That's the most obvious impact of the problem with filing fees and court fees.

If, properly advised, the litigant decides that even the Supreme Court or the District Court are prohibitively expensive there is often an attempt to try alternative dispute resolution and in many cases that's done before action. The fact is that the defendant, the seller of the business, may be reluctant to accept any responsibility. So again, the importance of the court being there looms large in any negotiation and so in those processes as you track it through - it's not about whether the solicitor's advising the litigants are going to miss out on anything, they're often assisting the client to a resolution, to an end point. The question is how to get to that end point effectively, quickly and efficiently, and having a court that's available to hear their cases quickly, efficiently and so forth is critical.

DR MUNDY: I won't labour the point, but I think what the issue I'm trying to get at is that litigants make a decision about where to bring maters on the total cost for the matter and marginal variations or even substantial variations, whilst court fees are a relatively small proportion of total litigation costs, are unlikely to determine fora. I suspect - and I think you allude to this - what actually might be driving this, might be driving the decision about the selection of fora may actually be how quickly they get on.

MR LIVESEY (ABA): That's true, for example in my - - -

DR MUNDY: If I can get on in the Federal Court in three weeks or a month, or three months and I've got to wait 12 months on a commercial matter, there is real economic value in delay.

MR LIVESEY (ABA): As you'll have heard from many people who have come before you, the Federal Court generally speaking is a quicker venue than the state courts, but it's getting harder for the Federal Court to attract that traditional business, notwithstanding speed of service, because of the fees.

DR MUNDY: Because there's a trade off between time and costs.

MR LIVESEY (ABA): There is.

DR MUNDY: So effectively people are valuing that additional cost against how quickly they get off within the total context of their litigation costs, including the cost of delay for them to gaining access to their settlement.

MR LIVESEY (ABA): That's true. But it would be a mistake to think that any person properly advised is simply thinking about going to court and about

getting a judgment. It's always a multifactorial process, multifaceted process, where dispute resolution is considered at every stage.

DR MUNDY: No, we understand that.

MS MacRAE: Just to get to the absolute - take you back to the heart of the matter though, just to be clear so we're on the record that you agree, that you're not suggesting that we shouldn't have court fees.

MR LIVESEY: I'm not suggesting that at all.

MS MacRAE: Okay. So we agree then that we're looking to try and find a mechanism that better reflects we might say the private benefit and not necessarily the total private benefit, but the benefit that's received directly by the individual, and in that instance, I guess, to give the example of the Federal Court, we might say, "Well, what factors determined how that rate was struck and how it's moved over time," and why aren't those same principles, or should they be, if we can identify principles that were used there, should those principles be used elsewhere, and if the principles were fairly applied then, you know, is there a case to say that in some instances these fees are too high. So that's the sort of - I guess that's the sort of issue we're trying to get to.

MR LIVESEY (ABA): Could I address two points at the outset. First, I'm not sure that fees were ever set in a principled way. I think they were set historically in ways which are no longer understood. Second, I'm not sure that they're now being set in a principled way or that to search for a principle is going to yield any beneficial outcome as to how to set them in the future. The problem that's emerged, certainly in my time in practice, is the retreat from funding by state and federal governments of court infrastructure. It's more pronounced in the states than it is federally, but it's apparent across the board.

It's been that retreat in funding which has caused these cost pressures to be addressed amongst other ways by increasing court fees and my point is that that's a mistake. That's to misunderstand the public role of the courts as a piece of our society's infrastructure, just in the same way that roads are and bridges and so forth.

DR MUNDY: I think this is probably the wrong fora and the wrong Commissioner to talk about efficient pricing of economic infrastructure with the greatest of respect, Mr Livesey. We might move on. The debate around contingency fees and litigation funding has drawn some discussion while we've been discussing this inquiry and I guess we had an interesting discussion with the New South Wales bar association on these issues, and I guess barristers are probably in a good position to make some observations on this because you see

this stuff up close and personal without necessarily being the ones doing the funding or charging the contingency fees, and you probably therefore have a degree of objectivity about these matters.

So before I ask you some specific questions, do you have any general reflections, and particularly it seems to us that the nub of the concern is about securities actions more than anything else. That seems to be where all the expression of angst is, it's not coming, for example, around - I think Maurice Blackburn told us yesterday they're running a class action for a defective hip replacement and the ANZ fees case which is a more - bushfires is another. There doesn't seem to be a big concern about those matters, but I'm interested in your broad view, particularly on contingency fees and the behavioural and ethical aspects, but also the funding question.

MR LIVESEY (ABA): The Bar support greater access to justice and getting really better outcomes more quickly. Contingency fees can be a way of ensuring that litigation which would otherwise not be pursued, rights which would otherwise be lost, can be pursued and rights defended.

DR MUNDY: I think we are coming at this issue from the same place.

MR LIVESEY (ABA): So the Bar's view is that there is a role for contingency fees. The concerns arise when there is - I'm sorry, I should have emphasised also that there are stringent ethical responsibilities on solicitors as well as on barristers about the maintenance of unmeritorious litigation and about advising clients about risks and returns and so forth. The problem comes in some areas of litigation, not most, in my experience, where the profit element in pursuing litigation is at the fore. Many other bar leaders have spoken about this in the past and whilst it's true that most of the criticism have been of some firms, I'm sure there's room for criticism of some barristers as well.

So I think that's a minor part of the problem, but it's something that needs to be looked at in any rules established regarding contingencies. The balance in Australia has always been the loser pays costs. The system has been thought to be a good disincentive for a meritorious litigation combined with some limited relaxation of contingency arrangements. Certain percentage uplifts, for example, on fees that can be recovered and in a carefully regulated way I think that's worked relatively well. It's probably been disproportionate concern about it, because by and large in the personal injury areas or some of the examples that you gave, it's really about a true contingency to be paid or not paid rather than any uplift, and that's the way most litigation is run with people who can't otherwise afford representation.

The new phenomena in the last 10 years, maybe a bit longer, has been the rise of litigation funding, and I think in general terms it's regarded as a good thing, but it does provide another avenue for representation that would not otherwise be there, but it's starting to develop to a point where some consideration of oversight and control would be a desirable thing, which is not to say that there are particular problems or examples of misconduct, I'm not aware of that, I think it's simply getting to a stage where it's a sufficiently mature aspect of the litigation landscape that looking at its regulation is an appropriate thing to consider.

DR MUNDY: I think you make a good point in as much as what a lot of what we here is about concerns about the future rather than abuse of the past. Starting with the ethical questions, we had similar discussion with Chief Justice Martin on Friday and I think his strong view was when it comes to the ethical behaviour of solicitors and barristers you can leave that to him. By "him" I think he was speaking with the royal - - -

MR LIVESEY (ABA): Generically.

DR MUNDY: Yes. That's the business of the courts and the courts can, along with the other fora for the regulation of the behaviour of lawyers, do their job. Would that be the bar's view?

MR LIVESEY (ABA): Yes.

DR MUNDY: Or do we need to do something more?

MR LIVESEY (ABA): No. To deal with it in context, there are very robust arrangements at the moment for oversight of the legal profession in all of the states and territory jurisdictions. By and large they work effectively. A slight criticism of the interim report is that it tends to lose sight of just how robust those powers are and how they're exercised, but they're there. There are always of improving that, for example, the interim report suggests a five-day rule. That's something that could certainly be considered, although that might have an impact on cost. Another thing is ensuring that the examples of unethical conduct are well publicised. That's another way of ensuring that the market is able to know who is providing ethical services or not.

I'm not sure that your commission would add very much to that. I think there are already a number of ways of dealing with that. The advantages or improvements would come, I think, with an increase nationalisation of the rules that apply, and I've already mentioned the float of the national profession, by and large a federated arrangement whereby there is a relatively small oversight body funded by each of the jurisdictions but ensuring consistency in

terminology, rules and so forth would be the best way to do that. There are always examples of idiosyncratic differences amongst the jurisdictions which don't appear to make sense. They should all be removed.

DR MUNDY: I don't want to get too, because of time, in the area of professional regulation. I think our concerns are more about the commercial conduct of lawyers rather than their ethical conduct, and the concerns which we reflect in the court have been put to us by Legal Services Commission and I, with respect, don't think the confidence in the community about these arrangements is as strong perhaps as they are in other areas of commerce where people acquire services from service providers. We've tried to understand some of the arrangements and we might be slightly better at understanding regulatory arrangements than the ordinary citizen. Some of them strike us as being profoundly opaque.

But can I just bring you back to this question of litigation funding. You seem to suggest that there's not much evidence of systematic problems. One of the things that's been suggested to us - and you did bring our attention to the existence of adverse costs orders which makes this sort of scare about American outcomes I think significantly out of play, but you talk about regulation. So the idea that a funder would have to hold a financial services licence, say from ASIC - we're not wanting to create a new regulatory agency just for the purpose, and our concern is primarily about the prudential, you know, people are essentially taking these people on, they're providing some sort of financial service which may be claimed upon in the event the action is unsuccessful, so the notion of a financial services licence would not be something the bar would object to, or some form of prudential regulation.

MR LIVESEY (ABA): I think careful consideration of that would be timely. Whether it's ultimately implemented, that depends on a range of factors. For example, insurers have been in the business of funding litigation for a very long time indeed.

DR MUNDY: Typically on their own.

MR LIVESEY (ABA): Certainly, but also subrogated rights actions and so forth. There are many examples of mums and dads or friends of families providing funding. Casting the net so wide as to encompass all of those things would not necessarily be a good thing.

DR MUNDY: I don't think that's what we had in mind. But what we do have in mind is the area where we see that contingency fees and litigation funding economically look quite similar and the only difference is really in the character of the funder, being the independent funder on one hand or the law

firm on the other, and it's the law firm issue that gives rise to certain ethical consideration, which I think a number of people have suggested to us might be a bit overblown.

MR LIVESEY (ABA): Yes, because ultimately there's a commercial self interest in the funder, and the funder - however keen the lawyer might be to run litigation, even if one ignores the ethical responsibilities, which you can't, but even if one did, the funder is not going to throw money at something that doesn't like bringing a return.

DR MUNDY: If the law firms are funded, they're not going to throw money at something.

MR LIVESEY (ABA): It makes no sense.

DR MUNDY: Yes. It stills leaves the prudential issue.

MR LIVESEY (ABA): Yes.

DR MUNDY: Would you see a problem if a law firm wanted to act as a funder - that's not to say law firms have to, and I suspect the vast majority of them, because we know the vast majority of them are actually small, if the law firm wished to act as a funder, that it should be exposed to the same prudential considerations as say IMF Bentham?

MR LIVESEY (ABA): I think it depends, because again, depending on how wide you cast the net, you may pick up, for example, the time honoured small personal interest firm.

DR MUNDY: I'm thinking about the Maurice Blackburns, the Slater and Gordons of the world who would enter this market, I think, if they were allowed and would effectively compete with the known funders that we have.

MR LIVESEY (ABA): If it's on a true basis of large scale commercial competition, it would be difficult to suggest that there shouldn't be some similar oversight, however, that's something that it's a very complex issue and there are a number of sub-issues to it and I haven't - I can't pretend that I've thought through all of those.

DR MUNDY: No, that's okay.

MS MacRAE: Could we perhaps just talk a little bit about you mentioned in your opening comments and I think in your submission about your support for the idea that the structure of the law degree should be reviewed. Could you

just say a little bit more about what elements you think are potentially problematic or need looking at in the current structure and what - - -

MR LIVESEY (ABA): It's not so much a complaint about what's happening at the moment, but a recognition of the proliferation of law schools over the last 10, 15 years, and the attempts made to try and bring in court elements which have failed over time, and the fact that there doesn't appear to have been a major review of the law degree for some considerable period. I think the last one was - - -

MS STONE (ABA): In Victoria in 2006 there was one, but that was all legal education from the law degree all the way to CPD.

MR LIVESEY (ABA): So it's timely to have a review of that and again, as in all of these matters dealing with an Australian legal profession, there are good reasons why there should be similarities rather than differences across the board, which is not to say that there shouldn't be unique opportunities provided by law schools, I think that's a good thing, innovation is a good thing, but there are going to be some certain elements that need to be in law degrees and there shouldn't be too many differences amongst them.

MS STONE (ABA): I just say, the model we have now in our law schools is really just in case learning, so there's a lot that you learn that we know because of the structure of the profession will probably be irrelevant to your day-to-day work, and there's an enormous amount of stuff that you don't actually learn, and unfortunately that is a very expensive process and it also puts the emphasis on actually training people to be fit for practice on the profession itself which is a cost absorbed by the profession and ultimately passed on to consumers and also in many ways can distort the actual character of the profession itself.

So by actually structuring a profession where you're required a mentor, the importance of a mentor to a legal degree is often referred to, can act as a subtle disadvantage to women, for example. So if your progression through the law in your career depends on you forming a close working relationship with usually an older man, I think it's probably self-evident what the problems inherent in that may well be. So there's certainly scope to actually perhaps tailor the law more to practice. I think a lot of law deans make claims that it's a very good general degree, and I'm not actually sure that that's tested and even true.

We may actually be better putting people through an engineering style degree where actually all of the stem courses, the science technology, engineering and mathematics, which actually generate productivity in the economy may actually be a better diversion in general degrees than a law

degree, so I think, as Mark has said, there's certainly scope to revisit it and actually consider - well, there's distortions in the way universities are funded.

DR MUNDY: You're speaking to the converted. I have a mathematics degree, a couple of economics degree and a law degree.

MS STONE (ABA): Yes. There are distortions in university funding traditionally too, which has made the law degree a very attractive proposition for the universities and there's reasons why they claim it's got a very good general - it's cheap to run and they can charge people. But I think that it has led to distortions in the legal profession and I think that we can actually consider that the just in case model may well be outdated, and this is a review that's happening extensively in the UK at the moment, the Canadians are doing it, and the Americans are doing it, so I think that there's certainly scope for Australia to perhaps be a little bit more open minded, because I think some of the submissions about legal education were particularly forceful and probably should - - -

MS MacRAE: That's a good word.

DR MUNDY: Some of them could be described as defensive as well. Can we perhaps bring you to - I mean, it's an issue that personally interests me because I've done a lot of legal-related work over my career, and we heard evidence yesterday from the Law Institute of Victoria and they were making some unusual observations for an organisation of their ilk in respect to lay advocates and particularly in jurisdictions like VCAT in areas such as town planning, I think, was the one that they focused on, whereby it's not uncommon for people to appear in VCAT on behalf of either their employer, typically the council, or their clients to whom they provide - and argue out matters about town planning and those sorts of issues. There's a tradition of it in the industrial jurisdiction as well. Is that - - -

MR LIVESEY (ABA): And in the police courts.

DR MUNDY: Yes, and the police. Thank you, we hadn't thought of that one. Is this something that - and it comes back to the just in case nature of legal training and whether there is some capacity to increase the training of people who - the legal skills of people who know that's what they want to do, you know. Back in the days when we had industrial relations degrees, there was a whole pile of law courses in IR degrees. Is that something that - well, within appropriately structured jurisdictions with people who are recognised in some way - what drew our interest to this in the first place were some reforms in Washington state in the family law jurisdiction. But is there a place in the world for lay advocates but with legal training in certain fora?

MR LIVESEY (ABA): Historically before degrees became commonplace, it was done on the job as it were, and someone would move through to full qualification or not. I think there's always a role for - - -

DR MUNDY: I think Mr Justice McHugh might be an example of that.

MR LIVESEY (ABA): Precisely, and I don't see any difficulty with lay advocates in those specialised areas. Whether there's a need, a pressing need for some form of formal qualification, a certificate or a diploma or something beyond that, I'm not sure about. But the question you raise has another element to it, and that is the impact of that type of person on litigation where the person is self-represented, particularly in the plethora of tribunals that we have at the moment, and what often happens is that because of dint of experience and informal training that lay advocate is much better placed to deal with what are sometimes very arcane rules, particularly in planning and industrial law, that the first time litigant, and the suggestion in the draft that there should be greater emphasis on keeping lawyers out of disputes carries with it the risk that that simply creates an imbalance in power and effectiveness.

One of the other problems that emerges is that when you've got the true dispute with an unrepresented litigant what often happens is that unless that person quickly acquires legal skills, like the lay advocate, or gets a lawyer, then the whole system has to change around that person, and so the tribunal or the court changes what it does. So for the price of saving legal representation, some thousands of dollars, tens of thousands of dollars can be wasted in changing the structure of the dispute to cater for something that isn't working.

DR MUNDY: I think our observations about creeping legalism was actually a reflection of those fora where leave is granted and perhaps where the fora has been designed for self-represented litigants and leave perhaps - but I think you make a good point. I mean the average citizen coming up against the chief planner of a large metropolitan council is clearly disadvantaged. I suspect the average suburban solicitor might be equally disadvantaged.

MR LIVESEY (ABA): I have the same experience.

DR MUNDY: Yes, but I think you make a very good point about the fact that sometimes legal representation is needed and that's - - -

MR LIVESEY (ABA): Well, it's there to balance the - - -

DR MUNDY: I think it's equality of arms.

MR LIVESEY (ABA): Precisely. But also it's quicker and cheaper to have a skilled lawyer deal with a problem with another skilled lawyer by and large, because contrary to public belief most skilled advocates want to get a dispute resolved relatively quickly. They don't like the grief they get from the bench or from the tribunal if they're wasting everyone's time.

DR MUNDY: True. Anything else?

MS MacRAE: I don't think so.

DR MUNDY: We're probably done. We are pressed for time.

MR LIVESEY (ABA): Can I just raise two final matters - - -

DR MUNDY: Yes.

MR LIVESEY (ABA): - - - with your permission. The first is we accept that there was a need for greater research and collection of data about the cost of the current system, and that a number of the decisions that are taken need to be costed properly, and I think court fees is an example of how that hasn't happened to date.

DR MUNDY: I think we're in violent agreement on that point.

MR LIVESEY (ABA): Root cause analysis, for example, is another thing that could be undertaken profitably to better understand the cost of each stage of a dispute because the bar's strong view is that the cost of legal representation in proper context is not as great a burden as is sometimes thought. It's often far and away the cheaper way to resolve disputes to have skilled advocates arguing only the relevant points relatively efficiently, and if you just pardon me one moment. That's all I wish to say.

DR MUNDY: All right. Well, thank you very much for your submissions and taking the time to come in and see us.

MR LIVESEY (ABA): Pleasure.

DR MUNDY: Thank you.

DR MUNDY: Could we have the Women's Legal Services of Victoria, please? Sorry for the slight delay.

MS FLETCHER (WLSV): That's all right.

DR MUNDY: But when you're settled, could you please state your names and the capacities in which you appear?

MS FLETCHER (WLSV): Joanna Fletcher, chief executive officer, Women's Legal Service Victoria.

MS MUTHA-MERENNEGE (WLSV): Pasanna Mutha-Merennege, policy and projects manager, Women's Legal Service Victoria.

DR MUNDY: Thank you. Would one of you like to make a brief opening statement? If you could keep it to five minutes or thereabouts, that would be helpful.

MS FLETCHER (WLSV): Thank you. We're both going to say a very small amount, if that's all right. I wanted to start just by talking about two things: Women's Legal Service's role in the legal assistance sector in Victoria; and also how we innovate and adapt to address legal need. We're a statewide legal centre with 20 staff. We specialise in issues arising from relationship breakdown and violence against women. We really complement Victoria Legal Aid in terms of the services we provide. We work opposite them in duty lawyer services in the Magistrates Court and through our related organisation in the family law courts, and we also provide assistance at Legal Aid's mediation service round table dispute management. The final way we see our role in complementing Legal Aid is our flexibility in relation to ongoing case work, and I'll talk about that a little bit more in a minute.

The final aspect of our role in the legal assistance sector in Victoria that I wanted to emphasis is that we play an important role building the capacity of generalist legal centres to respond to violence against women because it's the biggest issue facing our colleagues in generalist centres as well. We've found probably even more so in recent times that the need to innovate and adapt so that we can actually manage the increasing demand is more and more pressing. In that context we've developed a service called the link virtual outreach program where we're providing legal assistance via Skype to women supported by their family violence worker or community health worker in agencies around Victoria, and so that attempts to overcome some of the barriers of being in regional, rural and remote areas, and also barriers such as economic and cultural barriers.

We really make sure that we target our intensive services, so our ongoing casework. There's often a misperception about legal centres that we don't do a great deal of ongoing casework. Women's Legal Service runs four or 500 cases a year, and we focus in our casework guidelines on ensuring that the people we assist in those cases are the women facing the most significant disadvantage and whose cases will have the most significant impact.

It probably goes without saying that working in violence against women issues, we already feel that we're addressing legal need in Victoria. It's an increasing issue, but we're also on top of that, undertaking at the moment a statewide legal needs analysis of the needs of women in Victoria experiencing relationship breakdown and violence, and who face particular barriers to access to justice. So we've learnt a little in that context about sometimes the bluntness of the CIFA index, which I'm happy to take questions on.

Finally the thing I wanted to emphasise because it will continue to inform our innovation and adaptation is that we've developed a really robust monitoring and evaluation framework which is outcomes based, so that we'll be able to tell people not just, "This is the services we provide with your money" but, "This is actually what we're achieving for the women in Victoria."

MS MUTHA-MERENNEGE (WLSV): I wanted to speak very briefly too about key recommendations in our submission. The first is around complexity, and the commission has highlighted in its report how complexity in the court system is a barrier to accessing justice, and rather than leaving it to individual jurisdictions and individual courts to develop their own initiatives, we've recommended that there be a comprehensive audit of the federal court system to map where the gaps are and to identify areas of complexity, and we think that an audit is an opportunity to bring in expertise from outside of the legal profession, for example experts in plain English drafting, to develop solutions that are systemic and that are evidence based as well. An audit is actually an opportunity to consult with users of the court system to understand what their experience has been and to understand what would be a meaningful intervention for them in terms of assisting them to navigate the system.

Very quickly I wanted to draw the commissioners' attention to pages 6 and 7 of our supplementary submission, and I put in an example of the steps required to attain an order for a division of superannuation. Now, that's an ordinary order that our lawyers often seek in the Family Court system, and it's an incredibly complex process, and I think we counted at least eight different applications and affidavits that needed to be filed, and 12 different steps that needed to be completed before you could get a final court order, and that just illustrates one aspect of the Family Court system and its complexity.

The other recommendation we had was around addressing unmet legal need for women who have small property claims, and it's linked to the issue of complexity, but it's one of the key gaps in the system that we see. So regardless of the level of disadvantage that you experience, you actually can't access Legal Aid in Victoria if your family law case only relates to a property dispute, and we often step into that gap to assist women where there are property disputes. Given the complexity in the system you'd understand why women don't pursue an equitable property claim. It's far too complex for them. It's too expensive, and often their claims are quite small. They're often under $100,000.

It's for this reason that the recommendation we have in our submission is the creation of a family law tribunal to deal exclusively with small property claims, and we see that a tribunal provides a pathway to resolve disputes without lengthy and costly processes of going through court litigation, and that's something that we've referred to in page 26 of our original submission, and I'm happy to take questions on that as well.

DR MUNDY: I'm asking these questions of all CLCs. The commonwealth recently indicated it's reprioritising its expenditure towards frontline services. Can you advise us as to whether your CLC funding has been affected by that reprioritisation, or did you escape?

MS FLETCHER (WLSV): We haven't had a reduction in our actual funding in dollar terms, but the provision that will be put in our service agreement that refers to the core services now excludes reference to policy and law reform activities.

DR MUNDY: Okay.

MS FLETCHER (WLSV): So we're a little uncertain how that's going to be interpreted.

DR MUNDY: Is your current interpretation that would extend to not participating in the inquiries of this commission?

MS FLETCHER (WLSV): I think our approach is likely to be not to seek permission, but to ask forgiveness afterwards because we believe it's a pretty fundamental part of civil society that you have public commissions and they need information from the people at the frontline and, you know, that's what we do. We see 3000 women every year, and that's what informs - - -

DR MUNDY: To be fair, I think the commonwealth's intent is that their funding is not to be used for that purpose, rather than your organisation - - -

MS FLETCHER (WLSV): Exactly.

DR MUNDY: - - - isn't to pursue those activities. You touched on this small claims tribunal and I must there are some other matters that we wonder why need to go to courts too, and we might touch on those just in a moment. Obviously this would need to be a federal tribunal where - I think we are with the Commonwealth on attempting to reduce the bureaucracy around its own tribunals, whether what occurs, how success or not is a matter for others.

But would you envisage this tribunal - I guess there are essentially three options: it can stand alone; it can sit within the AAT's broader Commonwealth tribunals infrastructure; or it could effectively hang off either the circuit court or the Family Court. Now, given it's a small claims sort of jurisdiction, you're not expecting there's any complex issues of law, that would sort of lead you to the view that it should hang off the circuit court, if it's going to hang off either of them. Do you have a view on where that might be and why that would be appropriate?

MS MUTHA-MERENNEGE (WLSV): My first response would be that it would sit most appropriately with the AAT where there's already an existing tribunal structure and existing processes and procedures. What would be important is that people would understand that that is the process that they need to go through. So currently there's an understanding that if you are looking to pursue a family law case, it sits under the federal circuit court or the Family Court, and so it's really about making sure that there's an understanding amongst users of the court system that there's a different process that they need to access.

DR MUNDY: The difficulty I see with that proposition is that the AAT has no judicial function. It deals solely with matters of dispute between - well, matters in dispute with the Commonwealth. It's an administrative tribunal. It's not a judicial tribunal, so therefore it would need to be given jurisdiction to deal with matters between contesting parties which it doesn't have at the moment, and that raises questions under chapter III of the constitution as to its character. An easier problem for states to resolve with respect to tribunals and determinative tribunals between competing parties.

The circuit court doesn't suffer from that jurisdictional issue, and I think it's fair to say that - I mean my concern would be, and this is no disrespect to the president of the AAT who I have known for a long time and who has assisted us in this inquiry, is they're not set up to deal with family law. They don't deal with it now, and I'm just wondering whether the registrars and the edifice, the processes of the circuit court where the vast bulk of family matters

are dealt with and they're skilled with that in both a legal sense because they know, but also in a dealing with the people sense, might it be a better place? I mean I'd really invite you - if you'd like to come back to us with a short submission on where because I actually think it's an attractive idea, but if we're going to make a recommendation in this regard, I don't want to get knocked off on a jurisdictional question at the first hurdle. So if you'd like to think about that, we'd be really grateful.

MS FLETCHER (WLSV): Yes.

DR MUNDY: The other area I wanted - and I think we'd like to get a sense of, we've had a number of quite moving stories come to us about the resolution of people's estates and family disputes when someone dies, not particularly in relation to issues faced by women, but I suspect women are often - do you see many of these sorts of matters?

MS FLETCHER (WLSV): We'll sometimes get calls for advice, but because we have specialised, now 14 years ago, most of our referrers are quite - - -

DR MUNDY: Yes.

MS FLETCHER (WLSV): So because we work in violence against women in a relationship breakdown, we tend not to get those inquiries.

DR MUNDY: Well, let me put it to you in another way. Would your sense be that this is a problem for - I guess where we're going is we think the Supreme Courts are a pretty blunt device for dealing with what are essentially family disputes. Would that be your stance?

MS FLETCHER (WLSV): Well, it certainly would be, you know, from past history of dealing with property matters obviously that happened until recently with de facto property matters. It is complex and blunt, but obviously I'm not familiar with the particular areas of - - -

DR MUNDY: No. I mean if you want to go away and - I mean I guess what we're interested in - it's similar to the problem that - what brought me to this is this proposition about the resolution of small matrimonial disputes around property, whether a similar mechanism might lead to - because it's very traumatic for people. We've heard some shocking stories and we all know about them. Whether the sort of notion that you've prescribed suggesting for small matrimonial property disputes broadly defined might actually not be a device jurisdictionally founded properly that might actually assist in the resolution of what are other property disputes of a family nature.

MS FLETCHER (WLSV): Are you suggesting that that would happen in a commonwealth court?

DR MUNDY: No, it would happen in a state tribunal, I suspect.

MS FLETCHER (WLSV): In a state tribunal. Yes.

DR MUNDY: To be fair, the chief justice of Western Australia says it's not a problem. Other people tell us it's a problem. It may just be the conduct of the Supreme Court of Western Australia that's the difference here. I'd just be interested in your views.

MS MacRAE: The other main area that you talked about was the complexity of the law, and I think we absolutely agree with you there. One of the things you mentioned was possibly looking at some plain English drafting, and I guess I have some experience of that in the tax area, where we now have two Tax Acts, because we started out trying to do a plain English and it turned out so hard, and the benefits turned out to be so minimal that people decided it wasn't worth doing any more.

So I guess I just caution a little bit, and some of the experiences from there - and I'd be interested in your views on them - but one of the things was, if you're worried about the layman going to the Tax Act and not understanding it, the layman never looks at the Tax Act. The accountants might occasionally, but even they don't look at the act very often. The lawyers do, and most other people rely on someone else simplifying it for them anyway, if they even are ever going to touch that area of law, because if they've got a problem, it's very rare that someone is going to go to the legislation. So I guess the benefits of that plain English, who are we doing it for and why would we put resources into it? So asking that question initially.

Then I think the other problem that you run into early is that the people that do use the law say, "But we know now what that word means and we'll lose all the precedent around that. So if you just want to change that word" - I mean, the arguments became very entrenched. But things that looked to me, as a non-lawyer, absolutely commonsense, "Why wouldn't you put a simple word in here," "But we've got precedent around this word, and if we change this word in this legislation, there are implications over here." All those arguments sort of ran, and it just became very bogged down, hugely resource-intensive, and I think in the end everyone agreed, "Did we really gain much out of that process?"

So I guess I'd just be interested in how wedded you are to the plain English drafting and whether you could see an upside that I might be missing,

because I have to say that initially when that project was first mooted, I thought, "Good idea," and in practice it just didn't turn out to be such a good idea.

MS MUTHA-MERENNEGE (WLSV): I think that it's not just legislation that we consider there needs to be plain English drafting. I think it's looking at what are the court applications that people need to fill out, what's the legal information that's available to users of the court system when they actually go to court, so that they understand court process. I think that's probably the contact that users of the court system have, is through when they attend - - -

MS MacRAE: Sure. Okay. So you're not looking so much at the legislation but more at the periphery of - - -

MS MUTHA-MERENNEGE (WLSV): I think the legislation could do with a redraft.

MS MacRAE: Yes, there are certainly segments of it I know that we've had some submissions on, where basically lawyers work around what the law says, with workarounds, but they have to work around because the law itself is a dog, basically.

MS MUTHA-MERENNEGE (WLSV): But I do think - I mean, when you look at where the users actually come into contact with the court system, it is going to the registry and being given a bunch of forms that they don't understand. It's, you know, the access to legal information on the Family Court's web site. I read that and I don't understand it.

MS MacRAE: I have to admit, I did watch their video on just filing for a very straightforward divorce, and I thought, "If this is as easy as you can make it, you haven't done a very good job, to be honest." I mean, even the forms had 15-letter-word titles that they kept repeating, and I thought, "If my first language wasn't English, I would really be struggling. You keep repeating all this nomenclature of words, and why do we need to have something that complex?"

MS MUTHA-MERENNEGE (WLSV): Mostly I think that the external expertise does assist as well, because I think as lawyers it's just our second language to use all of these words, and an external expert can actually bring a different perspective to that.

MS MacRAE: Just in relation to your casework, you do have quite a heavy load there. Even though you are able to see that four to five hundred a year, how do you ration those things? Because I'm assuming you do get a very -

even though that looks like quite a big number, I'm sure it's the tip of the iceberg of people that come to you.

MS MUTHA-MERENNEGE (WLSV): It is, yes.

MS FLETCHER (WLSV): Before we made this recent change to our casework guidelines to be more targeted, we probably - 50 per cent of the clients who were actually taken to our casework meeting for consideration couldn't get taken on because we just didn't have capacity. What we're trying to do, therefore, with the new casework guidelines is to be much more targeted, and we basically developed sort of a simple sliding scale that really says, "What barriers to access to justice does this client face, and what will be the impact of this case for her as an individual, and ideally a bigger impact that might then have a flow-on effect to other cases?" So we're only three months into using the new guidelines, but it is changing the demographics of the clients we're taking on from going matters, which is exactly what we want to see.

DR MUNDY: How is it changing the demographic?

MS FLETCHER (WLSV): There are fewer clients - you might have been told about the income brackets in our (indistinct) reporting, which are a bit silly. So under 26,000 is low, between 26 and 52 is medium. We had more between the 26 and 52, and 52 and above even, under the old guidelines, because, as you've probably also been told, one of the key roles legal centres play, particularly centres like ours, is that gap between legal aid and really can't afford to pay, or, as our submission explained, excluded for some slightly strange reason, like having a financially associated person, or unfortunately having had to leave the matrimonial home, so now it's considered an investment property, and you might only have $10,000 in equity, but bang, you've got no access to legal aid. So we'd really try to make sure we're reaching those women, and those women who face other particular aspects of disadvantage.

DR MUNDY: Those examples which are highlighted there, which seem to be a triumph of form over substance, are they issues that you bring to the attention of Legal Aid?

MS FLETCHER (WLSV): Yes.

DR MUNDY: How do they respond?

MS FLETCHER (WLSV): I think with some of them they're aware they're an issue. I think it's a challenge, you know, they're a big organisation, they have a $156 million turnover, we have a $1 million approximately turnover.

We can be a bit more flexible. I think probably the issue would be that if they introduced more discretion in their grant offices, it would become too cumbersome a process to manage. The response has generally been - you can challenge those decisions on occasions, but again, as we've included in our submissions, the process of appealing is quite complex.

DR MUNDY: And time-consuming.

MS FLETCHER (WLSV): And time-consuming, yes. So often private firms who do legally aided work, it's really not worth their while from a financial point of view, because they would already see themselves as making a loss, to actually appeal, and even seek external review, which we have on occasions.

DR MUNDY: If they're doing underfunded, legally assisted work, they're going to do a certain amount of it, and if they don't provide it here, they'll provide it somewhere else.

MS FLETCHER (WLSV): Yes, and that's exactly the experience in family law, where even firms that do legally aided work, they will maintain only a small proportion of their overall work as legally aided, and sometimes view it as a community service as opposed to a moneymaking exercise.

DR MUNDY: We heard from Victoria Legal Aid earlier today, and they were suggesting - we've had issues about what has been referred to as "juniorisation" of private providers, and they've suggested from their perspective it's much more a problem for them in family law work than it is, say, in criminal work, because basically, if you're a criminal lawyer, you're doing a lot of - that's the business, that's the customers.

MS FLETCHER (WLSV): That's right. The same in child protection as well.

DR MUNDY: So I think where they said their real problem was, with private work they provided grant and aid for, is in the family law space. Is that - - -

MS FLETCHER (WLSV): That would certainly be our experience, and certainly when we're trying to find lawyers in regional areas who do legally aided work at all, in some areas it can be quite difficult.

DR MUNDY: Is that because of the money, or because they might act - because we've heard a lot about conflict issues in legal aid. Is it a conflict issue, or - - -

MS FLETCHER (WLSV): In this context that I was just mentioning then, no, it's about just money, it's not economically viable.

DR MUNDY: I mean, if you accept the old notion that you do legal aid at less than commercial rates but you still - the argument isn't that it's not being charged commercially, it's that it's so far below, is essentially the argument. How would we think through about some sort of mechanism by which those rates could be struck? Because if an understanding could become about the mechanism of how the rate should be struck, and an expectation - there then becomes a capacity to work out how much more money should be provided for legal aid and family law matters. So do you have any ideas about how 80 per cent of something - - -

MS FLETCHER (WLSV): I don't in a percentage term. I think it would be a bigger inquiry, including how the legal aid guidelines sometimes actually contribute to a lack of early resolution of matters because of how they're structured. So although there's legal aid for RDM in Victoria, roundtable dispute management, other sort of negotiated outcomes, and not really supported by the guidelines. So if you were doing a privately funded matter, you would spend a lot of time on the phone, writing letters, emails, talking to your client, trying to resolve the matter by negotiation. That's not well-funded under the guidelines, it's funded by stage of court proceeding. So those things actually structurally disincentivise settling, because you're not funded to do those negotiations. So I think that that's probably a bigger issue than the - - -

DR MUNDY: So you'd get paid to go to court?

MS FLETCHER (WLSV): Yes. You see it in other jurisdictions as well, but because they've come to operate in a bit of a churn sort of way, like summary crime and child protection. It's a problem, but it's just so inherent in the whole system, which is funded by Legal Aid, whereas the family law system, you see it done well when people have the resources to throw at it.

DR MUNDY: The other observation that Legal Aid made to us was that they thought - and Legal Aid rate is about 150 bucks an hour, they think. That seems to be a number that we've been told around the country, so let's assume that's the number. Their view wasn't the hourly rate, it was the amount of hours the rate was being applied to. So there was no recognition of complexity.

Now, whilst we have a view about time based billing and the desirability of fixed fees, I mean, I guess one question - and I'd be interested in your views about how this would assist in the problem you've just described - was that if the rate became a function not of necessarily going to stages of the court

proceeding but rather an assessment of the complexity of the matter, and payment was on resolution, whether it be through a court process - and there may be some issue around supplementation for court appearance - but the funding of these matters was to get the family law matter resolved and an assessment up front was made of, "Well, some of them" - I think I used A through D, and you wouldn't get as much for A as you would for D on an assessment. Do you think that sort of approach might - and I accept there's all sorts of hooks through that.

MS FLETCHER (WLSV): Yes. I think that that's probably something that we'd like to sort of think about and then come back to you on.

DR MUNDY: I'm just trying to think about how - because really, as far as Commonwealth Legal Aid is concerned, for the vast bulk of matters, it's family law. There's a bit of drug crime money and there's virtually nothing else. So it is, I think, within the Commonwealth to drive behaviour in this space, with an alternative model for - and it comes to, I guess, our view about, should we quarantine civil legal assistance? The reality is that Commonwealth quarantines its own money pretty much anyway. So if you could have a think about an alternative funding model for legal assistance, particularly reflecting upon the perverse incentive you identified about, "Let's get to court," that would be really helpful. If you wanted to talk to your colleagues interstate, a national view would be even more helpful.

MS MacRAE: You talked about doing a statewide analysis, and I'm just wondering what's the timing on that. In some respects - well, is that, who, the national body, or is that - - -

MS FLETCHER (WLSV): We've used this - the national association has developed a framework for undertaking legal needs analyses, which is really good. It's generally geared towards centres in local areas, so general centres in local areas rather than specialist centres that have a statewide catchment. So we've had to sort of tailor it for that, and we're really kind of looking at geographic areas where our priority clients, for want of a better word, are in greater numbers or greater concentrations, and also particular groups who may be underutilising our service. We're hoping to have that finished by the end of July.

DR MUNDY: Could we trouble you to forward us a copy when it's publicly available?

MS FLETCHER (WLSV): Certainly. Yes.

DR MUNDY: That's still within our time frame, just.

MS MacRAE: I guess the other sort of question around that is, is that data that you think, "I'm sure it would be useful to other people," and is it somewhat of a surprise to you that it's fallen to you to do that sort of analysis when you think that something like the Legal Aid Commission or elsewhere might be tasked with doing that sort of collection and have that sort of data readily available.

MS FLETCHER (WLSV): Yes. I think that question actually points to something that's quite important about the distinction between legal centres and Legal Aid. I guess because we have our specialist area, it would be very difficult to do a statewide legal needs analysis of all the legal needs of Victorian women, but because we're a specialist centre working in relationship breakdown and violence against women, we are targeting those issues, that makes it more feasible to do a statewide analysis. Certainly we will be accessing data from Legal Aid to help us look at some of the geographic areas that are coming up as areas that we should be paying more attention to.

MS MacRAE: I'll just ask you, on the specifics, and it is a very specific matter, but the Victorian law in relation to where there's an unrepresented party, so that legal aid can't be provided to the other side - if one side is unrepresented, the other side can't - I mean, we understand completely, that was - well, it was one way of rationing funds, and we had the rationale given to us this morning from Legal Aid - but does that present particular issues to you? Do you find that that's been - well, I guess, has it increased your caseload? Has it reduced the extent to which you can help women who you think need it? Do you have a general comment to - - -

MS FLETCHER (WLSV): Yes. It's a really significant issue, and that change came in early last year. We saw almost immediately a real impact in terms of women seeking our help. They were women who were at the very end stage of their proceeding and they had lost legal aid at the trial. So they were faced with either trying to negotiate a settlement or attending the trial by themselves and arguing their case, and for most of them it wasn't really a choice. You're talking about cases that are high conflict, they've got really complex issues, like drug and alcohol, mental health issues, and it wasn't really a choice for them to attend trial.

So we have duty lawyers at the Melbourne Family Court who were negotiating settlements at the door of the court, spending five hours doing that, because we had women who didn't want to go into court to argue their case. So, you see, we've been seeing a lot of quite poor outcomes for women at that stage, and it's certainly an issue. We've been collecting case studies around it, but it seems like quite a perverse outcome that you have both parties who are

legally aided, and they're both legally aided because they're disadvantaged parties losing their legal representation at trial.

DR MUNDY: So they're legally aided up to the point of trial, and then it falls away? It doesn't seem like a sound investment of public money.

MS FLETCHER (WLSV): No, we would agree.

DR MUNDY: Legal Aid did make the point that in certain circumstances, I think where violence had been perpetrated by one party on the other, I think there was a capacity for the judge to order Legal Aid to provide assistance.

MS FLETCHER (WLSV): The exceptions are very narrow. They're much, much narrower than that.

MS MUTHA-MERENNEGE (WLSV): So my understanding around the actual guideline exception is for a party that has an acquired brain injury, a party that has a diagnosis of a mental illness through a public mental health service. I know there's another one, but it's not related to family violence.

DR MUNDY: So it's more about capacity, in your mind, than anything.

MS MUTHA-MERENNEGE (WLSV): The exceptions.

MS FLETCHER (WLSV): Yes, and they're about exceptions that can be objectively proven by another agency having done some work. You have to be, under the Mental Health Act, recognised as having a mental illness, and Legal Aid's reluctance to change the guideline is that very significant proportions of matters that go to trial do involve allegations of family violence. Estimates range between 60 and 80 per cent of matters that go to trial. So effectively they would say, "Well, if we change that, then we're giving it to everyone, and we can't afford it."

DR MUNDY: We did ask them for data on the number of people who are actually having legal aid removed in the circumstances and also these other orders that apparently have been available for five years or so. That was - - -

MS MUTHA-MERENNEGE (WLSV): We've not heard of - I mean, we've heard of cases where judges have asked Legal Aid to appear to explain their guideline to the court, but not that they have been able to actually order that Legal Aid represent the party.

DR MUNDY: You might like the transcript of Legal Aid will be available - what's today, Wednesday - so by Friday or maybe Monday or Tuesday next

week, so you might want to have a look at it and if there's anything you want to comment on we'd be interested.

MS MUTHA-MERENNEGE (WLSV): Just very quickly on that point. Those guidelines are non-reviewable. So the decision to restore legal aid at that point in trial is not a reviewable decision, so our lawyers have written to Legal Aid to go through the review process and at each stage they say that the guideline can't be reversed, the decision can't be reversed.

DR MUNDY: Can they be directed by the judge to review it, or can the judge stay the matter until Legal Aid has thought about it again?

MS FLETCHER (WLSV): They haven't tried that in the Family Court, have they yet? I mean, that's obviously happened in criminal matters as you know in Victoria, but I'm not aware that that's - - -

DR MUNDY: But that's essentially because of Dietrich and those sorts of issues.

MS FLETCHER (WLSV): Yes, that's right.

DR MUNDY: You mentioned that you specialise in family violence and essentially family broadly defined.

MS MUTHA-MERENNEGE (WLSV): Yes.

DR MUNDY: Do you have any observations or comments you would like to make on other areas of civil law where women may suffer from disadvantage and how those issues get addressed and what might be done to improve outcomes?

MS MUTHA-MERENNEGE (WLSV): I would say - and it is very interesting, I think, looking at Victoria Legal Aid's reports. I think that users of the criminal justice system are marginally men and for women they're more affected by child protection issues, child support, discrimination, family law and family violence, and that's where from our point of view more funding needs to be directed to address the gender inequity around legal aid funding.

DR MUNDY: Okay.

MS MUTHA-MERENNEGE (WLSV): I just wonder if I could very quickly on that, on the point around the trial funding, if the Commissioners are interested, we do have clients who are very happy to speak of their experiences in losing legal aid, in not being represented, in having to represent themselves

at hearings. So please let me know if you would like to speak to any of the clients.

DR MUNDY: We will, and any of the case studies which you could provide us with. It's just we're - well, I haven't seen my own home since Monday of last week and we are having to draw an awful lot of material to a close.

MS MacRAE: It's a small matter which we haven't talked a lot about in our report, but there is a vexatious proceedings bill currently before the Victorian parliament, as I understand it, and I'm just wondering whether you see that that's got any particular relevance for the particular groups you're involved with and whether that will be helpful or not.

MS MUTHA-MERENNEGE (WLSV): Not in the federal jurisdiction because it is a Victorian bill, and we would like to see something similar at a federal level and I think that would be helpful, and I do think the bill is quite useful in terms of the way it grades vexatious litigants, and we've mentioned that in the submission as well, that there are a few different strategies that would assist in addressing vexatious litigants and it's certainly something that we see in high conflict family law cases as well.

DR MUNDY: I think the chief justice of Western Australia drew our attention to the fact on Friday that men are more inclined to be querulous litigants than women now, and his Honour probably does see matters on appeal on family law matters in Western Australia. Is your sense that within the family law jurisdiction that where parties tend to go querulous, they tend to be men rather than women?

MS MUTHA-MERENNEGE (WLSV): I have to tell you I'm quite biased about this.

DR MUNDY: It's a special question of fact.

MS FLETCHER (WLSV): Yes.

MS MacRAE: So those gradings would give the court more latitude, I guess, to impose some sanctions, where at the moment the bar seems to be set generally so high that the court understandably is concerned about imposing those kind of sanctions given that it's a pretty heavy sanction. So the Victorian arrangements look quite attractive from that point of view?

MS MUTHA-MERENNEGE (WLSV): They were. They were graded in terms of the particular court that you could apply to, and it also allowed the particular person who was the subject of the litigation to apply themselves in

some circumstances and I think that's really useful and at the moment for a lot of parties, for the women that we see, that they're not able to do that, they're quite powerless in that sense and so actually giving them the avenue to do that is useful.

DR MUNDY: Putting aside the obvious emotional impacts, if there is - let's assume it is a querulous litigant which the federal jurisdiction can't deal with at the moment, and obviously the woman who is on the other side of this matter needs to go to court because she has probably got a property settlement she wishes to defend and there's probably some custody issues that she is keen to preserve, will she get legal aid assistance if she - how does she - other than coming to yourselves, will legal aid support what may, in effect, be, you know, a victim - she is a victim of this querulous litigant and probably the primary victim as opposed to the judges get paid enough to put up with this.

MS MUTHA-MERENNEGE (WLSV): She would probably have to meet the means test.

MS FLETCHER (WLSV): Yes, that's right. I mean, she would have to fall within the means test and so on, but I guess she may also face another issue around whether there's a substantial issue in dispute because if the vexatious litigant is litigating over something that really isn't an issue, which often happens, or is something really minor about, you know, changeover being at this McDonalds rather than the one in the next-door town, you know, Legal Aid aren't going to fund that, and she's still going to have to front up to court. I mean, they may fund it under a public interest exception but because that's normally more about actually, you know, public interest litigation that's going to achieve something big - - -

DR MUNDY: So she might get struck out because of some sort of means test.

MS FLETCHER (WLSV): Means, yes.

DR MUNDY: But it may also be struck out on a matter basis.

MS FLETCHER (WLSV): Yes, because it is not a substantial issue in dispute.

DR MUNDY: She would then have to bear those costs, and because it's a family matter she couldn't get restitution from the claimant.

MS FLETCHER (WLSV): That's right. We've had - I'm not sure that we've had them in family law jurisdiction in fairness, but in intervention order

matters we've assisted a client, we've been able to have a barrister assist her pro bono who has had over 200 applications brought against her, and even the applicant, the vexatious litigant was declared vexatious, but even then, you know, he can apply for leave to issue an application even though he's been declared vexatious. She comes back to court, you know - - -

DR MUNDY: She has to respond.

MS FLETCHER (WLSV): The balance is quite off in those sort of cases.

DR MUNDY: I mean, any more information you can provide us on that, because vexatious and querulous litigants come up a lot. People have very different views about what vexatious litigation is. Sometimes it seems to be just the normal assertion of rights contrary to the interests of the person claiming the litigation is vexatious, but circumstances like this, I think any more we could - - -

MS FLETCHER (WLSV): And I think it's a big burden on the court system, leaving aside the impact on the individual on the other side of those applications.

DR MUNDY: Your experience would be it's a bigger problem in the superior courts because they tend to be matters on appeal because the facts have been - - -

MS FLETCHER (WLSV): I wouldn't say that necessarily, no. There are a quite a lot in the Magistrates Court around intervention order matters, you know. It will be an appeal and then it will be a variation application the next week, and then it will be a revocation application two weeks later, and - - -

DR MUNDY: So they just keep bringing - they're not necessarily abusing the appellant process, they're just abusing the process per se.

MS MUTHA-MERRENEGE (WLSV): It's the same at the federal circuit court level that they will bring an application because there has been a change in circumstances in relation to the children which is really no change in the circumstances but it has to go to a hearing and the other party has to appear as well. So there's no sort of bar high enough that they have to jump over.

DR MUNDY: That's interesting, and I think the sense that we've largely got is just progressive appeals and then it just circles around in the appellant jurisdiction. All right. Well, thank you very much for that. That's been very helpful.

DR MUNDY: Could we have Dr Elizabeth Curran, please. Could you please state your name and the capacity in which you appear.

DR CURRAN: My name is Dr Liz Curran. I am a senior lecturer at Australian National University.

DR MUNDY: A very august institution. Dr Curran, could you give us a brief five-minute opening statement?

DR CURRAN: Yes, thank you.

DR MUNDY: Then we'll put some questions to you.

DR CURRAN: Thank you. Firstly thank you very much for the opportunity to appear today. My last written submission was the third one and I found that in each submission I was sort of around a range of different areas, so apologies for that. I think that reflects the fact that I've been working as a lawyer for over three decades. The majority of that has been in Legal Aid, community legal centres, private practice, and also as an academic whose research for nearly two decades has been in relation to access to justice and human rights issues. So apologies for the three.

But there are, I guess, four main points, just picking up across the submissions that I'd like to cover on in a very short, hopefully, opening. The first I wanted to start with I guess was when I did the research evaluation of Legal Aid ACT I interviewed a range of clients, and I just wanted to note that overwhelmingly they had explained to me how but for the intervention of Legal Aid ACT their lives, which were often filled with trauma and stress, would have been very different, and that the interventions were pivotal often in positive, more often overwhelmingly in positive ways. For example, reunification with children, protection from violence.

Key elements seem to be good triage, good connection with other non-legal agencies, and I guess an unknown quantity that they said was persistence by their lawyer, persistence with them because of their complex needs, but also persistence with horrible other sides and a complex, difficult to navigate legal system that they felt was often very unsympathetic to their personal circumstances. So I thought that starting with that was an example of what access to justice arrangements should really be about.

The second point that I wanted to note in opening is I've been very encouraged by the Productivity Commission report itself, the draft report, which picks up the findings of Coumarelos and Cunneen particularly around holistic joined up integrated service delivery and the complexity of many

human beings in the justice system, which they often find hard to navigate. So I sort of wanted to reiterate that because it would be awful to see that part of the report lost in a final report.

But one area which struck me that seemed to run counter, and I said this in my final submission and that's why I spent a bit of time on it, to the general thrust of the report was that around the funding, and I know that that's a very difficult and fraught area for you anyway. But I raised in my final submission the concern around the proposal for tendering. That process can be very competitive, secretive which in itself will create barriers to the needed and necessary collaborations to help people who are accessing different services.

The other thing that I would like to talk about just very briefly is funding can be too political and ideological when done by governments, and that concerns me particularly given we've had two significant empirical studies on what is effective innovation and strategic methods that are needed in order to be effective.

One example of that sort of concern about government and ideology, and that runs across all political parties, is that in the budget announcements recently it appears that a lot of the what I would call innovative services that were funded - one I'd like to highlight is Inner City Community Legal Centre which is running a service at the Royal Women's Hospital for victims of domestic violence, and the idea is that rather than waiting for them with fear and the experience of trauma, to actually situate a legal service there and then at the hospital to pick up those people, and I note that that particular service has lost its funding as of the end of this year, this financial year, sorry - sorry, next financial year. They've been funded til end - sorry, June 2015.

The reason that I raise that as an ideological concern is nationwide we have a national commitment to prevention of family violence and doing something about it. We see a lot of rhetoric about it. The concern is that the reason for the defunding of that service was pretty much it was among a number of initiatives that were announced by the former Attorney-General Mark Dreyfus that were dropped and decided not to be funded because they were initiated by the former federal government. What I would argue is that in fact it was about the nature of the project and the nature of the program and situating a legal service at a point or juncture when people most need help, particularly groups that really we're seeing are more and more disadvantaged by fear and violence.

So my concern is it's not being - a lot of funding decisions need to be or should be better informed by policy information. We have two pivotal pieces of research now by Cunneen in relation to indigenous legal need and

Coumarelos in relation to the law-wide survey. So I guess what I'm saying is it would be really good if somehow or other the funding of legal assistance services across Australia could actually be based on empirical research about what is needed and what is effective about a service through service evaluation that actually is done in partnership and cooperation with those delivering the services.

You just heard from the Women Legal Service Victoria, and I think that is an example of how the vantage point of those who see things on the ground can actually assist in explaining why services are delivered in particular ways to particular groups. So I guess the argument is really to try as much as possible to take the funding of these essential services out of the political fray as much as is possible. That would be something that I would ask. Not an easy task, but something that I think would be worthy because I think it's a problem in the way in which, you know - and I know that the Commonwealth has to prioritise a range of services, but this is a human service and is at really the cutting edge of people's human rights. So that's pretty much the opening.

DR MUNDY: Okay. Can we start back on the funding question? I think it is a misrepresentation of our report that we have a proposal for competitive tendering. I think we said it was an option.

DR CURRAN: Yes. Fair enough.

DR MUNDY: The attraction that competitive tendering has is that it provides a mechanism of accountability that governments, possibly at some distance from the service provider, have and we are aware of this collaborative model that gets discussed, and we understand clearly the merits of it. I guess the question is that in providing funding that will be scarce funding for services, how can governments be assured that the funding goes to the areas of greatest need because it seems to me that the collaborative model works on assumption of incumbency, that there is a body or a group of organisations there who are able to collaborate, and therefore it doesn't have a mechanism to draw out necessarily the provision of new services in new areas and that's, you know, the community nature of the CLC system is of that character.

So I guess the question is just how would you see the identification of new services in new areas, not new services or add-ons to existing arrangements, working? I mean that's our concern, and the other is, quite frankly, how can the taxpayer be assured that - and I'm not saying they're not getting value for money, but how can they be assured, other than us saying they're getting value for money, that they're going to in the long run?

DR CURRAN: Yes, and I agree, I think it's a very important point in terms of

transparency, accountability, and also value for taxpayers' money, and what I would say is I've now, for a number of years, been evaluating legal services and, you know, some services are good at some things and some services say they're good at some things but when you actually go and have a look they're actually not doing it. So it's about matching the rhetoric with the actual reality as well.

DR MUNDY: Yes.

DR CURRAN: Also, in terms of the challenge with a large country like Australia and a federal system and remote and rural communities it is really challenging to get some services into areas remote - for instance, Aboriginal communities would be one key example that I would give, so I completely agree and understand the challenge that you're talking about, and I think my view is that the creation of an environment in which services that by and large deliver services to the most vulnerable and the most disadvantaged, which the studies are showing have the highest rates of legal need, multiple legal problems, often really complex and are least likely to get the help of a lawyer is a real challenge.

I think that, firstly, with existing services I think that they - I used to be a director of a community legal centre here in Victoria and we estimated that - and we actually ran ourselves a quick trial with a range of other legal services in the north eastern region of Victoria and we came up with a figure that we spent 36 per cent of our time on compliances. Reporting to Legal Aid, reporting to the CLSIS data system and we could not actually extract or use any of the information that we put in and that they weren't asking the questions that were relevant to inform us about how to improve or what and where our services need to be delivered.

So I guess my argument would be that I think that there needs to be a more collaborative - using that word again - a collaborative model whereby an existing service actually is supported in actually properly evaluating their service. One of the reasons that when Legal Aid ACT commissioned me to do the research in the ACT was to develop a model along the lines of Hazel Genn's work in the United Kingdom which is capable of using local understanding and knowledge and developing a model for evaluation of legal services that could be adapted and replicated and that's why we've put the methodology on the web site, and the idea of that was it was an action research model where you actually worked with the services concerned, led by the most recent and informed research in the specific area.

It may be that, say, it's an indigenous service led by the most recent indigenous - information about indigenous services and how to deliver them

effectively, international and domestic, and the idea of that was a low burdensome low cost snapshot approach to research that was done on a regular basis and can build up comparisons to demonstrate impact, and then the idea of that was to actually measure whether or not the service was effective or not and if it wasn't effective - because you worked with the service and the people delivering service and the clients of the service - and that's an important factor, so it's a 360 degree angle, the stakeholders, the clients themselves were part of the research, and you actually worked out what was working, what wasn't working, why it wasn't working, and how to proceed.

Now, on that basis I think that would provide a very, very useful - that sort of research useful platform for forming funding decisions, going back to the point that I initially made about funding decisions often being made divorced from or not taking into account evaluations. I know of a number of Aboriginal services which had just recently been evaluated and have been de-funded over many years and the local community has said, "I don't understand why we didn't continue the funding. It didn't cost them much and yet we were really making inroads" and so I do need to flag that some achievements or impacts do take time because of entrenched in the disadvantaged.

So I think if we could create a patchwork across the country of effective evaluations and then in that process, particularly if you involve legal and non-legal agencies, which is what I've been doing my more recent research with Consumer Action Law Centre here in Victoria who are appearing this afternoon, but bringing in line the discussions between legal and non-legal services. Then you can actually often identify partnerships in different areas where community groups or community organisations - like I'm doing some work currently with Loddon Campaspe Legal Centre in Bendigo.

What you can actually do is identify other areas which need support and assistance to set up a service in a remote rural area and they can just take the - it's very simple to do a legal needs analysis. The first step is to not call something a legal problem and then you're on your way because most people don't know how to identify a legal problem.

So I think that then that informs funding decisions and I think that there needs to be a link between the Commonwealth Attorney-General's Department and a respect for the expertise and the experience on the ground and a genuine partnership between those two and then that informs the funding arrangements and I think if you have that consistent model - and I'm not saying just my evaluation technique; there are a number of different organisations that are doing it differently - and the irony of all this is they're doing it differently because they've had these - some of them have been doing this innovative stuff for a while but some of them are actually listening to the results of the LAW

Survey and they're actually saying, "All right, we need to be doing things differently. We now know about advice-seeking behaviour." A lot of it used to be intuitive. Now they've got empirical studies, and they have been changing the services and just starting to be more innovative.

The problem is there are some community legal centres and Legal Aid Commissions that are slow to respond to that and to shift, but I think that there's - they're actually going to be left behind and I think that there's an issue of leadership now in the sector. They've got the material that they need. There are leaders out there who are demonstrating it. I wrote a report for - on behalf of Footscray Community Legal Service and Consumer Action Law Centre, strategic approaches to problem solving. It's now had significant hits and downloads and a lot of centres around the country and internationally - I've done some work in Canada as well - are now saying to me, "We want to be more effective. We want to learn how to communicate more effectively with communities on the outer edge", and some of them aren't being led by legal centres, they're being by community health centres in remote communities.

The difficulty, I guess, the more remote rural that you are and the less services you have you don't have that groundswell of people, even in non-legal service, to initiate the action and that is an issue, and I don't necessarily have the problem to that other than having something that's replicable, available, cheap, and allows for adaptability according to the local communities. Sorry it's such a long-winded answer, but I do think that issue of partnership and recognising expertise so to actually deliver the service delivery and having it processed by the very clients that we claim to be assisting are heard and have a voice and we can learn as to wether or not they think the service is effective is absolutely pivotal, and often they get lost in any funding model. The voice of the communities who often don't have a voice, so that's what I would advocate there.

MS MacRAE: So when did you do your evaluation of Legal Aid ACT?

DR CURRAN: 2011.

MS MacRAE: Okay.

DR CURRAN: Second half of 2011 and we produced the report in March 2012.

MS MacRAE: Okay. And is that - you said that you were looking at something that was ideally would be replicable. Is it the sort of - could you do a similar evaluation for other Legal Aids around the country using that same model?

DR CURRAN: Yes. Yes. You could use it to do an evaluation of a family violence service. You could use it to do an evaluation of an Aboriginal health service. You could use it to do - the idea was to get something that was able to measure impact on client outcome and quality service. So it has 11 outcomes - the work that I've been doing with Consumer Action because it's consumer we've developed some different, slightly tweaked outcomes, some additional ones, so it can be adapted for a range of different services. It doesn't have to be legal but it could be community legal centre, family violence, health services, allied health services, youth work, and that was the idea. It was based - its starting point was humanitarian organisations and some of the evaluation work that was being done internationally and a lot of it was based on the United Nations development work that had been done there.

MS MacRAE: And simple enough for someone from an existing organisation to be able to say, "I can look at this tool and apply it myself."

DR CURRAN: Absolutely.

MS MacRAE: And I don't need to have any expert skills or - - -

DR CURRAN: Absolutely.

MS MacRAE: Yes.

DR CURRAN: Yes.

MS MacRAE: Okay.

DR CURRAN: And that was the idea. I mean, we did a lot of the work around the literature of around the experience of vulnerable and disadvantaged and how it affects behaviours and stuff, so that's all there, and then they probably had their own understanding. But the idea of it is that it could actually - and what I did with Legal Aid is I trained up internally people within Legal Aid ACT who now run the snapshots on a regular basis, and so it can actually be done internal to an organisation or external if they're looking for that independent sort of - it could be done by a volunteer, so yes, it's quite replicable and low burdensome.

MS MacRAE: And do you know - I mean, I guess some of this might happen without anybody knowing about it because someone might see the web site, do their own little evaluation and you might never know - but do you know to what extent it might have been picked up?

DR CURRAN: Well, I know certainly Canada picked it up because I did some work with Law Clinics Ontario and Legal Aid Ontario around how to measure effectiveness and evaluate their own services. They've now put stuff on their web sites. I certainly know that Consumer Action certainly picked up on it and brought me to do some of the work with them and now, of course, Loddon Campaspe, the Advocacy Rights Centre has asked me to do some evaluation work with their family violence and their medico-legal health alliance to do a baseline evaluation and build on that. So, yes, it's being picked up. Victoria Legal Aid asked me to attend their strategic planning day, but unfortunately I can't go because I'm teaching the legal workshop intensive for ANU that week so - yes.

MS MacRAE: Okay. The other question, I guess, that comes to mind in relation to using this sort of evaluation work, if we were to link it more directly to funding whether there'd be an issue then about people not wanting to reveal that there are problems with what they're currently doing, and also then a concern that you might end up with a bit of a lead table that, well, we've got a finite budget here. We've evaluated these 50 programs. These five at the bottom here look like they're not performing so well. Because we've got a limited budget we'll chop the bottom five, but as you said, it's a snapshot in time and so maybe that's not the best way to look at it, that you'd be, you know, and obviously if you've got a bit of a longitudinal base, like Legal Aid ACT might have now that might help you with that. But I guess just coming back to this central issue about funding and how you link these things in, how do you - I mean, that's just some of the issues that have come immediately to mind about possibly making that link.

DR CURRAN: Yes, and I would very much urge against lead tables and all the rest of us can see where that's headed, unfortunately, but I guess the thing that I would be sort of saying is it's that recognition of the expertise, so the agencies do the evaluation and that then feeds up and there is, I think, a fraughtness about linking that to funding and I agree with you. One of the things that really made it work and made that continuous learning and development - like there were particular parts of Legal Aid that were very resistant to the evaluation and the reason that they bought into it and participated was that they felt a sense of ownership of it and an ownership of the outcomes and there is a danger that - and so they were prepared to change and some of these were people who'd been practising for like 40 years.

MS MacRAE: Yes.

DR CURRAN: And said, "It's my way or the highway," and then they were like, "No, actually, I can hear - this is safe. I feel safe in this. It's challenging but I feel like you're acknowledging the issues and I'm prepared to change." So

it was a good model for bringing about cultural change as well, and linking it to funding, I think, you're right. I mean, it is dangerous and, as I said at the outset, I see the struggle with how do you fund legal assistance services with competing government priorities but I guess what I would say is that funding decisions should be better made on empirical data and that these sorts of evaluations would provide empirical data and currently there seems to be a misfit, if you like, between a funding decision that is based on not an empirical reason for cutting the funding, and that would be, really, that, I think, is the point that I was trying to make.

MS MacRAE: Yes.

DR CURRAN: Is that I think there should be - we now have something that we've never had before, which is pivotal, qualitative, and quantitative, and I really want to stress the importance of qualitative work as I think I did in my second submission because I am aware of a number of studies that go to the Commonwealth Attorney-General's Department and other Commonwealth departments where they just look at the quantitative. So, for example, just to take a random example, kids are not in school for two weeks at the snapshot and tut tut, naughty naughty school in an indigenous community. The reason those kids aren't in school, if you actually do the qualitative study, is they're not in school because there's been a number of suicides and deaths in the families and it's perfectly human those kids were out of school attending to family business, and as a human being we would all expect kids who've lost a close family relative to take time out.

So it's really important that we not just get - and it goes back to the lead tables - convinced or hung up with just quantitative research, we need to have the quantitative and the qualitative, but my argument will be that funding decisions should be made not in a vacuum from empirical data, empirical information, and that the funding decisions we're seeing recently around de-funding some services seem to fly in the face of what this fairly pivotal and unique and never been done before Australia-wide research is telling us is the way to go.

So that would be my key thing is let's listen to the evaluations. Let's listen to the Cunneens and the Coumarelos' of this world and find out what is actually going on and then adapt our services to meet what the behaviours are of the people we claim to be helping. If we're not doing that we're not being effective. So if we're not being effective, then we're wasting taxpayers' money. So that would go back to my point, Dr Mundy, about taxpayers' money. It's all very well to fund something but if it's not effective and it's not having an impact and it's not making a different, then you've got to ask questions is how could we fund it better or how can we make it better?

DR MUNDY: I think we might call it waste, and we are almost out of time. Just briefly - and it's a question I've put to a number of participants around the re-prioritisation of Commonwealth funding away from all reform matters. How does this framework for assessment deal with those questions because it is one of the three pillars of what CLCs do.

DR CURRAN: Yes.

DR MUNDY: The Commonwealth is withdrawing assistance - funding for those activities.

DR CURRAN: Yes.

DR MUNDY: We're not quite sure the basis upon which that assessment was made. So how would this tool that you describe assist people in saying, well, actually, hang on, there is value coming from this and here's why.

DR CURRAN: Yes. What this tool recognises is that community agencies do advocacy because no matter what the service, but let's look at legal services - that's what the inquiry's about - we have a problem with trends and revolving doors. We can do individual casework over and over again. We can waste court time over and over again. There are some cases which need to go to court. It's not an issue. Sometimes the state drags individuals to court. So that's a necessary.

But there are some times when we can identify trends and we can say, okay, let's be innovative, let's do something different. Let's look at this particular issue. What's a strategic approach to solving this problem? In my final submission, and in my second submission I refer to the bulk negotiation project which is still ongoing but has saved 15 million dollars of individual's money. It's led to reforms of various industries; the banking industry, the telecommunications industry. It is an amazing - it was an idea - an idea that worked.

I think it's actually inefficient of the Commonwealth to be looking at deleting clause 5 of the funding and service agreements. I think it stifles legitimate debate. I think it's absolutely fundamental that those who are doing work on the ground can actually say this is the law, this is - it's not working as the government would - it intended. It's wasting a lot of money. It's harming community. It's causing undue stress which is causing ramifications for the health service system. We think this needs to change and going back to the submission of Women's Legal Service, it's not just that community organisations be able to talk to the Productivity Commission or the various other Commonwealth body advisories that they're on, it's that they also are able

to - sometimes - I wrote a report on this in 2007.

Sometimes legal centres have been the only voice and the sole voice in a need for change to the law and it's taken time for the momentum to build and others to see, yes, there is a problem, and the reasoning for that is that their workers connected to the case work that they see on the ground. So again, it goes back to efficiency. I think if you take away their role as advocates and you take away their capacity to have input to policymaking and law reform then you take away the voice of the people that they help and you actually take away the potentiality of solving the problems at their source, which is early intervention and prevention in its purest form.

DR MUNDY: Okay. Well, thank you very much. We are out of time. These hearings are adjourned until half-past 1.

DR CURRAN: Thank you very much.

MS MacRAE: Thank you.

(Luncheon adjournment)

DR MUNDY: Could you please state your name and the capacity in which you appear for the benefit of the transcript?

MR WATKINS: Andrew Watkins, appearing in person.

DR MUNDY: Could you make a brief opening statement, if you like, Mr Watkins?

MR WATKINS: Yes, thank you. Thanks to the commissioners for their time today. Today, I also thank the participants here who have brought a strong community founded on principles of equity and equality, fairness and a fair go, merit and perhaps some merriment. I think that description probably covers everyone except for lawyers. I'm an Australian citizen, I'm a father of three children, married for 10 years, my wedding cost about $25,000. I'm now separated and divorced, but the divorce cost about $250,000. This scenario might be typical for a separating couple with some assets and some children, so I speak on behalf of people in that category.

This cost is before adding the cost of losses of personal income, losses of business prospects, loss of employee productivity, and loss of momentum and personal energy associated with multiple mandated Court events post separation. At best, the Productivity Commission already has some idea of the costs of legal events like divorce and marital separation, but perhaps not the full cost of the injustices of that process. My desire is to address this forum today because legal events, legal suspense, and legal expense have all had a drastic effect on the effectiveness of my immediate community.

Divorce, we already know, affects some 40 per cent of marriages. The link I put today is that a system which drives productivity and ethical behaviour is one which comes with it the need for a complaints system, because we all know that not only must justice be done, it must be seen to be done, and so come the rules of evidence. To reframe, not only must justice be seen to be done; it must actually be done, and so come the courts with their justices followed by the lawyers with their injustices. The complaints system we've now created is one where not only must injustice be done before it gets seen, it must be obscene before it gets undone, and so come the legal professional legislation and the legal services commissioners.

I was attracted to this inquiry because of its main aim, or one of its aims: to study the cost of accessing and securing legal representation for effecting effective access to the justice system, i.e., it shouldn't be dependent on the capacity to pay. It should be timely and affordable. It should produce fair and equitable outcomes, and it should resolve disputes early and expeditiously at

the most appropriate level. Alternatively, we end up with a system which effectively excludes a sizeable proportion of society from adequate redress and risks considerable social and economic costs. Now, I've borrowed that wording from the issues statement.

My intention is to produce a written submission. My apologies to the commissioners for not having done so yet, but you at least have in draft some synopsis of that. A number of items which I may raise in the written form would speak to items 1.1, what is access to justice; 3.1, how much does it cost to resolve a dispute; 6.3, some reforms required; 10.4, how to improve tribunal performance; 11.5, discovery; 11.6, experts; 13.4, costs awards; 14.4, on the impacts of self-represented litigants; and perhaps something on unbundling. However, two main issue I would like to treat today are at 6.4 in relation to the complaints system. I do so with a series of examples, so we don't run foul of the Family Law Act in relation to specific cases.

Sections 6 and 7 of the inquiry welcoming further comments in relation to the powers, structure and execution of the complaints handling in all jurisdictions. As at last week, there were about 200-something submissions, but nothing in relation to this issue. I understand you've received some things verbally in the last week or so, whereas the LCA claims to speak on behalf of 60,000 lawyers, I suggest perhaps their views ought to be well tempered against the public's views. Recently, in The Age newspaper, there was an article which raised the issue of dealing with the LSC, so I know that I'm not alone in the difficulties that presents.

Of some 20,000 respondents surveyed about their lawyer experiences, some 30 per cent who had an issue did not pursue their gripe. 17 per cent did what the lawyer wanted, 6 per cent pursued resolution through another body, and only 4 per cent through a complaint body such as LSC. I'm introducing a series of examples. The first one is a complaint made to the LSC, the LSC spends four weeks looking at this issue then writes to the complainant advising, "We note that you have decided to withdraw your complaint." The complainant itself said otherwise and the complainant, therefore, had to say the same thing twice.

The second example is a conduct matter. The client has terminated their solicitor's services then asked for the client's files. There's no money outstanding, so the solicitor gives the client some, but not all of the documents. The LSC dismisses the matter on the basis that the solicitor said all files had been provided. The third example is a conduct matter where a solicitor who was sacked retained the client's personal items. The LSC said this was not a disciplinary matter and dismissed it. Common law and commonsense says otherwise.

The fourth example is a conduct matter. A solicitor refused to bill the client. The LSC said they could not force the practitioner to provide bills. The LSC then classified it as a cost matter only, did not consider this to be a disciplinary matter, and dismissed it. The LPA says otherwise. The fifth example is a billing matter for work not completed. The LSC requires the client to pay money in, but then negotiates a middle position which includes a gag order, or gag agreement. Surprise, surprise, no further details available on this one.

The sixth example is a practitioner commencing legal action while the LSC was still investigating, reasonably well-covered by the LPA, but the LSC took no interest. We heard from the LIV yesterday and they reported various statistics in relation to Australia wide, 1 to 3 complaints per 1000 and, in relation to Victoria, .8 to 2.2 complaints per thousand. That came from the LSC Vic's reports, which are included, I think, in the final version of the draft final report. What the LSC reports between the lines of the fine print is that it discourages complainants from maintaining their complaints, or aids the solicitors to disguise their unprofessional behaviours without recording complaint statistics against them.

I put a couple of rhetorical questions to the examples I've given. To the example where the LSC had written to the complainant saying, "We note you've decided to withdraw your complaint," does this identify the capacity that the LSC has to deal with a complaint by not even categorising it as one and by saying something to what the complainant's actually put? What does it say for the ability to investigate a more substantial complaint? For the second example, where a client terminated their services, has received some documents but not all, if your investigation consisted of reading the complainant's statement that they had not received all their documents and then reading a reply from the solicitor that the client "has received all files that they are entitled to", then writing to the client to say "we believe the practitioner", how appropriate is that? If you're going to sweep it under someone else's carpet, why not give the client the right to let VCAT sort it out?

The third example, where the solicitor has retained the client's personal items: is this or is this not unprofessional conduct? If it's not covered by the rules, then the rules need some amendment because certainly the man on the street would suggest that was unprofessional not to receive back from the solicitor their stuff at the end of a matter.

To the fourth example where the LSC said they could not force the practitioner to produce bills that may, in fact, be technically, in the eyes of the current regulations, correct. Very strange, but perhaps correct. There was a

case in 1999 in the Victorian Supreme Court, I think, where the magistrate noted that there was no definition in the Act of the word "bill". That's in the 1996 Act. We've since had a 2004 Act and now a 2014 Act, and we still have no definition of the word "bill". So why do we need to go to VCAT to litigate the question of whether there's been a bill provided or not at the client's expense.

The sixth example was VCAT heard a matter in relation to moneys owing in the middle of the LSC conducting an investigation. The LSC being made aware of this -it is prohibited by the Act - the LSC took no action. So, in summary, if our families and our communities are putting their trust in the legal profession to act professionally in our best interests then we ought to have a level of confidence in the upholding of these professional standards. If the above examples are occurring - and they are - then we have a potent combination of the incompetence, bias and dare I say it - it was mentioned yesterday - corruption within the office of the LSC. None of those ingredients gives us the confidence that community demands.

I've got further examples in relation to the new Legal Profession Act and the powers of the LSC, also comments on that in relation to billing issues, a further example in relation to family law on court delays costing the client some $50,000 potentially where the matter wasn't even heard and some minor comments which, depending on whether time permits today, in relation to unrepresented litigants in a family law sense, and unbundling of services for professions such as accountants and engineers. So any questions?

MS MacRAE: I guess at first instance are there some things, obvious or not, that you think need to happen in relation to the powers that the Victorian Legal Services Commissioner has and are there particular characteristics of regular legal professionals that you think that the LSC doesn't have?

MR WATKINS: In relation to the powers of the LSC, not much of this is new for the 2014 version of the Legal Profession Uniform Law Act, however if we were to name some of the relevant powers that the LSC has in relation to complaints, section 277 suggests it may close the complaint without further consideration of its merits and that is a discretionary provision. It may also - within that provision, if it forms the view that the complaint requires no further investigation, also discretionary. At sub-section 3 a complaint may be closed under this section without any investigation or without completing an investigation, also discretionary.

At section 282 the power to investigate complaints is written as follows: "The designated local regulatory authority may investigate the whole or part of a complaint." It doesn't say it must. Similarly, at 299, "The designated

regulatory authority may in relation to a disciplinary matter find that the respondent lawyer or legal practitioner has engaged in unsatisfactory professional conduct." It may, or it may not. "If it determines a disciplinary matter under this section no further action is to be taken under this chapter in relation to disciplinary complaints," therefore that is also a discretionary element and the buck stops with the LSC. Perhaps in that case, no longer being transferred to VCAT.

So I think all of those issues summed up, whilst the provisions might on the face of it be for good reason, to prevent some of the vexatious and unfounded complaints, if the examples I've described are sufficient to suggest otherwise then this is potentially behaviour that's occurring within the LSC environment and I understand there was a report written in 2009 by the Victorian ombudsman and that there were significant behaviours and cultural elements which the incoming Legal Services Commissioner for Victoria had to deal with. To the extent that he has been able to deal with that, I commend him however it seems there's more work to be done if these examples can be used as appropriate.

MS MacRAE: Was there something particular that prompted that ombudsman's report in 2009?

MR WATKINS: Yes, it was the fact that - and I don't have all the details in front of me on that one - but it was the fact that there were some 90 something complaints to the ombudsman about the Office of Legal Services Commissioner's activity in - must have been - 2008.

MS MacRAE: Are you aware of any or the extent of complaints since that time to the ombudsman?

MR WATKINS: I'm not. At the ombudsman's level, you mean?

MS MacRAE: Mm.

MR WATKINS: No, I'm not. However, this statistic that I mentioned before where we've got less complaints being carried through to resolution in Victoria and more withdrawals of complaint, does suggest to me that complainants are actually being encouraged to withdraw their complaints, some which may be meritorious and such as my example where they've written to the complainant saying "we note that you withdrew your complaint" without even having a discussion as to whether they wanted to withdraw it or not, and I think that's problematic.

DR MUNDY: With the greatest respect to that example, that could be

nothing more than an administrative error. These things happen.

MR WATKINS: I appreciate your comment and - - -

DR MUNDY: Can I just finish my question, if you may?

MR WATKINS: Yes.

DR MUNDY: What evidence is it that you have that sort of behaviour is systematic with exception to - is this an example of similar types of letters or is it just a one off?

MR WATKINS: In that particular case it's a one off, however it is a process whereby the case officer has referred it to a second person and it is the second person who's then issued the letter. So that means it's gone through two hands. If a complaint, you assume - the complainer's made the effort to make a complaint - you assume that the very least the LSC would do would be to identify the merit of it and if it is intending on dismissing it or asking a complainant to withdraw it, that there'd be an actual proper basis for that request.

DR MUNDY: That doesn't alter the fact that it may have been an administrative error. But I guess I'm more interested in the - I mean, I guess part of the story is - and you've obviously looked at a lot of this correspondence; when the Commissioner dismissed a complaint, decides not to proceed or whatever, are reasons given for that decision?

MR WATKINS: In not all cases.

DR MUNDY: Does the statute require them to give reasons for - - -

MR WATKINS: My understanding is it does, yes.

DR MUNDY: What - - -

MR WATKINS: Sorry, if I can just add to that, of the matters that have been dismissed in my examples, the reason given is that it is not - I'll just see if I can find the actual provision. Here we go. Yes, so in those cases, the LSCs dismissed them under section 4210(1)(f)(ii), which is that there's no further need for investigation.

DR MUNDY: So it is not a jurisdictional question, it is not, "I cannot look at this." It is, "There is no basis upon which" - that is the provision that enables the Commissioner to form a view that the Commissioner does not, as a matter

of habit or policy or practice, say, "There is no need to consider this matter because" - he just cites the provision and - so there is no reasons given other than citing the provision?

MR WATKINS: It seems to be the common practice that the LSC will restate the position of the complainant, then state the position of the practitioner. It may not be in that same correspondence, and it then will form a view, which I would suggest is a biased view, in favour of the practitioner that, given that there is a difference opinion, "We'll take the opinion of the practitioner." It sort of begs the question: what is this complaints process for? If we have identified a dispute based on two ends of the same stick, we have got to get something that is on the same stick. If we are saying, "He said, she said, they said. We're not interested in what the complainant's got to say," what benefit is that to the community?

DR MUNDY: I am interested in sound administrative and just processes and, certainly, within Commonwealth law, a decision maker who makes a decision of an administrative character, which this may or may not be - but let us assume it is for the time being - there is a general obligation in the Commonwealth jurisdiction that a person unhappy about that decision may seek a statement as to why the decision was made.

MR WATKINS: Without knowing the provision, I think that exists within it.

DR MUNDY: I am just coming from your evidence. If that provision was - I do not want to put words in your mouth, but let me put it this way because I am mindful of the time. Your expectation would be that, if asked to provide an explanation of the decision, the likely outcome in your view would be restating of the complaint, a restating of the service provider's response, and the Commissioner basically then saying, "There is no need to proceed," without providing what might be seen as an explanation of the reasons?

MR WATKINS: That is right. Further to that, I will note that the Commissioner does have powers to refer the matter to a mediation and in the examples given, as I've said before, if we've identified a dispute that consists of two parties being some distance apart - - -

DR MUNDY: The facts are not clear.

MR WATKINS: The facts can be clarified by that mediation process and, in any case, if it's outcome focussed, we could still get to the same point. If it's the fact that - in the example where the client's file wasn't provided, well, "You say it's not provided. You say you provided it. What did you provide?" Has any of that discussion occurred?

DR MUNDY: And presumably the remedy is "hand the file over now".

MR WATKINS: Exactly.

DR MUNDY: Do you have any sense, given, as you suggest, the Act contains provisions for mediation, are those provisions - do they empower the Commissioner to order mediation, or is it - - -

MR WATKINS: I believe they do.

DR MUNDY: It is not simply at the consent of the parties?

MR WATKINS: I am not sure on that. It may be with the consent of the parties, but if one party were to say, "How about mediation?" if the practitioner were then to say, "We're not interested," the expectation, I guess, would be that the LSC would then form a view that it would have been appropriate and there is a reason why the practitioner is not interested.

DR MUNDY: The sense I get from what you are saying is that, despite this mediation route being available to the Commissioner, there is not a lot of evidence to suggest that it is used.

MR WATKINS: It is not being suggested up front, that's for sure, and when it's being suggested by the complainant, who's obviously got to go and do the research and work out, well, what are the avenues if we're hitting brick wall after brick wall, to suggest to the LSC, "How about mediation, seeings how we've got a dispute," by definition. The LSC wouldn't then follow that through.

DR MUNDY: When I go to make a complaint at the LSC, do I get any sense from the LSC - and I know that other complaint resolution systems and, indeed, ombudsman - and I notice there is one in the room - will often say, "Here are the avenues in which this complaint - here is how it may proceed. These are the sort of steps that may be taken." That is not something you get from the LSC?

MR WATKINS: No.

DR MUNDY: It is essentially a black box?

MR WATKINS: Yes, it's a black box. You give us your complaint. We will stir it around in the black box and then, after a period of time, we will form the view that it is not a matter for further investigation and we will dismiss it under

4210(1)(f)(ii).

MS MacRAE: One of the other people we have seen in earlier proceedings - I think it was in South Australia - talked to us about the complaint handling there and was concerned that, at every turn, he had to put things in writing and there was no attempt to contact him in any other way and if he tried to contact the complaint body, he was told to put his concerns in writing and was not able to contact the complaint handling body directly. As far as you know - - -

MR WATKINS: I don't see that as an issue here in Victoria, however, I see the opposite side of that, which is, if you allow the LSC to engage you by telephone, you will then have words put into your mouth as what you said or didn't say. In the light of these experiences, it's actually preferable to deal only in writing with the LSC. However, even with the examples where that's been the case and the full paper trail exists, we're still getting, "We note that you've decided to withdraw your complaint." That's taking the facts and totally ignoring them.

MS MacRAE: Are the provisions that you are speaking to now - have they basically been picked up and will be re-produced in the uniform law, or is there - - -

MR WATKINS: Most of them. There is some re-wording, but most of the provisions are very similar to the current Victorian scheme. My understanding is Victoria actually put most of the work into that in writing of it. That is as much as I know on that fact.

DR MUNDY: Mr Watkins, cutting to the chase: where are the policy remedies in this? Is it that the underlying statutory framework is defective? Is it that the institutional - and we more than most people understand that regulation is both about the law and those who administer it. I, for one, have done a lot of work in this space. Is it your view that the real problem here is the conduct provisions under the uniform professions legislation? Is it that there are - reflecting on the ombudsman - institutional - the Commission has an institutional character which is such that it is not meeting the expectation of aggrieved consumers of legal services, or is it a third option, in that the appellate processes against decisions of the LSC are, in some sense, defective, or expensive, or not well enough known so that people who have a grievance - and let us accept that even with the best will in the world, mistakes do get made - that people do not have an adequate course to get those grievances addressed?

MR WATKINS: If I can respond to the third one first, in relation to the appellate process. It would have to be said that it's quite hazy as to what that

process is. Having been through a complaints process with the LSC, a complainant might expect to see at the end of it, "If you don't like our decision, you can go to the Vic Ombudsman." That's lovely advice and I'm sure that's where those other 90 complainants went to in 2009. Let's assume something is working there, but it's a slow process and it's certainly difficult for your average complainant to want to navigate that.

DR MUNDY: And it's not a determinative process.

MR WATKINS: Exactly, yes.

DR MUNDY: The ombudsman won't typically be able to make orders in regard to that.

MR WATKINS: And I can attest to the example where the LSC has suggested to the complainant, "Well, you can talk to the Vic Ombudsman, but we actually don't listen to them because they don't outrank us," effectively. Okay. Our determination is final and, yes, sure, we might let them whisper in our ear occasionally, but it's certainly not the case that it is an appeal process. As for the regulations, well, we mentioned before that most of these regulations are, you could assume, reasonably well drafted in the public interest, however, with all of the discretionary provisions at the LSC level, it does certainly provide a considerable power base in the office of the LSC.

So the concern then is to your second point, which is, who is policing the policemen. That was the nature of the article in The Age newspaper last month was, "We don't have anyone policing that policeman." So if we're expecting as a community that the legal services industry is a profession, then we are expecting it to have in a similar way to the accounting conduct rules, engineering rules, medical practitioner's rules, we are expecting it to have some form of code of ethics and some form of compliance and measurement against that code of ethics. If the best example we have in the legal profession is the office of the LSC, then there is definitely more work to be done.

DR MUNDY: All right. Look, we're probably out of time, but thank you very much. We look forward to receiving your submission and thanks for taking the time to be with us today.

MR WATKINS: Thank you. Have a safe journey.

DR MUNDY: Could I have the Telecommunication Industry Ombudsman, please. Can I please ask you to state your name and the capacity in which you appear.

MR COHEN (TIO): My name is Simon Cohen. I appear as the Telecommunications Industry Ombudsman and as an executive committee member of the Australian and New Zealand Ombudsman Association. I have with me my colleague, Shobini Mahendra, and I'll ask her to introduce herself as well, Commissioner.

MS MAHENDRA (TIO): Commissioner, I'm Shobini Mahendra, I'm the policy manager at the Telecommunications Industry Ombudsman's office.

DR MUNDY: Mr Cohen, would you like to make a brief opening statement, noting that I think by the end of this inquiry we'll have heard from all the executive of ANZOA at this rate.

MR COHEN (TIO): Commissioner, thank you. Firstly, can I congratulate the Commission on the draft report and the thoughtful review of access to justice that you have undertaken in its broader sense. Today I'd like to speak about four matters, the role of the ombudsman in addressing legal need, promoting awareness of justice mechanisms, the normative impact of ombudsmen and developing expertise of dispute resolution practitioners.

But before that, could I briefly outline a little information about my office, the TIO. We're Australia's busiest ombudsman and in each year we deal with in excess of 150,000 new complaints. Our dispute resolution approach is scaled to circumstance, from referrals to expert complaint handlers within telcos for a final chance at resolution, to conciliation, investigation and determination. Surveys of consumers and members involved in disputes dealt with by my office demonstrate high levels of satisfaction with outcomes and process. A combination of scale, streamlined process and a focus on efficiency means our dispute resolution service is of comparatively low cost.

ANZOA is an organisation that represents most industry and parliamentary ombudsman. ANZOA promotes excellence in external dispute resolution and provides a skilled community of practice sharing expertise, experiences and resources to the benefit of all its members. So to my four points. First, can I endorse the key point in the draft report that ombudsman potentially provide an appropriate mechanism to meet significant unmet legal need. The TIO, for example, provides a dispute resolution service that ranges from disputes about non-functioning $10 phone cards and disputed 50 cent mobile premium service charges through to business loss and excess

international mobile roaming charge complaints in the tens of thousands of dollars.

We deal with complaints other than consumer issues including about the use by telco carriers of their statutory powers of entry onto land, and about interferences with privacy by telcos. You can access the TIO by phone, by web site, by email, you can even still write to us in a letter and we will deal with your complaint.

DR MUNDY: Not if Mr Fahour has his way.

MR COHEN (TIO): We focus our service on what we understand from our research matters to consumers and telcos, that we are timely, that we are informal and that we are expert. In the past 20 years we have received more than 1.8 million consumer complaints which is access to justice on a very substantial scale. It is access at no cost to individuals across all Australian states and territories, in cities and country, to personal customers and small businesses. The ombudsman model has proved to work across government and industry as an access to justice mechanism.

My second point, I agree that work needs to be done to promote ombudsman services. For the TIO, our aided awareness is at 57 per cent, and that means that 43 per cent of Australians don't know there is a telco ombudsman. Closing the gap for us and every ombudsman is key to increasing our effectiveness as an access to justice mechanism. I don't think that the best approach is to create a single access point. There is a real risk with this approach of increasing consumer run around and resulting in a poor service experience and possibly poor centralised decision-making. Instead, my view is that a focus on increasing the profile of existing services and strengthening cross referral processes is to be preferred. This is likely to be effective both from an access to justice and from a costs perspective.

My third point is to the normative impact of ombudsman as a critical value add to the justice system, reducing the need to access justice for many thousands of individuals and small business. Ombudsmen's systemic work is informed by a unique data set and enhanced by increasingly sophisticated systems and processes within ombudsman offices. For example, all too regularly consumers complain to the TIO about misleading telemarketing practices which result in their phone services being transferred to a new provider without their proper consent.

We can solve the individual complaint. We can work with the company to improve its telemarketing practices to reduce new complaints, and we can refer repeat offenders or serious cases to the regulators for enforcement and

compliance activities. This trifecta of responses is a unique tool set that ombudsmen hold. Ombudsmen also have a strong track record of reporting to organisations, to government and to the community important issues impacting upon the vulnerable or impacting on individuals in a substantial and detrimental way.

TIO's highlighting of poor customer service in our Connect.Resolve campaign prompted a whole of telco industry review and reform of customer service. Our follow-up resilient consumers report brought a clear focus on the telco customer 'run-around' experienced by consumers who complained, and informed a complaint handling standard that is now in the industry code. Our public reporting of unexpected and unaffordable consumer charges for international mobile roaming services has been one of the key reasons for a stronger regulatory response from government and industry to stamp out consumers incurring these sometimes astronomical charges. This normative impact is maximised when all relevant disputes are handled by the ombudsman, improving the visibility of new dispute trends and maximising the response to them.

My final point is to the importance of competent and expert dispute resolution practitioners. I agree in this respect with the Productivity Commission draft report note that the calibre of ADR practitioners is fundamental to good dispute resolution. Ombudsmen have long recognised this. Our people are at the centre of our service and its ability to meet the community's justice needs. We wrap around dispute resolution staff extensive inductions and training, coaching and quality assurance. In addition, all industry ombudsman are the subject of regular independent external reviews which provide ongoing opportunities to consider and improve ombudsman services in a public and accountable way.

The TIO has had an emerging realisation that retaining and recruiting the right staff in 2014 requires an increased focus on training in the vocation of industry dispute resolution. We have accredited with Box Hill Institute a graduate certificate course which we are now delivering in a pilot program to our dispute resolution officers with a focus on general skills of communication and dispute resolution methods and specific skills on applying consumer and other laws and learning about technologies and rules that are specific to telecommunications. I thank you for the opportunity to address you today and look forward to any questions you might have of us.

DR MUNDY: Thank you. On the centralised access point issue, I think the issue that we were trying to bring some focus to there was not so much in relation to organisations such as yourselves but the plethora of legal assistance providers that permeate jurisdictions. I think perhaps we needed to be a bit

more nuanced in our language. Can I start with - and this may not be a relevant question to you but I'm interested - if you don't have a view and it's not relevant, that's fine. We heard from a CLC in Sydney last week who specialises in financial services issues and in the broad, so banking but also insurance as well. Do you have much engagement with the CLC sector in this sort of systemic identification - I guess, probably the specialist consumer CLCs would be the most likely candidates.

MR COHEN (TIO): We certainly have ongoing engagement with financially focused Community Legal Centres. We also have extensive engagement with financial counsellors, some of which are actually attached to Community Legal Centres, and they are an excellent source of information about things that consumers, particularly vulnerable consumers, are seeing happening in the community. We find that a really good way to work with specialist Community Legal Centres is to look for the opportunities for them to provide direct input into how we provide our services, so to provide a couple of examples, we recently ran a series of round tables with consumer representatives across Australia, and at every one of those Community Legal Centres, including appropriate financial legal centres, were represented and gave us feedback on our service.

As a s second example, we've recently facilitated the development of financial hardship guidelines for telcos through sponsoring a dialogue between telcos and consumer advocates and financial counsellors and the appropriate Community Legal Centre was one of the advocates who was present in the engagement around that, and I think they bring that richness of experience from the consumers that they're dealing with to inform the way that we provide our services and inform some of the priorities we make in our discretionary work.

DR MUNDY: So if consumer legal centres were unable to continue this sort of engagement with you, it would be likely to impact on both your development of your own dispute resolution process but also the systemic work that you do in, for example, the hardship provisions.

MR COHEN (TIO): That's absolutely my view, and can I say not just for Community Legal Centres but also for other key intermediaries who act for and represent consumers. So I, for example, point particularly to financial counsellors who are a key source of dealing with issues for consumers who do have, in essence, unmet legal needs. They often arrive at a financial counsellor with a dozen bills that they can't afford and they need to figure out some way forward in relation to them. A high awareness of our service through those intermediaries and an opportunity for them to critically evaluate the way we do our work is absolutely critical, I think, not just for the standard of the service

we provide them and their clients, but for the standards more generally that we provide to all consumers in a similar situation.

MS MacRAE: I was just interested in your - there's two questions, I'll ask the first one. In relation to the awareness of your office, I'm always a little bit - I don't know if "sceptical" is the right word - to say that 43 per cent don't know about you. I wonder if they had a problem with their phone, how easy would it be for them to find you? I mean, isn't that more the issue that you might say - you did say, I think, a prompted awareness.

MR COHEN (TIO): Yes.

MS MacRAE: Have you tried to get at that issue, so you put it to people you've got a telecommunications problem or a problem with your phone bill, where do you go? Is that sort of - - -

MR COHEN (TIO): That's the way that those questions are first asked. If you had a problem and you couldn't solve it to your provider, where would you go? That's your unprompted awareness, and then your prompted awareness is, have you heard of the Telecommunications Industry Ombudsman. I think the point you raise is a really good one, because I think there's two aspects to it that I think are relevant in terms of promoting access to justice, particularly in the ombudsman space. The first is that whether people in the community are aware that there's somewhere they can go at no cost to make a complaint if they have got a problem with a service, be it a government service, an energy service, a telco service.

Many in the community know that, quite a number don't though, and one of the frequent things that I hear when I go out and speak to community members is that they think that the problems that they've got aren't big enough for an ombudsman or that they shouldn't bother an ombudsman with them or so on and so forth. So I think that's one element to it, but I think the other element is that it's really when people have the problem that they need to know that the ombudsman is there and how to access them.

I actually have a view that if people know the basic tenet that there is likely to be someone who can help them and they land with one of us, be it me or any of my colleagues, we're going to direct them to the right place. That hand-off has got to be really easy for the consumer because otherwise they may just get tired and let it go, but it's the awareness more generally that I think is really key and critical to it.

Just a third point, because trying to make the entire community aware of you is, I think, an unrealistic expectation of an office like ours. We certainly

focus our initiatives on those key intermediaries who are dealing with vulnerable consumers, so disability advocates, migrant resource centres, financial counsellors, Community Legal Centres and the like, because we think that that's likely to maximise the impact that somebody will go to someone who might be able to help them and if they know that we're there, then that will increase the ability for us to be able to provide our service in those circumstances.

MS MacRAE: The other number that you mentioned in your opening statement was 150,000 complaints this year.

MR COHEN (TIO): Yes.

MS MacRAE: That still seems like a pretty big number to me.

MR COHEN (TIO): It is.

MS MacRAE: I guess one of the things that you would know from our report that we're interested in is how the way that you're financed might impact on the behaviour of your members, and so how much do you think the fact that you've got a per complaint basis part of your fees helps keep that number in check? How do you see that number moving over time? I mean, obviously it's unreasonable to think you would ever get it to zero. I'm thinking 150,000 is large in ignorance really of what the potential might be, perhaps it is a tiny little percentage. So I guess just particularly about the funding and the fee per complaint.

MR COHEN (TIO): Can I perhaps start one step back and note that the motivators for driving down complaints within telecommunications I think have changed very much over the past several years and by way of comparison, if I'd appeared before you three years ago I would have said almost 200,000 complaints each year. So the trend is a positive trend. The reason for that is, I think, threefold, none of which relate to our fees. But I'll come to those in a moment if I could. The first is that there is a real battle for telcos in customer service, and a key metric that they have been using is the number of consumers who approach the TIO in relation to complaints. So it's a very healthy sign, I think, that industries actually recognise, in an environment where there might not be the opportunities to get new customers because that growth phase in the industry cycles is less than it used to be, that the actual competition is now occurring in customer service, and that's resulting therefore in an increased investment in that area and a reduced need for those customers to come to the TIO at all.

I think the second thing is that everybody - industry, consumer groups,

and the community more generally, and telcos - realise that the number of complaints going to the EDR body, the telco ombudsman, was simply out of proportion with what was happening in other industries. So the regulator and the industry association Communications Alliance made conscious decisions to try and tighten up the codes to address the causes of complaint. So if a key cause of complaint is high bills, sending consumers alerts is one way to reduce the prospect of those high bills. Getting rid of misleading advertising, like unlimited that's limited, and caps that are floors, those sort of things result in fewer complaints coming to the TIO from a misunderstanding of the product that's being purchased by the consumer. So I think that's a second element.

I would put our hand up as being a third element in that. I think we've upped our game in how we intervene on systemic issues. We really try to get in on the ground floor and raise those matters immediately with service providers before we've got a big case load to say, "Hey, look at this," but when we're seeing those early indicators, and we are seeing service providers acting quickly to try and respond to some of those causes that we're seeing. So I think that those three elements are better protections, a real reputational issue, and a greater identification of systemic issues that are having an impact. Our cost structure is distinct from many of our colleagues, in that our only charge is a charge per complaint. So many of our colleagues have a baseline charge, kind of like an opening-the-door annual charge or membership charge.

DR MUNDY: A bit like a taxi.

MR COHEN (TIO): Yes, exactly like that. And then the fare charge. Whereas for us it's all fare, if we can continue the taxi analogy, and no flag fall.

DR MUNDY: I'd encourage as a future career option, to consider regulation of the taxi industry.

MR COHEN (TIO): I've been there once before, Dr Mundy, and I'll stay well away. But what I do think is that the process whereby complaints escalate through the process - so the initial fee is quite low, but if it can't be resolved quickly, the dispute resolution charge increases - does always bring to the mind of the telco a quick resolution of the complaint as an option because of the cost factor in relation to it. So I think it does have an impact in particularly the escalated levels, if I can call it, or the progress levels of our complaint process.

DR MUNDY: So if it goes on and on, what sort of money are we talking about?

MR COHEN (TIO): So for a referral complaint, a referred complaint, it's around $100. For a conciliation it's around $1000. For a matter that needs to

be determined, the charge is in the vicinity of seven to eight thousand dollars.

DR MUNDY: Is that down the big end of the scale? That seven or eight thousand dollars, is that an accurate reflection of your cost in dealing with the matter?

MR COHEN (TIO): More or less. It depends on the complexity of the matter. There are some quite simple matters where the determination simply results because the service provider isn't cooperating with our process. So the facts are simple.

DR MUNDY: But across the class of matters that end up at the $7000 level, the charges you collect will basically fund at least the avoidable cost of the dispute resolution?

MR COHEN (TIO): By and large, our cost structure reflects the cost at each point of doing our work.

DR MUNDY: So there's essentially no subsidy from the rest of the organisation, at least in an avoidable cost sense, from the other lower-level activity.

MR COHEN (TIO): Yes. So the lower-level activity funds some of the leadership costs in our dispute resolution area, but by and large, our dispute resolution costs are funded through our dispute resolution charge directly.

MS MacRAE: And then you get a separate funding amount to cover things like your staff training and - - -

MR COHEN (TIO): So then on top of that, we divide by the number of complaints and the proportion of complaints we receive each month our operating charges, and they get added on top of that in a proportionate way across all the complaints that we receive. So they get spread equally to the proportion of cost that each member incurs in that month.

DR MUNDY: So, if you like, the fixed costs of the operation are funded irrespective of complexity, and then the real expensive services fund themselves?

MR COHEN (TIO): That's right.

DR MUNDY: Okay. Can I just bring you back to complainants. Is it your sense that they come to you - this is a sort of general observation - in an already fatigued state, or do they come to you earlier in the process?

MR COHEN (TIO): Our experience, and we reported on this in a report called Resilient Consumers that, if it assists the commission, we'll make available after today - - -

DR MUNDY: If you could email it to Mr Irwin, that would be helpful.

MR COHEN (TIO): - - - is that consumers spend many hours over a significant period of time talking to a number of people to try and resolve their complaints before they come to the TIO, and often not reaching a resolution, but as often as that reaching one that then isn't kept, a broken promise. We called that report Resilient Consumers because it reflected the experience that we saw of these consumers who came to us. I would note, though, that our threshold for allowing consumers to make a complaint to the TIO is quite low. We say that the service provider has to be given an opportunity to consider the complaint.

There are a number of schemes, particularly in overseas jurisdictions, where there are deadlock provisions that prohibit consumers from approaching an external dispute office, be it an ombudsman or commissioner, for up to 60 days from the date of originally raising the dispute, and I think in the context of an essential service, where businesses and consumers are relying on it, those provisions exclude access to dispute resolution - - -

DR MUNDY: Your rules basically do require people to have at least had a go.

MR COHEN (TIO): That's right.

DR MUNDY: Is your sense - I mean, given that lots of people experience some form of disadvantage in resolving matters, be it language issues or they may have some form of disability or whatever - is your experience that those groups predominate the people who come to you, and within the group of people who seem to have some sort of disability - disadvantage, let's say, broadly defined - is it your sense that that is a reflection of the inability of the telco provider to actually have a dispute resolution system that's resilient with respect to people who may have some challenges communicating?

MR COHEN (TIO): Firstly, and unfortunately, our office doesn't at this time collect detailed demographic information on consumers who approach us, and it's a key information need that we've identified through our disability action plan, and that we propose to remedy in the next short period of time. My assessment, based on what we know from some of our survey, and particularly of migrant communities and indigenous communities, is that awareness of the

ombudsman and access to our services from those communities is less than it is from the general community. If you have a look at the TIO complaint rates in smaller states as against larger states, and in metro as against regional, you'll find that predominantly metro areas in the big states are where we most commonly get our complaints from. So that says to me that the accessibility of our services to many of the vulnerable in the community is something that's a piece of work that we have to do.

DR MUNDY: And we know from the Law Foundation survey that the big area of unmet legal needs are ‘consumer’, we understand that telco issues are prominent within that, particularly in remote and indigenous communities.

MR COHEN (TIO): Exactly right. So I'm under no misapprehension that our service has an incredible accessibility or awareness within those communities. I think that's a challenge not just for us, although I think one of the things that's distinctive about the TIO as against, for example, the energy ombudsman or the public transport ombudsman in Victoria, is that we're a national office with a single physical presence in Melbourne, and I think it does assist in outreaching many of those communities to have a physical presence or an ability to be physically seen in some of those communities.

DR MUNDY: I'm not sure which ones this applies to, but certainly some of the water and energy ombudsmen, there is a requirement on providers to say, "If you have a complaint about this bill, call the ombudsman on this 1300 number." Is that something - I mean, (a) is that a requirement of the members of your scheme, and (b) if not, do you think it would help? Would it get over this problem about people coming to you late in the game?

MR COHEN (TIO): Well, firstly, there's a number of requirements on Telcos to tell consumers about the TIO. A key one is in the critical information statement that telcos are required to give consumers every time they sign up for a new service. It's a double A4 side, at maximum, information - - -

DR MUNDY: I remember it well.

MR COHEN (TIO): If you have a look at the bottom right-hand corner on the second page, there's some information about our office. There's also a requirement, when a complaint can't be resolved, for that information to be provided to consumers. And I acknowledge that those efforts don't result in all consumers being aware of us if they can't resolve a complaint. I do have a view that putting the ombudsman's number on an account is problematic, because I think the consumer should be encouraged in the first instance to try and resolve the complaint, and rather than dealing with 300,000 contacts, of which 50 per cent are new contacts, you could see yourself in the position

where you would be dealing with a million contacts, because everybody is ringing you about their disputed bill, rather than ringing the telco. That's not just an unrealistic scenario, I'm actually aware of other similar schemes where in fact that information is required on bills, and the proportion of contacts that can't be acted on as against those that can is very, very significantly bigger, and I don't see how that's in any consumer's interest.

DR MUNDY: So the balance that you have at the moment you think is probably - you're not going to get significantly better outcomes by changing it?

MR COHEN (TIO): Well, there are some areas where telcos are required to tell consumers in a written format; for example, if they're going to disconnect a standard telephone service. I think the continually refining those points where consumers need to know - - -

DR MUNDY: So the obligation is where the essentiality of the service becomes the real issue, rather than, "The bill should be 400 bucks, not 800 bucks."

MR COHEN (TIO): Spot on. That first one, and then secondly, hopefully, that telcos, or any service provider, have the right systems and processes in place, that when a consumer generally can't resolve their problem with them, that they do get told, and that they are given the information they need to go to the external dispute resolution.

DR MUNDY: And you're satisfied that in the broad, the framework in place is adequate for those purposes?

MR COHEN (TIO): I think that there's a framework in place, a code framework in place, that requires that to occur. How well it actually happens on the ground I'm less certain of. I certainly know most telcos have information about us on their web sites, I think that's a very positive thing, and I think increasingly, as consumers are using online means to make complaints, to make inquiries, that is going to be an increasingly important repository.

DR MUNDY: Does the industry have in place ex ante frameworks for in fact monitoring - I mean, because one of the big challenges that we regularly face is we get to the point of being put on the job, and the data is not there, and if someone had have thought five years ago that we would make this inquiry and undertake these inquiries in five years' time, they would have collected the data and our staff would have a much easier life. So you've got these frameworks in place. Are you monitoring and making sure the telcos collect data through time, so that at some point an objective evidence based assessment can be made?

MR COHEN (TIO): There's two mechanisms that are in place in the telco system. The first is a self-regulatory mechanism through a body called Communications Compliance, which has been set up under the Telecommunications Consumer Protection Code. It's early days for that body, it's only been in place since 2012, but it is a significant advance on the situation before where there was no compliance mechanism at all. I think importantly that body has a governance framework that includes consumer as well as service provider representation, but at the moment I think it would be fair to say it's a work in progress.

The regulator, the Australian Communications and Media Authority, also has extensive powers to be able to audit compliance with the TCP Code, including audit functions that it has exercised in relation to new requirements under the code. So there is a framework there, and we're aware of information being collected to demonstrate compliance with the framework that has been put in place.

DR MUNDY: Compliance with the framework is one thing. I suggest effectiveness with respect to intent of the framework is another. Are you satisfied that those frameworks will lead to sensible public policy bodies being able to form a view about effectiveness of these frameworks in the fullness of time?

MR COHEN (TIO): My view in relation to industry self-regulation of compliance is that firstly it's a positive step to see the industry taking responsibility for it. I just think at this point it's a bit early for me to have an assessment about that. The body has only really been up and running for a short period of time, and I think it really needs some further time to see how effective it is.

DR MUNDY: Okay. Fair enough.

MS MacRAE: Just coming back to that issue about how you collect your funds, you might see in our report that we're interested in just seeing if we can find a mechanism that might give the same sort of impetus to government departments that also may have a level of complaint. Would you have any advice for us in terms of the sort of mechanisms that might help give an incentive to government departments or agencies that might be the subject of complaint? Having a cost per complaint seems to have some problems with it. We've certainly had some submissions to that effect. Are there other things that you think we should be considering that might help in that space?

MR COHEN (TIO): Firstly, and I imagine this point has been made to you

by some of my colleagues, there are a number of government organisations that are members of industry ombudsman schemes who already pay fees for dispute resolution services. For example, in respect of my office, when we were originally set up, Telstra was government-owned, and it paid fees in respect of dispute resolution services. National Broadband Network is a member of TIO, and we can deal with complaints in relation, for example, to its exercise of statutory powers to enter land. So there are precedents for that already in the industry ombudsman space. In terms of a broader application of that, I think there may be no single answer to it, it may require a really close consideration of the nature of the disputes that are being dealt with and the appropriateness of a funding model that is cost based on the service that is complained about.

DR MUNDY: I don't think we intended this as a mechanism by which to fund ombudsmen, but rather - because it just becomes a money-go-round within the consolidated revenue. I think what we were hoping, or what we had in mind perhaps, was that if departmental secretaries had to undertake a multi tens of thousands of dollars disbursement out of their budgets, particularly if they were repeat participants in the ombudsman - I won't use the word "offenders" - but this may focus the minds of secretaries and other agency - it would certainly focus the mind of our agency head - that perhaps better complaint and dispute resolution processes within government were a less bureaucratically painful way of dealing with these matters, rather than them turning up at the ombudsman's office.

MR COHEN (TIO): Look, perhaps if I can completely dodge it in this way - - -

DR MUNDY: We're looking for the behaviour, we're not looking for the funding.

MR COHEN (TIO): No. But I see very much the funding model for industry ombudsmen as being about a cost-for-service model. It's not designed per se to have an incentive to resolve costs, it's designed to recognise the cost of the service and to get the funding for that from the bodies that are best placed to fund it, while ensuring access to the service at no cost to consumers. So while it may have an incidental effect of incentivising a particular outcome, my view has always very strongly been that the primary objective is to fund the service, not to incentivise - - -

DR MUNDY: And to fund it in an equitable way.

MR COHEN (TIO): Exactly right.

DR MUNDY: Reflect that some participants may be very large and others

might be quite small.

MR COHEN (TIO): Exactly right.

DR MUNDY: Look, thank you, Mr Cohen. We're particularly grateful that you haven't brought to our attention the question of the use of the word "ombudsman".

MR COHEN: Thank you for your time, commissioners. It is much appreciated.

MS MacRAE: Thank you.

DR MUNDY: Can we have the Consumer Action Law Centre, please. Could each of your please state your name and the capacity in which you appear?

MR HUSPER (CALC): Hi, I'm Gregor Husper, the Director of Legal Practice at Consumer Action.

MR BRODY (CALC): I'm Gerard Brody, I'm the CEO of Consumer Action.

MR LEERMAKERS (CALC): David Leermakers, Senior Policy Officer.

DR MUNDY: Would one of you like to make a brief opening statement, and if you could limit it to five minutes, which the bar was able to manage, we would be very grateful.

MR BRODY (CALC): We'll definitely do that. I'll open the statement. I'll just ask Greg to make a few additional comments about costs issues. Firstly, thank you for the opportunity to participate in this hearing. I'm sure you've read our submission, but I'd just like to take a few minutes to draw a few issues out which we think is useful to reiterate. The first one is on consumer protection in the legal services market. As a specialist consumer law service, we really welcomed the consumer protection focus in the draft report in chapter 6. We did want to draw attention to the way the draft report seemed to conflate the two different concepts, the concept of independent regulation, including enforcement, of a market, as well as consumer complaint handling or dispute resolution. We see those a separate functions and usually - not always - handled by separate bodies.

In particular, a dispute resolution needs to be focused on providing fast, fair, accessible relief to complaints for their individual dispute and the previous presentation from the TIO is an example of that, but it is also important that professional conduct or systemic issues arising from disputes receive a response, but it's undesirable for these processes to get in the way of handling the individual's dispute.

My second point is on alternative dispute resolution. The Commission's draft report spoke very highly of alternative dispute resolution and we agree that ADR is an important part of the mix, but we do urge some caution. It's really important to properly evaluate existing ADR processes before we expand its use any wider, and make sure safeguards are in place to ensure that processes and personnel are up to the task. We included two case studies in our submission which explain why we have legitimate concerns that existing compulsory mediation are creating unjust outcomes in some circumstances. In both cases, the mediators made errors of law and we only know about these cases because our solicitors were able to attend, which is unusual for many

consumer complaints.

Without proper evaluation of existing processes, we can't be confident that extending the reach of compulsory ADR will improve access to justice. Before handing over to Gregor, who will mention costs awards. I will just make some of the comments we made in response to chapter 21 of the draft report on the application of eligibility criteria for legal assistance services. I'll just start by saying that our services, and we would suggest most other community legal services, have documented and thought out the eligibility criteria and that those criteria are applied consistently, but strict application of uniform means criteria across legal aid commissions and CLCs, as the Commission seems to suggest in its draft report, will likely limit community legal centre's ability to do work that they should do best: respond to issues arising from their community and engage in public interest work.

For example, strict application of means tests would prevent CLCs from taking on public interest litigation on behalf of clients with means. One example is when we acted for a higher income earner in a dispute over a $20,000 home loan exit fee. We knew that many vulnerable consumers were charged the same fee and the willingness of this client to take the matter to Court and engage in media contributed to systemic advocacy, including action by the regulator to obtain $3 million in refunds for consumers and ultimately a ban on home loan exit fees.

It may also rule out providing legal assistance on matters which have public interest implications, but where the detriment to the individual clients is minor. For example, the losses to an individual in a case of irresponsible lending with a pay day lender may be relatively small because the amounts in dispute are small, but much like the bank fees class actions, the total loss by many consumers across the economy may be very large. Moreover, litigating and winning that individual case will have real public interest impact if it addresses a systemic issue in advocacy. The Commission did recognise the importance of systemic advocacy by community legal centres and others in its draft report, and we welcomed that. It's important to see the links between how community legal centres assess eligibility and the capacity to do that systemic work. I'll just pass to Gregor.

MR HUSPER (CALC): I'm addressing what is essentially within chapter 21 on costs awards and protective costs orders. The Commission's draft findings support cost recovery in pro bono matters and the codification of protective costs orders, and we commend that. Both those propositions are aligned with the improvements of the rule of law and access to justice. The Commission cites a number of reasons for costs recovery in pro bono matters, which we endorse, including levelling the playing field and establishing the usual checks

and balances as to costs. The Commission, however, sought guidance as to who should recover those costs and we believe that it's the lawyers acting pro bono who should recover those costs awards.

The reasons lawyers act pro bono are, by definition, for reasons other than costs recovery, and we don't consider that philosophical base for undertaking pro bono is likely to be compromised because a small amount of costs may be available after payment of disbursements. It's all the case that pro bono matters are typically about restorative justice and injunctive relief; they are very rarely, if ever, about compensation because you can go to no win, no fee for that. On the other hand, the opportunity to recover costs is a welcome vindication of the lawyer's time and returns some capacity to those lawyers willing to undertake the work.

In the case of protective costs orders, our main point there is that we consider this should be equally available against private persons as well as government. Much of public life is now controlled by private parties and many of those private parties have a capitalisation that exceeds government departments and, indeed, some sovereign states. We can anticipate only two arguments against protective costs orders in the case of private litigation, which is the exposure to costs and the so-called flood gates of litigation that might take place. But the reality is that - and experience overseas and in other jurisdictions where they do have protective costs orders - either codified or in the common law, is that neither of those two concerns have ever materialised. There are no flood gates and, in fact, there are not many protective costs orders issued. The reason is because all protective costs order regimes, including those that have been advocated in Australia, talk about a balanced and proportionate scheme and that's what we would also advocate.

DR MUNDY: Thanks for that. Can I start on pro bono. I hate to disappoint you, but I intention with respect to pro bono fees was not about the recognition of lawyers' time; it was rather about equating incentives for people facing pro bono litigants not to over-egg the cake. I guess, as an organisation who presumably attracts pro bono lawyers from time to time, the systemic issue in our mind and what has been put to us is the complexity around pro bono work not being construed as a no win, no fee arrangement, or a contingency - probably a no win, no fee arrangement - and what has been put to us, for people acting pro bono, often for people who are experiencing some form of disadvantage, the hoops that people have to go through in their costs agreements could be avoided perhaps with a little bit of assistance from the legislature. Would that be something you would support?

MR HUSPER (CALC): That's right, for the reason that, as you well understand, the indemnity principle potentially undermines the costs recovery

and I was previously director at Public Interest Law Clearing House, Justice Connect, for four years, and we prepared - there's some case law which throws into doubt the opportunity to recover costs if represented pro bono because of the indemnity principle. We sought to craft and protect a costs agreement that would get around that. It was extraordinarily complex and, in my experience, most of the firms and most barristers failed to actually have a compliant costs agreement in place, and we are talking top-tier law firms which would come to us for guidance on that point.

DR MUNDY: So the legislature helping us out here would all in all just avoid a whole pile of transactions

MR HUSPER (CALC): It's low-hanging fruit and it exists, for example, for Victoria Legal Aid, the Act states for the avoidance of doubt they can recover costs and explain how it happens.

DR MUNDY: On protective costs orders - and we're grateful of your assistance. There seems to be more floods threatened against access to justice than you're average ark. I guess in relation to protective costs orders, you make the point that there is no evidence of a flood of litigation and to some extent there is already existing precedent in Australia particularly in relation to environmental matters in Oshlack - and it's been suggested to us by some participants that the existing - and I think it was the South Australian Law Society citing the Blue Wedges cases in Victoria, they weren't quite sure which one. But is it your view that the existing case law precedent - I guess it comes again to this question I guess, is enough, is Oshlack good enough and the other judgments that hang off it, or would this be facilitated by some legislative intervention?

MR HUSPER (CALC): My very strong view is that you need some codification of it and in comparison to other Commonwealth jurisdictions, notably South Africa, Canada and the UK, the courts in Australia have been very reluctant to engage in I suppose what you might regard as judicial law making, and so there has been a great reluctance to introduce that and for the courts to do it here, and Oshlack provides some guidance. It's very conservative. It's not nearly as advanced as it has become in, for example, the UK, and so for us codification, you would look at all those cases and it's pretty common ground what those cases suggest is the best practice, what are the sorts of elements that you might look for.

But that would provide greater certainty to the litigants and to the courts and I guess would give the courts a permission to make a PCO under known terms and under known considerations, because we've really only had one. In Victoria we've only ever had one contested protective costs order made, and

that was because of changes to the Civil Procedure Act which actually unwillingly, you might say, facilitated it. It was a section that was passed for other purposes, for case management purposes, which dropped the word "public interest" in and, without going into the details of that, there has only been one case.

DR MUNDY: Could you perhaps send us that case so we could have a look at it? It's an issue that we're quite - - -

MR HUSPER (CALC): Yes, and that's the Nassir Bare case, and I can provide that one to you.

DR MUNDY: Yes, that would be helpful.

MR HUSPER (CALC): I don't want to take away the rest of the time, but just very briefly in terms of private corporations, to give you three examples of cases against private corporations, the Coball case, which I think is now going to the High Court, which was the example of a children's youth advocacy group hiring camping facilities for same self attracted children, and the people who ran that camp, it was a Christian camp organisation, when they found out who the users were going to be, they cancelled their use of it. So that was a case in which a protective costs order would determine very important rights in terms of a private organisation's right to discriminate on the grounds of sexual orientation. Another one in Victoria was the water case where, I don't know if you're aware, there's a desalination plant in Victoria costing a number of billions of dollars.

DR MUNDY: I probably - the record should state I'm a director of the Sydney Desalination Plant.

MR HUSPER (CALC): Okay. So Thiessen, who are one of the constructors, had an MOU with the Victoria Government that they would share information about protesters, private information that the police were gathering, and so a couple of individuals took an action under the charter, the Victorian charter, raising important privacy issues. The organisation that they represented couldn't take the action because you had to be a private individual, and in the end a failure to get a protective costs order in that case, and it was applied for, but the risk of actually even applying for the protective costs order, that risk killed that case and we never got the jurisprudence on whether that was a breach of privacy. Think I had one final example. The Andrew Bolt case was another case where a protective costs order could have determined important issues. In the end they were represented pro bono and those clients were willing to take the hit had they lost that case.

MR BRODY (CALC): I think we find that every day in our casework in fact where we're acting on behalf of low income consumers that might have had a dispute that started in a tribunal, they feel that the tribunal had an unjust outcome, and they are looking to appeal the decision, and their risk of cost awards at a higher court deters them from what otherwise would be a meritorious case, and having some access to a protective costs order in those circumstances - and many of those cases might be on public interest grounds when it's, you know, perhaps got a business model that is affecting many other people in the same vein.

DR MUNDY: So your view would be that the issue around the flood and what constitutes the dam is effectively the judiciary.

MR BRODY (CALC): That's right.

DR MUNDY: That unmeritorious cases are brought on the public interest, particularly if the judiciary is left with the business of determining the protective cost order rather than it be some administrative process would be appropriate.

MR BRODY (CALC): Yes.

MR HUSPER (CALC): But even if it was codified, I think there would still not be that many.

DR MUNDY: Yes, okay.

MS MacRAE: You've made some comment in your submission about the billable hours and a preference not to use that billing method. I'd be interested if you could elaborate a little bit more on where you see that, and also then what might happen if there's a complaint about fees from a lawyer and how you see that system working in Victoria.

MR BRODY (CALC): Sure. Well, we do receive complaints from consumers about lawyers' bills, and it's often at a later stage as you can imagine where a bill has remained unpaid and they have sought to recover it through the courts or through bankruptcy even, and by that stage it's often too late for us to do much about, rather than, you know, perhaps assist that person with financial counselling. One of the key drivers of that problem I think is that people don't have a good understanding of how much legal services cost up-front, and that the very nature of billable hours is something that, you know, most - I'm talking about legal service users as individuals, have real lack of knowledge about, and we would say that, you know, that sort of billable hours for an individual matter is probably contributing to costs elsewhere down the system

when these disputes arise.

Look, there is the Legal Services Commission and our centre where that dispute resolution jurisdiction is available. We would refer to that Legal Services Commission. We don't have unfortunately a lot of evidence or data about the outcomes of there. We merely refer people to that. I guess we could say that, you know, people aren't obviously coming back to us saying they've had bad experiences through that body. We've been supporting of - - -

DR MUNDY: Are they coming back and saying they've had good ones?

MR BRODY (CALC): Well, they haven't said that either, no. We would say that it's been positive that the new uniform legal profession law operating in New South Wales and Victoria I think is going to improve the Legal Services Commission ability by making binding determinations. We think that that will, like in the Industry Ombudsman environment, reduce costs overall and reduce the likelihood that matters will get appealed further up to the - in Victoria to the Victorian Civil and Administrative Tribunal.

One issue that we did raise in our submission was there can be problems with jurisdiction if you end up at VCAT. For example you might have a complaint about a bill or costs, but if you end up in VCAT under the legal practice lists, you don't have - you can't bring claims around the Australian consumer law under that list about being misled in some way. So that might lead to sort of unjust outcomes. So having one dispute resolution body that has a binding determination that can consider the range of consumer protections that are available is a good step in the - a right step in the direction.

DR MUNDY: We have made some recommendations about these legal services commissioners being able to administer the Australian consumer law in the way of fair trading - - -

MR BRODY (CALC): Yes.

DR MUNDY: - - - commissioners' authorities, whatever they are depending on where you are. But what you're saying is that VCAT has no jurisdiction in relation to the ACL. That jurisdiction presumably has to be exercised by the Magistrates Court.

MR BRODY (CALC): That's not true. The VCAT does have a jurisdiction, but on a particular list. So if you go to the civil claims list, they will be able to - - -

DR MUNDY: So this is something which is within the capacity of either

VCAT itself or the Parliament of Victoria to remedy promptly - - -

MR BRODY (CALC): Indeed.

DR MUNDY: - - - and effectively. One of the concerns that's been put to us generally, and certainly historically, has been a matter of concern not only with the legal profession but certainly a lot of medical professions which exhibited guild-like characteristics, is the notion that dispute resolution bodies in these professions are not truly independent of the professions themselves, and the commission has - I guess myself in particular have been active in the policy space of how important is the conduct of regulators as opposed to the law under which they regulate. Do you have any views about the governance of legal services commissions and the desirability or necessity or otherwise of having people who are not of the profession there to provide some sort of governance, oversight of what could otherwise be seen to be outsourcing, the old closed shop?

MR BRODY (CALC): I actually agree that that would need to be viewed other than in the governance of those independent bodies and we are very supportive of the model, at least the industry dispute resolution area, where there is, you know, representation from industry but there's also representation of consumer or user interests with an independent chair and we think that that leads to a more balanced governance framework and more likely to have decision making that benefits, you know, not only the profession but users of the profession as well.

DR MUNDY: From your initial comments, am I right that what you were trying to say, or you were saying and I was just being addled, that your view is that we should separate the ethical regulation of the profession from what we might call its character, so how it bills people?

MR BRODY (CALC): I think it's more about, you know, having compliance and enforcement on one hand, about compliance with the rules, and that would mean a regulator that can take audits or take particular compliance action for breach of the rules, disciplinary action, if you like.

DR MUNDY: Yes.

MR BRODY (CALC): As separate from dispute resolution, so a consumer's complaint, that might be resolved quite easily without any recourse to - - -

DR MUNDY: It might be a misunderstanding.

MR BRODY (CALC): Could be.

DR MUNDY: Could be a simple clerical error.

MR BRODY (CALC): I agree that there would have to be good links between those two functions, so that the information that is obtained from dispute resolution, particularly systemic issues, are identified, are shared back with the regulator, who can take action, but we do see those roles as separate.

DR MUNDY: Do you receive funding from the commonwealth?

MR BRODY (CALC): We do, yes.

DR MUNDY: You will no doubt be aware - - -

MS MacRAE: A standard question.

MR BRODY (CALC): Pardon? Is that correct, a standard question?

DR MUNDY: Yes, I usually ask at the start.

MS MacRAE: I was expecting it.

DR MUNDY: Are you expecting a reduction in funding given the re-prioritisation of commonwealth expenditure?

MR BRODY (CALC): At this stage - our centre was fortunate enough to receive some additional funding over a period of four years, as many community legal centres received. We have been informed that we will receive that for two years rather than four and we will receive it on 30 June next year.

DR MUNDY: What will be impact on your activities of the loss of that funding?

MR BRODY (CALC): Look, we primarily used that funding to do a couple of things. One was actually improve our capacity to run our legal advice service, our telephone legal advice service, and we have undertaken some evaluations of that service over recent years, which I think we referred to in our submission, to really understand, well, what are the outcomes of the advice we provide? Do people use it to resolve their disputes without further recourse to our services or did they find challenges in that and the evaluation showed - so we didn't do call backs. Our evaluation showed - it's probably pretty obvious really - that people who have a significant degree of capacity were able to resolve a dispute. Those that are more vulnerable or easily persuaded

otherwise by the trader, you know, were less likely to be able to use the advice to achieve the just outcome that they sought, so what we wanted to do was improve the capacity of our legal advice service in a number of ways, about better identifying vulnerable people, that we should provide more assistance up front or other measures to ensure that those people are able to use the advice that we provide them.

DR MUNDY: Would you characterise the consequences of this loss of funding as impacting upon your front line service delivery or upon advocacy and law reform?

MR BRODY (CALC): I would characterise as impacting on front line service delivery.

DR MUNDY: Thank you. In relation to advocacy, how important is it that your organisation undertakes advocacy, given the systemic identification of issues to ensuring access to justice and development of the law, and do you have any views on whether it is a relatively efficient way of achieving outcomes for the community rather than waiting for large numbers of matters to be hashed out through the courts at a cost to the court system and for the individuals involved?

MR BRODY (CALC): Sure. It's hard to overstate how important undertaking systemic advocacy is to our service. Indeed, it's a central purpose. We would say that we are never going to be able to provide individual legal services to all those that have consumer issues and debt issues in Victoria and as such, it is incumbent on us to in fact undertake policy and systemic advocacy to hopefully prevent problems occurring that would need that sort of legal assistance and that's very central to our purpose of our organisation and indeed to the way in which we run the direct legal services, so our lawyers are trained and are able to identify systemic issues and then have ongoing discussions with our other staff in the centre who are more responsible for policy work or our campaigns work and work out what's the best way to respond to this issue and sometimes it will be "Let's get some more information or test it through the tribunal or the court" to really ask these things but what else can we do in terms of resolving these.

DR MUNDY: I would suspect that sometimes these are just inadvertent things and with a bit of advocacy to the appropriate government authority, the problem is fixed and what you are doing is identifying the problem.

MR BRODY (CALC): Indeed. I will give you an example, one in which we have had. It's a systemic problem actually, but we are hopefully going to solve it, around private carparks. Private carparks are operated in most capital cities

but they have been operating in Victoria around food markets and train stations and the like and their business model has really relied on people not understanding the way in which the parking works and often, you know, you get free hours and then you have to get a ticket or you might pay up front but it's just not clear about the terms and conditions of the parking at the carpark and then they use the court system.

They use the Magistrates Court to obtain your personal details to then send debt collectors and lawyers over to you to recover damages amounts, often $66, $88, for people who either forgot to pay a $2 fee or forgot to pay what was free parking, so people find this is a very unfair practice and we would say that there is a lot of evidence to say that the amount demanded doesn't actually equate to the loss that the carpark has incurred and therefore it's not actually credible in law but because of the difficulties in challenging them individually - in fact, actually when people do challenge them individually, it's often forgotten about, but they will make their money because most people pay and so we see it as very important to take that as a systemic issue. There are a mixture of activities. One is to talk to government about better protections in those circumstances, better enforced that our current protections under unfair contract terms, but also directly with industry about if you just used a boom gate, it would solve all these problems to begin with.

MR HUSPER (CALC): I would suggest, if I can, why is it we do the advocacy. It's virtually impossible to achieve a systemic outcome through the legal practice and it's very frustrating to us, because we take our cases on principally two eligibility criteria. One is that it's a systemic issue and we want to bring about change or secondly, the client is just ultimately very vulnerable and ought to be supported. On those cases which we take on for systemic purposes, we rarely actually achieve the outcome that we want to by taking on the case, because we go to EDR and there's a confidential settlement and you can do nothing with it or you litigate and the other party offers you a confidential settlement and you can do nothing with it or you seek to go to litigation.

Well, you can't find anyone who is willing to take the costs risk of going to litigation and this is quite separate to protective costs orders because often these clients wouldn't get a protective costs order anyhow but for those reasons, we actually struggle to get a change because of the cases. What the cases do is they inform our advocacy work. Because of the cases, we are able to speak to our client. We are able to evidence our client's experiences in the advocacy and policy work we do and so it's an evidence based practice that we have but the change typically comes about with the policy team, from David's team rather than directly from the legal practice.

DR MUNDY: So the litigation is as much about getting the court to clarify the inadequacy in the law.

MR HUSPER (CALC): Well, the failure to get the outcome - I shouldn't say exclusively. Every now and then we'd get a gratifyingly good outcome in a case, but those cases are actually quite rare and they're the celebrated cases.

MR BRODY: I mean, we make in our initial submission up to the Commission - I think we talked a bit about confidentiality clauses in disputes between consumers and traders, and the risk they are to actually harm public interest outcomes, because we're failing to get that broader outcome that might be possible.

DR MUNDY: I guess ADR in a form like an ombudsman gets around that sort of problem, but your ombudsman need homogeneity in that as to - so they can work, I guess.

MR HUSPER: I think, you know, a recommendation out of this would be that EDR schemes and EDR, and the like should report better to the regulators because they have an obligation to report matters, but in truth we will notify the regulator of a matter that we're taking to EDR but once it goes there it becomes confidential, and they'll often ask us what happened. We're unable to tell them, they're not getting the message from the scheme and those schemes - so there's a loss of information that the regulators could gain from those schemes.

MS MacRAE: So you can at least advise them of the nature of the problem. If you were seeing the same problem over and over, you'd be able to relay that but not the outcomes?

MR HUSPER: Yes, and I don't see why we can't, but I don't see why the traders should be quarantined from the scheme being able to notify the regulator. Why should they be quarantined from that?

DR MUNDY: And the information would be sufficient to say "the matter was of this character and this is how it ended". It wouldn't need to identify the individuals concerned?

MR HUSPER: No.

MR LEERMAKERS: That's right and, I mean, we'll have an enormous bank of cases that we've given advice on that may never get anywhere near a court, that may never even get anywhere near EDR and, I mean, what we see is probably the tip of the iceberg and what gets to court or a dispute resolution is

the tip of the tip of the iceberg. We're quite often doing advocacy or policy work based on a collection of maybe - if we get say six cases over the course of three months, that's usually indicating quite a huge problem and we'll go to the industry player and we'll say "there's a problem", or start talking to government. You couldn't do that kind of work based on the small amounts that would ultimately get to the courts.

DR MUNDY: But given these matters are small amounts reporting in the Magistrates Court and then the Tribunal's are patchy, I'm just wondering how these low level disputes, if they were conducted in a public forum as they traditionally have been, the value in that information that's going to be revealed as someone who's a statistician by trade. How am I going to collect it and analyse it in a systematic way, and weighing up against that whatever benefits there are in the EDR process. I'm not sure that the public benefits might outweigh the private costs of - I guess what we're trying to identify is a mechanism.

MR BRODY: Yes, and I think there probably are mechanisms there, so there is a lot of court appointed ADR or ADR through the Tribunals that ends up in confidential settlements, so I think in those processes or those programs, there is opportunities, evaluation techniques. So you might look at a sample of matters that have gone through there in a particular year. Maybe you're right, that it will be costly to try and report on outcomes of all of them, that using sampling to encourage evaluation and to publicly report on that. So, you know, parties can make judgements about whether the outcomes - those evaluations indicate good outcomes overall.

MS MacRAE: I don’t think we've got very much time but I was just interested also in your comments around ADR and the compulsory use of ADR, and it's interesting because we've had a range of participant say it's great and there should be more compulsory ADR, and other people that have some reservations, as you do. Are there things that we can do to better address power imbalances when ADR is compulsory?

MR BRODY: I think exactly what I was just talking about, around having evaluations of ADR processes. So there is some public assessment of outcomes. When it's a court appointed or a Tribunal appointed ADR scheme, it's a black box, we've got no idea about outcomes. If you compare that to the industry dispute resolution schemes they're generally mandated to have a public review at least every five years and, you know, they're always appointed more often than that, and that is an opportunity for stakeholders to give input into review, the independent reviewer comes and looks at files, and comes to some public judgment about whether there should be some changes to how dispute resolution is undertaken to improve justice outcomes. I think there's a

lot to be learnt from those sort of things that can be applied to other ADR.

MS MacRAE: We did have a suggestion or we asked for comment about having a threshold for small claims, if you like, and consumer matters. We did suggest a number of 50,000 and I think, you know, we note now that VCAT's got a $10,000 limit. Is a $10,000 figure - is that sort of acceptable to you? Do you think that's a good number? Or should there not be a threshold?

MR BRODY: Look, I think that when it comes to power and balance we would encourage - a power balance situation, we would encourage it to be the election of the weaker party. If they see there's not much point going through a mediation process, they're probably in all cases - and this is true to our complaints - have been in dispute with this trader for one to two years. They know they're in very false positions that, you know, a mediation that's going to go for two hours now, you know, is that going to achieve an outcome? It might be - and our concern has often been - that yes, it will achieve an outcome. It will achieve an outcome that's, you know, somewhere in the middle that's not a fair outcome to the consumer. So we would say that having, you know, things like an election of the weaker party, evaluation could all contribute to having a better system where ADR is part of the mix but it's compulsory in every circumstance.

DR MUNDY: You mentioned a couple of case studies and my sense of those case studies was that was as much a reflection upon the mediators as anything else. Is your concern that in the rush to get matters through Tribunals, we're effectively dumbing them down?

MR BRODY: I probably agree that is a risk. I mean, we also talk about in our submissions - - -

DR MUNDY: We get odd decisions from High Court judges.

MR BRODY: We do, I agree. But I think it is another factor that indicates the same concern. We're seeing, at least in our experience with the VCAT, that there have been a number of procedures put in place that's making it more like a court and less like an accessible Tribunal. So one of those was a recent threefold increase to application fees. A lot of the change around application for hardship waivers, making that a much more complex and timely process for individuals to go through and most recently there's been changes on - at least in the civil claims list - around extra steps that a consumer has to undertake to have their matter heard, for example providing - or there are documents directly to the other side rather than to the Tribunal.

They call it serving, you know, the documents on the other side. Now, serving

and legal things like that aren't well known to consumers. They're legal constructs so it leads us to the view that they're becoming more like a court and less like a Tribunal, potentially because they're wanting to limit the number of people going to the Tribunal because it's costing them a lot of money.

DR MUNDY: So the issues around creeping legalism are not solely about presence of lawyers, which tends to be the focus of the discussion, but it's the procedural aspects of the Tribunals that - they're procedurally looking more and more like courts?

MR BRODY: Indeed, and I would say again, our experience is in the civil claims list at VCAT, that only a very small proportion of those claims are represented by lawyers.

DR MUNDY: My sense from your previous comments was that this was largely a response to resourcing constraints?

MR BRODY: Indeed. Well, again it appears to us to be.

DR MUNDY: Thank you very much for your submissions and your time to be with us today.

MS MacRAE: Thank you.

MR BRODY: Thank you.

DR MUNDY: We'll adjourn these proceedings until half past 3.

DR MUNDY: We might recommence. To assist the transcript, could you each state your names and the capacities in which you appear?

MS BAIN (SCVFIC): My name is Miranda Bain. I'm Director of Strategy, Community and Government Relations for Funds in Court.

MS MAY: I'm Susan May. I'm a solicitor to the senior master.

MR WALTON (SCVFIC): Roger Walton, senior legal officer for Funds in Court.

DR MUNDY: Would one or more of you like to make a brief opening statement, by which we mean about five minutes?

MS BAIN (SCVFIC): Yes, I'll do a very brief one and then we'll be open to your questions. I thought it might be useful to give an historical context to Funds in Court of which you may not be aware. So the origins is the Master in Lunacy was an officer of the Supreme Court created under the Lunacy Act of 1867. The officer was responsible for registering the general care, protection and management or supervision of the affairs and estates of those mentally ill or disabled. They maintained registries and recorded everything to do with the patient, their names, where they went to, associated costs and they managed the general disbursement of funds for those people, and those judged incapable of managing their affairs.

The Master in Equity and Lunacy was responsible until 1940, with the transfer of that function to the Office of the Public Trustee for the general care, protection and management or supervision of the management of the estates of all lunatics, persons of unsound mind and those incapable of managing their own affairs. The Master in Equity and Lunacy became the Public Trustee but Funds in Courts estates remained with the court and eventually became the Office of the Senior Master in 1986. The Senior Master is an Associate Justice of the Supreme Court.

In our earlier submission you'll be aware of how the Funds in Court office manages itself. So I don't want to go through that again. I just want to draw your attention to the funds that are paid into the Court and that we administer those funds on behalf of those people who are deemed to be unable to manage their own affairs. We call them beneficiaries. The Productivity Commission calls them consumers. Our population group have various degrees of cognitive impairment borne out of either trauma, car accident or from a medical illness or negligence mostly.

I think we gave you information on how we managed the funds through

the senior master and the judicial registrar and I wanted to say quickly that our emphasis really is on the rights of our beneficiaries to be protected and we take that responsibility quite seriously. It has been historically sound and we think we are pretty good at what we do. The role of this section that's represented by Susan and Roger today is really to have a look at how legal bills are presented to our beneficiaries and to question those bills when we sense that there's been perhaps - well, our beneficiaries have been overcharged. Overcharging is a common practice in some law firms, not in all.

But I wanted to give you finally some sort of context about the protection. A beneficiary with an ABI may have spent over a year in hospital relearning common skills such as eating, walking, reading and writing. Post hospital, they may have to wait years to have their case go to trial and tests that were done previously have to be performed again if there is any kind of delay in that trial. We ask you to consider such a consumer has capacity to provide informed consent when signing an agreement pre trial and ask whether or not they can seriously question or have capacity to question their legal bills post trial.

How would they do that? Over time they develop a close relationship with a lawyer who will represent them in court and analysing a legal bill takes a particular skill and we have that skill with us today. If not, it would go to the Supreme Court's cost court, but to have a matter heard in the cost court means the consumer or our beneficiary would have to appoint yet another lawyer of whom they would know nothing about, having developed a relationship with a lawyer who represented them and won the case over a long period of time, and that questioning of their legal bill is going to cost them more money.

The funds that they get is a one time, once only sum, lump sum, which has to assist them in their life until the day that they die. They don't return to employment, for example. I think it would be an exceptional person who would have that skill to question the bill given the context of how that comes to be. There are other processes which we've acquainted you of, the appointment of a litigation guardian and other processes, but our experience is a litigation guardian is often appointed to a beneficiary from within the family construct and our beneficiaries are already disadvantaged, they often come from low socioeconomic areas, they're poorly resourced, they have very, very little knowledge of the legal system as such.

What we observe is that personal injuries is a growth industry for legal firms. There are other reasons for that but it's certainly a growth industry and we say that the establishment of other sorts of funding models like the central access funding credit facility for these consumers with an ABI or disability where they can pay for their own legal costs if their case wins or disbursements

may not protect the consumer from unwarranted and excessive legal bills.

Finally we thought we might come with some suggestions rather than a complaint. Since the client consumer beneficiary has to pay eventually one way or another for a battery of medical and psychological tests, we thought perhaps it might be useful if they were to have a neuropsychological assessment to deem capacity supported by their local GP or specialist before they sign an agreement and before the bills begin.

Another thought was that perhaps the role of the Senior Master's Office that we exercise in relation to costs could be duplicated somehow by perhaps an independent review panel or a tribunal who are made up of lawyers who are experts in costs, legal costs, who don't have an interest in the outcome and they might be appointed on a rotating basis to review a consumer's legal bill and make appropriate adjustments. So we're here now to answer your questions.

DR MUNDY: Thank you very much.

MS MacRAE: I guess the role that you play raises a whole range of issues for the system more generally in our view and I know there's a couple of things you said in your opening which were of interest. One is that you said that you thought that analysing a legal bill required a great deal of skill. I think we probably agree with you in that regard. But while you've got disadvantaged people that you are providing that service for, would you say that the average consumer who doesn't have those difficulties are also going to be struggling to analyse whether their bill is reasonable or not?

MS BAIN (SCVFIC): I'll answer and say yes, from experience, but you don't have a comparison so if your case takes 14 hours for legal research and another case takes 14 hours for research, the general punter won't know value for money around that or was the research warranted and, you know, there's some reflections that one could make about that, you know, how do you - unless you are a lawyer and skilled in the area, how could you know that something was appropriate for your particular case. What do you think?

MR WALTON (SCVFIC): I think you're right to the extent it's difficult for anyone, apart from, well, what are defined under the act as sophisticated users of legal services or people that are - - -

MS MacRAE: Obviously for large repeat users, that's not the problem.

MR WALTON (SCVFIC): Absolutely, but even for your - for want of a better word - average one-off user of legal services, it can be very hard to determine whether costs are reasonable or not, particularly when, as you

pointed out in your report, with the use of time-base costing, how do you determine whether the time that has been devoted to a particular case is appropriate, especially when there's no way really to make a meaningful comparison of the time that's been taken in your case with another case. So I think it is difficult.

The Legal Practice Act is not an easy act, I wouldn't think, for consumers of legal services to digest. I mean, you see enough mistakes in costs agreements disclosure by solicitors, let alone by lay people. So, yes, look, I think as a general statement it is difficult for people who are not regularly users of legal services to determine whether costs in all the circumstances of their case are reasonable or not. I mean, there are avenues, of course, the Legal Services Commissioner, but currently the jurisdiction is fairly limited, although that will be going, I understand, up to $100,000, there's still a substantial number of cases that would go beyond, that cost more than $100,000. So certainly the increase in the Legal Services Commissioner's jurisdiction is going to be a help but for those bigger cases there really is only the cost court as an avenue for consumers wanting to challenge their legal bills.

MS MacRAE: You also said in your opening statement that overcharging is common practice among some law firms. Are you in a position or would you be breaching your responsibilities to address that? I mean, I guess you're in a unique position to have seen enough bills across a whole range of clients, that you would pick up on that when no individual consumer could possibly be in that position, so how would that overcharging - is there a way of dealing with that information that would be helpful? Obviously if it's a systemic problem with particular practitioners, it would be great from a consumer point of view to have that somehow divulged and addressed. Is there any mechanism that that can be brought to anybody's attention in the current system that would allow that to happen?

MS BAIN (SCVFIC): That's four questions all rolled into one.

MS MacRAE: I'm good at that and they're all unanswerable.

MS BAIN (SCVFIC): I will give it a good shot. The only time we have provided costs information to anyone outside our office was to this Commission in relation to the NDIS inquiry. That was the first time it had been compiled. In our office we are very concerned about the privacy of our beneficiaries and when we did provide that information, the Commission and the Transport Accident Commission actually got together and paid for someone's time to do that. The Senior Master wasn't convinced that our existing beneficiaries should bear the cost of gathering that information. So I think if the confidentiality concerns could be addressed, then we could provide

that kind of information but we probably need funding to do it because we work on a cost recovery model and - - -

MS MacRAE: Sure. I can appreciate you wouldn't want the - it's a public benefit that you're looking for, not a private one for the individuals involved.

MS BAIN (SCVFIC): Yes.

MS MacRAE: In a hypothetical world, if the money was provided for you to be able to collate that information or for someone to collate it, where would that complaint then go? Would it go to the legal services commissioner?

MS BAIN (SCVFIC): Probably not. I mean, his role is to argue on an individual basis costs which he deems to be inappropriate. He responds to complaints rather than looking at it.

DR MUNDY: This is one of the concerns that we have with the resolution of what are essentially commercial issues between lawyers and their clients. We weren't here before but this is in stark contrast to situations with people who have a complaint with their telecommunications provider.

MS BAIN (SCVFIC): That's exactly right.

DR MUNDY: There is no systemic way in which - and in fact our view is that the failure to do so actually means that more people probably end up in your hands than actually need to be if there are systemic issues about conduct which can't be captured.

MS BAIN (SCVFIC): I think that's a reasonable summary.

DR MUNDY: That's the reason why repeat behaviour is in the public interest to be captured. Obviously not to the immediate beneficiaries because they have already been stuck, so the funding question is a relevant one because there probably is (indistinct) unreasonable to expect those who have been burned to pay for the prevention of others being burned.

MS BAIN (SCVFIC): I think the Senior Master's position on that would be that because these funds are beneficiaries, one of our custodial, I guess, obligations and responsibilities is to protect the funds from any depletion other than basically keeping the office running because they need these funds to get them through the rest of their life.

MS MacRAE: Just think if you were - would you be comfortable about explaining this one case study, because that might address the second question?

MS BAIN (SCVFIC): I had occasion to go through this list of special damages for one of the beneficiaries for whom we received about $6.5 million. They were injured as an infant as a result of medical negligence. The initial claim for costs was solicitor-client costs and disbursement was $295,000. Eventually it was settled at $280,000. So the actual costs in this case was about 4.3 per cent of the total award.

I was breaking down, in the list of special damages and then later in counsel's advice when the matter settled, how much was for future attendant care and future costs, how much was for funds administration, how much was for - because this beneficiary is never going to work. She is cashing in her earning capacity for her entire life. Because it's a medical negligence case, she has got to pay for all her future medical costs, whereas people who are injured in work or transport accidents have that ongoing entitlement to medical costs.

So although $6.5 million seems like a lot, it has got to last her all her life. One of the complexities of this case was they couldn't agree on how long she was going to live and eventually they decided on looking at about 40 years, so that's another - she is about eight at the moment. I suppose one of my concerns with contingency or damage-based assessment of fees, for instance, is that that will reduce the amount that's available for her future care if costs were on that basis.

MS MacRAE: And she doesn't qualify for NDIS.

MS BAIN (SCVFIC): And Centrelink either. She will never get Centrelink.

DR MUNDY: Because she fails an assets test presumably.

MS BAIN (SCVFIC): Yes. She will - - -

DR MUNDY: If an assets test is relevant to her, she has failed it.

MS BAIN (SCVFIC): Yes.

DR MUNDY: Yes. I think we have been quite careful, particularly in those sorts of matters. I don't think we would think contingency for these matters were appropriate in those sorts of circumstances. Conditional billing I guess is a different question. I mean, it has been observed to us by a plaintiff lawyer in Sydney that whether you allow an uplift or not is probably neither here nor there because if you don't allow an uplift on a no-win - in New South Wales there's no win, no fee, no uplift. They just smear the uplift over everyone anyway, so it probably doesn’t distort behaviour outcomes. I think

contingency fees in those sorts of matters are probably not what we had in mind. Our concern about not allowing conditional fees in those circumstances would be that the matter might never get brought, because a person in those circumstances is probably going to struggle to find means to fund the action. How they might actually give instructions is probably - - -

MS BAIN (SCVFIC): A moot point.

DR MUNDY: Yes. It's a difficult issue but yes, I don't think conditional fees - - -

MS BAIN (SCVFIC): That's a relief from our point of view.

DR MUNDY: Yes. They're the fees. The fees could have been 25 per cent higher on a zero uplift and you would have got the same outcome but just on that, I mean, where there are limits on - my understanding is from the way I have read your submission to us was that they are invariably charged at the limit anyway, so I guess it begs the question: why have the limit? Is that a reasonable observation?

MR WALTON (SCVFIC): Perhaps the question might be: why is the maximum amount almost invariably charged? I mean, the idea obviously is to take account of the risk the solicitors face and the disbursement that they might have to fund, but often cases proceed as an assessment of damages effectively and there's little risk that the solicitors won't recover in the end one way or the other. So I did recently see a costs agreement where the uplift was only 10 per cent but that's very, very rare that you see less than the 25 being charged.

DR MUNDY: I guess you probably didn't bother to have a look to see what the starting fee rate looked like anyway.

MR WALTON (SCVFIC): Yes. I think it was actually, from memory, on a Supreme Court scale, so it wasn't on the basis of hourly rates. Under those circumstances it's probably not an unreasonable costs agreement. I think with the issue of overcharging - I mean, certainly from what I have seen it's not in any respect conscious sort of overcharging. I mean, I think you pointed out the issues associated with time billing, the generation of activity, you know, sometimes and it may be inappropriate - it may be appropriate in a number of cases for two or three solicitors within the firm to discuss the matter but I think, as you have pointed out, time-based billing - there is obviously an in-built - not incentive but there is a tendency for costs to sometimes get out of control on a time - - -

DR MUNDY: It's a bit like when you're pricing infrastructure assets, is it the capital base that's having the cost put on it or is it the cost that really matters? My experience is it's easier to pad the asset base than it is easier to pad the rate. We had the benefit of Martin CJ appearing before us in Perth last week and he made the observation that if you can build a 35-storey building for a fixed price surely it's not beyond the wit of people to at least cost some forms of litigation on a fixed-price basis. What do you think the ups and downs of that - because that's clearly a reflection, it's an alternative to time-based billing. Perhaps a more useful question is what matters that come before you are more amenable to fixed-cost billing, or at least events-based billing, and which perhaps aren't?

MR WALTON (SCVFIC): Well, the things that we see, I would have thought that perhaps personal injury is one of the areas where, you know, there can be an element of stage costing or fixed costing. I mean, it can be - look, I don't think that anyone is suggesting that it's easy to work out how much the cost should be at a stage or at a beginning of a matter how much the costs should be, but I would have thought if you have enough cases, you would be able to draw out some kind of conclusions, averages, from those cases. I mean, the estimates that you often see now in costs agreements, as you are no doubt aware, solicitors are obliged to give an estimate of the costs, but the estimates are sometimes to broad that they are effectively meaningless; so I would have thought, as I said, in cases where there is a volume of cases that you can draw some conclusion, some dollar amounts from those cases, they might be amenable to fixed pricing or staged pricing.

MS BAIN (SCVFIC): Any categories - - -?

DR MUNDY: Those which could be dangerous or shouldn't be pursued.

MS BAIN (SCVFIC): Sorry?

DR MUNDY: Those where you might think there would be risks about going down that path.

MS BAIN (SCVFIC): We talked a lot about perceived risk and real - there's an observation, I guess, that what's presented as being a risk to the beneficiary or the client actually isn't a risk. You pretty well know that the legal firm that takes on the case, even though they may present the idea that it's risky, they have already kind of done their sums and know whether or not its going to win, and then what is the risk of winning. So you would think that, in the overall scheme of everything, you know, you have X amount of cars, X amount of interventions, X amount of traffic lights that are shot, the amount of injuries, in terms of being able to assess the risk, it doesn't feel like that's a risky assessment once the case is taken on; so when we have talked about that we

thought that there is sort of some categories within personal injuries that you would pretty well be able to predict how long is it going to do this, how long is the research for, how long do you think we are going - everyone knows basically how long the trial will take. We certainly do from the Supreme Court's point of view. We have to run the business based on estimates and length of trial.

DR MUNDY: Even if those estimates are perfect, the distribution of them is such that it's manageable and outliers are particularly rare and - I mean, I presume, you can have a look at these matters and say, "That one's going to - - -

MS BAIN (SCVFIC): That's a curly one.

DR MUNDY: Yes. I mean, just following on, one of the things we have suggested, which I think has been misunderstood by some representatives of the profession, the solicitors' professions primarily, is this notion that it would be helpful to consumers that if matters could be identified by type, that a range of likely costs, and we don't mean nought to a million dollars, but some sort of sensible range that could be provided, give people some idea about the costs of litigation before they actually go and start to have a look at them, that could be properly statistically constructed so you get rid of the outliers and you probably wouldn't ask major Colin Street firms to provide data on how much it costs to run a small claim in the magistrates - so you would have a sensible statistical process. Is that something that, in your experience of looking at how costs play out, that would not be an imponderable as far as the development is concerned?

MR WALTON (SCVFIC): I wouldn't have thought that it's impossible to do, no. You would think, given enough information, that you could draw some sensible conclusions from, some observations from that information; so yes, I certainly don't see it as being something that cannot under any circumstances be achieved.

DR MUNDY: I'm glad you say that, because that was the view of Martin CJ.

MS BAIN (SCVFIC): I thought so. It might be the view of our Chief Justice, but I can't speak on her behalf.

DR MUNDY: I mean, it is the nature of professional service, you know, there is a distribution of outcomes and practitioners usually know how much it is going to cost, otherwise how do they run their businesses?

MS BAIN (SCVFIC): We have talked again, we have asked some questions, because you are going to have workload and throughput, and you are going to

have to designate resources against that. We have to do that in the court when we are tying to work out how many trials we are going to be able to run. You know, even if you've got complex trials, you basically know that it is going to take x amount of time, it's going to take x amount of resources, so you would hope, wouldn't you, that a legal firm would have the same capacity. What we did think, though, was that we wondered whether or not someone who has an acquired brain injury has got - how would that information be able to be translated to such a level that they would be able to appreciate it and apply it to themselves, and we don't actually have a view of that today.

DR MUNDY: You made the observation about the Civil Procedure Act, and we are interested more broadly, I guess, in measures in - the Civil Procedures Act sits within a whole range of case management tools and efficiency tools for the courts. Is your court doing anything to try and monitor the effectiveness of these innovations in terms of costs, both to the court and to clients?

MS BAIN (SCVFIC): From the point of view of the Supreme Court, it's always monitored and reviewed, primarily because we have through the Chief Justice a commitment to reduce delays at all times. It has been a major focus of her leadership for the last 10 years. There are examples of that preoccupation which have been recorded in, I think, the Court of Appeal case.

DR MUNDY: We were at a timeliness conference at Monash University a few weeks ago, and one of the justices from the Supreme Court came and spoke. I want to say his surname is Martin, but that's not right.

MS BAIN (SCVFIC): No, it's not.

DR MUNDY: But I can't remember, he came and talked on the Civil Procedure Act and - - -

MS BAIN (SCVFIC): - - - remembered his name.

DR MUNDY: I forgot, but you weren't there, so you've got an excuse.

MS BAIN (SCVFIC): I'll get back to you on that.

DR MUNDY: No, I can look my own notes up.

MS MacRAE: We are interested in as much data as we get on professional fees, and we note in your submission that there's an increasing trend in average professional costs claims by plaintiff's solicitors over the last five years of 34 per cent, or an average of nine per cent per year. I'm just wondering if you have any idea of what's underlying that growth, and whether there's particular

factors in the personal injury area that explains that growth. I'm hoping you are not going to ask me to point to the page where I got that number. I might have to point to the man at the back of the room.

MS BAIN (SCVFIC): The 43 per cent, or nine per cent per annum is a statistic that came from the Transport Accident Commission. That was their observation, so they had trended it over that period of time. I think I would feel more comfortable if I was to go back to them and, say, provide a little bit more information and put it back to you in writing, because it's - - -

DR MUNDY: It's their number.

MS BAIN (SCVFIC): It's their number.

DR MUNDY: I mean, I guess what I would be interested as to whether they think it's a reflection of wage growth or more lawyers being - it is a volume thing, is it a price thing, those sorts of - basically what they think underlies it.

MS BAIN (SCVFIC): Well, from discussions, it was suggested that the trend was growth in the personal injuries, there might be some mitigating circumstances of which - - -

DR MUNDY: So it just might be growth of claims.

MS BAIN (SCVFIC): Yes, but I will qualify that.

DR MUNDY: That would be useful because they may have some data on unit claim costs as well which would be helpful.

MS BAIN (SCVFIC): In the general conversation with TAC, they were worried that there had been such an increase on a per annum basis and that it was trending up and they, you know, questioned how that came to be and I don't think it was a whine about how much they were paying out from the commission. I think there was a genuine concern that it seemed to be just continuously rising and it was unclear about what as - you know, what did they get out it, was a comment.

DR MUNDY: I guess ultimately they are the ones who have to justify the premium increases if it can't be stemmed.

MS BAIN (SCVFIC): Yes.

MS MacRAE: Do you want to make any observations about the increase?

MR WALTON (SCVFIC): No, look, I would be guessing.

DR MUNDY: So it's an aggregate level growth, so it could reflect complexity of matters; it could reflect remuneration. It could reflect the number of matters brought, or it could be anything - costs of witnesses.

MR WALTON (SCVFC): Yes, I was going to say medical reports, expert reports.

DR MUNDY: It could be experts, so it could be process driven. It could be any number of things. If they had a view as to what the cause of that would be, I guess the other thing we would be interested in is whether they think it's a reflection of speculative cases. We have heard from a number of folk concerns about speculative cases being brought, run by plaintiff lawyers who ultimately don't run, whether that has been built into their cost base which is driving it, because they have got fund those matters to the extent they exist.

MS BAIN (SCVFIC): That's an interesting reflection.

DR MUNDY: It's particularly in the context of funded litigation and issues around securities class actions.

MS BAIN (SCVFIC): Okay, that makes sense.

DR MUNDY: Probably not matters that are directly relevant to you.

MS MacRAE: Just coming back more directly to your work, if you find that there is excessive billing, so you regard a bill as excessive, what process do you go through then to determine what happens next, I guess.

MR WALTON (SCVFIC): In brief terms, the solicitors make an application. They usually - well, they have always recovered party-party costs and have usually effectively paid that to themselves, retained that and make any claim from Funds in Court for effectively the unrecovered component of their solicitor-client costs, so often it's made on very scant information. Sometimes we're provided with an itemised bill of costs, sometimes it's an assessment with details or sometimes it's little more than, you know, a one line - effectively an assessment of those costs with an explanation of what happened in the case.

There's issues of proportionality. Obviously, we're not going to pay out a huge proportion of the funds that we're holding for the beneficiary. We look at the party-party costs that have been recovered and the gap, if you like, in professional charges. We're looking at the disbursements to make sure that they are reasonably incurred and we are also looking at anything that the

solicitors put to us which they say has increased the component, if you like, of unrecovered solicitor-client costs, so, if you like, the standard of the applications, there's a huge variability. Some of them are very well made out, some of them are less so. It's generally a process of looking at all those different components and the information that we have at hand.

If necessary, we put the onus back on the solicitors, "Explain to us how unrecovered costs equal x dollars. What were you unable to claim on a party-party basis which you are now seeking from Funds in Court?" Then subject to the Senior Master's instructions or the judicial registrar's instructions, we will make an offer to the solicitors in settlement of their claim and then usually there's a bit of a negotiation process going to and forth and we arrive at a figure. That's typically the process that we go through. The onus is obviously on the solicitors to make out their entitlement and we're pretty cautious about paying out solicitor-client costs. We won't pay them out unless we feel, the court feels that the claim has been properly made but that's basically the process that we go through in trying to quantify those or determine the reasonableness or otherwise of the solicitor-client costs being claimed.

MS MacRAE: What proportion of the cases that you look at would there be a dispute about the level of costs claimed?

MR WALTON (SCVFIC): When you say dispute - - -

MS MacRAE: Discussion.

MR WALTON (SCVFIC): There is probably very few, not many cases where we will pay the amount that has been requested by the solicitors, although in a lot of cases there might be a very small reduction but in more substantial cases, it can be quite a convoluted process of negotiating the resolution.

MS MacRAE: Just roughly, are you able to give me a feel for what sort of proportion it might be where you get a substantial adjustment, because I can appreciate at the margin you might be arguing "I want this or that," but is there - - -

MR WALTON (SCVFIC): Just going on the last two months, because I have those figures sort of off the top of my head, the reduction on the amount claimed was an average of about 22 to 25 per cent.

MS MacRAE: Okay.

MR WALTON (SCVFIC): On average, so some of the claims were reduced

by a very small amount. Some more substantial claims are obviously reduced by a greater amount in terms of percentage but on average in these last two months, and I certainly haven't done figures going much further back but, yes, an average reduction that - - -

DR MUNDY: Your sense is that there is nothing abnormal about those figures.

MR WALTON (SCVFIC): I don't think so, no.

DR MUNDY: Thank you very much and we do appreciate the assistance the Supreme Court has provided in this inquiry and the past. Thank you very much.

MS BAIN (SCVFIC): Thank you, our pleasure.

DR MUNDY: Could we please have the representative of the pro bono practices of Clayton Utz.

MR HILLARD (CU): Our three firms put in a joint submission. Two of us are here today.

DR MUNDY: Could you please for the record state your names and the capacity in which you appear.

MS FRIEDMAN (A): I'm Nicky Friedman and I'm the head of pro bono and community programs from Allens.

MR HILLARD (CU): And I'm David Hillard. I'm the pro bono partner at Clayton Utz.

DR MUNDY: Thanks. Would one or both you like to make a brief opening statement and brief means less than five minutes.

MR HILLARD (CU): Certainly. Australia has a uniquely collaborative pro bono culture and that occurs both between large law firms, and I think Nicky and my presence today is a not subtle example of that, but also between pro bono providers at law firms and the legal assistance sector, and I think we are in a very good position to be able to comment on the way that we perceive the sector as a whole. We have got a breadth of exposure to all parts of the legal assistance community. I think it's true to say that from our point of view, we were very heartened to read that the commission acknowledge that pro bono was a small part of the solution to access to justice in the civil space. We are really a very tiny pool in terms of what's available out there to be able to assist low income and disadvantaged people to get access to civil legal assistance, and it always causes us some concern whenever politicians of either stripe turn to pro bono as perhaps a solution to how civil legal assistance might be offered in Australia. Our capacity is really very limited in the scheme of things. The (indistinct) that our three firms have, is really in how we create a stronger system for ensuring that low income and disadvantaged people have access to the legal system in relation to their civil rights. I think it's probably fair to say that it we started today from scratch to build a legal assistance sector we wouldn't end up with the one that we have today, and that's absolutely no criticism of the very competent, very dedicated people who are across the legal assistance sector, but it's a very ad hoc approach that we have in Australia, and particularly in the civil space. It's very interesting to contrast how we treat access to criminal law assistance and family law assistance in comparison to how we treat the access to civil law for exactly the same community of clients.

For low income and disadvantaged people, they are at capacity, and the

system to accessing legal assistance in a criminal space is very different to how you might get assistance in the civil space. These are all truisms, but they are the sort of things that keep us interested in how pro bono can work effectively and, as you will see from our submissions, our three firms are very supportive of the idea of a civil law one-stop shop of some form, at the very least a more collaborative and cohesive approach to how people might get access to civil legal assistance.

I think it is also important to acknowledge that one of the reasons Australia has such a strong pro bono sector within its private law firms is leadership the government has shown, both here in Victoria and at a Commonwealth level, particularly the Commonwealth with the adoption of a single national aspirational pro bono target and the incorporation of that into the system for how government purchases legal services has really transformed the way in which the capacity to do the pro bono and the willingness to do it from within some firms.

I have been in this role now, this is my 18th year, heading the pro bono practice. When I first started, Gilbert and Tobin and myself could meet in a phone booth to talk about corporate law firm pro bono. There has been a really collaborative approach over the last 18 years to develop a much broader and stronger landscape, and certainly the target, I know the target gets a mention throughout the report, has been a significant factor in the last six or seven years in really dramatically increasing the breadth of what's provided by law firms in the pro bono space. Thank you.

DR MUNDY: Could we start on target. It has been suggested to us that, whilst the target might be all well and good for the Commonwealth list and perhaps in larger jurisdictions, particularly the south-east corner of the country, that this approach of a target is quite problematic, for example, for trying to draw forward pro bono services in, say, South Australia, where there is - one of the benefits of New South Wales and Victoria, obviously, is the Commonwealth does most of its own legal procurement here, or perhaps in the other sector. Do you have any views about whether there is merit in that observation and, if so, how might pro bono services, and perhaps reflecting on your own firm's activities, say in South Australia or Tasmania or Western Australia, how that might be drawn forward?

MR HILLARD (CU):   I think that one of really strong benefits of the creation of the target was it was aspirational in nature, and there's still absolutely no compulsion on anybody to meet the target. What it has done, I think, is to provide a very clear statement that this is what good lawyers are expected to do, and this is sort of the quantity of work that meets the benchmark. One of the issues with the delivery of pro bono work is that any lawyer and any law

firm who does some work for free thinks that's a significant contribution that I've made.

When the target was created in 2007, none of the firms who are now signatories to it were at that 35-hour number, and I'm sure that all of us thought we were doing a fabulous job. We probably were, but we weren't doing as much as we could, and by setting a 35-hour number, it gave all firms something to aspire to, and this sense that, well in reality, a week's worth of work is a reasonable benchmark to set. Now, firms like Allens and Clayton Utz and Ashursts see ourselves as really being leaders in this area, so we have moved well beyond that target, but putting that 35-hour number there helped to give us a platform for which to move to, and it also helps, I hope, for those firms who might have previously done one or two matters a year to think, "Well, hang on, if there's a 35-hour professional benchmark, then maybe there's more that we can do." I think it provides that sort of incentive.

I would certainly not support any arrangement that had a compulsory and punitive nature to doing pro bono, but I think the aspirational and encouraging way that we have gone about it is useful, so that even in some of those other smaller jurisdictions, I don't think that it is more difficult, or that the lawyers in those jurisdictions are more different, that the concept of providing 35 hours is an unrealistic one for them to aspire to.

DR MUNDY: I guess it's more the mechanism. I mean, you say that the target has drawn forces, and the Commonwealth purchasing of legal services probably in South Australia is minimal, and I suspect that some submarine work is probably done from here. They don't - their crown solicitor's office tends to in-source most of the work rather than outsource it. I'm not being critical - - -

MR HILLARD (CU): No.

DR MUNDY: You say that the target has been effective in drawing out this stuff, so I guess my issue - - -

MR HILLARD (CU): What else can be done?

DR MUNDY: If there is no leverage by virtue of government procurement because of the character of the legal services market in the jurisdiction concerned, then what else can be done by governments? What recommendations could we make to achieve similar outcomes?

MS FRIEDMAN (A): The state government would still be procuring legal service, or are you saying that they - - -

DR MUNDY: We were advised by the people who manage the pro bono scheme in South Australia that the crown solicitor has an unusually high, I was about say "peculiarly high" but that would be probably - certainly, that they seem to outsource less than would be, certainly in New South Wales.

MR HILLARD (CU): The target came first before the Commonwealth system was adopted, and I think there's a real benefit from the target having been used as a statement by the profession, and by firms which saw themselves and being leaders in the profession, to say, "This is what we think should happen", and I think there is still that opportunity within a smaller jurisdiction, like South Australia, for the firms which see themselves as leaders to be able to say, "We are nailing our colours to the mast. We are committed to this." I think that there has been, as one of our great colleagues in the United States, Esther Lardent, has often said to us, "Law firms are competitive and collaborative creatures. We all want to do exactly the same as everybody else, just a little bit better," and that by creating a level of sort of professional, across the profession, responsibility, the profession itself can do it. One of the interesting things about the target was that it was established almost in the absence of similar leadership provided by our professional associations. It wasn't something that individual state law societies or bar associations or the Law Council was interested in doing, and it's something which the private profession itself has really created. I think those opportunities exist in each of the jurisdictions.

DR MUNDY: There has been some issues, and we have made some observations about the nature of the work that is being performed pro bono, and it seems to us that a relatively small proportion of it is going to dealing with increasing access to civil justice, whereas a large amount of it seems to be – what I'd call transactional in nature and I think, to be fair to the major firms, I certainly know on a personal level, country solicitors working on minor extensions to the golf course lease and all that sort of stuff, it's fine, but I guess the question is, I mean, have we got our estimates around how much of this is really going to access civil justice issues around about (indistinct) is there a view within the profession, within your sort of cohort, that perhaps over time we need to refocus it away from major artistic institutions who are in receipt of a substantial amount of Commonwealth money, certainly more Commonwealth money than any CLC would get, and back towards real areas of need?

MS FRIEDMAN (A): Absolutely.

DR MUNDY: Am I preaching - - -

MR HILLARD (CU): You are.

MS FRIEDMAN (A): I think on both counts, I think the estimates sounded fairly reasonable to us, and - I mean, I just looked at some numbers today, 80 per cent of the matters we have opened in our firm this year, the new pro bono matters, are for organisations and 20 per cent for individuals. There's also work we do through clinics, through our homeless clinic and so on, but actually individuals who we act for directly through the firm, it's an 80-20 spread.

DR MUNDY: Those matters that you have opened for organisations, I guess I draw a distinction between a homeless women's shelter and MSOs.

MS FRIEDMAN (A): Yes, absolutely.

DR MUNDY: So are we more in the homeless women's shelter or - - -

MS FRIEDMAN (A): We are moving much more towards the homeless women's shelter. We do a lot of work for Aboriginal corporations. It's also numbers of matters is only one measure and the time and complexity of those matters is a different measure, but one of the challenges we have had as managers of pro bono practices within the firms, and I think it's something that we would say is pretty universal, has been that when we came into - law firms have always done pro bono work. It's not a new thing. Corporatised professionalised pro bono is a relatively new thing but doing work for free is something that's as old as (indistinct), so there was a lot of work going on for scouts and private schools and golf clubs and so on before people came in from the access to justice sector to run professional pro bono practices, and part of challenge for all of us has been slowly redirecting our practices, which not everyone has chosen to do, not everyone aspires to do but certainly we do, those of us who have made this submission, and quite successfully, but any support I think that could come from government and from the legal profession and from the establishment for an idea that pro bono really should mean access to justice and it should be about disadvantage, whether for organisations that work with disadvantaged people or directly for those people, I think would further that.

MR HILLARD (CU): Just as an example, the policy at Clayton Utz and I know the policy at Ashursts says we act for low income and disadvantaged people and the not for profits which support low income and disadvantaged people.

DR MUNDY: Yes.

MR HILLARD (CU): I had the pleasure or discomfort yesterday of

knocking back a request for work from the state symphony orchestra. We had a partner who said could I do this and the answer was, "Absolutely, yes, if we do it as a business development file but it's not our pro bono work and it won't be counted as our pro bono time." One of the beauties of the target and the statement that underpin that is it really does focus again that idea that pro bono is something about disadvantage and I think all three of our firms are very conscious of - - -

DR MUNDY: So you actively distinguish between what you consider to be - - -

MR HILLARD (CU): We absolutely do.

DR MUNDY: - - - that and what we might for the better – say call work done for marketing type stuff, brand development.

MS MacRAE: And just then in coordinating the work that you do and what the legal assistance sector does generally, the more that you move towards what we can think of as help for the disadvantaged or the otherwise groups that would miss out, your submission is, if I'm reading it correctly, somewhat critical of the CLC sector saying that they tend to lack scale and that they are not always placed in areas where there is the greatest need, and I have to say we have had quite some push back on that from the CLC themselves, and I am just wondering if you would like to reflect a little bit, if you were in our shoes, I guess, if you were looking to find better coordination and better use of the total resources available in that sector, so that pro bono contribution alongside that legal assistance - the more general legal assistance sector - what changes or where you think reforms might be worthwhile.

MR HILLARD (CU): A lot of the work that we do comes on referral from CLCs. A lot of the work that we do is in partnership with CLCs. We are certainly not critical of the people involved in the community legal centres and the way in which they are conducted but there is, I think, a fundamental challenge that's created by having 200 independent small organisations, each of which is funded from a multitude of sources to deliver some form of comprehensive approach to access to civil legal assistance, and as I think the commission notes in its report, whereas with Legal Aid, representation court work is core business, that's often not the case for many CLCs. Those that do representation well tend to be larger places that have more than one and a half lawyers. They have got the capacity to be able to do that.

In my mind, there is a challenge with the fact that we have here in Victoria I think 51 community legal centres. I am not sure if we started again why we wouldn't look to have one community legal centre of Victoria with 51

branch offices, or some other way of doing it. The difficulty – not with just having a large number of small centres, is that it slices up the amount of work that's done but it also means that there needs to be 200 separate volunteer management committees that there lacks sort the back of house operations in terms of having HR policies and recruitment policies and funding programs and arrangements that are in place. There's a lot of duplication and a lot of time that's spent again and again and again, so that incredibly well intentioned and well meaning lawyers are often distracted by some of those sorts of issues. That I think is a criticism of how the sector has evolved but it's not a criticism of why the sector has evolved that way. CLCs started very much from an independent position, from some really pioneering lawyers responding to needs in their community. Nicky, did you want to - - -

MS FRIEDMAN (A): I would agree. Each of us works with numbers of community legal centres and we see up close the inconsistencies in resources and accordingly, inconsistency in procedures and so forth; again, not because anybody is not completely dedicated. They have to be dedicated to work in that environment but they are small and accordingly there's inefficiencies.

MR HILLARD (CU): So there is an example that's in our paper of a program run with Redfern Legal Centre. Redfern is of a sufficient size that it can employ a specific employment lawyer, someone who can specialise in that area, and so its capacity to therefore expand assistance is much, much greater in employment law than anybody who's at a general CLC that may have one or two legal staff. It's really a question of the size and the scale and so if there was a way to make CLCs larger, to have a greater capacity or to make a civil legal service larger with greater capacity, I think that naturally - - -

DR MUNDY: So the policies being pursued, and you may not be aware of it, with respect to western suburbs of Melbourne who would agree to amalgamate, that is the sort of issue open. I think in your submission, you made an observation about the concentration of CLCs particularly around the metropolitan, around the CBD of Sydney and I guess suffering from the occasional Marxist tendency, I historically determine - - -

MR HILLARD (CU): You are talking to pro bono lawyers.

DR MUNDY: Historical determination would suggest that these community centres have grown up in suburbs in the inner cities characterised to proximity to universities, with Fitzroy. The point that Redfern makes in relation to that point, and I think you also draw attention to the number of specialists, is, well, if they are not going to be located in the CBD, where would you expect the specialists to be located, and the second observation that Redfern made was it's much easier to attract pro bono lawyers from major firms to come to Redfern

than it is perhaps - and I don't know whether they used this example but certainly, the outer western suburbs of Sydney.

I guess the question is really about the view and about the capacity of outreach and we saw in the case of Redfern, they have got a state-wide overseas students program, and I just wonder whether the CRC has national reach in relation to insurance matters. We are just wondering whether the deployment of resources, perhaps the nature of the position would change over time with technology, because what we are very concerned about and what the CLC sector has come with an option or proposal about, competitive tendering that would fundamentally undermine its community nature and they would just be legal centres in communities perhaps but "C" comes first. I am just wondering, do you have a view about how we can get this efficiency encouraged and without undermining that fundamental community perspective?

MR HILLARD (CU): Can I say that I think the community question is an important one but I would suggest that service delivery of legal assistance is the primary issue and from my point of view, if the choice is between do we have a community feel or do we have the capacity to provide people with the ability to defend or enforce their legal rights, the notion of community should come second to that.

DR MUNDY: Yes.

MR HILLARD (CU): There are, as we have said in our response, there are certainly ways that community involvement can continue through any sort of structure, through having advisory committees or local invitations to the community to be involved but legal aid services, for example, service low income and disadvantaged people in the criminal space. There is no suggestion that they do a poorer job because they aren't established with a community person sitting on their board or whatever. It's an interesting argument but I would certainly suggest that it's also important to look at what capacity is involved, so community of itself is an admirable thing but if it comes at the cost of a greater delivery of service, that's a challenging question but we would certainly advocate the idea of a - I think we have referred to it, and we have stolen it unashamedly from previous reports, but the idea of a no wrong door approach, so that if I walk into a community legal centre at Fitzroy and the employment law specialist within the community legal sector is based in Bendigo, I should still be able to find a way to get access to that service, and that I think is the real challenge.

DR MUNDY: Yes. This is just an out of left field question, but a lot of your major clients, you major commercial clients, have very substantial community

obligation programs, and many of them, particularly in the mining resources sector, but not exclusively in the resources sector, are often directed at people suffering disadvantage. The mines are particularly interested in indigenous communities, for all the obvious reasons. Has it ever been the case that major clients, the firm, will come along and say, "Look, we see there's this problem of legal need in indigenous communities in Western Australia. We are not quite set up to work in that sort of space. Is there something we can do to partner with you, or can you facilitate a discussion with an appropriate body so that we could put some money into that, and can you provide us with some guidance and assistance in making sure the money is well spent"?

MS FRIEDMAN (A): Not that specific example in my experience, I don't know about David, but we have certainly worked closely with some of our resources clients.

DR MUNDY: I'm not picking on the resources - it just seems to be - - -

MS FRIEDMAN (A): Yes. Well, with the Aboriginal and Torres Straight Islander population base, which they do have – through our reconciliation action plan, so we have reconciliation action plans, they have reconciliation action plans, they fund micro-finance ventures. For example, we facilitate some of that legal work through micro finance providers, so it's really the micro finance providers who are our clients, it doesn't come through the resource companies, but we are aware of the triangular interest. If the client were to come and help us to identify a community with legal need and in some way wanted to provide the resources for us to service that need to the extent that we could, and didn't present other problems and we thought it was the best use of our resources to provide access to justice, we would be happy to do so. It's the kind of thing we would also be very likely to take a referral body like Justice Connect, if it were in Queensland to QPILCH, or the WA equivalent. They are probably best placed to facilitate that sort of thing.

MR HILLARD (CU): There aren't a lot of examples, but all three of our firms, and others, will have examples of working with in-house legal teams at commercial clients. We have got projects at the moment with Brookfield Multiplex in relation to an Aboriginal adult literacy foundation, and work in north-western New South Wales, which was a project that came to us from the client. There are other examples that we will have. I think it's increasingly part of the way in which law firms speak with their commercial clients through the language of their pro bono programs and their broader community engagement, but I don't want to overstate the size of that. Certainly, there would be absolutely a willingness for us to be engaged in those sorts of discussions.

MS MacRAE: Just in relation to costs awards, I note in particular that you're opposed to the sort of scheme that operates in the UK, and I'm wondering if you could just outline a little bit why that would be the case, and what your preference would be.

MR HILLARD (CU): Yes. It hasn't operated well in the UK. It's a scheme which exists, but I'm not actually aware of any substantial grants or payments that have been made into that scheme or paid out. It's not supported by most of the firms, and I think the reason for it is fairly understandable. As we put in our submissions, I think that we sat and crunched our numbers. We provided more than 500,000 hours worth of assistance between us over the last three years, and in total costs paid from all potential sources, between us there was about $485,000 or something of that nature that we had received.

I think we all took the view that that was - any money which we do recover, we would much rather put back into our own, we think well-functioning, pro bono commitments, rather than to have it go out to something else. The funds are relatively small anyway. I think one of the things that conceptually differs pro bono representation from, if I was running just simply a no win-no pay arrangement, is quite often matters which we run, we don't want to run to a final determination, we don't want to keep going until we get a judgment, we don't want to keep going for a costs order. Many of our matters, sometimes frustratingly for the lawyers involved, but not for the clients, are matters that get settled much earlier in the process, because our fees aren't in question; so there are very few matters, and in fact between the three of us we might have had four substantial matters in the last three years were we had any sort of significant costs awarded, it's not a large scheme anyway, and most firms, I think, are very comfortable in saying, "Our program costs a lot more to run than we ever recover and, if we ever recover anything, heaven forbid, we would like to be able put that into our own programs."

DR MUNDY: I think it has been, I mean our real interest in costs awards was not actually about funding pro bono lawyers, our real interest in costs awards is the behaviour of the litigants, and particularly the circumstance where a well-resourced litigant faces a pro bono or self-represented litigant and, in the absence of a costs order would seem to have an incentive to drag the matter out, and to ultimately frustrate the matter financially until stalemate, and then the matter falls over and parties go away. That's – so justice isn't achieved.

I guess, following on from your question, you don't expect to get paid, and there has been a relatively small number of matters which you have received substantial awards in. Would it follow therefore from those observations or generally, are we conceiving of a problem that is more theoretical in nature on behalf of practising economists, than perhaps in the

reality of practising lawyers?

MR HILLARD (CU): I think so. I think it's a situation where, as we said in our submissions, we're not aware of a situation that anybody has not taken on a pro bono matter because they didn't think they were going to get paid at the end of it, so it's not stopping the – it's not the issue for representation.

DR MUNDY: I'm not worried about the refusal, I'm worried about - - -

MR HILLARD (CU): Just between us, certainly when we act, we don't often disclose to the other side that we're acting on a pro bono basis, or we don't disclose to them that we think that acting on a pro bono basis might mean that we're disentitled to a costs order so it's remarkable what happens in matters, understandably perhaps, when Allens hoves into view, suddenly a party on the other side does start to think about those things, and I'm sure they're not just thinking about the quality of the representation or the size of the representation on the other side, but they're thinking about the costs risks.

DR MUNDY: So when the Clayton Utz pro bono partner turns up, he just turns up, or she turns up, "Hello, I'm the Clayton Utz partner, and I'm acting for them." That's all they know?

MR HILLARD (CU): That's right.

MS FRIEDMAN (A): Probably, our major cases, and certainly the ones where we have had significant recovered costs, have all been matters on behalf of people who everybody in the room would know are represented pro bono, they have been asylum seekers or prisoners. It's pretty clear that there's pro bono representation.

DR MUNDY: Are they typically matters against the state?

MS FRIEDMAN (A): I was going to say, it's pretty much always the Commonwealth or occasionally the state government on the other side.

DR MUNDY: So you could rely upon the Commonwealth model litigant laws to - - -

MS FRIEDMAN (A): Exactly right.

DR MUNDY: - - - any sort of adverse behaviour.

MS FRIEDMAN (A): Yes, in theory that's right, so yes, it's not another, it's not a party on the other side who is going to push the matter harder because

they think won't have to pay costs.

DR MUNDY: Okay, so it's not a tier 1 issue?

MS FRIEDMAN (A): It's a bit of a red herring though.

MR HILLARD (CU): As an example of the matter that resolved with us this week, a client who was referred to us, we wrote to the other side. We asked effectively, "What's the basis of this claim that you have commenced in the District Court against our client?" We signed it off "Clayton Utz". There's nothing on it about pro bono. Within 28 days the proceedings had been discontinued by the plaintiff, and we never said we were acting on a pro bono basis. I assume that they didn't think we were, and they were worried about, "Gosh, there really is a problem here. We better make sure we really have a claim to run."

DR MUNDY: Or if you were, it doesn't matter. We've already sucked up all the costs, so they are not going to be able to exhaust you; so the issue probably, if it exists, exists with Mary Smith, the suburban solicitor, who might be trying to help someone out, and then faced a major firm of insurance, or some such, particularly in a money matter I think is - - -

MR HILLARD (CU): Yes.

DR MUNDY: - - - rather than matters which lead to a, you know - - -

MS FRIEDMAN (A): A constitutional question, yes.

DR MUNDY: Okay.

MR HILLARD (CU): As we have put in our submission, we would certainly welcome any clarification about making sure that costs, if push comes to shove, that costs would be available, but in reality I think it's actually not a huge issue for any of our practices.

DR MUNDY: I think the issue really may be here that the legislature might be able to remove a large amount of transactions costs that are irritating people providing services pro bono, rather than people having to do hoops and things with costs.

MR HILLARD (CU): We're acting at the moment for a client who was trafficked here from India and has been working locked inside a restaurant for two years. We're happy to provide - to run the case, but the interpreter costs are killing us. You know, it's those sorts of things. The absence of access to

interpreter costs to pay the disbursements are really the challenge for us.

DR MUNDY: Yes. That's not - and you may have done this already, but are you able to give us any data on the nature of the matters that you've - I mean you've indicated migration matters and matters in the High Court and constitutional questions and administrative law matters, so just be - I guess part of our thinking has largely been brought forward on the basis of matters involving monetary settlement where the incentives are probably very different to the sort of proceedings you might have with respect to the Department of Immigration.

MR HILLARD (CU): I think it's fair to - we can certainly try and crunch those numbers, but it's fair to say that for all of our practices the bulk of what we do is not ending up in the High Court, you know. There are - and Allens more than any firm is probably to be credited with the leadership it's shown in that, but the vast bulk of what we do are matters which perhaps ordinarily would look like they should be at Legal Aid. They're matters for low-income people who have got an employment problem, they're the victim of discrimination, they've got a dispute over, yes, their housing, those sorts of - they're everyday legal matters.

MS FRIEDMAN (A): Minor credit and debt matters, yes.

MR HILLARD (CU): Yes.

MS MacRAE: What sort of evaluations do you undertake of the pro bono work that you do?

MR HILLARD (CU): We probably measure what we do simply by way of volume and a sense of outcome, but we're not - it's an almost impossible task and we struggle with this all the time. A number of years ago we ran a High Court matter which saw a man released from prison after 12 years who had been wrongfully convicted of murder. That took up two and a half million dollars worth of our time. I don't know whether that is a better way of using our resources than acting for two and a half thousand people who have been unfairly dismissed and can't get access to a lawyer to pursue their employment rights, and it's very difficult to draw that sort of thing.

What we do, I guess, is each of our matters is opened under terms of engagement. All of our work is supervised by partners, clients are treated in precisely the same way that we would treat any of our other clients, and that I guess builds in some sense for us of integrity and proper service. It's certainly not a - I mean the fact that both of us are here as full-time people leading these practices and in reality our pro bono practices are probably our largest

commercial client at either firm, this work is done with integrity and it's done properly, but we're probably not sitting down with a sort of a systematised way of saying, "We need to do 27 of these type of cases and 106 of these," and that sort of thing. So we're probably guilty of not having a lot of internal - - -

MS FRIEDMAN (A): We don't survey past - we don't anyway. We don't survey past clients to ask how satisfied they were or otherwise. I mean we've had discussions. I don't have key performance indicators for example attached to my employment because every couple of years it comes up someone from HR wants to know what Nicky's KPIs are. We say, "Well, what would it be? More pro bono matters, or less pro bono matters, or bigger ones, or smaller ones, you know? How do you measure those things?

MS MacRAE: Yes.

MS FRIEDMAN (A): So, yes, we just - I mean we get a sense of things, but it's (indistinct) enough for an economist.

DR MUNDY: No. Well, look, we don't - Angela and I don't have KPIs. The Governor-General doesn't expect them obviously. Is there anything else?

MS MacRAE: I don't think so.

DR MUNDY: Okay. Look, we might draw it to a close there. Thanks very much for the material you've put to us and the time.

MR HILLARD (CU): Thank you.

MS FRIEDMAN (A): Thanks very much.

MR HILLARD (CU): Very pleased to have been here. Thank you.

DR MUNDY: Could we have Mr Hannigan, please. When you're settled, could I ask you to state your name and the capacity in which you appear.

MR HANNIGAN: Just have to find my glasses.

DR MUNDY: I usually have to take mine off to read.

MR HANNIGAN: That's a good question. I come from Collingwood by the way at the moment.

DR MUNDY: As long as you don't barrack for them - - -

MR HANNIGAN: I don't.

DR MUNDY: - - - we'll listen to you with respect.

MR HANNIGAN (FLAC): Thank you. My name is Diarmuid Hannigan, and I'm on the executive committee of an organisation called For Legally Abused Citizens, so that's the capacity in which I appear.

DR MUNDY: Could we ask you to make a brief opening statement, Mr Hannigan, and then we'll ask you some questions?

MR HANNIGAN (FLAC): Right. I'll read this. Thank you for giving me the opportunity to address the Commission on behalf of the legally abused citizens of Australia. It is all too apparent that we have formed a legal culture that has excluded family and community as a participant. Lawyers make, administer and interpret out laws. During law reform process the committee members are nearly always drawn from members of the legal industry. Concerns raised by the community are often ignored or become so diluted by the lawyer-run reform committees in their recommendations that they become ineffective when they are shrouded in legal speak that is designed to create a series of indeterminate outcomes which will require engaging the services of the legal industry.

So sophisticated is this manipulation of our laws by the legal profession that when the Trade Practices Act of 1974 was introduced to Australia, the legal industry promptly decided that the learned profession was above reproach and maintained their own separate state-sanctioned Legal Professional Acts where consumers of legal services are clients. Clients do not have consumer rights. The Legal Professional Act was passed in Victoria in 1946.

The example of the Brookland Greens Estate fiasco, which has cost the Victorian taxpayer about $150 million, is a case in point. The details are

outlined in the Victorian Ombudsman's report on this matter. The ombudsman discovered that Colin Taylor of Russell Kennedy failed to honour his duty to the court by not informing the hearing at VCAT that the expert witness had raised concerns regarding an explosion of gas. Considering the purpose of the forum and implications of the knowledge, having consideration for the fact that young families would start a community in this area, and there was even a possibility of there being an explosion in a house full of children, one has to ask the question why has the legal regulator in Victoria not prosecuted the lawyer?

Another example: example of lawyers who become executors. 175,000 people die each year in Victoria leaving an average estate worth half a million dollars, a total of $80 billion per year. The legal industry manages the majority of this money, and many lawyers and law firms offer their services as executors. Since executors have access to the estate, it is essential that their behaviour is accountable to the beneficiaries. Currently these lawyers, executors, can engage in misleading and deceptive conduct in order to generate disputes which will permit them to pay themselves more fees from these estates, particularly if they have helped to draw the will and ensure the terms of the will have some ambiguities. These lawyers, as was the case of Russell Kennedy when managing my own mother's estate, can also hide documents they have in their possession from the deceased.

DR MUNDY: Mr Hannigan, can I just interrupt you there, please? I need to advise you that these proceedings provide you with no privilege and anything - - -

MR HANNIGAN (FLAC): Fine.

DR MUNDY: - - - anything - - -

MR HANNIGAN (FLAC): Fine, fine.

DR MUNDY: Can I just finish? I am obliged to warn you - - -

MR HANNIGAN (FLAC): Yes.

DR MUNDY: - - - of this. These are not parliamentary proceedings and anything you say is available for people to bring action against you.

MR HANNIGAN (FLAC): Fine.

DR MUNDY: I'm not going to stop you, but I want you to be aware.

MR HANNIGAN (FLAC): No. I'm speaking the truth from Collingwood.

DR MUNDY: Please continue.

MR HANNIGAN (FLAC): These lawyers, as was the case of Russell Kennedy when managing my own mother's estate, can also hide documents they have in their possession from the deceased, and even lie about the contents of those documents without fear of prosecution by the regulators. Lawyers who become executors of deceased estates are not deemed as lawyers and are not bound by the Legal Professional Act of 2004 in Victoria. But lawyers who are executors were appointed by people who are now dead who thought they were lawyers. Clearly a case of misleading and deceptive advertising.

Unfortunately the impacts of this culture when left unrestrained extend well beyond the dismemberment of a few grieving families, or even a community of 1000 people living on a methane mine, and into our aged care and retirement living community, the sick, the ageing, and one of our society's most vulnerable groups. One only has to follow the growth of the law firm Russell Kennedy who now advises the Victorian Government on five special legal panels and has now opened an office in Canberra so as to market its expertise in the aged care and retirement living industry to the Federal Government.

In conclusion our laws are not founded on the basis of family or community. Our laws are created, administered and interpreted by the legal industry for its own financial benefit. Despite the fact that Australia has embraced consumer rights since 1974 through the Trade Practices Act and now Australian consumer law, the legal industry has been able to subvert its responsibilities under that Act to Australian consumers of its services by maintaining Legal Professional Acts that regulate lawyer behaviour in each separate state.

These acts turn consumers of legal services into clients who do not have consumer rights. I suggest that the Commission address this anomaly within the law and ensure that Australian consumers of legal services are ensured of their consumer rights. I also suggest that during the law-making process members of our communities who represent Australian families play a dominant role and are well resourced and funded to ensure the best outcomes for our nation. Thank you very much. Hopefully it's waking up.

DR MUNDY: It's been a long - this is the seventh working - no, yes, because we had a day off on Monday. I'd make the observation about the Trade Practices Act 1974 that there were constitutional issues which were there around the regulation of partnerships which at the time were thought to be

beyond the scope of the Commonwealth, but that's just a point which has subsequently been clarified with the Australian consumer law, and in fact we are trying to advocate stronger application of the Australia consumer law. I think some of the issues with the executors probably go into the very murky area of the law of trusts and when people are trustees or they're something else, and that's not a matter which we're probably competent to resolve.

But one of the things we are interested in is consumer protection and fraud. You've raised a number of matters, and I get the sense that you're probably not particularly satisfied with the processes around the Victorian Legal Services Commissioner and legal services complaints more generally. We heard from someone earlier on and others who have made the observation of the legal system designed by lawyers for the benefit of lawyers and administered by lawyers. Do you think there would be any merit in us making recommendations as to the governance of these complaint bodies to require their membership to consists of at least a number of people who were not lawyers, much in the same way as some of the medical registration bodies require there be persons who are not medical practitioners to sit upon them?

MR HANNIGAN (FLAC): It would help a little bit, but I would suggest that they would automatically feel intimidated, not being a lawyer. That's my suggestion.

DR MUNDY: I'd be available, and I'm not a legal practitioner.

MR HANNIGAN (FLAC): No, no. A person of your calibre, or somebody who has got an education and is a tough nut, could well be very, very useful in those areas. I also feel though that it would be better if the consumer affairs bodies were well resourced and in many instances were capable of dealing with issues regarding the provision of legal services to consumers.

DR MUNDY: Well, given that the Australian consumer law does extend now to the provision of legal - - -

MR HANNIGAN (FLAC): You've worked that out.

DR MUNDY: - - - services, do you think there's a problem inasmuch as that because there are these legal services commissions there, and all agencies are scarcely resourced at some point, that there's a risk that the consumer law isn't vigorously brought to bear by the fair trading commissions or the ACCC or whoever because there is this other body there and they say, "Well, given there's someone over there to deal with those sorts of disputes, and given there's no-one over here to deal with these, we'll focus our resources on that"? It's not a criticism of the people involved. I think it's a logical bureaucratic

response. But I'm wondering whether that's part of the cause of the lack of an enforcement of the consumer law.

MR HANNIGAN (FLAC): No. I'm going to hand you over more information, but from my own experience they're loathe to tip their toe in the water. That's from my experience. I'm trying to get Consumer Affairs Victoria to organise a voluntary mediation between the firm I'm dealing with, and they write back to me and say, "We can't do that because we think that the voluntary mediation wouldn't resolve your issues." So they're loathe to even go to stage 1 and formalise it. My point is that if they arranged the voluntary mediation, then the law firm, if they decline to attend, will have to give reasons for why they don't want to attend. So I can't even get to that base, which is why I'm running down the consumer - - -

DR MUNDY: It's interesting that you've actually tried to go to Consumer Affairs - - -

MR HANNIGAN (FLAC): I've done all that, yes.

DR MUNDY: - - - and deal with the matter under the ACL rather than through the legal services option.

MR HANNIGAN (FLAC): Yes, I've been there, and the other point I'll make whilst we've got a bit of time, I've been trying to get the Victorian Ombudsman's report on the Legal Services Commission that was done in 2009 through FOI, and I would suggest to the Commission that you obtain that report, but it's a very, very difficult report to get. They're loathe to hand it out. That report contains 29 recommendations on how the Office of the Legal Services Commissioner could improve its performance, but we don't know what the recommendations are, so we don't know if the recommendations have been implemented or how it's progressing or - - -

DR MUNDY: Is the ombudsman in this jurisdiction required to table their reports in parliament, or not?

MR HANNIGAN (FLAC): The ombudsman mentioned the report in his 2009 annual report, and in that report he gave a copy to the Attorney-General for his information. The Attorney-General, I gather, has not tabled that in parliament, and therefore the report has not become public.

DR MUNDY: That's a few Attorneys-General ago I would suspect.

MR HANNIGAN (FLAC): Two: Hulls and then Robert Clarke.

DR MUNDY: So Hulls received it.

MR HANNIGAN (FLAC): Yes.

MS MacRAE: Are you aware of any jurisdiction where you think this works better? I guess because you've got issues with the complaints system, but you've got issues about how, if I read your - - -

MR HANNIGAN (FLAC): Well, from communicating with Peter Andrew - I've never met him actually. He's up in Sydney and he's helped me a lot over the years - they continue to talk about the European system and the inquisitorial system as a far more appropriate system, and Annette Marfording did a report on that through the University of New South Wales and they found that to be cheaper, quicker and more accurate, but it was also very, very difficult to get that report. Took two years to dig that one out. Was funded by a federal body, and then it went through - I can't remember the name of thing, some federal legal agency that funded the New South Wales people. She wrote the report, but the report then was stashed for a while, disappeared, and I've only come into this, as I said, as a result of a will.

DR MUNDY: Yes. No, and that's the issue I perhaps - - -

MR HANNIGAN (FLAC): I'm a businessman and an engineer by trade.

DR MUNDY: Yes. I'd like to bring you to that question of wills because we've had some quite moving evidence from a number of people around a whole pile of issues about the finalisation of estates and where people are to be buried, and a whole pile of issues which seem to us to be primarily disputes within families. They're - a case on the record we had in South Australia, a dispute within an indigenous family about where someone was to be buried, and ultimately a judge of the Supreme Court had to try and sort it out, and another dispute whereby a man was - a medical practitioner was highly traumatised by the conduct of his siblings and their legal counsel, and arguably on the basis of his evidence the conduct of the Supreme Court of New South Wales.

It seems to us that these are matters which are quite rife or the normal sort - you know, we have very well developed processes for resolving disputes within families when a marriage breaks down, and they seem on evidence to do a better job than trying them in front of a judge, at least in many cases, and you raise the issue of a small - a low-cost tribunal for dealing with these very much in the way that the Women's Legal Service earlier said, "Well, look, do we really need to resolve disputes over matrimonial property say up to the value of $100,000 or whatever?"

How would you see such a tribunal working, because it seems to us that these are circumstances where quite often, not always, the parties are grieving for a lost one, there's the realisation of a lot of unspoken angst built up over times, and perhaps a mediated arrangement rather than probate which just as you - has a capacity to chew through the resources of the estate either because of the conduct of the executor or the conduct of any of the beneficiaries for that matter, might actually get better outcomes more quickly?

MR HANNIGAN (FLAC): If you have a trained commissioner and you paid him a grand a day, that's 5000 a week, he could sit there and sort out all the rubbish, and it's not rocket science.

DR MUNDY: It's about people, isn't it?

MR HANNIGAN (FLAC): It's just about people. It's not - we're not trying to reinvent the wheel or fly to the moon, we're just trying to sort out, "It's my Dinky toy, it's not yours."

DR MUNDY: "Auntie Molly was going to leave me that and - - -"

MR HANNIGAN (FLAC): That's it, yes. It's really simple stuff, and you don't need a guy in there on 10 grand a day sitting there with a wig and a - you know, and all that.

DR MUNDY: I guess if you would do it in a way which was successful, it would be a lot quicker and people would get in and out and get on with their lives.

MR HANNIGAN (FLAC): Lot less psychological angst. I mean it split my family. I don't talk to my sister - two sisters, and that's been 10 years.

DR MUNDY: Okay.

MR HANNIGAN (FLAC): So it creates - and then it creates a lot of rifts with the children too, and the whole - it's very bad stuff.

DR MUNDY: Yes. So it's a bit - and it's funny, it's a family breaking up in a different way.

MR HANNIGAN (FLAC): Yes. It's really bad stuff and it's not good for Australia. All right.

DR MUNDY: All right. Well, look, thank you very much for your

submission.

MR HANNIGAN (FLAC): Thanks for listening to me, and it was good to meet you and thank you for doing your work too.

DR MUNDY: They pay us reasonably. Unless there are any observations or comments that anyone else wishes to make, these proceedings are adjourned until 8.45 on Friday morning in Hobart.

AT 5.04 PM THE INQUIRY WAS ADJOURNED UNTIL
FRIDAY, 13 JUNE 2014