Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON THURSDAY, 19 JUNE 2014, AT 8.53 AM

Continued from 18/6/14

INDEX

DR MUNDY: Good morning, ladies and gentlemen. Welcome to these public hearings of the Productivity Commission's access to justice inquiry. My name is Dr Warren Mundy, and with me is Commissioner Angela MacRae, and together we exercise the powers of the commission in relation to this matter. Before going any further, I'd like to pay my respects to elders past and present of the Djirubal and Jagera peoples, the original owners of this land, and also I would pay my respects to the elders past and present of all indigenous nations who have continuously inhabited this continent for over 40,000 years.

The purpose of these hearings is to facilitate public scrutiny and comment, to provide feedback, and to get responses on the record to the commission's draft report which we published in April 2014. Following these hearings there will hopefully be no more after today, having conducted hearings for the record in Canberra, Sydney, Adelaide, Perth, Melbourne, Hobart, Darwin and here yesterday in Brisbane. We expect to provide our final report to the government in September and in accordance with our Act the government will make that report public within 25 sitting days by way of tabling the report in both houses of the Commonwealth parliament.

Whilst we like to conduct these hearings in a relatively informal manner, I would remind participants that under Part 7 of the Productivity Commission Act 1988 the commission has certain powers to act in the case of false information or a refusal to provide information. To date since the Act was passed in 1988 the commission has not had occasion to seek to use those powers, and I trust we will not have occasion to seek to use them today. That said, we do take a transcript of these proceedings, both to facilitate transparency, but also to facilitate our own research so today's proceedings will be understood by our research staff who are not present.

We don't require to take people on oath, but I hope, as I have indicated, people are required to be truthful, and we also welcome comments from individuals in relation to submissions made by other people. The transcript will be made available probably some time next week I would expect. Now, in accordance with Commonwealth health and safety regulations, I am required to advise you of the emergency evacuation procedures for this building. It's hard to get good help. In the event of an emergency, an alarm will sound which will go "beep, beep, beep." When this alarm is activated the cause is being investigated. Please remain calm and wait for further instructions.

In the event that it is necessary to evacuate the building a second alarm will sound, and it will go "whoop, whoop, whoop". This is the evacuation order. Please exit the building via the fire exits either opposite the lifts or to the left on the terrace. The meeting spot is located on the corner of Turbot Street and North Quay, which I understand is out there, turn left and turn left again. Please do not use the lifts or return to your room. There ends the safety briefing. Our first participant for today is the Women's Legal Service of Queensland. For the benefit of the transcript could

you each identify yourselves by name and the capacity in which you appear here today.

MS MUNRO (WLSQ): Rosslyn Munro, coordinator of Women's Legal Service.

MS LYNCH (WLSQ): Angela Lynch, community legal education lawyer.

DR MUNDY: Thank you. Would one of you like to make a brief - by that we mean no more than five minutes - opening statement?

MS MUNRO (WLSQ): Certainly. I will briefly outline what we do, and then I'll refer to Angela to make some specific comments about the draft report. So by way of background, Women's Legal Service is a specialist community legal centre. It provides legal assistance to women in Queensland, 40 per cent of whom are in rural, regional and remote areas of the state. Currently we receive approximately $1.1 million worth of funding. 55 per cent of that is state funding, 45 per cent of that is Commonwealth. We employ 15 staff, which equates to approximately 10.5 full-time equivalents. We provide legal information, advice and casework in the areas of domestic violence, family law, child support and to some extent child protection. We're in our 30th year of operation, and over this time we have provided assistance to over 60,000 women.

By of background, in 2011 we had to make some cuts to our service as a result of an increase in costs of running the service and no increase in funding, and during that time we ran a public campaign and appeal to state and federal governments. In the upcoming state election the LNP made Women's Legal Service an election commitment of $250,000 per year until June 2015. So as a result of that public campaign and those original cuts, we have focused on diversifying our funding to make sure that we have sustainability into the future.

As a result of doing that, we have been able to secure a $25,000 sponsorship from Gadens, who are a law firm, and a $30,000 sponsorship from Bankmecu. So as a direct result we have been able to extend our networks and leverage significant pro bono support also. We estimate that we were able to successfully engage and leverage up to $640,000 per year in volunteer hours. We have a successful volunteer program of 100 evening volunteer, which are largely solicitors, and 10 daytime volunteers. We believe the success of being able to attract that pool of volunteers, who are all women, is because of our proximity to the CBD and the ability for those volunteers to access our service geographically to provide that support. We know that over 1300 women per year are directly assisted by volunteer support only. We estimate, however, that we can't provide services to another 16,000 women per year.

We believe that this strategy of engagement across community and corporate is not substitute for core government funding and believe that those things are quite

interrelated, so by having sustainable core government funding, we're able to leverage those resources in order to get other resources by way of pro bono support sponsorships and grants in order to be able to maximise those government dollars. So we're very keen in ensuring that government continues to support our service in a sustainable way, but also acknowledge that government are not necessarily the only source of resources for Community Legal Centres.

MS LYNCH (WLSQ): In relation to the NPA caveat on policy and law reform, the issue for us is that law reform and policy work are integral components to our service delivery. The caveat on doing this work will result, we believe, in the medium to long term in an increase in clients requiring our assistance and a reduction in our service's capacity to response. Policy and legislation is often drafted by people who are experts in policy and drafting but are unaware how the law operates in practice. We are acutely aware of how our laws, legal practice and legislation affects our clients, and we're able to predict how it will affect them and we know that and we are able to identify and know that the impact will be widespread.

We believe that the legal system will become even more overloaded with clients responding to unfair, impractical and unsafe laws. Our clients are victims of domestic violence abuse, are vulnerable and frightened, and often the primary carers of children. They do not have the capacity or self-esteem to engage individually in the political process and lobby politicians about their concerns. When it can, the Women's Legal Service participates with QLS, Queensland Law Society, and the Law Council processes, but we do not necessarily share the same policy position on legislation or have the same priorities. For example, for 14 years we have lobbied for sexual assault counselling privilege legislation in Queensland. These issues have not been taken up by the Queensland Law Society and, in fact, are opposed by them.

There is also some lack of clarity around what is defined as policy in law reform work and we'd like that to be clarified by government. There's a whole range of activities that are covered by that notion and we really want to know, I suppose, all of those activities, stopped from us having involvement or only some of them. We believe the work is important, early intervention and prevention work, it identifies laws that will have an adverse impact and potentially save other women experiencing the impact on them and the direct costs savings to the justice system.

We believe if Women's Legal Service does not involve itself in law reform and policy work in the medium to long term it will affect our standing, expertise and reputation in the community. In the same way as academics build their expertise and credentials through research papers, we build our reputation as thought leaders through our policy position on issues. In the medium to long term our reputation will be slowly eroded. Volunteers will ask, "Why isn't the Women's Legal Service responding to this issue?" Our engagement with volunteers will be detrimentally impacted, along with our leverage capacity with corporate and fund raising support

because for some of those they also see value in being associated with thought leaders.

In relation to the issue of one court which relates to the domestic violence, child protection and family law matters being heard in a single court, we'd just like to say that we do have an interest in this idea as we can see that many of our clients are required to appear in multiple courts and tribunals and have to have their issues reheard on numerous occasions and we know that perpetrators of violence can thrive in environments where there are multiple decisionmakers and lack of coordination. We would be interested in a pilot and evaluation of such an approach being undertaken.

We would urge, if this was actually undertaken that experts in domestic violence were involved in any group that developed such a model, we believe that the - and that the safety of women and children should be prioritised. We would be concerned about losing any priority given to safety in the state DV courts or it being eroded or overtaken by the family law cultural approach which can - where there can be a failure to understand the dynamics of violence in how it makes its decisions.

A couple more points in relation to early intervention and ADR. I suppose we provide legal advice at two FDR services at Logan and Mount Gravatt and we see real potential in the expansion of these services so that our lawyers can regularly represent clients at FDR sessions. In Queensland this doesn't happen very often and it's mainly in relation to funding issues or resourcing issues. The fact is despite screening exceptions and legal exemptions about domestic violence, it's common practice for mediations to proceed where there is domestic violence in the relationship, and an attorney-general's issues paper, FDR services estimated that 80 per cent of their work involves domestic violence.

Our client experiences it. They are often pressured to form agreements that are not safe for them or their children due to the ongoing exertion of power and control in the FDR setting. Another option if you weren't having lawyers in that FDR setting was for a specifically developed model of FDR that took into account domestic violence to be considered. That model was developed actually by the Women's Legal Service in Brisbane, the coordinated family dispute resolution model. It was a pilot that was funded between 2000 and 2013 but funding was withdrawn from that model at the conclusion of the pilot, and it was for financial reasons.

In relation to the issue of common eligibility requirements, we're of the view that common eligibility requirements with legal aid across legal assistance services would result in even larger numbers of people being unable to access justice. Much of our work is about providing a safety net of support to clients that are ineligible for legal aid and are unable to pay for private legal help. Wherever possible Women's Legal Services assist clients to access legal aid when available. We have developed

clear and transparent case guidelines that guide decisionmaking in relation to how we take on work in relation to making sure that we assist the most vulnerable clients.

We still have some general access avenues to our service through the drop-in evening session and also our telephone line, but if they don't meet that criteria no further assistance is provided to those clients and they are referred out. We have also increased our access to vulnerable clients by having direct pathways with other community agencies that assist vulnerable and marginalised women such as Domestic Violence Connect, DV services, immigrant women's support services and indigenous community groups.

Access is also increased via outreach work. We undertake a number of number of outreach work and have always pretty much for the lifetime of our service provided outreach at the women's prison, our DV duty lawyer service, so we're at the DV court, our rural legal advice line which is a specific legal advice line for rural women. We provide assistance to the Gold Coast Centre Against Sexual Violence, so victims of sexual violence, and two FRCs. Our community education work in rural and regional areas also increases our access to these communities. We have or will provide education services this year to Bundaberg, Mackay, Gladstone, Dalby, Toowoomba and Gold Coast, and that's it for our opening.

DR MUNDY: Okay, thanks for that. Funding. What's been the reduction of funding in recent times for your service?

MS MUNRO (WLSQ): We haven't experienced a reduction in our funding. As a result of the pay equity decision our operating costs increased significantly without any real change into our funding base, particularly at the beginning of those wage levels. However, I guess part of the history there is that there hasn't been any real growth in those core funding levels and so it purchases less and less.

DR MUNDY: Okay. We understand the broader picture. So the reductions in funding that some CLCs experienced as a result of the budget last month have not impacted upon you?

MS MUNRO (WLSQ): Not specifically the federal budget, that's right.

DR MUNDY: Okay. Can I just ask you in relation to the caveat that's been placed upon your service agreement. Are you able to share with us the precise words of that?

MS MUNRO (WLSQ): We were only provided with a draft of that late yesterday afternoon, so we're yet to - - -

MS LYNCH (WLSQ): I think it pretty much just removed the clause that related -

I just quickly looked at it yesterday afternoon, and Rosslyn would be more across what the actual funding agreement looked like, but it looked like it was just pretty much a removal. There's no kind of tinkering with drafting. It's just - - -

DR MUNDY: So it is striking out?

MS LYNCH (WLSQ): Just striking out whatever clause related to law reform, I think.

DR MUNDY: Your arrangements with the Government of Queensland, do they have a similar prohibition on undertaking that sort of work?

MS MUNRO (WLSQ): That's my understanding, yes, that the Queensland position is similar to the Commonwealth.

DR MUNDY: So we're now in a position where - depends on how you read the agreement I guess, but other than perhaps incidental law reform and advocacy work, any other law reform advocacy type work would put you in breach of your undertakings to both your primary funders.

MS MUNRO (WLSQ): So if we were to use community legal service program funds to do that, yes. If we were to use other funds to do that - - -

DR MUNDY: Such as philanthropic donations for example.

MS MUNRO (WLSQ): That's right. Independent sources.

DR MUNDY: So you're now presumably in a position where if you do do a piece of - you've got to undertake a piece of accounting to be able to demonstrate, or are you going to proceed on the basis that you're in compliance, and wait until you're invited to prove otherwise?

MS MUNRO (WLSQ): I'm not sure our management committee has actually got a firm position on how we strategically manage that, however I guess the confusion, and Angela certainly mentioned this, is that quite often we are called upon by government to respond, and we have had incidences of that at the state and Commonwealth level very recently about being contacted to ask us what we thought about particular ideas and contributing to those, and whether that's in or that's out. You know, when we're specifically asked by government, I'm not sure that they perhaps understand that even those requests might - - -

DR MUNDY: Can I ask a really subserving question? In the world going forward, would you consider that your funding agreements would enable you to participate in the work of our commission?

MS LYNCH (WLSQ): At the moment I would think that they - there's no other way to say but no, is there? I mean like it's - - -

MS MUNRO (WLSQ): Without any - - -

MS LYNCH (WLSQ): Unless there's further definition or defining of what "law reform work" means, then we would have to say - and that's our concern, is that we just put in - Women's Legal Services Australia has just put in a child support submission to the parliamentary inquiry on child support. It's an issue of high importance to our client women in Australia, vulnerable women in Australia. We put in the submission. It's still within the funding agreement from this year, but the public inquiry will take place under the new funding agreement, and we have to ask ourselves are we able to participate, but we have an obligation to our clients.

Our clients can't - we speak for our clients. Our clients - and that's why we're saying they can't - there has been some sort of - we've heard some sort of talk about that clients can go through and use the parliamentary process, they can go and lobby politicians, they don't need services like ours, but our clients can do that, and they've never been able to do that, and they don't even know they have the right to do that, and they haven't got the capacity to.

DR MUNDY: And they run the risk of just being seen as an isolated case.

MS MUNRO (WLSQ): Absolutely.

MS LYNCH (WLSQ): That's right. Absolutely.

DR MUNDY: We, better than most Commonwealth offices, understand the challenges of people appearing in public inquiries. It's what we do. Just before we move off this funding question, I suspect I know the answer to this question, but have you been given any indication by either the Commonwealth or the State Government as to whether there will be a reporting or compliance regime around the prohibition on doing law reform work, or you've just been told it's out of their ambit now and their expectation's you'll comply.

MS MUNRO (WLSQ): Yes. So essentially in terms of our performance targets, we've been asked not to submit any kind of targets for law reform as opposed to other sorts of work like casework and CLE. So in terms of our reporting, performance reporting requirements, it just won't appear at all.

DR MUNDY: I think following on from your evidence earlier, Angela, on the question of who might take this up, I think you indicated that these are not matters that the Law Council or Law Society in its normal forums would take up, and indeed

we had someone here yesterday from the Law Society and she indicated to us that the matters which CLCs in the broad typically take up for law reform are often not, and I don't mean this in a derogatory sense, but not of interest to the Law Society because they are matters which in their normal practice privately practising solicitors don't tend to deal with.

MS LYNCH (WLSQ): Yes, that's right. I mean we are - there is a bit of crossover of clients, but we are seeing clients that they don't see. We're seeing clients who are representing themselves in the court, so therefore they logically don't have lawyers, so lawyers aren't seeing that client group, and for us as a women's service, we are often taking a policy position that's diametrically opposed to often what the Queensland Law Society will take, who possibly can often take a much more defence lawyer position and a civil rights position and traditionally have, and we are advocating on behalf of basically, you know, victims of crimes in the courts, and that sort of stuff, so we are actually at opposite ends in relation to the policy position. So advocating through that channel won't be effective in relation to getting the voices heard of our vulnerable clients.

MS MacRAE: Can I just ask, in your opening statement you mentioned that you'd estimated the unmet need of about 16,000 per year. We love it when people can give us such precise numbers, and I appreciate it's probably not a precise number, but it's a number you've estimated. Just wonder if you could tell us a little bit about how you came to that number and whether you've done any - or given any thought to where those people might go, or if they don't go what the costs of not being able to be assisted might be?

MS MUNRO (WLSQ): Sure. Look, I think they're the figures that we can develop to the best of our ability.

MS MacRAE: Sure.

MS MUNRO (WLSQ): They're the sorts of figures that we generate as a result of knowing how many missed calls we have on our statewide phone line.

MS MacRAE: Okay.

MS MUNRO (WLSQ): So knowing that. Now, there's some - I guess there can be some conjecture about whether they are the actual individuals or about the number of missed calls. We also have our evening advice service twice a week, and we are routinely turning women away from that service because we don't have the capacity to see them that night. So we certainly count those women as not being able to access that service on the evening, and generally what we would do is we would either offer them another referral, offer them another pathway into the service if we think it's warranted from their circumstances, or ask them to come back another

evening. So while those clients are turn-aways for that evening, I guess they're not left to their own devices. We would make sure that there's some kind of safety net there for them, and particularly we'd screen for violence. So if there's an emergency happening, we're not going to turn that woman away.

MS LYNCH (WLSQ): But we've had to significantly increase our resourcing of that service at night-time because of the demand on that service at night-time, and there were women turning up in a highly emotional and risky state. We've had to - we employ a volunteer coordinator at night-time. We've had to put resources into having a domestic violence specialist social worker on at night-time because of the levels of risk that women were coming in and the state - in an emotional state that they were coming in, and we've also had to, at this stage while we can, and put a very experienced staff lawyer on as well to undertake the triage as women are turning up and we are turning them away. She is triaging at the door in relation to, you know - - -

MS MUNRO (WLSQ): Urgency.

MS LYNCH (WLSQ): - - - need and urgency and what has to happen, and then we are actually also putting resources into the next day from that triage if they're turned away that that lawyer can call them the next day if she's not able to take them at night-time. So it's - you know, that night-time service has had to be significantly resourced because of that element of risk. Women are at risk when they come to our service, and that we may have to be turning them away.

MS MUNRO (WLSQ): So the second part of your question if I heard correctly was about the costs of meeting that unmet demand.

MS MacRAE: Yes.

MS MUNRO (WLSQ): We haven't done any specific work around that. Certainly when we're counting missed telephone calls, it's difficult to ascertain what those missed telephone calls - - -

MS MacRAE: Yes, sure.

MS MUNRO (WLSQ): - - - were essentially going to be about, but certainly for us we know that we've just started to trial one private law firm once a month to be a second person on the telephone line and at that particular time when we've got a staff lawyer and the pro bono lawyer on the phone, we know that we don't miss any calls that day. So it can be as simple as just having another body on the telephone line.

MS LYNCH (WLSQ): But often if you open up the telephone lines more, it also means - it creates a capacity issue at the back end of our service as well so, you

know, not everything can be dealt with on the telephone, so the more that you open the service up obviously over the telephone as well there is more need that comes in and the more that the service capacity - you know, that there's the back end service capacity of lawyers having to do stuff in relation to support.

You know, some of those calls can be dealt with on a call basis, but some of them can't be, and also in relation to those 16,000 calls that we miss a year, I mean, there could be some women sitting on a phone call, you know, ringing a number of times, but we also know that there are a number of women that just give up. They can't get through. So there's that, that we can't capture of, "Well, why bother going to the Women's Legal Service? We can't even - you know, I tried them once, and I just can't get through," and we know that from feedback from other services.

MS MacRAE: Yes.

DR MUNDY: But we can be reasonably assured that the unmet need is many, many thousands.

MS MUNRO (WLSQ): Yes.

MS LYNCH (WLSQ): Huge, absolutely - - -

DR MUNDY: Whether it's 10, 12, 16, really isn't the question.

MS LYNCH (WLSQ): It's huge in family law, you know, there's - it's just - and so much of our work is about - who are women in domestic violence situations in family law and so much of our work is about trying to get those women legal aid, they're rejected legal aid, so trying to get them - you know, doing their appeal letters, doing very good legal aid applications so that they get legal aid in the first place, so much of our work is taken up with trying to get women in that situation legal aid because they need the representation in court and we know under the current MBA that women in domestic violence are a priority area, yet we're spending so much time on trying to get them legal aid, and not everyone can get into the Women's Legal Service to get that extra support to do the appeal letter, to argue the issue of violence and that it should be taken into account, so we also know that there's a whole lot of women who get their rejection letter from legal aid and think, "Well, I can't get legal aid and that's it."

DR MUNDY: Can we perhaps have a brief discussion about one matter that's received some notoriety, particularly - well, a circumstance which has received some notoriety in Victoria, which we understand is also the case in Tasmania from evidence we've taken there, and that's in the circumstance where there's a property only dispute that needs to be resolved in the Family Court. The woman involved - there are no children issues. The woman involved in the dispute has been the subject

or is suspected to have been the subject of violence from the male. Legal aid is not provided in this circumstance in Victoria and there is a real possibility that the woman may well be - she goes unrepresented, Legal Aid won't provide, and she goes unrepresented and runs the risk of being cross-examined by someone who has perpetrated violence against her. Now, is that the case in Queensland?

MS LYNCH (WLSQ): Yes.

DR MUNDY: Do you have any idea how many of such cases would occur every year? Hundreds, thousands, dozens, you know, orders of magnitude will probably do us. Something more precise would be better.

MS LYNCH (WLSQ): Well, Legal Aid doesn't do property and doesn't do even FDR in property, except if it's linked in with a children's matter and only sometimes. So basically there's pretty much no legal aid for property disputes. So Community Legal Centres are the only place really that for those women - in our situation obviously women - can go to, and I just think that women lose out, especially if it's a small property pool. They just live with - whatever they have taken out of that house - - -

DR MUNDY: Is what they're getting.

MS LYNCH (WLSQ): - - - is what they get, and often that's nothing. I mean, I was just up in Mackay. We did a community education up there. I sat in at a refuge. There was a refuge workers' group and they were just speaking and they were talking about that women up there going into refuge leave with nothing and they leave the refuge with nothing, and that's what happens.

DR MUNDY: I think it was your Victorian colleagues suggested that perhaps a way to get some more justice into particularly these smaller matters is some form of tribunal rather than a full-blown court process. Is that a proposition you think would work?

MS LYNCH (WLSQ): I think that we have to look at it, because it the federal government is interested in property and FDR through the FRCs, you know, through the Family Relationship Centres. That is a possibility, but because there's no disclosure that occurs in those FRCs and it's also about the specialisation of those FRCs and their ability to deal with those property matters, that is a possibility, but I think that a tribunal would have some merit and - yes, I mean, I think that we have to look at it. For some women it might be that's more of a possibility to go and argue about who should own the car or have the car, and the car is so important for them, then they're just not going to perhaps go through the whole plethora and processes that are involved in starting proceedings in the Family Court or the Federal Circuit Court.

DR MUNDY: Just while we're on this, we notice that a number of recent judicial appointments to the Family Court seem to come from people with a background in equity and trusts rather than a background in one might think family law matters. It has been suggested to us that certainly in some Family Court registries, not in the circuit court, but in the Family Court itself that look to be largely taking up a large amount - a large amount of the court's resources are actually involved in disputes about large matrimonial estates, if you like, where there are no children's issues and it is really just two people fighting over money.

The commission suggested that as a general proposition in money only disputes, higher fees might encourage people to resolve their matters elsewhere so the courts could be left to get on with things that perhaps have a greater public interest component. In the circumstance of no children, no violence, just a pure property dispute, would you see any merit in that?

MS LYNCH (WLSQ): Yes, and, of course, high end property disputes aren't the expertise of the Women's Legal Service, and it probably is - - -

DR MUNDY: My staff would expect me to say I hope they fail the means test, whatever we might think the means test should be.

MS LYNCH (WLSQ): It possibly is more of an issue in Sydney and Melbourne, I'd say. But, yes, I think that's definitely that should be looked at. I'm just trying to go through my head in relation to issues of violence and how that's worked out, but certainly even in - - -

DR MUNDY: Please don't think I'm suggesting that women who happen to be in affluent circumstances aren't the subject of some sort of abuse or violence - - -

MS LYNCH (WLSQ): Yes, I understand that.

DR MUNDY: But let's assume that they're not.

MS LYNCH (WLSQ): They're not. Well, I think that's something that should be looked at, and also in the state commercial courts as well, because if you look at how much it costs to run those big commercial matters and the resourcing of the court that is required, you know, if those parties in those commercial matters went to a private mediation they would be paying thousands, you know, for someone to resolve their dispute, whilst they seem to be able to go to court and use up months of the court's time perhaps for really not as much - you know, they're not paying for the court's time and the judicial time for making the determination.

MS MUNRO (WLSQ): So when we identified in the draft report the fixed cost

idea, we certainly considered it from our clients' perspective and really didn't think a fixed costs perspective was going to assist two parties where violence is a matter to be able to encourage them to settle and settle quickly in an equal power relationship.

DR MUNDY: I think even the commission's harshest critics would probably cut us some slack on the view that we probably don't think economic signals are the way to deal with domestic and family violence. Commissioner?

MS MacRAE: Just coming back to your opening statement again, you mentioned an 80 per cent figures, and I just wondered if you could tell me - it was about mediation. I wasn't sure whether you were saying that 80 per cent of mediations - 80 per cent of people that have been in violent - or had relationships where violence was a factor, whether 80 per cent of those had gone through mediation. I might have misunderstood you. It just seemed like quite a critical point, and I just wanted to be sure about it.

MS LYNCH (WLSQ): Sorry, yes, and we can provide you with that reference. It in relation to - it was an Attorney-General Department's discussion - or it might have been an issues paper or discussion paper in relation to family dispute resolution services, so services that are dealing with children's family law matters, and the FDR services themselves, there's a reference in that that the FDR services themselves estimate that 80 per cent of their work in the family dispute resolution services, the FRCs, involves domestic violence. So the families that are coming through - - -

MS MacRAE: Okay.

MS LYNCH (WLSQ): - - - 80 per cent have issues of domestic violence, and that would accord with probably what we hear from the FRCs that we are in contact with, and it probably is in accordance with what our - I mean we go to those FRCs as well, so what we're sort of seeing on the ground as well. It's not a figure that surprises us. It's not like we go, "Oh my God, that can't be true." It's something that we would go, "Yes, that is - that accords with what our - the reality is."

MS MacRAE: Right.

MS LYNCH (WLSQ): Because people in domestic violence - sorry. Families in domestic violence we know are the ones that are going to be using these services. They need help to resolve their disputes, so it's more likely in a family law situation in services for there to be domestic violence, because they need that help.

DR MUNDY: And of course the marriages which have just - relationships which have just ended will just end, and the parties will go and sort it out so - and, you know, hopefully some of them even just fill in the forms and lodge themselves.

MS LYNCH (WLSQ): Yes. They might engage lawyers maybe to negotiate a little bit, but pretty much people will - - -

DR MUNDY: Sure.

MS LYNCH (WLSQ): You know, with a little bit of assistance will be - - -

DR MUNDY: So the people who you are going to see, they're almost self-selecting in a sense.

MS LYNCH (WLSQ): That's right.

DR MUNDY: Or at least the ones who aren't in the violent situation select out.

MS LYNCH (WLSQ): That's right.

MS MUNRO (WLSQ): That's' right, so about - I mean we'd say at least 80 per cent of our clients have experienced violence during their lifetime, and the figures are probably a little bit higher, but we have a lot of people that don't want to disclose that information. So, you know, anyone who doesn't have that series of risk factors is not going to receive a more complex service from us.

DR MUNDY: Yes. We are running out of time, but you mentioned the idea of one court, and we understand from experience in Western Australia that even though they have one jurisdiction, they still haven't managed one court. We understand there was a trial conducted in Bendigo. Are you aware of that?

MS LYNCH (WLSQ): Only in the last - well, I had heard something about it, and then only - I don't know what I was reading. Only in the last couple of days did I then actually - I just note that I did read something about it. Obviously it's probably more well known perhaps down in Victoria. I think that might have been - it was - I'm not sure if it was child protection or if it was - I'm not sure. The mix wasn't exactly the same I suppose, or do you know more about it and I'm just - - -

DR MUNDY: No. We've only heard it, and no doubt we'll know a lot more about it before we write to the government.

MS LYNCH (WLSQ): Yes.

DR MUNDY: But if we were to go down the path of recommending that such trials should be undertaken, is there anywhere in Queensland you suggest would be a good place?

MS LYNCH (WLSQ): Well - - -

DR MUNDY: Or do you want to get back to us?

MS LYNCH (WLSQ): Women's Legal Service probably would like to be involved, and I mean, as we said, we would be really - we would strongly advocate for domestic violence experts, whether it's us or if it's some other expert in relation to violence, and often this doesn't occur, so that's why we are very strong on this. We are talking about the safety of women and children. One woman a week in Australia dies from domestic violence. Four children this year have died on contact visits with non-protective parents. The issues of safety and risk have to be the priority, and so, you know, obviously it's an issue for us. Our clients are in danger, and so that's why we would strongly advocate that whatever model was developed was developed with those experts and with that priority in place.

MS MUNRO (WLSQ): Also the need to have a very collaborative model, not only from the judicial side of things but also from the support side of things, so the legal domestic violence workers being able to support people that are going through that process. So in our domestic violence court work at Holland Park we've got, you know, not only lawyers providing assistance from our service, but also DV Connect who are doing the sort of work with women around their safety and safety planning.

DR MUNDY: Okay. Look, thank you very much for your submission and the time you've taken to come here today.

MS MUNRO (WLSQ): Thank you.

MS LYNCH (WLSQ): We have a copy of some of our written thoughts that we've presented today.

DR MUNDY: If you give it to Mr Raine on the way out, that would be most excellent. Thank you.

MS LYNCH (WLSQ): Thank you for the opportunity. Thank you.

MS MUNRO (WLSQ): Thank you.

DR MUNDY: Pleasure.

DR MUNDY: Could we have the University of Queensland Pro Bono Centre, please? When we've got ourselves settled and the witnesses have sorted out their handbags, could you state your name and capacity in which you're appearing here today, please?

MS TAYLOR (UQPBC): My name is Monica Taylor. I'm the director of the University of Queensland Pro Bono Centre.

DR MUNDY: Would you like to make a brief opening statement before we ask you some questions?

MS TAYLOR (UQPBC): Thank you for the opportunity to present the oral submissions today. I'm happy to speak to the written points in the written submissions, and also to reiterate the point that we made in both of our submissions that our interest is really confined to student involvement in clinical legal education and pro bono activities, and that we feel that the priority of the commission's focus ought to be on the areas of acute and unmet legal need in frontline service delivery.

We partner very closely with community legal centres. We have community legal centre representation on our advisory board, and also Legal Aid Queensland, as well as other members of the legal profession, and we feel that the capacity of CLCs and Legal Aid Queensland and other frontline agencies to deliver their services with certainty is directly connected to our ability to involve our law students through pro bono work and also clinical legal education work. That is one thing that wasn't mentioned specifically in our written submissions, but in terms of pro bono partnerships, they are really as effective as the ability of those frontline services to deliver that work, and it really does depend on a vibrant CLC sector.

So in relation to the activities that we run for our students at the university, we have a range of pro bono placements that we frame up with organisation like the Women's Legal Service, and indeed CLCs would comprise about three-quarters of the placements that our students undertake. But we also have flexible opportunities so students can do legal research on a pro bono basis, write submissions on a pro bono basis, and we often engage the support of the academics at the law school to provide supervision of that work, and the flexibility that we are able to use in creating those placements is, I think, of benefit to everybody. Students have lots of demands on their time, and they often enjoy being able to do something without actually having to go on site and commit one day per week for a full semester, or something of that effect. That is really all I'd like to say in terms of my opening statement. I'm happy to take questions.

DR MUNDY: Thank you. Can we start on legal education because I think we've trodden where some people fear we should not have.

MS TAYLOR (UQPBC): Right.

DR MUNDY: But that's all right. We'll read our Act as we choose. I think you seem to be concerned that clinical legal education shouldn't be seen as a tack-on, and I think we're at one with you on that, and I think that's a point we do actually make on around about page 230 of the report. But I guess for a start I'd like to ask this question. I mean the commission itself employs a number of people who hold law degrees - - -

MS TAYLOR (UQPBC): Right.

DR MUNDY: - - - who never had any intention of practising. They wished to be public policy lawyers and they felt, for whatever bizarre and perverted logic, that doing a combined economics-law degree was the best way for them to enter what we like to consider is a profession. So it seems to me that you're suggesting that this should be mandatory, that clinical legal education should be mandatory. I'm just wondering whether you think it should necessarily be mandatory for people who have no intention of ever practising in terms of seeing clients, and perhaps is there a streaming opportunity available there because it is quite consistently pointed out to us now that a law degree is becoming a bit like an arts degree was when I was an undergraduate in the 80s.

MS TAYLOR (UQPBC): We don't think it should be mandatory. I mean I've used the word "embedded", so to the extent that CLE could be given a greater focus in the course of an undergraduate degree.

DR MUNDY: So it's not something we're just going to tack-on the end and you're going to do some of - if you want to practise you're going to do - if there is - - -

MS TAYLOR (UQPBC): If there is an ability to, that's right, integrate it throughout the course of the degree, then that's what we think would be ideal, particularly in the teaching of ethics because ethics, as you would know having studied law, is something that can be taught best in a real client situation.

DR MUNDY: Okay. You suggest that we should perhaps do a cost benefit analysis on clinical legal education. I think perhaps that's probably a bit narrow for the broad nature of our inquiry, but we do suggest that there should be a wider ranging review of legal education. We question the need for the ongoing adherence to the Priestley 11. We've made some suggestions about ADR having more focus. The sort of analysis you talk of I think probably better belongs there, but do you think there is time for there to be a decent objective nationwide holistic review of legal education?

MS TAYLOR (UQPBC): To the extent that I can answer the question, our

reticence in wholeheartedly endorsing recommendation 7.1 was really about our concern that the value of clinic as it relates to access to justice would get a bit lost in the scope of that recommendation because it is so broad ranging.

DR MUNDY: Okay. So if we were to perhaps give clinical legal education a bit more prominence in a redrafted version of 7.1, you would possibly be more likely to be more fulsome in your endorsement of it.

MS TAYLOR (UQPBC): Indeed.

DR MUNDY: Thank you.

MS MacRAE: I guess in many senses people think of pro bono services as being free and fantastic for CLCs, and I'm sure that they really welcome that input, but it's not costless for them obviously and you're saying that you're relying on supervision from within the university sector, but I guess the CLCs have also got to do a little bit of supervision as well, and there's some training, and obviously in the benefit that the students get that they need that interaction and that's not costless for CLCs. So I'm just wondering if you had any thoughts about what the recent funding cuts for CLCs might mean in their capacity to take on students into that sector, and I guess a lot of the work that you've described that students particularly like to do is not necessarily on site and that the work they're doing is really more of that advocacy type, and if you've thought about what the recent restrictions might be in relation to the caveats on doing that sort of work for CLCs, what the impact might be for this clinical education.

MS TAYLOR (UQPBC): We came very close to not offering two of our clinics last year due to funding cuts to two of the community legal centres in Brisbane that take students: the Environmental Defenders Office, and also there was proposed funding to be cut to the Homeless Persons' Legal Clinic based at QPILCH. So without funding for those services that would obviously mean that students could not be placed with those organisations, or indeed if they were it would probably come at resourcing costs for the organisation. The university though, in terms of clinical legal education, does pay for students to be placed with those community legal centres, and that payment does include a recognition of the staffing costs and the - - -

MS MacRAE: Okay.

MS TAYLOR (UQPBC): - - - in-kind costs that the community legal centre bears, and we are very responsive to the demands on their time, and we would only ever place students if it comes at a request. It's mutually beneficial for the CLC, as well as the university.

MS MacRAE: Yes. Sorry, I wasn't trying to suggest it wasn't beneficial in net

terms to them, it's just the - - -

MS TAYLOR (UQPBC): No.

MS MacRAE: Yes. Because we know they do operate on shoestrings.

MS TAYLOR (UQPBC): We have been very busy with requests for research as it relates to law reform. The pace of law reform in Queensland at the moment is at breakneck speed and that has meant that we have received requests from CLCs for students to do that work. Look I think that students will be involved with carefully crafted and structured pro bono work facilitated by the university. Students will be involved in that work better I think when a CLC has the appropriate resources to do their own advocacy and law reform, and I think funding cuts to frontline services to be able to advocate on systemic work just really leads to poor law making down the track and is a short-sighted decision in terms of being able to involve all of us in making laws that are going to be of benefit in the long term in terms of access to justice.

DR MUNDY: Can I ask you - so I guess from - it's a long time since I was an advocate of the interests of students, but what due diligence do you undertake in making a decision that a CLC is an appropriate organisation to entrust with the supervision of those which you are seeking to educate?

MS TAYLOR (UQPBC): We have a short agreement that we enter into with CLCs before we would place a student on site, and we hope that they would adhere to at the very least the best practice Volunteering Queensland guides. CLCs are very adept at taking volunteers, and they have professional indemnity insurance requirements that also go to the supervision of volunteers. We stay in contact with our students if they are going on site and we do check in with them, and we try and keep those lines of communication very open. But that's it for due diligence I have to say.

DR MUNDY: But obviously you have referred to a case where you had - before, where there were concerns around a couple of CLCs because of their financial position, so you're aware of - I mean you would hardly place someone in a CLC that had two staff members on it. You would want to be satisfied they have a capacity to supervise the student concerned.

MS TAYLOR (UQPBC): Yes, that's - yes, we would, but if it's going to enhance the CLCs - I mean we have informal relationships with a lot of the community legal centres and I think the strength of the relationship really dictates whether we feel comfortable, and we have a good sense now of what's going to fly in terms of a placement, what's going to be too burdensome for a student, at what point during the semester would you try and find a student, and it's exams at the moment, so it's a notoriously bad time to try and find a student to undertake some pro bono work.

DR MUNDY: Okay.

MS MacRAE: I think I've asked maybe everything that I want to.

DR MUNDY: Perhaps just more a general question because you obviously have a lot of contact with the sector - CLC sector. Other than funding, and by funding I mean the aggregate amount of money available, are there any sort of policy recommendations we could make that you think would make the CLC sector more effective?

MS TAYLOR (UQPBC): Advocacy.

DR MUNDY: Okay. Thank you very much.

MS MacRAE: Thank you.

DR MUNDY: That's very helpful. Thanks your time, and thanks for your submission.

DR MUNDY: Could we have Mr Lynton Freeman, please?

MR FREEMAN: Morning.

DR MUNDY: Good morning.

MS MacRAE: Morning.

DR MUNDY: When you get yourself settled could you please state your name and the capacity in which you appear here today.

MR FREEMAN: All right. Lynton Freeman. I am the principal of LNCF Consulting, and I deal mainly with banking problems and some other commercial litigation problems.

MS MacRAE: Sorry.

MR FREEMAN: Do you want me to start?

DR MUNDY: No. I would like to advise you, Mr Freeman, that - and I think you were here yesterday, so you probably heard me say this to others. We are not in a position to reopen, revisit or indeed we won't be casting judgments on the decisions of others.

MR FREEMAN: No-one asked - - -

DR MUNDY: Mr Freeman, just let me finish because I - I know you might, but lots of people in the community don't understand this. The other thing I must advise you of, because there's often some confusion on this point, is that evidence given to this commission is not privileged so - - -

MR FREEMAN: Yes, that's all right.

DR MUNDY: - - - you don't have the protection of defamation, and we prefer for people not to be named if they don't have the opportunity to hear what's said about them and respond. Could you please make, if you'd like to, otherwise we can go to questions, but if you'd like to make a brief sort of five minutes or so opening statement.

MR FREEMAN: In my capacity in what I do I've come across a series of problems in the courts that revolve to access to justice, and the reason it revolves around access to justice is there's a lot of people that appear in the court and they're cases actually affect government. The government has no input into the case. The government either loses or wins depending on that person's ability, and yet within that court

program there are public policy issues that the courts don't address because it's a civil case.

This means that there can be a great effect on taxation and situations like that. We've had some senate inquiries that have exposed some of it, but there's a massive amount, particularly with the big banks, that's in there because there's a policy within the courts that the banks get their money back. So when these things go astray, it affects - if the person is bankrupted or sold up in some way, it affects the bankrupt people that are other parts of the bankruptcy. Right? Now, because these accounts in most cases are secured accounts, then the bank gets the first chop of the money, any money, and the banks have systems which they use to maximise their return but keep the person in bankruptcy so they can't come back under the law to attack them.

In cases where people get away and they do have something and they find - and the bank does whatever they can to stop them. Now, in some cases it's like me where they have made judgments and judgments have been made and then they've admitted the evidence later. There's much of that goes on. But what I have done here is I have pulled out some guidance notes out of APRA because I was asked to explain why you people - why the previous interest subsidy scheme, and this may occur again in this new drought scheme, why that industry subsidy scheme could be used to identify how native vegetation legislation could be misused. I've done that in the report, but what I didn't produce to you people was the guidelines that came out of APRA that allowed it to happen. Now, I have them here. You may want to follow them, so I drafted them up for you.

DR MUNDY: Okay, thank you.

MR FREEMAN: One is 2002 and one is 2008.

MS MacRAE: There's 2008.

DR MUNDY: Mr Freeman, I would just remind you that I did ask you to keep your opening comments brief to about five minutes.

MR FREEMAN: Okay. Well, all right. So what's established is how this system worked, and the system worked quite simply. The banks call the people unviable, or change their program. Now, same thing is happening now with - it's coming out of the carbon sequestration where people have declared their properties, parts of their properties for carbon sequestration. They're being found unviable because the bank has lost their security or part of their security. So in the 2002 one if you go to 13. I'll be as quick as I can. If you go to 13, at 13 it discusses security for the bank. At 16 it discusses how it fits into the rural industry. At 23 it discusses how a facility that may have been found to be at risk can be returned, and at 36 it discusses how money is to be appropriated and so forth and so on.

Then at 38 it discusses non-accrual facilities, and non-accrual facilities happen when the bank declares that someone is - an account cannot be repaid in full, or that interest has been owing, or there's some other problem with it for over 90 days. Now, the problem with this is that the banks declared people non-accrual who are not non-accrual. There is a judgment on this - part of it. And they have been misusing bank statements. Now, that has been identified. I have samples here for you. I won't hand them up at the moment. I'll give them to Mr Raine. So it shows you how they do it with how the refunds work.

At guidance note 221 2008 we go into changes in value of collateral. Okay. It's the same guidance note but it's updated. Then they have - sorry. At 4(f) and (g) - at 25(a) to (e) we have the same things where accounts were reinstated. Now, what happened with interest subsidies, and what's going to happen again with this new system that they're going to bring in with the drought, there's a reduction in principal with the new system. With the old system it was an interest rate below the terms originally contracted or a reduction of accrued interest, including forgiveness of interest, and that was quite common in the old drought scheme.

Now, at 37 and 38 it shows how the bank used the system to gain an advantage. Under tier 1 capital the bank had to write off any write-offs in accounts, and then when they sold the property up, or sold the customer up, they re-appropriated that money to a tax-free benefit to capital. The issue here is of course that they could then lend that money again for the number of times - the multiple that they were lending money for at that period of time. So besides all the legal fees and all the accounts and everything else with it, the bank made substantial money.

Now, to give you an idea, I know of one case where the debt was 1,015,000. The bank added interest on it on a bill facility after a mediation of 5000, to bring it up to their lending facility and then - so that account was false there. Then there was a whole series of corrupted practices that have now been admitted by the bank prior to that date, so that the mediation couldn't have held either.

These are common, and so the access to justice for people, because the banks don't go into court and admit it, and so the judgments can be changed or they can be thrown out or whatever the story is, is a major issue and it affects the government because the governments pay subsidies and provide funds to farmers on that issue, and it's not just farmers, it's small business too.

Now, right at the moment I think we might be seeing a change in bank attitudes where they're going to declare a lot of rural property at risk, which means that they will start to look to sell up for whatever excuse they can find. So these become a major issue and the access to justice is just unbelievable because people don't know, not only that, but the banks are in the position where they get total credibility.

DR MUNDY: Thank you for that, Mr Freeman. Look, I have to be frank with you, and it's not for this inquiry to consider the guidance - - -

MR FREEMAN: It's the access to justice that's the problem.

DR MUNDY: Well, if you just let me finish what I'm going to say, please.

MR FREEMAN: Sorry.

DR MUNDY: It's not for this inquiry to consider the guidance issued by APRA or indeed the government's drought policy. The commission has opined on drought policy in the past but the government has not sought to ask us about its current drought policy and it would be wrong for us to opine on that without a specific question. But you do raise some significant access to justice issues and I guess the first question I'd like to ask is, have any of these matters been raised with the banking ombudsman?

MR FREEMAN: Yes, some of them would have been. The ombudsman doesn't - most of them are above his limit.

DR MUNDY: Okay. So they're commercial matters rather than - - -

MR FREEMAN: No, some of them would be ombudsman stuff. The incorrect bank statements and things like that, they're ombudsman material.

DR MUNDY: You say that some of them have been raised. What was the outcome of that, or you're not aware?

MR FREEMAN: Well, it came out of a senate inquiry into shadow ledgers. The banks were issuing shadow bank statements - and I've given you a couple here - and they were incorrect and you will find that when they were incorrect the bank has gone to court and said, "No, they're correct," and made an affidavit on that, but then later on they have admitted how these bank statements were incorrect. Okay. Now, that becomes a really big issue because if there's only a small variation before someone goes bankrupt, they've gone bankrupt, haven't they?

DR MUNDY: Yes. And you cite a number of cases which - - -

MR FREEMAN: Yes, I've given you some examples.

DR MUNDY: Which I haven't had the opportunity to consider in detail, but I guess what's happening here is that even if these cases are successful, it's a bit late in the game for those who have been declared - - -

MR FREEMAN: That's right, the bank should admit it. In this particular case, the bank I'm talking about was under an enforceable undertaking and there's not really any excuse for not advising those customers, and that is a significant access to justice issue.

DR MUNDY: So the relevant regulator, APRA is setting prudential guidelines, but the conduct issues probably belong with ASIC, I'd expect.

MR FREEMAN: Well, yes, they do, but ASIC - look, I'm not being critical of ASIC or APRA. I think they have just got that much on their plate they can't keep up with it, and I think these smaller things, that they consider small, that are really big, you know - and some of these refunds to the public, some of this came to 400,000 customers and a billion dollars.

DR MUNDY: I'm just mindful that APRA is really a prudential agency, not conduct.

MR FREEMAN: Yes. I'm not finding anything wrong with APRA or ASIC.

DR MUNDY: ASIC is in a different position however, but it does appear that they have at various times had a go. You mentioned the enforceable undertaking.

MR FREEMAN: The enforceable undertaking was created through APRA and ASIC coming out of the $360 million thing that the bank had with their foreign exchange, well, this all came up at the same - - -

DR MUNDY: Okay. So that came out of when there was restrictions placed on the NAB's FX licence.

MR FREEMAN: All this came up at the same time. So then they had to do all these audits, but they didn't complete the audits either, by the way, but that's just by the by.

MS MacRAE: Can I just be clear. So your view would be that the underlying policy and the documents and whatever are provided in relation to that are fine, it's the enforcement of the rules where the problem is laying?

MR FREEMAN: It's not just the enforcement of the rules, it's the banks as a group, are not taking responsibility for what they do. In one example I gave you and my second submission, there's a - I'm just not sure what they call it now, but anyway it's a judgment that's come out of an RCA, the English group, CRA. So what they have done is they have said that the National Bank - not the National Bank, the bank, Clydesdale Bank, made a mistake - - -

DR MUNDY: I should probably declare for the record that I am a customer of the Clydesdale Bank and hold an account in Glasgow.

MR FREEMAN: You have got my sympathy.

DR MUNDY: I've not had any difficulties with them.

MR FREEMAN: Do you check your bank statement?

DR MUNDY: Yes, I do and, in fact, they refunded me money which they inappropriately billed me on a mortgage.

MR FREEMAN: You're one of the customers, you're one of the people affected. Well, what they did was, they sent material to people to say that they believed that they were the problem, that the customer was at fault, and it was picked up and - I wondered why it was published.

DR MUNDY: Well, for the record, I never received a letter suggesting I was at fault. I received a letter advising me I was entitled to a refund and asked to instruct where the funds should be placed.

MR FREEMAN: What year was that?

DR MUNDY: A couple of years ago. Probably 2012, early 2012.

MR FREEMAN: Yes. They pulled them up in 2010. Actually it came out of the work I did that was some English accounts. But anyway, that's not the point, the issue was that that's right, they had sent material to the customers that let the customers believe it, and that's what the banks do, they have the customer believe that they're at fault and so the justice gets lost. Now, we have judgments that come out that say, "Well, this was not used properly." The debit tax went on for 22 years - 1982 to 2004. The other ones that have gone on, default interest and that, from 1992, gone through, and, you know, there's thousands and thousands of dollars at stake for some people.

Now, if it's in the court situation and they don't advise, then it becomes a serious matter because the government loses as well, and they don't know any different because they don't check the accounts, and the bankruptcy trustee has got no real - in practice, it's got no ability to be involved because it's a secured account. So as long as the bank keeps the debt underneath their secured value, then the bank says it's right, nobody is going to check it.

I estimate that out of the drought scheme, the government could have lost over

300 million. Queensland got back 35. So I'm the - how much would be owing to farmers I would have no idea, but it could be quite substantial amounts if everybody takes an account, an account in equity, so, you know, they have got a lot at stake to keep this quiet and that's what they're doing. So we now have to come up with answer to how the Queensland government, and particularly the Queensland government because there's judgments in Queensland, it's said that the viability - that the Queensland rural adjustment authority, their viability exercise was incorrect. Now, if they're not living with the conditions that are there, that's placed on them, and they're not living with the enforceable undertakings, as far as I know there's no way to charge it. ASIC wouldn't do it.

DR MUNDY: Well, the fact is that there are enforceable undertakings and it's ASIC who should be enforcing them. I'm not familiar with those provisions of the corporations law, so it's not clear to me whether third parties can enforce them as they can under some - - -

MR FREEMAN: No. I don't know either.

DR MUNDY: But that's probably not the issue.

MR FREEMAN: No.

DR MUNDY: Okay. Well, thank you, Mr Freeman, both for your quite detailed and lengthy submission. We do understand how long these things take to put together.

MR FREEMAN: There is something else I'd like to bring up. I'd like to thank you for bringing up the part where people can be paid for helping others represented in court. I do it all the time and I don't do that much of it, but I might do 50 cases a year, you know, which means that there's a big service that I give for nothing and many of these people do get satisfaction, but once it's in the court and they go to mediational process after it's been in the court, it's not a court process, well, I really can't charge them. So that becomes a major - and there are other people like me about who do do it, and I think that the other thing that I would like to bring up is discovery.

Everybody has said discovery is not necessary, but you don't know if discovery is necessary until you read the document. So you can't say that discovery is not an important issue. It is a very important issue, especially when you're dealing with things like major corporations and where major corporations can hide things, and where you're dealing with a whole group of people that make decisions. So discovery becomes very important in these sort of cases. One of the problems that this has evolved is because discovery has been stopped, you know, they say, "Well, the bank account is it. We accept the debt," and they don't go into discovery on the

debt. So this has just kept evolving over a long period of time since about 1946, maybe earlier, 1936.

So this is just one of the processes. There are other things that you've mentioned in there that are very important, and some of those are shortening up of the program. There isn't a training process for court staff. I come from a court staff. There used to be a court training process for court staff; there isn't now, and what's happening is we've seen court staff exceed their actual authority - in specific cases, I wouldn't know on a general basis, but on specific cases we're seeing it happen.

Now, some of those problems are they're keeping interest out of Court of Appeal record books, but many of them are this - in the court process there's secret correspondence, that secret correspondence is being corrupted by - not maybe intentionally, it may not be intentional, but it's being corrupted because the process is not - is being followed as a secret process. Now, as you know, courts often seal affidavits that are vexatious or whatever, but they don't go into any discussion about what's on the file. So unless all of a sudden a letter rolls up off the file that's a problem, nobody knows.

So we're seeing people where orders come out, that those orders are not directly applicable or those orders may not be correct, they are being supported by the court staff because the court staff is just not trained, and that's a significant access to justice issue as well. These things might be too narrow for what you need to do.

DR MUNDY: No, the issue of court staff are relevant to us. So we might have a little look at that issue.

MR FREEMAN: Yes, well, if you want further evidence I can give you further evidence.

DR MUNDY: Right, well, we might be in touch.

MR FREEMAN: Thank you.

DR MUNDY: Thank you very much.

MS MacRAE: Thank you.

DR MUNDY: I'm going to adjourn these proceedings until such time as the next witness is available which I suspect is somewhere between 10.30 and 10.45.

DR MUNDY: We'll resume these proceedings. If you could state your name and the capacity in which you appear.

MR QUICK (QICS): Indeed, Commissioner. My name is Roger Quick, and I appear as a representative of Queensland Independent Costing Services, serendipitously pronounced "quicks", but I have no ownership interest in the organisation, Mr Commissioner. I might just spend a couple of seconds telling you about what they do.

DR MUNDY: And if you could perhaps make a brief opening statement, Mr Quick, and limit that to about five minutes.

MR QUICK (QICS): Indeed, and I would be grateful if you would promptly guillotine me if I step to six. But can I just say that QICS provides legal costing solutions. It doesn't seem from the submissions I've read that in fact you've had anybody like that make a submission to you. They are basically therefore a group that provides services which include the preparation of all forms of costs assessment: solicitor and client, standard indemnity, all those sort of words that you've heard before.

They prepare cost statements and they have innovative services which I fondly think is where I fit because one of the things that they have helped me do is understand the practicalities of costing and helped me also in the rewriting of the book Quick on Costs, to which I have referred you in the submission. The only other thing I would ask in opening in that way, Commissioner, is there anything that you would like me to particularly address in the submission?

DR MUNDY: No, no.

MR QUICK (QICS): Good. May I then say that yesterday I lodged three documents with you, which I think you have. One of these was a couple of reviews, because I couldn't find anything else, as an introduction to this text which is called Civil Costs: Law and Practice. It's by Dr Mark Friston at the UK Bar, and it seems to have escaped, from what I have read, the dragnet net of the research that's been done, and that is a tremendous pity because it deals with the complexities of what is happening in the UK with admirable clarity within the framework of a single volume.

I met Dr Friston over in the UK a couple of years ago and the two of us produced the second document that I lodged with you yesterday, which is a paper called Proportionality, Possibilities and Problems. That was a paper delivered at the Queensland Law Society Symposium here in Brisbane early in 2012, and its purpose really was to, in a sense, either to persuade people as to how proportionality should

become an immigrant here, or alternatively prophesy the mistakes that would be made in that translation or immigration. It can't be located very easily now and I'm not sure why, other than that it was the longest paper of the symposium and therefore I imagine one of the least appetising. But you have a physical copy of it, and I might, if time allows, refer to it briefly.

There was a third document that I was very anxious to try and get to you, which I haven't been able to do because I only got the galley proofs of a chapter of Quick on Costs, which is called The Future of the Law of Costs, earlier this week, but I'm told that as soon as I have dealt with the galley proofs, the chapter will issue so that should be very quickly available to you. I've said in the submission the scope of what it deals with. It deals with things which are alluded to by you in your terms of reference, such as alternative business disputes - alternative - ABS. But - and many other things which are relevant to what is currently happening.

That brings me to the submission and what is numbered DR270, and I would like to say at the outset about that submission, that my fiercest critic is my eldest son who is both an ex-army officer and a pilot, and very ably persuaded me the previous editions of this submission were very hard to follow, that there was too much history in it, that it required a degree of perseverance on the part of the reader that very few of them would be willing to invest. So what I propose to do is take you very quickly to that submission in a different order from that in which it is printed in the hope that Peter will read the transcript ultimately and forgive me for what I've done.

Sorry. In the submission itself, I should have said, there are two typographical errors which I thought were significant. On page 2 in paragraph 1.4 I couldn't persuade my secretary to type "incremants", i-n-c-r-e-m-a-n-t-s, but that was what I meant. The second one is on page 4 in paragraph 2.3 because some carping critic will no doubt point out that the English statute which brought the system of costs into existence was passed in the sixth year of Edward I, which was 1278, not 1275, and is a statute infamously known as the Statute of Gloucester.

So that brings me to a sort of a quick tour through, forgive the pun, a quick tour through the submission, and I want really to take you first of all to page 7 because I want to try and answer very quickly what is LPM and how does it work. The subject, by the way, abounds with acronyms. Some people suggest - some of the people who have made submissions to you, very big firms that have made these submissions to you, would not have said this, but I am saying it, that in fact LPM is one of at least two ways of approaching the present problems.

The other way is to make a sort of application to the matrix type product that it is of industrial techniques applicable to business processes rather than to legal costs. So you get another acronym very often referred to in the literature of the major law firms, and that acronym is LPI, legal process, rather than legal project management.

My point of view throughout the submission though is to suggest that as a starting point the techniques of project management can be applied to the management of legal matters. That's the thrust of it, and to do it by reference to what I call PMBOK, the project management book of knowledge, which is the result - I see one of you smiling. I'm very glad to see that.

It is a comprehensive treatise, if you like, on the 10 - or maybe it's 11 now - the 10 areas of project management knowledge. You're not dealing of course with a physical project, you're dealing with the management of it, which is why I described it as a matrix type operation. It involves you, of course, managing lawyers and there are some words about the difficulty in doing that in the submission which I will pass quickly over.

DR MUNDY: Mr Quick, you're at about eight minutes so far.

MR QUICK (QICS): I beg your pardon?

DR MUNDY: You're at about eight minutes so far.

MR QUICK (QICS): Thank you very much.

DR MUNDY: Which my mathematics tells me is in excess of five, so perhaps you could bring your opening comments to a conclusion.

MR QUICK (QICS): I've finished there.

DR MUNDY: Okay.

MR QUICK (QICS): So I'm into taking you through the submission.

DR MUNDY: Okay. Well, perhaps we can get to there because I am mindful of time and other issues.

MR QUICK (QICS): Right, okay.

DR MUNDY: My sense of - and I haven't had an opportunity, as I'm sure you would appreciate, to read the materials that were provided to us yesterday - is that what you're suggesting - I mean what legal project management does would presumably give one a much clearer idea about costs before the event. So if adopted or applied, it has a capacity for clients to be better informed as to what costs - - -

MR QUICK (QICS): At the outset.

DR MUNDY: - - - at the outset. We might come back to that, but my question is

actually a bit broader than that. One of the concerns that has been raised with us, and as a matter of fact we accept, is that - and given our inquiry is concerned primarily with access to civil justice, we're probably more concerned about disputes involving individuals and small businesses than we are about party-party disputes in the superior courts, although they are of some interest to us.

I'm just wondering whether you had any observations that would be helpful in as far as could these techniques facilitate the estimation of what you might call a range of costs for a well defined standard sort of legal matter, because our concern is that when individuals or small businesses have to get involved in something that has the potential to end up in litigation that this is an unusual event for them, it's a traumatic experience for them, as I say it's a bit akin to discovering that you're going to have to go and have surgery, so you want to get on and get - and there is no readily - it's not as if I'm going to buy a car and I can look up on the Internet and get a sense of a range of prices which I might pay for this car, assuming I can specify the car.

But I'm wondering whether this methodology could be applied in a public policy context to enable, supported by suitably constructed data collection, to enable the production of a range of estimates for common legal matters which citizens could at least have as a guide so they know when they go to see a lawyer that, "I'm talking about something that's going to cost me a few hundred dollars, maybe a thousand dollars, as opposed to something that's going to cost me $40,000."

MR QUICK (QICS): Yes. Can I just say this, that it's a pity the transcriber can't actually record that I was nodding vigorously at what you were saying, because I am.

DR MUNDY: He's a very good transcriber, but he's not that good.

MR QUICK (QICS): Thank you, Commissioner. Can I say this though? The first part of your question is I think whether this technique of estimating and managing the estimate is applicable to the smaller transaction, and that's why deliberately I put it in terms of those four clear English questions, you know: what's it going to cost me; how long is it going to take; and so on.

DR MUNDY: Yes.

MR QUICK (QICS): Because it is applicable to all, up and down the system, just like the alternative fee arrangement, the fixed fee, has its application with the criminal lawyers at level at the bottom, and at the top it has an application to Pfizer, who are looking for somebody to do global work across allowances all over the word. So you're absolutely right that in fact it has that sort of accordion type application. And secondly you're right, and it is very important that you've said it, that in fact it enables you to do it prospectively at the outset. Right?

I didn't in fact thought I would need to define what the oozlum bird was, but I say in there that the present process, in which QICS does a wonderful job I think, is a process retroactively deciding what the cost should have been all too late, whereas the oozlum bird will fly backwards and up its own backside, or alternatively it will poise in the middle of the air while the world goes around beneath it. I've yet to see the oozlum bird, but it does enable me to say that the whole process currently is loaded retroactively, and we want to load it prospectively.

DR MUNDY: My question about does the approach have any public policy application to giving the community a sense of what they might expect, how could we set that up?

MR QUICK (QICS): That's more difficult for me because what you're really looking for me to answer, and I'm not sure that I can, is what is the data and where should and by whom should it be assembled. Can I just make one point though? These sort of cost assessments, you take a sort of cost assessment made by one of the costs assessors within QICS, it will then be filed with reasons, if the reasons are paid for. Right?

So rarely in the courts as a public document there is some sort of record of how that resulted, and believe you me it will often, where you've got a billable hour and then the whole painful process to completion, it will often be that the reductions can be 20, 30, 40, 50 per cent of what that original estimate was. The other point that I make in here is that the lawyer will often be unable to give estimates. He will say, particularly in litigation, "One of my assumptions is that I won't be able to control what the end price is," and personally I would never accept that. Does that go a little way to answering the question?

DR MUNDY: I think if we could just explore the - putting aside the issue of who might do this and how the data may be compelled into the hands of an appropriate body, there are many ways that that could be done, if not using the Census and Statistics Act, but more generally what sort of information would need to be collected to give people a sense of - a prior of when - before they go off to see a solicitor about a matter, a ballpark figure of what they - a range of what they could expect?

MR QUICK (QICS): Well, can I make one other point to you? I did say that the solicitor is obliged to give estimates.

DR MUNDY: Yes.

MR QUICK (QICS): These aren't my words, but the law as to estimates and enforcement of estimates is wilfully and woefully under-developed.

DR MUNDY: I think our concern with the current disclosure regime is that people who are going, putting aside major corporations, but small businesses, citizens, the disclosure documents have been likened to us to mobile phone contracts. In some jurisdictions they're dense, and for someone possibly with, you know, limited language skills. English mightn't be the first - essentially impenetrable. So we - but we also understand that typically people will go along, they'll get these documents, but they won't have any reference points by which they can understand whether this is about what it should cost, whether this lawyer is just really expensive, or indeed whether this lawyer seems to be on the cheap end of the scale.

So what we have in mind is something that would facilitate people, and because if you're in a matter and its quite urgent, you don't have the time to shop around, and search costs aren't zero. So what we're trying to do is to have some publicly available statement of what - you know, I know it's difficult to define a standard matter, but we've been advised by lots of people that it's not easy, but it's doable. I guess from your experience what I'm trying to understand is what information would we actually need to collect? Would statements filed in court be sufficient, or would some - - -

MR QUICK (QICS): It would help.

DR MUNDY: Or would some sort of obligation to disclose in a confidential way for statistical purposes help? Would a survey perhaps help?

MR QUICK (QICS): It would. All those things might help because the aim is transparency, isn't it? A sort of giving substance to the relationship of trust which allegedly should be there.

DR MUNDY: Okay.

MR QUICK (QICS): Where am I up to in terms of time?

DR MUNDY: No, we'll continue for a bit.

MR QUICK (QICS): Okay. Well, can I just take you to something then, to page 4? Because page 4 attempts to explain what I call the doctrine of indemnity. Indemnity is a confusing word because you can use it in terms of the quantification of costs as well as the right of reimbursement for compensatory - I describe it as a doctrine both in my book and in here, except when I made a couple of slips and talked about it as a principle. I described it as a doctrine since about - perhaps since 1278. It's under underlie, it's underlay what is the nature of legal costs. When they become party and party costs, the costs that are awarded in the court if you're lucky, when they become those, they are in the nature of a qualified indemnity, okay?

Terrific difficulty flows from that single idea because it's never been 100 per cent. It's - there's been all sorts of difficulties, going back to the original statement which is in 1860 in the case of Harold v Smith where Baron Bramwell, giving the judgment of the barons of the Barons of the Exchequers, it's something like this. This is quoted, by the way, in chapter 2 of my book at, I think, paragraph 2.2300. He says costs are compensatory. They're an indemnity apart from arbitrary rules of taxation. The arbitrary rules of taxation have caught different people. They've caught, for example, the unqualified lawyer. They've caught the interstate lawyer. They've caught the pro bono litigant. The material in the submissions that I've read about King v King illustrates that.

DR MUNDY: Do you have any further questions?

MS MacRAE: I was just going to ask, because you mentioned that you'd worked in collaboration on some of the UK - with some of the colleagues from the UK. If you could tell us anything, or if you're aware of, and it might be not in scope of your knowledge, but we have referred to some of the reforms in England and Wales talking about cost budgeting and capping and whether you had any - whether you could tell us anything about how they worked in practice and whether or not you think those reforms have been positive or negative in that.

MR QUICK (QICS): Will your fellow commissioner allow me to tell you fully about that? Because I - - -

DR MUNDY: Please, we need to probably wind this discussion up in about 10 minutes.

MR QUICK (QICS): I think that's long enough, because I've actually finished now with the submission.

DR MUNDY: Please. We've got a couple of other questions we want to ask you, but please answer Commissioner MacRae's question.

MR QUICK (QICS): Can I just say the difficulty unless you subscribe to this is to get a clear statement of what's actually happening. For example, the capping has its place, but capping is a net budget, okay? In terms of private negotiations of a capped fee, one Australian commentator has described as the dumbest deal ever because all it does is fix that limit without giving you any manoeuvre on it. So if that limit, that capping is not reached by the time the litigation is done, it's served its purpose. It's just done nothing. Whereas in fact what happens with cost budgeting is you deploy all the proper techniques of estimating, budgeting, enforcement of the budget to whatever the final result is. Is that clear?

MS MacRAE: So in working out that - using that methodology, is that - is your

LPM used in practice in the UK?

MR QUICK (QICS): Well, there's a great divide between litigation which is dominated by the doctrine of indemnity and the other threat, but it is. It is very much so, and it's very much used in the states, whereas I make the point in the paper the doctrine of indemnity has no place. There was a case in 1796 called Arcambel v Wiseman where the United States in something like three or four lines said, "We have no interest in this idea that judges should fix the costs and there should be no right of indemnity."

So you've ended up with no cost jurisdictions at various places. Can I just say something else? Capping has a place, but it is not the place that you would assign to it. You seem to think it's an answer, and the fact is it failed in the UK. That's what Friston said in here, it's what he and I came up with and said in this paper, and we said, "No, it hasn't worked."

DR MUNDY: Why?

MR QUICK (QICS): Because it is just net budget and doesn't allow the other techniques like estimating, like managing the budget, like securing the result as proportionate, and I'll come back to that word in a minute. It doesn't allow those other techniques place. It's just a figure. Can I just go back to proportion for a moment?

DR MUNDY: Yes, please.

MR QUICK (QICS): Because what Friston is saying, I'm sorry but it's in this paper that he and I put together a section called Lessons to be Learned. I think I've learned painfully over the years that either persuasion or prophecy are very difficulty. It's depressing, I can tell you, that never - there's never been any interest expressed in learning from the lessons in the UK. But they are there at pages 30 through to 41. You've got to give it a clear and precise row.

You may find it hard to believe this, but when I was talking to - doing the survey for this paper about where the different jurisdictions were up to in terms of proportionality, I found myself talking to an officer in one of the Supreme Courts, and we were definitely not agreeing with each other when she thought that I should want to know about what they did in proportionality down there, because they were anxious that the punishment should fit the crime. So proportionality can mean many things to many people. So you must be clear, you must be precise.

You mustn't confuse its place in the process. It has a place where which is both as a principle of assessment and also as a principle of management, and that's laid out in terms of criticisms of the Lownds test in the UK which Dr Friston actually

appeared in to get judicial guidance as to what it meant, got it from Lord Woolf, and that didn't save it either.

DR MUNDY: Look, Mr Quick, thank you ver much for your time. We will have a look at those materials that you've provided, just particularly, I think, our very capable research staff in Canberra will have a look. So we may well need to get in contact further to clarify some matters if that's okay?

MR QUICK (QICS): Can I just point two trifling mistakes in this? I'm sure - here in Queensland the limit for disclosure to operate is $1500. You say it's 1750, that's what the legislation says, but section 80 of the Legal Practitioners Regulation says it's 15.

DR MUNDY: I think someone has pointed that out to us already.

MR QUICK (QICS): I must be out of time.

DR MUNDY: Thank you very much.

DR MUNDY: Can we have the Law Council of Australia, please? When you're settled, could each of you please state your names and the capacity in which you appear for the benefit of the transcripts?

MR COLBRAN (LCA): My name is Michael Colbran and I'm the president of the Law Council of Australia.

MR HAGAN (LCA): Martyn Hagan, secretary general, Law Council of Australia.

MR PARMETER (LCA): Nick Parmeter, Law Council of Australia.

DR NEAL (LCA): David Neal, the access to justice committee of Law Council of Australia.

DR MUNDY: Gentlemen, thank you for appearing today. Before I ask you to make a brief opening statement of about no more than five minutes, Commissioner MacRae and I would like to place on the record our unhappiness in the delay of what is an important submission to us being provided, in fact two weeks after the due date, when many other organisations significantly less well resourced were able to meet those timelines. That has caused the commission to have to conduct additional hearings at significant cost. So I just wanted to place that on the record. And with that, could we have your opening statements?

MR COLBRAN (LCA): Thank you very much, Commissioner. We're very grateful, obviously, for the opportunity to say some things to you today. We're grateful for the opportunity to make two very lengthy submissions to the commission, and we appreciate the time the commission has taken to come to grips with what we're saying. I think I'd like to say something initially about what the law council is, because in order to understand what we are able to say and perhaps, sir, when you're thinking of the resources that you have so kindly characterised, it might be worth taking into account just what the law council is and how it works.

The law council is a peak body which represents Australian lawyers, but it does so in a way through the federated structure that applies to the legal profession. So we are a council which meets together constituted by representatives of each of the operative law societies and bar associations of which there are 16 in the country. The resources that you speak of are considerably more limited than you might think. In any event, I'd like to place on the record the gratitude which the law council has to Nick Parmeter who has been the primary person coordinating our response.

In terms of direct pastoral responsibility for lawyers, that rests with law societies and bar associations, and I think over the last weeks you've had the opportunity to talk to a number of them. The law council is mandated to speak on

national and international issues, and in respect of the work of this commission, we have endeavoured to collate and coordinate information from a variety of places, which explains why our submissions run to so very, very many pages in contrast, I think, to many of the submissions you've received. But I make no apology for the length of those submissions. It's a vast field that we've endeavoured to cover. I think I'd like to say something next about lawyers.

If may be that it's unnecessary to say this, but since neither of you are lawyers, I would like to say that what leads a person to take a career in law is a sense of idealism and a commitment to fundamental concepts of justice. It is hardly something which a person would take on in order to make a lot of money. If you want to make a lot money, there are plenty of ways to do it and the law is not one of them. I think it may well be that this acute concern that lawyers beginning their practice, and as their practice continues, have for justice is to be reflected in the approach which we have for years adopted to contingency fees.

Contingency fees obviously, in one sense, would be a great economic benefit to those who are able to profit from them, but the resistance of the profession for decades, for centuries to this is a reflection of the concern to maintain standards of the profession and the ideals of service of the community which inspire us to get into it in the first place.

Next I think I'd like to draw your attention to the observation which we've made in the introduction to our second paper, which again focus attention on the issue of justice, which, with great respect to the commission's paper, seems possibly sometimes to have been elided in a focus on simply the resolution of disputes. Between - Commissioner - Dr Mundy, between the resolution of several disputes and the provision of a system of justice to the community lies a very large gulf which we have endeavoured to expose in the introduction.

DR MUNDY: And I think at a number of points we acknowledge, with respect.

MR COLBRAN (LCA): Yes. It is of fundamental importance, in our submission, to recognise that what we are talking about here is a system which sustains civil society. It's not just a way of preventing brawls in the streets over civil disputes. It is a way of - - -

DR MUNDY: I think that is an unfair characterisation of our position, given the lengthy attention we pay to matters like family violence and those issues.

MR COLBRAN (LCA): I beg your pardon. I wasn't intending to suggest that you were blinkered in what you had written. What I'm suggesting is that we need to be aware when proposing changes to the system of justice, that the ramifications of doing so are very broad.

DR MUNDY: We understand that.

MR COLBRAN (LCA): I think the final thing I'll say by way of opening, and it really reflects a little what Dr Quick said a moment ago, and that's the real importance of recognising that Australia in the common law world has the advantage of seeing some experiments that have been tried elsewhere. Seeing what happens in America, seeing what happens in the UK. Some of the lessons from the UK in the insurance field and others make very scary reading, which we've tried to identify, I think, at about page 74 of the submission.

DR MUNDY: I think one of the appendices of our reports indicates that I did in fact meet with the British Insurance Council when I was in London, and other practitioners in this area. So we are aware of the international - - -

MR COLBRAN (LCA): Thank you very much. Well, we're certainly in a position to assist you with further introductions if necessary in respect of those issues, which are - - -

DR MUNDY: Sadly the resources of the commission as a result of efficiency dividends are quite limited, and in fact our overseas inquiries were part of other business which I had overseas.

MR COLBRAN (LCA): Well, as I said, we're happy to facilitate that, or to take up, on your behalf, any questions that you might like raised.

DR MUNDY: I think our time is now drawing to a close and we need to focus more on finalising our report to the treasurer. Thank you for that opening and for its brevity. I have to note though that the Australian Bar Association did keep its comments to just over three minutes which means that they win the prize for brevity. Look, we do appreciate the volume of effort that goes into these submissions and Commissioner MacRae and I have both worked for industry associations in the past and understand the difficulties and what can sometimes appear to be an exercising of herding cats.

MR COLBRAN (LCA): Thank you.

DR MUNDY: So we do appreciate the difficulty. It's much easier producing a submission for a corporation.

MR COLBRAN (LCA): Yes, exactly.

DR MUNDY: Particularly when you're the officer authorised to sign it off. But, look, I think we'd like to probably start with some discussions about unmet legal

need and you say in paragraph 40 or thereabouts in your submission that we seem to have - you make an observation that our findings are tangential but I don't intend to explore that very greatly. You're saying that even if the commission's approach is accepted, on its own estimates 23.6 per cent of the population experienced unmet legal need and therefore it's difficult to understand the basis upon which the PC's finding that only 17.1 per cent of the population experienced legal need.

I'd invite you to have a look at that, because I think what you will find we said was that 23.6 per cent of matters constitute unmet legal need and if you entertain the notion that some people may experience one more matter that is unmet, and whilst you note I'm not a lawyer, I do have a honours degree in statistics so I think I'm competent to comment on this - - -

MR COLBRAN (LCA): Which I don't, so we're - - -

DR MUNDY: I would suggest that if some people have more than one unmet matter, then the percentage of people experiencing need will be smaller than the percentage of unmet matters, and that is precisely the commission's point. So you might want to go and reread that and see whether we haven't - I think we're right, but whether there's just a misunderstanding.

MR COLBRAN (LCA): I'm sorry - - -

DR MUNDY: I'm just trying to correct the record. There does appear to us to be a number of criticisms that are made on the report on the basis of methodology and technique which upon our review - - -

MR COLBRAN (LCA): You don't think are justified.

DR MUNDY: - - - don't seem to be made out.

MR COLBRAN (LCA): Sure. All right. Well, thank you. So if I understand correct, the difference is between an unmet need - - -

DR MUNDY: And the number of the people.

MS MacRAE: Proportion of problems and - - -

MR COLBRAN (LCA): - - - at 23 per cent or seven people - - -

DR MUNDY: Yes, and the proportion of people at seven - - -

MR COLBRAN (LCA): Or 17 per cent.

DR MUNDY: - - - reflecting, as I'm sure you're aware, there are very large clusterings of people.

MR COLBRAN (LCA): Yes.

DR MUNDY: You know, many - sorry, let me phrase that - a small but significant number of citizens experience multiple needs. I mean, that's indeed what the law survey tells us.

MR COLBRAN (LCA): So it seems that there is a significant unmet need, whether it's 17 or 23 per cent.

DR MUNDY: Indeed. But I think it is fair to say that the survey, and it's acknowledged widely that the survey under estimates both of those by virtue of its methodology being a phone survey, and as a number of participants have indicated to us, particularly in relation to indigenous communities, they have no landlines. So I mean, we would be interested, and I'm happy for you to come back on this, of the council's views of how that - and it's no criticism of the law foundation - - -

MR COLBRAN (LCA): No, that's fine.

DR MUNDY: We understand these things. But how the council feels that could be addressed, and perhaps whether it or its members may be able to find some resources to assist in financing the expansion of that survey. We're trying to work through that question. I think in your first submission you encouraged us not to look very much further than the law survey, which we didn't, but we have taken the opportunity and we have had access to its unit record data, I think - it's data. and very low levels, for us to be able to undertake analysis that they haven't had the resources to undertake themselves.

MR COLBRAN (LCA): Just so I'm clear, the purpose of this is to identify the precise percentage of unmet legal need.

DR MUNDY: Yes. I think we are asked to do that in our terms of reference. I think perhaps at some point whether it's 17 per cent or 20 per cent it doesn't really matter.

MR COLBRAN (LCA): That's really what I was thinking.

DR MUNDY: But we do note that there are some criticisms of our, what we might call statistical methodology, which we are confident are correct.

MR COLBRAN (LCA): Very happy with that. If on reflection, having heard what you said, and looked at again we concluded that the criticism we made of your

statistical ability was unfounded, would you like us to formally correct that?

DR MUNDY: A brief note would be best.

MS MacRAE: I mean, I think the other main area of concern in relation to the discussion of the law survey is a criticism that we haven't defined what substantial is, and we've actually done that in numerous places in the report. So we give it in box 2.1, we give it in the text on page 93. We've got it on a note on one of our figures on page 94, and then there's a part of your submission, I think, where you're inclined then to say, "Well, if they have got three or more legal problems, I think that might be substantial and we should be addressing those in a different way."

MR COLBRAN (LCA): Yes.

MS MacRAE: Now, we've adopted what the law survey adopted as a substantial problem and I think that's probably - we would say that's still the best method to use. So again I think that whole area about what's substantial and what you - - -

MR COLBRAN (LCA): I think you have made, if I may say, a very fair case for us to go back and to correct any inappropriate criticism, but it does seem to me, commissioners, that whether it's 17, 23, and how you precisely define "substantial", we've got a problem which needs to be addressed.

DR MUNDY: I don't think the commission denies that.

MR COLBRAN (LCA): No.

DR MUNDY: The commission prides itself on the quality of its evidence and is keen to make sure that where - - -

MR COLBRAN (LCA): Unfair criticism - - -

DR MUNDY: - - - our analysis is challenged and we think we're right, that the record is corrected appropriately.

MR COLBRAN (LCA): Certainly. Thank you.

DR MUNDY: Otherwise it undermines the reputation of the commission that some hold in high regard.

MR COLBRAN (LCA): And it would not be fair, which is what lawyers are all on about in the first place.

DR MUNDY: Indeed. Commissioner.

MS MacRAE: I'm just thinking about where to go next.

DR MUNDY: Could we talk briefly about unbundled services?

MR COLBRAN (LCA): Sure.

DR MUNDY: Because I think we're actually - particularly with the assistance of the Law Society of Queensland yesterday - we seem to be cutting to the chase on this. It seems to us that there are some issues around insurance. There's some issues around lawyers being hauled in when they have provided limited assistance and been dragged up before the bench, but I don't think anyone is suggesting to us that this is one of the great imponderables of legal policy and your colleagues from the Law Society of Queensland, and indeed I think others, I think perhaps the Law Institute of Victoria might have suggested to us that the parliament could probably help us out here, or at least the practice rules could be amended.

I think - and I don't quite have the words precisely with me, but the Law Society of Queensland suggested a very brief set of words, which I think my colleague is trying to find, from the Bar Association rules in the United States, and I don't know if you are familiar with them, but they're a simple sentence and they indicated to us in their view that that might actually do the job. Is a simple amendment of that type, assuming it's fit for purpose, something that you would support?

MR COLBRAN (LCA): Well, I think we've said in the submission that we support the idea of looking at unbundling. We're not at all opposed to the concept. What we would need to do is reflect on that sentence to see if it does in fact meet what we anticipate to be a number of multi-dimensional problems.

DR MUNDY: I think Commissioner MacRae is about to read you the words that we are interested in.

MS MacRAE: So if it helps you and you want to look at it again later, the Law Society of Queensland, page 8 of their submission refers to the American Bar Association Rules which state:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

MR COLBRAN (LCA): Yes. That's paragraph 405 of our submission.

DR MUNDY: It's there as well, is it?

MS MacRAE: Sorry. Yes, okay.

DR MUNDY: So those sorts of words in your view, subject to a bit more investigation.

MR COLBRAN (LCA): Yes. In principle, that seems to address the very point we made. Yes.

DR MUNDY: Yes, okay.

MR COLBRAN (LCA): But it does need - when you're writing rules, they have got to fit into the context and all of that.

MS MacRAE: Could I perhaps just bring you to the issue of trust accounts.

MR COLBRAN (LCA): I'm sorry, I beg your pardon. Perhaps before leaving that I should draw your attention to paragraph 405 and particularly to 406, because while unbundling can work perhaps more easily in a non-litigious situation, there are the constraints which operate between barristers and the court which mean that it's just sometimes not feasible or acceptable to unbundle at an inappropriate time.

DR MUNDY: Yes. No, I think we appreciate that. I think that's not the context in which most people have discussed, but I do appreciate the issue of barristers in that circumstance.

MS MacRAE: We heard from one of the - not quite a sole practitioner, but a small practitioner yesterday here in Queensland saying that often she would like to get certainty of payment from a client and if she was a builder or some other business that regularly takes these amounts that she wouldn't be required to set up a separate trust account and hold the money in trust. She would just - they would make an arrangement between them as you do in other circles of life and that that would save her quite a lot of red tape, and I'm wondering if you had a view about the place of trust accounts and whether in fact there might be instances where the requirements for those might be relaxed?

MR COLBRAN (LCA): So is this in the context of payments that are made in advance of the performance of legal services?

MS MacRAE: Yes.

MR COLBRAN (LCA): I was going to say and should have said at the beginning that it's possibly helpful to you to know who we are, not just why we're here. I'm a barrister, I've been a barrister for 32 years, and that is all I have done in my legal

career. So this is a long way to answer your question, but barristers don't have - generally speaking - we don't have trust accounts and we don't receive money on account of work to be performed. So I say that because my ability to speak confidently about your question is limited. Nick works with the counsel and is a senior policy lawyer. David is also a barrister. But we took the precaution of bringing a Victorian and a Queensland solicitor along. Would you mind if I asked - - -

DR MUNDY: No, if they're happy to answer the question. All I ask is they state their name and they'll have to come to the table.

MS MacRAE: And probably need to come to the table.

DR MUNDY: But if they just state their name and their affiliation then we can proceed quite happily.

MR COLBRAN (LCA): Thank you.

MR DOYLE (LCA): I'm Bruce Doyle, I'm also on the LCA Access to Justice Committee, although I should make a disclosure, that you referred to the evidence of Elizabeth Shearer affording justice yesterday, she's my wife but also my business partner, and that is a practice where I'm the other - it's one practice, two brands. I'm Doyle Family Law. So perhaps I can answer that question about the place of trust accounts.

The issue about trust accounts is that, yes, it does create a lot more work, particularly when we're talking about small sums of money, and that submission I believe, if we look at it narrowly from the point of view of what would be more efficient for legal practice, there are a lot of cases where the efficiency for legal practice would be enhanced if we didn't need to have a trust account for certain amounts of money. I mean, I've just been doing trust account things this morning and it's a headache for a small practice. We spend a lot of time on that, perhaps unnecessarily.

The only side issue I'd point to, and I don't want to detract from the force of what I just said, is that of course Legal Aid, Legal Service Commissions, in Queensland the Supreme Court Library, they're all paid out of interest on trust accounts. So from an efficiency point of view we'd like less trust accounts, although you will be aware of the implications for funding of those services. They're entrenched interests and needs that have been met out of that source.

DR MUNDY: Many public policy issues, people used to believe the tariff was a good thing too. But I guess my observation would be, if those resources could be replaced and given essentially this is acting as some sort of a - it looks a bit like a

tax, that's just how it is. If alternative sources of revenue, and let's consider that for the sake of discussion to be the consolidated revenue fund, would it be a useful and helpful thing for a large part of the trust account edifice and arrangements to actually be reformed so that, you know, you could do away with a lot of that burden and also that people wouldn't have to pay necessarily up front, particularly those who may suffer some form of economic disadvantage.

MR DOYLE (LCA): Look, from an efficiency point of view of our practices, yes, it would be of assistance. But I think you're aware, and I've flagged the other issues there, that there are - - -

MS MacRAE: Yes, so you want to be certain that the - - -

MR DOYLE (LCA): I think the ethical issues can be dealt with, I believe, in other ways.

DR MUNDY: And we're not suggesting that, for example, when monies are held in trust during the course of conveyance of property or something that should be done away with. We're talking - - -

MR DOYLE (LCA): Of course. As you may be aware too, electronic conveyancing is going to pull a lot of those funds out of those trust accounts. So the issue of diminution of trust account income - or interest on lawyer's trust accounts, that's very close.

DR MUNDY: I think part of our concern is that what we consider to be in many cases, and I think this is not - is that in many cases those trust funds are supporting activities that are really important for disadvantaged citizens to get access to justice. What concerns us is that technology and other things are eroding the revenue from the trust funds to a point where it may be dangerous public policy to rely upon them necessarily into the future, and that's I guess - our concern is in part about red tape, because that's what we do, but also that this seems to be a somewhat unreliable form of revenue upon which to base sound public policy.

MR DOYLE (LCA): That's right, I agree with that and also - just as a halfway house, I think it might be easy to at least reduce that requirement for costs below the cost disclosure threshold, which you've just said is $1500. That would be an easy thing to do, because there would be minimal interest earned on that and the transaction costs of dealing with those small amounts of money is out of proportion to the benefit.

DR MUNDY: Perhaps - and I appreciate these matters will be very different in different jurisdictions. I absolutely get that. But perhaps the council could come, given the discussion that we've just had - because our primary concern is, to be frank,

we just think it's really quite dangerous to, you know, interest rates are low, technology is eroding the value of funds in - the amounts of money in the funds and it just seems that at some point it will break.

MR COLBRAN (LCA): I think, if I may say, it's a very welcome and helpful observation which we'll be happy to come back to - - -

DR MUNDY: Yes, and if you could get it - I mean, it would be helpful if you could gather up some national facts and stuff.

MR COLBRAN (LCA): Information about how it's working, yes.

DR MUNDY: Your members would probably be the best people placed to provide us with this information quickly.

MR COLBRAN (LCA): Sure, and particularly with this change to electronic conveyancing and the likely impact of that, you would probably like to know what we think about that.

MS MacRAE: Yes, that would be helpful.

DR MUNDY: Yes - I mean, I suspect we think electronic conveyancing is a wonderful idea, but - - -

MR COLBRAN (LCA): In principle, yes, but is has that flow on - - -

DR MUNDY: It has that consequence and we do - I think we've heard of many examples where really important services depended on funds which looked to be vulnerable, is the word that's probably - - -

MR COLBRAN (LCA): Thank you, we readily welcome that. Can I just ask what your time frame is? I do appreciate that you're moving quickly and I don't want to be guilty of creating a problem again, so - - -

DR MUNDY: Certainly the next couple of weeks.

MR COLBRAN (LCA): Okay, we'll get onto it.

DR MUNDY: Where are we today?

MS MacRAE: Mid June.

DR MUNDY: This month would be really good. The first week of July is probably okay. Mr Raine and Mr Parmeter can negotiate this on our behalf. He's the one

that's got to make sure the work gets done and answers to his boss. Where did we want to go to? Could we talk briefly about limited licences, and I think there's been a bit of a misconception here. Our focus is really on - and we've done a lot of work in this area of occupational licensing. Indeed, the commission has been a strong advocate that legal practitioners should not have to have licences to be migration agents, for example.

So this cuts both ways in our mind, and as you know there are a number of areas in which in narrowly defined areas of the law like tax, migration, conveyancing that practitioners who have knowledge of the relevant law, indeed are often trained in the relevant law, are able to get on and I think do a reasonable job. We are also aware, for example in Washington state, of arrangements where people are able to enter limited practice in family law after quite considerable amounts of formal education and with a quite limited practice.

For example, they can't appear in a family law matter, but they're able to provide advice and they probably have other skills which assist in the resolution of family disputes, and if you're not aware of that you might like to consider that one, because my just looking at it thinking, why wouldn't you just do a law degree anyway, because you're spending a lot of - yes, I think it's four years and then supervised practice. So it's quite rigorous.

I'm just wondering whether there are any other areas, and particularly in tribunals where we see - and I have some experience with VCAT, where you do see in the planning list in VCAT quite often - and to be fair, you could characterise them as self-representers, because they're employees of say council representing. But also planning practices more generally in large scale tribunal matters with disputes, and I think there was some indication in Victoria that this was probably not a bad idea. But I guess the question is, what's the real issue here? If we accept that a person is appropriately skilled and trained to deal with a limited, known matter, is that - as we have in other areas - is that such a real problem?

MR COLBRAN (LCA): Look, I think the difficulty that we have had in reaching a consent - let me explain the difficulty. We've had a difficulty in reaching consensus about it because the question is being posed at a fairly abstract level. You're helpfully making it a little more precise, and I'm happy to adventure into providing an answer for that based on my own thoughts. But I think I would like to emphasise that the Law Council is not root and branch opposed to this kind of thing.

But it really is much more a matter or respecting those issues which we think are important to the community, and those are things like - which you've already, I accept, touched on - proper training and proper regulation and proper ways of fixing mistakes when they occur and proper disciplinary structures. Once you first identify the specific area in which you don't really need to be a lawyer to do something that

might be allied to legal work and then you provide the panoply of support mechanisms, I'm not sure that there's going to be that much of a problem.

DR MUNDY: One other issue that's been raised, and we certainly don't have in mind such people appearing in the superior courts.

MR COLBRAN (LCA): No, I gathered that from what you - - -

DR MUNDY: That's not what we're on about. One issue, and it's a broader issue, and that goes to the question of tribunals, and I think it was first raised with us by Justice Kerr in his capacity as the president of the AAT, was that in some circumstances it's suggested that it would be helpful if all participants in tribunal matters had a statutory duty to assist the tribunals in their statutory purposes, which typically are phrased in the terms of just, quick and cheap.

MR COLBRAN (LCA): It's like the overarching obligations we're very familiar with in one respect.

DR MUNDY: Indeed, and some of your colleagues have mentioned to us a concern that lay practitioners, let's assume they're suited, don't have the overarching duty to the judicial system that lawyers did. But I guess the question in our mind is, at least in a tribunal context where these people are most likely to be found, would an overarching statutory duty of all persons appearing at least go some way to allaying those concerns?

MR COLBRAN (LCA): Well, obviously that would go some way, and these things are a matter of balancing. In the course of what we were talking about before you just, as a side wind, mentioned the length of the legal education training, and I think I'd like to say something about that because I think they are a little bit related. The training of a lawyer, which does as you say extend over four or five years often, is a training in a lot more things than specific areas of work. Those things are small modules of the course.

But a great deal of the utility of spending that time surrounded by lawyers and thinking about legal issues is that it inculcates a sense of service to the community and a sense of ethical responsibility and a sense of the importance of what it is that you're doing. Now, I understand that what you're postulating is that in place of the inherent duty which a lawyer owes to the court, and which I think is built by that period of immersion in the system. You replace that with a statutory obligation. Look, it will go some way towards achieving it. But I do not, with respect, think that it will have that kind of all encompassing focus which lawyers have. When a lawyer goes to court, it's quite different from going to the dentist. You really do walk down the road sensing that you are carrying a responsibility to the community, and I think that's hard to develop.

DR MUNDY: I think Commissioner MacRae and I would make similar observations about holders of statutory office.

MR COLBRAN (LCA): Yes.

DR MUNDY: Angela?

MS MacRAE: I just wonder - coming to something completely different - but in the Northern Territory we spoke to your - in fact is was the Northern Territory bar that we spoke to there, that were, I might say, highly supportive, almost excited about the pre-action protocols and how well that regime had worked there, and very keen I think to see that sort of arrangement applied more broadly. I just wonder if you could comment on that. You're more circumspect, I guess, in your submission about how effective they might be and how appropriate they might be in certain types of actions. If I might say, the NT bar was pretty forthcoming in saying they thought they were appropriate for pretty much all actions and things that were required where - - -

MR COLBRAN (LCA): Okay. Well, the fact that we are circumspect reflects the reality that we have had feedback of various kinds.

MS MacRAE: Sure.

MR COLBRAN (LCA): And we've tried to set that out. Can I say, in my own personal, professional experience as a commercial barrister for many years, I've seen circumstances where pre-action protocols have worked and they've been great and, you know, if that's all I'd been exposed to then I'd be like the Northern Territory bar, for whose experience it's relatively new. But I've also encountered circumstances where it has been a complete waste of time, where it's added unnecessarily to costs, and I think what we've been trying to say here is that pre-action protocols can be useful, but you shouldn't impose them willy-nilly everywhere and that courts who have developed specialist lists and the ability to see the kinds of work that's coming through are best qualified to indicate the areas in which pre-action protocols are likely to be necessary.

MR DOYLE (LCA): Might I add two things to that?

MS MacRAE: Sure.

MR DOYLE (LCA): My experience is of family law, where of course with have the Family Court of Australia which has pre-action protocols and the Federal Circuity Court which does the overwhelming bulk of family law work which doesn't have the pre-action protocols, and I think the fact that you got that from the NT bar, I

mean, I think barristers may have a different perspective on this, because they see the matters that have gone to court and reach a higher level.

So for those larger matters, they can look back and see this might have been appropriate. But as a solicitor, I occasionally see people who apply the pre-action protocols in a, one might say, an over the top matter for a small asset pool. I'll give an example of a matter that recently completed with my client getting a payment of something like $5000. The other side did an impeccable pre-action protocol compliance. I'd be astonished if it cost them less than $2000, you know? So I think in small matters, it's over the top, or perhaps those particular pre-action protocols were over the top. It might be appropriate to have difference pre-action protocols.

MS MacRAE: Okay, thank you.

DR NEAL (LCA): I'm of the same view. I'm a criminal barrister actually. But the same sorts of - I actually have been a policy maker as well and instituted such programs then had to practice under them and regretted that.

DR MUNDY: Be careful what you ask for.

DR NEAL (LCA): Well, and you do find it becomes mechanical, expensive and sort of formulaic. It starts off with great intentions, but it becomes routinised very quickly and it then really loses it's effect. It's meant to get the parties talking about issues, but the system works against that and all it does is really run up expense.

MR DOYLE (LCA): One think, if I can add again, is that one thing I've seen in my practice over 31 years of practice in the family court is that as the resources of courts have constricted, they have externalised the costs by placing greater obligations on the parties and the lawyers. So I think that's an example where, if everyone complied with the pre-action protocols it would reduce the workload of the court, but it is done at significant expense to parties and their legal representatives.

MS MacRAE: Thank you.

DR MUNDY: I guess one issue that's always in the minds of policy makers when they're considering professional services regulations, and I use that term in the broad, are issues around barriers to entry to the profession, and some examples have been raised with us - I'm just wondering whether you believe that - whether it's the council's view that the current arrangements for admission of qualified persons from overseas - and I'll help you out, the United Kingdom and not Scotland, having worked in Scotland I profoundly understand, although I do like the ideas that barristers are kept in stables. But I'm interested in your views as to whether as a general proposition you think the current arrangements for admission of qualified persons from the United Kingdom is suitable?

MR COLBRAN (LCA): I think the answer to that is that the Law Council has felt for some time that there is a great interest for the Australian legal community and for the good of our region, for there to be greater facilitation of professional mobility within the region and between countries such as those that you mentioned, including the Irish and the Scottish. But obviously there is an organisation lack which is in charge of this. I know there are very good people on it, but we would like to see some real effort being put into testing whether the protections that have been thought necessary up to date are really necessary these days. It's a different world.

DR MUNDY: So would you think it was a well-functioning and appropriate system that if a person admitted to the criminal bar in London and subsequently admitted as a silk would have to take more than two years to get a final determination of what she might have to do to gain admission to practice in Australia?

MR COLBRAN (LCA): Well, if I were here, I'd be pretty unhappy about that.

DR MUNDY: Given this person is a queen's counsel at the Bar in London, would you think it was reasonable to require her prior to being considered to be supervised for practice in the jurisdiction of the Northern Territory that she be required to complete a number of courses, and she's seeking admission to the bar, professional responsibility, trust and office accounting, commercial and corporate practice, property law, bearing in mind she's primarily a criminal barrister, and one of the following; consumer law practice, employment and industrial relations practice, planning or environmental law practice, or wills and estates practice.

MR COLBRAN (LCA): Well, look, first I would say that - - -

DR MUNDY: I wish the record could record your colleague's face.

DR NEAL (LCA): Federal constitutional law would be the only thing she really would need to do.

DR MUNDY: She's been told she needs to do that, and that's not an issue.

DR NEAL (LCA): Okay.

MR COLBRAN (LCA): I think one issue - I don't know about the office management and trust accounts because if she makes an undertaking that she will only practice as a barrister then that becomes irrelevant, although I must say office management by barristers could be improved somewhat in general. But I think there are a couple of things that come to mind. Reciprocity is one word which I would like to see applied here, and I don't think it's quite that easy for us to get into the UK, but my overall theme is that we should be reducing barriers from both angles.

The only other thing I'd say is this, when she signs up as a barrister, at the moment she can't sign up as a criminal barrister, she signs up as a barrister of general practice. If she receives a brief in the area of Torrens title property law or something the community has no real confidence that she has an ability in that field. So I think I'm trying to equivocate slightly but not disagree with what you're fundamentally putting to me which is, is there a case for trying to see whether these barriers are really necessary and we would be very happy to be a part of such an inquiry.

DR MUNDY: Okay. I think we'll move on from there. Commissioner.

MS MacRAE: I'd just be interested in your views about where there are complaints about difficulties with either the quality or the cost of services, how well you think the complaint mechanisms are working, how well understood they are, their availability, and I guess if you had some ideas about the institutional framework for those bodies and whether some jurisdictions work better than others. Those sorts of issues.

MR COLBRAN (LCA): It might be a question which - I mean, although I appreciate that it's there already, we might come back to you with a little bit more, but let's have the discussion now. First I'll say again I'm a barrister. During my career I have spent a lot of time working with the Victorian Bar Council of which I was chair for a while, and I was on the ethics committee of that body for about 12 years or something. So I have had some exposure to discipline in respect of barristers. I'll ask Steve Stevens to say something about solicitors in a moment because he's well qualified to do so. It was my sense back in 1984 when I started with the ethics committee that the availability of a complaint mechanism was not terribly well understood within the community. I think it was well understood by the legal community, but I don't think it was necessarily well understood by consumers.

MS MacRAE: Yes. And here you're talking just about barristers, sorry, just to be clear.

MR COLBRAN (LCA): I'm talking about complaints about barristers, but I think what I'm about to say probably has application generally. Over the course of the time when I was on the ethics committee, and I'm not saying that they're related, there was a very considerable development in the amount of literature and material that was available to facilitate complaints to be made, and so by the end of that time, I think I would probably say that I felt that the availability of a complaint mechanism was fairly well understood in the community.

In terms of the second part of the question which is how well those institutions deal with it, as you will be aware, within Victoria the form of disciplinary structure has changed. But happily, from the bar's perspective, or at least from the

community's perspective, most of the work is still done within the bar, and that is important because barristers are quite hard on other barristers and we also know what to look for in a way that others don't.

So I would say that I have a great deal of confidence that the way in which investigation - the way in which discipline was dealt with back in the early days and the way in which investigation is now undertaken by the ethics committee of the Victorian Bar for the regulator, for the LSC, is effective. I have no hesitation about that. Now, I'm happy to make inquiries around the country of other bar organisations but Steve might like to be able to say something solicitors. I hope that deals with that.

MS MacRAE: Yes.

DR NEAL (LCA): Could I say as a barrister having the bar ethics committee available when you get into difficult situations, to get rulings from them or get advice from them, it's a very good form of regulation when the people who are being regulated have confidence in the regulator sufficient to go to them and have easy access to them, and knowing that the people that you are dealing with are expert in the sorts of issues that are confronting you. So you could do that with a deal of confidence and, where necessary, get a ruling about which way things stand if there's a conflict of interest or whatever it may be. That is a very appealing aspect of that form of regulation.

DR MUNDY: I think our concern in this space is not so much with the ethical conduct of barristers or indeed solicitors, but more we might call their economic conduct, their billing practices, what they disclose to their clients, is what is disclosed understandable to people, it's in that space, and appeal mechanisms around that.

MR COLBRAN (LCA): I'll come back to that then. I'm sorry.

MR STEVENS (LCA): My name is Steven Stevens. I'm a solicitor and a member of the Access to Justice working group of the law council. I might just also disclose that I'm a legal practitioner representative on the Legal Services Board, which is one of the regulatory bodies in Victoria. I support Michael's comments generally. I think the system generally works fairly well at the moment. In terms of disclosure, as you're aware, there are sort of significant disclosure obligations in relation to costs and so on.

I'd reiterate some of the comments that were made by Geoff Bowyer, the LIV president in Victoria, that a lot of these sort of dealing with consumers is required to and should be additional to the cost disclosure in terms of, you know, normal communication with other parties. So I think the system generally works fairly well.

I think what might help is, you know, increased education and funding for education in terms of both consumers and lawyers in being trained to deal with other people to the extent that they don't have those sorts of skills, because a lot of people don't have those sorts of skills and often sort of training around that sort of point, good behaviour, good communication and so on, I think there's room for that sort of you know funding out of the public purse fund, et cetera, to have practitioners, you know, be aware from the outset of the importance of those things and perhaps funding to consumers as to sort of what questions they should ask as well.

DR MUNDY: I guess what concerned us to some extent, and I think you were there, Mr Stevens, when we had evidence from Funds in Court of the Supreme Court of Victoria - I think you were there, I can't remember.

MR STEVENS (LCA): Yes.

DR MUNDY: They indicated to us that over two months the average reduction that they make in respect to fees for matters which related to Funds in Court is somewhere in the order of 22 to 25 per cent. So they're basically knocking back bills from solicitors at the rate of about 20 per cent regularly, and they advise us there is nothing abnormal about the last two months. Now, I think we can assume, and from what we understand, the processes of the people who do this work in the Supreme Court could be described as more rigorous than your average consumer of legal services. They know what they're doing. They do it for a living.

MR STEVENS (LCA): Yes.

DR MUNDY: But I guess what concerns us is if this is happening with funds in court matters, then why should we not believe that it's happening to ordinary citizens in the community?

MR STEVENS (LCA): Look, I'm not familiar - I did hear that evidence in relation to the funds in court, and it is a significant figure. All I'd say - - -

DR MUNDY: Even if it's 10 per cent, I'd be concerned, Mr Stevens.

MR STEVENS (LCA): The only thing I'd say is the sort of complaint data, you know, whilst we hear a lot about complaints and complaints are important, it's important we have an excellent complaints system. I think the evidence isn't there to sort of say that complaints are totally out of control. I mean the data that is around suggests that complaints are fairly stable and are in fact at the sort of low end of the scale, very low end of the scale. So you're always going to have complaints and, you know, there may be clearly cases of overcharging and other issues, but the evidence doesn't seem to suggest it being a high magnitude problem.

DR MUNDY: Indeed, but the reason why complaints are low could be for reasons other than there are not - I mean I guess the flipside of it is is there something peculiar going on with people who are dealing with funds in court - - -

MR COLBRAN (LCA): I think I'd like to correct that.

DR MUNDY: - - - that - or are they trying it on?

MR COLBRAN (LCA): Yes. I think it's a very arresting statistic and I think - - -

DR MUNDY: I was quite - - -

MR COLBRAN (LCA): Arrested.

DR MUNDY: I mean well I could understand if there was the odd event which was just an outlier and a shocker, but this was not - this was what they do.

MR COLBRAN (LCA): Yes. Look, I mean we'll take that on board and look into it a bit further because I don't know. If there is something that is specific about the kind of matter or the size of the matter or - - -

DR MUNDY: They're obviously people who can't care for themselves in exercising the due care of the court.

MR COLBRAN (LCA): Yes. And I think I'd then like to see, you know, how that could play out in a variety of contexts. I mean we're talking about - when you talk about legal costs and the risk of overcharging, they operate in such a variety of circumstances from the multimillion dollar claim down to the very small civil claim, or the family law matter. I think we need to drill down a little bit.

DR MUNDY: Because I guess what concerns us, and we've heard this from, you know, the Consumer Action Law Centre, a whole range of places, is in some jurisdictions, to be fair, not all, but certainly in some jurisdictions the disclosure documents that are provided to people have been likened to mobile phone contracts or old style banking contracts. A number of participants were impressed with the question how do you think a person who may experience some form of disability, and as common as perhaps English is not their first language, would go? The answer is they probably wouldn't understand what they're signing. So I guess what concerns us in many instances, not all, people are engaging legal practitioners when they have a problem. They're probably distressed. I mean this could be the nature of their professional experience.

There may be others who are buying a new home where they are quite happy about it, but in the main, and particularly vulnerable people, the circumstances in

which they are engaging legal practitioners is one of where they are in stress, and what concerns us is the understanding, and indeed in part I guess what recommendations could be made to not only deal with the - we'll call it abhorrent behaviour of practitioners, but also we suspect to better manage the expectations of clients when they get into these arrangements because what the legal services commissions tell us is that quite often the problem is one of unmet expectation rather than inappropriate behaviour. Now, we've heard examples of inappropriate behaviour - - -

MR COLBRAN (LCA): Sure. Leave them aside. I think it's a really important issue because that kind of lack of understanding merely leads to problems later on which are in nobody's interest. The position of the Law Council in this, as in many areas, is that there should be a more national approach to these things, so you've correctly observed that different things apply and different forms apply in different places. We would like to see disclosure requirements that are clear, that are reasonable, that don't - you know, there have to be thresholds for different pieces of information, but we'd like to see things that are clear. I personally would think that it ought - that the shorter and more clearly expressed the disclosure requirement, the better it's likely to be met.

I heard - I'm not sure, I think somebody else may have made a submission to the commission which raised the idea that one way in which consumers could be assisted is to be given a series of questions which they can - can even be in different languages, but which they can then ask their lawyers to try to flesh out some of the things which may not be obvious, and I personally think that sounds like a sensible idea, in addition to the requirement for a clear discussion that means the expectations of both parties are closer to - - -

DR MUNDY: I agree, and I think the funds in court folk from the Supreme Court of Victoria actually indicated that in their experience quite often solicitors were coming unstuck because they themselves didn't understand the law and the disclosure and the funds agreements that they had around them.

MR COLBRAN (LCA): That sounds like fascinating testimony. I must read what they had to say.

MS MacRAE: Just more on the institutional sort of structure, one of the other concerns that's been raised is that if not in practice, certainly in the way that the arrangements are viewed, there's a concern that it's lawyers or barristers just, you know, looking over their own, and that if you had some lay people on the complaints bodies or whatever, that that would be helpful and that at least in perception that would certainly help, and perhaps in practice as well.

MR COLBRAN (LCA): Yes.

MS MacRAE: Would you have a view about that?

MR COLBRAN (LCA): Well, my experience when I was on the ethics committee we had a lay observer who was there for a good deal of the time, and of course to some degree the answer will depend on the personal qualities of whoever is holding that office from time to time. In principle I would say I think it's a good idea.

DR MUNDY: So the path that the medical professions broadly defined have gone down with lay people - if you have a look at them, there might be a few lawyers actually, but on medical registration boards, subject to a suitably qualified - you know, a person of some integrity, and obviously some capacity to understand the issues involved. The presence of those people on professional regulation bodies would not be something you would object to.

MR COLBRAN (LCA): I think I have the sense that I'm being stretched along a path that I've ventured upon.

DR MUNDY: I'm just trying to properly understand your answer.

MR COLBRAN (LCA): Yes. So what I was endeavouring to draw attention to is that I thought the presence of the lay observer was a beneficial step. I thought that the requirement that she provide a report to parliament provided a protection to the community, and I think that was a good thing. However, that doesn't mean to say that he or she is necessarily well qualified to make the kind of judgments that are needed about professional misconduct. So I'm not familiar with what happens in the AMA, so I can't really speak about that. I would be very reluctant to see a significant move away from the control by those who really understand the issues.

DR MUNDY: In the ones we have in mind, and there's a unified registration process now for people like physiotherapists and a range of those medical professions, allied medical professions, my understanding is the practitioners still constitute the majority of these bodies, but there is representation on those bodies of - well, there is - "representation" is the wrong word. There is membership of those bodies by persons - - -

MR COLBRAN (LCA): Sure. I wouldn't be at all surprised if somebody else wants to add to this discussion, but let me just say this: I think it would be very interesting to look at the way in which those things have panned out, whether it's been effective and so forth, but I think I would probably come back to drawing attention to some unique features of the legal profession and the service that we offer which underlies or underpins things like the immunity from suit that barristers enjoy, negligence suit in relation to court matters. Now, I draw attention to that, perhaps raising another red flag or controversial issue, but it is there for reasons explained by

the High Court because of the quite unique issues of judgment which arise, which perhaps distinguish us relevantly in this context as well.

MS MacRAE: Okay.

DR MUNDY: Do you want to - - -

MR STEVENS (LCA): Yes. I was just going to add whilst I'm not aware of the position in all other jurisdictions around Australia, in Victoria certainly there are non-lawyer representatives for example on the legal services board, a consumer representative and a - - -

DR MUNDY: Yes. I actually think perhaps the Bar itself might be a little different, but no, that's okay. I mean I think we understand where you're at. Just while we're on consumer protection, we make a suggestion, and we thought we were being actually helpful here - - -

MR COLBRAN (LCA): So did we.

DR MUNDY: - - - about the Australian consumer law and - - -

MR COLBRAN (LCA): Yes. I think this all got a bit muddled. I mean - - -

DR MUNDY: Yes. Look, I guess the only thing is - - -

MR COLBRAN (LCA): I'm not saying it's your fault either.

DR MUNDY: - - - I just wonder whether - I mean what we were trying to get at was a circumstance whereby there weren't two regulatory agencies enforcing two different legal frameworks with different corporate objectives and perhaps if an - and as is the case with the Fair Trading Commissions who administer the Australian Consumer Law, whether or not, given that the provision of legal services is subject to the Australian Consumer Law, whether it would not be convenient or helpful if the regulatory authorities could come to an agreement that with respect to the Australian Consumer Law the relative legal body in the jurisdiction concerned could deal with those matters.

MR COLBRAN (LCA): Yes. I think - - -

DR MUNDY: That was all we were trying to get at.

MR COLBRAN (LCA): I think we may have got the wrong end of the stick, and I apologise for that. It did seem, I must say, to me that with the focus that you've identified, it would be jolly sensible - - -

DR MUNDY: Excellent.

MR COLBRAN (LCA): - - - for people who know something about the area to talk to each other.

DR MUNDY: Yes. I mean that was - it was the mere fact that they're not authorised to enforce that.

MR COLBRAN (LCA): I think the concern was that there would be set up - I don't know quite, but there would be set up some - - -

DR MUNDY: Yes. No. Our concern is they're sitting there, they detect an offence, they've got to run off to the ACCC to get someone - or the Fair Trading Commission and get them to deal with it. That's what our primary issue was. Okay.

MS MacRAE: We might just come briefly to the matter of the online resource that we recommended.

MR COLBRAN (LCA): Yes.

MS MacRAE: Or at least in our draft, and we've had a range of views, I guess, about how hard this might be, whether it's possible, and whether or not it would be a good thing. So I guess I'd be interested in your views firstly about whether or not you think something like it might be - if it could be done, whether it would be beneficial, and then secondly the practicalities of having something such as an online resource.

So just to be clear, what was in our minds was that we had a concern that a lot of consumers will, as we have discussed before, be one-off users of a legal service, have absolutely no idea, don't even know which ballpark they're in in terms of what fees and costs they might be looking at, and particularly in matters where they may be distressed, less likely to, well, feel less confident about ringing around and getting a range of prices and that's not always easy to do anyway.

So the idea of the online resource was it would give people some kind of starting point, that they would have some notion that, "Is this worth me pursuing? Am I looking at hundreds of dollars, thousands of dollars, tens of thousands of dollars? What sort of a range might my costs fall in if I've got a matter of a particular type," knowing that if we had a resource of that sort it would be heavily caveated, we'd be - you know, you would need to say, "It's a particular case of this type and obviously yours is going to vary, but this will give you some sort of ballpark feel for where you might go," and so I come back to the question would something like that, do you think, be beneficial, and then we can talk about the practicalities of doing it.

MR COLBRAN (LCA): Yes, sure. Look I think our submission on this may not be entirely clear either. I think what we are trying to say is that we doubt, we sincerely doubt, that it will be of great assistance in relation to many matters. We are very open to discuss the areas where it can be helpful. I mean an illustration of how it could be helpful is you could say that, "For a straightforward conveyance of Torrens title land where nothing goes wrong, this is the order of costs that you'll be looking at." But I must say as a barrister thinking about litigation matters, it's really very, very difficult to hedge around sufficient qualifications. We'll come to the 35-storey building I'm sure in due course but - - -

MS MacRAE: Getting in first.

MR COLBRAN (LCA): But it would be really difficult, and I think we would say that in respect of matters other than those that can be clearly quarantined as following a run of the mill kind of approach where it could be useful, I think we would say that the better way is down the path of clear disclosure about what's going on, clear disclosure - - -

DR MUNDY: No, no.

MR COLBRAN (LCA): - - - insofar as one can - - -

DR MUNDY: Yes.

MR COLBRAN (LCA): - - - about the expectation of what will happen, and providing the opportunity for reasonable questions to be asked.

DR MUNDY: The difficulty I have with this, and I used to work as a self-employed professional service provider so I understand the challenges involved, and the difficulty is, I think from a consumer welfare perspective is this, people consume these services intermittently, often once or twice in their lifetime and, as we discussed before, often at times of significant distress and urgency.

MR COLBRAN (LCA): Yes.

DR MUNDY: So the problem that - the issue that we have is essentially one of information, is that with the best disclosure in the world, and putting aside the issues of assessment of quality, which complicates it but isn't important, it does seem to us as an observation about consumer behaviour in the broad that these people - that people seeking services in such circumstance aren't going to undertake an awful lot of search activity to ascertain whether the first solicitor they go to is really expensive, about where the market price might be, or for some reason really cheap, whereas in other areas, for example if you say what about medical matters, well we at least have

an idea about this thing called the scheduled fee.

MR COLBRAN (LCA): Yes.

DR MUNDY: There is at least a peg in the ground somewhere, and I guess what we are - and I guess perhaps the better way to proceed with this discussion is what we are trying to do is to create a circumstance where people going to seek legal services can get some idea ex-ante before they meet their lawyers to have a sense of, "Is this fee disclosure about what I should be paying, or is it expensive?"

MR COLBRAN (LCA): Yes. Well, you know, information asymmetry is to be avoided if it can be.

DR MUNDY: That's stock in trade of my profession.

MR COLBRAN (LCA): Well, it's jargon that I've started to use. If a step can be taken which really helps with that, but doesn't do so at extraordinary cost and create more confusion, then you're not going to hear much of an argument from me about it. We can identify particular areas, such as the conveyance I illustrated, and there may well be others - - -

DR MUNDY: Well, can I suggest that perhaps given that I hope now the problem we are trying to solve is clear, perhaps if you would like to reflect on it and if you wish to come back, that would be helpful.

MR COLBRAN (LCA): I mean the whole issue of costing is a really troublesome one. When I started scales of costs were much, much more frequently used, and so a simple letter would cost X, a long letter would cost Y, and there were whole lots of benchmarks of a kind which - but I understand they all went out because they were thought to be anti-competitive and problematic.

DR NEAL (LCA): I'm still a little unclear about exactly - we are now required - I'm a barrister, so solicitors will say, "All right, we're sending out our costs letter to the client at the start of the action, and here's - you know, we need to know what you estimate your costs will be," and that gets done, and those documents seem to me to be reasonably clear.

DR MUNDY: I think they're clearer in some places than they are in others.

DR NEAL (LCA): Yes. Well, we're in Victoria, so we're obviously a beacon for everybody else. Only visit Brisbane occasionally. Then we are obliged when/if circumstances change to renotify. That's one aspect of it, and I'm not sure if that's what you're aiming at.

MR COLBRAN (LCA): But you see I might think that what I got was reasonable, but I wouldn't know if somebody down the road would give me a - - -

DR NEAL (LCA): They might want clarity.

DR MUNDY: I don't have - - -

MR COLBRAN (LCA): reasonable figure, might have a less rate.

DR MUNDY: I don't wish to degrade the notion of the service, but I've got an idea what a loaf of bread costs.

MR COLBRAN (LCA): Yes, and if it can be done - - -

DR MUNDY: Yes. I mean that's what we're actually trying to do.

DR NEAL (LCA): But one of the suggestions though in this context is the online suggestion you've been making which said, "If you're going to go and see a lawyer, here are the things you need to ask about what it's going to cost," and set out the questions that they might want answered: "How much will it cost? Here's broadly what is my problem. I want a quote essentially on what it's likely to cost," and they might be able to do that, then they might compare, you know, two or three solicitors to see how they're going. That doesn't seem - - -

DR MUNDY: Yes. Our sense of behaviour of people who are - - -

MR COLBRAN (LCA): In trouble.

DR MUNDY: - - - particularly people who are vulnerable or in trouble is that they don't shop around, for the want of a better phrase.

DR NEAL (LCA): But I also think that - I mean some of the old stuff on poverty law that came out with Henderson showed there was a sort of an intimidation factor of lawyers' offices and a fear of the unknown, and it did seem to me that the online idea where you tell people, "Firstly you're entitled to ask, and you can get a quote," so they don't feel so intimidated by the unknown, and then, "Here are the sorts of things that you might - you know, you should get answers to." If that's - you know, I'm just sort of trying to come to grips with exactly what sort of things that you'd like to see occur, but I mean both of those things seem to me to be perfectly reasonable.

MR COLBRAN (LCA): It's hard in litigation I think, so we're both struggling. Steve, do you - - -

MR STEVENS (LCA): I'd agree with what David has just said that, you know,

there's a number of things that might be useful, and if you're going to have an online resource, having an online resource which, I think as Michael mentioned before, says to consumers, "These are the questions you should ask in terms of the matter you're seeking legal help on." I think that's an important component. I think that would be very helpful, and again I think look a lot of it comes down to communication between consumers and practitioners, often not as equals unfortunately, but that's where we need to think about sort of consumer education and education of practitioners, or part of their training so that, you know, they're not just lawyers, but they're people able to, and trained to deal with and perceive client issues.

DR MUNDY: I think the president of the Law Institute of Victoria in his evidence to us in Melbourne last week indicated that he felt that there would be challenges, that they were not insurmountable.

MR STEVENS (LCA): Yes, and so - - -

MR COLBRAN (LCA): He's optimistic, I'd suggest.

MR STEVENS (LCA): - - - the outcome - - -

DR MUNDY: He's a very wise country solicitor from Bendigo.

MR STEVENS (LCA): And I think he made the point that it doesn't stop at cost disclosure. That's just a small part of it really. It's the communication afterwards. So I think if we have an online resource which tells consumers what questions they need to ask, I think that sort of thing is very helpful.

DR MUNDY: I think the other thing, as has been pointed out to us quite regularly, is that lots of disadvantaged people don't necessarily find online resources particularly helpful. Look, I'm mindful of the time and that we've afforded yourselves a lot more time than we have any other participant. Our staff have provided us with extensive notes, and I'm afraid are going to be disappointed, but I think perhaps we may have to, on reflection after having a look at today, we may need to come back to you on a couple more points, but we'll get in contact with you.

MR COLBRAN (LCA): Look, I would like to apologise for the fact that we were late with the submission. I do appreciate that that has caused problems for the commission. It wasn't for want of trying I assure you.

DR MUNDY: Indeed.

MR COLBRAN (LCA): I assure you we were not off on a holiday, and we do really want to help as much as we can with this. Could I say something about the 35 floor thing, or do you not need it? You know, I can't quite understand why the

chief justice - - -

DR MUNDY: The chief justice's character.

MR COLBRAN (LCA): And what he's forgotten is that when he was at the Bar, he was one of the very best at wielding the jackhammer that was trying to tear down the very building that he says can be so confidently created. I mean when you're running a case, it is not a Meccano set. You are operating in a - I think you clearly know this.

DR MUNDY: I was about to say at this point when persons get identified I usually advise people that these proceedings are not covered by privilege in the same way that parliamentary proceedings are, and that you can be sued for anything you might say here.

MR COLBRAN (LCA): Well, I was - - -

DR MUNDY: But I doubt his Honour will be bringing suit any time soon.

MR COLBRAN (LCA): No. Well, I was hoping to compliment him on the brilliance that he brought to making life very difficult as a barrister. But it's also like building the building in a force 10 gale sometimes and, you know, with delays on the wharf.

DR MUNDY: But the commission was very grateful of his Honour to grace us with his time. These proceedings are now adjourned.

MR COLBRAN (LCA): Thank you.

AT 12.14 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY