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PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE

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

TRANSCRIPT OF PROCEEDINGS

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

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

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

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

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

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

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

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

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

DR MUNDY: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: You want to start?

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

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

MS MacRAE: Yes, I did.

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

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

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

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

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

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

MS MacRAE: Do you ever seek payment from clients?

MS YATES (WLC): No.

MS MacRAE: No?

MS YATES (WLC): We don't.

MS MacRAE: Okay.

MS YATES (WLC): No.

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

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

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

MS MacRAE: You have a conference room?

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

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

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

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

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

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

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

DR MUNDY: Yes.

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

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

MS YATES (WLC): Yes.

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

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

DR MUNDY: Yes, I - - -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Has it got better?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS PAYGET (WLC): Thank you.

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

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

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

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

DR MUNDY: Over to you.

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

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

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

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

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

DR BOERSIG (LAC): Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS MacRAE: Yes.

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

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

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

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

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

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

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

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

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

DR BOERSIG (LAC): No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS MacRAE: Sure.

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

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

services?

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

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

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

DR MUNDY: So that's more project related?

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

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

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

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

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

MR SCHILD (LAC): Roughly 2000 a year.

DR MUNDY: So 10 per cent.

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

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

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

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

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

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

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

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

MS MacRAE: Right, okay.

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

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

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

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

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

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

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

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

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

DR BOERSIG (LAC): Yes.

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

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

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

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

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

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

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

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

DR MUNDY: So you are not - - -

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

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

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

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

MS TAYLOR (LAC): In civil matters?

DR MUNDY: Yes.

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

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

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

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

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

DR MUNDY: So the bloke has been brought in.

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

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

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

DR MUNDY: So you can manage the conflict internally.

DR BOERSIG (LAC): We can.

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

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

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

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

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

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

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

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

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

DR MUNDY: It's a management issue.

MS TAYLOR (LAC): Yes.

DR MUNDY: It is not a fundamental structural issue.

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

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

MS TAYLOR (LAC): Indeed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: This is for funding.

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

DR MUNDY: Yes.

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

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

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

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

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

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

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

DR MUNDY: Yes.

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

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

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

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

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

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

MS MacRAE: Yes.

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

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

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

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

MS MacRAE: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Off you go, gents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS MacRAE: Yes.

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

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

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

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

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

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

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

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

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

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

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

MR BRENNAN (ASBC): Yes.

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

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

MS MacRAE: No.

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

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

MR BRENNAN (ASBC): Exactly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: You are not expecting the Lowys?

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

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

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

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

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

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

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

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

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

DR MUNDY: Is it time or cost?

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

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

governments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Travel back - travel safely.

MR BRENNAN (ASBC): Thank you.

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

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

DR MUNDY: Yes, we understand all of that.

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

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

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

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

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

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

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

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

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

very helpful if that was clear.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Fences - - -

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

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

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

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

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

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

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

MS TAYLOR (EDO): No.

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

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

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

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

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

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

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

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

MS MacRAE: Do you have a reference for that?

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

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

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

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

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

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

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

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

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

MS MacRAE: I might just jump in.

DR MUNDY: Yes.

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

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

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

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

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

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

DR MUNDY: Separate courtrooms.

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

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

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

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

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

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

DR MUNDY: Careful what you wish for.

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

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

MS TAYLOR (EDO): Certainly.

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

(Luncheon adjournment)

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

PROF CHAPMAN: How brief?

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

PROF CHAPMAN: So five minutes is okay?

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

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

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

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

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

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

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

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

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

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

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

The contribution is very simple. It's to ask the question with reference to the income data and the parameters that we have used to design this system about what it means for budget, basically. It's as simple as that. It's not about this is the solution, the panacea for Legal Aid. It's not about taking into account the circumstances in which Legal Aid should or should not apply. It is really very narrowly defined as a financial exercise to work out, under the given parameters that we have used, is this viable; as if you're the Department

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROF CHAPMAN: Yes.

DR MUNDY: That's the logic.

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

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

PROF CHAPMAN: Yes.

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

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

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

PROF CHAPMAN: How big is it?

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

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

MS MacRAE: Yes.

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

DR MUNDY: Thanks for that, Prof Chapman.

PROF CHAPMAN: My pleasure.

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

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

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

PROF CHAPMAN: Yes.

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

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

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

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

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

DR MUNDY: We wish everyone thought that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS MALLETT (DANA): Yes.

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

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

DR MUNDY: The matter excluded.

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

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

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

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

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

DR MUNDY: Because they're worried about them.

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

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

MS MALLETT (DANA): Yes.

DR MUNDY: Okay. Sorry to interrupt.

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: (indistinct) legal service.

MS MacRAE: (indistinct) affairs.

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

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

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

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

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

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

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

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

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

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

MS MALLETT (DANA): No.

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

MS MALLETT (DANA): Yes.

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

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

DR MUNDY: What would we need to guard against?

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

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

MS MALLETT (DANA): Yes.

DR MUNDY: - - - to do it properly.

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

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

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

MS MALLET (DANA): Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Let me rephrase the question.

MS MALLETT (DANA): Yes.

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

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

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

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

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

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

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

MS MALLETT (DANA): It is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Today is day one.

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

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

MS MALLETT (DANA): Yes.

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

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

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

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



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 SYDNEY ON TUESDAY, 3 JUNE 2014, AT 10.16 AM

Continued from 2/6/14 in Canberra

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DR MUNDY: Good morning, ladies and gentlemen. My name is Dr Warren Mundy and I am the presiding Commissioner on this Access to Civil Justice inquiry and with me is my fellow Commissioner, Angela MacRae. Before starting, I'd like to pay my respects to the elders past and present of the Gadigal people, on whose ancestral lands we meet today, and to the elders past and present of all other indigenous peoples who have continuously inhabited this continent for over 40,000 years. The purpose of this round of hearings is to facilitate public scrutiny of the Commission's work, to get comments and feedbacks on the findings and recommendations we have made at this stage, and to gather further evidence to inform our final report.

Following this hearing, there will be further hearings in every capital city in the country. Hearings in Canberra have already been completed. We expect to provide a formal report to government in September of this year and according to the Productivity Commission Act, following the delivery of our report the government can take up to 25 parliamentary sitting days to release it by way of tabling it in both houses of the Commonwealth Parliament. We like to conduct these hearings in a reasonably informal manner but I do remind participants that there is a full transcript being taken, so we do not take comments from the floor as they actually won't be recorded effectively. But at the end of the day's proceeding there will be an opportunity for those people who wish to make a brief statement and obviously people can submit further evidence and advice to us if they choose to do so as a result of what might be said here today or, indeed, if they have other information they wish to draw to our attention.

Whilst our preference to run these hearings informally I would just like to note that under Part 7 of the Productivity Commission Act, the Commission has certain powers to act in the case of false information or a refusal to provide such information. The Commission, since the Act was passed, has not had occasion to use these powers and we certainly do not expect to have to call upon them today. Participants are not required to take an oath but should, of course, be truthful in their remarks and participants are welcome to comment on issues raised by others in submissions or, indeed, in evidence given to us. The transcript will be made available and published on the Commission's website along with the submissions to the inquiry that have been made to date, and will be made in the future.

I'm advised that I'm obliged to tell you under Commonwealth Health and Safety Legislation that in the event that there is an emergency requiring evacuation from the building, you should follow the green exit signs to the nearest stairwell, don't use the lifts and follow instructions of the floor wardens. The emergency evacuation point is at the Westpac building on the corner of Clarence and Market Street, which - I am totally disoriented, so it's out there somewhere. That's the formalities dealt with.

The first participant in these hearings today is Alastair McEwin from the Community Legal Centres New South Wales. For the record could you provide your name and your affiliation, and if you'd like to start with a brief opening statement of seven or eight minutes or so, and then we'll move to discussion.

MR McEWIN: Thank you, Commissioners, for the opportunity to give an oral statement in support of our submission. I'm Alastair McEwin, the director of Community Legal Centres New South Wales. With me is Kerry Nettle, Advocacy and Human Rights Officer, also of Community Legal Centres New South Wales and thank you again for the opportunity. You will also note that I'm working with an Australian sign language interpreter to assist in my communication needs. So without further ado, congratulations to the Commission for your draft report. We welcome it. We appreciate that it is a complex and difficult issue in terms of access to justice. Firstly, I acknowledge that we are meeting on the lands of the Gadigal people of your nation and I, too, pay my respects to the elders past and present.

Community Legal Centres New South Wales play an integral role in access to justice and they also play a vital role in the community. They provide information, advice, representation, play a role in community education and development, and a large role in systemic advocacy and law reform. All those activities contribute to access to justice and often those activities are not seen and can't be quantified many times. The issues that we deal with every day, and every day that Community Legal Centres deal with, are complex and they are across all areas of life; housing, employment, education, welfare and access to community services.

They might be helping someone who is homeless, they might be helping someone who has been dismissed from employment due to unfair work practices, they might be assisting parents who have been told that their child with a disability cannot go to their local primary school, they might be helping someone who can't access their local community services. So the matters that Community Legal Centres assist people with are broad and across all areas of life.

The role that we play in the community is unique. We are community based, we are independent from government and we are a voice for the voiceless and disadvantaged. We listen carefully to our community and their needs, and we articulate their need in working with government. So we were working with other community organisations and with our colleagues in the justice sector. Often these people have been marginalised and disadvantaged for many, many years and are not able to articulate not only their legal needs but their other needs as well, and that's where Community Legal Centres play a role.

In your report you've talked about the efficiency of Community Legal Centres and we'd like to make some brief comments on that, and again I would go back to my

earlier comment; often efficiency cannot always be seen on paper, and cannot always be measured in dollars and cents. Community Legal Centres are - the funding, when you look at the bigger picture - is low. When you look at the funding for Community Legal Centres compared to other legal services provided and, indeed, other community organisations, it's very low and is itself actually also decreasing. We have been told, both in state and federal, that our funding for next financial year will be decreasing and also in further years, so it's a very bleak picture that we are facing for the next two to four years and beyond that, a very uncertain future. So across New South Wales and across Australia CLCs are very much tightening their belts.

Having said that, CLCs have always been very efficient at using scarce resources and that also goes for the peak body, and also for the national body as well, the National Association of CLC. We use pro bono support, we're working in partnership with other organisations, we make sure that we don't duplicate services and I should note that our funding requires us not to the duplicate services of, for example, Legal Aid. So we strive to that. We make sure that we collaborate with Legal Aid and other service providers to make sure that we are not doubling up or duplicating.

If, for example, you compare our figures with other service providers, they may appear to be small, but then again when you look at our funding, of course it can be correlated. I should also emphasise that our clients have very complex needs. It's not always just a legal issue. They may present with - and they often do - they may have a mental health issue, they may be escaping domestic violence, have no home, have three children who may have a disability. They present with incredibly complex life issues so our CLC needs to spend time - they want to spend time with them to make sure they can hear their story. So I urge the Commission to approach measuring efficiency very carefully when you look at CLCs and how you measure them versus or against other legal service providers in terms of the quality and the quantity of our output.

We also note that you've talked about guidelines in terms of what guidelines should be in place for when we take on case work or when we provide legal assistance to people in the community. We wholeheartedly agree that there should be a framework in terms of providing access to justice to those who need it the most - those who are most disadvantaged. Funding should be targeted to those who most need it and that's what CLCs do, and Legal Aid Commission, and Aboriginal Legal Services, and other justice providers. We all do that and we agree that in principle there should be an overarching framework to guide that.

Most CLCs, if not all, have guidelines in place. They also have flexibility and that flexibility is based around predominantly wanting to respond quickly to emerging need. For example, in Redfern a few years ago Redfern Legal Centre

noted a small but growing number of Russian-speaking migrants, so they tailored their services to addressing some of their urgent legal needs. That was something where we've seen a legal need, met that need then and there, and then they evolved over time. So that was something that was seen as responding in a flexible way to a disadvantaged pocket of that community; other centres might include Marrickville and Inner City Legal Centre, which are situated in what may appear to be affluent suburbs but are actually servicing pockets of significant disadvantage in those suburbs.

So we believe that having exactly the same guideline for CLCs and Legal Aid Commissions would lead to a situation that would be exclusionary, not inclusive. We also note in your draft report you've suggested that competitive tendering may be a solution or a process that may address some of the funding issues or the way that we deliver services. We view that with great concern and we also note that your Commission produced a Not For Profit report in 2010 and you also noted the pitfall - perhaps for want of a better word - around competitive tendering for the Not For Profit, so I draw upon those comments in that report.

Our sector works in a very collaborative way and I earlier mentioned that we collaborate with Legal Aid Commission and our national body, and with the Aboriginal Legal Services and Family Violence - we collaborate to make sure that we're not duplicating services, so competitive tendering would be a threat in one way to that and could possibly destroy that collaborative manner. We also can illustrate through many examples and a big one is the work development orders which we've mentioned in our submission, and that is a significant achievement for Community Legal Centres and Legal Aid New South Wales where we've worked together to remove - I think we've already removed something around about a minimum of \$2 million plus worth of debt in New South Wales and it's rising.

A few other quick issues before I bring my opening statement to a close. Community Legal Centres New South Wales is not an expert in identifying and statistical modelling around legal needs. What we have done in the last three years is we've developed, working with an independent consultancy, a tool kit for CLCs to try and understand the environment around them. So CLC New South Wales in 2008, 2009, working with a steering committee which included Legal Aid New South Wales, developed a toolkit which ended up being called the LNAF - Legal Needs Assessment Framework - and it's now a national tool kit. It was taken up by the national association and rolled out to all legal centres around Australia, and that was developed as a toolkit to assist Community Legal Centres.

So to be frank, we've waited for many years for the government to come up with a sophisticated model and for them to come up with a way to assist us but we couldn't always wait so we came up with our own mechanism and whilst I'm not

saying it's foolproof, I'm saying that it's helped our Community Legal Centres to understand the environment better. So we're not experts in identifying legal need and we agree with the fact that there are pockets of - there are areas in New South Wales that do not have legal services and there are gaps in legal services. We agree with that.

We would be concerned, however, that to see the development of a model that, for example, excluded community education, community development and systemic law reform work. So we would ask the Commission to look holistically at a model that includes those two factors. In conclusion, we thank the Commission again for your work and we appreciate the opportunity to come here today, as we do also your engagement with the sector. Thank you very much.

DR MUNDY (CLCNSW): Can I start on the question of law reform. We understand that in the recent funding reductions a view has been expressed that the Commonwealth now wishes to focus its funding of CLCs on frontline service delivery, and we heard yesterday from the EDO in ACT that the consequence of that decision is likely to lead to the closure of the EDO in the ACT, and potentially other smaller EDOs in places like Darwin and elsewhere. There was no view expressed that would lead one to the view that the EDO in New South Wales might close, but its operations may be impacted. Beyond the EDOs are you able to give us a sense of how that decision to remove funding from what we might call broad areas of law reform is going impact CLCs in New South Wales — if you've got any dollar amounts, but if not, in a practical operational sense?

MR McEWIN (CLCNSW): I'll answer that in several ways. I'll answer that by saying what I know. So what's happened at the moment is that we don't know yet what the New South Wales government will do. We are waiting for them to advise us on - so as a work that the Commonwealth and state, as you know, fund jointly. So the Commonwealth has advised us that they will no longer fund us for law reform work, from their part. We don't know yet in New South Wales whether they will allow us to continue to do law reform, and by way of example the Victorian government has said, "You can continue to do law reform, we have no issue with that."

We don't know yet in New South Wales so it's difficult for me to say. To quantify, what I believe will happen in New South Wales is that our centres will continue to do law reform on state money if we are allowed to do that and what that will mean is that they will report to the government using state money to do law reform activity. However, we don't know whether that will take place yet. We are hoping that the state government will allow us to do law reform, so I can't answer the question and I'll probably defer to my colleague, Kerry, in a minute.

But the other thing to say is that if the state government does say, "You can't do law reform under our money," many centres will probably continue to do law reform but using other money such as member fees and pro bono support. Our members at their meeting two weeks ago resolved that law reform is an essential part of the work that we do, and they will continue to do it.

MS NETTLE (CLCNSW): Kerry Nettle from CLC New South Wales, for the record. Last week in the senate estimates process there was a question which was put to the attorney general about the restriction on doing law reform work through the funding of Community Legal Centres and an example that he gave around law reform work that would be impacted by the funding decision was submissions that Community Legal Centres write to government inquiries or inquiries such as this one. So there are Community Legal Centres who, when being given that restriction - that they cannot use Commonwealth funding for inquiries - are currently having discussions about whether or not they will be in a position to be able to make submissions to Federal inquiries.

So there was a real potential that the voice that Community Legal Centres represent in that forum will be lost if, indeed, those Community Legal Centres determine that they are not able to put staff resources into doing that activity. Some discussion has occurred around whether they may be able to use volunteers for that process, but whenever you use volunteers you need staff involved in assessing and overseeing the activities that they're involved in. So in terms of the Commonwealth funding and that impact, that is one very practical and I would say quite substantial impact. If there were to be no more submissions to Federal inquiries from Community Legal Centres across the country I'd suggest that would have quite an impact on the voices of the vulnerable clients that we service being heard.

MR McEWIN (CLCNSW): One last thing. We are finalising a report on the efficiency, on the value of law reform activities by New South Wales CLC. We expect that report to be finished in the next four to six weeks and we are happy to provide the Commission with a copy of that report if that would be useful to you.

DR MUNDY: That would be very helpful.

MS MacRAE: Can I just ask specifically - you mentioned about pockets of disadvantage within well-off suburbs and I just wonder if you could say a little bit more about that. I guess if I can preface it a little bit, we are also struggling with how do you easily define efficiency in these cases and I take many of your points very seriously. I think you're quite right, you've raised a lot of issues that it is very hard to measure some of these issues and when you're dealing with very disadvantaged people, sometimes working out what the pluses and minuses are can be very hard.

So we are, though, trying to get a handle on it as best we can and as you'll see from our report one of the issues that has come out was CLCs - and it's probably less of an issue in New South Wales than elsewhere, but nevertheless there does seem to be - because of historical precedent as much as anything - sometimes the location of CLCs does seem to be problematic in terms of very scarce resources needing to be really very carefully targeted to those most disadvantaged. So could you say a little bit more about that for me?

MR McEWIN (CLCNSW): I'll answer that in two ways. Firstly, yes, pockets of disadvantage still do exist. So using, for example, Redfern and Inner City Legal Centre and Marrickville Legal Centre, are prime examples in Sydney, an immediate high profile example. So even though Redfern has become quite gentrified and even with Inner City Legal Centre - Inner City Legal Centre for example is based in Kings Cross and Kings Cross has a number of - as you might appreciate - boarding houses and refuges where there are a significant amount of people who experience issues with police and with drug and alcohol. So there are a significant number of issues that Inner City Legal deal with, with those clients.

There's also a high population of gay and lesbian people who also experience a significant amount of same-sex violence and family violence which is very hidden. So even though that's not seen generally in the general population widespread across Sydney, it's concentrated in the inner city. So they're examples of where they target their services to particular needs. And the second part I would answer is those Inner City Legal Centres have also started specialising across the state by getting out of bricks and mortar, and by doing outreach. So Redfern, for example, now has a statewide international student legal service which they provide face to face as well as by video-link and Inner City Legal Centre also provides, again, lesbian service advice across the state.

So even though those CLCs still seem to be based in affluent suburbs, they are also trained in the way they provide services to disadvantaged people across the state even though they're a generalist centre and still funded as a generalist centre, they've also obtained funding to provide specialist centres to ensure that they meet those who continue to be disadvantaged. That's two ways of answering your question. I'm not sure it answered specifically, but the two ways are - - -

MS MacRAE: No, that was good. Thank you. That was what I was looking for.

DR MUNDY: I guess the concern in this space that I - I mean, on the one hand there are particularly regional areas around metropolitan areas or in the outlying suburbs - you know, if you can conceive Newcastle having suburbs - there is unmet need. I guess the challenge for us, thinking through this and for me is that we

recognise that community bases upon which these organisations have grown up and some of us have read a bit of Marx and understand historical determinism but we're trying to grapple with the idea of how can we make recommendations that we'll get the sort of physical presence of the CLC into these communities where there is clearly need, and is it efficient or is it effective to be trying to deliver services of a properly community nature rather than a thematic statewide basis at such large distances, and how might that be better facilitated even if you've put aside the strictures and the current funding envelope? It's not that we're profoundly unhappy about where things are, we're more concerned about where things aren't.

MR McEWIN (CLCNSW): Absolutely. The challenges for delivering services in remote areas are enormous. This is not a position but rather more an observation. Where there's been money just literally provided to an area in a remote area and by, say, the government and said, "Here's money for a legal centre. Here you go, set up a legal centre and start providing services," there have sometimes been issues with getting that legal centre up and running. Whereas on the converse where there's been community ready for a legal centre or where the community has come together and worked together and said, "We need a legal centre or we need a legal service of some sort," worked together and then asked for funding and obtained funding, and the community's been ready for it, that centre has been successful.

So you also need to look at whether the community - there's community support and I think that's been a measure of success, so that's not our - our position per se is not so much whether you can say, "Yes, that area needs a legal service," but our observation has been there needs to be some sort of community support behind it and we would want to see some sort of model that allows a community to also support the development of or engagement of legal services for that area. I might also ask Kerry if she wants to add anything.

MS NETTLE (CLCNSW): There are large areas of the state in New South Wales where there's not a community legal service and we take the phone calls from those people, and we're not able to direct them to somewhere. What some of the regional community legal centres in New South Wales spend a lot of time doing is the outreach services where they will go into another nearby local area and they operate then in conjunction with a community organisation that exists in that area to be able to provide services. So that means they already have some connections to that area by working with a community legal centre.

So unfortunately with some of the recent cuts that have happened to funding for community legal centres in New South Wales, those CLCs are not going to be able to continue those outreach services but that has proven to be quite an effective way to spread the geographic area of community legal service programs, is where there's funding for outreach services then it enables a relationship to develop with a

community that then may be able to lead to a Community Legal Centre being developed in that new area.

DR MUNDY: So basically I think what you're both saying is that - and it comes in the name almost - is that there needs to be some community express demand. It's a bit like the Bendigo Bank model, in a sense - is that there's this community desire for the service to be provided and then on the other hand nearly located or I think somewhat possibly not so nearly located CLCs will reach out into other communities and funding restrictions mean, probably quite naturally, that the first thing that you get, you just stay closer to home. Travelling's expensive, you're not attending to your own community's needs, so you haven't got the resources to extend. So that's the basic development picture.

MR McEWIN (CLCNSW): Absolutely. We've found with our Aboriginal Legal Access program by Aboriginal workers in the Community Legal Centres going out to literally where the communities meet under trees, for example, on a regular basis, you know, whether it be weekly, fortnightly, and that gradual building of trust and then they will bring the solicitor from the legal centre to those meetings after a period - not on the first or second, or third visit - and then the community get used to meeting with the solicitors. So absolutely, building that community trust has been fundamental and, I mean, you take that away, the hidden costs are very hard to quantify.

So yes, we agree with your position or your suggestion around building community trust, takes a long time and is particularly telling, and important for people in remote areas, and we've found in our visit to our centres around New South Wales those who are particularly remote appreciate the personal contact and whilst technology is developing rapidly it still takes a lot to build that one-on-one relationship and you can only do that through personal contact.

DR MUNDY: We might move off that topic.

MS MacRAE: I just wonder if you could give us a little bit more of a flavour of how you work with other organisations. As you said, there's a lot of people that come to you that have legal issues, but that's just one part of the problem and certainly we're aware of that in the research we've looked at. You've talked a little bit about outreach and working with some other organisations. How were you finding that and are some of those other organisations similarly stressed for funding? Is that networking being able to work as effectively as it has in the past?

MR McEWIN (CLCNSW): There are many ways and I'll just give you a few examples. Firstly, CLC New South Wales itself convened a quarterly meeting, so every quarter, as the name implies, our members get together. So we have 40

members and they get together in Sydney over one or two days, and we have network meetings, working group meetings and we also provide training opportunities because we also recognise that for rural and remote solicitors and other staff the only time they can get training opportunities other than online is face to face in Sydney. So it's two to three days of opportunities for them to meet, share information, network. It's a very powerful opportunity for everyone to get together and hear about what's going on. So that's one example and it's been described by many in the sector as the life blood of the sector. So we work very hard at the state office to provide those opportunities to the sector.

In the community we were in remote CLC work with their local community organisation to do, for example, the cooperative legal services delivery model which is convened by Legal Aid New South Wales, and I'm sure that later when they appear this afternoon, they may speak towards that as an example of how they bring together legal and non-legal organisations to collaborate on projects that benefit their local communities, and CLC play a leading role in that because CLCs are independent community organisations who have a very good relationship with their partner organisations. I should also emphasise that many of our Community Legal Centres work well with pro bono law firms, large law firms and medium law firms, and there are many examples of small law firms that provide a solicitor to go and help with evening advice clinic.

An excellent example of large law firms providing a secondees. Secondees are highly prized as, as you know, a secondee of a senior associate or a senior lawyer going to work for a Community Legal Centre for six months is not only a great resource but also a good opportunity for lawyers in the Community Legal Centre to learn from the private lawyer and vice versa, and that relationship helps the legal centre to become even more efficient at providing services. So there's just some of the tip of the iceberg and I would also want to emphasise that if competitive tendering were to be introduced to our sector, many volunteers will probably leave the sector because they value being able to work for an organisation that has a particular connection to the area of law that they're interested in or in the community that they are working for.

DR MUNDY: Can I just come to the competitive tendering question? We didn't actually recommend it, we said it was an option. We probably thought the response we got was the response we were going to get, but it begs the question how governments might act to distribute resources that are scarce across competing needs within jurisdictions but, indeed, also between jurisdictions because the pattern and nature of legal need, the extent and the types of legal needs between Australian jurisdictions are very different; Hobart's different to Perth.

So what sort of models in any sort of budgetary environment do you think

work better? Because to be frank, we've had a bit of a look at the history of CLC funding and it seems to be often on the whim of the attorney general of the day and certainly some point in the month of June, before the end of the financial year and I think, you know, we're trying to find a more systemic way and a predictable way that addresses funds across jurisdictions and nationally.

MR McEWIN (CLCNSW): I mean, in terms of a perfect model, I think there is no such thing as a perfect model in terms of the - when you look at all the variables including how we collaborate and work together as a sector, and also the difficulties around measuring outputs and outcomes for the individual client at the end of the day, we would suggest that a model that - for example, in New South Wales where the New South Wales attorney general, for example, administered the funding on behalf of Commonwealth and state would be beneficial in the sense that they would be closer to the issues around the legal issues of the state, noting of course there are many federal issues that Community Legal Centres deal with and that we would expect to have funding for, and also they would also have the resources closer to the ground to be able to be more well informed about issues that are happening for Community Legal Centres and we have a good working relationship with policy officers in the department, and we have a good working relationship with them, and we work on issues that are very important to our centre. So having that in mind, we will probably see a model that had that - the state attorney general as the administrator, administering the funds - - -

DR MUNDY: So a model whereby the Commonwealth would look to distribute funds between the states and territories on some sort of high-level assessed need - and possibly not the Grants Commission model because then no-one would understand it - but some sort of needs based outcome and then effectively leave it to the states to add their resources and then distribute that money, which would presumably see a breakdown in this notion of money for Commonwealth matters and money for state matters, which probably is not useful in your context because the person experiencing disadvantage almost certainly had state and Commonwealth matters wrapped up together.

MR McEWIN (CLCNSW): Yes, and the other thing to note is we have a very close working relationship with Legal Aid New South Wales as our funding body and we appreciate that. We also have to acknowledge that we also, for want of a better word, compete for the same pool of money ultimately at the end of the day, both through Commonwealth and through the public purpose fund, and not so much through state at the moment because the state allocation is a very defined, and it's pretty well much the case also for the public purpose fund. But with the declining pool of money for the public purpose fund it means that ultimately we will all be competing for a smaller piece of the shrinking pool.

So ultimately, we will all be seen as competing. I mean, but that's not just for us, it's for the law society, it's - I would say almost every single justice organisation in New South Wales relies to some degree on the public purpose fund so ultimately there is a sense of competing for limited resources from the public purpose fund, so a model that allows the state attorney general's department to administer that funding for CLCs might be a fairer and equitable way if we were allowed to collaborate with our partners on a more equitable basis. I might also ask Kerry if she wants to add anything.

MS NETTLE (CLCNSW): Yes, I think what Alastair was saying about competition between the various legal service providers, if we all had the same eligibility test that would obviously heighten issues that we've raised around competitiveness because currently we are specifically funded not to duplicate the Legal Aid service that is provided. So I'm not aware of how many people there are that meet the Legal Aid test but are not able to be serviced, you know, but we do have the figures for the number of people that we service that don't meet the Legal Aid test.

One of the things that Community Legal Centres in New South Wales also do is assist people to articulate their legal need who can't do that because of the disadvantage they experience. So they may actually meet the Legal Aid test and the Community Legal Centre end up helping them, assisting them to explain that they do meet the Legal Aid test. So I suppose that's one of the disadvantages that we see if we had the same eligibility test operating as for Legal Aid.

DR MUNDY: Just coming back to this model that we've been talking about, presumably in such a circumstance if an arrangement could be reached at a high level where the Commonwealth could be satisfied that its objectives were being met, that would have the potential to reduce the compliance burden on CLCs if an arrangement could be met where the supervisory relationship or the compliance relationship existed solely with the state, and then the state could be accountable for the outcomes of its use of Commonwealth money. Would that have a significant impact on the current compliance burden and compliance costs that your members experience?

MR McEWIN (CLCNSW): What we would do is, noting and going back to - our focus has always been on the most disadvantaged and being a safety net for those who can't get services elsewhere. So that would always be our core aim, irrespective of funding or arrangements. So yes, we would aim toward an arrangement with the - I mean, that would be lobbying. If that was to take place, we would lobby for that to make sure that the safety net would capture all clients and the client burden would fall to us, that we would deal with the most complex clients.

DR MUNDY: I'm more focused on - I mean, we've heard from some CLCs from various places that they face significance, compliance burdens and reporting, and things like that and I guess what I'm trying to explore is whether, if the arrangement which you described where the state attorney general's department is essentially distributing resources, that the reporting relationships which now we understand occur both at a state level for various arrangements and then onto the Commonwealth, perhaps the state could then become the compliance agency for meeting the Commonwealth policy objectives and your members could be freed of some administrative reporting burden and duplication to the Commonwealth. I'm just trying to get a sense of how big that burden would be, because that would presumably yield up some resources to actually do what you're there to do.

MR McEWIN (CLCNSW): I should probably start off by saying in New South Wales we've been very fortunate with the way Legal Aid manage our funding through an extremely rigorous approach, but they've also allowed us a great freedom to achieve the highest aim, so I think our experience has been different across Australia. So I'll state that at the opening in that I've been very pleased to observe that CLCs in New South Wales have always had that freedom to achieve the very best for their client. So our outcomes have been very good, so I would like to see that continue in terms of reporting and our reporting requirements have been very much focussed on outcomes, so we would like to see that continue, particularly around a holistic approach. Not just so much always about the legal issue and again I would emphasise our close working relationship with our partners to achieve non-duplication of services as well as a collaborative approach. So in terms of reporting we would like to see that continue if that was a model for New South Wales. I'm conscious of time.

DR MUNDY: Just bear with us for a moment. One of the propositions that we've brought forward is this apparent issue within Legal Aid that criminal matters get preference because of Dietrich and all sorts of things. One of the propositions we've put forward is, in our view, that civil matters are the poor cousin within the legal assistance system more generally. Do you see any benefits in governments when they consider their legal assistance broadly; just not Legal Aid but the both primary sources and the indigenous areas in actually trying to assess what an appropriate funding base for civil matters is, bearing in mind there's a lot of people who experience significant disadvantage are often tied up in the civil and criminal justice systems.

MR McEWIN (CLCNSW): We've seen first-hand the problems that escalate when somebody presents with many civil law issues, for example they've got a young person with a mobile phone bill that they can't pay and then they get fined, and you know, speeding fines and parking fines, and then it escalates into a short time in gaol, and then they have lack of educational opportunities. So we've seen first-hand how a

lack of opportunity to address all those civil law issues escalates into, unfortunately, a lifetime or a cycle of poverty and crime. So our position is that investment in both civil and criminal law is necessary.

As I said earlier, we're not experts in quantifying a legal need but what we have seen is that investment in civil law will reduce the need for criminal law, investing more in criminal law and one of the things that we've been working on for the last three to four years is a justice investment campaign which you may have come across through other submissions. If you haven't, I'm happy to provide you with more information on the justice reinvestment campaign.

DR MUNDY: That would be helpful, thank you. I'm mindful of having to stay on time. I know Kerry will, from a former life, know that sometimes the witness list gets very long. Thank you very much for your time here today and we do appreciate the assistance you've provided the Commission.

MR McEWIN (CLCNSW): Thank you, both of you.

MS NETTLE (CLCNSW): Thank you.

DR MUNDY: Sorry for that slight delay. Could you please state your name and affiliation for the record and then make a brief opening statement, if you'd like to.

MR MOSES (NSWBA): Yes, thank you, Commissioner. My name is Arthur Moses. I'm the junior vice president for the New South Wales Bar Association and with me is my colleague Dominique Hogan-Doran who has sat on the working party which has dealt with the Productivity Commission's draft report.

DR MUNDY: Thank you.

MR MOSES (NSWBA): Yes, thank you, Commissioner. The Bar Association thanks the Productivity Commission for the opportunity to provide its submissions on the important issues raised in its draft report which has been released as part of its reference on access to justice arrangements. The Bar Association regards the work that this Commission is doing as very important and it is hoped that its legacy will be to develop initiatives which have a focus on promoting access to justice and equality before the law.

I have noted from a lecture that the Presiding Commissioner Dr Mundy gave last week at the Australian National University that the intention of the Commission is to provide a whole of government approach to this issue as it straddles both economic and legal issues, and we embrace that. It is important to recognise at the outset that enormous strain is currently placed upon an already under-resourced judiciary, registry staff and the legal assistance sector by the chronic under-funding of Legal Aid in Australia.

As you would have noted from both the submissions of the association and other interested parties, unrepresented litigants through no fault of their own increase the demand on time, costs and resources in the court system as well as increased costs for their opponents. This is at a time when courts are having their allocation of resources reduced.

The Bar Association accepts that there must be a limit to the level of legal aid funding. However, there needs to be serious consideration by government as to whether it should. I can't remember funding to Legal Aid that could enable the proper representation of individuals in civil proceedings. This may in fact, as we've noted in our paper, lead to savings for the court system. We are not aware of any cost benefit analysis that has been done which quantifies the increased time and costs associated with unrepresented litigants as opposed to when similar cases are subject to Legal Aid funding.

What we have seen is that by reducing the amount of legal aid, the cost of conducting unrepresented litigant matters shifts to the court's budget and increases

legal fees for opposing parties. Again, as the Presiding Commissioner noted correctly in his lecture at the Australian National University last week, pro bono assistance alone will not cure the issue of a lack of Legal Aid funding or the problems associated with unrepresented litigants, and pro bono work of course should not be compulsory, nor is it a panacea.

Pro bono work of course undertaken by legal practitioners, we all accept cannot be relied upon to remedy major deficiencies in our legal aid system. It can be safely said, we think, that no other profession undertakes a similar level of pro bono work that the legal profession engages in, both barristers and solicitors. It is the one area that government depends upon for a profession to provide voluntary contributions in order to facilitate our justice system operating.

Having said that, the Bar Association is committed to contributing to various court legal assistance schemes under which barristers as sole practitioners give their time in providing day in, day out through pro bono and other legal assistance work. This is in addition to the many cases in which practitioners take on work on a no-win, no-pay basis in order to progress matters to hearing which would otherwise fall by the wayside.

In that respect the only issue that I take issue with the Presiding Commissioner's comments at his lecture last week was the reference to the amount of pro bono work that is undertaken by the large firms. It should not be forgotten that the New South Wales Bar Association contributes the lion's share of pro bono work that is undertaken in our courts. Unlike practitioners within firms, they do not draw a salary or earnings from other revenue sources within a firm. When barristers appear pro bono, they are literally not receiving an income for each and every day they are in court. They do it without complaint and without any fanfare.

The other issue that I wanted to touch on very briefly was the issue of the missing model or the unfunded model. We accept that the Commission in looking at matters such as case management, cost budgets and alternate forms of funding such as litigation funding models, these are matters that need to be looked at to ensure that the unfunded model can support litigation. We are very grateful for the initiatives that this Commission is exploring on those matters because things that need to have a light shone on them are being shone on them and we are grateful for that.

The only concern that we have is to ensure that nothing comes out of the inquiry that would fetter or purport to fetter the discretion of the judiciary in dealing with case management. Judges have an oath of office that they must take and which they must comply with. They are a third arm of government and they should not be perceived as being a service provider. They are not. To regard them as that would be mistake and would foist upon them a title which they cannot comply with because

of their oath.

The other final issue that I want to touch upon was a suggestion, I think it was in chapter 10, that there be restrictions on legal representatives before tribunals. The Bar Association takes the view, and we also think tribunal members take the view in most tribunals, that lawyers actually assist members of the tribunal in dealing with matters before them. We think there should not be artificial fetters being placed on representation before tribunals as a blanket measure. There have been decisions which we've referred to where tribunals have welcomed assistance and it has ensured that tribunals get their job done quickly and correctly.

So with those opening remarks, I thank both Commissioners for your patience; my colleague and I are here to attempt to assist you in whatever way we can. I thank you for your patience.

DR MUNDY: I'm pleased that someone has paid attention to what was meant to be a lunchtime chat.

MR MOSES (NSWBA): Yes, there's a good podcast I think, Commissioner.

DR MUNDY: Yes, I presume so. We'll start with the question of tribunals. I'm not sure it's your submission but it has been suggested that there is no evidentiary basis of our concern. We've treated certain comments made to us by judicial and non-judicial members of tribunals as 'in confidence', but the concern we reflect is their concern. It has been put to us that that is the case.

MR MOSES (NSWBA): I understand.

DR MUNDY: I think part of the challenge here in these very large tribunals such as VCAT, which I have more experience with, there are clearly matters in VCAT in which people must be represented, guardianship probably being the most outstanding, but when you look at very large planning matters which in the first instance are almost exclusively dealt with there, where the amounts of money involved are very substantial - but it has been put to us in those smaller jurisdictions, particularly where there are parties of relatively equal capacity — be they financial or legal or whatever — representation can slow the process down. That is where we are coming from on that.

I guess the solution that has been suggested to us - and I think the solution has been made in public by Justice Kerr - is that those who appear in tribunals should have an obligation to assist the business of the tribunal, not just a moral one but a statutory one. Is that something the New South Wales Bar would object to?

MR MOSES (NSWBA): Not for our part, Commissioner, because it would model itself no doubt on provisions of our Civil Procedure Act that mandate our obligations to do that, so we would embrace that, Commissioner.

DR MUNDY: Presumably you wouldn't be uncomfortable if any person appearing on behalf of another in a tribunal was subject to that obligation, because in places like VCAT there are occasions when non-legally qualified people appear on behalf of others, or their employers, more often.

MS HOGAN-DORAN (NSWBA): Section 56 of the Civil Procedure Act imposes obligations not only on party representatives but parties themselves and the court itself, so if something modelled on section 56 was to be put in a tribunal context I think then it would tend to capture those issues like a landlord's agent being the representative. Insurance companies have an in-house counsel, being the representative. It also has the advantage of appreciating that the obligations should be on all actors in that system, not just on the legal representatives but each of those with a role to play within it.

MR MOSES (NSWBA): Commissioner, I think that point that you have raised - and I agree with my colleague's comments on that - the Fair Work Commission has been grappling with this issue for some time. What they have are industrial agents who appear who are not bound by the same obligations as lawyers in the conduct of matters and there have been quite a few critical decisions and I can have them sent to you of agents who have behaved in a manner that has either led to increased costs or let the person down who they had been representing and they have been handcuffed - that is, the members of the Commission - because they have had nothing that they can do in respect of that issue once the person is through the front door and they have granted them representation, so having a statutory obligation would be I think a very important way forward for these tribunals because if a person breaches it, it would be on notice down the track that when they come to seek leave again to appear, the fact that they have breached their obligation previously could be a ground to refuse them permission to appear for a person, so we think that is a good idea, Commissioner.

MS HOGAN-DORAN (NSWBA): Could I say two additional matters? The first is in relation to section 56 the High Court gave judgment at the end of last year on the construction of that provision which it had not previously considered. I don't think it is canvassed in the draft report, the decision of the expense reduction analyst group which is probably a rather ironic case because it is a case that counsels against the satellite litigation by parties because of the costs that are involved. The court does consider and expose the importance of the obligations being on parties but also on their counsel and representatives and on the court itself.

The second thing I wanted to mention was that I think the difficulty we had,

and others may have had in relation to draft recommendation 10.1, is perhaps in the broad-brush way it deals with - restrictions should be more rigorously applied. I think were it to be subject to or qualified by having regard to the nature of the matter before - - -

DR MUNDY: To be fair to the person who would have drafted that, there are certainly in VCAT a range of matters where representation is the norm. That is expected. There are no restrictions to be applied.

MS HOGAN-DORAN (NSWBA): And the new tribunal in New South Wales, the new mega tribunal NCAT which has just commenced, has a leave requirement in respect of most of its divisions but in some divisions, the one that we identified in our submission - the occupational and regulatory division - it has an automatic one and we say that is an appropriate division and a good model perhaps for states other than Victoria.

DR MUNDY: I don't think we are actually very - - -

MR MOSES (NSWBA): No. I'm attracted to your wording, Commissioner, in terms of looking at the complexity of the matter and the parties being the test. What we might do is send you a decision of the full bench of the Fair Work Commission that the Bar Association was a party in where a barrister was refused permission to appear but on appeal the full bench had something to say about errors of law made where they set out criteria as to relevancy when lawyers should appear in matters and the like. We might send that to you if you would like that as part of a bundle of papers, together with the High Court decision, that my colleague - - -

DR MUNDY: That would be helpful.

MR MOSES (NSWBA): Thank you.

MS HOGAN-DORAN (NSWBA): More to read.

MR MOSES (NSWBA): Sorry, Commissioner.

DR MUNDY: Sorry. The colleague who is attending to these matters is sitting up the back and she is looking forward to it.

MR MOSES (NSWBA): I apologise to her directly.

MS MacRAE: One very small issue. You made some comments about pro bono and what we had said about it.

MR MOSES (NSWBA): Yes.

MS MacRAE: I understand you are doing a survey of your members on this. Is that right?

MR MOSES (NSWBA): We are, Commissioner.

MS MacRAE: Is that likely to be available before our final report?

MS HOGAN-DORAN (NSWBA): It is with the practising certificate renewals which are ongoing now and must all be completed by 30 June, so we will receive the survey results - they are being received already but they won't be completed until that process of renewal is completed, so it will be in July some time. I don't know if that is still within your time frame.

DR MUNDY: If we could have your permission to also - - -

MS HOGAN-DORAN (NSWBA): It is well within your time frame?

MS MacRAE: Yes. That would be great.

DR MUNDY: Thank you.

MS MacRAE: That would be terrific. What we do say in the report about pro bono is based on as much information as we could get but we knew it was inadequate.

MS HOGAN-DORAN (NSWBA): The data is very limited because the law firms of course have reasons other than reporting obligations that are reasons why they wish to report. It also obviously has perhaps some marketing aspect to it.

DR MUNDY: I think my reflection on the pro bono services of major firms was to point out that not all of their activities were directed at access to the courts.

MR MOSES (NSWBA): I understand, yes.

MS HOGAN-DORAN (NSWBA): I think your comment was in relation to transactional - - -

DR MUNDY: Yes. Even your suburban solicitor or country town solicitor probably does pro bono work for the local bowls club.

MR MOSES (NSWBA): Yes.

DR MUNDY: There's nothing wrong with that. I was merely making an observation about the amount of work - and the material that has been put to us is that the pro bono activities of law firms seems to be predominated by transactional matters, rather than representational matters. That was the only point I ought to make.

MS MacRAE: Something that you didn't mention but was mentioned in your submission was the supporting accreditation and standards for ADR providers. The national Legal Aid submission to us has said that they are concerned that that might end up being quite expensive and restrict the supply of ADR practitioners. I just wondered if you had a view about that or if you had anything to say about what you think the cost might be and if that would be a barrier.

MR MOSES (NSWBA): Is this the concern, Commissioner MacRae, that by supporting the development of - - -

MS MacRAE: Of accreditation and standards for all ADR practitioners; that there would be a cost in that that might then restrict the supply of those people and become a problem. It's just an issue that national Legal Aid has raised with us that in principle sounds like a good idea and in practice would create another barrier.

MR MOSES (NSWBA): We would like to reflect on that. Our understanding is that having a standard system whereby a person can become accredited should not have, as it were, an extra layer on the accreditation process if we adopt a model accreditation process across the Commonwealth. Then we should just have one feeder system into that so that people know that what they are getting is a mediator, for instance, or a practitioner in ADR who had been accredited through the same program in order to facilitate that being done, but at the moment there is no barrier, for instance, for a barrister such as myself to be approached to mediate in a matter, even though I have done no ADR accredited course. I do mediations where I preside as a mediator and so do others who are far more qualified than I such as former High Court judges who sit and do mediations without having, as it were, an accreditation to do it. I think standard accreditation would give comfort to individuals out there that what they are getting is somebody who has been through a process and it is standardised.

MS HOGAN-DORAN (NSWBA): That was the reason for that.

DR MUNDY: Can I ask you two questions on that front? The first is: do you think admission as a barrister or solicitor should be taken as a de facto qualification for being a mediator?

MR MOSES (NSWBA): No, Commissioner, because I think some solicitors or

barristers may not have the necessary skill set or temperament to do it, so to answer your question directly - - -

DR MUNDY: So some sort of training and accreditation is appropriate?

MS HOGAN-DORAN (NSWBA): Perhaps I might add, I recently became a nationally-accredited mediator under the mediator accreditation system that's currently in place, and I did it through the Institute of Arbitrators and Mediators.

DR MUNDY: Yes.

MS HOGAN-DORAN (NSWBA): I think, from my own personal experience of that, I was struck by how much I didn't know and learnt through that process of training and then accreditation, which is part of that - - -

DR MUNDY: This is the sort of issue the Commission has dealt with in the past, particularly with respect to migration agencies, legal practice - - -

MS HOGAN-DORAN (NSWBA): Right.

DR MUNDY: I think the issues are different in this case.

MS HOGAN-DORAN (NSWBA): And I think also the great value of that kind of training system and accreditation system, and I'm speaking separately to the notion of who should be the accreditors, but is the emphasis on interpersonal skills and skills of communication and empathy and things that we would like to think all of us, as legal practitioners, have, but it's helpful to have it pointed out if you don't, and to find ways in which to deal with that. I think that, per se, qualification as a lawyer or solicitor is not necessary, but what I think we are directing our minds to is that the accreditation should recognise that you may be a mediator who has that qualification in addition, or prior qualification.

MR MOSES (NSWBA): There have been some Supreme Court judges who have retired and come back to be mediators, and you soon work out within the first 15 minutes, this is not for them.

DR MUNDY: No. My second question is in relation to accreditation. There's a model that says, if there is an accreditation body, it is then able to accredit processes rather than organisation. For example, you might have the Institute of Arbitrators, the LEADR people. That's the sort of model where, basically, organisations holding themselves out to provide training and accreditation have to basically get the tick from some overarching body. Is that the model that you have in mind, rather than there being a monopoly provider?

MR MOSES (NSWBA): I think the model of having a body that will accredit the trading bodies is the best way to go, and there will be no suggestion then that there is a monopoly as you have referred to.

DR MUNDY: Okay.

MS MacRAE: I was just interested in your comments in your submission about costs awards, so this is where settlement offers are made, and a concern that you had that at the moment plaintiffs are disproportionately punished if they reject settlement offers, and that there is insufficient punishment for defendants that reject offers, and you have adopted, I think, the suggestion that we use the Wolff arrangements where there's a 10 per cent uplift on damages.

MR MOSES (NSWBA): Yes.

MS MacRAE: You will see that we have suggested something somewhat different, so I just wanted to explore a little bit what you saw as the purpose of having these arrangements in place anyway across the board. Predominantly, I would say our purpose was to try and enhance the possibility that reasonable settlement offers would be taken up. So as a starter I guess I'd say our proposal was that, and I'm going to recommendation 13.1 here.

MR MOSES (NSWBA): Thank you.

MS MacRAE: Our proposal was that where a judgment is made that is more favourable than has been - - -

MR MOSES (NSWBA): The subject of a settlement?

MS MacRAE: Yes, sorry, then there would be costs paid on an indemnity basis.

MR MOSES (NSWBA): Yes.

MS MacRAE: Your proposal is, as I say, the UK one. That looks at more the 10 per cent uplift on damages as an additional sort of cost that the defendant would pay, but that the plaintiff wouldn't have the same kind of negative consequences of not accepting a more positive settlement on claim. So the first question, I suppose, is we deliberately linked our arrangements to the costs involved, and I was interested to know why you saw it as more appropriate to link the penalties, if you can call it that, to the damages involved, because we are really talking about costs here. We have taken the view that it was more appropriate to link it to the costs situation rather than the size of the damages.

MR MOSES (NSWBA): I don't think necessarily that we're at odds with that, Commissioner. In our submission, I think it was at paragraph 25, you quite correctly observed that we did refer to the Jackson review of the conduct of civil litigation - - -

MS MacRAE: Sorry, Jackson, not Wolff.

MR MOSES (NSWBA): No, it's okay, Commissioner, and we made reference to the recommendation, I suppose more as a thought bubble, in respect of the matter, but we don't disagree with the position that the Commission is exploring in respect of this issue. Our concern was to try and balance, as it were, the punishment that would flow to a plaintiff as well as a defendant if offers were not accepted. That was the main concern coming from some of the lawyers that we had on our working group, who regularly appear for plaintiffs. We need to ensure that the system is fair, and we wholly accept that there should be a punishment factor when it comes to costs if matters are not settled in a timely fashion, because otherwise people are on the road to a very lengthy and costly piece of litigation that nobody wins.

MS MacRAE: Is the feeling then that, if you like, the punishment for defendants must be sort of harsher or bigger because they have generally got deeper pockets and the financial incentive won't affect them in the same way, or - - -

MS HOGAN-DORAN (NSWBA): I think it's important to distinguish between jurisdictions, between types and cases. The particular recommendation about the 10 per cent damages aspect is for a particular kind of litigations, particularly personal injury insurance kind of claims; so they have their own incentives and disincentives in that, so I think that recommendation was particularly directed to those circumstances, but in terms of more general commercial litigation or just general civil claims, there's a couple of levels. The first is the recommendation that creates an incentive towards settlement must be right and must be something that ought to be enshrined in court practice and in court rules.

The second is, it's important to distinguish between whether or not costs will follow the event, as is the position in most Australian jurisdictions, and then what is the level of the costs that ought to be assessed, such an order having been made. What the recommendation does is conflate it to - what it says is an order should be made and it should be on an indemnity basis; so they are not necessarily the same thing. Having an order made may well get you 60 per cent of the costs, because it would ordinarily be assessed on a party-party basis, and because it would be assessed on a party-party basis, it will still be subject to reasonableness tests, or some sort of proportionality test, but not quite the UK proportionality test. The indemnity aspect is that additional element in a sense of punishment or some comment on conduct.

The failure alone to accept a compromise offer is, I think, the way the Commission is proposing, but generally indemnity costs orders are assessed on not just that one factor. Indemnity costs orders might be made in order that it be assessed on an indemnity basis, heading to that sort of 70, 80 per cent of recoverable costs, is on the basis of the conduct of the litigation, whether there has been any improper conduct, not just being a refusal of a reasonable offer of compromise that has been - - -

DR MUNDY: Because presumably someone can reject a reasonable offer and just have got it wrong.

MS HOGAN-DORAN (NSWBA): That's right, and just because you might beat the number at the end of the day that was offered six months - doesn't necessarily take into account that there may have been subsequent developments in the case, there may have been new information that came to light, the case law may have changed, and all of those matters go to what ultimately is a discretionary decision by the presiding judge, put to one side tribunals of course, but presiding judge, and so an automatic rule of indemnity I think fails to take into account those legitimate issues that are referable to the exercise of discretion; so fair to say, I think, that we agree in principle.

MR MOSES (NSWBA): We do.

MS HOGAN-DORAN (NSWBA): And in practice, we are looking at something that might be more flexible than what we have proposed.

MS MacRAE: That's right, and I guess potentially, on this reading of your submission you're really saying the example we have looked at is something particular to a case, but we are not saying that this would be something we would generalise necessarily, but the principle is still one that we need to - - -

MR MOSES (NSWBA): No, and it would be inappropriate, for instance, in smaller cases where you have, for instance, litigation going on involving small commercial disputes, mums and dads type litigation. It would not be appropriate to those types of matters at all; in fact, it could be, I would have thought, a devastating consequence for an individual.

MS HOGAN-DORAN (NSWBA): Because hardship is a relevant matter.

MR MOSES (NSWBA): In terms of the 10 per cent upward point, yes. I think it's a thought bubble that we put there from the Jackson report for consideration.

MS MacRAE: Yes, sure.

MR MOSES (NSWBA): And I apologise if it didn't come across very - - -

MS MacRAE: No, it's fine. I think that sometimes it's just we have been swamped with hundreds of pages in the last couple of weeks, so we try and sort things as well as we can in the time we've got.

MR MOSES (NSWBA): I honestly don't know how you're doing this. It's a massive task.

DR MUNDY: Gives us a call in two and half months' time and see how we're going.

MR MOSES (NSWBA): Yes.

MS MacRAE: This might be an unreasonable question as well and maybe it's just too much 'horses for courses' but what's your experience of settlement offers? How often are they accepted and rejected, and is it plaintiffs or defendants that are making them, or does it just vary too much by - - -

MR MOSES (NSWBA): It will depend on various matters. The settlement offers are made on a very regular basis in litigation, in all types of litigation. What will come down to the resolution of a matter ultimately will be whether the parties both recognise that there is risk in the conduct of litigation; that there is a price to pay by actually conducting the litigation even if you are successful. It relates to the emotional investment, the costs issues, reputational loss - things of that nature. They all bear on a client when considering a settlement offer. I think it's fair to say that the majority of litigation that goes through our court system ultimately is the subject of resolution in one way or another without a judgment being delivered.

MS HOGAN-DORAN (NSWBA): May I also add true settlement negotiation often doesn't occur in writing. It's happening between practitioners discussing and debating the merits of each side's case. Most written settlement offers, in my experience, are directed towards winning the costs argument at the end of the case that won't settle.

MS MacRAE: Right.

MS HOGAN-DORAN (NSWBA): So from my practice area, which is primarily commercial litigation, most cases will settle. They may settle prior to hearing, in the middle of the hearing or before judgment, but the great majority, by which I mean 90 per cent, will settle, but they will ordinarily settle because the parties either through a mediation process or some other alternative dispute resolution process or

by direct negotiation between their legal representatives or indeed the parties themselves work towards an outcome because they appreciate the issues that my colleague just adverted to and they're willing to pay perhaps some element of a price to achieve a certainty, to achieve a certain outcome at an earlier date that they wouldn't otherwise be able to obtain through the court system.

MR MOSES (NSWBA): Most settlement discussions at the Bar take place with full and frank discussions amongst the barristers as to the weaknesses and strengths in each other's case, and issues. We often are the ones who are dragging the parties together as a result of those discussions.

MS MacRAE: Just in relation to that certainty in relation to costs, we've talked about costs budgeting and one of the measures that the UK is involved. I just wonder if you could give me a bit of a view about your feelings about that. As I read it, you were talking about costs budgeting being most appropriate in sort of bigger civil cases and that in other cases it may be less attractive because of the problems of establishing a costs budget.

MS HOGAN-DORAN (NSWBA): The costs budgeting regime in the UK has only been in operation since April last year.

MS MacRAE: Yes. A very short time, sure.

MS HOGAN-DORAN (NSWBA): I've been tracking the decisions and the appeals from the interlocutory decisions on costs budgeting because they're tied very closely to the costs sanctions regime that has also been imposed and case management sanctions that have been imposed. So two things to take from that: the first is I think the Commission should be reticent to cherry-pick elements of the UK reforms without necessarily appreciating that they are a holistic reform.

To the extent obligations are being imposed on parties to provide costs budgets and to be subject to costs sanctions and to be subjected to strict timetables, that's the stick, but then the carrot is the changes to damages, awards and uplifts and cost shifting regimes and the wider availability of after-event insurance. So there's a whole range of changes that have been done in the UK, and bringing in one aspect to the Australian system may suffer the law of unintended consequences.

MS MacRAE: Sure.

MS HOGAN-DORAN (NSWBA): The second is that in respect of costs budgeting: in our submission, it ought to be court led. Its take-up ought to be court led. There are some courts in some jurisdictions, particularly the Supreme Court of New South Wales in some of its commercial divisions, that have very active case

management by judicial officers and it's structured and, more importantly, funded in that manner.

Now, if there's going to be costs budgeting regimes, there's going to have to be a number of registrars who are going to have to hear and determine these sorts of disputes because they aren't always going to be agreed. They're going to have to be the subject of disputes which means they need to have costs capacity to adjudicate those kinds of disputes, and by a large those decisions aren't presently in the hands of registrars any more. If a costs assessment has to be done, they tend to be sent out for costs assessment by people outside the court system. There'll be practitioners who do it. So you'd have to have a whole range of resourcing and education issues that would come into the implementation of a recommendation of that kind, which is why I think it will be best to be judge led, in the sense of court led, that it says, "Within our budget, what can we actually impose and is there some availability to it?"

DR MUNDY: Is there a sense in which if you have active judicial management of the matter that costs budgeting may actually in some sense become redundant?

MR MOSES (NSWBA): It does - sorry.

MS HOGAN-DORAN (NSWBA): I was going to say, indeed in the really big cases in the UK they're excluded from the costs budgeting requirements, so the case where the claims of over 2 million pounds in business related divisions aren't subject to those costs budgeting because the parties are sophisticated litigants, it's assumed, and they're going to be case managed in any event.

The costs budget is again directed, as we say in our submission, we think, where there's more sophisticated clients who understand how to deal with that kind of information and they can be subject to the outcome because the importance of the costs budget is not just to signal to each other how much you're proposing to spend on the case, it's to stand as a sanction as to, "This is the most that you can hope to recover and you're to take that into account in any settlement or whether you've received this litigation."

MR MOSES (NSWBA): I agree with my colleague's comments about that. I think the exemplar for judicial case management is the Federal Court where you have the docket system. So you have the judge travelling with the matter from the start. That does provide certainty as to what the issues are and how the case will be conducted.

As we've said in paragraph 30 to 32 of our submission, on this issue we agree in principle that it's a good idea but we have to pick the targets for these cases and there has to be consistency because in order to know what a costs budget will look

like, you need to know what the issues are in the case. If we have pleadings being abolished in matters, which I think is one of the issues touched upon by the report, once that falls away then it becomes less certain as to what will be the issues to be adjudicated upon in the matter, so there's a bit of a tension there. We accept the sentiment that is in the Commission's report about this but we just think it needs to be targeted for particular cases that we've alluded to.

MS HOGAN-DORAN (NSWBA): Could I say something in relation to the abolition of pleadings recommendation. The abolition of formal pleadings in the fast-track list in the Federal Court and similar in the commercial list in the Supreme Court of New South Wales are in the context of there being active judicial case management where a judge is saying, "I understand these to be the issues," and asking the practitioners who are participating in that process, "What do you say are the issues?"

That's a very sophisticated environment. To then say in other jurisdictions you should abolish formal pleadings where there isn't going to be active judicial case management, because it just isn't going to be funded at that level, is a recipe we fear for increased costs because of less certainty as to "What's actually in dispute?" and "What are we actually having to put evidence about? What are we actually going to make submissions about? How long should the trial be?"

That's why there's such a long, long history in civil litigation of pleadings. They have a purpose there to help refine the issues in the absence of the court doing it until it gets to the hearing itself. So we would caution against that recommendation outside the more sophisticated commercial environments. Could I mention one other thing. In a High Court decision that I referred to earlier, the Expense Reduction case, the court was having regard to the changes in the UK, in England and Wales, and noted that whatever be the position in England the courts of New South Wales should actively engage in case management in order to achieve the purposes of the Civil Procedure Act.

So the High Court has already indicated to all courts in New South Wales, and it no doubt will do the same in respect of other states, that judicial officers must actively engage in case management. One aspect might be costs budgeting, if that's what they regard as being an appropriate practice direction to give to the cases that they hear, but I think the High Court is on to this issue and is making it very firm to the practitioners we should sort the system out ourselves.

DR MUNDY: So you'd have no problem with a recommendation along the lines of 'jurisdictions should ensure that costs budgeting is available to judicial officers if they chose to use it in any given matter' rather than make it a compulsion or some sort of mechanistic application.

MR MOSES (NSWBA): There would be no difficulty if that was part of the matters that the presiding judge could implement as part of their armoury of case management as their exercise of their discretion, so it is a matter that they would have a power to do, that we provide them with the power so they can exercise that discretion in cases.

DR MUNDY: Yes. It's another choice for effectively managing cases.

MR MOSES (NSWBA): Yes, I agree with that, Commissioner.

DR MUNDY: Okay. I'm just mindful of time and I'm reflecting on your comments before about some concern that we may have misunderstood the role of judges and it was something that was put to us by the Chief Justice of Western Australia not too long ago and - - -

MR MOSES (NSWBA): Chief Justice Martin is never backwards when he's - - -

DR MUNDY: In a public place, and I think, with the greatest respect to his Honour, I think he misread what we were saying.

MR MOSES (NSWBA): Yes.

DR MUNDY: But we do see that - and we make the point that the courts and the superior courts are places where public and private benefits are generated.

MR MOSES (NSWBA): Yes.

DR MUNDY: And our profession suggests that people should pay for their private benefits and the state should scratch its head about the public ones, and sometimes you get the public ones for free, and I guess what our concern is - and I do think we do share your concern about the resources available to the courts - and in the current budgetary environment, which even extends to our Commission - we're mindful of having to find resources.

MR MOSES (NSWBA): Yes.

DR MUNDY: You'll all be invited to make a gold coin donation when you leave. But what we're trying to get at is a regime where the private benefits generated by litigation are recovered from parties who are able to pay for the private benefits. Now, we're not talking about migration appeal matters.

MR MOSES (NSWBA): I understand.

DR MUNDY: We're talking about - and I think his Honour, Justice Martin, is on the record observing that the Bell case cost the Supreme Court of Western Australia 15 million bucks and they didn't recover a fifteenth of it.

MR MOSES (NSWBA): That's true. It tied up a judge for a very long time.

DR MUNDY: Well, and - - -

MR MOSES (NSWBA): Resources and - - -

DR MUNDY: And all that sort of stuff, and it's part of the incentives for parties to settle.

MR MOSES (NSWBA): Yes.

DR MUNDY: It works in an incentive way in the same way that costs orders should. I guess the question I want to ask you is not so much about how we should perhaps think about setting court fees, but how should we - well, it is about that. How should we think about major litigation where there are substantial economic benefits involved but there is no monetary outcome. So I'm thinking perhaps of major environmental matters or major planning matters where, if you think about a major commercial split where there's ultimately a monetary settlement, then you can say, well, the fees should be a basis of that, or something hangs off that. But in a matter which is essentially an economic matter but has no monetary outcome, do you have any views on how we might think about that?

MS HOGAN-DORAN (NSWBA): I think it's happened in other cases, but I was very involved in it. Some years ago the James Hardie litigation by ASIC against 11 defendants was one of the first fully computerised courtrooms. The parties were required by the court to contribute to the cost of that litigation. I can't remember the numbers now but the numbers are available because I know there were decisions about it because there was a dispute about what the apportionment should be and effectively the parties did pay for the cost of at least that service that was being provided to them. We could try and track down that information and provide it to you.

The second thing is that I think there's a distinction which we're both concerned about - and I think Mr Moses will second this - is that there's a distinction between the actual services that are delivered by the court system, that is, courtrooms and technology and registry services, and the notion that judges are delivering a service. Judges are exercising the judicial power of government and I think where we don't see that distinction is when one would start to see criticisms being raised by the

courts of an absence of that acknowledgment.

So the obligation to fund the exercise of judicial power is, we would say, an obligation of the state in the sense of all members of the community through our tax contribution should be funding it, but where there's particular services - for example, use of technology - that may be a helpful way of accepting the distinctions of judicial power but also dealing with your concern about cost recovery.

DR MUNDY: Okay.

MR MOSES (NSWBA): Commissioner, in our submission what we said is that we accept that there should be a flexible approach to court fees and, to use your example, what we would say there is you look at the nature of the dispute and the type of relief sought and then you go to the characteristics of the parties who are before the court.

Now, if they are a large mining company and the like then one would not think twice about putting some form of [indistinct] on that type of litigation, but you've got to look to the nature of the parties. For instance, in a classic Land and Environment Court dispute you may have a large mining corporation and a small community group. You have to be very careful, of course, how one applies the fees to that circumstance and there may be difficulties, for instance, in putting a weighting on the mining company and nothing on the individuals and one would have to look at what the mechanisms would be for waving certain fees in those cases involving one party and not the other and we'd need to consider how that would then impact upon the way in which the litigation is to be conducted and perceived by the parties before the court.

DR MUNDY: I mean, I don't want to belabour this point, but if there was any examples of determinations of that sort of nature we'd find those useful.

MR MOSES (NSWBA): I'll add that to the list, Commissioner, and we'll draw it to your attention.

DR MUNDY: Just one final question because it's a matter of some public discussion.

MR MOSES (NSWBA): Yes.

DR MUNDY: Does the New South Wales Bar have any views it would like to express with respect to litigation funding or with respect to contingency fees?

MS HOGAN-DORAN (NSWBA): Well, we support the proposed

recommendation for licensing of litigation funders. The Australian Financial Service licence regime is a well-developed regime and there's obviously very sensible reasons for there being a regulation of that. Also, for our practitioners, it's helpful for us because it would assist in the distinguishing between the obligations that are had to the clients and the separate obligations that are had when there's a contractual relationship with a litigation funder.

So I think that's touching on those issues and we also - I think we've suggested in our submission that there ought to be more litigation funding arrangements generally and more complex proceedings to be more to be done to investigate that, but I don't think we've said more than that, partly because I think the industry's still quite immature in Australia.

MR MOSES (NSWBA): But we do accept a role for litigation funding and it's the question of its licence and regulation which you're looking at.

DR MUNDY: And contingency fees.

MR MOSES (NSWBA): That is an issue which is the subject of much debate in the community.

DR MUNDY: Yes, I know.

MR MOSES (NSWBA): I think it can be said that there is a place for contingency fees in the legal system in order to assist the conduct of litigation for the - if I can call it the missing middle.

DR MUNDY: That's where we're looking.

MR MOSES (NSWBA): Yes, and that, I think, is something that is a very useful thing that the Commission is examining and something which we think is an area that can be examined in order to ensure that justice can be provided to those individuals who otherwise would not be in that position and it would assist the legal profession to ensure delivery of services.

MS HOGAN-DORAN (NSWBA): But if there is such an arrangement and if there's going to be funding of such contingent practices you then have to look at issues like capital adequacy and things like that.

DR MUNDY: Yes. I mean, I guess our view is that from an economic perspective we look at these things and they sort of look a lot the same, so why shouldn't the prudential requirements of litigation funders.

MS HOGAN-DORAN (NSWBA): The prudential requirements that would be imposed under the AFSL and are imposed under AFSL arrangements are obviously the kind of things you would have to look at because it needs to determine whether or not they'd be able to bear any adverse costs order, and I think that's why the issue's so difficult in that middle - for the unfunded middle. It's obviously easier in the aggregated class action arrangements but when you start to deal into individual circumstances which may all turn on the credit of a witness you've never seen give evidence before as to the likely prospects of the success of the litigation it becomes much harder.

DR MUNDY: Speaking of which, I've got a series of witnesses I've got to cross-examine shortly.

MS HOGAN-DORAN (NSWBA): That's right.

DR MUNDY: Thank you very much for your time.

MS MacRAE: Thank you.

MS HOGAN-DORAN (NSWBA): Thank you.

MR MOSES (NSWBA): Commissioners, thank you very much for your time.

MS HOGAN-DORAN (NSWBA): Thank you.

MR MOSES (NSWBA): And we will undertake to provide that material. Thank you.

DR MUNDY: Thank you.

DR MUNDY: Our next participant is Law Society New South Wales. I'm sorry we're running a little bit late, but we had a technology hitch. Could you please state your name, position and affiliation for the record and then if you would like to make a brief - and that means single-digit minutes - opening statement?

MS EVERETT (LSNSW): Yes, certainly. Good morning, Commissioners, my name is Ros Everett. I'm the president of the Law Society of New South Wales.

MR TIDBALL (LSNSW): Michael Tidball. I'm the chief executive officer of the Law Society of New South Wales.

DR MUNDY: Off you go, we are in your hands.

MS EVERETT (LSNSW): Well, thank you for inviting the Law Society to give evidence at this hearing. The CEO, Michael Tidball, and I both welcome the opportunity to present some further information to you. We represent around 25,000 solicitors in New South Wales and we play an active role in the regulation of the legal profession in New South Wales. We have statutory obligations to maintain and improve the professional standards of the legal profession and also protect the public from inadequate advice and representation and we fulfil these obligations in various ways. We have a large education program, investigation of members and complaints and intervention and support.

We work closely with the Law Council of Australia and obviously we have worked with them in providing the submissions in response to the Productivity Commission's issues paper and draft report. We've also provided the Productivity Commission with a separate submission in response to the draft report which covers the New South Wales specific issues. In summary, these issues are the distribution of the New South Wales public purpose fund, the provision of professional indemnity insurance, the administration of practising certificates and the regulation of the legal profession.

I hope we'll be able to assist you today and answer any further questions you may have in relation to these issues. Thank you.

MR TIDBALL (LSNSW): Just very briefly, Commissioners, the province of our evidence today is specific, as Ms Everett has indicated, to the material which is specific to the Law Society of New South Wales' structure and funding arrangements and specifically professional indemnity insurance, public purpose funds, administration of practising certificates and the rest of the substantial material that the Commission has hitherto considered will be covered via the Law Council which will separately submit and I would add, finally, that there is a brief separate

submission provided by our alternate dispute resolution committee which was attached to our submission and as regards to that submission I note that one of the main authors of that material, Mr Lancken, is giving evidence later.

DR MUNDY: Thank you. Do you want to start?

MS MacRAE: Well, you have mentioned a couple of times about the professional indemnity insurance and you will know that we made a recommendation saying that we thought that there was a layer of regulation not required there, so could you just be more specific for me about what you see - what does the additional approval for the legal profession to the existing regulation by APRA?

MS EVERETT (LSNSW): If I could just give some background, Commissioner. You may recall in 2002 HIH Insurance Company collapsed and the legal profession were covered by HIH Insurance, so out of the ashes of that rose Law Cover and we capitulated Law Cover about 2003. Now Law Cover has come into its own. It's regulated by APRA. It's doing very well. The funding ratio, as I said, over the years it's become fully capitalised and we're in a very strong position now offering really good premium pricing to the members of the profession. We're concerned if it's open to the insurance market as has happened in England and Wales and also in Europe - I've just come back from a conference, the International Bar Association, in Brussels, and, unfortunately, there are a number of members of the profession in those countries that it's deregulated that the smaller members of the profession can't get cover.

It's limiting the practice in a lot of areas, so people where, for example, if you have a country area, country town, where you've got a solicitor who is providing really good legal services in his or her community and the way the insurance market operates, they're quite happy to cover the top end of the market, the large legal firms, but forget the little shopfront lawyer who, again, is providing a really good community service, but the premium could be just so high that it means that that solicitor can't continue to practice or, indeed, they can't get cover. I was speaking with the Law Society president - Nick Fluck is the president of England and Wales and he was saying they have a lot of solicitors who can't get cover which means they can't practice.

It means that end of the market, the little shopfront lawyers, and even in my practice in Penrith where I'm a sort of small/medium size firm and I pay quite a reasonable premium through Law Cover and it allows me to practice and I do a lot of pro bono work, which is another subject we want to speak to you about, but that allows me to operate and also be there to provide the pro bono services for people in my community who otherwise could not afford legal advice. We think the current system is working really well and Law Cover is in a very strong financial position

and we think the fees really in the open market would be considered very, very competitive as well, so I think Mr Tidball is probably more on top of that than I am so he may wish to add to my comments.

MR TIDBALL (LSNSW): I'm not more top of it but can I add some things? Can I take, note and reinforce what Ms Everett has said about the history. The HIH collapsed and there was a view taken in New South Wales that the collapse HIH was an event that should never happen again. To deal with that ultimately and the post-HIH years were precarious years both in terms of ensuring that there was availability of insurance for all solicitors, availability of cover that they could procure, but, secondly, we were concerned about the public and consumers.

To that end a decision was made to obtain an APRA licence and the capital requirements of APRA are such and we hold the only APRA licence of any of the compulsory PII providers in the country is to ensure that we have pretty much a bomb-proof level of capital. That's the first point. The second point is in terms of foundation principles the reality of a statutory scheme is that everybody is in and we've done well with risk management but with everyone in you're not going to be providing the cheapest cover that's out there, but unlike the UK, which has had to revert to the assigned risk pool where a significant percentage of the profession ultimately can't practice after they've fulfilled or sat in the assigned risk pool for as long as they're able because it's time-limited. Our task is to ensure that the profession is entirely covered and ultimately that all consumers are covered.

Can I finally add in terms of the destiny of Law Cover, what we have done since obtaining the licence has been to build capital and if you work on the basis that APRA requires a prescribed capital ration of a hundred per cent, Law Cover current sits at 324 per cent. Our task has been to build capital strength with a view that as capital strength is at a point of optimisation that that capital ratio can to be used in the out years to lower premiums and that will be, having built that complete, as I term it, bomb-proof safety in the out years will now be to look at ensuring that we can take the pressure off premiums and that is where New South Wales will be headed.

DR MUNDY: Are these anti-competitive arrangements in place in all other jurisdictions in Australia?

MR TIDBALL (LSNSW): I believe that statutory insurance arrangement are in place in Victoria. I'm not a spokesperson for those jurisdictions but, effectively, I know definitely Queensland and I know definitely Victoria and I believe WA, but I can't give a comprehensive response, Commissioner.

DR MUNDY: I mean I am interested in your observations about HIH because that

was a general failure of prudential regulation. It was nothing specific to legal insurance, was it?

MS EVERETT (LSNSW): I don't know we're in a position really to comment.

MR TIDBALL (LSNSW): I mean I remember there being a rule, Commissioner, I remember a scheme for personal injury, so it clearly wasn't just about legal insurance.

MS EVERETT (LSNSW): Oh, no. No.

DR MUNDY: So it was a general failure - - -

MS EVERETT (LSNSW): The general insurer.

DR MUNDY: - - - and my recollection is the then chairman of APRA essentially lost his job over it.

MR TIDBALL (LSNSW): Correct.

DR MUNDY: There were dislocations in insurance markets after September 11, I remember them vividly. Construction of the Australian reinsurance led to the existence of the Australian reinsurance agency. The commonwealth provided all aviation insurance at the time. It now provides none. So insurance markets can recover from these events and there's examples even more recently with the collapse of AIG and on line insurance for the bond market, so the fact that a response was put in place to a prudential event or a capital event does not necessarily, of itself, lead to an argument for a competitive restraint to ensure a market functions, whatever that market is.

I mean, similar issues occur in directors' and officers' insurance and occurs in medical insurance as well, but I guess what we're trying to get at - and I am interested in what the decision making around this is, because presumably if you are building up capital in excess of the APRA requirement, then to meet the APRA requirement you would need to charge lower premiums. It follows, the money must come from somewhere if the capital is being built up. Then if the capital was less than the demand on the insurers' policies would be left and those costs could be passed on to consumers today who may not benefit from the premium reductions you are contemplating in the future.

MS EVERETT (LSNSW): We've had to capitalise and get to the strong position, which we are now in, and it means that we are able to - from my knowledge - we're able to avoid the very expensive reinsurance market and we're in a position now that

we can really start passing on those savings to our members.

DR MUNDY: Because these costs are really - these insurance costs are, ultimately, borne by the consumers of legal services and effectively they have no say in this matter, do they?

MR TIDBALL (LSNSW): They do not have a say in it, Commissioner. If I may respond. One of the costs is attached to the fact that if you moved to an open market the view taken has been that there may be, as the president indicated - - -

DR MUNDY: Sorry, the view taken by who?

MR TIDBALL (LSNSW): My president; by Ros Everett in her evidence. There may be parts of the profession that can't get insurance - - -

DR MUNDY: Yes.

MR TIDBALL (LSNSW): - - - if it's an open market. So that's a risk and that's a risk which I think policy makers, as in government policy makers, in partnership in the profession have considered to be a very undesirable outcome in New South Wales. There is a cost associated with that. Secondly, though, during the establishment years there has been a need to have a high degree of reinsurance in place and that has - that has - led to premiums which are higher, but always with the recognition that having, in a sense, obtained the APRA licence and built that capital strength that ultimately there would be benefit that would flow down the track with lower premiums.

DR MUNDY: Okay. Anything else on that?

MS MacRAE: No.

DR MUNDY: What do you want to move on to?

MS MacRAE: I was thinking we could talk about pro bono.

DR MUNDY: Yes.

MS MacRAE: You also mentioned in your opening statements about pro bono and I think you were keen to tell us a bit more about that.

MS EVERETT (LSNSW): Yes. Every solicitor I know does a lot of pro bono work and does it willingly, and we don't talk about it. It's something that we just do and it's something that I think is innate in the profession. I talk about it from my own

experience being out in Penrith and I come from country New South Wales, so I know the great need for the provision of local legal services in the country because the distance we travelled to access legal services in the country, especially if you've got people in the lower socio-economic markets who perhaps do not have a car and there is no public transport, so to speak. So it's important that local solicitors do provide that pro bono service and I certainly know that happens.

There was some discussion about people who are practising only in pro bono areas are not to pay practising certificate fees, licensing fees, but that then does bring in the problem of insurance, professional indemnity insurance, payments to the fidelity fund and also ongoing legal training, the CPD requirements. So what I find happens is - and I have done a lot of time in community legal centres myself and I know we do provide some funding for that - but it's something we're not really opposed to but we just don't know whether it is necessary and is something which, you know, we're open to discussions about.

DR MUNDY: We have had a large number of submissions saying it is necessary.

MS EVERETT (LSNSW): It's necessary.

DR MUNDY: Coming from CLCs in the main. That is where the issue came from. We did not cook this up on a Saturday afternoon. It came to us in discussions with particularly their peak bodies, not so much the individual ones, but their peak bodies. I think in some jurisdictions it is available. South Australia springs to mind but I might be wrong.

MS MacRAE: Yes, that's right.

DR MUNDY: Probably a South Australian sort of thing.

MS EVERETT (LSNSW): Well, look, as I said, I think it's working well now. I think the experience of some of the centres is that they probably don't see that there's so much pro bono work happening - as I said, we don't talk about it. It happens. We don't have a community legal centre in Penrith where I am, but I know all my colleagues there and we do an awful lot of pro bono work.

DR MUNDY: I think one of the things that is being - I mean we do understand the issues around insurance and those questions - - -

MS EVERETT (LSNSW): Yes.

DR MUNDY: - - - and that is obviously something that does need to be dealt with and properly dealt with. I think the concern has been around people who genuinely -

who are suitable - who are in career breaks or they have retired who are willing and able to do the work, essentially, getting around. Now it may well be for some that it is sufficient to get around even if they or the CLC had to pull on the insurance cost.

MS EVERETT (LSNSW): Yes.

DR MUNDY: The additional cost of the practising certificate may be at the margin the thing that discourages them doing the pro bono work. Now there may well be others for whom the - if they had to privately fund the insurance that might be the trigger, so that is essentially - we are not suggesting that they should be exempt from those things.

MS EVERETT (LSNSW): No. No, well, we think the coverage is absolutely necessary because, obviously, you can't have people practising uncovered.

DR MUNDY: Oh, no, we would not suggest otherwise.

MS EVERETT (LSNSW): My other concern is, you know, we have solicitors who have retired. Now, if they're recently retired that probably is acceptable, but if we have someone who is out of practice for five years and not doing ongoing legal education, they can very easily get out of touch. Now, I don't think the users of pro bono services in community legal centres are well served by having people who aren't up to date and who aren't providing proper legal services, so I don't think we would be really helping them by not keeping the level - - -

DR MUNDY: I don't know if that's what was suggested.

MS EVERETT (LSNSW): No, probably not.

DR MUNDY: I mean, they could be provided with a limited form of practising certificate which to hold that practising certificate they had to meet the normal CPD requirement. Again that would come at a cost to them, but we're not suggesting that - or there may well be charitable firms who wish to set up a fund to set up CPD funding for people in that position.

MS EVERETT (LSNSW): Yes. I don't know. There's obviously lots of ways that it can be dealt with but obviously acknowledge that we really need to keep our services up to date, obviously. If that's acknowledged and recognised and there's some way to provide that then certainly that would be a good thing.

MR TIDBALL (LSNSW): Commissioners, if I may just comment briefly on insurance. The Lawcover board, several years ago determined to develop a pro bono product which is offered, and I'm not sure whether you've learned about this from

elsewhere but I'm happy to forward you the details of it, but it's a loss leader. It's a very low-priced policy to make sure that lack of insurance is never the reason for a solicitor to not be under-funded to be able to undertake pro bono work and it's offered through the National Pro Bono Resource Centre.

DR MUNDY: Okay. We've had other examples, particularly where people are on career breaks, typically, whose firms will say, "If you want to do pro bono work, that's fine. We'll keep you under policy" - but the cost of paying for their practices doesn't get - there's a range of circumstances. We're not trying to create a second class of solicitor.

MS EVERETT (LSNSW): Of course, thank you.

MS MacRAE: One of the things that we've recommended - because we're somewhat concerned about the information that's available for consumers and how easy it is for them to shop around, given the nature of legal services - is to have an online resource that would report on ranges of legal fees for particular matters. I'm wondering if you have a view about whether you would resource that and support it, do you think it's a reasonable proposition and do you think it would help to have a better informed consumer market in terms of choice and range of legal services that might be available?

MS EVERETT (LSNSW): The Internet is a powerful tool and I know, certainly, consumers do ring around in the conveyancing market which is very competitive. People ring my firm - and I'm just quoting from my experience, of course, which is the best way to do it. We have phone calls daily from people wanting to know what it's going to cost for a sale or a purchase or a conveyancing matter. It is very, very difficult to predict what sort of fees are going to be applicable to, say, a litigation matter where someone will come in, they have a litigation matter they want to pursue, and it is very difficult to say, "Okay, it is going to cost you X amount of dollars," because you don't know whether it's going to be a couple of letters backwards and forwards to the other person, whether it is going to be litigated, whether it's going to settle or go through an alternative dispute resolution - a mediation, conciliation point - or whether it's going to go to a full hearing, which could take a day in the court or it could take two weeks or two months.

So it's incredibly hard to give an estimate, especially when you haven't taken instructions, it would be impossible. If someone rang up and said, "Well, my car has been damaged in an accident and I'd like you to act for me. How much is that going to cost me?" Well, it would be impossible to say how much that would cost. But on the other side of the coin, in the Family Court we are required to serve on the other party an estimate of our fees, and we could do that event based. "If it goes to this point, if it settles at the first mediation conference, our estimate fees will be this

amount.. If it settles before hearing it would be this amount." We're required to provide the court with an estimate of our fees, and also the other parties'. That does turn our minds to it but in that sort of environment it is probably less difficult to do, because we all know what the requirements of the court are, we know what we have to do to get to that point and we know what evidence we have to gather.

Even though it's not an exact science we can give an estimate, but with some other matters it can be very difficult to be able to give an estimate of what our fees would be. The only way would be, I suppose, if a potential client asked what the hourly fee is, we could tell them that, and certainly our cost disclosures are very stringent and the Legal Profession Act, of course, we have to give a very lengthy cost disclosure which runs to some 10 pages and that is a very powerful document that we go through with our client and even though we can estimate what it's going to cost them you can't be very precise because you just don't know what the future holds.

MS MacRAE: I guess just taking that a little further, if you were able to take a type of cost and if you were able to say, if it reached this stage - as you do with Family matters - that it makes sense for other civil matters to be able to give a range - because, really, I think Joe Blow off the street, if you asked them how much would a lawyer cost, most of them - they've never dealt with one. They generally say, "I'm sure they would be very expensive." You'd say, "But how much do you think?" "I don't know, probably more than I could afford." That would be as broad an answer as you would get. We're just trying to find a way of getting the market a little bit more informed than that and trying to make it a bit easier than having to ring around 10 different people and then finding that maybe you're explaining all your circumstances to everybody to try and get an estimate and then you're not really quite sure at the end of the day whether that's helped you or not.

At least to be able to go somewhere to say, "Well, if I've got a personal injury and you can tell me if it goes to this stage or if I've got some idea in my head about the figure I think it might be, sure I'm not going to be able to come back to anybody and say, 'Well, that misguided me.' It's only an estimate, it's a range but at least I've got something in the ballpark that gives me somewhere to start when I then might want to choose to ring around and see if I can refine those costs a bit better." Is that too wild a proposition to be able to do something of that sort?

MS EVERETT (LSNSW): It's extremely difficult because litigation is very complex, as we know, and I frequently see people and I explain to them what the process would be and give them an idea of what are the standard costs within a range and that's something we do and something we are required to do under our costs disclosure, but to have a web site it would be very problematic, I would think, because you have, for example, some solicitors who may be more experienced in an area of law, and what may take them two hours to do could take another solicitor

10 hours to do. When you specialise, obviously - my practice is a general practice but I have solicitors, and myself, who are experienced in different areas.

It would be very problematic to be able to put - in litigation matters - an estimate of fees. Conveyancing would be easier and some areas would be easier, obviously, because you know it pretty well, but with litigation it would be very difficult, I would imagine, to be able to do that but it may be something we could look at and come back.

MR TIDBALL (LSNSW): Yes. It's certainly an issue though that we are covering, along with the other law societies and bars in our submission to the Law Council. It's a matter that has been, I believe, covered in that submission and our comments.

DR MUNDY: It does seem possible for a range of medical professions in the United States - and surgery, I suggest, is as complex as running litigation - to do this. They even have quality feedback which in a litigious country like the United States where defamation is almost king it's quite interesting. I guess what we're trying to get a sense of is whether it's possible to give people some - we're not seeking to identify individual solicitors, we're trying to give people some sense that if you're in a matter that looks something like this, you're looking down the throat of something in this range. That's what we're trying to get at, in part because people just suffer from sticker shock.

MS EVERETT (LSNSW): Yes.

DR MUNDY: They have no expectation. There's no experience of this and if the range was even quite wide and the number fell in the range, at least they would have some sense of it. I'm just mindful of the time. I just was wanting to see if you had any reflections in relation to the Legal Profession Reform Law Act or Bill, wherever it's up to. Not so much about its content. I mean, we think it's a good thing. I'm just interested whether you have any reflections on (a) the reason why it hasn't ended up being quite as uniform as we would have liked it to be, and (b) those particular areas where work is needed perhaps where alignment with those jurisdictions that aren't participating might be important from a public policy perspective, that we might be able to say, "Well, okay, you're not going to take on the whole bill, but for heaven's sake line these bits up for us."

MS EVERETT (LSNSW): Doctor, we have New South Wales and Victoria on board, which is 70 per cent of the national profession, and we're getting really positive feedback from the other states that they're coming on board.

DR MUNDY: Even Western Australia?

MS EVERETT (LSNSW): Perhaps not Western Australia, but they're renowned to stand alone. Even with the Family Law Act they stand alone, so they're out of the Commonwealth Act. Every other state and territory is guided by the Commonwealth Act, but Western Australia not. Even so, we have had discussions with Western Australia and we are hopeful. We're talking to them and we think now that we have got the enabling legislation in place, those discussions are continuing, especially in COAG, and the New South Wales Attorney-General has - well, I don't want to misquote him but I know he's keen to speak to his counterpart attorneys-general in other states and - - -

DR MUNDY: This is the new one?

MS EVERETT (LSNSW): Yes, Mr Hazzard - to promote that, and also the federal Attorney-General we believe is keen to promote it as well. Again I don't want to verbal them but that's my understanding. We're quietly confident that the other states and territories will come on board because the ACT, being surrounded by New South Wales and Victoria, we think it's in their interest and we think they understand that and they will come on board. As I said, I'm quietly confident, but Mr Tidball will probably perhaps add to that.

MR TIDBALL (LSNSW): Very quickly, Commissioners. As I understand it, although I am not an expert on it, applied law schemes very often see other jurisdictions come in later in the day and I think as this was always very much an east coast push to have a large market, it stands to all commonsense that Victoria and New South Wales would be there first. It is up to us to expound the benefits of the scheme and that is what we're doing. My view is that as we do that, the others will come in.

I think, Commissioner, the main deal breaker for the smaller jurisdictions is that - and I use the ACT as an example - it has not had a co-regulator. The issues of cost and the issues of cost escalation in terms of infrastructure are always going to be smaller in a small jurisdiction where you have to add a function. Effectively now with the start-up costs covered, which the Law Society of New South Wales has covered, as well as the recurrent costs being covered, there is a very constructive conversation that we can have but we will need to explain the benefits, but I think over time you will see other jurisdictions come in.

DR MUNDY: Okay. Thanks very much for your time today.

MS EVERETT (LSNSW): Thank you very much for the opportunity.

DR MUNDY: We will now have a short break and reconvene at 11 am. Thank

you.

MR TIDBALL (LSNSW): Thank you.

MS EVERETT (LSNSW): Thank you, Commissioners.

DR MUNDY: We are ready to recommence these proceedings. For the record, could you state your name, position and affiliation and then if you wish to make a brief statement, that would be most appreciated.

MR BOWMAN (BIMF): Clive Bowman; I'm a director and the organisation is Bentham IMF.

MR ATTRILL (BIMF): Wayne Attrill, investment manager at Bentham IMF.

DR MUNDY: If you would like to make an opening statement briefly.

MR ATTRILL (BIMF): Well, the Commission has our two submissions and I suppose just in sort of very general terms, if I could summarise our response to the draft report, in relation to the Commission's recommendation that a ban on lawyers charging contingency fees be lifted, I guess our position is perhaps somewhat agnostic, in the sense that we think that the current arrangements whereby there is a separation between litigation funders who fund on a contingency basis and the lawyers who conduct the litigation is a superior model, we think it's better in terms of managing conflicts of interest and transparency. However, if the Commission is minded to convert its draft recommendation into a final recommendation, the submission we would make is that there should be a level playing field between litigation funders and lawyers acting under a damages based agreement in relation to adverse costs and it's interesting that the submissions that have been made to the Commission so far don't seem to deal with this question of lawyers being liable for adverse costs. It's an issue they have dodged in England and we submit that it's one that the Commission should take on board here and we are happy to go through the reasons for our recommendation, if you would like.

In relation to the other draft recommendation, which is the regulation of litigation funders, we support that. We strongly support that. That's been a position that we have held for a long time and again, our submission is that if lawyers are to engage in contingency funding, then the financial aspects of their funding should also be subject to the same regulatory regime for the sake of competitive neutrality. In terms of what would be the appropriate regulatory regime, the Commission has suggested that that be subject to consultation between Treasury, the Australian Securities & Investments Commission and the stakeholders and we agree with that and we would be happy to participate enthusiastically in that exercise.

There was one other recommendation that the Commission made and that was in relation to court oversight of funders' ethical and professional conduct. The

Commission drew parallels between, or perhaps drew some support from, the UK code of conduct for litigation funders, which is a voluntary code that is in place over there. Our view on the funders' interface with the courts is that we think that it would be preferable for the courts to develop practice notes or rules in consultation with the stakeholders, rather than a voluntary code. The code in the UK really arose in a particular set of circumstances and it's really the precursor to full financial regulation. I think that was the way that Lord Justice Jackson saw it and the Civil Justice Council encouraged the development of the code, because it was seen as being important to the implementation of the Jackson reforms. But I think this country has moved on and the Commission is recommending full financial regulation, so it seems to us that you might as well cut to the chase and the most appropriate way to regulate the funders' interaction with the courts is directly with the courts themselves.

DR MUNDY: Could we perhaps start by asking if you have any reflections on the recent public debate in the media with respect to what some see as an outbreak, avalanche, torrent, tidal wave of particularly class actions and particularly in relation to security matters. We are aware of it and I am sure others will put these issues to us during the course of these proceedings. I guess we are interested in the view that yourselves may have from that. We are particularly interested in trying to understand, and this is some that you will be able to answer, but one of the issues that struck is there is an awful lot of debate about funded class actions in security matters, as opposed to funded class actions anywhere else, so if there any reflections that you might like to offer us, given others will no doubt put their views to us.

MR BOWMAN (BIMF): I think we can both comment. I will start. I think that when you view comments, you need to look at where it's coming from, understand the vested interests that those people may have, so there have been some comments made by law firms who typically represent defendants and in particular, a law firm has been engaged by the American Institute for Regulatory Reform and they have a particular agenda and so I do think comments need to be put in a proper context. I think anecdotally if you look at the number of Shareholder cases that have been started as class actions, it's not a particularly large number. I think that Shareholder cases receive media attention because they are interesting and because the company is listed. Large numbers of people are affected and usually the class action follows on from a fall in the share price and that has already taken the media's attention, so the first response is look at the statistics closely and try and discard some of the nuances associated with the commentary and I don't think that there is really a large number of Shareholder cases. Then the second response is that the number is really irrelevant if they're being properly brought and if they are properly based because that is access to justice.

So even if there are large numbers, we would say that's really irrelevant if these are proper circumstances where people are having an opportunity to receive compensation. So we say there's nothing inappropriate about that; in fact that's a demonstration of funding achieving the aims which the Court has recognised are beneficial to access to justice; thirdly, I think there's some concern about litigation funders beating up cases, fomenting disputes where otherwise there wouldn't be one.

I think that that also has to be put in context. Many people are unaware of their rights and so when they do become aware of them through a process of publicising the opportunity, then they do become very concerned about seeking redress and it's a redress that's not possible, really not possible by individuals taking action because usually in these Shareholder cases the claim size is small, or for a number of people who are participants in the group the claim size is small, and the cost is great. So what might be seen to be by some defendants as beating up an action is actually an information process informing people about the opportunity and about their rights.

From our perspective we are not going to fund a case unless we think the conduct is serious because - and I know we have said this a lot but this idea about funding - you know, funders are going to fund spurious cases is ridiculous because we have a solid reputation and we don't want to sully that reputation and we don't want to go out of business, so we only want to fund cases where people are supportive.

So the cases that we fund, the Shareholder cases, are circumstances where people are aggrieved, brokers have written reports that say, "We're surprised by this information and we're concerned about it," and people are upset about it.

MR ATTRILL (BIMF): It's pretty hard to follow on from that comprehensive response - I have written down some points and they were all getting ticked off! I would reinforce what Clive has said, you need to have a look at the data and there is objective data available in this area and that's particularly the work done by Prof Morabito at Monash University. You can even have a look at some of the publications which have been published by the major defendant law firms, and in fact I think I referred to one in the initial submission where the lawyers were candid enough to say there has been no explosion in claims.

Another important point is that the regulators themselves have expressed publicly their support for funded class actions as a means of enhancing private enforcement of our securities laws, and that's an important factor to keep in mind. Finally, as far as IMF is concerned, we impose very strict criteria on ourselves as to when we're deciding whether to fund a class action, a securities class action, or not and we are not going to fund one unless we are absolutely satisfied that there are very strong claims, that there's likely to be a sense of outrage in the community, such that there will be strong demand for the class action. We have to be prepared to see it through to the end. So I think those are all points that we would make in response.

DR MUNDY: Okay. I just wanted to give you that opportunity to put that on the record because I'm sure others will put a contrary view on the record in the coming days.

MR BOWMAN (BIMF): Could I say one thing? I would be interested to hear from any defendant who comes along and says, "There was no case against us," who genuinely would be willing to provide the sort of evidence needed to support a statement, "No case against us but we just have to settle," because we are constrained by confidentiality obligations, so we can't disclose information that we have received in the course of these cases, but if that evidence were to come out, it would be interesting.

DR MUNDY: The difficulty we have in conducting this inquiry is exactly that. We can point to those matters which have been run and have been successful, indeed have failed. The concern to some extent seems to be the matters that never see the light of day but are settled privately which we can't get - we could in principle probably get access to but we would be in court defending the statute. So that's the challenge that we have but that's an issue we have regularly.

MS MacRAE: Just to come back to the point that we hear a lot about, fomenting this public concern that wasn't there originally, in relation to the cases that you vet, if I can call it that - so you have a much longer list than you would ever proceed with. So of those you proceed with and even those that you don't, how do you identify those initially? How do those issues come to mind? Would it be you being approached by a broker or an individual or - - -

MR BOWMAN (BIMF): Are you speaking specifically about securities class actions or more generally?

MS MacRAE: Any actually. I would be interested generally.

MR BOWMAN (BIMF): The majority of cases will come to us through a lawyer or from the plaintiff, the aggrieved party themselves, sometimes through a broker, and then other cases we identify through reading the press. So securities cases tend to be cases where the company is listed and there's an announcement and the share price falls and that will be publicised. So initially we would see that this has occurred and we might do some investigation but often it's also by brokers who then say, "I'm concerned about it," or our shareholders refer matters to us. So it's a combination of people coming to us and us just looking in the newspaper and seeing a potential circumstance.

MS MacRAE: I was just going to say there is a variety of views about whether or not in relation to the percentage of damages that you might take - whether there should be a cap and if that would be a percentage and then what should that percentage be. Can you just outline for us your views about that?

MR BOWMAN (BIMF): We think that would be an unfortunate intrusion into the party's freedom of contract, to set the price and I don't think that a regulator is most appropriately placed to evaluate the various commercial considerations that apply to determining the price in each particular circumstance.

A price is influenced by a number of things; risk is important, risk is very important, and I think that the parties should be left to negotiate, taking into account things like risk. Where you have other protections in place like the ones that we were talking about which we endorse, like capital adequacy and where you have a backdrop of other laws which also apply, like unconscionability, unfair contracts, I think that they are sufficient to protect against excesses and beyond that, within the normalcy of commercial negotiations, that should be left to the parties.

MR ATTRILL (BIMF): There's also a competitive market operating too. We are not the only litigation funder and nor is litigation funding the only way in which litigation can be funded.

DR MUNDY: I guess the concern and rightly stated is that you're in the business of assessing risk in relation to bringing large actions. That's what you get paid for. The

people who seek funding are not in that position and the information asymmetry between yourselves and your clients and lawyers and their clients which we've made observations about at some length in the report on face seem to be pretty similar, so I guess the concern is that whilst I accept there are laws of unconscionability of an unfair contract, for an ordinary citizen they are difficult to enforce.

It would be a very, very unlikely outcome that a person who felt aggrieved with an arrangement and a contract that was unconscionable or unfair could have the resources to bring that action against yourselves unless another funder was perhaps prepared to assist them or perhaps sensible governments had formed contingency fees and that's the reason why this issue comes because we could in principle do away with almost the entirety of the Australian consumer law and rely upon contract, the common law notions of contract, but we choose not to do that for public policy reasons, because we acknowledge the transactions cost.

How would you feel about - and this is one of these situations, where there is a concern in the community beyond those who are opposed to litigation funding for their own reasons, which we understand, but people are uneasy about this; judges are uneasy about this and they've expressed those views to us - an arrangement whereby a cap might be put in place for a period of time and then subject to some sort of review to see that the framework was working alongside reforms that might come with contingency fees, or alternatively, what alternative model of consumer protection beyond taking you to court might be appropriate, because that's what the concern is: the ability of individuals to bring those contract based actions is very difficult.

MR BOWMAN (BIMF): They do have the benefit of independent advice.

MR ATTRILL (BIMF): Yes, legal advice.

MR BOWMAN (BIMF): So if the legal advice is, "This contract is unconscionable," then they can decide not to enter into it.

DR MUNDY: Yes, that's true and they mightn't but the history of unfair contract is precisely in the contrary circumstance, where they have entered into it or the terms are unconscionable and they - - -

MR ATTRILL (BIMF): But it's usually a different situation. In most of the cases of unfair contract, the parties weren't legally represented at the time. In the

circumstances of funded litigation there is a lawyer retained whose obligation is to act on behalf of the parties.

DR MUNDY: Yes, okay. You might like to think about that because it does seem to me just to be a small - not that we're profoundly opposed to litigation funding because I think it's obvious we're not, but it strikes me as an issue that may be at large.

MR BOWMAN (BIMF): I'm not sure we fully answered your question. For the reasons that we've mentioned about the difficulty in somebody else determining an appropriate price, I think a temporary measure would be equally unsatisfactory and with semipermanent measures or temporary measures, you've always got this concern that they ultimately are really going to become a permanent measure. I don't know what would happen. Possibly all contracts would be just set at the cap.

DR MUNDY: That is the risk; that they'd all be priced up to the cap. It's an issue around consumer protection. It's not unusual for governments when they're reforming arrangements to put in temporary consumer protection arrangements. We had caps on airport prices for five years and then they went away, so I think there's some scope. I don't want to belabour the point but I think it would be something we - - -

MR ATTRILL (BIMF): It's what's motivating the proposals in relation to damages based agreements, is that where it's - - -

DR MUNDY: We're keen to ensure a level playing field.

MR ATTRILL (BIMF): Yes.

DR MUNDY: So if the cap was to be placed on damages based agreements, a cap should therefore - I mean, on the basis of your own reason, we would like them to be as - I think the Bar Association of New South Wales suggested to us that it might even be appropriate for the licence to be held by a firm who was - there should be a requirement for prudential supervision of a law firm providing funding in a damages based billing arrangement because it is essentially the same as what you do. So we're trying to get our heads around what this consistent framework might look like.

MR BOWMAN (BIMF): Including the position in relation to adverse costs

because our percentage also reflects the fact that we're taking on an adverse costs exposure.

DR MUNDY: Yes.

MS MacRAE: They did recognise that actually. The New South Wales Bar did talk about the necessity for them to be able to bear adverse costs and to be able to demonstrate they could.

DR MUNDY: Given your reflections about freedom of contract, given that there will be a licence set up, would you have a problem that a feature of that licence must be the acceptance of any adverse cost orders because the argument that says Australia is different to the US is adverse costs orders. The litigation funds pick it up.

MR ATTRILL (BIMF): Yes.

DR MUNDY: You pick them up at the moment as a matter of contract and business model, not as a matter of law or regulatory obligation.

MR ATTRILL (BIMF): Not as a matter of compulsory regulatory obligation but we're still exposed to the possibility of an order being made.

DR MUNDY: Yes.

MR ATTRILL (BIMF): Yes.

MR BOWMAN (BIMF): I think we wouldn't be opposed so long as it was limited to the period in which we were funding. So we would be opposed if it extended beyond that period.

DR MUNDY: I understand, yes. I think that's a question of regulatory design rather than not - - -

MR BOWMAN (BIMF): Yes.

DR MUNDY: Once you've exited the field.

MR BOWMAN (BIMF): Or before we come into - we don't normally take on adverse costs order exposure in relation to a case that we haven't been funding to date and then it comes to us. We only accept it from the time we start funding.

DR MUNDY: That's understood and that could then be a requirement of firms providing contingency based fees.

MR ATTRILL (BIMF): It would have this consequence: if there was a client, say, a large company that simply wanted to lay off its own costs of funding litigation from its balance sheet, it couldn't enter into a contract with us presumably to do so but retain the adverse costs risk to itself for a lower percentage?

DR MUNDY: Yes. I guess part of the issue here is thinking through the big company versus those sorts of matters. It's a design question. Okay, I think I know what I need to know.

MS MacRAE: I guess just coming back to the caps thing. I think the other reason that it's in people's minds is that we do have these caps currently where there's conditional billing, so I think people, "No, we've got a cap there," and so we think about this other kind of arrangement, "Maybe we should have a cap." So I think that's the other reason that it's in people's minds but conditional billing is - - -

MR BOWMAN (BIMF): That doesn't work very well, those caps.

MS MacRAE: On the conditional billing?

MR BOWMAN (BIMF): No. For a start they differ according to which state you're in but if the purpose of contingency fees is to increase access to justice then I think many law firms take the view that the cap, depending on what state you're in, is too low.

MS MacRAE: So they can take the - - -

MR BOWMAN (BIMF): So if you're in Victoria, there is a 25 per cent uplift on your fees. For risking all your fees, I think the view of many is, "That's just not worth us doing it."

MS MacRAE: Again you'd say there are sufficient protections elsewhere and you wouldn't see a need for a cap on contingency fees either?

MR BOWMAN (BIMF): That's right. I agree with the point about our stance is a level playing field and so consistently with that, we don't advocate that there be a cap on damages based agreements.

DR MUNDY: In your submission you note that courts are taking different points about adverse costs orders against litigation funders and lawyers charging on a no-win, no-fee basis. Would you expect that behaviour to extend to circumstances where lawyers were allowed to charge on a contingency fee basis? Is it something, if we went down this level playing field that the statutory framework that sets this up would need to draw judges' attention to, without wanting to fetter judges unreasonably?

MR ATTRILL (BIMF): Yes. I mean, we drafted a suggested rule in our submission actually to deal with that. I think the issue is really just clarifying the law. There is dicta in some of the reported cases under conditional fee agreements where judges speculate about at what limit would an uplift fee convert the solicitor into effectively a real party to the litigation like a funder, but they don't need to take that very far because of the current restrictions. It is possible that over time the courts would develop their own principles that would be equivalent to the approach that they take to litigation funders; but our view is that to make the position quite clear, it would be better to either have it in rules or regulations or legislation so that it is clear that the courts do have that power.

DR MUNDY: Your view presumably would be that that approach would be more likely to facilitate the development of the market than waiting for the courts to have developed a body of precedent.

MR ATTRILL (BIMF): Yes, because what will happen is that you will get satellite litigation which is the bane of any regulatory reform and to the extent that the policy-makers can make everything clear and neat and tight, then it reduces that risk of quite frankly just wasteful satellite litigation.

MR BOWMAN (BIMF): Clarity is important for consumer protection.

MR ATTRILL (BIMF): I agree.

DR MUNDY: The issue about disclosure - and you talk about an obligation upon lawyers to be suggesting that there should be an obligation to disclose how litigation might be funded. I guess the question we have there, particularly if you go down the path of damages if you are allowed contingency fee based arrangements, is how we are actually going to enforce this. I mean, are we going to wait for a complaint to a legal services Commission or - - -

MR ATTRILL (BIMF): What happens in the UK now - and I'm aware that this obligation has been in place since at least 2007 and possibly even earlier - is that basically the regulator takes a deep interest in it. I have seen bulletins issued by the Solicitors Regulatory Authority reminding lawyers of their obligations to advise their clients in relation to funding options. I suspect that what happens is that the regulator in their normal sort of oversight of law firms - it is just one of the things that they check up on periodically.

DR MUNDY: You would expect that this advice would be tailored to the nature of the matter.

MR ATTRILL (BIMF): Yes.

DR MUNDY: In a relatively small matter, a conditional fees basis might be appropriate.

MR ATTRILL (BIMF): Exactly.

DR MUNDY: But in a much larger matter obviously - - -

MR ATTRILL (BIMF): And it also turns the lawyers' attention towards whether there is any insurance that might respond to the claim and it focuses both the lawyer's and the client's mind more directly on what it is going to cost, what the liabilities are including adverse costs and how the client is going to actually finance those.

MS MacRAE: We had a little bit of a discussion about settlement offers with the New South Wales Bar. There has been concern that the current rules regarding rejection of favourable settlement offers disproportionately punish plaintiffs who reject the offers and insufficiently penalise defendants. Would you have a view

about that? Would you say that they need any kind of reform?

MR BOWMAN (BIMF): Are you talking about things like Calderbank offers, the cost consequence?

MS MacRAE: Yes. Someone makes an offer and you say, "I don't like that offer" and it turns out that the judgment is more favourable.

MR ATTRILL (BIMF): Or less favourable than the offer?

MS MacRAE: Less favourable, yes.

MR BOWMAN (BIMF): And you have got to pay indemnity costs.

MS MacRAE: Yes - whether those arrangements are appropriate or not.

MR BOWMAN (BIMF): I think they probably are. I think it does encourage people to think seriously about settlement offers and think seriously about making them. There is litigation around whether an offer made was genuine, because some people seek to perhaps use the system when they make very low offers which they know won't be accepted because they want to get the cost protection and so maybe there is some scope for looking at it. I think generally it is a mechanism that does encourage people to look at early resolution.

I don't know whether this is part of your ambit, but other things which encourage early settlement I think are also beneficial, like the Federal Court Rules which now require pre-proceedings discussion. We are seeking to embrace those procedures and we are actively encouraging people we fund to seek to resolve proceedings before taking them. There is some evidence that that is working. I think also security for costs needs to be looked at because you also have a lot of litigation around that and it is in defendants' interests to come up with some massive figure so that the plaintiff is incapable of putting it up and so stifling the litigation. We see some circumstances where the defendant has caused the plaintiff to be in an impecunious position and then seeks to exploit that position by asking for a large amount of security. There is always a balancing exercise but I think sometimes it can be out of whack. That is a much longer answer to your question than you probably wanted.

MS MacRAE: No, not at all.

DR MUNDY: Sorry. Were you about to say something?

MR ATTRILL (BIMF): No.

MR BOWMAN (BIMF): I just asked him whether he agreed.

DR MUNDY: One of the issues that we have been bringing our mind to in respect to costs orders and also recovery of court fees has been this idea that costs broadly defined and fees should in some sense reflect the scale of the matter, to put some brake on people in a sense trying to exploit the other side by running up fee bills on relatively small matters. We can get our heads around that. I guess one of the issues that interests us though is where you have matters where the outcome is not of a monetary nature but it may well be an environmental case where interlocutory orders are sought. Now, I suspect they are not the sort of things that you would naturally want to fund but do you have any views about how we might think about that?

MR BOWMAN (BIMF): I just need to understand the context of your question. It is where you're seeking to require the plaintiff and the lawyers to put up a budget or something?

DR MUNDY: A community comes to you, a pile of residents concerned about the development of a mine. The orders that they seek are to overturn a decision to approve the mine. Obviously that is a significant economic value to the miner, a significant economic value and amenity value to the people who have come to you and the government might have an interest in there as well. I guess what we are interested in is how costs in those matters and fees in those matters should be thought about where the economic value is very high but there mightn't be a monetary settlement or not a particularly large monetary settlement in the matter.

MR BOWMAN (BIMF): The costs you are talking about are adverse costs?

DR MUNDY: Adverse costs and court fees, because the matter could go on for a while.

MR ATTRILL (BIMF): You have got a proposal for protected costs orders, haven't you, in that setting - - -

DR MUNDY: Yes.

MR ATTRILL (BIMF): - - - which is designed to protect public interest litigation.

DR MUNDY: Yes.

MR ATTRILL (BIMF): And I would think that would be essential because I can't see anybody wanting to be prepared to take on a mining company and risk losing everything.

MR BOWMAN (BIMF): I think it's important to maybe give the court greater discretion.

MR ATTRILL (BIMF): I'm thinking case management too.

MR BOWMAN (BIMF): There's an argument that the rule that the loser pays is currently a presumptive - or there's a prima facie position the loser pays, so maybe there needs to be some greater discretion in the courts so that isn't seen to be the default position, so the court can exercise - - -

MR ATTRILL (BIMF): Isn't the question how do you stop the mining company investing millions to defeat - - -

DR MUNDY: The question is more how do you think about a costs order in a significant economic case where there is - you know, if it's a claim over a million dollars, we can think about a million dollars because one party is going to get the million dollars or not. It's not a big issue.

MR BOWMAN (BIMF): It's an interesting thing to think about though.

MR ATTRILL (BIMF): Well, this brings us back to the absence of data, but perhaps there's data that's collected by the Land and Environment Court where they engage in this sort of litigation all the time. That's one of the points that we would like to support in the Commission's report outside of the area that we're primarily concerned with and that's your recommendations in relation to collecting data. There is a real problem with understanding the functioning of the civil justice system because it's so hard to get data. I don't have any suggestions as to who is going to do that. There will have to be some sort of powers presumably to collect - even on a de-identified basis you're wanting to collect confidential information, but I think that's really very important.

DR MUNDY: I'm mindful of the time so thank you very much for your time here

today and the submissions you have made to us.

MR ATTRILL (BIMF): Thank you.

DR MUNDY: The next participant is the National Pro Bono Resource Centre. Could you for the record state your name, position and affiliation, and then perhaps make a short opening statement.

MR CORKER (NPBRC): My name is John Corker. I'm the director of the National Pro Bono Resource Centre based at the University of New South Wales.

MS HO (NPBRC): I'm Leanne Ho. I'm the senior policy officer at the National Pro Bono Resource Centre.

DR MUNDY: Off you go.

MR CORKER (NPBRC): I wasn't sure how you want to proceed, whether it's questions or - - -

DR MUNDY: If there's anything you feel you need to get off your chest, we're more than happy to hear from you and then we will move on to questions.

MR CORKER (NPBRC): Okay. We have made two written submissions to the submission in November 2013 and just recently again on 21 May. Thank you for the opportunity to come and talk to you. We sort of note from the draft report that the Commission expressed a sort of strong understanding of the pro bono sector in its draft report and we thought that was good.

What I thought I would do is maybe just talk a little about the pro bono sector globally, put things in context, make some short comments in relation to the sort of barriers and constraints that were identified in the draft report in terms of freeing up lawyers to do more pro bono legal work. A couple of comments about broader policy issues that the draft report raised: one was the idea of a sort of single pro bono target in relation to government tender schemes. The other was really in relation to measurement and evaluation comments that the Commission has made. Then maybe finally how the centre can help address some of the issues identified by the Commission. I would say feel free to ask questions or interrupt at any time because that's the value of getting together to talk about these things.

The centre is an independent expert body that maintains a sort of national perspective across the entire legal profession and we have been in existence for about 12 years. Our main objective is, you know, we have a view to grow the capacity of the Australian legal profession to provide pro bono legal services that are focused on increasing access to justice for socially disadvantaged and/or marginalised persons and furthering the public interest.

A lot of our work is with firms and particularly with the larger firms, those

above 50 lawyers, and I suppose the reason for that really is that the Australian pro bono movement has very much been firm-led in Australia. You know, we're talking about the structured and coordinated part of the pro bono sector. That's where we mainly work. Those firms have become increasingly strategic in the type of work they do and the way in which they work. That ideology, or we often call it a pro bono movement, has sort of filtered down from the larger firms to more of the mid-tier firms and the mid-size firms. We tend to be doing more work there than in past years.

Australia has a number of strong pro bono clearing houses. It in fact has some form of pro bono clearing house in each state and territory now, so that's a unique aspect of the Australian pro bono sector. Australian barristers seem quite keen to support public interest litigation in appropriate cases. That's an important aspect of pro bono in Australia and an important aspect of democracy in terms of the judicial or the legal sector working effectively.

The other thing is that the Australian sector has created clever partnership models and a diversity in the way that it helps, so there's the Homeless Persons' Legal Clinic, there's the self-represented litigation services, there's the Justice Connect not for profit law service. These things have expanded the range of legal services that law firms can provide and in a sense play to their strengths as well as being involved in clinics where large firm lawyers often have to do training to provide that type of service, but nevertheless a sort of diversity of offerings and models.

Having said all that, pro bono is a limited resource. It's limited in expertise. Sometimes in areas where there's great legal need, such as criminal and family law, large firm lawyers don't have those skills. They don't have the knowledge. As the Commission laid out in its draft report, our research around - you know, which we loosely called Why Not Family Law - illustrated that point well, I think.

They're limited in capacity as well from time to time and subject to industry pressures, particularly mergers and more recently globalisation, which has really changed the face of the Australian legal sector quite considerably, so there's cultural issues about how much pro bono will be done when a firm merges with a London-based or a Shanghai-based firm. It's one of those issues that may not be at the top of the scale.

In that sense it's a service that can't be necessarily relied on. It's voluntary in nature. Nevertheless, it's strategic in the sense that it does make a difference where it can and I think can be compared favourably particularly to the UK pro bono sector where they have probably spent a lot more time working more in the sort of law centre area and so they're more substitutable with government-funded legal services,

which is sort of the main issue that I wanted to make initially, is that it's not a substitutable product in that way in the economic sense of being within a market.

The pro bono legal services are sort of quite unique and diverse and have unique characteristics, whereas government-funded legal services - primarily into Legal Aid which covers criminal law and family law, a little bit of money for civil particularly in New South Wales, probably better than other states, and then the rest of the money goes into community legal centres - you know, so the main other bucket - and the Aboriginal and Torres Strait Islander Legal Service, the family violence protection units. And that broad government-funded legal assistance sector tends to be focused on crime, family, certainly community education from the CLC sector and some discrimination cases I suppose. One of the great strengths of the Australian pro bono sector is that it has really carefully picked up bits of work that others were not going to do or not likely to do.

Other reasons why pro bono is not a substitute for adequately resourced, publicly-funded services is the mismatch of expertise and need. 65 per cent of the work done by firms above 50 lawyers was done for organisations, not for individuals. That in a sense is quite an important statistic to show you that they are using more their corporate law skills to assist organisations who are then assisting people, individuals who are in need; but it is more at that level that a lot of the work is done.

Turning to the barriers to increased pro bono which the draft report identified, there was this idea of costs recovery and we have argued for some legislative enforcement to make clear that in a matter where a party is acted for pro bono, the only way to really get a level playing field, particularly in terms of settlement prior to hearing, is for there to be a clear right for that party to get a costs order in their favour, should the judgment go in their favour.

DR MUNDY: My sense of your submission on that was that - and I am not wanting to put words in your mouth - almost that the award of costs should be blind to the financial arrangements between the lawyer and their client, but then there is a question of where the award of costs should go.

MR CORKER (NPBRC): That's right, so if in your recommendations you suggest it should be clarified - and we say it should be, particularly to distinguish it from no win, no fee type matters or contingency arrangements. The UK arrangement has been, as you know, is that there is an Access to Justice Foundation and there is a legislative right to make pro bono costs orders. All the feedback we have had in Australia is that that wouldn't suit the Australian system. There's a number of reasons for that. One, there are not that many costs orders; two, I think the large firms feel that barristers should be paid in the first instance. That is a legitimate disbursement, particularly for a junior barrister who is a self-employed person, if

they can get their costs back. They don't expect to but if they can or if it can be offered to them, it is much more likely that they will take on another pro bono case, so that feeds the system.

DR MUNDY: And presumably disbursements, experts and all those sorts of things, you would expect, would be paid. The question then really comes back to I think the only place where there is some dispute. The question is: what happens to the solicitors and barristers? Perhaps silk will cop it on a pro bono basis, so if there is an understanding up-front that junior barristers are acting effectively on a no win, no fee basis - - -

MR CORKER (NPBRC): Yes.

DR MUNDY: But the solicitor is not acting on that. The solicitor is on a properly understood pro bono basis. The question then I guess goes to: where does the money go?

MR CORKER (NPBRC): What we are suggesting in our recent submission - and this is in consultation with a number of firms - is that there be some sort of self-regulatory protocol so it doesn't need direct regulatory intervention and lawyers agree. They sign up to this and they say, "Okay". The money will either go first of all to disbursements and to pay barristers if they want to be paid; second, back into our pro bono practice to facilitate further pro bono work or, thirdly, to a charity of choice, to make clear that it is true pro bono work.

DR MUNDY: If the pro bono work was being organised, for example, through a community legal centre, would it not be unreasonable perhaps that the money could go there? It would be analogous to the situation that the money went to the firm's pro bono scheme.

MR CORKER (NPBRC): Indeed, and that was another aspect of this sort of draft idea: either to the community legal centre or the community organisation that had been the subject of the litigation or in fact to the community organisation that had referred the matter. All of those would be options open to the plaintiff I suppose or the applicant who is the benefactor of the favourable costs order.

DR MUNDY: We have sort of moved on to the issue of barriers. The draft recommendation 23.1 talked about volunteer practising certificates. We had the Law Society of New South Wales before us earlier on. They weren't so keen on the idea, either because they didn't think it was necessary or there were issues around continued professional development and insurance and the important contributions to the fidelity fund. Do you have a view on those sorts of issues and how those issues may be dealt with if you are of a mind that they were legitimate to be dealt with?

MR CORKER (NPBRC): Our experience is that there is demand for those certificates, particularly from retired and career-break lawyers essentially. What they say to us is they want to have that continued professional development. Even they will say that is a necessary part of them continuing to practice. That is one aspect of it.

DR MUNDY: Who would pay for that? Presumably them out of their own pocket.

MR CORKER (NPBRC): Out of their own pocket, or there is quite a lot of free CPD available. There's lots of way that you can get your CPD points without having to spend that much money. You can write an article for a magazine. Even that will give you CPD points. The aspect of the fidelity fund I think is a more difficult one because that is a direct payment of money. What we would probably say is for the benefit of the profession as a whole, that is just something that won't - for those few lawyers who are willing to provide their time free of charge, we don't think it is appropriate that they pay into a fidelity fund.

In terms of insurance, we at the moment provide a PI insurance scheme for in-house counsel without charge to them which was set up actually through Lawcover in New South Wales. We pay the excess if there is any claim. It's to facilitate pro bono work. In the same way we would see that model working. In fact we have had one case recently in Queensland where they have a slightly better system or project for a lawyer to do who is on a sort of career break, to do a piece of litigation, and provided the insurance, so we have covered off on it that way.

DR MUNDY: In these limited licences, the expectation could reasonably be that they are insured and from what I think you are saying, the insurance will happen somehow.

MR CORKER (NPBRC): The insurance will happen somehow. I mean, the other issue - I don't know whether they raised it with you - is really the supervision; you know, whether a person has - - -

DR MUNDY: No, they didn't raise that.

MR CORKER (NPBRC): That's the other issue I think that we touch on in our submission. It's important that these lawyers are capable and are acting in a professional manner, so there needs to be some regulation and presumably under the new Legal Practice Act, the board would have the power to sort this out, but it may be that if they haven't practised for three years, then they need a supervising solicitor who has got an unrestricted practising certificate to whom they are working. Those sort of issues need to be in place as well.

DR MUNDY: I can imagine circumstances with former senior lawyers who are minded to be involved with this. It's a bit like when very senior air force officers go and get supervised by flight lieutenants to keep their ratings up. Is that something that should be mandatory or discretionary when the licence is applied for? I suspect you would get a lot of cases where that is just not going to be necessary.

MR CORKER (NPBRC): I think mandatory in terms of CPD, yes.

DR MUNDY: Yes, but this supervision question.

MR CORKER (NPBRC): I think judgment has got to be exercised in terms of the person's background and experience and capability.

DR MUNDY: But that judgment could be exercised at the time of the licence being granted, rather than as of - "You will need to be supervised".

MR CORKER (NPBRC): That would be our view, yes.

DR MUNDY: So it would be a discretionary thing on who was issuing it.

MR CORKER (NPBRC): Yes. For example, there is a retired judge in New South Wales who has been doing a lot of work for the Aboriginal Legal Service and appears on behalf of clients. He is still paying full fees, full insurance. He has been doing it for five or six years. He rings me every year and he says, "Is this ever going to change? This is really pretty unrealistic." He drives all over the state at his own expense. If only he could just get a reduced fee certificate and insurance, he'd be happy.

DR MUNDY: He gets a judicial pension though.

MR CORKER (NPBRC): He does; he does.

DR MUNDY: You mentioned before issues about targets.

MR CORKER (NPBRC): Yes. In the draft report you raised the idea of a single target in terms of efficiency. At the moment there's the target that we run, the national pro bono aspirational target which is tied into the Commonwealth government Legal Services Multi-Use List arrangements and then there's the Victorian government scheme which started earlier which has the condition of being on the panel that you spent 15 per cent of your money on pro bono. Slightly different tests. Slightly different reporting mechanisms.

DR MUNDY: Do you have any insights I guess with respect to those jurisdictions that don't have targets and why they don't have targets or are they going to move to targets?

MR CORKER (NPBRC): My understanding is that particularly in New South Wales and Queensland which are the two largest ones in terms of lawyers, they have for quite some time been trying to work out their legal panel arrangements in terms of the broader issue of what mechanism they put in place to control their agencies and the way that their legal spend is carried out in relation to private firms.

There are different models around panel arrangements. In fact the idea of the Legal Services Multi-Use List as compared to the Victorian panel are two broad examples of different approaches to that. One is just a list which you apply to be on. The other is a proper tender contractual arrangement, so I think some of it is tied up in them working out what they do in that space. We've certainly suggested to both those governments on a couple of occasions that it's a good opportunity to leverage from your purchasing power and include some pro bono conditions in whatever arrangements you come up with. We get differing responses from time to time, so we support the draft recommendation in the report that all governments should adopt. In American terms, it's a no-brainer in terms of leveraging off your purchasing power. The evidence in Victoria and the Commonwealth is that it has been very successful.

DR MUNDY: Beyond the broad, given the different nature of purchasing range which can be legitimately chosen, we shouldn't be going too hard on specificity but rather just dealing with the principle in general?

MR CORKER (NPBRC): I think so, although there is clearly an efficiency point that if the target is standardised and the measurements are standardised, it's much more efficient for law firms to comply with that. It's much more efficient to government to comply with that as well. Law firms really don't like the bureaucratic stuff that's associated with complying in pro bono space. It does annoy them, so the simpler that can be and the more uniform that can be, the better the system is likely to be overall.

DR MUNDY: Was there anything else? We're just about done. Was there anything else you wanted to raise with us?

MR CORKER (NPBRC): Look, one thing I would like to raise is why we think a time based rather than a financial based measure is better for these systems and for pro bono work generally. Our target is based on hours per lawyer per year. It's a fixed constant an hour, as we know, and it takes into account firm size, so an hour is

an hour is an hour, as I'm heard to say often enough - - -

DR MUNDY: Yes.

MR CORKER (NPBRC): - - - whereas the financial measurements which some firms prefer to get into and in various contexts, it can be misleading and it creates problems in comparisons between providers. That's an issue within firms even, where the financial side say, "Look at all the money we're spending on pro bono," and the other people say, "No, a lot of it is actually below the line cost. It's busy people that are doing the pro bono work," or "It's not a realistic measure."

The other factor is that pro bono work by its nature just doesn't relate to commercial rates in law firms. It's the nature of the work to say that a partner charges out at \$550 an hour and he has done an hour's work on it. A Legal Aid lawyer may well have done a lot more work in a similar role and are obviously paid a lot less. So those costs measures really do create some problems.

DR MUNDY: And did it need a senior partner to do the work?

MR CORKER (NPBRC): That's right, so what we push for is the time based measurement. We try and push that right across the sector, for various reasons, so we encourage the Commission to look at it that was as well.

DR MUNDY: Thank you. That has been very helpful.

MR CORKER (NPBRC): Thank you.

DR MUNDY: Thanks for both your submissions. You have been very helpful.

MS HO (NPBRS): Yes, thank you.

MR CORKER (NPBRC): Thanks very much.

DR MUNDY: I think the next participant is Melanie Schwartz. Could you state your name and your affiliation for the record, please?

MS SCHWARTZ (ILNP): My name is Melanie Schwartz. I'm a senior lecturer at the University of New South Wales and a chief investigator on the Indigenous Legal Needs Project.

DR MUNDY: Melanie, would you like to make a brief opening statement before we grill you?

MS SCHWARTZ (ILNP): Sure, thank you. I On behalf of my colleagues at the national Indigenous Legal Needs Project thank you for the opportunity to make oral submissions. Our project is an ARC funded grant that has been running for the last three years with the aim of assessing the extent of civil and family law needs of indigenous people in Australia. The full project will take us to 40 communities in Australia with significant indigenous populations, ranging from metropolitan to remote communities across five jurisdictions. At the moment we are three communities shy of completion of our work.

The research is affording a truly national picture of need for indigenous people in civil and family law, going a long way, we feel, to answering some of the policy questions posed in table B.1 of the draft report. The research also provides an important evidence base for understanding what the current obstacles to access to justice are for indigenous people in civil and family law and how they might be overcome.

I'd like to speak briefly to our written submission in the light of the draft report. Obviously my comments will centre on indigenous specific issues. As our submission indicates there are high levels of civil and family law need among indigenous people in Australia. If we examine for a moment just one area of sustained need, housing: across our four completed jurisdictions, the picture is quite telling.

In Victoria 42 per cent of indigenous people we talked to said that they'd had a legal need around housing in the last two years and only 22 per cent of those people had sought or been able to access legal advice. In the Northern Territory 54 per cent of our focus group participants have legal needs around housing and of these, only 34 per cent of respondents had accessed legal help.

In Queensland 44 per cent had had a housing issue in the last two years and less than 21 per cent of people had accessed any legal advice. In New South Wales 41 per cent of indigenous people that we spoke to had had a legal need around housing and only a quarter had accessed legal advice in relation to it. This is only

one area of legal need that we looked at. Although it was a very high area of need, the picture here is very clearly one of acute legal need coupled with low current levels of access to legal advice.

Moving now briefly to access to legal advice, it's important to note that the overwhelming observation of both the community members that we spoke to and service providers was that Aboriginal people preferred to go to Aboriginal Legal Services for help. On numerous occasions we've heard from people who attempted to find help for civil or family law issues with ATSILS and when they needed to be referred on, they failed to pursue advice from non-indigenous specific services. Aboriginal legal services are the go-to organisations for indigenous people facing legal problems and because ATSILS are not adequately resourced for the most part to provide civil and family law services, indigenous people with often high levels of complex legal need are being lost to legal service provision, either being they don't want to access non-indigenous legal services or because they didn't receive an adequate response in the moment that they were reaching out for help for the issue that they were facing and when the moment passed, it was too difficult for them to start again at a new or unfamiliar service provider.

There is evidence that ATSILS practitioners work harder with clients in more complex legal needs for less money even than their Legal Aid counterparts. In order to better service indigenous civil and family law needs, ATSILS should receive more funding and that funding should be specified for civil and family law matters. Having said that, there is undoubtedly, as the Commission's draft report identifies, an ongoing role for non-indigenous legal services in addressing these high levels of civil and family law needs in the indigenous population and I wanted to bring to the Commission's attention the pilot program that Legal Aid New South Wales currently has in employing Aboriginal field officers specifically for civil and family law.

Prof Chris Cunneen and I have just completed an evaluation of the pilot and that evaluation shows that this role has been instrumental in increasing both the quality of legal service to indigenous people and the quantity of that service in civil and family law. The pilot has involved the employment of local indigenous people in the three areas that are being piloted to undertake client care, CLC to establish outreach services and cultivate partnerships with other organisations, as well as providing a consistent indigenous presence in communities around these issues. The initiative works particularly well when the field officer is housed within an Aboriginal Legal Service office to capture clients who present at the ALS with multiple legal issues or who attend the ALS as a preferred service provider and can then be dealt with there and then by the field officer.

The field officer typically provides referrals to Legal Aid or private practitioners and then continues to support the client through to the resolution of the

matter. I commend this model to the Commission not as an alternative to adequate funding as Aboriginal and Torres Strait Islander Legal Services but as an additional necessary measure, and in closing, can I reiterate the importance of addressing the high levels of civil and family law needs, particularly in our indigenous population. Whilst the astronomical levels in Aboriginal criminal law needs tends to eclipse the issue, the truth is that it's only by addressing these underlying issues which are often also precursors to criminal matters, that strong individuals and communities with capacity for social and economic growth will ultimately be built. Thank you.

DR MUNDY: You will appreciate this better than we do. We have relied quite heavily on the Law Foundation survey because that's what is available to us and it certainly identifies indigenous people as a group with incredible and profound legal need. We are just wondering, just briefly, given the differences in methodology between your work and the way the Law Foundation works, particularly given it's a telephone based survey, what would your view be about the relative outcomes? It has been suggested to us by others that when it comes to groups with more profound complex needs, because of the basis of the survey methodology, that it's probably understating the extent of need for disadvantaged groups. Have you tried to marry them up and have a look at them?

MS SCHWARTZ (ILNP): We haven't married up them specifically but I agree with that assessment. I think that when you look specifically at indigenous people, telephone interviews need to take in a range of considerations: the fact that people may not have telephones, that English might be their third, fourth, fifth or sixth language and speaking over the phone may not be something that they can easily do, and that it's much more productive in getting information from indigenous people when you are sitting face to face with them. That's why we used the methodology that we did, going and sitting with people, and I think that's certainly more productive of research outcomes than you would get over the telephone.

DR MUNDY: In a longitudinal sense, do you have any observations to make about the level of legal need within indigenous communities broadly and whether the level of unmet needs has been growing over time?

MS SCHWARTZ (ILNP): Our current research obviously doesn't take a longitudinal approach. My observation really would be that it's a demographic with a high level of need, whatever way you cut it, so whether that's been growing over time; it may be that in certain jurisdictions, because of law and policy changes, that the needs will have increased. We have seen that even in the three years that we have been conducting this research in the Northern Territory, for example. Talking to people about their experiences in housing is a good example, since the Northern Territory emergency response of the interventions showing that those types of policy contexts really do make a big difference in terms of legal needs and even in the

criminal justice sphere, as we have moved towards a more punitive approach in criminal justice, which disproportionately affects indigenous people, that then has a knock on effect in terms of civil and family law needs, particularly in prison affected indigenous people, so I would expect to find that the level of legal needs over a long period of time will have been consistently high and in jurisdictions where there have been more punitive approaches that impact disproportionately on indigenous people in the criminal justice sphere and elsewhere, that that would serve to increase the level of need as well.

MS MacRAE: One of the questions initially: your current research is subject to a grant. Is it going to be a one-off or are you likely to be able to do a repeat at some point to get a longitudinal picture or - - -

MS SCHWARTZ (ILNP): At the moment it's a one-off.

MS MacRAE: Right.

MS SCHWARTZ (ILNP): So that the funding will finish within the next 12 months. Whether or not we will be able at a future date to do some update to that or whether the legal services themselves will be in a better position to assess the need in the future because of the foundations that this work lays I don't know. It may be something that we return to and we are interested in exploring legal need, continuing to explore legal need.

MS MacRAE: You said that your work is covering five jurisdictions and I know you are not quite finished yet but it sounds like you are nearly there. Is there anything emerging from your data that gives you lessons that are learnt between jurisdictions about things that work and things that don't? You mentioned the Aboriginal field officers trialing in New South Wales appearing to be very successful. Are there any things that you have learnt between jurisdictions about things that work and that might be transferable?

MS SCHWARTZ (ILNP): Yes. In terms of access to justice, what is consistent across jurisdictions is that legal service provision that takes place within the community rather than within a legal service provider context is more likely to be successful for indigenous people, so partnership with community controlled organisations, anything from Aboriginal corporations to women's or men's shelters, just depending where the hubs are for the community, where there's outreach services that take place in the community context where people already are and can be captured seem to have higher levels of engagement with communities. In communities that have access to community legal education initiative, the level of understanding around legal needs is much higher and therefore access to remedies is higher. So certainly an emphasis on engaging community so that they can better

understand what is a legal issue, that was one of the things that arose in our research; that people may not identify things as legal needs as such, even in things like housing that I mentioned and certainly in areas like discrimination where people might see it as a fact of life rather than a legal issue that has a legal remedy. So education about what civil law is. You know, even people working in the area sometimes in communities didn't really know, you know, people working in community support roles. So Outreach services into community and community legal education would be two of the things that really stood out as being really important for increasing access to justice.

DR MUNDY: We had a discussion with the Disability Advocates Network yesterday in Canberra and there was this idea that - the idea of a almost a legal health check, which community based workers could be trained, skilled up to do. Would a similar piece of work be useful, do you think, for people who are working in assisting indigenous people with issues?

MS SCHWARTZ (ILNP): I think so, and I know that there are some organisations who are trying those types of approaches. Aboriginal Medical Services, for example, while their clients are there, they're sort of screening them for referrals.

DR MUNDY: So this will be consistent with your idea about trying to deliver information and services through existing community rather than putting a "Here's the legal shop," sort of thing.

MS SCHWARTZ (ILNP): Yes, I think so. So that would be a good way to identify legal need. The question then arises about servicing the legal need which is another question altogether.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): So it's all very well to identify it but then people have to have an effective way of addressing it, also in a way that is appropriate to whatever their circumstances and geographic realities and that kind of thing are. Yes.

MS MacRAE: Just in relation to housing being such a big issue - - -

MS SCHWARTZ (ILNP): Yes.

MS MacRAE: Do you have a feel for how much of that would be government housing and how much would be private?

MS SCHWARTZ (ILNP): Mostly Department of Housing.

MS MacRAE: Yes. Okay.

MS SCHWARTZ (ILNP): Or indigenous housing.

MS MacRAE: So is there a place for better management through - I mean, we can try and deal with the Aboriginal people that are having the problem or is there something more systemic in the way that the departments are working that might give you a better - you know, is there something more - a source you could do to try and prevent some of those problems before they arise?

MS SCHWARTZ (ILNP): Absolutely. Yes. I think so. Many of the issues that arise specifically with housing are things like maintenance, so really quite major things that need to be repaired that are not being repaired in a timely way and then, you know, in many cases go on to be an actual hazard in the house. And it's a difficult one because when you're a tenant of public housing you're walking this fine line with the housing authority of not wanting to get on their bad side.

MS MacRAE: Yes, push it aside in case you get thrown out.

MS SCHWARTZ (ILNP): Exactly. There is a - you know, people don't want to lose their housing. And because the avenue of redress is first and foremost with, you know, the housing authority it's not always a successful avenue for tenants. Yes, so it would be certainly sensible for there to be things put in place within those authorities to deal with the issues that arise at an early stage and in a way that actually resolves it for the tenant satisfactorily before it progresses to it being an actual dispute that needs to go to the tribunal or the - or because people don't understand the nature of their obligations they then stop paying rent because the repairs aren't being done and then they have an eviction issue and then it goes to the tribunal. So it can really escalate to become a legal issue.

DR MUNDY: We make the point more generally that government agencies, particularly at a state level, not so much Commonwealth, should put in place dispute resolution frameworks — which Commonwealth agencies do as a matter of policy, but state agencies don't — and I guess the idea of that is to chop these matters off before they end up in court or some sort of formal judicial or quasi-judicial process in a tribunal. Do you have any observations about the extent to which these non-court based mechanisms are currently being used and perhaps also the sense of why they aren't being used by government agencies? Because it seems what you're saying is that these things escalate, they get out of hand and it seems that with a bit more care and attention upfront by government officials that they could have been nipped in the bud.

MS SCHWARTZ (ILNP): So why they're not being used from a government perspective rather than from a community perspective?

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): I don't really know the answer to that. I mean, I know that, you know, staying with housing, the tenants are not always model tenants.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): Usually, you know, there's a complex of issues that arise with the tenancy anyway. I don't know why it's not something that - I don't - I just don't really know from the government perspective. I know that from the community perspective even if there were non-legal mechanisms or non-escalated mechanisms that they could access there would still be a need for people in support roles to assist people to get along to those forums and to represent their issues and their needs. Yes.

DR MUNDY: Okay.

MS MacRAE: I was just interested with the Aboriginal field officers project we've been working on, one of the major barriers that we've identified in our report and I'm sure that you're well aware of it, is the problem that you have with the multiplicity of languages and the lack of interpreters in courts, but I would imagine for field officers they would often have a similar issue, wouldn't they, if they're going into a community and they've got to service a relatively broad area. How do they cope with those language issues?

MS SCHWARTZ (ILNP): Well, the field officer pilot program for legal aid is only a New South Wales based program, so you don't get the languages issues arising as much as you would in other jurisdictions.

MS MacRAE: Okay.

MS SCHWARTZ (ILNP): So that may be a question that's better for Aboriginal Legal Services and Family Violence Prevention Legal Services in the Northern Territory, for example.

MS MacRAE: Okay.

MS SCHWARTZ (ILNP): But as a sort of a framework question, I think that the idea is that the field officers come from the community of need.

MS MacRAE: Yes.

MS SCHWARTZ (ILNP): Assuming that that field officer was able to straddle English and the traditional languages well, that that might go some way to providing some bridge.

MS MacRAE: Yes.

MS SCHWARTZ (ILNP): A linguistic bridge as well as a bridge in many other senses between the community and legal service provision. That's the value of having someone who's local to the community, that they can bridge the range of issues that prevent the community from effectively accessing services.

MS MacRAE: And was it difficult to source individuals to take on that role, do you know?

MS SCHWARTZ (ILNP): There have been now four individuals over those three roles in the life of the pilot and it's fair to say that each of them are extraordinary. They - - -

MS MacRAE: That's what I'm figuring.

MS SCHWARTZ (ILNP): Yes.

MS MacRAE: I can imagine they would have to be pretty extraordinary people to do that, yes.

MS SCHWARTZ (ILNP): They really are. They really are, and Legal Aid has been fortunate to be in the position of getting that right really first off. But there are a number of extraordinary people, community workers who are working in their communities. It may be that they need some orientation towards legal service provision but [indistinct] has a course that can do that, a - you know, a legal support skills course.

There are a number of extraordinary individuals that are working in their communities so, yes, it does need to be someone who has a great deal of initiative and who can deal with the lawyers as well as dealing holistically with the community, but luckily that's something that many indigenous people have in spades, so - - -

MS MacRAE: And I'm assuming it being a trial there's sort of been a limited funding budget or something for that. If the trial looks successful is there guaranteed money for something like that going forward, or is it something that Legal Aid - I

might ask Legal Aid later, but, yes, whether they have funding in the budget?

MS SCHWARTZ (ILNP): I'm sure Legal Aid will speak to that. I am hopeful that there'll be funding for it in the future. Given that the evaluation has shown it to be such a successful initiative it would be great if it could be extended. It's only in three small areas.

DR MUNDY: Where are they?

MS SCHWARTZ: One is in Campbelltown.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): But that positions services Wollongong and Nowra as well - - -

DR MUNDY: Yes. Okay.

MS SCHWARTZ (ILNP): - - - all the way down the south. One is in Coffs Harbour, Grafton.

DR MUNDY: Yes.

MS SCHWARTZ (ILNP): And the third is in Walgett. Yes. So it will be - ultimately, I think it will be a decision for Legal Aid about how they divvy up their budget.

MS MacRAE: Sure.

MS SCHWARTZ (ILNP): But they're certainly - you know, they're very committed to being at the moment the major service provider for indigenous people in civil and family law. They're taking that responsibility very seriously.

DR MUNDY: I'm done.

MS MacRAE: Me, too, I think.

DR MUNDY: All right.

MS MacRAE: Thank you very much.

MS SCHWARTZ (ILNP): Thank you.

DR MUNDY: Thank you very much for your time and coming to us.

MS SCHWARTZ (ILNP): Thank you.

DR MUNDY: These hearings are adjourned till half past 1.

(Luncheon adjournment)

DR MUNDY: Okay, we will recommence these proceedings and now hear from New South Wales Legal Aid. Could you each please state your name and the capacity in which you appear today for the record and then perhaps, Bill, you can make a brief, that's less than 10 minutes, opening statement.

MR GRANT (LANSW): Thanks, Commissioner. Bill Grant, CEO of Legal Aid, New South Wales.

MS BECKHOUSE (LANSW): Kylie Beckhouse, executive director, family law, Legal Aid, New South Wales.

MS HITTER (LANSW): Monique Hitter, executive director, civil law, Legal Aid, New South Wales.

MS PRITCHARD (LANSW): Jane Pritchard, manger, review and strategy, Legal Aid, New South Wales.

DR MUNDY: Bill?

MR GRANT (LANSW): Commissioner, thank you. Can I begin first by, without in any way wanting to appear condescending, congratulating the Commission on an excellent draft report.

DR MUNDY: We take congratulations whenever we can get them.

MR GRANT (LANSW): It was so easy to read, it obviously wasn't drafted by lawyers.

DR MUNDY: We will bear that one in mind if we set out some initial thoughts.

MR GRANT (LANSW): As you are aware, New South Wales is the largest legal aid agency in Australia with the most comprehensive civil law practice, but the expenditure on our civil law practice is still only 13 per cent of our overall legal expenditure, so it's still, notwithstanding its work, very small in the scheme of things.

We have provided submissions, of course, in response to the issues paper and draft report, but if I can just make a few preliminary comments before I turn to some of the issues in those. The legal assistance sector in New South Wales operates in a way which makes maximum use of our scarce resources. We share our resources in terms of the provision of legal services. We share our training resources, our community legal education resources, and we do engage in joint planning to maximise the use of our joint resources.

While things can always be done better, and there's always room for improvement, I think we maximise our scarce dollars in a way that serves the interests of the socially and economically disadvantaged people of New South Wales. For example, we established a highly functional legal assistance forum. We have in Legal Aid developed the cooperative legal service delivery project, which operates in 11 regions throughout New South Wales, and we otherwise work together on joint projects to meet client needs.

Can I say that I think I would speak on behalf of all the legal assistance sector in New South Wales when I say we wish to continue to build on that strong relationship and work together to serve our common client base. Any changes which would detrimentally affect our partnership and relationships may be harmful to the overall delivery of our legal services as a sector.

We have had major cuts to Legal Aid funding coming from the Commonwealth government's budgetary decision way back in 1996, and in New South Wales in 1996 we received \$41 million from the Commonwealth, and the next year, 1997, it went down to \$31 million. That was repeated across the country. The government share in percentage terms went from over 50 per cent, and again that was true nationally, to in New South Wales we are expecting, subject to the delivery of the New South Wales state budget, that the Commonwealth contribution will be down around 27, 28 per cent.

Just prior to Christmas, of course, the legal assistance sector received funding cuts which, after the Commonwealth budget, now total somewhere around \$58 million. It's disappointing that these cuts fly in the face of the evidence of that unmet need with Legal Aid Commissions and the other members of the legal assistance sector providing excellent services to the community. So it's not too difficult to read into this that, whatever the proven need for legal assistance services, however good the legal assistance sector is providing services to our client base, the realities of life in the sometimes difficult economic circumstances in which governments are operating, mean that cuts will still come our way.

In these circumstances, we would request the Commission to make it particularly clear in its report that there are insufficient resources available through all levels of government, including through sources like the public purpose fund, to provide the services the community needs to have access to justice, not just in New South Wales and in this country. The Commission is also requested to make it clear that there is insufficient resources available, particularly in family law and civil law, to enable persons to access services and for us to have an appropriate range of services available to meet our clients' needs right across our jurisdiction, whether it's city based, rural or regional and particularly remote. So any assistance the Commission could give to quantify the sort of funding necessary to support

appropriate service delivery in the areas of civil law in the general sense would be most welcome.

Can I just turn to a few of the issues arising out of chapter 21. We strongly agree with the Productivity Commission's assessment about the lack of joint commitment between the Commonwealth and the state in the continuation of the Commonwealth-state divide and the National Partnership Agreement, as it is in its current form. A true national agreement to address legal need requires job commitment from the Commonwealth and the state on priority areas of law, priority clients, in establishing eligibility criteria for assistance.

To be truly effective as a national agreement, it must jointly have agreed service priorities which respond to legal need, the capacity of the client and the impact of the legal problem on the client's life. We also need consistent and appropriate eligibility principles, including a new realistic means test that looks at indicators of disadvantage and extends assistance to the working poor. In addition, the agreement must include a commitment to additional and appropriate Commonwealth state funding, increasing over time to an agreed acceptable level. This means sufficient funding to address unmet legal need amongst disadvantaged people, provide appropriate fee scales for private practitioners, and provide a measure of permanency in service delivery, which the current form of national partnership agreement simply does not deliver.

The agreement must also include an understanding and support of unbundled services, including advice, community legal education, alternative dispute resolution and duty law services. Finally, there must be agreed appropriate data definitions and accounting rules to enable effective evaluation of service delivery.

Can I just make a couple of other comments. In relation to our submission, we have made it clear that we would work collaboratively with our legal assistance colleague to ensure resources are used efficiently and cost effectively to address gaps; so whatever form of funding distribution model is perhaps preferred ultimately by the Commission and, of course, by government, we will work within that. Whether the money is allocated to the most appropriate level of government to ensure that services are delivered, which some would argue would be the state, or whether it comes directly to Legal Aid to work with our partners in a collaborative way, we could work under either of those models.

In relation to demarcation of funds, we welcome draft recommendation 21.1 that the civil law, including family law, funding be divided from the enormous amount the Commissions across the country pay in criminal law, but it certainly couldn't happen under current budgetary arrangements; there is simply not enough funding there, and there are all sorts of problems with being a down-stream agency

when you are looking at criminal law activity whether it's governments introducing mandatory minimum sentences or whether it's new forms of criminal offences we have from time to time. Those demands simply have to be met, and government would expect that they be met; but we are very supportive, in principle, of having dedicated funds, as long as there is some mechanism to ensure that any criminal law over-expenditure doesn't then impact on the family and civil law.

The reduction in expenditure of the Commonwealth government's expensive cases fund is going to bring that problem into stark relief at some stage by cutting those funds, not just in the pre-Christmas statement, but also because there was built into the forward estimates a reduction of that fund in any event. We figure that it will probably lead in the next year or so to a reduction of about \$2 million in expensive cases. So if we have got those funds allocated, as we would at the moment, to family and civil law, if a truly large expensive case comes up, we will simply not be able to meet it out of that fund; so it raises all the Dietrich-style issues in a very stark way.

In relation to Commonwealth funding, we would ask the Commission to look at perhaps starting its analysis of Commonwealth funding impacts on the 1996-97 year, which was prior to the substantial cuts that was introduced by the then government. When we did our calculation based on the wage price index, starting at that 96-97 year, leaving out state and public purpose funding, we actually came up with a funding decrease in real terms of 14.7 per cent.

Can I come to the means test and just make a couple of comments in relation to that. The Productivity Commission in its draft report makes the point that, on their initial assessment of the material that was seen, just over 8 per cent of households in New South Wales would qualify for a grant of aid, and less than 5 per cent would be eligible without a contribution. I think that, in itself, tells the story of that unmet need and the tidal wave of demand that comes through liability.

Legal Aid Commissions do not collect the data that will enable us to assist you with trying to quantify that unmet need. A lot of clients, a lot of solicitors that will apply for legal aid on behalf of a client, select out of the system, because they know they can't meet our means test. We have on our web site the means test indicator. Although we have all of the usual warnings about, "Don't take this as final", it does give people a reasonably accurate understanding of whether they qualify. So I think we would welcome any assistance the Commission could give in relation to appropriate eligibility tests.

Private practitioner fees, the Commission in its draft report raised that issue of where it should be. We have made some comments in our material. It's complicated, because there are not appropriate scales that operate across the country. It's not easy

to say something like 80 per cent of scale fees. Some jurisdictions, like New South Wales, move right away from scales and do it by cost assessment. There's all sorts of factors, which the Commission is well aware of, and I won't dwell on any longer.

Can I conclude, Commissioners, by saying that anything Legal Aid New South Wales can do to assist with the finalisation of your report in terms of data or in terms of anything, we would be more than happy to do what we can. Thank you.

DR MUNDY: Thanks for that, Bill. We do appreciate the ongoing assistance your organisation is providing to us. Just so I'm clear, our assessment of the percentage of households likely to qualify for a grant of aid, you're not disputing that?

MR GRANT (LANSW): No, we're not.

DR MUNDY: It's the best we can do on what we've got, and we appreciate the data limitations. Just to perhaps start on topical matters, and this is a question I asked ACT Legal Aid yesterday, and if you're speaking to your colleagues you might suggest they'll have an answer to this. ACT Legal Aid was able to outline to us quite specifically impacts of the funding cuts that have occurred in the budget in December. Are you able, other than the issue that you raised in relation to the large cases issue, to identify what the outcome in a service delivery sense these cuts are going to have on yourselves? The ACT tools were quite specific. I suspect that might be because they are so little. You may have more sophisticated financial management tools but we would be interested if you could identify those for us.

MR GRANT (LANSW): I might make a few comments and then hand over to my colleague to talk about their areas. It is more difficult for us. The Commonwealth wanted very specific proposals. They did not say to us, "Here is money over two years. Use it as wisely as you can." That would have been greatly appreciated - a little bit of trust. Let us use it. However, we did. They wanted specific projects and we came up with something like seven projects in civil law and six I think in family law. They can be corrected in a moment.

What we did with the loss of funding - because that happened so very quickly and because a lot of those services are delivered by staff, usually temporary staff, there has been an under-spend this year and the Commonwealth has agreed that we can carry that into next year. That is part of the 4.6 that we got for the first year. The 4.6 second year has gone. Some of our projects will continue to run on that.

We then weighed up the projects that we have against projects we were running under the NPA funding and we have tried to do an assessment of what is providing the most value for our client base. We will continue some of - I will call it the Dreyfus money proposals until the end of the next financial year. Some of them

we have had to discontinue and some we are continuing because we have had to discontinue NPA funding which we thought was lower in value for us.

With that general statement, having muddied the waters, I will ask Monique and Kylie to clear it up for you.

MS BECKHOUSE (LANSW): There are a few specific impacts on family law services. Probably the most significant one was the loss of staff to a project that was aimed at improving family law services for Aboriginal people. We have had to reduce our staffing on that. The direct impact of that will therefore be a reduction in family law services, particularly to rural and remote areas, because that was one of the big focuses of that group. I will come back to that because unfortunately there is a combined effect because the community legal centres were also funded in that area and there are services in that area that they have lost.

Also rural and regional - we have had to reduce our expenditure on our early intervention unit who were playing a role, an information referral role, so specifically for clients in remote and rural areas who were having difficulty accessing case representation services. We have had to reduce our resources in that area. We haven't wound it back completely but we have reduced those resources.

The third area where we have had to reduce resources is in the area of, I suppose, the quality of representation for children and young people. Over the last 12 months we have focused on improving the practitioner standards of private practitioners particularly who are independent children's lawyers, so we have run quite an amount of training this year to try and improve those skills but regrettably there won't be funding this year to provide those training programs.

MS HITTER (LANSW): The additional funding that funding was allocated to - in civil law we focused it on three central areas. One are issues that we think impact on the community by the cost to the community, where we can respond to market failure and where we can do things in a really cost effective way. We have used that funding to do things like provide employment law services where they weren't being provided, early intervention in social security matters and working with children who have complex needs. While we are able to continue to do that work for another 12 months, that funding would then come to an end and we will no longer be able to do that work, so for us that represents a very substantial amount of work that we are now doing that will not be able to be done in 12 months' time.

The immediate impact is that services like - we had a service for people who are being trialled in the National Disability Insurance Scheme. We had a position targeting those people with legal needs and that position is no longer going to be funded, so there are some immediate consequences like that but the more concerning

aspect is that in 12 months' time there will be a large amount of services that will just be simply withdrawn because that funding is no longer available. It will be in very basic services like employment law and long-term hardship and mortgage hardship and those sorts of things.

DR MUNDY: So it is fair to say that the impacts are predominantly on frontline service delivery as opposed to what might be described as law reform and advocacy.

MR GRANT (LANSW): Yes, absolutely. None of that money went to law reform advocacy. In fact we don't do advocacy other than law reform in the Legal Aid Commission. The law reform we do is always, almost without exception, at the request of government. If I looked, as I did - in the previous year we did 33 state requests for assistance. 28 of those either came from our attorney-general or from our Attorney-General's Department as it then was. The other five, from memory, were parliamentary inquiries. We respond to things. Our opinion is sought because we are providing an opinion on behalf of the other side of the market, if you like, particularly with Monique's work in relation to working in things like debt reduction and various forms of consumer law, working with the ombudsman et cetera. We partner up a lot with ASIC, with the ombudsman, to try to find systemic solutions to problems.

MS MacRAE: The first thing I should say is that we have been very, very grateful for all the assistance you have given us. I know there is a lot of behind the scenes work between our staff and your staff and it really is very much appreciated, so thank you for that. We are grappling with: what can we do with the data we have got? I am hoping from your opening comments that you think we have done quite well with what we have got but it is, I think, apparent; I think it would be fair to say you would like us to caveat a bit more heavily some of the conclusions we have drawn out of the law survey, in particular the methodology that is required.

Are you able to express that in any further detail in terms of how you would see - because you do make some comments about the data collection; whether there are other alternative ways of collecting data that might be helpful to supplement what we have got that maybe we haven't looked at that you would see as beneficial, or whether in fact the best we can do is caveat more heavily what we do have.

MR GRANT (LANSW): I will invite comments from my colleagues, but I suspect your latter comment is the accurate one. There is simply no better data. We collect data at the moment in consultation with our funders. That doesn't give you a good view, but our data will never really give you unmet need. It will only give you indications of where it might be, what is coming at us. It will give you an idea of the people who fail our means test but it will never tell you who didn't apply because we thought they would fail our means test. I really don't know that there are any mines

of data out there that you can attack. I would love to be able to identify that for you. We will give that some thought and if we can come up with anything, we will - - -

MS MacRAE: I think you probably already have. I just want to make sure that there is nothing that we have missed.

MR GRANT (LANSW): No, sadly.

DR MUNDY: But your view would be - observation has been made about the methodology that underlines the Law Society. Your view would be that it systematically underestimates need because it would seem on its face to miss those who might be most disadvantaged and therefore constitute the greatest unmet need.

MR GRANT (LANSW): We most certainly made that point in our submission because the Law and Justice Foundation, a great first step as it was, did not deal with anything other than telephone interviews. A large number of our clients of course - - -

DR MUNDY: I think we accept the nature of the bias. I guess the question is: is speculating on whether it is 17 or 18 or 25 the best use of the limited resources of the Commission - - -

MR GRANT (LANSW): Indeed.

DR MUNDY: - - - as opposed to bringing our minds to other matters as we go forward.

MR GRANT (LANSW): I don't think you will be able to pin it down with any greater degree of accuracy.

MS MacRAE: You did talk a little bit about the mixed model of provision and the difficulties that you have of not paying enough. I would just be interested in your comments about whether you felt - because we did raise this in Canberra yesterday - about the extent to which you feel that there is a sort of juniorisation happening and what the consequences might be in terms of equitable access to justice.

MR GRANT (LANSW): Look, I'll let my frontline colleagues talk about it in a second but just my introductory remarks would be most certainly a generalisation, but I think in terms of a solicitor branch of the profession and the bar I don't think there's any doubt about that and I think that would apply across the country. Our rates across the country are significantly below market rates. We know that some people do, for example, particularly practices in rural Australia will do some legal aid work because that benefits their community and they've probably done it for 30

years. Whether that will continue when those baby boomers go out of the profession and new people come in, I don't know, but just one little sort of anecdote in relation to that. I probably go back to about 2003 or so when the firm, the collective firms in Dubbo that were doing legal aid, came to us and said, "We don't want to do legal aid any more. Why don't you open an office?"

That was quite extraordinary because previous experience of us trying to open an office it was like the end of civilisation as you know it, we'd be taking work away. But these firms said, "We have more than enough private clients out here. We really don't want to do your work for what you can pay us, so open an office and solve it that way." We did with their help. A lot of those firms still do some legal aid but they've bundled for them and they can be quite selective rather than having to man the duty lawyer schedule every Monday to Friday and do whatever. I think a lot of that will happen particularly in regional Australia where there aren't enough practitioners, where they have enough private clients as the older practitioners start to leave the firms, we will have that problem of keeping that commitment of the firm to do some legal aid work.

Because there are some parts of this country, parts of New South Wales where we have no legal aid offices at all. We rely on the private profession. Big centres like Goulburn, Armidale, the south coast, there is no legal aid presence in those areas at all so we rely on the profession to do that. Sorry, can I invite any other?

MS BECKHOUSE (LANSW): Look, I probably don't have much more to add except for this: in previous years [indistinct] what was the impact of that reduced funding and one of the examples I gave was training to private practitioners and the reality for us is that we'll never know how much is enough and we are faced with that sort of generalisation but if it at least we have ways that we can engage the profession, particularly the senior people in the profession, that assists us. When we're stuck in situations where there is no-one in a regional town to do any of the work, it is incredibly problematic and we do grind to a halt or it is incredibly expensive because there are cases right now where we will - towns where we need to fly professionals in. Broken Hill is an example of where we spend quite an amount of money flying practitioners in to undertake the work.

So sometimes it's not just - there's an incentive and the incentives sometimes can be a bit more creative than necessarily a whole scale increase in fees.

MS HITTER (LANSW): The only thing I would add to that is that in the kind of civil law that we practice in our brand of civil law, we find that private practitioners don't practice in that area on a commercial basis so even if the fees were perhaps a little bit more attractive we'd unlikely be attracting them to our work because they don't really do that kind of work.

DR MUNDY: There's not much work for private firms in social security.

MS HITTER (LANSW): Exactly, and even in employment law now there's been a massive reduction in the amount of private practitioners doing that work even on a commercial basis, because it's, essentially, a no cost jurisdiction, so in the kind of areas that we practice in we're not likely to get private practitioners involved even if the fees were a bit more generous.

MR GRANT (LANSW): And we see it in other ways too. We have the occasional complaint from judicial officers about some practitioner doing legal aid work and why are you funding babies to do this sort of work? They don't know what they're doing, et cetera, and, you know, in a sense that's a result of juniorisation.

MS MacRAE: And one of the things that Legal Aid Commissions seem to do very well is to be able to unbundle things and do parts of service for people and make services available and people will come in and out and assist and get help when they need to and then be able to do certain parts of the process themselves, but there does seem to be quite some barriers for the private sector in being able to do some of those things and we have talked to them a little bit about some of the barriers they face. If we were able to make unbundling somewhat easier for the profession do you think that would help ease the pressure on your resources if there was a - if some of that middle ground of, I suppose the people that still might not meet your means test that you can't help but they might be able to get a bit more selective help rather than having a whole of service from a lawyer. Do you see benefits in us pursuing those things?

MR GRANT (LANSW): Look, I've never quite understood the opposition to unbundling services. I know there are circumstances where it's inappropriate. I know often circumstances when it's difficult, but we do it, we are practitioners. We don't come up against ethical difficulties in relation to how we do it. It assists them, it assists the courts. Our duty lawyer services are basically unbundled services, so I'm not all that sympathetic to opposition to that. It's a way of conducting your business to meet your clients' needs with the resources you have. I think some firms are actually starting to provide those unbundled services.

We actually have, we call it, ROCP - the explanation I can't remember - and what that is we pay private lawyers in remote areas, regional areas, rural areas to do the same sort of work that we do, so they will provide the advice and the minor assistance that traditionally their lawyers won't really want to specialise in and they will do that and we will pay them to do that. We do that in about 15 regions where we have firms that do that.

DR MUNDY: So the points that are put to us about, in the first instances, judicial officers dragging in solicitors who have unbundled services in an effort to try and do the right thing and castigating them is not something that, in the experience of New South Wales Legal Aid, happens with any regularity?

MR GRANT (LANSW): To us it doesn't happen at all, I don't think.

DR MUNDY: And I guess the second issue that is raised with us is the question around insurance for negligence and I presume you insure yourselves and your lawyers with credible and reputable insurers. They have not raised this as an issue with you?

MR GRANT (LANSW): We are government insured.

DR MUNDY: I see, you are insured by the government.

MR GRANT (LANSW): So we're provided with that, so I wouldn't be unfair to the profession and say that's not an issue. It probably for them is, but I fail to see how it's not one that can't be overcome. Can Kylie - - -

MS BECKHOUSE (LANSW): Sorry, it's just in relation to court procedures. There probably are some changes that could be made to court procedures to better assist in unbundling the services and what I mean by that is if somebody, for example, wanted assistance drafting an affidavit, which is something that happens in family law, you would be reliant on the client providing you with all of the documents they had and an easier thing would be to get access to the court file to see the documents that were filed, but you would need to actually go on the record to do that and going on the record actually does really change the nature of the service and your relationship with the client, so there are just small things like that.

DR MUNDY: Does it change the nature of your relationship in form or in practice?

MS BECKHOUSE (LANSW): I think both because of that example that you - that suggestion about the judicial officer calling in the legal practitioner and expecting a level of service or expecting a type of representation would flow from the filing of a document that says, "I'm acting for this person," so in a way our court practices haven't quite adapted to the notion.

DR MUNDY: Is it an intractable problem or is it something that is soluble if sound minds of good will and good intent were brought to it?

MS BECKHOUSE (LANSW): Yes, soluble.

DR MUNDY: Okay. Talking about courts we have come under a little bit of criticism about some views we expressed about court fees, most recently from Justice Rares in the Federal Court I have discovered at lunch today. I guess what we are trying to get at is an equitable way of putting aside the issue before cost recovery, but an equitable way of dealing with the benefits that people gain from legal action in the event that they are of means to pay as a way of providing resources to the courts, but also as a way of providing resources to the courts but also as a way of dealing with incentives in the same way people talk about incentive structures across the board.

You mention that you support a sliding fee scale which is fair and provides more accessible systems, more uses the court. We just wanted to clarify: by that, did you mean that the fees should reflect both the value of the matter involved and the character of the litigants, and the second question, which is something of particular interest to me, is how would you think about that in the context of where the outcome of the litigation is not a monetary settlement but perhaps some interlocutory type order or some administrative rule matter, perhaps a planning or environment matter which may involved significant economic value but no monetary settlement?

MR GRANT (LANSW): I will start, if you like. For us, we are at the wrong end of all of that, because our clients generally can't afford to pay anything. Most courts, not all courts and tribunals but most courts, will accept that. The trouble is, we have to work far too much for that. It could be simplified and I think there are some comments in the draft report along that line. In terms of the sliding scale, I think I would agree. We would say both in terms of what is at stake but also in terms of capacity to pay, what you don't want to do is discourage people from pursuing their rights by simply having fee scales that aren't flexible enough to do that, particularly as it is a no cost jurisdiction. The majority of what we do is no cost jurisdictions, whether it's family law or whether it is a lot of civil law tribunals that we appear in, and it's very difficult I think to start making people pay something that might resemble the full cost recovery for the proceedings. Then again, we are the wrong end of things. They are the comments.

MS HITTER (LANSW): I have got nothing further to add.

DR MUNDY: You have raised tribunals, Mr Grant. We have made some recommendations about representation in tribunals and I guess what we are trying to get at here is a framework which maybe identifies matters. There is a reasonable expectation that citizens who don't suffer some particular form of impairment or disability in conducting things can actually go and resolve these matters on their own but also how do we deal with it where representation may be appropriate from one side or the other or one party is de facto represented; they are sufficiently large or they are a council and arguing a planning dispute and the council planning officer is probably as good as having a junior solicitor argue it anyway, possibly better.

MR GRANT (LANSW): Yes.

DR MUNDY: In those sorts of matters, it's an issue where we are trying to find ways to facilitate tribunal processes and make them cheaper and more accessible but not denying people representation when they are [indistinct] and it seems to have become quite a thorny issue both with the bar and the law societies. I won't speculate why. I am sure it's a concern for justice. Do you have any views on this, because it does seem people can seem to agree in the principle but we're struggling to get traction on the practicality.

MR GRANT (LANSW): We sort of made some positive comments in our submission about 'horses for courses'. There are tribunals and circumstances where people can represent themselves. You are quite right. A lot of our clients simply could and so we are not allowed to send our lawyers in to assist them and to assist the tribunal, can I say. I think that's a little bit crazy, so a hard and fast rule is never going to satisfy every circumstance. You are also absolutely correct when you say there are perhaps industry people, whether it's real estate or whether it is some sort of planning or whether it is some form of professional circumstance, where the people would not really be qualified but they are as good an advocate as you are ever going to get and even consumers who have some ability to advocate their own cause will have difficulty matching that level of expertise. However, I think from my perspective, it would be not having absolutes at all. There are many circumstances where it's not appropriate to have, not necessary to have lawyers.

DR MUNDY: So would you in the conduct of your business if somebody came along with a matter that on its face could be self-represented in a tribunal context, have a look at the individual and the matter and say, "No, you can do this yourself," or, "No, because of some particular characteristic, you need us to do it"? Is that essentially - - -

MR GRANT (LANSW): We do that now.

MS HITTER (LANSW): Absolutely; that is one of the first things that we would do, is assess the person's capacity to represent themselves or advocate for themselves in the context of the jurisdiction that they are in and how complex the problem was that they had got and the role the tribunal is going to take in dealing with the issue. Some tribunals take on a more inquisitorial role than others and we find that where they are taking a bit of an inquisitorial role, it is often a lot easier for a self-represented person to participate in the proceedings, but where it is purely adversarial and the tribunal is just there to listen to both people make their arguments and then make a decision, well, then the person with the least power in that situation is going to have more difficulty in putting their case forward.

DR MUNDY: Because I know that in a lot of other areas, the report has been in the process more generally. The fact that someone is legally aided is relevant to giving consideration to waiving the fees or whatever. How would you see or could you see any problems with the notion that says, well, if a person turns up with Legal Aid representation in a tribunal which normally you would expect to be self-representing, should the judicial officer or the tribunal member looking after this matter place some weight on the fact that Legal Aid has made an assessment that they actually need to be here to assist this person? Is that something that would place a responsibility upon you that you would think was onerous?

MR GRANT (LANSW): No. I would think we would welcome that sort of rational discussion about why you were there and what we thought we could do to assist both the client and the tribunal itself. In fact that does happen now but two further comments, if I may. We actually had, and I think still have, some advocates in the veterans area that aren't lawyers. They are just advocates and they assist people and there was a move from the tribunal certainly at one stage not to allow lawyers into the tribunal. It was lay, so we had lay advocates. We adjusted to that and deal with our clients that way but in terms of the assistance that lawyers are providing things like the Social Security Tribunal and various other tribunals, you are providing unbundled services on occasion to these people. You are also appearing before the tribunal and maybe for some things but not for everything and assisting them to get their arguments together, et cetera, so there is a role for lawyers apart from just standing on their feet, in advocating in assisting that person to be able to do it and maybe making the balance a little bit more even.

DR MUNDY: Thanks for that.

MS MacRAE: Just as a general proposition, we have reflected in our report on some comments that we have heard that were made in confidence that we weren't attributing to individuals and other evidence that we did get on the record, but in relation to the way the tribunals have evolved, and you will see that we made the observation that it would appear that some of them have become more court like than was originally intended, would you agree with that assessment, that maybe in some instances, tribunals have become more adversarial and more court like than maybe is desirable in the best interests of access to justice?

MS HITTER (LANSW): I think it's certainly true that some of the tribunals are much more formal in the way they approach the resolution of disputes than other tribunals. For example, the Administrative Appeals Tribunal is quite a formal jurisdiction and very often, you really do need a lawyer to represent you in that tribunal, whereas the Social Security Appeals Tribunal is at the complete other end of that spectrum, where you probably don't need a lawyer to actually represent you,

although it is often good to have some advice before you go in as to how you present your matter, so it is true that the way they have evolved, some have evolved in a much more formal sense and some have kept a very low key way of dealing with their matters.

DR MUNDY: Is that a reflection of the matters that they deal with and, secondly, do you see any risks or do you have any concerns about the amalgamation of the Social Security Appeals Tribunal with the AAT, and I guess also you probably have occasional engagement with the Refugee and Migration Review Tribunals.

MS HITTER (LANSW): I think our submission flags some concerns that we have with the consolidation of the Commonwealth tribunals. In the social security jurisdiction it is very good to have that two-tiered approach. Well, it's actually three-tiered when you take into account it has an internal dispute resolution process as well. To have those three tiers is a lot more user friendly than going straight from a refusal up to the AAT or a consolidated tribunal. That is probably going to have a much more formal approach because it is at that higher level than the Society Security Appeals Tribunal, so that would be a concern if the two were merged together for our clients.

MR GRANT (LANSW): In many of those matters traditionally we have argued - because of the way certain Commonwealth priorities and guidelines were framed in previous agreements before the NPA, we have argued, "Let us get in earlier. Let us get in when the department is either reviewing the decision internally or just making the principal decision." I'm trying to remember the actual circumstances but it was either veterans, I think, or immigration where we had something like a two-thirds success rate before the tribunal.

We kept saying, "That's crazy. Let us get in and advise our clients," but we were precluded actually from the agreement, from actually providing that form of early assistance. Hopefully those days have gone, but I think the principle is true that the quicker you can provide advice and assistance to those people, it benefits the primary decision-maker and any perhaps review. We would certainly encourage in all departmental areas - just about all - an internal review mechanism.

DR MUNDY: It helps them because it supports meritorious applicants but it also presumably knocks on the head a few unmeritorious applicants.

MR GRANT (LANSW): We have our own merit tests, et cetera. If we don't think there's an argument there, we won't be running it. You don't get aid just because you ask for it. You have to have merit on your side. We won't be wasting our resources.

DR MUNDY: Eligibility tests I think is probably something we - just bearing in

mind time. I think it's fair to say that we share the view that means tests generally - whilst we note there are differences, it's probably not the big issue, but I guess the question that we would probably appreciate your thoughts on is what would a realistic means test actually look like? Not one that's constrained but where - and I guess, how would you think about - I think we have made an observation that there are probably better definitions of measurement of a disadvantage. The Commission has done work on the other respects, but I guess just perhaps to finish up, if we were in a position to make the means test less mean, what would it look like?

MR GRANT (LANSW): That is a really good question and one that we would love to see an answer to. Obviously things like Henderson poverty lines and things are probably old-fashioned and there's better ways of doing it. In terms of a monetary limit, whether it's 80 per cent of a minimum wage or some factor like that that keeps increasing with changing times, I'm sure you're much better than us at trying to find that appropriate economic line in the sand, as it were.

We would warmly embrace your second idea that that doesn't begin to cover all the eligibility requirements. There are people who have all sorts of other indicators of disadvantage who may or may not pass that means test but who are always going to need help of one form or another, whether it's an unbundled service or whether it's a full service, right up through litigation.

DR MUNDY: I presume in the family law areas, given short-term access available to resources within the family may be an issue, that there should always remain some discretion - for cases, for example, like a woman who doesn't have access to the resources of the household, who might look particularly well resourced. Is that one of those cases which you would want carved out?

MS BECKHOUSE (LANSW): I think our guidelines do try and make provision for that except that there is a cap on equity.

DR MUNDY: Are you able to put in place arrangements whereby you effectively bring the matter on the basis that once it's settled, you will be able to cover - this is a cash flow issue rather than a means issue, if that makes sense.

MS BECKHOUSE (LANSW): Only to a limited extent. The answer is yes, but we don't charge at a commercial rate so there would have to be some measure of disadvantage, I suppose, that we would be looking at in our merit test in order to afford that courtesy, I suppose.

MR GRANT (LANSW): Some commissions do that more than we do at the moment. Victoria does that more than we do, where they take a contribution. They know there's assets there so they will impose a \$10,000 contribution. If it can't be

settled out of the family law settlement, it will end up being a charge on the property, so you wait for it but you will recover it at some stage. We have such demand on our services that we really can't provide that service. We would like to and we think it makes sense, so if people are just outside your means test but still need help but have an ability to make a contribution, that's a halfway house to help - - -

DR MUNDY: They can make it when they're able to.

MR GRANT (LANSW): Yes, indeed, and maybe just when the property is sold or what have you. You wait for it. Those sort of factors can come into play depending upon the resources you have available to enable you to do that.

DR MUNDY: Okay. Thank you very much for that. I'm sorry we don't have more time but we have 12 witnesses today and 12 tomorrow. Thank you very much for your time.

MR GRANT (LANSW): Thank you.

DR MUNDY: Now if we could have LEADR and Negocio Resolutions. I understand that you're happy to appear together. Can I just ask you to state your names and the capacity in which you appear.

MS HOLLIER (LEADR): Yes, hello. My name is Fiona Hollier and I'm the chief executive officer of LEADR.

MR LANCKEN: My name is Steve Lancken and I appear in my personal capacity as a consultant and private practitioner.

DR MUNDY: Okay. I don't know how you wish to deal with this but we're fairly flexible. We have got about 35, 40 minutes for this discussion so if you would like to make an opening statement and then we can perhaps put some questions to you.

MS HOLLIER (LEADR): Yes, thank you. Steve is one of LEADR's members and so in consultation with each other we thought that there may be some aspects of what we would want to say which were very much in parallel and so it would make sense if you were hearing those together. In reading our submissions you will notice that we place some different emphases and put some different points more strongly or less strongly, and yet I think you would also see that there was a lot in common in what we were saying, so it just seemed to make sense that we would come along and speak to you in that light. Is that how you see it, Steve?

MR LANCKEN: Yes.

MS HOLLIER (LEADR): Anything to add?

MR LANCKEN: No.

MS HOLLIER (LEADR): Okay. From LEADR's point of view, we wanted to come along so that we could answer any questions that you might have about our submission and also, I guess, to put the context around the submission that we have made to say that we think there are some very good reasons why we should be looking to encourage people to engage in ADR whenever they can and we think that the purposes and outcomes of ADR are very much about self-determination and encouraging individuals and businesses to take personal responsibility and accountability for the actions that they take. We think that that kind of emphasis helps to ensure that we get the best use of resources. From a business point of view, whenever businesses are locked in an adversarial engagement, then they are using up their own resources and the state's resources and not focusing on producing value. So from our perspective it makes really good sense that wherever possible and appropriate people are provided with the sort of systems and structures and so on to

use ADR.

So within that sort of context we think that we need to be looking as a society to recognise that most disputes are actually resolved informally and even those where proceedings are begun in court, most frequently they're resolved before a point of determination. So in that sense what have formerly been seen as the alternative forms of dispute resolution are actually the mainstream forms of dispute resolution, and we would like to see that reflected more strongly in the report.

You have certainly noted the percentages of matters that are dealt with by courts, so you have noted in fact that this is very much the dispute resolution landscape and we think to move to actually say, "Well, we're really talking about, you know, what has previously been alternative dispute resolution, is in fact the mainstream and litigation needs to be there but it should be the sort of second resort, not the first one."

So that's the first point. The second is that we think that the genuine steps that has been part of the federal legislation has been a really good introduction. We are somewhat concerned that with its current review that legislation might be repealed and LEADR had been hoping that, if anything, it would move in the direction of making it even more robust, what might be meant by genuine steps towards something like, you know, an assessment for suitability for ADR.

Much has happened very effectively in family dispute resolution and family dispute resolution, I think, that has paved the way and has been a very good example of what's possible. There are some areas - and I'm sure if we were actually looking at FDR, where we could look at refinements, but broadly speaking, it has moved in a very positive direction.

The third area is that we would like the government to be setting the example. You have noted in the report, the need for the dispute management plans, that they have been on the agenda now for many years and yet there are many departments which haven't moved in the direction of creating those plans. We commented that as part of seeing ADR as the mainstream, we would actually rather be thinking in terms of model dispute resolver guidelines rather than model litigant guidelines.

I think where we would like to see that going is that government departments need to become accountable for when they are choosing litigation instead of ADR. So ADR should be seen again as the default, as what they do as first resort and that they need to present a good reason, a good case for why they have chosen to use litigation.

The final sort of point I guess is that we think accreditation is very important.

We have made huge strides in Australia in recent times with the introduction of the family dispute resolution practitioners but also national accreditation within the mediation field. The feedback we get from overseas bodies is that they look to Australia as something as a model in this, and I think we really should be building on that. Where there aren't those kind of national guidelines for other forms of ADR, there certainly are reputable organisations which are accrediting ADR practitioners and we would like to see that that becomes something that in particular the government must only use people who are accredited. So I think that's a good kick-off point, Steve.

MR LANCKEN: It sure is, yes. I guess my interest was listening to what the Legal Aid people were saying in discussion about less adversarial ways of resolving disputes. The question I ask, because that's the business I'm in, is: what are the barriers to people accessing those sorts of services, why don't they come directly to me as a mediator or my colleagues or why are there not more services available in the places where they're needed? So I ask the question as to what might be the barriers.

I think there are a couple of misconceptions that I think your report so far has avoided but I think we could more strongly put the pin in those balloons of misconceptions. The first is of course that litigation is the normal way people do business and that's not the case and your report makes that very clear, but lawyers would have us think that it is the normal and it's the default position, as Fiona said.

The second I think is something that my profession is as guilty of engaging in as others and that is this discussion as to whether litigation beats mediation or mediation beats litigation or what's better than the other, and the reality is they are different ways of making decisions. While we're engaged in the debate of what's better or worse, then we're involved in an adversarial debate and discussion rather than helping people to choose what's the best method of resolving their dispute. And it comes through clearly in your draft report that that's a really important thing, where you talk about triage, you know, appropriate process.

While we're in that debate, that one is better than the other, I know where the money is because the courthouse is the biggest building in town and it has got the biggest advertising and the judges and the lawyers have the loudest voice. So that's where people are going to be attracted. So I think that debate is somewhat of a barrier to people because they think, "If I'm going to mediation, I'm not going to the biggest building in town. I'm not going to the lawyers. I must be getting something that's not as good," which is absolutely untrue.

The third thing, I see from some of the submissions, and perhaps not from the draft report, that is an educative thing for our profession I think, is the idea that you

approach a mediator because you want to settle and that's all it's about; indeed I see that sort of process as good decision-making and businesses don't make decisions without having a discussion, they don't make decisions with people who are in their workplace. They talk about it first.

When I was listening to the Legal Aid people saying, "We want to get into the departments earlier and work out how we can have discussions to avoid making decisions that are wrong 60 per cent of the time," I say, "That's my business." It's about the exchange of information. It's about the conversation. It's not necessarily about the outcome and I think that's another thing that my profession is guilty of saying, "Well, we will help you settle your case." I say, "We help you have the discussion and decide whether you settle the case or decide what an outcome might be."

There's an educative piece in this I think and you have identified in your draft report the need for those who access legal and other services to understand how to use these processes, and that's certainly the benefit of triage and education. The last one that Fiona has already touched on that goes back to - I think the easiest place to point to is the government but I think it applies to businesses and it applies to individuals and it seems that the thought, "I need to have a reason why I want to go and see a mediator or what I want to negotiate," where in fact that's the wrong way around, "I want to have a reason to go to court. I want to be able to justify it."

I think courts are precious resources and they're very valuable and I don't think they should be wasted. That's clear and everybody agrees on that. That means that we all should be able to justify why we can't resolve this dispute in some other way. I think the government has got to take the lead and the lead comes in only a couple of words of the legal services direction which are in the model; litigant rules which is in rule 2(2)(d) where they say, "The government has to consider ADR before" - and I say the government should have to justify why it litigates.

Some businesses - NCR, is one of them - changed their policy and said, "If you want to litigate or defend a case in litigation, you have to be able to justify it, so the auditors are going to look at your justification and tell us whether that was a worthwhile decision," and it changed the mindset of the way they were doing business because then they were focused on, "How can we resolve this dispute?" I think that's the challenge for the government.

I understand the difficulty that our civil servants have in being accountable and I understand that sometimes it's less risk to have the judge make a decision than not to make a decision and risk being criticised, and our political system doesn't necessarily support that. I think that it's fundamental to the way we do business that our government be given the authority and the mandate to make decisions based on

fairness and the legislation, and be able to do that in the way that makes most sense rather than have the judge make that decision.

DR MUNDY: Yes. Risk is something that our Commission regularly brings its mind to in the context of public policy. We walk away scratching our heads without an answer. Can we talk about accreditation first? We had a discussion this morning with the Bar Association and, perhaps surprisingly, they conceded that perhaps all lawyers, solicitors, and barristers weren't per se set up to be mediators and arbitrators, and they indicated they felt that some additional training and certification was appropriate before they just went out and hung out their shingles, which we thought was quite interesting, and I guess this question of accreditation is interesting for us because we are often concerned about accreditation for good purposes being used as effective in any competitive market control device and we've made observations in the past about the medical profession specialists.

How would the ideal national accreditation process work? Would there be a body to which other bodies such as yourself and the Institute of Arbitrators would come along and say this is what we do, accredit this, or would you see it - so it's effectively an open accreditation framework. There's no limit to it. It's standards based. Is that the sort of thing that you have in mind?

MS HOLLIER (LEADR): Yes. Well, with the national mediator accreditation I don't know to what extent you know the history of that, but it was actually a coming together of sort of most of the bodies who were involved in mediation, so before 2008 organisations like Leader, like LEADR, like IAMA, had their own accreditation processes and through from, I think, probably the discussion sort of were starting from sort of about 2002 and then through till, you know, 2008 when we actually, after some robust discussions, I think, where we - - -

MR LANCKEN: Lengthy. Lengthy and robust.

MS HOLLIER (LEADR): Robust and lengthy discussions where Bar Associations, Law Societies, IAMA, LEADR, and many other players came together in a room and together we hammered out what we thought was a threshold accreditation level, and then the next two years we set about, again robust and lengthy discussions, to come up with the Mediator Standards Board who would be responsible for overseeing the implementation of the accreditation scheme.

I think what we've seen is that we had a lot of, as I said, a lot of dissent about it, a lot of productive discussion, and now in 2014, so six years down the track, we've got around about 2000 nationally accredited mediators, and we've got those mediators being accredited through a devolved system, so organisations like LEADR are responsible for training people, for assessing them and for accrediting them. At

times there will be other organisations who provide the training and then we'll do the assessment and accreditation, and the system works in that sort of flexible way.

It's likely an honour system at this stage, but I think the fact that it's grown at that pace to have around about 2000 nationally accredited mediators is very significant and says it's something that the industry itself felt was needed, and you know, there was a large amount of collaboration by the various organisations to produce that.

I think looking forward we know that there's conversation now, interest in, say, conciliation, developing a separate conciliation accreditation, and those people engaged in conciliation. There are pockets - I couldn't say universally - but there is certainly some momentum towards saying we actually want a National standard that's going to cover conciliation as a separate process to mediation, but the point is we want a national standard. So I think working as, you know, the industry coming together to produce something and to voluntarily adhere to it is actually a pretty powerful model.

MS MacRAE: Can I just be clear there? Does everybody come through LEADR for their - - -

MS HOLLIER (LEADR): No.

MS MacRAE: No. No. Okay.

MS HOLLIER (LEADR): No, no, no, sorry.

MS MacRAE: Just when you said other people come back to you, I thought that's not what always happened. You've got a range of organisations that are accredited that can - - -

MR LANCKEN: There's about 30 or 40 providers.

MS MacRAE: Yes.

MS HOLLIER (LEADR): Yes.

MS MacRAE: I thought that was the case. I just wanted to make sure I hadn't mistaken your - - -

MS HOLLIER (LEADR): No, no, it's more that you can actually do bits of the process.

MS MacRAE: Yes. Okay. Sure.

MS HOLLIER (LEADR): So that there are more training providers than there are accrediting organisations.

MS MacRAE: Sure.

MS HOLLIER (LEADR): So some of those training organisations would send their graduates along to one of the accrediting bodies such as LEADR or IAMA or AMA or someone.

MS MacRAE: Yes. Okay.

MR LANCKEN: I think in answer to part of your question, Commissioner, I think the profession or the industry wants an open access.

MS MacRAE: Sure. Sure. Yes.

MR LANCKEN: I don't think accreditation standards are set to exclude people.

MS HOLLIER (LEADR): No.

MR LANCKEN: The struggle we always I have, I think, as Fiona just started to talk about, is how do we include people and ensure that the standards are high and it's quite hard to accredit people on skills. It's not like you can do an exam and write it on a piece of paper, so that's our challenge and we're struggling with making it more relevant. Relevant's not the right word. More appropriate for the sort of work that we do.

MS MacRAE: Okay.

MR LANCKEN: I think the other challenge that we have is in the market place is people recognising what these products and services are and what they should expect because if that matches with your accreditation standards then you have safety for consumers as well.

MS MacRAE: And would you have an estimate about what sort of costs would be involved in becoming accredited?

MS HOLLIER (LEADR): I think it varies, but probably I'd say it's in round figures around about \$4000. Would you say that's - - -

MR LANCKEN: Depends what you - the standards require you to do a five-day

training course and that can cost you anywhere between nothing if you do it through a community justice centre to three and a half or four or five thousand dollars.

MS MacRAE: Okay.

MR LANCKEN: There is the cost of being tested. There's a cost of maintaining your accreditation, so you have to engage in continuing education, supervision in some places, so there is a fairly high cost or barrier to enter it. It's probably closer to - by the time you put everybody's time into it, it's probably up even around the 15 or 20 thousand dollars it's going to cost you. That being said, there's no shortage of people who want to be accredited because they see it as being valuable skills and tools.

MS MacRAE: Yes.

MR LANCKEN: I think that was what - may have been what was behind what the Bar Association and the Law Society said. They see that there's a benefit to their members in having these sorts of skills.

MS MacRAE: Absolutely.

DR MUNDY: It was only the Bar.

MR LANCKEN: Only the Bar. I'm surprised at my colleagues of the Law Society who are accrediting their members as mediators.

DR MUNDY: To be fair, we didn't put the question - - -

MS MacRAE: We didn't raise that with them, did we?

DR MUNDY: Didn't put that question to them.

MS MacRAE: Yes.

DR MUNDY: In your submission you raise a report from the European Parliament on ADR. I guess the two things that interested me are there similar studies that you're aware of that we mightn't have stumbled across relating to the Australian jurisdiction, and one thing that pricked our imaginations was this notion in that report from the European Parliament - and I think it was Italy - that indicated that mandatory mediation actually encourages voluntary mediation.

Have you got any views about why - (a) on the factual question are there studies, Australian-based studies available you could steer us to, but also why do you think

that mandatory leads to voluntary mediation?

MR LANCKEN: We'd like to think it's because when people experience good service they want to get some more of it. I would hope that was the case.

MS HOLLIER (LEADR): And I think it's because it's - I think that's part of it, that in fact people start to see the benefits and, you know, word of mouth, but if someone's experiencing value then someone else will say, well, it's worth a go, and I think it also helps to normalise it. You know, the fact that it's become part of what we do makes it much more - much easier to actually access, so you know, Steve talked about one of the barriers.

I think at the moment one of our barriers is that people just kind of don't know that it's an appropriate alternative, and they do think in terms of the courthouse as being the way that legal problems are solved and so if you can get a sort of a groundswell of usage which is what some form of referral to ADR or, you know, pre-action protocols does, then it helps to normalise that and just increase - gets that sense of usage. In terms of similar Australian studies, I think we've got a dearth of studies in that area.

MR LANCKEN: You won't have to ask very far for any of our practitioners to say this. There is no study in Australia. There is the Ontario study but that was 10 or 15 years ago where they mandated mediation 20 days after an offence. That was a very thorough study but it is quite old now.

I think the interesting thing is that where mediation has become quasi mandatory is in the legal profession. I came from the legal profession. I was a commercial litigant. When I speak to my former colleagues and colleagues now, they know that they really can't get to see a judge without coming to see me or one of my colleagues because judges will insist that they go to mediation at least once and sometimes two or three times in Western Australia.

DR MUNDY: We've heard from the chief justice in Western Australia on this quite loud and strong. I guess that begs the question: why is that? Is that because judges are sensibly saying, "Look, I've got to work out and apply the law and I want to know before this matter comes to me that the things that these guys can sort out themselves have been sorted out." Is that - - -

MR LANCKEN: I wish I could be as positive as that. I think partly judges do this because they see it as a case management tool which I think is quite dangerous. However, the other side of that is that it means that people are experiencing the opportunity to solve their own problems much earlier in the case.

There are some judges who actually get the difference between having a decision made on the rights and having a decision made by the parties themselves, in terms of their interests. There are some judges - but of course we shouldn't expect all of them to because they've been lawyers all of their life and their frame of reference is a rights-based system.

MS HOLLIER (LEADR): And what's more, we think that's appropriate.

MR LANCKEN: Yes, it should be too.

MS HOLLIER (LEADR): We don't want an alternative to that. What we want is that people can access an interest based process in which they get the opportunity to determine the outcome. I think the fact that so many judges do refer to mediation is positive. From our point of view, it's still not the best use of resources. To actually have to file to go through numerous steps and then to get referred to mediation has made the case much lengthier than it needs to be and costlier and using what should be seen as a very precious and costly resource of court time to do that.

DR MUNDY: It does raise the whole question, given the amazingly low rates of matters that actually go to trial, how the court is something much more grandiose than the dispute resolution framework is.

MS HOLLIER (LEADR): Yes.

DR MUNDY: I think the statistic begs the question.

MR LANCKEN: Sorry, I don't want to interrupt but what's interesting in the way some of the lawyers frame this, especially judges, they say, "Yes, we think mediation is very good once things get into our system but don't mandate it beforehand, before it gets into our system, because that's dangerous because it limits people's access to justice." That's a discussion that's really worthwhile having, if only for educative purposes because if it's worthwhile to engage in a discussion at this point, why is it not worthwhile engage to in a discussion at this point earlier? I just can't understand the difficulty. Sorry, I interrupted.

DR MUNDY: Or what is the court doing? What is the court doing that the parties couldn't have - - -

MR LANCKEN: Couldn't have done themselves, that's right.

MS HOLLIER (LEADR): Yes, that's right.

MR LANCKEN: That's right, and is there a benefit? This is where the dearth of

information in statistics is worth [worst?]. What would be the benefit if people were able to resolve their disputes before they filed the piece of paper in the court?

DR MUNDY: Yes.

MS HOLLIER (LEADR): In fact we do know that that happens. You acknowledge that in your report; that there's a lot of people who just get on and - - -

DR MUNDY: Do it.

MS HOLLIER (LEADR): - - - get things sort out and the court's lawyers don't hear about it.

DR MUNDY: One of the things, well, there have been a number of observations made about when ADR, however you might want to describe it, is not appropriate: you know, suppression of rights. There have been arguments put to us that some fora are much easier to get a positive outcome; that when you get it if you had a meritorious case you would have got a better outcome in court. You might have got it later. You might have got it at a greater risk of failure.

MS HOLLIER (LEADR): Yes.

MR LANCKEN: Then there are questions of the public interest in establishing precedents at law and so on.

DR MUNDY: Do you have a view on when ADR isn't appropriate and the matter should just go to court?

MS HOLLIER (LEADR): I was just going to say - - -

MR LANCKEN: You can go first.

MS HOLLIER (LEADR): Yes. I think what we need to be doing is to be providing the process whereby the participants themselves can be making those kinds of decisions. They need to be well-informed decisions. I'm always interested in the argument that says you would have got a better outcome from court because very often "better" is only measured on one dimension. It might well be that I might have been able to get more money, a larger settlement of money and the cost might have been that I would have been involved in the process for two years longer and would have dealt with a whole lot of stress.

From the individual's point of view, the better outcome might have been to take the lesser amount and be able to move on, and of course better if you're thinking

about "What did I actually get in the final settlement?" hasn't been considered, say, from a business point of view of "How many hours have I spent in that process, so how much have I lost?" I guess understanding the nature of outcomes of course is really important and we need to know that there's many dimensions to those outcomes and they can't be measured simply on the basis of that single - - -

DR MUNDY: I am interested in this point because I have a personal view. Interlocutory proceedings, restraining orders, mining companies about to drive through a piece of pristine wilderness, presumably that's a matter where the courts are more suited?

MR LANCKEN: By definition, if you need urgent relief, you need urgent relief because the only thing that's going to stop that mining company is a court order.

DR MUNDY: Yes.

MS HOLLIER (LEADR): Yes.

MR LANCKEN: But what we know is that then the court will say, "Stop doing that now and go away and talk." So there's a difference between the act of wanting to hold something up for the time being - - -

DR MUNDY: And resolving it.

MR LANCKEN: - - - and then talking about it or resolving it later on. So it's absolutely true. People shouldn't be prevented from seeking urgent relief from courts, if they're concerned that their health, their rights or damage is going to be done that is irreparable. That's obvious. The only other place where ADR is obviously inappropriate is where there's a risk that somebody will be hurt. The number 1 rule is do no harm, so if there's a risk of mental or physical damage it doesn't happen.

DR MUNDY: I think most people will generally accept that that's - - -

MR LANCKEN: But otherwise I think Roger Fisher was asked, "Would you negotiate with terrorists?" and he said, "At least I'd go along and listen to them." I think there's no harm ever in listening and talking because the information gets exchanged and we can find that 60 per cent of cases where the decision was wrong because the wrong information was given or - - -

DR MUNDY: What about those circumstances where there are real and legitimate issues of law that are of such a profound nature that there is a public interest in them being dealt with. If you had a triage system in a court and the registrar was alive to

that, would that be a circumstance where you think it would be appropriate to say, "No, this really does need to go to court even though it mightn't be in the interests necessarily of the parties"?

MR LANCKEN: The parties can choose because the parties can choose to mediate any time but if we have the default system that I suggested, that is that you need a justification, one of the justifications that you would make is, "No, this case affects 3000 other cases and we need to have a decision here so that these other 3000 cases can be settled." I think that those sorts of cases in fact not only should be going to trial quickly but they should be given priority, so the other 3000 can sit down and talk about things.

MS HOLLIER (LEADR): I don't have anything to add other than to say that's exactly LEADR's view too. Actually I do have, I guess, that point of emphasis that we don't want to be finding ourselves in an argument of ADR is better than litigation. It's very much about saying, "What's the most appropriate here?" and very often ADR is going to be the most appropriate and there are going to be circumstances such as urgent relief, such as public interest matters, such as risk of damage or harm.

DR MUNDY: One other circumstance has been raised with us and it's really in the context of an ADR based arrangement, say, in a tribunal, relatively minor matters, and dealing with the matter, say, with an ombudsman where the concern is raised that the privately mediated ADR process doesn't bring forward systemic problems. It might be as simple as water bills or low scale commercial disputes, whereas in a framework where outcomes are publicly reported or at least captured by some sort of industry or public agency, and it goes to your point, Steve, the systemic problem gets captured and can be dealt with, whereas the privately resolved matters I guess the question is: in those circumstances, if we had a framework where they were privately resolved, are we reliant upon the ADR practitioners who mightn't be organised in any systemic way to somehow get together and say, "Look, we've dealt with 48 of these things in the last six months and the problem is X. Will someone just hop into the parliament and fix it because we are sure there's another 500 of them out there." Whereas reporting of cases and the public airing of these matters is important.

MR LANCKEN: I think the fear is expressed but nobody can point to the reality. That is the difficulty.

DR MUNDY: Welcome to our world.

MR LANCKEN: There are plenty of lawyers who want to run cases on a public interest basis and we have legal aid systems. I just can't imagine a situation where that hasn't occurred.

DR MUNDY: How do we learn about the outcomes of these mediated matters so we as public policy practitioners can actually - or as people who are interested in law reform; you know, a simple change to the law. It might be that the law is crap. How do we bring this information to light so we can deal with it?

MR LANCKEN: I think there are some examples that I can give - - -

DR MUNDY: That would be very helpful, if you could.

MR LANCKEN: - - - where there may be a need. People in the native title area, especially in relation to future use compensation and those sorts of things, where most cases are mediated, in fact it is very hard to get a determinative decision. They have trouble pointing to standards of what is fair compensation. I think that is the best example I could give you. I think that's because that legislation has got it back to front. It says that everything has to be mediated and there is no way you can get a trial.

I think while ever we have robust courts, and nobody is suggesting we shouldn't have them, people are going to take those sort of issues to trial and we should support that. That's the best example I can give. I think we do need objective criteria and standards by which people make decisions. I think there is very little evidence that additional use of people talking to each other prevents us from getting those standards through the courts. There are still plenty of cases being tried and plenty of decisions being made.

DR MUNDY: How do we find the problems? The great thing about industry ombudsmen of course is that they find the problems.

MR LANCKEN: They find the problems.

MS HOLLIER (LEADR): Absolutely.

DR MUNDY: Then if there is enough of it, they go "eee" and put up the flag.

MR LANCKEN: It may be that it is possible - I don't know how. Legislating per se for mediators is problematic but if there was an opportunity where a mediator could make a report on a confidential basis and say, "Hey, I think there might be a systemic problem here. I sign a confidentiality agreement with my clients. If I did that, I might be breaching their confidentiality" - my morality would say that if I discovered, for instance, in an area of banking and finance where banks were ripping off farmers, and that is not happening but let's assume there was a systemic drive by banks to rip off farmers, I would want to say something about it; but the experience of the Farm Debt Mediation Act is not that that is going to occur because there are

lots of farmers who are prepared to take their cases to court, notwithstanding the fact that they have got to mediate first.

MS HOLLIER (LEADR): I think broadly we are saying that wherever there is a public interest, then that needs to be pursued. I think ombudsmen themselves serve a really valuable process and they actually do deliver a particular form of ADR so we would see them as continuing to perform a valuable service. I think what Steve was alluding to is - perhaps the business about reporting is something we need to think about further. We haven't had to address that as an issue in the past. Moving forward, it might be something that we want to actually consider. Would there be some way that we could do that while we keep faith with the notion of the confidential mediation process.

DR MUNDY: We have gone about our work in this inquiry. We can get limited information about litigation but we don't know what goes on between lawyers and their clients before or after the matter. I mean, it is part of a broader problem about the statistical and evidentiary underpinning of understanding the problem.

MR LANCKEN: That's right. There's a broader issue as well though. The challenge for me is - and I hear what you say. We want to make sure we have standards by which people can make their decisions. Courts provide us with standards but if we say that mediators, for instance, have to report and people don't want to report, then they are just going to go somewhere else to resolve their disputes without a mediator and we have got one less independent person helping people have the conversation. Anybody can negotiate a settlement. They don't need a mediator.

MS HOLLIER (LEADR): I actually think too that you don't actually need to get to the resolution point to start identifying that there is a problem. I mean, if there is an issue that has come up between an individual and a government agency, even if the outcome is confidential and the proceedings of mediation were confidential, the government agency knows what the issue is. There is already information out there about what are the matters that are causing us concern from particular industry areas, whatever area of business you would think about. Those industry associations know what are the problems that our newsagents are facing or our telcos are facing.

MR LANCKEN: You have probably spoken to the AAT. Their registrars deal with the government. They have an outreach program for government. They go to government departments and say, "Hey, we have had 15 of these similar complaints and it seems you are losing them all. What is going on?" That's a really valuable part of the, inverted commas, services of the AAT.

MS HOLLIER (LEADR): It makes me actually wonder whether there is a question here. If we have been relying on the outgoings from litigation to come up

with - what is it that we need to change? Again I'm confident that that information is already there available and you are not going to need to know what the mediated outcome was to know that there is an issue here, because businesses and government agencies are able to tell you what their time has been taken up on and what problems they are having to solve.

MS MacRAE: Can I just ask two questions on a pretty different tack? We have heard in a number of submissions that ADR for indigenous communities can be quite different and the style of mediation that suits them is different. We had the Small Business Commissioner tell us that small businesses would much rather enter into something they call facilitation. I think it is the same thing but they like the word because it doesn't sound as confrontational.

We have also heard from the disability sector that for a lot of people with disabilities having an advocate there and being able to have them effectively as a sort of go-between when there is mediation happening can be very helpful.

In the training and the accreditation sort of process, do you look at some of those specific issues for the groups that might have particular problems accessing mediation and finding it a suitable forum to attend?

MS HOLLIER (LEADR): I guess to talk about it just as an outcome from training would be not to grasp the full sense of it. The training is pitched at sort of threshold levels. What we would be saying is that we are looking for practitioners who are accredited. It means that they have got a certain skill level and then they should be able to design the process that is going to be appropriate to the particular people, so who do you need there to be providing the support to those who are engaging? Do they need legal support? Do they need someone providing financial support or some kind of other advice, business advice or family advice? All of those things can certainly be brought into the room, as well as adapting the mediation process; you know, where do we hold it, over what time frames do we hold it? All of those things are potentially able to be done by a skilled practitioner.

MS MacRAE: Are there enough practitioners who can maybe get to those niches? I mean, from what we have heard and we haven't heard a lot yet from people from the disability sector, there does seem to be a real barrier for them in terms of being able to access any form of justice that a person with a disability is able to really participate in. Mediation would potentially be something that, being less adversarial, is more accessible to them.

MR LANCKEN: I think part of this comes back to - we don't have enough information or data. We don't have information or data about the needs of those people to assist us, although we are starting to get it. We know, for instance, in the

small business area that there is a type of process that works quite well in the small business area for lessees and franchisees.

The disability sector is another issue for us. I have a friend who works as a Guardianship Board member and they are experimenting with some sort of facilitated - or they are about to; I think they are thinking about some sort of facilitated process there. There you do have people with profound disabilities obviously. I must say, you having asked the question, I don't think we have addressed that as a profession well enough. What are the special needs and how do we address them? Fiona and I have done some work trying to create some pro bono processes of ADR to put in with pro bono legal services. You will probably [indistinct] disability and of course we have done a lot of work in the family area. That is obvious. We can see the benefits of having specialist family law practitioners. I think the question you have raised is a really good one.

MS HOLLIER (LEADR): Yes, and I think there is a preparedness within the sort of body of ADR practitioners to be looking at extending their skills, extending their understanding and knowledge, and partly at the moment what we need to do is to see how an investment of more time and energy in skills development converts to getting work, so there's a bit of a chicken and egg situation.

I think if we can be looking at reducing the barriers and increasing the incentives to use ADR, then we are also going to be able to look at what we need to do in terms of further skilling people to respond to particular needs that groups have.

MR LANCKEN: In terms of indigenous people, it would be worthwhile - do you know Ippei's surname?

MS HOLLIER (LEADR): I'm sorry? Ippei?

MR LANCKEN: Ippei.

MS HOLLIER (LEADR): Ippei Okazaki.

MR LANCKEN: He works in the Northern Territory with a specialist indigenous dispute resolution process.

DR MUNDY: I have met him.

MR LANCKEN: He runs around the Territory and he sees ADR very broadly. In fact he sees one of his roles as training people in communities to help solve problems.

DR MUNDY: He operates out of the Magistrates Court.

MR LANCKEN: Yes. They have got a community justice - - -

MS HOLLIER (LEADR): It's a community justice centre.

MR LANCKEN: He is galloping around the Territory all the time.

DR MUNDY: We met with him when we were in Darwin, whenever that was - six or nine months ago. That's probably where we need to draw this discussion to a close. Thank you very much for your time and the submissions that you have made.

MR LANCKEN: Thank you.

MS HOLLIER (LEADR): Thank you.

DR MUNDY: Just before we adjourn for afternoon tea, can I ask if Adam Johnston is here? I was just thinking - to bring matters on - if we perhaps had 10 minutes for afternoon tea. We might start at 10 past, rather than quarter past, if that is not a problem for you, Mr Johnston. Thanks very much. We will just adjourn for 10 minutes.

DR MUNDY: We might recommence these proceedings. For the record, could you state your name and provide an opening statement.

MR JOHNSTON: Of course. My name is Adam Johnston. I appear here as a private citizen, and am also the proprietor of a consultancy business, ADJ Consultancy Services. I am also a solicitor. I happen to be a member of the Law Society, but again I am not appearing for them or any other agency. I have also had prior experience in various ombudsman's offices, but again I'm only appearing in my own capacity, not in their capacities.

I guess my opening gambit would be, having considered your draft report, there's not a lot in there that surprises me. We seem fairly agreed on the issues and problems. Again, from my own perspective, and you would have seen a lot of that from my submission, I think an important way of moving this whole debate forward about access to justice is looking actually at the legal system and legal providers, and having a conversation that particularly some in the legal profession don't like to have, and that's the reality of their monopoly of service provision.

Again, from my own experience, there are any number of services I could provide, given my experience, but because of both a legislative structure and a historic structure, which relates back to a craft and an association model which really doesn't reflect legal need or commercial reality, or even basic human working realities, of the modern day. We are sort of stuck in a system which is lucky to come out of the 19th century, and here we are in the 21st. I mean, I think, in many respects, if anything, your final report needs to be far bolder and confront a lot of the vested interests, including the providers and governments and the court system, about how restrictive and rigid many of them are, and how many of the structures that remain still come out of bygone eras which are centuries old.

DR MUNDY: Thank you. Do you want to expand a bit on that? I mean, what services in particular do you have in mind, and what sort of recommendations do you think we could make that would deal with those?

MR JOHNSTON: Certainly, from my perspective, I'm aware of many lawyers, because I have worked with them in my various capacities as a complaints handler for both the New South Wales ombudsman, the energy and water ombudsman, various bodies like that, that there are many lawyers or law students working in paralegal positions. They develop a series of skills around dealing with problems, analysing problems, dealing with administrative matters. One of the things I've discovered through my learning and the law is that, unfortunately, none of that experience will be officially acknowledged by the Law Society registry, for example, when seeking credit for the attainment of a unrestricted practicing certificate,

because they require, partly due to the Legal Services Act and the Legal Admissions Board, that all work be done under the supervision of a senior solicitor who has an unrestricted practising certificate.

The reality of employment, I would put it, these days is many people, or most people, couldn't walk into any office, any agency, be it government or private, and insist that a term of their employment be that they be supervised by a person who is also a solicitor with an unrestricted practising certificate. What I would, firstly, be suggesting is that there be more flexibility put into the types of work that can be recognised towards professional competence. Equally, I think the Law Society and the Law Society registry, again because they have a privileged, legislatively enshrined position to dispense practising certificates and deem you qualified and competent or not, they tend to not want to consider or look at on a reasonable basis other comparable qualifications.

I can give an example there, in that I have, throughout my working life, been on a series of temporary contracts. This seems to be the nature of modern employment. You go on a temporary contract, you're above establishment, so that when the business cycle comes around again, you are the temp, so the money runs out and you go off; so it's difficult to maintain ongoing employment in that way. So in between times you go out and you try to find other qualifications to make yourself more employable. I had an employment agent who recommended that I undertake a small business course.

They assured me, as did the provider, that they were recognised and funded by the Commonwealth, that they offered a nationally-recognised qualification in Certificate IV in Small Business, that I wouldn't have difficulty getting it recognised anywhere. When I did that and then went back to the Law Society and said, "Will you recognise this for the purposes of your practice management course?" They said, "No, because it's not recognised or approved by us." So I then presented them with all the documentation I could find from the department on its web site about how the federal government officially recognised this. They said it was a formal, official qualification. The law registry and their committee processes still said, "No, you will still be required to do the full practice management course, regardless of the fact that you have already clearly done a unit on running a business and business processes."

What I can say is that there were elements of the practice management course that were specific to running a legal business, but there were also elements that were clearly generic and that would clearly have fitted under the certificate in small business. So in fact it's arguable that - there was really no reason for the law registry not to recognise at least some of that other course.

DR MUNDY: So if they had have come back to you and said, "Yes, we will let you off that, that and that, but you've got to do that and that", that would have been a reasonable outcome?

MR JOHNSTON: Yes.

DR MUNDY: I guess, just a related question, we have had a look at an initiative that's being undertaken in Washington State in the US, where they are accrediting or whether they have a framework to provide limited licences to practice in family law is the case in point. I was just wondering whether you had any observations to make that if the industry - and I use that word deliberately, because I think it is an industry, provides goods or provides services to people. We should see it as that but if the industry was to progress on a basis where people would have a licence to practice within a range of matters, let's say family law - you could think of industrial matters or perhaps planning, for example - whether that might facilitate this broader recognition. Do you think the issue about an unlimited practising licence might be resolvable at least in those areas where the expertise is more specific?

MR JOHNSTON: Certainly, and I think it would actually talk to a more general situation, where it's certainly my observation and certainly my experience that many lawyers end up in situations where they become specialists in one or two specific areas and you will see this from the advertising that many do, that they say they are a specialist in criminal law or they put out ads, "Have you been charged by the police? Come and see me or ring me." Equally, others will be specialists in family law or specialists when it comes to wills or estates, so I think there's a possibility there to not only stop there in Washington State but to literally break open every aspect of what a lawyer might do and break it down into comprehensible sort of parts because again, I think it's fair to say that each one of those parts potentially represents a speciality in the real sort of modern legal world.

I think it's very hard to make a case these days that there really is a generalist lawyer. That might still be the case for some suburban lawyers but even on your own statistics that I noted in your report, they seem to be a declining number. Most or a sizeable number of the lawyers seem to be in larger firms in metropolitan Sydney or in the city and again, there what you are seeing is specialised business units or sub-units in large city firms and again, I think that's the way a lot of work is going. I don't see a lot of generalists anywhere and you can put that towards questions of other professions like medicine and science and virtually any other thing.

DR MUNDY: You can say it of economists as well. I guess following on from that, we would make some observations about the nature of legal training and legal education and whether the Priestley 11 is fit for purpose in the 21st century. Do you

have any views on that and more generally, and I think it's true of a lot of professions, you start out as a generalist - - -

MR JOHNSTON: And then you specialise.

DR MUNDY: And then you narrow it but I guess there are circumstances where people may come from other backgrounds or forms of training which may then converge upon certain parts of the law.

MR JOHNSTON: Certainly, and my response to that would be that I still believe there is a place, at least in initial education, for the Priestley 11, because what that laid down is the foundation and you can go on and build your house and build your specialty in whatever you like, so long as you have got the good foundation. For example, when I was faced with various questions at the ombudsman's office; people would ring up and say, "What sort of problem is this?" It was important to be able first of all to identify it as a government or public problem and if not, if it was sort of a private dispute between people, to be able to suggest a body or an agency or even, more generally, something like law access but also, if you could suggest the kind of issue this was and the questions you might consider asking, so you need to have some level of general knowledge.

I think the problem or at least the problem as I have perceived it, I would not be surprised for many sort of new lawyers or lawyers just trying to make their way is that the monopoly - and I will call it a monopoly because I think in many ways that's what it is - because it's a monopoly, it can then place prices and put additional regulatory barriers in the way of people who for all intents and purposes can argue their competence but simply because of running out of financial resources, may not eventually get to where they would like to go and from that, probably there are many lawyers and barristers or people who would be very competent there who never actually get to the point of practising because they simply can't afford it. I perhaps naively believed that when I completed law school, I would be able to call myself a lawyer. I very quickly learned that there were many other steps down the road and almost 20 years later, I am still making them. That's partly due to my own disability and physical limitations, I might add, but I still think there is some validity to the argument that again the modern world is very different from the craft or Inns of Court world that the law came out of.

MS MacRAE: I guess looking again at what our report has to say about legal training, we do make some recommendations about possibly making some changes to the undergraduate arrangements, but from what I hear you say, you say you are broadly happy with that, but it's the post-degree requirements that you feel are getting in your way here.

MR JOHNSTON: Yes, I would say that and additionally, I would add that one of the issues there is that generally, there is only one provider and it's almost like the fox being in charge of the hen house scenario, where the regulator is also the provider, sort of the provider, and the same body does just about everything, so it's a very in-house sort of arrangement and I think that limits competition on prices and that means that some perhaps questionable arguments can be made about, "We have got the control of the profession. This is a quality measure." No, it isn't. What it is, it's a price fixing measure and I'm quite sure that there are a number of other models and a number of other scenarios that could be far more competitive, far more cost sensitive than having the legal profession monitor, oversee and train its own but make that a financial income for itself.

For example, while I can claim a dispensation because I am currently unemployed, an understandable requirement of continuing legal practice is that you continue to undergo mandatory continuing legal education. An important point about that is the cost of gaining those points. This is fully fledged conferences of several hundred dollars at least, more like three to four hundred dollars, and for someone on a limited income like me, and possibly many other lawyers who are trying to run businesses, and running a business is always tight, that's a lot of money and that doesn't add in things like transport costs of getting to and from, other costs that might be involved as well, so I think there is a question there as to who provides it, at what cost, and just because there's a cost and just because it has been provided by the legislated association is not necessarily a guarantee that it's always going to be right or the best quality or that it couldn't do with some outside scrutiny.

DR MUNDY: I didn't have anything else.

MS MacRAE: No.

DR MUNDY: I certainly am quite interested in the observation. Is a solution to this problem that you raise with the Law Society in that really it's of - taking what you have said together is that you don't see any problem with the way, you know, the path that people can take. It's the absence of a forbearance or alternative paths.

MR JOHNSTON: Certainly, and it's the absence of obvious open competitive pressures on the Law Society and its related bodies, even the courts, as to the costs of those requirements, because I think you could end up with a far more competitive structure if that was allowed open.

If I might just add and go back to the point of sort of splitting up the specialities, one of the objectives of my consultancy business was to prepare for the oncoming National Disability Insurance Scheme. I know that the Commission has a certain degree of responsibility in this and I know that Commissioners at the time

obviously believed that they were doing the right and proper thing. I have already stated my concerns about it to the Commission and in a submission to the senate about the bill.

The point I would make that actually relates to the evidence I heard on arrival is that you express some concern about mediators and other ADR for being out of the view of public scrutiny in public courts. I would also sort of send up the same red flag at the executive and public administrative acts like the National Disability Insurance Agency. It not only has regulations but it also has under its legislation something called rules.

The regulations, as we all know, will be tabled and approved or disallowed by the parliament. The rules, on the other hand, are listed differently and I'm assuming, because no-one else has told me differently, that they're a different creature and my concern is that they will not be tabled or scrutinised by the parliament or anyone else necessarily.

My concern there is that you're already dealing with a potentially very vulnerable population, many of whom won't be either legally trained or necessarily have a good understanding of administrative things. They will have to deal with a range of sort of care bodies and other interests who will be sort of giving them advice, some good, some bad and then they will be presented with a body of rules or a body of guidelines. I have in the past which was the purpose of my initial submission to the Commission on the NDIS.

In a lot of situations it would be preferable - and I have certainly heard from some of these people and other vulnerable people on the ombudsman's advice line or complaints line - for these people to get formal legal advice or some form of formal advice but many of them, if not most of them, won't ever be able to afford it. I note that you make comments in your draft report of a lawyer who said to you, "I couldn't even afford my own services." That tells you something very important.

What I would be offering, if I'm allowed to do it, would be a lower cost service which dealt specifically with the problems of people that I would understand most, that I have had to deal with similar sorts of problems. Of course I have had the advantage of the training and the education but nonetheless the legislative set-up prohibits me from doing that at this moment.

If I take on clients and if I give out any advice, I have to be very clear that it is purely advice and if we get to the point of, "We would like you to draw up a legal document for us," or, "We would like you to write a legal letter for us," or, "We would like you to become our formal representative in a tribunal or a court," that's where I have to stop and say, "No, I can't actually do that. I'm going to have to refer

you to a lawyer who is probably going to cost you 10 times more and you're probably already a pensioner or a low-income person, so you can't afford that, but I can't do it for you."

I know that part of the answer might be things like Legal Aid and community legal centres but I have also worked previously for a community legal centre. They are fine as far as they go but I must admit to having certain concerns about public interest litigation, because what that can do is divert a lot of resources and a lot of time of another party who might be running a large business on litigation that they either weren't prepared for or they were trying to run a business or some sort of major enterprise and then they suddenly get advised of some group being subsidised by the government, their task is to object to their proposal, whatever it is, be it a mine or a colliery, something like that.

I would tend to argue that in many respects public interest should be the focus of the parliament, so those questions should be dealt with by the parliament, not the courts and that if we want to do something for civil process and procedure and individuals and businesses versus businesses, individuals and individuals in the courts, then we need to take Public Interest Advocacy out of the courts and we need to take it back to where it should be, in the people's representatives in the parliament.

DR MUNDY: All right. Did you have anything to add?

MS MacRAE: No.

DR MUNDY: Thank you very much for your submission and your time.

MR JOHNSTON: Certainly. Thank you very much.

MS MacRAE: Thank you.

DR MUNDY: Mr Orme, if we could please. If you could please state your name and the capacity in which you appear?

MR ORME: Bill Orme. I'm a retired solicitor and have particular interest in affordable justice and accessibility.

DR MUNDY: Thank you, Mr Orme. Just before I ask you to give an opening statement, you raised with us earlier the question of the publication of certain correspondence. I have subsequently checked with our office in Canberra and the Commission's policy is not to publish correspondence unless both parties to the correspondence consent to it.

So if we are able to acquire the - we have no objection to the publication but our policy is generally that parties to the correspondence need to consent and this is our general rule. So if the other party consents to the publication of - I think it was the Supreme Court of New South Wales but also other individuals which I won't name for the purposes of the record as they are now private individuals and not public office holders.

MR ORME: I have aimed to get their consent.

DR MUNDY: If you are able to procure such consents, then we will have no objection to publishing them. They pass all our other tests. They just don't quite go to the consent.

MR ORME: Thank you for clarifying that because I was disappointed - - -

DR MUNDY: You will understand that we have received an inquiry - - -

MR ORME: 220 submissions.

DR MUNDY: Indeed we have received raft of documents which purported to be submissions but have turned out not to be and they have been put to one side for a range of reasons, not only including that the comments were defamatory. So you will understand our caution in this regard.

MR ORME: I do.

DR MUNDY: With that formality over, could we ask you to make an opening statement.

MR ORME: I would like to make a statement and having listened to Mr Johnston, he has already made many points that are very dear to my heart and how eloquently

and directly he made them.

DR MUNDY: Yes, indeed.

MR ORME: And why a person with his ability is limited in his capacity to serve the community amazes me. In opening, I am in a slightly unusual position. My wife and I are long-distance walkers. We walk for six months a year and for sometimes two months at a time, we don't have access to the Internet, as we are in very remote places and while we were walking in April, May in France, I first heard about the Commission. I wasn't aware that you had an interest in probate and administering it until I had access to the report and as soon as I came back, I read it and quickly made a submission. If I could make two corrections in it: I didn't clearly say that I am proposing - I said under three and four that I would consider the Consumer Claims Tribunal as a possible body to take this over. I was more referring to the Fair Trading Division and its licensing division and conveyance division and things of that nature, if I can correct it, and I wasn't aware of your comments on cost recovery. I probably would have adopted that if I had read it before I ran the report.

The other thing by way of introduction, I might say that my original career was on a Defence Department scholarship to do a doctorate in the three dimensional geometry of space in combination with master in the British government and I have a deep interest in mathematics and things of that nature. I then moved to law and was lucky enough to be made a partner in a national firm, now DLA Piper, at the age of 22. I realised at that stage, going back to 1952, that my law degree and science was inadequate, because the law in those days didn't do much commercial, economics and mathematics, so I also qualified as an accountant, while my wife was having four children, and as a result of that, at the age of 24, I was made managing partner as well as being senior commercial partner and for 15 years, I set about putting many of the things I learnt in engineering to look at running an efficient, effective law firm, in particular critical path analysis, where I found that I could do things in half the time more effectively and in particular, make more effective use of senior lawyers and partners. In doing it, I'm very conscious of the cost of running an efficient practice and providing service to the community.

Coming to the particular issue here, in reading the submissions, I would like to concentrate on the issues of elderly people and particularly elderly women, as I have for the last 25 years been doing a regular Meals On Wheels run covering seven different deliveries and I hear continually the condescending attitude of particularly accountants and lawyers; 80 per cent of the people we deal with are widows and not only that, the unreasonable costs that are being imposed upon them in accessing the services not only of law and accountancy but other services. My particular interest in this started when I happened to be in the Probate Court to see the rudeness and lack of help by the court. The woman had received a requisition to comply with rule 42

and she asked what the rule was and she was told, "I'm not allowed to tell you." She then asked for a copy of the rule and she was told, "I'm not allowed to show it to you." I was so horrified by that, I presumed it was an aberration. I went back a week later and found the same sort of thing happened.

I took it up with the chief justice, who to my delight went in and pretended to be a member of the public and watched what happened and confirmed the same problem but rang me to say that they had been threatened with being sued so many times that the Crown Solicitor had directed the court not to help the public. I questioned that and asked could I be given a copy of the Crown Solicitor's opinion, because I disagreed with it, and secondly, I would like the statistics of how many times they had been threatened with being sued in the last five years. He rang back a week later to say it was embarrassing, that firstly, they had gone back 22 years, which is as far as the records allowed, and they had never been threatened with being sued as far as he could find out and secondly, even worse, the Crown Solicitor's opinion didn't exist. It was a furphy the court was using to refuse to help the public.

I have taken some time in explaining that but it's in that background that I then offered, he said, though not particularly good at helping the public, that a daughter and I, a lawyer, would do a do-it-yourself guide for the court "because if you do that, we will publish it and support it." We did it and produced it and as a result, it was then published. It was important to me that it wasn't a private document. It was the Supreme Court offering the service and deputy registrars were rostered daily to help the public. Very quickly, it got a lot of publicity in the media. It was very popular. My daughter came up with the idea that we created Mary: "And here is Mary's handwriting, how Mary did it, and here are the blank forms. Copy what Mary did." We worked with the pensioners association and the older women's network. It went through 18 drafts as they pointed out we didn't answer their questions. They couldn't understand how we did. As I say, it was very popular.

The court, coming to this question of costs, refused and at first, the court gave us - because they arbitrated in glorious fees what the average solicitor charged. I put that in the draft. They insisted we take it out of the draft because they believed a widow should get three quotes and compare it, which is ludicrous. As a result of that, I said, well, I've heard of the Law Consumers Association and they are experienced in conveyancing and law and they were enormously helpful in developing the guide, working with the people we did, so I said to the court, "Let them produce a document identical to what you did with this further information in it." A Manchester health fund offered to fund it and it was produced on that basis with quite a bit of extra information.

In about a year, I started to get rung by people to say that they had heard me on television or read about it and the court was no longer handing it out. I put in the

submission, I went and pretended to be a member of the public and was told that, no, they no longer handed it out because it was so full of errors, they couldn't vouch for it, even though of course they had approved it. When I wrote to them, asked them could they tell me what the errors were, being the Law Consumers were reprinting theirs, they told me very bluntly that it was not their policy to help non-government bodies. I then offered to send the correspondence to the Sydney Morning Herald. Then they reluctantly told me that they had changed it, a minor change in one of the forms and they had increased the filing fee and they were the serious errors on which this service has been suspended.

The court now tells me it's been trying to getting it updated. I might say I have updated it and it's ready for publication but they are not prepared to do it any more and their words are, "It is no longer in our business plan to help the public. We only want to deal with solicitors and trustee companies."

Lawyers, equally, have now taken action. The Law Consumers Association, in our work with the pensioners and the older women's network, we found they fell into three categories, those people that wanted to use lawyers and accountants, and that's fine. The second group wanted to do everything themselves. They said, "We have been under the thumbs of men all our lives. We want to be independent. The lawyers pat us on the head and say, 'Go home, dear, leave it to us. We'll fix it.' We want to do it ourselves." They want a bit of help like this, but they want to do it themselves. The third group said, "Look, we want to learn to do things ourselves, but we don't like dealing with government departments, so the law consumers, for a fee of \$45, said, "We will help you fill in the forms. We will lodge them for you, we will help you answer requisitions, and that will be a service we provide to you."

The Law Society employed a private investigator to investigate this service, and this is coming to what Mr Johnston was saying, and took legal action against the Law Consumers Association for helping them fill in the forms, as a result of which they had an injunction to stop them doing this, and had to pay \$21,000 for the Law Society's costs.

It's in this atmosphere that I add to the submission I have put, and the final thing there is that the Supreme Court of New South Wales virtually has no statistical information of what sort of applications, who they are lodged by. I have on a number of occasions found in the widows in the Meals on Wheels service that accountants are charging them \$400 to lodge a tax return which they are no longer required to lodge, they can be exempted from lodging it, but they don't tell them and they continue to do it. So we are having services like the law consumers restricted by the Legal Practitioners Act that make it impossible for a person to assist people.

In addition, we have got the fact that by protecting themselves, as I put in the

submission, lawyers tell me, "It is out last remaining area of fat." Not only is it an area of fat, and that is true, but it is on a very vulnerable section of our community. These widows who have paid the medical fees, funeral fees and that of their deceased husbands, have no cash; so the lawyers are maintaining this monopoly, restricted monopoly, I think, and to say in our sophisticated society, we are applying for a credit card, trading shares on the Internet, doing things that - filling in one form, and that's all it is, there's no legal advice needed, that on a default basis the form is lodged; if there's no objection, probate is granted - that women are incapable of doing that is not only denying access to their justice in this area, but it is insulting to them.

The final thing, as I say, if I annex to that my exchange. I have for seven years after I left law initially, was the first Privacy Commissioner with very large - we produced 59 reports in my seven years, right across the society. We dealt with some 20,000 complaints. I then went on to head one of the royal consultancy agencies, conducting surveys as well as all sorts of issues. I offered the court, with their lack of information, because I believe, like tax returns are being lodged where they're not necessary, that many probate applications are being lodged where it's not necessary to obtain probate, to ensure that thousands of dollars are charged for fees, that the forms could be greatly simplified and procedures greatly improved so that we could have a much more efficient service.

I offered for a dollar to do a month's sample for the court, because agents don't collect any of this information, and as you have access to that correspondence, you can see what the result is; so I would be looking for two things. One is that the Supreme Court in its costs structures and procedures and attitudes are such that it is not the appropriate body for dealing with these, it should only be dealing with disputes, and probably even not generally disputes as there are many cheaper and more efficient lower courts who deal with the vast majority.

You put in your report, which I don't have, that there are 66,000 applications a year. I have the New South Wales figures, only in the rawest form, there are 22,000, and it's amazing how consistent it is year by year, but only 150 of them are disputed. Virtually all of these 22,000 are just straightforward clerical procedures, and we have an average fee of about \$1800 to do this. So I say in summary of all this, one is I don't have the statistics, I wish I had, which I had as Privacy Commissioner, royal commission powers to do it, but I'd certainly offer my services, because I believe my background and my privacy experience means that I do have the skills to do a study if the Productivity Commission wished the study to be done and was interested, I would offer my services to do it for the dollar, and I think the reason the for dollar is that so you would be contractually bound and there would be the normal protections of confidentiality and that nature and, secondly, I believe these sort of procedures should be looked at as being dealt with by much lower courts, where they can be more efficiently and economically done.

Thank you very much for all your time, and I apologise for the looseness of the original submission.

DR MUNDY: Of the 150 matters that are disputed, do you have any sense of - I mean, one would have thought that a number of these disputes would be relative low grade, relatively simple and could be resolved. Probably, they would be no more complex than matters which are typically resolved by tribunal members in all sorts of places or maybe, on a bad day, by a magistrate. I mean, how many of these matters of the 150 would you think really need the attention of a Supreme Court judge? Are we talking about - - -

MR ORME: I, unfortunately, I tried to get his information, but it has been denied to me, the letters that I would like to table, but until I get consent, written by leading judicial figures. The comment in one of them, I was delighted to see, I said, "The trouble is, every time I deal with a bureaucracy, I get a bureaucratic reply." The letter said, "He thinks that if he continues to deal with the bureaucracy, he will only get bureaucratic replies. I am inclined to agree with him."

This is the problem, and this is one of ways the profession and the courts defend themselves. When I was Privacy Commissioner, there was a comment that you didn't have teeth. I didn't want teeth; I had two powers. One is I had enormously and too broad, because one of my functions was to try and define privacy, and therefore you have to go beyond the boundaries to say you have done too far, so virtually I had unfettered royal commission powers, but secondly, and most importantly, while I had to report to parliament once a year, I had the right to report to the public whenever I wanted and the right to find the facts and the right to inform the public unfettered is far more important than the right to enforce, because I used to take the view on the very rare occasions that it had happened that if your recommendation at first wasn't accepted, that was a plus to me, because it made me say, "Maybe I'm wrong."

So I would go back and re-think and re-study and secondly, maybe I didn't argue it well enough. It meant you performed better. The court hides behind the fact, I think, it doesn't want the study done because it doesn't like it, the same as the spurious Crown Solicitor's opinion. It doesn't want the facts known and I am convinced that if the facts are known, the problems will be pretty quickly rectified because they couldn't stand the scrutiny. In the Law Society, the definition of "legal work" should be far more restricted because in this sophisticated society, there are many people who are more suited than lawyers to deal with many of the problems that they are now restrictively considering.

DR MUNDY: The issue of processing of wills, as I said, is on the boundary of our

terms of reference.

MR ORME: I didn't think at first it was within the terms.

DR MUNDY: We will give it some thought and see if we can shine some light on it with a creative reading of section 89. Thanks very much for your time, Mr Orme.

MR ORME: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Can we now have the Australian Lawyers Alliance, please. Could you please state your name and affiliation for the record, please, and then if you would like to make a brief opening statement

MR STONE (ALA): Certainly. I am Andrew Stone. I am a barrister in New South Wales. I am the president elect of the Australian Lawyers Alliance.

MR SCARCELLA (ALA): I am Anthony Scarcella. I am here in my capacity as New South Wales director of the Australian Lawyers Alliance. I am a solicitor of 38 years' standing, former Local Court and District Court arbitrator, one of the 2000 nationally accredited mediators you heard about before and I am happy to be able to give some evidence today.

DR MUNDY: Thank you; if you would like to make a brief statement.

MR STONE (ALA): Thank you. In short terms, our members are the people who act for the injured. We represent plaintiffs in personal injury actions around the country. In that respect, we are quite possibly the single largest facilitator of access to justice amongst the legal profession in terms of the capacity to claim for personal injury would shut down overnight if our membership wasn't willing to act on a speculative basis and carry the costs of running those cases to a conclusion. No-one anywhere in this country pays up front to bring a personal injury action. The risk is borne entirely by the legal profession. The costs and disbursements are by and large borne by the legal profession and if we stopped doing that, people stop getting to sue for being injured and we take considerable pride in our willingness to do that, including taking on difficult cases. That means from time to time, we don't get paid. It's just part of our process of doing business.

You have our submissions and it might help if I focused on what we saw as being two important points that we summarise at paragraph 49 in the conclusions. The first is that by and large, we and our clients deal with institutional defendants. It's either government insurers or private insurers and that's in part because where there is no insurance, we don't sue. We tend not to pursue private individuals except in fairly rare cases. Because they are institutional defendants, without us, our clients don't do as well and the statistics clearly bear that out. Part of what you look at within, for example, the New South Wales motor accident scheme is they say, "Well, introducing lawyers means that costs go up," and when the motor accident authority complains about that, they are not complaining about legal costs so much going up. It's about the actual claims costs going up and we say when we meet with them, "Well, yes, because we make sure our clients know about the heads of damage they are entitled to recover. We make sure they get what they are properly entitled to."

Strip us out and people have no idea what they are entitled to. They have no

idea they can negotiate with the insurer. They have no idea of the relevant criteria to apply to determine the value of their claim. I am very keenly aware that from an economist's perspective, a phrase I heard years ago, that the plural of anecdote is not data, but having expressed that awareness, let me nonetheless give you an anecdote of a short story. I was called upon by a mate of a mate to look at somebody who had been dealing with their own personal injury claim, knocked off their motorbike, fractured wrist, had gone back to work but had some difficulties. I met them for breakfast at my regular hang out up in the Phillip Street where I sit and do some work before everyone else gets in. They came in and met me.

We looked over the paperwork for their claim that consisted of about half a dozen pages of paper, including the insurer made the offer for 90,000 odd to settle the case. I applied my knowledge and learning to it. They wanted to take it, said, "Look, you know, it's not much but I want out." By the end of the day and after three phone calls, there was a negotiated settlement and I think it was just over \$200,000, because that's what we can do. Most cases are a lot more involved. Most cases, it's not done in a day because you are involved in preparing things from a lot earlier on and getting it prepared and that was a case that might well have been worth more if you are prepared to bear with it but the short answer is, the injured unrepresented get ripped off, full stop. Strip lawyers out of that process against institutional defendants, all of whom have vast hordes of in-house lawyers themselves, and that is nowhere a level fight.

The second point we make is out of some concern about the Commission's comments about tribunal systems. We think and we know from the experience of our own members acting within tribunals that we facilitate the smooth passage of matters through tribunals. Again, my area of expertise, motor accidents in New South Wales, is dealt with by a tribunal, the Claims Assessment and Resolution Service, and our members act as CARS assessors, the abbreviation, and their universal experience is they hate cases involving unrepresented litigants, because they are not organised, they have unrealistic expectations, they don't appreciate the way the systems work and those cases take twice as long and twice as much effort.

Given that our members act on a speculative basis, we have no interest whatsoever in unnecessarily dragging out cases. We want them done, so that we get paid. We want them done because from my perspective, I want to maximise the amount my client gets out of it and I want to minimise the amount I have got to take out of my client's money for the client's costs to get it done. I don't act for the injured so that I can take their money. I act for the injured so that I can get them money and that's exactly the view of our membership, so we think we do have a real value to add to the system and we also that we help enormously in getting an awful lot of cases out of the system that wouldn't be there. We are the preliminary filter.

Almost invariably, our members will give people a free first consultation to discuss. They will then quite often continue to explore the options before six or 12 months later, having done a very thorough investigation of the claim, saying, "Look, you can't win this case" or "You can and it's not worth it because the damage is limited to this." We are a very effective filter in actually getting cases out of the system where people unadvised would tend to proceed ahead. We are also very helpful at reshaping people's expectations out of the system within the system.

One of the ways in which that happens is that you have in effect got three parts to the claim: can you prove liability; did someone do something wrong that caused you injury; is there any contributory negligence, and then what are the damages. The one where we do quite a bit of work with people that is tough is people are very poor at understanding the concept of contributory negligence, that you are partly responsible for your own misfortune. It's a fundamental aspect human nature called cognitive dissonance that in order to maintain our own self-image, we don't like to be partly to blame for the things that happen to us. You find that amongst children, and a lot of us never grow up, so an awful lot of what we have to do is explained to people why this is partly your fault.

That's a lot more difficult without us taking that educative role over a period of time and attuning people to the idea of, "Look, you have got to compromise the damages in this case, because you're partly to blame. You should have been looking where you were going. You should have exercised more care. There were things you could have done that could have avoided this accident, as well as the other party." So that's where we also think we have an important role to play in shaping expectations and then negotiating settlements.

Within my practice, I view it as almost a failure if I get to court, because that means that I haven't been able to negotiate a deal that satisfies both sides and gets us out of there. I do a lot more settlement conferences than I do court appearances. I know Anthony has got one or two things he wanted to say. The only other thing is, I won't say it now, but I invite you to ask me a question about offers of compromise, because that's a particular bugbear of mine over a number of years in the unfairness of the offer of compromise regime, but we'll perhaps come back to that and let Anthony have a word.

MR SCARCELLA (ALA): I just want to come to a couple of matters in relation to self representation. I can speak with some little authority, having been a Local Court and District Court arbitrator for some years, and that is that I'm certain that the overwhelming majority of judicial officers or quasi judicial officers have a real struggle with self-represented litigants. There's a real dilemma, because you are faced with wanting to make sure that the unrepresented litigant has an opportunity to get their case out, but on the other hand you don't want to disadvantage the other

party who is prepared and who is represented by showing too much leeway on the other side.

I can understand the reasons between preparing some sort of a protocol for self-represented litigants as a last resort, but that would be as a last resort. The whole idea would be to avoid that scenario happening in the first place, and there are a number of factors that have been taken into account in that regard, and that's the diminishing availability of legal aid, what can be done to do that. I myself am a volunteer of Salvo's legal humanitarian, and we do a lot of filtering at our advice bureaux. We see people coming in off the street in all sorts of matters - criminal, matrimonial, police, traffic, those sorts of things - and a lot of the time I suppose really the inquiry is really a general guidance; it doesn't require so much legal advice as to pointing someone in the right direction.

We do need filters. The Australian Lawyers Alliance members, as Andrew has said, form a filtering work in the system, and we add value to the system. Our concern is that we really have no great issue with the majority of the Commission's draft report. Obviously, we have something to say about concept of what the value of our services are, and that goes back to, if you consider it carefully, those who continue to use our services, and you will really find, I think the statistics will show, not that I know where you get to find them, except in the Supreme Court and the District Court themselves, if they keep those records, that most personal injury clients are represented, because we do provide the service and we provide the value.

DR MUNDY: I think, just on this question of representation, I mean I think, and maybe we weren't as clear as we might have otherwise been, but I'm pretty certain there were words around "where appropriate", and there are tribunals, and there are jurisdictions which have been set up for the purpose so parties can self represent. What has been put to us by a range of people is that there are a significant, perhaps a majority, but a significant number of matters within those fora where the presence of legal representatives doesn't help.

All we are saying is that those fora usually have rules where appearance by representatives is allowed by leave, and I think we canvassed some of those before where in the former there might be a normally self-representing fora, but someone might, say, have experienced some form of disadvantage. I think all we are suggesting in that space is that those rules, which were constructed for the purposes of those foras, are perhaps not being enforced with the rigour that the architects of those foras had intended. I think we also make very clear there are places where we think absolutely people must be represented, for example, guardianship matters is by far - - -

MR SCARCELLA (ALA): Yes.

DR MUNDY: So I think that's - it has been put to us by presiding magistrates that their courts should be places where well-informed, capable citizens should be able to come unrepresented and get matters, certain types of matters, resolved. I guess where I would like to start is that we have attracted some notoriety about our propositions about contingency fees, and given that you are probably on the boundary of people who may be able to benefit, or at least participate in such reforms, whether you have any views on - - -

MR STONE (ALA): I don't think we're at the boundary, I think we are at the very core of it.

DR MUNDY: I was trying to protect myself.

MR STONE (ALA): What in the United States would be called the ambulance chasers. I know the Law Council has done some fairly detailed research work on this, and I was given to understand that they were going to be sharing that with you.

DR MUNDY: They hadn't as of lunchtime that the staff were aware.

MR STONE (ALA): Right, okay. You have heard rumours of their work on the subject?

DR MUNDY: I understand it's coming.

MR STONE (ALA): Right. I have seen that in draft as part of the consultative process. The ALA were consulted by the Law Council in doing it, and they have done some detailed work. I can see arguments for and against. Before we even start down this track, it's going to be over the dead bodies almost of every state government, as far as I can see, on a political level.

DR MUNDY: So was tariff reform.

MR STONE (ALA): I'm not saying, you know, you shouldn't recommend as part of the groundwork of what might in the long term lead to changes of thinking. At a personal level, and this is purely personal and not organisational, I have a reservation about taking a part of my client's money that is intended to cover, in effect make good the damage done to them. If there's 100,000 plus treatment expenses that have to be paid back to somebody else, to doctors and so forth, well, I struggle to think that I should get a third of that, or 25 per cent of that, or any part of that.

I think there is something to be said for a system that reimburses people as they properly ought to be reimbursed, and then takes care of the costs of having to get that

reimbursement on top of it. A lot of the American jurisdictions, were that to allow the contingency fee, that then becomes the costs and, at a personal level, I've got an issue with taking the money out of my client's pocket, rather than having the insurer behind the person who caused the injury pay them their proper compensation, and the Lord know, we have long since abandoned the concept of proper compensation in this country; with the caps and thresholds, it's nowhere near proper. At a personal level, I don't want to be a further impost on that. That's my reservation, but there are arguments for it.

DR MUNDY: Yes. Let me perhaps ask a more specific question. I mean, one of the concerns that are expressed is this will lead to an outbreak of unmeritorious litigation, and the courts will be full of unmeritorious claims or there will be various forms of black and greenmail perpetrated on defendants. That's perhaps an extreme characterisation, particularly of the case in the US. Our observation, at least initially, would be, "Yes, but we have this thing called adverse costs orders in this country." Would it be your view that, whatever the volume of litigation issues that may bedevil the United States would be significant, are significantly mitigated by the presence of adverse costs orders, or is our concern really you don't think there would be this rush of litigation?

MR STONE (ALA): I would be surprised if there was a rush. I think, given that people are willing to act on spec currently, if there's a viable claim with a reasonable prospect of you getting paid, and subject to the client being willing, you run the case, subject of course, not now that negotiated settlements - you start the case, you pursue the case - better than saying run the case. I must say, there is probably in our minds some small degree of sliding scale in that I'm more likely to advise the client to run a fifty-fifty case if there's a million dollars at stake, rather than if there's \$20,000 at stake. I'm more likely to run it if they have no assets and therefore have nothing to lose personally.

I have a risk of personal liability if it's entirely unmeritorious but provided there's a viable argument, I'm protected as against adverse cost orders in New South Wales currently. It's purely the client. I'm more likely to run the fifty-fifty hundred thousand dollar case for someone who has no assets compared to someone who has a mortgage, a house and puts assets at risk. So difficult cases are more often run by the impecunious or at least on their behalf because they take less of a risk in the system.

Having said that, even for those with assets - you know, if it's an arguable case, you're on it, you lose it. It's very rare that you see an insurer pursuing costs because usually the threat of, "Well, let's go to the Court of Appeal" - at that point they offer to walk away and pay their own costs. I don't see a floodgate because to be frank I think, you know, the cases that are winnable are run at the moment. I don't think there's some large pool of marginal cases that people will run, where you invest your

own time and effort, because - - -

DR MUNDY: Because the incentives for people like yourselves in that environment to do the filtering you describe are essentially the same.

MR STONE (ALA): Yes. There's no change.

DR MUNDY: There's no different trigger?

MR STONE (ALA): No, there's no different trigger.

MR SCARCELLA (ALA): It's not as if with a different system of costs the courts change their approach to whether you win or lose. I mean, I do some commercial litigation on a smaller scale, not the big end of town, but it's the same principle there. You assess the prospects of success and then you give your advice and it's the same with - perhaps it's the impression that has been laid and we say unjustifiably. Litigation is the absolute last resort.

In differing tribunals and courts we have a dispute resolution process running somewhere in there or alongside there. Some of them are better than others but most experienced lawyers, or even younger lawyers who know what they're doing, will look at various stages, when the information is available, to try to resolve it, whether it be by - Andrew tends to do it by a lot of settlement conferences. My preference is mediations; acting for a party, not just as a mediator. So we factor all that into account through our filter system and I just don't see any different trigger for suddenly there being a flood of cases.

DR MUNDY: Okay. Interesting perspective about the ethical issue about remuneration which isn't something that has been raised with us before. I accept it's not the view of your organisation but I suspect it's a view you don't hold solely and by yourself.

MR SCARCELLA (ALA): That was purely a personal view I was expressing. It's my reservation.

DR MUNDY: Yes, I can see that. It goes beyond the notion of a fee for services.

MR STONE (ALA): Yes. I mean, I feel bad about solicitor-client costs.

MR SCARCELLA (ALA): Most practitioners in this area for a child will not charge solicitor-client costs. They would be party-party costs.

MR STONE (ALA): Yes, that's very much so. You know, I never take money out

of a kid's pocket because I just believe, you know, there are boundaries you set and I think the case with most of our members is that, you know, in effect, we just act for the recoverable party-party in kid's cases because the money is going off to the trustee to be guarded until they're aged 18 and you just don't go taking money off kid's. Adults, all right, that's the price of their doing business, that there's a solicitor-client gap, but we just tend to treat kids as special and different and don't do it.

DR MUNDY: Okay. You indicated you had some views you wanted to express about cost orders?

MR STONE (ALA): Yes, and I might say I had some input in the New South Wales Bar Association submissions on the same topic.

DR MUNDY: We had a discussion with the Bar Association this morning and I think at the end of the day we mightn't be that far apart. Where we're coming from is essentially and we may have got - our intent is to try and explore ways in which appropriate incentives are provided for behaviour and they're symmetric.

MR STONE (ALA): They are in no way symmetric at the moment. They are disproportionate to the tune of 5:1. Institutional defendants have no fear whatsoever of the offer of compromised regime. I encourage you to search up and down the length of the institutional defendants around this country and find a single individual to put their hand on a Bible and make an affirmation and say, "Yeah. We settled the case because we were afraid that the plaintiff would beat their offer."

All they're up for is the solicitor-client gap which is - if you view that you're recovering the total solicitor-client costs, if you feel that you return, say, two-thirds on a party-party basis, indemnity costs might be - it isn't usually - at worst the remaining one-third. On the other hand, plaintiffs live in absolute terror of offers of compromise and indeed it is usually when settlement negotiations have broken down or about to run a case, I will often have a solicitor say to me, "Shall we make an offer of compromise?" and I say, "No," and they say, "Why?" and I will say, "Because we don't want to put the idea in the defendant's head."

We get almost no benefit out of beating an offer. We get a marginal amount of extra costs. We come into their offer and we get no costs from the date of their offer, that's our full recoverable party-party, two-thirds of a set of costs, and we pay theirs on a party-party basis, two-thirds of a set of costs. That's a 4:1 ratio. If the solicitor-client gets 25 per cent, then it becomes a 6:1 ratio. So the current offer of compromise regime is broken. I have tried to interest people on that subject for the last three years and have got absolutely nowhere with it.

Someone asked me, "What do you do to fix it?" and I said, "Well, if you

actually wanted to make it a proportionate system, then it would be that the unsuccessful defendant pays the plaintiff's costs twice. That would be the equivalent penalty, because a plaintiff pays their own out of their own pocket and pays the defendants. If you want an equivalent penalty for a defendant, make them pay the plaintiff's party-party costs twice as a windfall for the plaintiff.

People argue that that contravenes issues of indemnity but we're not here talking indemnity. We're talking penalty now for behaviour, but that is the commensurate penalty. The 10 per cent that they suggested in the UK is a disproportionate penalty in large cases and is not enough penalty in small cases. The real solution, if you want it to be dead even, dead equal, level playing field, pay me two sets of costs and then you would find some defendants paying some attention, because at the moment they could not care less.

I'm not sure if you have received any submissions from the insurance industry. We invite you to call them in and ask them when did they last accept an offer of compromise from a plaintiff because they were concerned about the cost consequences.

MS MacRAE: Sorry, I'm still trying to get my head around it. Is that partly because the defendants you're dealing with are always so large that having to pay an indemnity amount from the date of an offer that - - -

MR STONE (ALA): It's just not very much money.

MS MacRAE: - - - the cost points - that it doesn't matter?

MR STONE (ALA): Exactly.

MS MacRAE: Yes, but if it was a smaller - if you had parties of equal power - what we were trying to do - - -

MR STONE (ALA): We never do.

MS MacRAE: - - - was to make something symmetrical with our recommendation and I appreciate now that we haven't quite got that right, but what you're suggesting from your submission is going the other way. If you were doubling the amount of party-party - - -

MR STONE (ALA): Let's assume an action worth a million dollars in which each party is going to spend a hundred thousand by the end of it and let's assume a two-thirds recovery on a party-party basis. If on the date of commencement of proceedings the plaintiff had made an offer of compromise and beats it, then their

financial reward out of those proceedings is effectively \$33,000. They get their one-third.

Let's imagine the defendant makes the offer on the day of commencement of proceedings and the plaintiff doesn't beat it, by a dollar, then the penalty to the plaintiff is that they no longer recover the 66,000 out of their hundred thousand in costs and they pay 66,000 to the defendant for the defendant's costs. So the plaintiff beating an offer of compromise got \$33,000 for it. The defendant beating an offer of compromise got 66 plus 66, \$132,000 out of it, a 4:1 ratio.

The equivalent penalty would be - if you wanted to make it even for both sides, if you want to up the defendant's penalty so that it too is \$132,000, you have to make them pay the plaintiff's costs twice. That is perfectly symmetrical but everybody blanches the moment I say it because it's just, "We don't do that to defendants." Trust me, you do it to plaintiffs. You do it to my clients, and that's why they live in fear of offer of compromise. They are very effective against plaintiffs, especially made early in the proceedings. They're dynamite against plaintiffs.

When we view a settlement, we look at a range. There's no pretending in personal injury that you can precisely quantify what a case is worth. There are just too many impressionistic elements in it. There's a range and basically an offer of compromise at the bottom end of the range, within the scope of available results from the mean judge on a bad day, with your witnesses doing badly and their witnesses doing well, it becomes gutsy at the moment you pass on something that's within the range because of just its risk minimisation. It is catastrophic if you miss their offer of compromise by a dollar. It is a real behaviour modifier on plaintiffs on the other hand, in part because their institutional defendants, and in part because there is such a small penalty by comparison. The insurance industry just doesn't care.

DR MUNDY: And it has probably reinsured some of the risk anyway.

MR STONE (ALA): Not at the lower levels, yes at the higher levels, but in fairness, probably not an issue in relation to costs. It's mainly the damages that blow out beyond a million, two million, is where the reinsurance really kicks in. Most of them aren't reinsured on the vast majority of claims; it doesn't get near the reinsurance.

DR MUNDY: Particularly the sort of matters you are doing.

MR STONE (ALA): Yes.

MS MacRAE: Just in relation to then to, if you are looking at this, and we are interested, as you know, because have got a recommendation on it, the Jackson

reforms had the penalty relating to damages, but that does seem a bit odd when we are really worried about costs, but would you see the benefit of having it related to damages because, if you are against the big defender and they've got deep pockets, that you might have more of an effect on them, or - in principle, it would seem to me you would be better off working out a symmetrical system, even if it was pay the costs twice, to say, "Let's relate it to the costs incurred. Let's not relate it to the damages paid."

MR STONE (ALA): If what you're trying to do is apply an equal penalty to both parties and provide an incentive to get out of the court system, then a 10 per cent uplift again in a \$100,000 case is of marginal interest to an insurer who has a chance to win outright on liability. In fact, it's probably less of a penalty than the solicitor-client costs gap. On the other hand, on a \$10 million case, to hit them up for a million dollars for not accepting an offer of compromise is probably disproportionate, so I'm actually not a fan of the Jackson solution, because I don't think it gives that degree of proportionality. In fairness, misbehaviour ought to not depend upon the size of the case, if you're viewing failure of - - -

MS MacRAE: No. That's exactly my point.

MR STONE (ALA): - - - compromise is misbehaviour.

MS MacRAE: So what would you use then?

MR STONE (ALA): I'd double their costs.

MS MacRAE: You would? Okay, good. I'm not saying that's what we would necessarily go for, but I think we're agreed, we are looking for incentives and I think we're agreed - - -

MR STONE (ALA): I would tell you if you were on a level playing field that, with a flick of the pen, gives you your answer, but it's what it takes to actually even it out.

DR MUNDY: And you will get a reaction, because it does even it out.

MR STONE (ALA): The insurance industry would hate that idea with a passion.

MS MacRAE: I think we can be pretty sure of that.

MR STONE (ALA): And given that government is also an institutional defendant, I suspect government will hate that idea as well.

DR MUNDY: Yes. Can we talk about this institutional defendant issue. We have

made some observations about what are litigant rules. Putting aside whether they're observed or not and the redress that people may have in the event that they are not is a different issue, but I mean one of the questions that we have posited is, we have model litigant rules for the state for two reasons. One is it's the innate character of the state that makes it powerful, but the state also is possessed of, arguably, unlimited resources for all intents and purposes, so there's an economic character to this.

We observe that there are large institutional defendants called the banks, perhaps more interested than insurers, who, and indeed in some sense the government is the insurer. Do you have any views on the benefits of requiring large institutional defendants who may have to hold a licence from government, at least we could pull out the Corporations Act power if we really needed to, to place upon them the same requirements as model litigants as the Commonwealth takes to its own agencies?

MR STONE (ALA): Can I answer that in two parts, which is to say, first of all, there are such obligations in some instances.

DR MUNDY: Can I just stop you there and ask you what those instances are.

MR STONE (ALA): For example, in New South Wales, look at the Motor Accidents Authority issues claims handling guidelines, and it's a condition of an insurer's licence that they comply with those guidelines in terms of - they have to give notices at certain points in time, they have to - there's a variety of obligations on them in their claims handling.

DR MUNDY: So these are, in effect, third party compulsory insurers who - - -

MR STONE (ALA): Yes.

DR MUNDY: Can I just stop there and just ask a historical question. Is that because - did that come with the privatisation of third party insurance?

MR STONE (ALA): Yes.

DR MUNDY: So it was to keep those obligations consistent?

MR STONE (ALA): It's a mandatory product and they're regulated, both as to the price they can charge and they're regulated as to their handling of claims, and extensively regulated.

DR MUNDY: Okay.

MR STONE (ALA): There are examples of that occurring, it does happen, and it happens in a variety of other states, and in some states you've got private insurers in that space, in other states you've got government insurers such as TAC.

DR MUNDY: Is that something that your organisation could come back to us on with an identification of who they might be, because that would be helpful to us, or at least some more examples?

MR STONE (ALA): Yes, I know, for example in Victoria there has been agreements between TAC and the legal industry as to codes of conduct and so forth. So yes, we can - - -

MR SCARCELLA (ALA): It's called the model litigant rules.

DR MUNDY: Okay.

MR STONE (ALA): Having said that, and having at various times litigated against the state of New South Wales, I'm far from certain that I can ever actually point to a single instance where the model litigant provisions have made a jot of difference to anything anyone has ever done against me in terms of, "Yes, they only did that because they're model litigants." It's difficult to identify what exactly is the benefit in that everybody should give you proper pleadings that identify the issues, that's a court-imposed obligation on every defendant. It doesn't happen half the time and across a variety of defendants irrespective of their obligations. People should engage in early resolutions of claims, and some do and some don't, and again that doesn't seem to depend on whether they're a model litigant or not.

Even within the context of the heavily regulated, as they would say, CTP industry, where I can complain to an industry regulator who goes and investigates. The regulation certainly makes a difference, makes an enormous difference, but it's a much more heavy-handed regulation than model litigant. You know, they get measured on KPIs, the timeliness of doing things and it really is, they would say, very heavily regulated in terms of their conduct, and you have still got plenty of people giving us a hard time. Institutional defendants don't like parting with their money.

MR SCARCELLA (ALA): And with claims handling guidelines, et cetera, you often find in the case that there's no consequence. The guidelines are there, but if someone puts up their hand and says, "Well, look, this is the procedure that should have been followed." It wasn't followed, and at best you will get a slap on the wrist, and that's the end of it. There are no consequences to it.

MR STONE (ALA): Given that the only penalty that the Motor Accidents

Authority ultimately has is to withdraw their licence, and that's so catastrophic as to be unthinkable: they are not as well advanced in intermediate penalty.

DR MUNDY: Yes, and you can see that perhaps others might suffer as a result in that sort of action.

MR STONE (ALA): It's a nuclear button, for the obvious reason they have never taken it.

DR MUNDY: Fair enough.

MS MacRAE: I was just interested, given that you do act on a no win, no fee basis a lot of the time, do you see a necessity for a legislated cap on that? Is there one in New South Wales? I'm sorry that I don't know the answer to that question.

DR MUNDY: On the uplift.

MS MacRAE: On the uplift?

MR STONE (ALA): There is no uplift.

MR SCARCELLA (ALA): There is no uplift in New South Wales.

MS MacRAE: There's none at all?

MR STONE (ALA): No, and I'm not sure of anywhere else that's got an uplift left either.

MR SCARCELLA (ALA): In commercial matters in Queensland there's still an uplift.

MR STONE (ALA): Okay.

DR MUNDY: Yes, and I think there are cases where there is no uplift in personal injury matters, but there are uplifts available - - -

MR STONE (ALA): Commercially.

MS MacRAE: Right.

DR MUNDY: So I guess the question, more broadly I think, is do you see any benefit, either from an access to justice perspective or whatever else, from there being an uplift, if one was available and, if so, should it be regulated in some way?

Should it be capped, effectively?

MR STONE (ALA): The return question from perspective would first of all be is that an uplift that is in effect an extra cost recoverable from the unsuccessful defendant as a penalty for not admitting liability in cases that I win, or is it me again taking it out of my client's pocket. I'm allowed to charge them extra for the risk that I took.

MR SCARCELLA (ALA): For the former, that would be a yes.

MR STONE (ALA): If the former, yes. If the latter, I've got a great reluctance about it. There is something to be said - I'm against any form of uplift in what's effectively a non-speculative case, because you get an admission of liability. If truly there were an uplift to cover the speculative risk, then it should only apply where liability is not admitted, and that should act as an economic incentive for defendants to admit liability to escape that penalty, but for that to be the case they've got to be the ones paying the penalty rather than just giving me permission to charge my clients more in high-risk cases. I mean, we would be kidding if we didn't say that overall we price our services, taking into account the fact that we lose some, so in effect the risk of the losses is spread amongst everybody rather than being borne by the ones we can't - you know, who we don't charge when we lose. You know, we're still in business so quite obviously we've spread the risk across the portfolio.

MS MacRAE: Yes. Yes.

DR MUNDY: Like the banks set more rates on the basis of they're not going to recover 3 per cent of it.

MR STONE (ALA): Yes.

DR MUNDY: It just becomes part - so in a business model sense you just - - -

MR STONE (ALA): It's factored into the price.

DR MUNDY: Yes.

MR STONE (ALA): If I'm using the appropriate economic jargon.

DR MUNDY: Okay.

MS MacRAE: Okay.

DR MUNDY: So the threshold issue for you would be whether it's allowed or not

and if it's allowed then - - -

MR STONE (ALA): Well, who's paying it.

DR MUNDY: Yes.

MR STONE (ALA): And I'm not in favour of giving us more reason to take money out of our client's pocket.

DR MUNDY: No.

MR STONE (ALA): I mean, you know, I start from the position of principle that the whole point of having a system of compensation is to the best extent that money can to put people that would have been in the position they would have been in but for the tortfeasor's negligence. That's the old common law principle, and I don't like that costs in part chew away at that and I don't want systems that further encourage costs to chew away at that because government's already done by far enough to chew away at it.

You know, if you want just one example of the way governments chew away at it, all future losses in almost all jurisdictions in Australia, with the sole exception I think of the ACT, are calculated using a 5 per cent discount rate. That's the assumption you make as to what will be the return on the lump sum spread over time. Some places it's 6 and a few outlaying - I think in Tasmania it's 8 per cent. Now, to be frank, that's just government mandated bullying of the injured because the real rate of return on money is in the order of 2 per cent in terms of what you can invest for, clear of inflation and tax.

DR MUNDY: That's what it currently is in England, I think.

MR STONE (ALA): Yes, and I think the UK's acknowledged that and brought theirs down. A 5 per cent discount rate to work out your future loss of earnings if, you know, the two of you are injured in a taxi going back to the airport you can - you know, that 5 per cent will cost you, depending on what you make, anywhere between hundreds of thousands and more. Now, there's enough things already government does to beat up on our clients. We don't want to join the parade.

DR MUNDY: Thank you very much.

MS MacRAE: Thank you.

MR STONE (ALA): Thank you

MR SCARCELLA (ALA): Thank you for the opportunity.

MR STONE (ALA): If there's further things that come up in the course of your inquiries that we can address we're happy to take questions that you have.

MR SCARCELLA (ALA): You would like us to come back to you on the model litigant rules.

MS MacRAE: Yes, if you would.

MR SCARCELLA (ALA): Yes. That would be - - -

MR STONE (ALA): Or really sort of alternate versions thereof.

DR MUNDY: Yes.

MS MacRAE: Yes.

DR MUNDY: I guess the issue is how might the behaviour of well-resourced litigants - probably most cases they'll be defendants - be manipulate - you know, be encouraged, I guess is probably what we're looking at.

MR STONE (ALA): But having said that, even with those highly prescriptive claims handling guidelines - now, I should say 50 per cent of motor car cases in New South Wales resolved without any legal representation, mostly because people, you know, the majority of people are not badly injured. A few weeks off work, a few thousand dollars in treatment expenses.

DR MUNDY: Insurer pays up.

MR STONE (ALA): Insurer pays up and they move on their way and, indeed, one of the things that has really facilitated that occurring in New South Wales is that they've introduced a scheme whereby, you know, the first five thousand dollars in treatment expenses paid on a no-fault basis.

DR MUNDY: Yes.

MR STONE (ALA): And that helps get the small cases out of the system. We're delighted about that.

DR MUNDY: Yes.

MR STONE (ALA): Where you get more serious cases and arguments over the

nature and extent of injury, prior injuries, causation, the self-employed are always difficult in terms of their economic loss. It's never easy to calculate because it tends to waiver up and down and for all of those variety of reasons they get more complex. And that's where we come in to assist people, and no matter how good a set of guidelines you put in place, very few people on their own are capable of working out "What is my future loss of earnings?" to know that you should inflation-adjust your past loss, you shouldn't be held at the wage rate you were on two years earlier but you're entitled to claim that your wages might have gone up in the last two years. They can't apply a 5 per cent discount rate to a future loss. They don't know that the courts will take off 15 per cent for vicissitudes. They've got no idea what the going rate is for, you know, an amputated leg above the knee for pain and suffering.

DR MUNDY: They don't know.

MR STONE (ALA): Yes. I mean, I suppose to me the truly telling point is that the people best trained in this system would be the in-house claims staff of the New South Wales CTP insurers. You know, they do nothing else. They live and breathe this for a living, and I've acted for three of them or their family and friends over the last decade and there's a reason that the most experienced people in doing this still come and retain lawyers, which is they know that we value add for the outcome they will obtain when having to deal with an insurer, because even they fear the complexity of the system that they are supposedly the experts in running. I mean, that's the true test of why do people who have a choice not to, utilise a system is because they see value in it.

DR MUNDY: Yes.

MR SCARCELLA (ALA): And you can have guidelines that are completely incomprehensible. One of my hobby horses is the workers compensation where they've as recently as 2012 taken away the ability in reality of the worker to access legal advice, and if you're talking about a denial of access to justice here you've got government saying worker capacity decisions are made by the insurer, reviewable by the insurer, reviewable by the nominal insurer, the Workcover Authority on its merits, and then you have an administrative review by the Workcover independent review officer.

Workcover sitting next to the word "independent" sort of doesn't sit safely, but you've got guidelines there for workers who have to represent themselves in making applications for review that are almost incomprehensible to lawyers and they've been re-done a couple of times, and that's a case where you've got guidelines, claims handling guidelines for the forcibly self-represented litigant, that he has or she has no hope of coping with, and the experience I've had where I've tried to pro bono and

tried to steer the in the right direction is, "I give up. This is just too hard," and that's a denial of access to justice. Yet on the scoreboard it's a safe return to work.

MS MacRAE: Yes.

MR STONE (ALA): And that perhaps leads into a dilemma that we didn't expand upon at length in our submissions but might be worth your while considering is that, for example, the CARS system was meant to be a quick, cheap, easy tribunal to try and move things along. Now, you end up with this pile of paper to put it into a CARS assessment because the CARS assessor wants written submissions from everybody. He wants a schedule of damages, wants detailed written statements as evidence-in-chief. There's actually more work to prepare a CARS assessment than it is to prepare for a court case because this so-called doing it on the papers and then having a hearing to determine - and none of them want to give a decision on the spot and in part that's all driven by - and in order to help the tribunal define, or they remove the power of the insurer to re-hear the CARS determination in court. It's final for the insurer. So a claimant who doesn't like the result trots off to the District Court not lightly or readily because if you don't improve by 20 per cent in front of the District Court you don't get any costs. Now, in 10 years I think I've taken one case out of the CARS system to a re-hearing, so you know, almost unused by some plaintiffs whereas for the insurers, because they don't have that right of review in the District Court, they're only out is administrative appeal of the Supreme Court and they bring quite a lot of them, and because the assessors hate being the one who got carted off to the Supreme Court for an admin appeal, the system bureaucratises up.

DR MUNDY: Decision makers become risk averse on reputation, effectively.

MR STONE (ALA): That's very neatly put, but I'm loathe to say that the solution to that is to give them power of God and remove all review from them, and at that point you've, in effect, removed an access to justice and you've got an arbitrary decision-maker - sorry - unreviewable decision-maker - and that runs very contrary to the grain of our system of justice.

DR MUNDY: We've, for good public policy reasons, always been in favour of sensible review processes, so - - -

MR SCARCELLA (ALA): And none of those complexities were created by lawyers working in the system.

DR MUNDY: No.

MR SCARCELLA (ALA): The bureaucrats created them.

MS MacRAE: Yes.

MR SCARCELLA (ALA): We'll tidy this up and now we'll add something extra. This will make it better and it becomes so much more complex.

MR STONE (ALA): But it's the decision-makers themselves who've set up, you know, we want this help and we want this help and we want this help to make the decision, and they in effect up the ante on the amount of assistance they want us to give them because they want to avoid and, you know, they want to be extending procedural fairness to everybody and it just gets harder.

MR SCARCELLA (ALA): Yet in the District Court not that long ago as an arbitrator your case would come in, people were laid back. It was actually very informal and casual, sort of rules were observed, but a decision was then dished out, sometimes on the day, sometimes a couple of weeks later without all the fanfare and hoo-ha and people went away, and at one stage most of them weren't re-heard by a judge. Then it became an opportunity again for the big defendants, institutional defendants, including insurers, to go to the arbitrations and roll their arm over. Not call a witness. Let you do all the work as the plaintiff. See how the case goes. Then go away and get some more information. Strap up their case and come back and re-hear it in front of a judge. So that system was working quite well. They were knocking over case after case, you know, I would have anything up to 20 cases in the list amongst six arbitrators and we'd get through most of them, or start them, and most of them would resolve - a lot of them would resolve, but now the technicality and the complications we've got to go through it just - - -

MR STONE (ALA): But those were the - yeah, I was going to say you'd get the occasional one page decision handed down on the day saying, "All right, you've got this - here are the six line items you're entitled to; this much, this much, this much, this much. I'm not giving you detailed reasons. If you don't like it re-hear it" and an awful lot of people would live with it, but within the CARS system we've now got them producing lengthy written decisions after waiting a couple of weeks after massive submissions from each side. It's finding decision makers prepared to give cheap, quick opinions but when they're then beaten over the head by the Supreme Court - - -

DR MUNDY: Quality control.

MR STONE (ALA): - - - not administrative review for not giving detailed reasons and analysis and failure to give proper reasons as a ground of administrative appeal.

DR MUNDY: All right. Well, we probably should end there.

MR STONE (ALA): Yeah, sorry, we've taken - run you late.

DR MUNDY: Thanks very much for that.

MR SCARCELLA (ALA): Thank you.

MR STONE (ALA): Thank you.

DR MUNDY: Could we now have Law Consumers Association, Max Burgess? Could you state your name and your affiliation for the record, please, and then perhaps make a brief opening statement?

MR BURGESS (LCA): I'm Max Burgess from the Law Consumers Association. I've been with the association for probably over 40 years on and off. I'm now acting as a volunteer and my only claim to fame is that I, under the transitional provisions of the Conveyances Licensing Act 1992 I became a licensed conveyancer and that was, again, renewed as another licence after the 95 Act came in. I've been a member of the Property Services Council when it was operating, so I had a close up look at the regulation of real agents in New South Wales. I was a consumer member on that council, not that we did much in the way of regulation. It was more oversight than anything else, I think.

That has since been moved to the Department of Fair Trading, do it entirely themselves within house rather than have a board or any other representation there at all. The interests of the association have generally been in non-litigious matters, mostly in administrative things where we believe that processes can be handled by people personally without the intervention of a lawyer and to that extent we've developed, in the first instance, we started as the Divorce Law Reform Association of New South Wales and we produced a DIY divorce kit, which was adopted, finally, by the Family Court and it may or may not have helped with the reform of the old Matrimonial Causes Act but at least we ended up with the Family Law Act which is universal in Australia.

I think it's only Western Australian which undertook to administer the act within the state system. Every other state does it with the Federal Court. Then we developed mostly as a form of producing some income to pay the rent our DIY kits, do it yourself divorce kit and people paid for that. Somebody made some notes up. That became the conveyancing kit and then it broadened. Probate and conveyancing are the two major issues; will kits, powers of attorney, guardianship, you know, all the other little things that hang off those activities we've covered.

It's quite amazing we've managed survived for nearly over 40 years so it's - I'm not sure whether we're doing some things right or not. We've had litigation with the Law Society which is always quite interesting. That was - they commenced proceedings against us when we started the first conveyancing company in New South Wales and that's - - -

MS MacRAE: Was this the Law Society of New South Wales?

MR BURGESS (LCA): Law Society of New South Wales, yes. We started the company in 1980, I think, 1979 or 80. They commenced proceedings in the Supreme

Court in 1980. We responded with a counter proceedings seeking a declaration as to the methods that we adopted in doing conveyancing. We were not in breach of the Legal Professions Act and we acted on the advice of David Bennett QC and Peter Strasser, another barrister. David Bennett, you may recall, was a crown solicitor for the commonwealth and his advice has never really been tested in court, which was basically divisibility of a conveyance into a legal component and a non-legal component and we had this so-called system of panel solicitors whereby we had a solicitor that was paid a relatively small amount and then we did the administration for which we got paid a relatively large amount.

It's of interest, I think, particularly to the Productivity Commission, perhaps, that - like I find it ironic the Productivity Commissions investigating an industry which has little or no production, in my view. The point that I really wanted to make in relation to conveyancing was the effect that we had on the market and that the licensing was the first time the legal profession, in Australia, at least, ever took a step backwards. It always, you know, accumulated power rather than lost power and the costs associated with conveyancing would be astronomical today but for the licensing of conveyancers.

Should the Commission want a loan of my three volumes of costs, which go back - I looked at it this afternoon in the fly leaf - it's 1991 and you can do your own sums on inflation costs, average house, all that sort of thing and the price of conveyancing today is really not that much higher than what it was then. It's quite amazing that those costs have been kept down, yet if you get into probate they still retain a scale and it's the icing on the cake for the profession. It doesn't require any skill. It can be done very quickly. If your client comes in with a death certificate, knows what the estate comprises of, I've actually done one in 20 minutes and filed it because we have an office here in the city, walked down to the court, filed it and asked for expedition and we got it back in about a week.

It requires none of the legal skills that the lawyers might wish to impress with you, but it can certainly be done by lay people. We've developed a kit. We've also started a company which runs in direct competition with the lawyers. Again, we've had litigation over that, which we've lost, but we're still going. The conveyancing exercise, I say, there's a lot to be learnt in that on breaking the monopoly can produce good results for consumers. They must have save hundreds of millions of dollars since 1992 on fees in New South Wales along, probably billions.

It would be an exercise, if you had the resources, it could be interesting to do. That is really, you know, like the probate question is the one that's relevant to me at the moment from one of those scores I'd like to settle. We just recently - and I mean only just recently - started to assist people who are litigants in person and I've been sitting on that Litigants in Persons Act for probably 10 or 15 years waiting for an

opportunity to bring it out from the closet because there's no way that the Law Society is going to let it be known that this act exists in England and is being actively used.

If anything else that's to their benefit we trot out old English law, it's wonderful, it's this and it's that, but that Litigants in Person Costs and Fees Act is a real gem both as to its brevity and to its effect. That's about all I really have to say.

MS MacRAE: How are you managing to continue to do your probate work if you have had a - - -

MR BURGESS (LCA): A run in?

MS MacRAE: Yes. What was the - - -

MR BURGESS (LCA): It was settled out of court because I don't think the Law Society really wanted to argue it. We lost, you know, we conceded. In one of the previous Legal Profession Act of New South Wales, in the section about unqualified persons, what you can do and what you can't do, there are two groups of people that were relevant to what I was interested in and that was the old Land Agents Act, which said that any act which came under the administration of the minister for lands was exempted from the effects of the Legal Profession Act.

At that time the current premier, who was Neville Wran, had consolidated the Lands Department, he'd taken it out of the Attorney-Generals Department and put the administration of the Conveyancing Act and the Real Property Act under the minister for lands, so here was this link that I couldn't get how barristers and I wasn't experienced enough at the time to force the issue to take up the point so it lapsed and since it's been repealed from the act.

MS MacRAE: Right.

MR BURGESS (LCA): They didn't consult me. I rang them up when I found out about it and said, "You know, like what about me, I'm a registered land - I became a registered land agent because I could see the invitation there and I went through unopposed. The second one to apply was opposed by the Law Society and the judge said, "Okay, you can become a land agent but in future everybody's got to become a lawyer virtually before you could become registered as a land agent," so they shut the door on it. But the other one was that there's this word "engrossment".

I can't fill up a document for you or I can't draft a document for you. This is all legal work, you know, covered by the monopoly, but there was an exception for persons who could engross documents, which my understanding of the word and

generally accepted, I believe, is that if I could sit in front of a typewriter and I could have a standard prescribed form, so either set up on my computer or typewriter as it was back then and you could sit there and I could ask you questions. I couldn't tell you anything. I could ask you a question, "What is your name?" I could type in your name. Then I could go to the next line, "What is your address?"

I could go through this form which asked all the questions and I only relayed the questions, you gave me the answers and I engrossed the form and that wasn't in breach of the Legal Professions Act. So I've made the argument with the Law Society and they've begrudgingly admitted that - but don't test my luck was their words more or less - that engrossment was a defence but has now been taken out of the act.

DR MUNDY: When was that done?

MR BURGESS (LCA): Pardon?

DR MUNDY: When was that done?

MR BURGESS (LCA): Oh, it must have been done four or five years ago, yes.

DR MUNDY: In the recent past, not back in the 80s?

MR BURGESS (LCA): Oh, no, no. No. There's been a number of minor changes to the Legal Professions Act to just tighten it up a bit and to bring it a little more into the - into this century.

DR MUNDY: So presumably that might not necessarily, on its face, be a bad thing. That might not necessarily be a bad thing.

MR BURGESS (LCA): No.

DR MUNDY: Just on this point of engrossment, presumably that means that if those provisions had not have been, those provisions which facilitated you assisting someone with a document in that way, would have facilitated you assisting someone - - -

MR BURGESS (LCA): Fill out a probate application.

DR MUNDY: Probate application or any other sort of - - -

MR BURGESS (LCA): Yes, a summons - - -

DR MUNDY: - - - a court document.

MR BURGESS (LCA): - - - in the Supreme Court, anything, yes.

DR MUNDY: So as long as you were not advising them on the merit of what was going into the form - - -

MR BURGESS (LCA): Yes.

DR MUNDY: - - - or presumably not prompting.

MR BURGESS (LCA): So long as it didn't come from my mind as to what goes into the document it was acceptable.

DR MUNDY: So that presumably could have facilitated the support of self-represented litigants at least in relation to court documents.

MR BURGESS (LCA): Well, we do that today. You know, if we've got three or four people that are litigants in person and it all - the system runs on forms which are all defined by regulation, so the questions are all there. It's only when you come to affidavits where there's a story, a personal story that has to be said that they - you've got to be a little bit more - you can't really tell them what to say, but you can say that there's always, you know, the pedantic argument, so you can say, "Well, so and so said this in a similar situation" and, you know, it's the way the law works.

MS MacRAE: So even without the word "engrossment" though you are still able to do that?

MR BURGESS (LCA): Nobody - I haven't been challenged.

MS MacRAE: You have not been challenged. Okay. Would you see a case for a wholesale look at the Professions Act, not just New South Wales, but more generally around Australia?

MR BURGESS (LCA): The Legal Professions Act?

MS MacRAE: Just to try and open it up.

MR BURGESS (LCA): Oh, yes. There should be a national one for a start and, of course, I can't see the benefit of the monopoly nowadays. Perhaps, you know, 50 years ago there may have been a case, but today the monopoly has degenerated into just a straight out commercial business and they don't have to abide by the rules that any other business has to abide by. They make up their own rules. They sit in

judgement on themselves. I think as I said in my submission, you know, like there's not a judge in Australia that's been trained to be a judge. They're all lawyers.

The view, I can understand the view that - because my view is quite biased because I only hear the worst cases, I never hear the good cases. They don't have much of a chance in the system really and just listening to the previous submissions to you where we're talking about a million dollar case and a hundred thousand for costs on one side and a hundred thousand dollars costs on the other, why not \$10,000 costs, was my thought. A hundred thousand dollars just seems a lot of costs.

DR MUNDY: I am mindful of the time and people probably have families to go home to - - -

MR BURGESS (LCA): Sure.

DR MUNDY: - - - but just perhaps to wrap up, just back on the probate issue.

MR BURGESS (LCA): Yes.

DR MUNDY: You presumably would not have any objection to people, probably a bit like registered conveyancers - the people who were going to offer these probate services, around wills and probate and those matters, would have to in some - could be subject to some sort of licensing arrangements.

MR BURGESS (LCA): I think it's already provided for.

DR MUNDY: So they could be licensed.

MR BURGESS (LCA): Well, if you - without letting the cat out of the bag too much - but the Conveyancers Licensing Act 1995 implies the licence conveyancer can do probate work. Just you have a good look at it and you will see that it is there. It's explicit in the act that they can't draw up a will and because they - it's been limited, if they wanted to cut out doing probate work they would have said - they would have broadened that. Instead of using the very narrow definition of a will, they would have used a broader definition to cut out probate work.

I think that the Conveyancers Licensing Act - I'd like to go back and read the Hansard - but I would think that it was the expectation of the legislators that conveyancers become a corner store operation, low cost corner store operation for non-litigious, repetitive (indistinct) engrossing work.

DR MUNDY: Yes.

MR BURGESS (LCA): Right. As a service to consumers. But it hasn't been taken up, but it will be my defence. Like I've held a licence twice and I think that it is entirely possible that licensed conveyancers, if they were to become aware. Their big problem is though because they have such low cost income and their overheads are still there, they have to run very efficient, slick operations to make money and they don't make a lot of money, then they're generally cottage industry type things, you know. They find some resistance to increasing their fees and I don't know what the reason is, but the lawyers would love to increase the fees, but there again the lawyers are employing a lot of licensed conveyancers whilst they get on to making more money on other things.

DR MUNDY: We might draw a close there. Thank you very much for your submission - - -

MS MacRAE: Thank you.

DR MUNDY: - - - and coming in and speaking with us, I am not sure whether it is this afternoon or this evening.

MR BURGESS (LCA): The sun's gone down.

DR MUNDY: I will adjourn these proceedings until 9 o'clock in the morning.

MR BURGESS (LCA): Okay.

DR MUNDY: Thank you.

MS MacRAE: Thank you.

AT 5.15 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 4 JUNE 2014



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 SYDNEY ON WEDNESDAY, 4 JUNE 2014, AT 8.58 AM

Continued from 3/6/14

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DR MUNDY: We will make a start. Good morning, ladies and gentlemen. My name is Dr Warren Mundy and I am the presiding Commissioner in this inquiry into access to civil justice, and with me is my colleague, Commissioner Angela MacRea, who is the other Commissioner exercising the powers of the Commission in this matter. Before starting, I would like to pay my respect to the elders past and present of the Gadigal people, who are the traditional owners of the land on which we meet and, indeed, we also wish to pay our respects to all the elders past and present of all indigenous nations who have occupied this continent continuously for over 40,000 years.

As you are aware, we put out a draft report in April and the purpose of these hearings is to facilitate public scrutiny of the Commission's work, seek comments and feedback on it, to get evidence on the record for those who wish to give it, that we may draw upon in our final report. Following this hearing, Commissioner MacRea and I will conduct hearings in Adelaide, Perth, Melbourne, Hobart, Darwin, and Brisbane. We have already concluded our hearings in Canberra. We expect to provide the final report to the government in September and, as a matter of law, they have 25 parliamentary sitting days in which they must publish it by way of tabling in both houses of the federal parliament.

We do like to conduct these hearings in a formal manner, however, we would note that under part 7 of our Act, the Commission has certain powers to act in the case of false information or a refusal to provide information. As far as we are aware, those powers have not been used by the Commission and I am sure we will not need to use them in relation to proceedings here today. We do like to conduct these hearings in an informal manner, but we would remind participants that we are taking a full transcript of the proceedings and because of that, we do not take comments from the floor as we cannot properly record them.

However, at the end of the day, we will provide an opportunity for anyone who is not on the list to make a brief statement in relation to what they have heard today or, indeed, any other matter they wish to raise with us, but I do stress it needs to be brief. Participants are required to be truthful in their remarks and we do welcome not only their own material being provided to us, but comments made on the material that is put to us by others. I do intend to keep these proceedings pretty close to time (a) out of courtesy to other who take their time to come and give evidence to us, but also because my colleague and I have a plane to catch later on this afternoon to Adelaide and we do not wish to miss it.

Finally, I am obliged under Commonwealth health and safety legislation to advise you that, in the unlikely event of an emergency requiring the evacuation of this building, you should follow the green exit signs to the nearest stairwell, do not use the lifts, and follow the instruction of the floor wardens. The emergency evacuation point is to be found outside the Westpac building on the corner of Market

and Clarence Street. There ends the opening statement. Mr John Emmerig from Jones Day, would you like to come up, please? Could we ask you to state your name and the capacity in which you appear here today, and then perhaps make a brief opening statement. We have got about 25 minutes for your evidence, Mr Emmerig.

MR EMMERIG (JD): Thanks very much. John Emmerig. I'm a partner with the global law firm, Jones Day. I appear in that capacity. I should perhaps indicate that I hold a number of other positions which are relevant to the area I am going to discuss. I am the co-chair of the Class Actions Committee of the Law Council of Australia. I am the Deputy Chair of the Federal Litigation Section of the Law Council of Australia, a member of the Litigation Funding Committee of that body, and at various stages have been the Acting Chair of that committee. I'm on the Federal Court's National Liaison Committee, which I've been on for over 15 years, and a range of other Federal Court-related bodies. I need to indicate that I don't appear in any of those capacities or speak on behalf of any of those organisations, just for the record.

Jones Day is a global law firm, one of the largest in the world, 900 partners, 2500 lawyers, practising across 41 offices in all the major business centres of the world. Half of our firm is litigation and we're particularly noted for our class actions. I've been active in class actions for pretty much the entire time they've been in this country, which is about 20 years. I've been in practice for 26 years. I joined Jones Day in December 2012 and, prior to that, I was the Head of Class Actions at Ashurst, which was Blake Dawson before that time, where I practised for 24, 25 years, and I'm the Australian Head of Class Actions for Jones Day.

My comments are really directed in amplification to a submission Jones Day made prior to the release of the draft report. I don't really propose to go through our earlier submission, I just wanted to really add a few points of emphasis that now arise in our view, having seen the draft report. Really, it's on the very narrow issue that I'm concerned about: the prospect of what you call damages-based fee arrangements, what might loosely be called "contingency fees", but for clarity, I'm talking about arrangements where the lawyers are able to charge a percentage of the settlement or outcome achieved in the case.

I'm certainly very concerned about those entering into the regime in relation to at least class actions and major litigation, and that may beg the question, what about other types of claims, and I'm happy to speak about that. But I thought I might just focus on those two areas because it seems to me they have a particular force at the moment. I'm sorry for having been so extensive with the description of my background, but I've been involved in advising in probably 20 class actions over the last 20 years and I'm really just indicating that we seek to bring to bear a degree of experience in this area.

The concern we have is that we are seeing an increase in certain types of class actions in this market place, in particular, shareholder claims. In the last seven months, we've seen 14 new actions threatened or filed. That's separate from any of the other class actions that are currently being promoted through the courts. There was, for example, a class action alleging, I think, a billion dollars filed last week which is not out of character, but traditionally, the area has been relatively stable, in terms of numbers of claims over the years with the class actions as a whole, but I think a more defined analysis shows that in certain areas, such as shareholder claims and other types of claims, we're starting to see a spike in the number of claims occurring in those areas. That spike is driven by a number of new funders who have come into the marketplace and a number of new plaintiff law firms who want to play in that space.

You will have seen from your research already that there is a concern about a growing number of unmeritorious class actions being filed. The Former Chief Justice of the Federal Court, now a High Court Judge, Chief Justice Keane, as he then was, last year made comments that were reported in *The Australian* about that concern. Attorney-General Brandis has recently made similar comments. There have been concerns raised in a number of class actions to Centro proceedings by Justice Finkelstein about lawyer-driven litigation. The concern I have in short, essentially, is this: that if contingency fees are introduced for class actions in this country - and I'll extend my comments to certain other forms of large-scale litigation, it will simply magnify a problem that is starting to emerge as a serious issue, which is lawyer-driven litigation.

I wish to acknowledge that I'm not criticising class actions. Class actions provide a very valuable access to justice opportunity for people to bring claims that would otherwise not be available to them, at a practical level, to prosecute because of the inherent value of their claim versus the cost of litigation. Equally, litigation funding can play an important role in access to justice as well. It's about getting the balance right. It works well in certain areas to have large amounts of litigation funding perhaps available, but not in the form of contingency fees and not in these areas. You may say, "Well, why do you hold that view?" and it's based on a few considerations. One is around conflicts of interest. Take the billion dollar class action filed. Litigation law firms running large class actions in this country have been making, on the bigger claims, fees around 10 million up to 25, 30 million dollars, sometimes lower on some of the really big claims which is an enormous amount of money anyway based on hourly rates and so on.

If you started applying our learned lawyers to charge the sort of fee rates that are being charged or contingency rates being charged by litigation funders and they vary between 25 to 45 per cent generally and a lot of the time it's in that 35 to 45 per cent range, you know, it creates a different world of participation for the lawyer. Imagine the prospect of being able to obtain 350 to 450 million dollars as your fee on

a case. It's very difficult for me to see the present conflict of interest laws and regime really providing an adequate protection for class members when the interests are balanced, the interests of the firm and the interests of the class.

It's really, really difficult to see how that will work in practice. The temptation to settle early for a particular sum or guide the class action in a different way or, as was experienced - and I did some research around this. A breast implants class action was an example where you have different subcategories and there might be something good for one subcategory and good for the plaintiff firm, not so good for another subcategory and there is a real tension as to how it is all resolved. There's a conflict of interest issue there of some size.

The system we have was never built to tolerate those sorts of pressures. I'm concerned about risk taking. There'll be, no doubt, a body of evidence that comes forward and says, "Well, look, the funders don't waste their money, they only invest in claims that have, you know, good merits," and there will be some funders out there who, in fact, do that and law firms would act the same if they had the same opportunity, but I don't think that's actually right. I think what we've seen in the marketplace now is as the market starts to mature with the class action litigation we're seeing more and more funders come in to the market and the risk appetite is differing between those funders.

Some are prepared to fund riskier claims. I think the same thing would happen with law firms who, if they had the opportunity, could fund claims. Again, the shareholder space provides a useful example because every shareholder class action in this country to date has settled. A person in the position of thinking, "Well, if I brought a shareholder class action and I know to date every class action has settled, there's a good chance this class action will settle," and all we'll start to see then is a creep in to the risk environment. How risky a claim can I bring before the company says - the target says, "No, we're not prepared to settle on that matter. We're going to fight to the death."

There'll be increased risk takers, I think, coming into the marketplace and court approval of some of the class action settlements won't really be an effective barrier because in some centres it will be easier to get court approval for a less prospective claim for a low sum than it will be for a highly prospective claim for a low sum. The class actions have an impact which is different from other claims and constructed in a different way from other claims. It's, what we call, the multiplier effect, I suppose. You'd come to me with a \$10,000 claim, not of much interest, but if you come to me with 10,000 people with a \$10,000 claim that \$100 million claim obviously has attention straightaway.

Unlike other forms of litigation class actions don't require the consent of all of the members of the class before the class action can be filed. Indeed, they've been

deliberately designed not to require that. You can start a class action with seven people. You only need one substantial issue of fact or law, same, similar or related circumstances but that's generally a pretty straightforward requirement and you can start that class action on behalf of a large group of people without those people knowing and generate an enormous prospective number that the target that you're bringing this claim against has to face.

They're open to a form of use which is not really available in other sorts of cases where the traditional position is that plaintiffs have to sign up, have to agree to be part of the class. They're also open to domination by the class action plaintiff and the people who stand behind that plaintiff. They run the class action.

DR MUNDY: We do have a number of questions we want to ask you, so could I ask you to bring your opening remarks to a bit of a conclusion?

MR EMMERIG (JD): I'm sorry, I probably moved past that in remarks to some detail. So, in short, my concerns around those class action issues is - I can go to some US evidence as well, but they're my initial comments. Large scale litigation suffers from the same concern except it doesn't have court approvals and I'll mention one further thing which you may want to bury into, but it's the concept of what we call the corporate blackmail impact. Because of the scale and size of these claims the mere fact someone says, "I'm going to bring a class action" can impact on share price, it can impact loan covenants, the ability to raise finance, contract arrangements and so on.

Merely announcing that, being able to say that and the more that occurs in the marketplace that has a price to pay and it's one of the ones you've got to balance against access to justice, but there's been a whole range of problems that have been addressed in America or tried to be addressed in America around dealing with this problem that have not been effective. In my final closing comment I'd just say I'd be really concerned about seeing us introduce a concept into the system without major modifications to other areas of the system. It would be like introducing a virus or a beetle or something to deal with one particular problem without understanding the full environmental impact.

DR MUNDY: Okay. Thank you for that. We are approaching this inquiry from an access of justice perspective and our principal concern, not our only concern, but our principal concern is essentially for ordinary citizens, small businesses, that sort of - if you like to characterise that as, you know, the people whose access we are primarily concerned with. What we are trying to bring our minds to and to provide policy recommendations about are how can we facilitate in a financial sense, because financing court actions is difficult, how we can facilitate people who have meritorious claims in being able to bring those actions.

It seems to us in respect to contingency fees, damages based billing, that the only real difference, if you like, between a litigation funding circumstance such as that which was brought against the ANZ, which was won at substantial benefit to the plaintiffs who were the customers of the ANZ, but also I think clarified the law in a way which was of benefit to many other people. The only difference we see between those sorts of actions and perhaps a damages based billing action is who is putting up the capital. I guess the question in that circumstance goes to - and we have had evidence and I think it is fair to say that the draft report could be construed to say we find it somewhat persuasive that the presence of the third party funder actually deals with, to a significant degree, some of the ethical concerns you correctly raise.

I guess what we are interested in and having seen a lot of the debate material from yourself, statements by the Attorney-General and quite thoughtful statements from the Attorney, I thought, is this an issue - the debate seems to be around securities matters, shareholder matters. The concerns seems to be around a particular set of matters and it is not clear in our mind whether - if you accepted all that evidence at its face there is a question to be asked - and I would like you to reflect on this - would we be better to deal with the cause of the action, in other words, is this a problem actually to be solved in the securities law or is it a question that needs to be dealt with in relation to funding and class actions broadly defined and if it is the latter what safeguards do we need to put in place to ensure the sort of class actions, which I think you have indicated, and, indeed, the Attorney has indicated he does not see a problem with, how do we go down this path because it is not clear to us whether the problem that is emerging is just about securities matters and should we deal with those rather than - otherwise, you know, as you would know, there are very few class actions brought in Australia every year and your concern seems to be around this one particular set of them.

MR EMMERIG (JD): There's a lot of concepts bundled up there, I suppose. Just to try and deal with them. First of all I think - I appreciate your perspective on the access to justice and the idea that you're looking to find opportunities, ways to help the mums and dads of the world.

DR MUNDY: Yes.

MR EMMERIG (JD): Small business, others who access justice where they would otherwise have trouble and that's, you know, clearly an important inquiry. I'd probably make the general observation that I guess every policy development in this area has to be, I suppose, weighed. It can't be viewed in isolation. It has to be weighed in a broader context about what is the social impact. There will be some access to justice opportunities that the price of paying is too high and I think this is one of the tricky areas that we get into. There are definitely some class actions that are facilitated by access to justice.

I don't necessarily - I won't speak on the ANZ one in particular other than to perhaps use it as the example of reflecting that there's a clarification of the law. That's an advantage. The real winners in that matter are - in terms of who gets the biggest financial take out of that - I would argue, in fact, that it's the law firm and those who stand behind the funding of the action, the return to individuals will be marginal. In America one of the problems they've had is with what they call these ultimately coupon class actions where the return is so small that, you know, the benefit for the individual is very hard to see, but where the law is clarified there may be some benefits and I acknowledge that.

DR MUNDY: Can I just stop you at that point, that is one of the issues we are trying to bring our mind to, certainly it is with contingency fees, but it is arguable. You might say the same about funded actions, third party funded actions, is the idea of placing some sort of cap on the percentage the lawyer can take. Now would that, to some extent, address that concern, putting aside the issue that any cap, its magnitude to be arbitrary?

MR EMMERIG (JD): Exactly. It's a scaling factor. I was trying to think of a way last night to give you a useful analogy and I'm going to give you one which I hope helps. I think of this a little bit like my attitude towards fishing which I'm generally pretty happy to go along and catch a bream or a flathead, you know, I don't mind going in and on the boat and catching that. That's something that I can kind of live with. I'm not a fan of people catching the giant marlins, these huge creatures and killing them, and, yes, I appreciate whales are not fish, to scale it up further I've got no time for people catching whales.

There's a sort of inconsistency in my position in that there's some level of fishing I'm happy with and there's some I'm not and where do you draw this boundary between when it's too small and when it turns into too big? Is it really the case that you should have a consistent principle, either you're for fishing or you're against fishing. I think, well, I can't really define for you with great precision when I get uncomfortable with the size of a fish before it starts to turn me off. There is a transition there that I don't think is uncommon and I think a lot of people could relate to.

I think my wider point is I think damages based for all sorts of actions would be a problem. I know you're not recommending that. It's a question about, well, working out what might it work for if anything and where I'm - despite the fishing example - landing at the moment is the big cases create a real big problem and I'm unpersuaded yet that the smaller cases may not create the same problem. Business securities issue was a question you asked. Yes, I think there is a problem with securities claims. Could it be regulated by changing the laws on the securities area? Yes, that's one solution but what's attractive, I think, about securities class actions, shareholder class actions to the plaintiff camps who generate these classes is that

they are generally - because they're continuous disclosure claims - they're reputationally sensitive for the companies involved and they all settle. They're large, large sums and in these cases take years to run through court and commercially the company has to decide whether it's better to settle these cases or let it run and have the fight.

One of the problems they had in America is this sort of corporate blackmail problem, they call it, and that's a fairly provocative term, but if you just burrow behind the concept, somebody threatens a class action that has - there's some studies out of Stanford where they've shown that it's had an impact on the share price during the life of the class action until the class action settles. The social behaviour that you get is the companies kind of work out is it better to have that share price dip and the class action lingering around or is it just better to pay it out early, quick and dirty settlement, get rid of it.

I think the problem has been that there's been a lot of decisions made to do those early, quick and dirty settlements and what they do is they then fuel more of that behaviour because others then copy that and you get this spiralling effect and there's been a range of reforms that they've tried to bring into place in America to deal with it. Shareholder actions there's no doubt are particularly vulnerable to that. Is it the same for product liability claims or environmental claims or other areas? It's a little hard to say. But I think the thing to bear in mind about the various studies and the general anecdotal evidence about class actions in this country is that this is an evolving market and in the evolving market the past levels of activity don't really reflect what the go forward looks like.

The position pre-2006 before the Fostif case into litigation funding was permitted by the High Court and the position post-2006 is quite dramatically different, so I do see a problem in relation to that area. I would encourage you to not support class actions having contingency fee funding in these larger cases because simply the scale of returns are enormous. If I'm taking a contingency fee on a \$10,000 claim, the bream, you know, 30 per cent on that it's a lot to those who are involved, no doubt, but it's not, you know, the temptation levels are different from if I'm facing the prospect of making 300 million of a billion dollar class action.

DR MUNDY: And presumably if it is a 10,000 or 50,000 dollar claim it effectively looks like conditional fees. It has the same economic - ultimately has a very similar economic character.

MR EMMERIG (JD): I would have to say that that's where I'm trending as well and I appreciate the dilemma of devising a regime to draw the lines, but it may be that the way to start is to actually look at areas you can exclude and add to your exclusion list. So scale is incredibly important here in terms of managing the conflict of interest, but at the end of the day ultimately that's got to be a huge part of this

whole issue. You've got to find a way to manage that. The other concern related to that, which is really is in part safeguards. One can certainly raise the issue with safeguards. One concern I have is about just bolting this new mechanism on to the current system. I don't think the current system can cope with that. I think you would need to give some guidance around it and say, "We can see it as a vehicle for access to justice but there would need to in each area in which it operates a substantial reconsideration of the impact and whether any consequential reforms are needed."

I'm not counselling that we should have contingency fees. I'm, I think, on balance against it definitely for the large and I guess the debate in my mind is still open for the smaller end but that's how I see it. I certainly see the temptations and the risks and you see it right now. The level of activity increasing in this market in circumstances where - in the US Stanford put out some research recently. They had 169 federal securities class actions last year against a population of 300-odd in America, and so we need to have basically 12 securities class actions a year to match that. Bear in mind that we don't have contingency fees. We don't have the American rule on costs, so in America you - - -

DR MUNDY: That's what I was going to ask you. One would have thought that our rule on costs would act as some form of - - -

MR EMMERIG (JD): A deterrence, yes.

DR MUNDY: Would that be your view?

MR EMMERIG (JD): Yes.

DR MUNDY: But the question is we don't know how much.

MR EMMERIG (JD): It should act as a deterrence but the point I'm really making is that with the sort of increase in the numbers that we're seeing pro rata by population, yes, in this area but if you have that increase already in circumstances where you do face the adverse costs risk, imagine the impact where you introduce this enormous potential windfall for the lawyers into the marketplace. So people are prepared to run these claims, take these risks now when you've got the adverse costs risk, what's going to happen when you add this extra fuel here. The risk appetite in many ways is almost higher than America in some respects but there is a sort of mechanism that plaintiff firms use to get around the adverse costs risk.

The only person liable in a class action, shareholder or any other kind for adverse costs is in fact the class representative, not the class, so in all the major shareholder class actions it's generally a mum and dad who's put into the class representative's seat.

DR MUNDY: What if we put the plaintiff firm in the gun, in the sights for the adverse cost order?

MR EMMERIG (JD): I think you would see a much different attitude.

DR MUNDY: Because the litigation funders typically accept the risk of the adverse cost orders.

MR EMMERIG (JD): That's absolutely right. You would need to acknowledge that most class actions have some form of litigation funder behind them. I think the issue will be if lawyers get to charge contingency fees, they are also exposed to that risk as well or simply they can just take a contingency fee. I suspect most of the legal profession will be arguing that they should take the fee but not have the risk. That may go to your issue about caps. What I feel happy about caps, caps on small claims which look like the conditional fee arrangement would be a mutual effect.

DR MUNDY: That's why we have a conditional fee arrangement.

MR EMMERIG (JD): That's right, yes.

DR MUNDY: Look, we do appreciate your time. We probably would have liked to have had more time since it's an issue obviously that I think has expressly led us to develop some notoriety with some. Thanks very much for your time and we may want to have another chat with you as we take our thinking forward on some of this stuff.

MR EMMERIG (JD): I'm at your disposal.

DR MUNDY: We certainly are aware that it's ultimately an issue of risks and incentives and weighing them up.

MR EMMERIG (JD): Yes.

DR MUNDY: Thanks very much.

MS MacRAE: Thank you.

MR EMMERIG (JD): Thank you.

DR MUNDY: Could we have the Australian Centre for Disability Law, please?

MS KAYESS (ACDL): Good morning.

DR MUNDY: Good morning. When you're ready, could you please state your name and the capacity in which you appear and then perhaps make a brief opening statement. We've got about 25, 30 minutes.

MS KAYESS (ACDL): My name is Rosemary Kayess. I'm the chairperson of the Australian Centre for Disability Law. I'm joined with colleagues Yael Frisch and Hiranya Perera. We'd like to thank you for the opportunity for appearing before the Commission on this inquiry. We do welcome the inquiry, though I do note we have some concern to the lack of focus that disability has been given in the draft report.

Given the over-representation of people with disability within the justice system, both civil and criminal, we have serious concerns about the ability of people with disability in Australia to be able to effectively access justice. This is also reflected in developments that have happened in international law in the Convention on the Rights of Persons with Disability for the first time in an instrument.

Articulating access to justice is a critical facilitation factor in people with disability being able to exercise their rights and their legal personhood. People with disabilities face significant barriers to being able to access justice and to have equal recognition before the law within the legal system. These barriers can be complex, being twofold, overarching and overlapping complex legal needs, the very nature of access to justice arrangements and the inaccessibility of mainstream legal arrangements.

I would like to ask my colleague Yael Frisch to walk us through some of the issues around the complex legal assistance.

MS FRISCH (ACDL): As Rosemary mentioned, people with disability are more likely, even than other vulnerable groups, to experience substantial legal problems, and multiple legal problems, and this was found by the Law and Justice Foundation in 2012. For example, if you have a disability and any other legal disadvantage (such as discrimination, housing disadvantage, and family law disadvantage) may intersect and, whilst we mentioned this - these severe and aggravated legal disadvantages can be experienced for a range of reasons by people with disabilities, which includes discrimination on the basis of disability, higher level of social surveillance, for example, when child protection, mental health and guardianship schemes survey people with disability more highly than people with - the rest of the population.

The effect of disability and the absence of specialised legal services, which I'll also talk about in a minute, and the disadvantage faced by people - the legal disadvantage faced by people with disability can be bi-directional, which means that the effect of impairments, legal disadvantage and social exclusion all exacerbate one another and they note that, when the NDIS commences, it will actually increase the unmet legal need of people with disability as people participate more in society. Now I'd like to talk about what specialised legal services have reported. Legal services for people with disability need to address the legal and non-legal issues that affect people with disabilities.

For example, as I sit here, I have a slight speech impediment. I am able to express my legal needs, but sometimes this will take more time and more know how. Another example is that it took longer to get up today, so these little things which the legal system should be responsive to. Other things include the need for AUSLAN interpreters for people who are hearing impaired and the need for information in multiple formats and easy English versions. People with disability might need assistance with alternative dispute resolution as well as legal representation because some of these impairments make it harder for people with disability to be self-represented litigants.

The Human Rights Commission and the Law Reform Commission have also addressed access to justice, and they talked about the barriers faced by people with disability, including the barriers in accessing support, adjustments to aid with the need to participate in the legal process. Another barrier is that people with disability were seen to be less reliable witnesses and participants in the legal process. When I read the Law Reform Commission report, the story that hit me hard was how a woman who was giving evidence, admittedly in a legal trial, needed- the Court process wouldn't slow down for her for her cerebral palsy accent and, as someone who has a cerebral palsy accent and is a lawyer, I thought, wow, there does need to be accommodations in the process, and all the way through the process, for disability and specialist legal services to do that.

We argue that the specialist legal services may be direct legal needs and non-legal needs, civil and criminal, and also particular areas of law dealing with mental health as well as discrimination, as well as the whole gamut of legal issues faced. Now I'll hand it back over to Rosemary.

MS KAYESS (ACDL): From what Yael has put forward to us - I mean, Yael and I both speak as lawyers and we also speak as people who experience the lived experience as disability. For us, in our management role within the Australian Centre for Disability Law, it's not just our own personal experience, but the case work load and the advice load that we carry at the centre reflects this complex need of both high levels of interaction with administrative frameworks and institutional

frameworks married with an impairment that has significant barriers to being able to rely on institutions and justice mechanisms being able to provide communication and information which is accessible to them.

On the secondary issue, there is need for reform in the current access to justice arrangements, especially the funding model. The Australian Centre for Disability Law exists as a specialist legal advice service, but it's a specialist legal advice service with a very narrow focus. The historical funding anomalies that happened within the community legal sector are problematic for people with disability being able to access primary right through to tertiary legal assistance that is accessible and specialist. We believe that special disability legal services are an essential part of any restructure of access to justice arrangements in Australia.

There is a necessity for a holistic, articulated, integrated legal service system for people with disabilities. An integrated, articulated service system would have for people a primary source of access and referral that can deal with non-legal needs, but also form as a point of reference for referral into secondary advice and case work provision and also through into specialist, test case and law reform provisions of services through an articulated method. We believe it is important for there to be specialist disability legal services to be able to deal with the complex legal needs experienced by people with disability, but at the moment we currently have very poor funding and - sorry, very poor access to well-funded specialist legal assistance in Australia.

Mainstream services are very inaccessible to people with disability when they ought to be accessible to people with disability. As Yael pointed out, it is a complex mix of attitudes, physical environment, and also the skillset of practitioners within the justice system. This is reflected not only within mainstream community legal services, but also in other mainstream services and the private legal sector. It is also reflected in our judicial system. There is a lack of access and knowledge through the legal system that is able to accommodate people with disability as equally participating in members of the justice system.

We also believe that the framework of funding needs to be able to be adequate to effectively service the legal needs of people with disability and currently anomalies, such as not being able to recover solicitor costs, but only disbursements and funds for counsel, does not recognise the level of intense case work that is required at the solicitor level to be able to provide effective legal services for people with disability. This is picking up some of the highlights of our submission. Our submission goes into more detail and we would like to be able to answer any questions that the Commissioners have of us.

MS MacRAE: First of all, thank you for what we appreciate is an additional effort

that you need to go to, to come and see us today, and we really appreciate that. Thank you for your written submissions as well. I guess funding is the issue across the whole sector and we are very conscious of the fact - and you would have seen from our report that we are conscious that there are specific and additional barriers to people with disabilities. We have talked a little bit about the skill set of the sector itself and I would be interested in your comments about whether you think that has been improving at all over time. Certainly, there seems to be a higher awareness amongst the judiciary and amongst the legal profession itself that there are areas of training that have been lacking. We also heard from the Disability Advocacy Network about the need or the advantages there would be and I think this goes to your point about legal and non-legal issues being married, that funding in that sector and being able to help more with advocates would also be helpful, and I would be interested in your views about the relative values of those things, given that we are always in a sort of cost constrained world here.

MS KAYESS (ACDL): We see that as essential. We think that integration between primary services and generally non-primary legal services, not legal primary services, is a necessary part of the integrated system. Advocates provide a very, very important role in non-legal services but also getting to ADR opportunities as well; also dispute resolution and conciliation can be carried out within the non-legal sector if the advocates are funded to be able to fill into the areas and we believe that would be in fact an important load off the community legal structure and make it more accessible to people with disabilities.

MS MacRAE: You talked about physical barriers being a problem as well and I just wondered the extent to which that is still a problem for you.

MS KAYESS (ACDL): Well, you know, I got under this desk today. It is very rare that I can get under a desk now. I know it sounds really quite silly.

MS MacRAE: Not silly, no.

MS KAYESS (ACDL): But getting under a desk can be quite important. I was going to check with your support person, who is taking obviously the transcript, if my distance from the mike was problematic. It's not, no, but there are many occasions where it is problematic. I have been in situations where I have had to perch on the corner of a desk, just so I can get to the mike, but any supporting documentation I need access to, I can't have in front of me. These things have a compounding impact, so that would affect any quality of representation that I would be able to make of myself or my, you know, client if I was working with a client. Whilst the physical access has improved significantly, there is still significant barriers in people recognising the need for alternative and augmented modes of communication.

MS MacRAE: Right.

MS KAYESS (ACDL): We had a judgment come down in Queensland last week that upholds the precluding of people who use AUSLAN from participating in juries. It's a very narrow black letter reading of the legislation that, you know, denies the ability to have a 13th person, even if that person is a mode of communication for one of the jury.

DR MUNDY: You mentioned ADR and one of the issues that we have tried to bring our minds to broadly is how disputes could be avoided in the first place and particularly by governments, because we probably have more capacity for traction with governments than we do necessarily with the private sector and obviously, NDIS raises a whole pile of administrative law questions and I know the AAT is thinking about how it's going to deal with that and I suspect - - -

MS KAYESS (ACDL): Well, that's just our recruiting process.

DR MUNDY: And how they going to deal with those issues in the context of the amalgamated tribunals issue. I am just wondering: do you have any observations to make upon how government agencies could improve their own processes of dispute resolution before it ends up in a formal appellant sort of arrangement or, you know, in a tribunal or something like that? The Commonwealth has a set of arrangements. The states and local governments don't and we were just wondering the extent to which those issues, if reformed and how reformed, could be undertaken to assist people with disabilities who have those sorts of issues they want to deal with government agencies before they could escalate.

MS KAYESS (ACDL): I mean, with any complaints mechanism, the more access we make from the beginning and that there's problem solving elements along the way; that's always going to be better. With NDIS, it's really quite unclear. Well, I suppose this will come out a little bit more through the launch sites but it can be quite unclear about where authority steps in and who has authority for certain problem solving areas, so if a complaint escalates, where it goes to and if it has solving facilities, because you have got that unknown mix now, because where the funding is going to the individuals, if there is a support mechanism around that individual that's broader for the individual, where does the legal responsibility lie, and a lot of that hasn't been tidied up, I don't think, and it's got I think problematic issues within the construction of the legislation, so whether there will be challenges to that and whether ADR can be built into that, I don't know, whether it will become a conciliation process, if that is the option. If it hasn't got those assets prior to ADT, it goes straight to review.

MS FRISCH (ACDL): And I think it's very important to maintain and continue, important, the availability of information in a non-jargon sort of language. That's very important to avoiding and resolving, so all parties understand what's going on, and jargon is very good at obscuring that.

MS MacRAE: I think that everybody today faces that actually.

DR MUNDY: It's interesting that one issue that the President of the AAT has raised with us on a number of occasions is the problem of language in ordinary citizens being able to access their rights. I know it's something his Honour is quite vociferous on.

MS KAYESS (ACDL): Well, I am a legal academic especially towards students. I mean, I know what little they get in terms of disabilities but just in terms of importing plain English.

DR MUNDY: One thing that we find useful sometimes is to identify agencies that have good practices. It's easier to say "This is good" rather than "You're bad." Are there any agencies, either state or government agencies, that you think are particularly attuned or deal well with people who have disabilities or are they all pretty much of a muchness?

MS KAYESS (ACDL): I don't think I could say that anything stands out. Elements of certain departments have done extremely well on, you know, certain topics but overall, I would say, yes, pretty much of a muchness and I think a lot of that has to do with the monitoring of agencies.

DR MUNDY: What they do.

MS KAYESS (ACDL): What they do. Sometimes it's very hard to even get agencies to recognise, unless they have got some sort of disability within their purview that they have, that people with disability are in any way part of their purview and it's really quite interesting that they don't see disability as part of human diversity and that, you know, whatever any department does is going to have an impact on people with disabilities in some way.

DR MUNDY: Just, I guess, coming back to the point about, you know, essentially dedicated assistance services for people with disability, institutionally, do you have any views about where they might be housed? I am mindful that geography is always a challenge for service delivery. Would that be better in a stand-alone agency or, for administrative purposes, perhaps attached to a Legal Aid Commission in a special division, or a separate, stand-alone CLC-type framework?

MS KAYESS (ACDL): I think the strength of the CLC framework, whilst I have problems with some of the historical funding mechanisms - sorry, we have problems with some of the historical mechanism fundings. I mean, we suffer from being one of the roll-outs of the Disability Discrimination Act. So we're a specialist disability legal centre, but we have a very narrow jurisdictional purview that relates only to discrimination law and people with disability very rarely proceed with one legal problem.

The strength of our centre is our community management because we are able to have that ongoing relationship with the community, which is really important, in terms of primarily your tertiary role, in terms of test case law, and law reform. I think that's a real strength of the CLC model and, I mean, community management has its problems as well, but it does have a certain strength in keeping in touch with your constituency and being able to be involved in what some of the broader issues are and where law reform and test case litigation falls within that.

DR MUNDY: So the recent developments, particularly at the federal level, for funding has been to move the emphasis away from - - -

MS KAYESS (ACDL): Law reform.

DR MUNDY: - - - law reform onto frontline services, whatever that might mean. We had some evidence from the ACT EDO, who basically indicated to us that the outcome of that process was probably that the ACT EDO will no longer be with us and perhaps some of the jurisdictional EDOs will go the same way. So what is the impact on - is your funding brought into question by that general - or are you funded some - - -

MS KAYESS (ACDL): No, the funding principles would have an impact on us. I mean, I think it's really problematic in a common law system to be saying that you can divorce law reform from case work.

DR MUNDY: We would be introduced in further submissions upon that point. We are quite interested - we have made some observations elsewhere about the funding of law reform and the benefits that brings. We are quite interested in exploring that question further.

MS KAYESS (ACDL): We see it as critical because the nature of a lot of our work is disability discrimination law. The nature of disability discrimination is getting structural change. The burden the disability discrimination law places on individuals, because the individual carries the onus to claim their rights, for systemic, structural problems within society that continue to create barriers to people with disability being able to participate. Law reform is a way for us to take that burden

off the individuals and get structural, systemic change. We don't see that as being outside our purview. We find it very hard to reconcile that the funding principles nearly set up a kind of punishment to get systemic change to be able to relieve that individual onus that people with disability carry.

DR MUNDY: It might ultimately be, from the taxpayer's point of view, the cheapest way of fixing the problem.

MS FRISCH (ACDL): Yes, because it would reduce the case work as well.

DR MUNDY: We do appreciate you - - -

MS KAYESS (ACDL): If you would like further submission on that - - -

DR MUNDY: We would, not that we would ever try and solicit evidence, but we would love to get some more material.

MS KAYESS (ACDL): If we can get it in under the guise of evidence, that would - - -

DR MUNDY: We do thank you for coming along today. We do appreciate you participating in our process.

MS KAYESS (ACDL): Thank you very much.

DR MUNDY: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Can we have the National Association of Community Legal Centres, please? Could you please state your names for the record and the capacity in which you appear today?

MR SMITH (NACLC): Sure, I can do that. My name's Michael Smith. I'm the Convenor, or National Chair, of the Association of Community Legal Centres. I've got Amanda Alford with me, the Deputy Director of Policy and Advocacy at NACLC, and Julia Hall, our Executive Director.

DR MUNDY: Could I ask you to make a brief opening statement? Given we are running a little bit behind time, brief would be helpful. We have had the opportunity to read your submissions already.

MR SMITH (NACLC): Thank you. I will try and keep it brief, thank you very much. Thank you very much for the opportunity to be here. I think it is a really important inquiry and the Commission's work to date shows a lot of detail and thought in what is going on, so we really appreciate that. We would like to briefly outline some of the key issues we have found in the Commission's work to date, and we will not go through all the submission, of course. We speak on behalf of the roughly 200 community legal centres right across Australia, including the ones who have just spoken and did a very good job, but both generalist and specialist community legal centres right across Australia.

Firstly, I want to talk a little bit about how special community legal centres. I do not mean in the sense that community legal centres are special because they make people feel better - volunteers, staff, clients and all those things - in a warm and fuzzy kind of sense. I don't mean their specialist because they're community run and managed, although that's important, and therefore, they are professional. We are really proud of how professional, high quality, evidence-based community legal centres are, and their great work. We don't mean it's special just because it's idealistic. We think it's important to say that community legal centres are special because they are different in the way that they work and their approach and their practice, and it's not just like other legal service providers.

We undertake the strategic service delivery model of community engagement, of direct legal work, of looking at community need, and responding in whatever way is most appropriate, whether it is through direct legal services, whether it is through education, and whether it is through some systemic and policy work, and that mix is flexible and adapts to the changing needs of the community. That can occasionally look like community legal centres are doing all sorts of different things, whereas some of the bigger providers look to offer a clear, consistent model, but that flexibility and adaptability is actually the strength that community legal centres bring to the table.

In particular, community legal centres are very adept at reaching hard-to-reach groups, reaching groups that other providers find very hard to reach, whether it is because they have got a disability, or whether it is because they are from a culturally-diverse background, or whether they just want to access the system for a whole range of other reasons. So increasingly, community legal centres are using a very sophisticated, evidence-based approach to inform their target work and approach to service delivery and respond to legal needs in their community. Many community legal centres have changed their organisation, their service, or their service delivery methods to meet the change profile and needs of the changing communities.

The draft report talked a bit about the historic funding model for community legal centres, but community legal centres have not just waited for the model to catch up with what they are doing; they have adapted their own work in accordance with the local needs. There are many, many examples of new approaches being trialed in community legal centres and being piloted there and then taken out more broadly and adapted to a broader audience. NACLC's a very strong active partner with our colleagues in the Legal Aid Commissions, the Aboriginal and Torres Strait Islander Legal Services, the Aboriginal Family Violence Prevention Legal Services, as well as private legal profession and pro bono work. All have a really important role to play and they all complement each other. But it's not quite right to say they are each providing legal services and we can roll them out to different places and we'll talk pretty much the same. Those differences make the comparisons really difficult and we find that when comparisons are made, whether it's using data or assessments of the kind of work they're doing, those comparisons can often miss a lot of the detail and make those comparisons really unhelpful.

While it has not been formally released, we are really concerned that some of the comparison problems in the NPA review report were really problematic and we would really not want the Commission to make those kind of mistakes because we think there are a whole lot of issues they have missed here. In terms of the draft report, in principle, NACLC really supports the Commission's support for a national and consistent approach to legal assistance services, including a national framework or agreement that covers all four legal assistance providers, particularly the Family Violence Prevention Legal Service, that has now been moved out of the department, through high-level national priorities and objectives, national core priorities of legal need, national priority of client groups and common baseline data. Certainly, NACLC has been calling for this kind of review right across the whole legal assistance for many, many years, and we tried to look back and see how long it had been, but it has been a long time.

We certainly support the development of an equitable, consistent and

transparent national framework for legal assistance funding. We can see a national framework working with a national funding model and a national partnership agreement. I think the complainant wrote in your draft report that it's not really a national partnership at the moment, and that's certainly our view. A true national partnership has a lot of potential, rather than the current fragmented and disparate system, and we could talk certainly more about that.

Any funding model has to be based on evidence-based research about legal need, and NACLC has been a leader in developing resources to help centres do this kind of legal needs work, and it's happening more and more and we can talk about that. The legal assistance sector needs to be involved in these kind of decisions about funding allocation through inter-agency forums of all legal assistance providers, but no one legal assistance provider should decide the funding allocation. A collaborative approach to identifying or responding to legal need and allocating funds is the most effective and appropriate approach. We have got really serious concerns about competitive tendering mainly - for a whole range of reasons, but not least because it really reduces the collaboration that's possible. Once you set up agencies to be competitors against each other, a whole lot of good work deserts very quickly.

We think the eligibility tests at a high level are appropriate, high-level principles, and that might be a more appropriate approach to the imposition of eligibility tests across the board between legal assistance providers such as Legal Aid Commissions and CLCs. We know that our evidence shows that CLCs are reaching the most disadvantaged people most of the time, and often when people can't get help from Legal Aid they will go to a community legal centre, so a common eligibility test creates a lot of problems.

We were talking before about systemic work, and certainly, as you would expect, we are very concerned about the current approach of the Attorney-General's Department around funding for CLC work to not include policy and law reform, and we certainly support the Commission's view so far in this area. One of the concerns we have is that there are very narrow assumptions about work in this area. I think my fear is the assumption that community CLC staff sit around with a whiteboard and say, "What law will we change today?" That's not the way it works, but certainly the law reform policy work comes out of the client experience and the community experience that we deal with every day, but also it's a much broader scope than that. It might be about talking to police about their response to family violence, it might be talking to the courts about how their systems are making it really difficult for people. It's not just about changing the law, it's about a whole range of systemic approaches in a really collaborative way.

That saves money, and increasingly the sector has been using a prevention

conversation, a prevention early intervention, and some of that's in the NPA agreement, I'll probably go further than that in some ways, but that notion of prevention that we understand from the health sector is really crucial, and it saves money, particularly long-term savings rather than letting things go.

Finally, we know that quantifying unmet legal demand is very difficult, but centres are turning away clients every day that they can't assist. We know the sector has really high hopes that the Commission might undertake that really challenging work about trying to quantify the level of unmet legal demand and particularly the funding shortfalls in legal assistance. We know that's a challenging task, but we think probably the Commission can't do it, who can? We know the impact it has every day on people with legal problems. So it's probably what we'd start with it, and we'd be really keen to have a conversation about where we go from here.

DR MUNDY: Okay. We had your colleagues from New South Wales before us yesterday and we had a discussion around, I guess, the institutional framework for funding going forward, and I think Alistair has indicated a favourable disposition, I won't say a preference, towards a model whereby the Commonwealth would essentially make allocations of funding and then the distribution within jurisdictions would be a matter for that jurisdiction, the Attorney-General's Department, your organisations and other relevant bodies.

I guess it stands in counterpoint to an arrangement where CLCs have a direct relationship with the Commonwealth. That obviously has some attractions, the general proposition that service delivery is always done better closer to source, and all those sorts of things. Does NACLC have a national view on what the institutional relationships might look like?

MS HALL (NACLC): We do support that idea, but we have said that we think we should be, we think though, an inter-agency forum at the national level, that it's important that the different service providers participate in that decision about allocation down to the state level, so subject to that qualification, then - I think you said the Attorney-General's Department, so we were seeing it again as another state lever inter-agency forum. We think that's really important, to encourage the collaboration, but also to - - -

DR MUNDY: I only say the Attorney-General's Department on the basis that there needs to be, obviously, a government - - -

MS HALL (NACLC): A government, that's right, yes.

DR MUNDY: - - - that's accountable to the Commonwealth.

MS HALL (NACLC): Yes, in broad terms, yes we do, subject to those - - -

DR MUNDY: Do you see that that approach would - one of the things that a number of your members have raised with us, and I think some of the statements, is the administrative burden of clients. Would you see such a model might be able to get rid of some of that, if sensible - if the Commonwealth set up broad performance-based outcomes that were measurable jurisdictionally and then the states could be left to - so you would perhaps be able to get rid of some of the reporting burden?

MS HALL (NACLC): It should, that's the theory, so that's a matter where the government is going to participate in that, if that - we certainly think that it can, so that the Commonwealth money is devolved and then the Commonwealth and the state have the same criteria. We have also said that you know that the states may want to have separate, some particular influences about allocations and so forth, their own priorities, and that's fine, as long as they are not inconsistent with. Subject to that, as long as there's complementary data requirements and so forth and recording requirements, it's quite feasible, I think, in theory.

MR SMITH (NACLC): I think we have touched on this before, and one of the - which you will know by looking at the figures - that some territories and states don't give any funding to community legal centres, and I think there's - in terms of the national partnership work - I think there's an opportunity that has been missed a few times around the Commonwealth leverages and saying, "If we give a dollar, you give a dollar", or "If we give two, you give one", that kind of work, and so there haven't been joint decisions, and I think there are times when the states, whether it's Legal Aid or the state government, might say, "That was a surprising decision", but the Commonwealth might, quite rightly, say the others are the states, so I think there's a conversation that has been missed many times, and certainly, if you look at the funding model, you can see historically, it's hard to say how that funding probably works in an overall kind of basis, we certainly understand that.

DR MUNDY: We have some suspicions about how the funding model might work, and we think most decisions might be taken in the month of June.

MS HALL (NACLC): Yes. What has happened, I should say, that in the CLSP, when the cycle comes around, the service agreement, and the guy runs a renegotiating - not the guys, but just the service agreement, there are conversations there and NACLC is represented there, representing the sector, where the state program managers and the Commonwealth, CLSP section, do talk about those specific - I've seen that it can work, but you need to have, I think, the formal structure that requires everybody to be in that room.

DR MUNDY: No, I think - we are keen - we will make recommendations that will involve some sort of structure. I think the absence of structure is part of the problem, and joining up the bits. In some of the material that you have put to us, you have given us what looks like a model for a base, core, no smaller than this sort of five-person model. I guess, the first question is what drives that, and I think I can probably have a guess but, secondly, is it your view that that should be a basis at which all existing CLCs would be funded, or is this what your view about a sustainable organisation looks like and the notion that some CLCs may need to - if we thought that was the base model, it would be appropriate for some sort of consolidation.

MS HALL (NACLC): That model is - as you know, we call it a sort of effective strategic delivery model, and it is premised on it being a stand-alone organisation, and it's a generalisation, so it's not impossible that there are some CLCs, and particularly, perhaps, if they have got all - or (for instance, they might have access to either administrative support or infrastructure support) could be smaller. We don't rule that out, or that it's not the particular market, or they need to be much bigger. So we are saying, though, that - and it's partly the model that they need to be lawyers because of the - it's referred to as historical sort of funding decisions. Sometimes there have been instances where a certain justice statement, the '90s was an example, where funding was given which basically supported one and a half, two people, and then it hasn't been increased and, because of the pressure, sometimes they're lawyers and there's not that recognition to have effective lawyers doing their work and also volunteers, and the support that they require, you need administrative support. So it's just to sort of say that you really need a couple of lawyers, you need an admin person, you know, and because of the type of holistic service, you need somebody who is community development or some other type of support person. So we do say as a generalisation, but not an immutable one, that that is an effective size we think organisationally but also in terms of service delivery.

MR SMITH (NACLC): I suppose what that's meant in practice is that when you have centres of a certain size, then they have the scope - whether a part of the organisation or not - to then go out and perhaps generate additional funds or do other projects and get other kind of funding sources in and do that kind of developmental work. I think the very small ones have struggled to kind of do that kind of development. You know, you see the ones that have grown and developed and have gone very well beyond that. So I think that's certainly the key kind of starting point too. There's some good examples I think in the Victorian submission about centres that are in what appear to be gentrified areas but have actually adjusted their model and very much still focus very much on clients very much in need.

MS MacRAE: Would you say that scale is a widespread problem? We had a submission from some pro bono providers come in just last night, actually, but they

do say quite strongly that they consider the ability of CLCs to be hampered somewhat by the lack of scale and I just wondered if you would agree with that.

MS HALL (NACLC): Yes, there are examples of that. I have one from five years ago back when QPILCH Homelessness Service was then I think something like one and a half FTE lawyers. They had no support. They had a lot of volunteers but all they needed really was a half-time admin person who could have coordinated the volunteers and they were wasting time. The lawyers should have been doing the supervision and the training. They would have had twice as many volunteers. When they got that admin support, it just ballooned, the amount of capacity for the services, so it does absolutely increase capability and capacity.

MS MacRAE: Given the community nature of these things, they're sort of trying to just get increase scale. Is there an alternative to hoping that you might get more money from somewhere that will allow you to flourish, or are there better mechanisms within the sector to sort of consolidate where that might be the most helpful thing to do?

MS HALL (NACLC): There are examples, I think, and there's a couple of examples having - a recent one where two centres in Victoria have looked at merging and sharing infrastructure and so forth. So I think that is going on and it's increasing. You're probably aware that in the CLC sector there's an increasing number that are either auspiced or co-locating and so forth, so I think there is a movement to that. There has always been some but it's probably a little bit more of that, but there's also appropriate occasions where they are separate and that's what is needed.

MS MacRAE: Yes.

MR SMITH (NACLC): I think that geographically if you look across the country, particularly in the rural and regional areas, there are significant gaps where centres need a lot more resources, and particularly rural and regional areas. So there are a couple of spots where centres are relatively close together in the urban areas but it's actually a fairly small issue in the overall scale of what's going on.

I think the other scale question is often the Community Legal Centres are so used to being small, we don't necessarily have the conversation about what would they like if they had a million dollars each or two million dollars each and what kind of impact would it actually have on the legal issues in the community. I think the Commission talked about civil law being the poor cousin in legal assistance and because Community Legal Centres do so much work in the civil law space, I think we might be the poor cousin of the poor cousin in that kind of sense too and I think there's a huge scope for that kind of impact. It would have on a broader kind of scale in the scaling-up kind of sense too. Certainly a lot of centres that for various reasons

have merged or have got a bit bigger are having huge impacts and we're seeing those kind of real achievements.

MS HALL (NACLC): Can I just add a note of caution about - there is a tendency, I think, sometimes for people to come from outside and think, "The idea there is to co-locate. What's the problem with that?" Particularly in rural - triple R areas, we call them - regional areas. Sometimes the whole thing about a legal practice and the professional requirements and our own risk management scheme requirements about, you know, you might have a client who is a victim of family violence, a survivor of family violence, and you don't want a common waiting room with another service where the perpetrator might be there.

There's a whole lot of having to segregate your data systems, which you're required to do in terms of protecting client confidentiality, but also the whole perception of conflict or reality or conflict, and so it requires you to have quite a degree of segregation and that can be one reason why sometimes you see CLCs that you might think are small, "Why are you there?" Well, they need to be because the people need to feel safe in going to that location.

MR SMITH (NACLC): The issue of legal conflict is much more an issue in the civil law space than it might be say in the criminal law space.

DR MUNDY: You remarked on our observation about poor relatives. One of the things we are recommending, or we have suggested we will recommend at the end of the day, is that resources for assistance in civil matters should be in some sense funded separately, trying to get away from the impact that Dietrich has on a fixed aggregate. Is that something that NACLC would support.

MS ALFORD (NACLC): In principle, I think our concern would be to ensure that there's not a redirection of funds simply into civil, but in principle I don't think we're opposed to a demarcation. Of course noting too the different definitions of civil and whether that would include family or not and how that might play into the model that we have articulated with respect to Commonwealth funding decisions and then the state and territories.

DR MUNDY: Given that particularly for a number of sort of classes of disadvantaged people who often present with both civil and criminal needs, or when violence orders suddenly in breach become criminal matters and things like that, would it be beyond the wit of people to work that sort of interaction out without it becoming an incredibly intrusive and overly bureaucratic, "Well, we can't help you because that's a criminal matter and we're not funded to do criminal stuff"? Is that just a bureaucratic shibboleth the sensible people dealing with real issues will deal with?

MS HALL (NACLC): We were talking about funding for CLCs or for that matter for family violence prevention legal services. As you probably know, the FVPLS are funded for particular survivors of family violence but they actually see and deal with all the legal problems and related problems, not just the civil, and I think that is necessary also for CLC-type clients. You have to be able to assist with the different parts. You cannot split them down the road from one little bit. It just doesn't work. So I think there has to be some understanding of that in the way that the civil funding is allocated.

DR MUNDY: Yes, but we can probably just fund family violence prevention centres and say that's funding for family violence prevention centres.

MS HALL (NACLC): Exactly.

DR MUNDY: Okay.

MS ALFORD (NACLC): Which fits with the very unique and holistic service that CLCs provide.

MR SMITH (NACLC): Certainly within the CLC - I mean, we may get on to data but, I mean, within the CLC data system - for example, in Victoria a centre might get funding for family violence work at the court and when you put that data into your system, you have to indicate that that's from the family violence funding, not from other funding, so within the CLC sector there are some systems in place for those kind of things so it wouldn't be particularly burdensome. You want to make it as smooth as you can, but those things can be done.

MS MacRAE: I guess ultimately the reason we thought it might be helpful to split it is to show just what a poor cousin civil is. Would that help?

MS HALL (NACLC): I really think it would. I think it's necessary to do because I think it's massively under-appreciated, just as it how much of the civil budget, if you like, is swallowed up by family and family-related stuff. I think it would be good to - - -

DR MUNDY: Because of the predominance of the Commonwealth in family matters anyway - and it is about all the civil that it funds, quite frankly; the rest are neither here nor there in money terms - would you see merit in actually funding family separately because it's an identified separate - - -

MS HALL (NACLC): I don't have a view about whether it should be funded separately. I think it's incredibly important to demarcate the two so you can track

them, if you like.

DR MUNDY: If you want to think about that and talk to your members, it's something we would be interested in hearing back on because it has been a challenge for us when talking about civil matters because so much of the material we have is actually family related in the Commonwealth civil funding.

MS HALL (NACLC): Government is very attracted to separating them out because of the states wanting to say, "It's mine," or say, "It's the Commonwealth's," and one of the issues with civil is because they're often interwoven, the state and Commonwealth stuff, I would be a little bit concerned that it's not sort of used as an excuse, "No, it's yours." "No, it's mine."

MR SMITH (NACLC): There's a strong interplay between the family violence and family law work. People might say family law when actually what they mean is it's actually family violence work which is quite different to the straight family law kind of work too, so in the conversation they can be really confusing and get lost, I think.

MS HALL (NACLC): And the child protection as well.

MR SMITH (NACLC): Or child protection. There's a whole range of other issues like that too.

DR MUNDY: We put this to your colleagues from the ACT Women's Legal Centre on Monday about whether the jurisdictional separation in that family space with the Commonwealth law and state law is actually a real problem for people and whether there might be merit in trying to find a more institutionally simpler form. We're told there was a trial done in Bendigo where family law matters were being held and heard in the state jurisdiction. Is there a law reform opportunity around that could facilitate better resolution of family matters by trying to deal with the Commonwealth/state jurisdictional issue?

MS HALL (NACLC): I'm not aware of the Bendigo trials.

DR MUNDY: Neither were we until Monday. I'm sure someone's looking into - - -

MS HALL (NACLC): I'll take that on notice. We have some excellent colleagues in Bendigo.

MR SMITH (NACLC): Everything happens in Bendigo, didn't know that as well.

DR MUNDY: It's a great place, Bendigo.

MR SMITH (NACLC): I think when the Commonwealth-state divides an issue at its funding levels - but I don't think it's an issue on the grounds so much of a Community Legal Centres in practice about "we don't do that because it's Commonwealth or its state"? There's things like that, too?

MS HALL: No, it's more Legal Aid.

MR SMITH (NACLC): I mean, there may be an issue, particular for ACT, Tassie and some other places where they've changed the policy around funding, around policy and law reform if they've only got Commonwealth money which some of those places have, it's going to be a huge issue because it means those services won't be able to do that kind of work.

MS HALL (NACLC): There'll be a state divide in the ACT.

MS MacRAE: There's a few places now where we've heard about the collaborative approach used in Western Australia being a good model and I'm just wondering if you could elaborate a bit more about what's different between the way they do things in WA and elsewhere, and what's particularly good about that Western Australian - - -

MS HALL (NACLC): There's a particular example in WA rather than an invariable practice - talk about that particular review.

MS ALFORD: I suppose we drew your attention to the Western Australia model as potentially useful because it really emphasised the collaborative nature of all legal assistance providers being around a single table and being involved in determination of funding allocations. So really drawing on the collaborative service delivery model, to then translate that in determination of an allocation of funds and essentially the inter-agency forums that we've outlined in our submission we think would be useful at both a Commonwealth and at a state and territory level would be sort of an articulation of that in terms of everyone being around the table, applying local knowledge and drawing on service delivery mechanisms and collaborative approaches to translate that into assessing legal need in a particular jurisdiction, and determining funding, and identifying and responding to legal needs accordingly.

MS MacRAE: Would you be able to say you felt that would give them good outcomes as a result of that sort of approach.

MS HALL: At least we know and we understand that if there was more funding - as there was on occasions in WA - that the Legal Aid Commission - so the state pro bono managers, the CLSP and the Commonwealth were talking and they made decisions based on criteria, based on legal needs, the previous review and the

subsequent follow ups of the review, so at least there we had some understanding about why moneys went where they went. They funded wheat belts and various areas that had gaps in it, so that's good in practice.

MS ALFORD (NACLC): And detailed analysis of legal need and then the update of that in 2009, and then the use of that to provide a blueprint for mapping of legal need and then the collaborative approach that you referred to, and our Western Australia colleagues have indicated that was a useful approach.

MS HALL (NACLC): So it was a positive example but because it wasn't required to be done that way, so that's why we harp on about the need for a framework, to make sure that it does happen in that sort of way - consistently.

MR SMITH (NACLC): I think in Western Australia at that time, there wasn't a fear that centres were going to lose existing funding so it was very much about "what can we do about the unmet legal need, where would we go next, what would be most important if we had an opportunity to grow into the future?" I think there's a very different conversation in that kind of collaborative sense.

DR MUNDY: Obviously the Commission's expressed some concerns about the efficiency of allocation, if you sense. Is the money going to the right places? And that's obviously a model that solves that. I guess the question is if we went down this model which was more decentralised, which has some - how do you think we should think about and deal with the question of - how do we allocated money between jurisdictions? I mean, there's a grants commission type model that can look at relativities and stuff, and if you understand the first thing about the grants commission you're probably not human but I've looked at the grants commission model many times and flummoxes me. How would you see that? Would we dole the money out on a per capita basis? How do you think it should work?

MS HALL (NACLC): I guess we'd go back to our legal needs assessment, basically, and that would take into agree - numbers are relevant and numbers of people are relevant there, but legal needs and other factors that go into the term.

DR MUNDY: Should it in any sense reflect the funding commitment that the jurisdictions themselves make? Sort of coming to this grants commission notion about relative capacity as well as relative need, should the rest of the country be helping out jurisdictions where state government won't put in any money, I guess is the crux of that question.

MS HALL (NACLC): Do we want to live in a country that doesn't make sure the people are represented in Tasmania because the states can't afford it?

DR MUNDY: I have no particular jurisdiction in mind.

MS HALL (NACLC): Hypothetically.

DR MUNDY: It could be New South Wales.

MS HALL (NACLC): It could be.

DR MUNDY: But is the performance of the jurisdiction I guess something that should be considered within the funding model or should it be blind to it?

MS HALL (NACLC): NACLC's previously expressed a view that the Commonwealth - if it comes to, sort of, working out allocations - so this is separate to the discussion on this particular model that the Commonwealth should wear a greater burden for a whole lot of reasons. I've articulated our funding principles and I think that would remain our position, that if there is a state, hypothetically, that can't afford it or isn't stepping up, that the Commonwealth should pick it up to a base level.

DR MUNDY: So the Commonwealth should determine what it wants and if the CLC is in a jurisdiction or there's a particularly generous state attorney, good luck to them. Then they've got a bit more and they can do more, but the basic level of outcomes should be funded.

MS HALL (NACLC): I would imagine at that national level if there was - I mean, if I were the Commonwealth I wouldn't do my decisions without knowing what the states might be stepping up to plate. I think there's a market reality about this. I think if you've got bargaining power, why not use it? So I think that should be an informed discussion at that higher level about what the commitment may be coming from below. I think that's important, yes.

MR SMITH (NACLC): But I think the conversation you said before about devolving some of the decision making more to state level, to state government should come with some buy-in and actually bring something to the table. That's what I'd be saying. I wouldn't be saying, "Well, you can get some power to decide," if you're not going to put in any money. I think there's a opportunity there that's probably been missed.

DR MUNDY: It becomes part of the partnership.

MR SMITH (NACLC): Yes, and you were talking before about the lack of civil law emphasis. I think part of that, I suppose from a Community Legal Centres experience, is that because that isn't emphasised generally in legal assistance, people

assume that Legal Aid, as people call it, is all about criminal matters and those kind of issues and therefore there's not a lot of community support for that. They're not thinking about responding to family violence, or people with debt problems, or people with consumer issues. Once that broader understanding is there, there's much more community support for those kind of things, and that actually helps, get some legal assistance funding on the agenda because it's not just about helping criminals that should be helping themselves. We think all those people need to be supported, but that's the kind of community discussion that gets missed.

MS HALL (NACLC): We find that in our research - I mean, it's very clear if you talk to someone about the importance of the services for somebody who's lost their job or at risk of going into homelessness, or you know, with the sort of natural disaster insurance advice - all those things, you know, there's massive support, if you ask them about civil law, I mean nobody know a lot about it. Who cares, you know?

MS MacRAE: What's that?

MS HALL (NACLC): That's right.

DR MUNDY: Thank you very much for taking the time to come in and thanks for your submissions and the other material that you've provided to our guys, and I'm sure we'll - - -

MR SMITH (NACLC): Is there anything else we can be assisting you with in terms of the other kind of work you're doing, or the gaps that are still there, you might need some responses to?

DR MUNDY: The answer to that is probably but we're probably not the right people to ask. But we'll be in touch with the - - -

MS ALFORD (NACLC): You did mention to our colleagues that further submissions with respect to the law reform point might be useful. We did include a point in our substantive submission on that, but if it would assist the Commission we're able to provide further information on that point.

MR SMITH (NACLC): Thank you.

DR MUNDY: We'll now adjourn these proceedings until 5 to 11.

DR MUNDY: Okay. We'll recommence now. Could you please state your name and capacity in which you appear today and if someone would like to make a brief opening statement.

MS MUNRO (RLC): My name is Amy Munro. I'm the chair of Redfern Legal Centre board and I appear with Elizabeth Morley who is our principal solicitor, and Jacqui Swinburne who is our acting in chief executive officer. I would like to make an opening statement and I hope that it is sufficiently brief but you should feel free to ding your water glass at any time.

In March 1997 the scarcity of affordable legal services for disadvantaged and marginalised people led to students, academics, lawyers, law students, and community activists to establish our centre. The first community legal centre in New South Wales and the second in Australia. Redfern's always delivered case work and community legal education and advocated for law reform for its students.

Since its inception the centre has strived to provide holistic assistance to its clients and to build rapport with the community. It's done so through the work of its staff who have built networks with the community and trust with their clients. The path to our centre and, ultimately, access to justice has taken many years to lay.

The establishment of the centre was groundbreaking and the centre has continued to be at the forefront of the delivery of legal services. It does that through innovative models which I'll touch on. We currently specialise in six areas of work. Domestic violence, tenancy, employment, discrimination, complaints against police and other government agencies, and credit and debt, in addition to providing generous legal services to the vulnerable members of our community.

As you've heard many times we're chronically under-funded - and I use the word "teams". But that's perhaps a misnomer because most of those specialist areas are staffed by only one solicitor, and in the case of our employment and discrimination sections one person does both. This Commission has been asked to undertake an inquiry into Australia's system of civil dispute resolution with a view to constraining costs and, importantly, promoting access to justice. We submit that any recommendation which, in effect, reduces the role or independence of our legal centre and any community legal centre does not meet the aim of access to justice and there are four principal reasons why.

First is we have a unique ability to leverage the good will of the wider legal community, so we're effectively really good value for money. The shopfront of our legal centre is open to the public and staffed by volunteers Monday to Friday 9 till 6 pm. We also offer a free night-time advice service four nights a week. It's staffed by volunteer solicitors and barristers. In the 2012 to 2013 financial year Redfern

benefited from the support of 150 volunteers contributing 23,550 hours of work, which we conservatively estimated at \$2,066,000.

Additionally, each of our specialist teams is supported by a partner law firm from the big end of town who provide a substantial amount of pro bono advice and assistance and they also engage the New South Wales Bar on a regular and pro bono basis. Should the funding to our centre diminish, likely so will the generous contributions made by the legal community. Without the staff to supervise, manage, or facilitate those volunteers the centre simply cannot accept any more pro bono support.

Furthermore, we expect that the perception of the provision of legal aid that should be or is provided by government will prevent offers of support from being transferred to Legal Aid or another government organisation. We're acutely aware that our geographical position makes us very attractive to volunteers and to pro bono organisations and a geographical shift of our work will likely see that support diminish or vanish. So we're good value for money. For every dollar we stretch it to 18. Such cost effectiveness is unparalleled and unlikely to be replicated.

The second pillar is through adopting flexible intake criteria we assist vulnerable people who would otherwise have no access to justice. As you well know, vulnerability takes many different forms. We've identified indicators to the Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people with disability, international students, victims of domestic violence, and homeless persons.

Our flexible intake procedures enable us provide an initial in-depth consultation. This is essential for vulnerable clients whose complex and compounding legal issues cannot be dealt with quickly or in a generic form.

The third pillar is our connection with the community. We, like other CLCs, receive a high proportion of referrals from other community organisations. We're open after business hours and we work hard to be accessible to vulnerable members of the community. Our longevity has established us within the community. Our networks can't be easily replaced or the respect we've earned be transferred. Our position has enabled us to meet unmet legal need.

The fourth and final pillar is that through research and innovation we've been able to identify unmet legal need and extend our reach. By way of example, in 2012 we saw an increase in the number of international students seeking assistance. Research carried out by the Human Rights Commission supported our belief that international students were experiencing a high degree of discrimination and exploitation. An evaluation of existing legal services determined that those students

had significant unmet needs. Accordingly, we established a specialist service for this vulnerable group and it's the only legal service in New South Wales that specialises in international students.

At the time of establishing this service we were well aware that international students resided not only in Sydney but in regional areas. Accordingly, we worked with the University of New England to establish the legal assistance with Armidale project. By using video conferencing programs our solicitors provide vulnerable international students at the university with free confidential legal advice. So I reiterate our submission that any recommendation which, in effect, reduces the role or independence of the centre will not promote access to justice and we urge the Commission to give great weight to the unique role of our centre in the local and legal community when making its recommendations.

DR MUNDY: Thanks. It's been suggested to us - and I mean, it's a reasonable proposition from the data that over time, for entirely understandable reasons - there's been a concentration of CLC resources close to the CBD areas. We see it in Sydney, we see it in Melbourne, and it's understandable why that's happened, and I mean, the reasons you cite plus the fact that they've often been sponsored by universities, so you know - but I note that the Kensington Centre actually now sits in the law school at the University of New South Wales which I found a little odd, but anyway, so the charge is that - I guess the suggestion is that, you know, well, what about Mount Druitt or what about Wagga or wherever? You mentioned the initiative with overseas students and the work with Armidale. Would you like to just expand a bit on that and - I mean, I guess your response to the suggestion that, well, we should move some of these - that we should shut some of these CLCs or defund them or whatever and move them out to Mount Druitt or Wagga or whatever.

MS MUNRO (RLC): I might answer the sort of high level question and then hand over to Jacqui to give you a couple of examples of how we have stretched our ability to meet the need in other areas. There are a couple of points to make. I think the first point is that we see a difference between legal need and a centre of disadvantage. So we've got statistics and information that talk about the density of people that live in the areas that we service. For example, in the Sydney region 50 per cent of those people are renters. As I've mentioned, one of our specialist area is housing and that's a huge volume of people that have an identified legal need.

Likewise there are pockets of disadvantaged within otherwise gentrified areas. Again, Redfern, Waterloo, is a perfect example. Waterloo has something like 90 per cent of public housing, so there's obviously a huge amount of legal aid. Legal need as opposed to an area of disadvantaged is the first point. I think the second point that I sought to highlight in the opening is having the geographical centre in the CBD enables us to attract a huge volume of volunteer and pro bono support that simply

wouldn't be transferred and I think that's important not only from a financial point of view, the one to 18 dollar ration, but also engaging with the wider legal community in terms of delivering access to justice. So I have those concerns.

But we do accept that there is unmet legal need in regional areas, whether it's international students or otherwise, and I might hand over to Jacqui to give a case study of how we identified and met that legal need and used the services that we have.

MS SWINBURNE (RLC): Yes, I think we know that we're very lucky to have all these resources in the city and we've also been quite lucky recently in being able to use video link-up to try and help partner up with our other organisations and get resources out to regional areas and, ideally, the long-term plan is to sort of partner up, say, with far west New South Wales and the smaller community legal centres to help them with some of our volunteer and pro bono resources and we were quite lucky to get some funding through the NBN Regional Legal Assistance Program for the last couple of years which helped us to set up the service in Armidale that Amy just mentioned.

With the next round of funding we partnered up with the neighbourhood centre at Coffs Harbour. That was partly because that's where the funding was based and that's where the NBN was at the time, supposedly. We thought it was going to be there.

DR MUNDY: It was where Rob Oakeshott was at the time.

MS SWINBURNE (RLC): However, also it was a great area to pilot the project because there was no community legal centre in that area and there was a legal aid office, but what they said to us what it was great to also have our service there as well partnered up with the local neighbourhood centre. The main, really, two advantages were one was the use of interpreters because in a regional area you have a very close-knit small community and it's very hard to find an interpreter that doesn't know that client, and it's not the same as just being on the telephone because with the video link-up we can have an interpreter sitting in our office and see all that body language and understand if the client is really understanding the advice they're being given, for example.

The other big advantage was just being able to do some of the areas of law that Legal Aid can't do, and that's because of our pro bono partnership. So, for example, international students have lots of problems with their student visas because it connects with their other legal problems like employment or housing or problems with their university and so with a pro bono partnership with a law firm we're able to provide that integrated advice. So they might then decide not to pursue their unpaid

wages because it will affect their visa, for example, and it's also just a great partnership anyway with a neighbourhood centre because you're really feeding into the networks of people that they already had.

DR MUNDY: Just coming back on your point, Amy, the data you mention about the general area. Is that something you could just share with us because it's an issue that we're quite, you know - and similar observation - I'm adjunct professor at the University of New South Wales - similar observation about the nature of the community out there is very different to what it was when I was a undergraduate there in the early 80s.

MS MUNRO (RLC): Yes.

DR MUNDY: So sort of just a case study of that would be really helpful to us if you could provide it to us.

MS MUNRO (RLC): You mean the data within our area?

MS MacRAE: Yes.

MS MUNRO (RLC): I'll hand over to Elizabeth to talk about that.

DR MUNDY: That'd be just, really - in a nice box.

MS MORLEY (RLC): I'd probably like to do that in further submission in more detail.

DR MUNDY: Yes. No, that's fine.

MS MORLEY (RLC): But I can - we did do an analysis suburb by suburb of the 2011 census against areas of legal need and so we do have a fairly good picture of that and there's been a recent excellent study by the Law and Justice Foundation which is the one that Amy referred to on renters. The city of Sydney has on their website a very good mapping process where you can just easily go in and just pull up issues around the population type and it's really to see from that the mapping of where the renters are and where the public housing is and things like that. It's a very good resource.

DR MUNDY: Okay.

MS MUNRO (RLC): But we will update our submission to put in a section of the geographical services that we do.

DR MUNDY: Okay.

MS MORLEY (RLC): Yes.

MS MacRAE: I'd just be interested in the way that you see the general funding arrangements working now and whether you feel that they're working well and what sort of changes you might like to make. I think you were here for the previous participants and they talked about their preference for a collaborative approach in working out funding is split at the interjurisdictional level and I just wonder if you've got a view on that.

MS MORLEY (RLC): Sorry, I was still thinking about mapping for a moment.

DR MUNDY: We've moved on.

MS MUNRO (RLC): Well, I think we do support the national office submissions on the funding structure that they are proposing.

MS MORLEY (RLC): Yes.

MS MUNRO (RLC): And perhaps we could take that on notice as far as more details. I think the short answer is at the moment we are in a privileged provision that we have a diversification of funding and we're very conscious of that at a board level to make sure that we are not putting all of our eggs in one basket and we're lucky that we're able to do that. There are a couple of reasons why. One is because we have the actual genuine teams we have domestic violence and tenancy they get funded from different sources as opposed to the CLSP funding, and we're able to leverage our admin costs and other costs off the back of those types of streams of funding.

The pool of funding that we haven't probably tapped into as much as we would like is the philanthropic and private sector donations, but that is something that we are increasing to highlight. We've been lucky to receive a couple of significant grants on the philanthropic space recently, but so we are privileged that we diversify. Having said that, I can't recall if I tapped on this in my opening or not.

Because of the way the funding is structured if we lose funding from one source often that means a whole specialist area will be cut. We faced that at the end of last year when we lost funding from the New South Wales state government in relation to, in effect, our credit and debt service. That would have meant that that funding for that solicitor would have gone. Therefore, that whole service falls away, which is why I was - wanted to clarify in my opening that that's - I use the word team but that sort of gives the wrong impression. We were lucky enough that we got a

one-off grant from the former Commonwealth Government to sustain us and we've been able to do a bit of re-juggling to make that continue but as a board we're very conscious of diversification.

DR MUNDY: Can I just ask: how many solicitors do you employ and how many admin staff?

MS MUNRO (RLC): We have 10 solicitors. Sorry, it's difficult. We're all poolers because we have a structure where the people that work in our domestic violence and tenancy team are advocates and not solicitors, so if we break it down - - -

MS MORLEY (RLC): And a number of - - -

DR MUNDY: Let's call them professional client facing staff.

MS MUNRO (RLC): So we have I think four domestic violence staff, four tenancy staff. We have one credit and debt solicitor, one employment and discrimination solicitor, one government agency complaints solicitor and one international student/NBN project solicitor. We have a principal solicitor, a chief executive officer and one admin staff, and we also have one person who coordinates our volunteer program.

DR MUNDY: I just was trying to get a sense of scale.

MS MUNRO (RLC): I should say two branch officers as well, so we have one solicitor that works at the University of Sydney and one solicitor that works at TAFE, so they're out of each offices through - - -

DR MUNDY: Is that TAFE up in Broadway?

MS MUNRO (RLC): That's right.

MS MORLEY (RLC): And they're funded on contracts with those institutions.

DR MUNDY: With those institutions, so they basically pay you to provide the - - -

MS MUNRO (RLC): That's right, exactly.

DR MUNDY: - - - corporate framework and professional guidance and so on.

MS MUNRO (RLC): Correct. That's right but they come within our structure, in the sense that they report to our board and are required to do all those types of things.

MS MORLEY (RLC): We apply the same principles of prioritising service to those who are vulnerable within those services.

MS MacRAE: So what proportion, roughly, of your funding would come from the CLSP?

MS MUNRO (RLC): That is a question that I can answer.

MS MORLEY (RLC): There would be approximately about - - -

MS MacRAE: Just roughly.

MS MORLEY (RLC): A bit over a third really.

DR MUNDY: Are you prepared to show us the funding on the record which we'd be urging - - -

MS MUNRO (RLC): I don't think there's any problem in sharing our funding structure.

DR MUNDY: If you are able to provide us with some broader financial information, that will be really helpful to us. We don't ask you to do it now.

MS MUNRO (RLC): No, no. We'll put that in our submission as well.

DR MUNDY: Go away and make sure it's okay.

MS MUNRO (RLC): Yes, I'll check with our admin officer who's the boss on this kind of stuff but - - -

DR MUNDY: I don't want you to disclose any secrets but it would just be useful for us to see what the funding of a relatively large, for want of a better word, mature CLC looks like.

MS MUNRO (RLC): Yes, that's right and I think in terms of percentage basis, this type of pie graph might be useful as well.

DR MUNDY: That's probably all we need.

MS MORLEY (RLC): Yes.

MS MUNRO (RLC): Yes, perfect. We can do that.

DR MUNDY: Sorry to interrupt.

MS MacRAE: No, that's all right. That's perfectly fine. We talked in our report about the variations that occur in eligibility for people that are coming and we've now heard regularly that we target our assistance and we're looking to ensure that the most vulnerable are the people that we're looking at. In general we would have to say in the main that there has been support for having eligibility principles to work out how you would target your services. Is that something that you're comfortable with and what would you see in terms of how broad those principles would be and what sort of things they would target or how they would phrased, I suppose.

MS SWINBURNE (RLC): I note that the issue of the eligibility principles have been addressed in both the NACLC submission and the CLC NSW's submission. Broadly we support that approach of having high level eligibility criteria. One of the great values of community legal centres has been their ability to look at what is happening in their area and fill the gaps. So I think you want to retain that flexibility because you want to be able to fill those gaps in that area.

We're not duplicating the services provided by either mainstream private profession or by Legal Aid. We're there to look at what might be a priority issue in looking at our - we're constantly monitoring against our demographics about whether or not we've got the right areas to target. You do have to balance everything to everyone because you can spread yourself so thin, you have no expertise in any area to be actually achieving good outcomes for the people. So you do have to prioritise some areas that are going to be the ones that meet that community with a safety net under that which is what we do.

I think that in looking at a picture of our service delivery, that flexibility is important because we're a gateway to people getting into justice, so a lot of conversations happen at reception. Those conversations are not, "Can I have an appointment?" "No." "Okay" - go away. They're conversations about what's the nature of the problem, then characterising that as to whether or not it's a legal problem, characterising about whether we're the best service to deliver that problem - or service to that and where it might go, so we start at that very point of reception, providing legal information resources and skilling up of the people who call us.

From there we move on to advices which do further triage about what the problem might be and where it might go. Again, we're looking at filling the gaps. A lot of what we do is assisting people to achieve outcomes themselves with advice and referral, advice and drafting, and trying to avoid people ending up in litigation. If we can get matters resolved at that stage, before it reaches the point of a court, then that's a court aim for everyone. So again, if we have too tight an eligibility criteria about that, it will never happen. Those people will end up in court and at that point then

we are looking at much larger amounts of money or a costs system to address those things.

I had another point to make there and it has just escaped me for the moment. I might come back to it if I think of it, if I may, in a moment.

MS MacRAE: Sure.

MS MUNRO (RLC): If I could just add one thing on to that? This is something that we, again my position on the board, struggle with at a board level as well and I think the international students is a really good example of why there needs to be some flexibility in us with our eligibility criteria because it's very difficult to assess. For example, a student who has come here from another country that may have a family or some other support network behind them in another jurisdiction but the indicators of vulnerability that we see with those students are not things that are able to be ameliorated by support networks that they have elsewhere, whether that's assets or otherwise.

In some circumstances, sure, but generally as a group we've found that they are being marginalised, discriminated against, exploited particularly in the employment space. As I said, that has been evidenced by research done by the Human Rights Commission but that was a conversation we had at a heated and long conversation at a board level as "Is this a group that fits within our concept of someone that is vulnerable or would fit within our eligibility criteria?" but given that we have that flexibility, it's something that we've been able to do and have found to be incredibly effective for getting outcomes for those people.

MS MORLEY (RLC): If I could go back to the example I was going to give is what do we do with a person who has an income last week of \$70,000 a year which he might, say, fall outside an eligibility criteria, but this week has no income because he has been unfairly dismissed? At that point do we list them as a person with no income or do we list them as a person of 70,000?

At the moment we tend to put them on the stats as 70,000 in the hope that they'll be back in to 70,000 again within a matter of a few weeks, but that's not true for everyone, but in fact at that point they've got a lot of debts, a lifestyle and a commitment and mortgages and rent and all other things that are geared to an income of 70,000 but no income. So the flexibility in that eligibility criteria in that sense allows us to look at that. There's a cap on where that's going to go. Our volunteers baulk if we start to provide services to people who are being paid more than they are. So there's a natural cap on how far that's going to go.

DR MUNDY: Presumably you've got similar issues with women who experience

domestic violence and - - -

MS MORLEY (RLC): Absolutely.

MS MUNRO (RLC): Absolutely and that's something you would have heard over and over again. Their assets are tied to their partner which they can't access and the same for elderly people which is obviously a discussion that's happening in this country as to if you quantify the asset being the family home, is that something that you would take into account when they have otherwise no cash flow or assets? It's a debate for the ages I think.

DR MUNDY: I think we might even decline as a Commission on that point. We're in different circumstances. I'm interested in coming back to this affluent women experiencing violence. It's an issue that has been raised with us in a number of places. You're in this mixed area and affluent areas around what you might call your catchment.

MS MUNRO (RLC): Yes.

DR MUNDY: Is this 5 per cent of the women who present in general violence issues or is it a number like 50? I am just trying to get a sense of how prevalent within the family violence space that you see is it?

MS MORLEY (RLC): I would be loathe to try and put a figure on it except to say that it's probably - you might see in the Waverley space more woman of eastern suburbs background with financial resources in the family, however the ones that I've become aware because they've come back up to our main office for either credit and debt advice or family law advice, so I then see them coming through that office. They are, at that stage, very traumatised, very lost, with no control really over what's happening. Often away from work at that time trying to manage the domestic violence.

DR MUNDY: I am not - I am just curious to how preponderant is it?

MS MUNRO (RLC): Yes, my CEO is telling me she thinks it's quite low, but I would also be loath to put a figure on it without consulting our - obviously that's something we can - - -

DR MUNDY: I am just curious as to how preponderant within the space it is, that is all. That is fine.

MS SWINBURNE (RLC): I think there really is a proportion of people that come through with their own solicitors and just bypass our domestic violence scene.

DR MUNDY: Oh, yes. No. No, no, I understand.

MS MUNRO (RLC): Yes. So two questions; one is how prevalent is domestic violence in affluent relationships and, two, how many of those people access our service? Which I mean are two different questions that we can attempt to answer further in our submission.

DR MUNDY: That would be helpful.

MS MORLEY (RLC): A number of people do come through our service because they're referred by the police through the, what was, the Yellow Card Project and will be the new safety action meeting arrangements, so they do come through that process.

MS MUNRO (RLC): But we'll respond to that question in due course.

MS MORLEY (RLC): And that's under a separate funding program from legal aid.

DR MUNDY: Okay.

MS MacRAE: Sort of coming away from the court arrangements but looking particularly at tribunals and we have had a bit of a discussion and there has been a bit of a response from parts of the legal profession about the suggestion that we try and get them back to being more informal, cheap, quick and easy kind of mechanisms to deal with civil matters. I see that you are concerned with our recommendations about representation and I think probably that is partly because we did not express our intentions very well there. We are certainly not intending to say that there would be instances where someone that was in need of representation would be denied it and, you know, there would be no possibility of you seeking leave from the tribunal to be represented.

Would you have a view on how relatively formal or informal tribunals have been over time and whether that has created any additional problems for any of your clients who might be self-represented in those forums?

MS MORLEY (RLC): Perhaps I might throw to Jacqui who has experience with tenancy matters in what was the CTTT because you were trained on the tenancy tribunal.

MS SWINBURNE (RLC): I think that over the last 15 or so years from the residential tribunal to the - it keeps changing its name - it has become more and more

formal over time and whilst some matters are still quite straightforward (for example, getting repairs done or a dispute about a bond) there are certainly some very complex matters around whether you fall in or out of the Tenancy Act and the other example has just gone out of my head, but there are a lot of more complex matters about breaking leases and all these sorts of things and often there's an imbalance of power anyway between a tenant and the landlord, like in many of these different legal spaces. I think it's definitely gotten more legal and complex over time.

MS MacRAE: And is that inevitable, do you think, or is there - - -

MS SWINBURNE (RLC): I think that's an age old question about procedural fairness and being quick and cheap and efficient, so I don't have the answer.

MS MORLEY (RLC): I think there's a risk in saying, "Look, these are small matters so let's just get - you know - we'll win some on the swings, lose on the roundabouts, but overall it will be fair." To the person who loses their home, loses the roof over their head, it's a major thing.

DR MUNDY: Yes. If you are one of the five per cent of people who get the wrong outcome that is not much comfort to you.

MS MUNRO (RLC): That's right.

MS MORLEY (RLC): That's correct.

DR MUNDY: I guess just to follow up on that because it is an area that interests - I used to have a lot to do with VCAT in a former life. Is the issue here that not only is the power relationship because of the landlord/tenant arrangement, but is it also a reflection of the fact that the landlord is, in some sense, professional and - even if they appear unrepresented by lawyers, this is what they'll do, they'll often be - the agents, they'll possibly be large strata companies or whatever, so their capacity to self-represent is much greater than some other person who particularly who may be suffering some form of disadvantage as well.

MS SWINBURNE (RLC): I think often that's the case, not always. You do get the mum and dad investors who are in there, but at the same time I would say it is a business and they have the choice of using a real estate agent and most of them do and then that's their profession and they work in that area of law and they represent all the time, so I think that's as well within - - -

DR MUNDY: So it is like someone with a planning dispute coming up against a council planning officer who might not be a lawyer but is competent and knows - does 10 of these a month and that sort of thing.

MS SWINBURNE (RLC): And I think it's the same in employment law in that tribunal and many other of those spaces as well.

DR MUNDY: One of the suggestions that has been made to us is that perhaps - and there are lots of matters, guardianship matters which we would not think people should - well, it would not work if people - at least certainly the person subject to the guardian questions and represented, but - - -

MS MORLEY (RLC): But, in fact, very often - I'm sorry to interrupt - but very often they're not represented in fact.

DR MUNDY: Yes. Would you have any views or objections to a notion that says there should be a duty placed on all participants in the tribunal process to facilitate the objectives of rapid, speedy, all those just - - -

MS MUNRO (RLC): Quick, just and cheap.

DR MUNDY: Yes, quick and cheap. That would not be a problem though necessarily?

MS SWINBURNE (RLC): No. I think you do have to balance it with what the outcome might be, for example, for example being evicted from public housing is a much bigger outcome to getting - - -

DR MUNDY: Because the concern that has been raised with us with tribunal members is that there are occasions where people turn up represented, usually strong parties and they just drag - they frustrate the thing to a cul de sac and justice is effectively denied because the aggrieved party walks away.

MS MUNRO (RLC): I can't - I mean that, to my mind, should be a duty or an obligation that is placed on anyone in any type of adversarial process because it doesn't benefit any party to not have just, quick and cheap. I mean each of those things need to be equal. There shouldn't be a diminishment on the justice where we could call it cheap, but I just, senator - sorry, it's not senator - Commissioner, you mentioned in the legal aid hearing when you were talking about this issue that you talked about there being an acceptance that someone that suffered from an impairment at a tribunal should be entitled to representation and to my mind this touches on this issue as to how would you define an impairment.

Is it someone that is suffering from a power imbalance or is it someone that has an additional mental health problem or otherwise and that was something that I think Jacqui sensibly articulated as to an impairment can be something as simple as a

power imbalance?

DR MUNDY: Yes, I know. No, I mean there are tribunal jurisdictions where tribunal members typically, not judicial officers, will exercise judgments to allow representation where there is some sort of - it might be language, it might be the person is old. Yes, there may have been some prior history between the parties. I mean that is - the intent of what we were saying was actually there are forums in which representation is meant to be by leave and special or extenuating circumstances and that perhaps tribunal members in those circumstances need to be a little bit more vigorous around granting leave. That is actually what we were getting at in the first instance.

MS MORLEY (RLC): If I might add to that. The less representation there is I think the more you need a good appeal system.

DR MUNDY: Yes.

MS SWINBURNE (RLC): That deals with matters de novo.

DR MUNDY: Yes. No, that is a fair point. Angela, do you have any more?

MS MacRAE: I do not think I have.

DR MUNDY: Cost awards. We are interested in cost awards from a number of angles, but particularly incentive based, but behavioural characteristics that will flow from that and obviously we have made some recommendations in relation to people who either represent themselves or are represented pro bono because the current cost rules seem to us to provide an incentive to behave poorly. I guess probably more from the pro bonos perspective I guess what we are saying is, well, the nature of the representation should not be a function of costs being awarded against a party, but there is a question of where those costs go. If the person is self represented or, indeed, if they are being represented pro bono, there is a concern about, if it went to the pro bono lawyer, well, is this becoming a no win, no fee arrangement. Do you have any views on that because you obviously use pro bono stuff.

MS MUNRO (RLC): Yes.

DR MUNDY: I mean, just issues around disbursements, counsel, those sorts - it has been suggested that perhaps junior barristers might actually get the dough, but silk might not.

MS MUNRO (RLC): Yes, I should disclose as well that I am also a barrister and do act on a pro bono basis, so - - -

DR MUNDY: We will not hold that against you.

MS MUNRO (RLC): We support the recommendations you have made in both these areas, so first, that parties who are represented on a pro bono basis should be entitled to recover their costs. There is also the question as to the self-represented litigant should be able to recover their costs. We support the formalisation in relation to the first recommendation being, I think, 13.4, that pro bono solicitors should be entitled to recover their costs because, at the moment, it is quite murky and much of it depends on the way in which a costs agreement is drafted. That is often, and unfortunately, something that sometimes happens later in the piece.

There needs to be - as I'm sure I'm repeating things that you're already well aware of, which is that, in order to be entitled to have your costs follow the event, there needs to be a liability to pay those costs. The question is: if I said I am prepared to act for someone for free and then they win their case and they would be entitled to a costs order, then I should get my money back. If I said, "I'm prepared to act for free," do they have a liability to pay me? Arguably, no. That would then mean that my costs agreement with that client would need to be drafted on a speculative basis, which is again quite murky.

We support the Western Australian model, which I think we've picked up in our submissions, which provides that, where a practitioner provides free legal services to a party, the party should be entitled to recover costs in the same manner and to the same extent as if the services were provided for award. We think that is a sensible way of doing business. It also means that, in circumstances where the solicitors agreement is different to the barrister's agreement, which is different between the junior and the silk, there is some equality between who is entitled to recover what. At the moment, it's different practices for different barristers and law firms. We would strongly support that recommendation.

In relation to self-represented litigants, my understanding at the moment is that the cost rules in New South Wales mean that a self-represented litigant is entitled to recover their disbursements, but the High Court said they're not entitled to recover their time. I looked at this morning - there was a case by - comments made by Justice Bryson in the Supreme Court in 2001 that I thought were quite relevant and if I may just indulge to read a little bit? In that case, his Honour made a statement about the unfortunate effect of that High Court decision which said that a self-represented litigant wasn't entitled to be compensated for their time. He commented, then, in that case, "There were no serious prospects against the defendant" - who was self represented - "and that person was of considerably ability and acumen and conducted his defence efficiently and well." However, he commented that the defendant could only be indemnified for witness expenses by reason of the case law,

which was a matter that his Honour regarded as an unfortunate weakness in the law.

In effect, this person had been litigated against. There were never any prospects of success in the case running against him. He had elected to self represent, but wasn't entitled to recover the time that he had spent in that case. I think that is an unfortunate weakness in the law and there perhaps should be given to, in the right circumstances, that a self-represented litigant should be entitled to recover the cost of the time they've thrown away in those proceedings. So we would endorse the comments made by Justice Bryson in that case.

DR MUNDY: Presumably, the best way of achieving this outcome or certainty would be for the parliament to do its work?

MS MUNRO (RLC): That's correct, because at the moment, the High Court has made a pronouncement on the issue so it's not going to change in a hurry unless the law changes.

DR MUNDY: Is that material going to be in your submissions?

MS MUNRO (RLC): I can provide you with that.

DR MUNDY: I am mindful of the time. Thank you for coming all the way in from Redfern today. We do appreciate the material and, if we have got further questions on the written material, we will come back to you.

MS MUNRO (RLC): I have a written copy of the opening, if that would be of assistance to you?

DR MUNDY: That probably would be. Give it to Vashti on the way out. That would be helpful, thank you.

MS MUNRO (RLC): Thank you. I should also comment, my colleague has told me I said the centre opened in 1997. It was 1977, just to correct the record. Thank you.

DR MUNDY: Could we now please have the Consumer Credit Legal Centre? Could you please for the record state your name and the capacity in which you appear?

MS LANE (FRLC): My name is Katherine Lane. I'm the principal solicitor, and this is Julie Davis. She's the policy and communications officer.

DR MUNDY: Would you like to make a brief opening statement and then we can move onto some questions.

MS LANE (FRLC): I promise to keep it brief.

DR MUNDY: We like that.

MS LANE (FRLC): Thank you for inviting us to give evidence today. Before I go into three points I want to make, rather inconveniently, we've just changed our name to the Financial Rights Legal Centre, this week.

DR MUNDY: Excellent.

MS LANE (FRLC): So our submission is one name; this is our new name. I also want to quickly say what we do. We are a specialist community legal centre. We run an advice line for credit debt and we are the only one in New South Wales. We also run insurance advice - free insurance advice - Australia wide and, again, we're the only one in Australia.

DR MUNDY: You are those people. I have heard about you.

MS LANE (FRLC): Yes. Good. I'm glad you've heard about us. I just want to make three points. First of all, I want to comment on the importance of systemic advocacy and law reform. As of 30 June, or actually 1 July, we will no longer be funded to appear in hearings like this. The Attorney General has removed this type of activity from our funding agreements and he has made it clear that he believes community legal centre should respond to law reform consultations, or appear at hearings in our own personal volunteer time, even though hearings are usually held during business hours. Obviously, this is nonsensical.

The Commission, itself, has recognised the importance and efficiency of systemic advocacy when resources are limited. That's in your report - thank you - and we strongly encourage you to express a similar view in your final report. The Financial Rights Legal Centre has many examples of advocacy that has led to systemic change for consumers in the financial services sector, including the regulations of mortgage brokers and the banning of mortgage exit fees, where we

worked hard to get those outcomes. We are currently finishing a report on the efficacy of law reform work in community legal centres, and we have some survey results to give to the Commission and we'll hand those up in a minute.

Just to give you an indication on how much time is spent in CLCs, according to our survey results, it's around - about 10 per cent of time doing law reform and systemic advocacy, and the vast majority, it's less than 25 per cent. So we're not talking all our time, but a very important part of time. We argue that the time we have spent on law reform and policy has benefited many more people than the individuals we could help with advice and case work alone.

The second point I would like to make in regards to access to justice is that specialist legal centres are a critical part of the legal assistance landscape - rather self servicing because we are one - but we genuinely believe they're a critical part of the CLC landscape. Generalists are extremely important; specialists are extremely important.

We consider ourselves to be an effective, efficient, and highly productive model of providing access to justice. NACLC, who appeared earlier, commissioned an independent report on the economic cost benefit analysis of community legal centres, which was published in June 2012, and found that our service had a benefit of \$33 to every \$1 spent on funding. Any funding model for legal services must, in our views, incorporate specialist centres along with generalist legal centres.

We offer a multi disciplinary - the integrated specialist service that provides financial counselling, legal information and advice, ongoing representation as well as training and publish resources to other community organisations and generalist legal centres. It is important to recognise that clients in financial difficulty often don't know whether they need a financial counsellor or a lawyer, and many times they need both. Clients are more likely to seek advice earlier in an integrated service because they don't identify their problem as legal until it's well advanced.

Finally, I want to emphasise the importance of advice. Quality legal advice, as opposed to just legal information, is a critical part of what community legal centres provide. Quality legal advice is developed from case work experience. It cannot be duplicated in referral centres, such as Law Access New South Wales. It is our submission that any referral centre should be just for referral. We provide highly specialised expert advice for many people every year. We can give large amounts of advice because of our telephone based legal assistance model. Last year we answered 20,000 calls with only 17 full time equivalent staff in our centre. In addition, telephone specialist advice helps meet the missing middle, that is people who can't afford a private solicitor that don't meet Legal Aid eligibility or don't have a general centre near them. That concludes.

MS MacRAE: I just might invite you to give the example you were talking about at morning tea, about your biggest success story in terms of - - -

MS LANE (FRLC): I've been doing this for a long time - 13 years, along with the coordinator, very similar amount of time. We've done a huge amount of work over many years - which, of course, is less than 25 per cent of our time because we're doing all our advice and case work - where we've worked on systemic issues to identify a problem and to work out, and one of the ones I named earlier was - we already named one which we worked and advocated, and lobbied for the credit laws to change so that we had compulsory dispute resolution, mortgage brokers were properly regulated, interest rate caps were put in, universal dispute resolution.

So all those things but the one example I gave earlier was the issue with financial hardship. When the dispute resolution scheme set up, one of the issues was they weren't considering financial hardship. We advocated for many years to just change the jurisdiction to include financial hardship as part of the matter that the dispute resolution scheme, financial ombudsman service or the credit ombudsman service could consider, and that lobbying was successful, and now financial hardship is one of the most - it's the most - common complaint that goes into a dispute resolution scheme now and that type of work came out of the giant demand we saw from our advice and case work where people were desperate to have a review of financial hardship decisions, and court was just completely too hard, and of course it's axiomatic when you're in financial hardship you can't afford court. There is no legal court, court is just expensive, you've got to even fight to get the fee waived.

MS MacRAE: Thank you.

MS LANE (FRLC): I could go on about it.

MS MacRAE: No, that's fine. How do you find the ombudsman services generally? Would you say that they're now operating well in this space?

MS LANE (FRLC): Absolutely. I mean, the reason we advocated so hard for comprehensive and compulsory membership of dispute resolution in financial services is simply because they are the biggest, most important change in access to justice in the financial services area, since I can remember. It is, in terms of access to justice - I mean, thousand and thousand - well, it's hundreds of thousands of Australians now have access to a dispute resolution mechanism that's free, easy, informal to resolve their dispute. I cannot stress enough how much it's changed the landscape.

DR MUNDY: One of the observations we make about industry ombudsman in particular, not so much the jurisdictional ones - and I'm sure ANZOA will make this

point this afternoon - is their capacity in dealing with matters to identify systemic issues and is your experience that since these arrangements were set up largely for the dispute resolution purposes you describe, that the ombudsman that you deal with are doing that and that they are identifying problems either with the industry as a whole or with individual providers, and that the industry's responsive to the things that they find.

MS LANE (FRLC): Yes, absolutely. There is no doubt and it's one of the things again that consumer advocates have played a very vital role and we've consistently - and consumer advocates sit on the boards of these dispute resolution schemes - consistently press for - and identifying systemic issues, reporting them to a regulator, dealing with them. I mean, we have worked long and hard on trying to expand that role of the ombudsman service but there's no doubt the ombudsman service has been doing that proactively as well. I mean, it's resulted in many, many excellent outcomes for consumers that have just been well and truly sorted out through an ombudsman service.

DR MUNDY: Is your sense that the banks or the insurers, or whichever the financial institutions are that have been dealt with, that they're receptive to this sort of identification of issues - - -

MS LANE (FRLC): Yes.

DR MUNDY: - - - by the - it's not something "oh, God, it's the ombudsman again"?

MS LANE (FRLC): I can't stress enough, again, how important it's been with the culture change in financial services over a long period of time and I think the consumer advocates again need to take some of the kudos here of changing that culture. External dispute resolution schemes have worked very hard on changing the culture and improving dispute resolution in industry, and consumer advocates have worked in concert with the dispute resolution schemes and with industry to get these outcomes. So yes, I think an industry has been - again, the culture change has been fantastic. The industry are keen to fix any systemic problems, they're keen to hear from consumer advocates about problems, they're keen to hear from dispute resolution schemes.

DR MUNDY: It's something that's always struck me as curious, in respect to the ANZ litigation. It seemed to me that was, to an extent, a systemic issue certainly within that bank but clearly it may have been an issue in others. Are you able to - and if you can't, that's fine, but I just find it curious that a well-functioning ombudsman service hadn't found that problem or was there a fundamental issue in law there which the court needed to solve?

MS LANE (FRLC): Which litigation are you talking about?

DR MUNDY: The recently funded ANZ case about bank fees.

MS LANE (FRLC): Yes, the one run by Maurice Blackburn?

DR MUNDY: Yes, that one.

MS LANE (FRLC): Yes, thank you. It's just that it was original ANZ litigation, this is not the first lot of ANZ litigation.

DR MUNDY: I think it's an interesting example of something - - -

MS LANE (FRLC): I do, too.

DR MUNDY: - - - which looks like systemic and it ended up in court, we have interest in it because it was funded and it's a different - we might come to that. But I'm just interested in why the ombudsman didn't fix it.

MS LANE (FRLC): It's an absolutely brilliant observation. One of the things we, as consumer advocates, said for years prior to the ANZ litigation is that these fees were excessive and above the costs. People - my colleagues at consumer action put out a report, it was clearly a penalty. There was no doubt in our minds. We all advocated to the ombudsman and the ombudsman took the view that it was a fee matter and therefore it was outside its terms of reference. This is one of the limitations of ombudsmen. They don't do everything, they're particularly funny about commercial decisions and fees. We advocated hard but in the end it had to be run through litigation and, of course, we support Maurice Blackburn in that endeavour because it was clearly a problem that was systemic. Interestingly enough it's reformed, a lot of it, since the litigation but again, I think this was a loophole in the way that they ombudsman service - certainly we argue they made the wrong decision there.

DR MUNDY: So the ombudsman, effectively, formed a jurisdictional view of itself and wouldn't shove its beak in.

MS LANE (FRLC): Yes, that's exactly right. It took a jurisdictional view and we argued strongly against it but we could not get anywhere and it was absolutely required to do litigation to sort it out.

DR MUNDY: Just while we're talking about this matter, there's been some contention around some of the observations we've made about litigation funding and particularly around contingency fees as a way of enabling people who don't have the

resources to bring litigation if ANZ cases obviously want a more traditional class action. Is that, as a consumer advocate, is litigation funding something that you think is important within the gamut of tools available for dealing with these sorts of issues?

MS LANE (FRLC): I believe so. Unfortunately I'm just not a large enough centre to run a class action. I'd love to but that's well beyond my capabilities. I do think that sort of thing which Maurice Blackburn does in relation to - and there's Slater and Gordon, there's a whole heap of class action firms - I think that serves an important public interest. I don't think there's any doubt. I mean, Maurice Blackburn is not only running the ANZ case, they're also running the - this is in my sphere - the Cash Converters case which are clearly systemic issues that need to be litigated and sorted out for the public interest. So obviously I think in - I think there might be tweaking required to make sure it works fairly and transparently, and to serve the public interest but do I think this class action litigation funding is necessary to be able to run these class actions? I suspect it is.

MS MacRAE: We've made a draft recommendation around a threshold being applied through which compulsory ADR would take place and I think in your submission you had some problems with the value that we support, and we've suggested maybe something like \$50,000. Do you have a view on what that number should be or, in fact, whether it's reasonable to say that there should be a level of compulsory ADR?

MS LANE (FRLC): In principle, I've got no problem with compulsory ADR whatsoever. The problem is: I'm an extremely specialist lawyer. I turn up to get ADR and the mediator has no clear about my area, like nothing. I'm sitting there - I think the last dispute resolution I turned up and I ended up a mediator who does dividing fences, when I was running a serious consumer lease matter where I thought that a contract was unjust. It gets ridiculous.

So the quality is really important and, of course, the people who have got money can afford very good mediators who are very good at getting to an outcome and guiding the parties and then, of course, the problem is, for poor people, who can't afford that, you end up with Court appointed and the quality can be not very good, particularly - I think the assumption that I need to start with, because I'm a specialist, is that, if you don't know anything about the law in the area you're mediating, it's a problem because it's, like - you know, I know people think mediating is just a skill by itself. I just don't think that's correct. I think you've got to understand what you're mediating and I think the best outcomes are from that sort of situation.

DR MUNDY: Is that an argument that only lawyers should be mediators?

MS LANE (FRLC): Maybe, because it's legal matters, but yes, I think I'm getting

to that. It's like - I just think that the best mediation I've ever seen is where they understand the area of law really well and can see what the options are for solutions because I think the best mediators generate solutions.

DR MUNDY: Let me just explore this because it is an issue that we are interested in. What if - perhaps not in your particular area, but what you see in, for example, mediations around planning matters is that you might have a professional planner who will - or in your case, you might get someone who has decided to become a mediator and may have been a former banker. That circumstance, there is a fair chance that a non-legally qualified person will know enough about the law, but you would want them to have that skill?

MS LANE (FRLC): Absolutely. I'm not - I mean, look, I employ a tonne of non-lawyer, so just - I'm not wedded to it has to be a lawyer, but it has to be somebody who knows the area.

DR MUNDY: How would - I tend to agree with you, but my agreement might be self serving. How do we set up a framework around - you know, it is all well and good to have mediator accreditation and that is a tick, they have got the general skill. How would you see a framework that would deliver that sort of outcome, that they know what they are talking about when they come to talk about matter X? Who - - -

MS LANE (FRLC): I think you need to have the LEDA qualification, plus I'd like some university qualifications in dispute resolution subjects, plus I'd really like them to be a specialist panel. I think - look, there are going to be disputes that sit in the tribunal that are mediated every day over your microwave where you don't know you're a specialist, but - so there are a group of disputes, but I'd still prefer the mediator to have experience in general consumer matters. I mean, if it's a fence or it's a microwave, it goes better if they understand basically what the law is in those situations.

So specialist panels, well-trained mediators for very small disputes over microwaves and things like that, and up to \$50,000 is a large amount of money for people who are poor and I just think, once it gets to - you've got to have - I think this is what we're trying to make the point in our submission. There are matters where the issues are very complex and the amount of money is not large, and it's basically almost a test case of some - minor test case - and you want a very specialist person sitting on those, so I think, yes, you've got to be able to access the panel and make your case on your particular merits of the dispute.

DR MUNDY: Just on that, I mean, one of the concerns that you have expressed to us about ADR is that the matters, or mediation in particular, is that the matters are resolved privately. So the revelation of systemic issues, say, for example, you would

lose that, but you might get - particularly with an ombudsman arrangement and to a lesser extent, if matters are resolved in open court or tribunals, there may be some reporting of it. Also, I guess, the other issue is - and you used the word "precedent" - is that, you know, the development of the law, or the clarification of the law, even if it happened in a place like VCAT, which are occasionally reported, we lose that too.

MS LANE (FRLC): Yes.

DR MUNDY: How do we balance that?

MS LANE (FRLC): I've given a lot of thought to this because - - -

DR MUNDY: Excellent.

MS LANE (FRLC): I have because, in advocating over many years for ombudsman services, I knew what I was giving up. I mean, like, I knew that part of the issue would be that there would be miles less court decisions, miles less tribunal decisions, and a whole heap of stuff would just go under the carpet, and that's why - in terms of what I've been doing to try - look, it's always the best interest of your client. There's no doubt in my mind about that. You can't be running cases where it isn't in the best interests of your client to get a result where they are at risk of losing everything. Some people will, that's their choice, but the vast majority just settle and, in fact, because of my low income client, it doesn't take a lot for the other side just to throw money at them to settle anyway.

I think there's a couple of things that are really important. Ombudsman services have to be doing better on systemic issues. They're doing well, but they need to do better because they have such a vast amount of data now and we need that to work really well because how on earth does a regulator or anyone - the government regulator, ASIC - know what's going on unless somebody's telling them. The other thing I do is, as soon as I see an issue, regardless of the outcome for the client, I tend to tell the regulator about it if I think it's systemic, but all of this is no substitute for access to justice to get a decision when you need it. That is, again, why you need the Maurice Blackburns being able to do the class actions.

It also means you've got to have a way of doing it so we can recover our costs, which came up in the last session. We need to be able to recover our costs and our barristers costs for running a case through to conclusion, if our client will do it, and we need to be able to go to the tribunal and represent people on matters that are complex. So all of those things need to come together to make sure that these systemic issues are coming out, where necessary, but I can't think of anything else, apart from those things, to make sure - balancing the best interests of the client and

access to justice, versus getting systemic issues out, I think that's the right balance.

DR MUNDY: Ombudsmen clearly have the benefit over privately arranged - - -

MS LANE (FRLC): They have got the data sitting in front of them. They can see the trends. I mean, we rely on heavily on them to do this well, and that is why we put pressure on them - and they put pressure on themselves, which is great - to identify the systemic issues. I think they are doing well. I would like them to do better.

DR MUNDY: When you bring matters - when matters go to Court - I presume you're agreeing with our proposition that people represented pro bono should get costs awards?

MS LANE (FRLC): Yes, absolutely. There's no doubt. I mean, and it needs to be clarified at law. Occasionally, I get crazy solicitors acting for crazy industry people who seem to think that they can just, you know, "We're running it for free, therefore, there will never be any cost." That's just completely inappropriate and it allows for very bad behaviour on the other side.

DR MUNDY: You have seen the absence of costs?

MS LANE (FRLC): I have seen it where the other side is wanting it to the High Court, if necessary, that we can't get our costs. Usually, it settles, but what a waste of my time. It just needs to be clarified. I mean, we consider we do get our costs, but I don't really want to spend my time trying to draft my costs agreement so carefully. I just want it clarified because you don't want poor behaviour on the other side simply because of a loop hole in the law, which arguably I don't think exists. I mean, let's just clarify it. All these people who spend all their time doing pro bono work, people like me, who are free lawyers, we need to be able to cover our costs if we run a case that's successful.

MS MacRAE: Can I just ask - it was interesting to me that you were the only CLC for insurance Australia wide.

MS LANE (FRLC): We think it's interesting, too.

MS MacRAE: How do you go coping with matters that are drawn to your attention from Western Australia, or somewhere?

MS LANE (FRLC): We do very well because we have a dispute resolution scheme sitting there. I've got to say from the start, though, we've just received one year of funding until it all comes up, pending this report. We can't meet the demand for the

whole of Australia with the three or four people we've got answering the phone for the insurance law service, but we do a very - what I think we do a really good job of is, all the calls come in from - I take these calls. I'm one of the people who takes the calls. The calls come in from all around Australia. We give them advice. We tell them how to run through the financial ombudsman service and for low income and very disadvantaged people we lodge in the ombudsman's service and run it through them for them. I haven't had a matter yet that needed to go to court but as far as I'm concerned if I was properly funded I'd get on the plane. I mean if it's important enough or I can find pro bono I have never had a problem with organising the access to justice element of running an Australia-wide service. I would make it work. I do make it work.

We do a lot of law reform work, so we're very, very involved with dealing with the industry, working on the flood issues. I mean particularly if big challenges are coming forward in terms of climate change and natural disasters that we think we're just essential for, we need an Australia-wide insurance force service to gather data and really provide access to legal advice, because it's the only one in Australia.

MS DAVIS (FRLC): Can I also just add that what makes this work at least for us being remotely located here in Sydney, is that it's a telephone hotline. We have a ton of self-help resources on our website and the ombudsman service is all run remotely through telephone and the Internet, so we can have people call us from Tasmania, from Northern Territory. We can give them quality advice about insurance. We can tell them exactly how to do it and we can help them lodge in the ombudsman if we need to and it can all be run remotely from our office here.

MS LANE (FRLC): We represent hundreds of people a year, no troubles as all and, look, a lot of - because we were at risk of losing our funding recently, so we were about to be shut down, we got a year's reprieve, I can't tell you the amount of people who rang me and said, "I don't know where we'd go" and the good question is where would they go? Myself and the coordinator of the service were the ones who wanted this service. We wanted it because we saw a need. There's no doubt we built it and they came in droves. We only answer about a third of the calls that come in.

We are enormously under-resourced. The demand is enormous for our service, and, look, I'm not surprised by that because I could see the demand everywhere already and that was prior to the natural disasters, so, look, I think that that type of service, that type of special service where you get somebody on the phone and they know exactly all about insurance is critical, is critically important.

DR MUNDY: We done? All right. Well, thank you very much for your - - -

MS DAVIS (FRLC): Thank you. I brought you - sorry, we just finished this

state-wide survey of law reform among CLCs, so I brought these for you if you might find them interesting. We can send them by email if that's easier.

DR MUNDY: That would be better because then we could share it with - Vashti will give you a card on the way out and if you flick it to her than she will make sure all our folk are aware. It is a matter of which we have some interest.

MS LANE (FRLC): Good.

DR MUNDY: I will adjourn these proceedings until 1 o'clock.

DR MUNDY: Thanks very much.

(Luncheon adjournment)

DR MUNDY: We reconvene these hearings. Could you please state for the record your name and the capacity in which you appear?

MS PETRE (ANZOA): Thank you. It's Clare Petre, I'm the chair of the Australia and New Zealand Ombudsman Association, ANZOA, and I'm also speaking on their behalf as well as on behalf of the Energy and Water Ombudsman New South Wales.

DR MUNDY: Clare, if you would like to make a brief opening statement perhaps and then Commissioner MacRae and I might ask you some questions.

MS PETRE (ANZOA): Thank you. Obviously I don't want to go over things that you've already read but I just probably want to emphasise some of the main points of the submissions from ANZOA and EWON and the first is, clearly, the value of ombudsman services. It's interesting that I was on the original Sackville inquiry, a member of that inquiry, and it was very interesting to go back and read that report and what the report said about ombudsmen because they were sort of in the early days then and it's been fascinating to see how ombudsman services have grown in Australia and New Zealand but particularly in Australia.

I think the information that ANZOA members provided that we put in our original submission really confirmed that ombudsman services are meeting the essential criteria of timeliness in that 80 per cent of matters are either resolved or finalised within 30 days, we're accessible, fair, et cetera, that ombudsmen have increasingly put an emphasis on looking at systemic issues arising from complaints so that I've always thought that just dealing with individual complaints while it's our core business and really important, if we don't use that information to look at trends and patterns of complaints then we're wasting our time, to be honest.

I think all ombudsmen have had a real emphasis on that so that we can reduce or eliminate areas of complaints; and the third area of community information and outreach to get information out there to either empower consumers to deal with their own matters or tell them the essential things that they need to know to avoid trouble in financial services and energy et cetera. It's not enough for us just to assert our own worthiness. I think we have included in our submission information about our stakeholder surveys. The ones that matter to us of course are surveys of the people who deal with us.

I had a look at the Energy and Water Ombudsman, our last consumer survey, and very high levels of satisfaction but the question that's most important to me is the one that says, "Did you receive the outcome you were seeking? Yes or no?" If yes, they're always happy. People are happy. If no, people may be dissatisfied but we go on to ask the question, "If you did not receive the outcome you were seeking" - a

series of questions. That's the one that matters most to me because 94 per cent of the people who did not receive a satisfactory outcome from us said that it was easy to make a complaint to us.

79 per cent said that our staff were courteous and helpful. 72 per cent said they're recommend EWON to a friend and 66 per cent said the outcome was clearly explained and that's actually the key one for me because ombudsmen can't deliver outcomes to everyone who comes but we can treat everyone with respect, explain things clearly and let them feel that they really have their complaint heard.

That said, the area that ANZOA is concerned about most is probably the risk to the reputation of ombudsmen, because of the growth of them and I guess the popularity of them. We are concerned about the inappropriate use of the name "ombudsman". We've referred to that in the ANZOA submission. We think the Commission's draft report has not clearly distinguished ombudsman from other complaint handling bodies. I think there was a reference to 83 or something ombudsman services but it's really 83 ombudsman and other complaint services around Australia. I think it's really important to do that. I learned a lot about little ADR schemes I'd never heard of, so that was interesting but they're not ombudsmen.

DR MUNDY: A lot of other people haven't heard of them either.

MS PETRE (ANZOA): You mean consumers?

DR MUNDY: They mightn't need to be heard of for much longer.

MS PETRE (ANZOA): Yes, indeed. Indeed. At the moment we have written to treasury, for example, about a proposal to set up a small business and family enterprise ombudsman. We have said, "Fabulous idea. Small business needs all the help it can get but it's not an ombudsman." The opening, forward, by the minister, Minister Billson, says, "This will be an independent advocate for small business." You can't be an ombudsman if you're an advocate. You just can't be. So we have strongly suggested that every aim of this new proposed body is fabulous but it needs to be called something else, a commissioner or something but not an ombudsman, because I think it confuses people. It will disappoint people, consumers, if they have an expectation about what this body called an ombudsman will do. So it's really important and we've asked the Commission to consider incorporating into your final report the guidelines for use of the name "ombudsman".

It's not a matter of, "We're in the club and we don't want anyone else in it," but it is really important for an ombudsman to be truly named that way. There was a reference to a suggestion that the whole issue of access to ombudsman - we're aware, for all the people who come to us and we're increasingly busy, there are many people

who still don't know about us. There was a suggestion that there be sort of a one-stop shop arrangement for people who have a complaint. We are concerned about that. We don't think in practice that will work just because the people who staff such a service would have to be so trained across so many issues just to even identify the area that we think that it would possibly become just another bureaucracy, but what we need - I think maybe more shared facilities among ombudsmen.

We've got very good referral arrangements anyway, so no matter at what point in the system a consumer hits, if they ring the financial ombudsman and they have an issue, a telecommunications problem, they will be referred on and if people come to my office we will refer them on. So we think it's more a matter of sharpening up those processes rather than creating perhaps another organisation. In terms of access, as I said, it's still a real problem but ombudsman can't afford mass advertising and I don't think it's really appropriate anyway because you could bombard people with those messages but they only need an ombudsman when they need them and so it will go over their head.

We think the key message to get out to the community is if you have a problem, you have a right to complain and there's probably somewhere you can go. ANZOA, for example, got together some years ago and put up a combined postcard which just said that, "Speak up. Everyone has a right to complain. If you have a problem about any of these things, you can find yourself an ombudsman," and that was distributed widely throughout Australia. We think if that message, rather than, "There's this ombudsman with this jurisdiction and these details" - it's much better to get those messages out so people feel entitled and think, "There must be somewhere I can go."

Certainly EWON's outreach activities, and we do a lot of it, is not focused necessarily on consumers but we ask ourselves, "Where would consumers go if they had a problem?" So we target the gatekeepers, the MPs, community organisations, Office of Fair Trading, the places where people would think to go. I think that's where we focus our outreach activities, although we do talk to community groups but even then we've found with - we're currently working with Legal Aid in a partnership in terms of reaching some regional and remote indigenous communities. It's absolutely clear that we have to go to them. There are people there who are never going to come to an ombudsman.

While it's time-consuming and resource intensive, it's really important for us to do that and not only to visit once but to go back again, so that there isn't that, "Who was that person with the clipboard who came last week?" So that has been a really good partnership for us and we're going out to some community multicultural organisations who have set up "bring your bills" days for people who's first language

isn't English. Again, it's quite clear that they would never contact an ombudsman. We have to go to them and be seen to be helpful and to offer practical assistance.

We don't duplicate our work. If someone has already been to a tribunal or a court and they come to EWON, we don't deal with it. If someone has been to EWON and then goes to a tribunal or a court, they will still deal with it but it doesn't work the other way around. We've had one case where a magistrate adjourned a case pending investigation by EWON. So there's some quite good linkages there. I have to say in 16 years where we have given customers adverse outcomes, we didn't find for them, only a handful have ever gone to a tribunal because we take great care in explaining the reasons for why we cannot find grounds for taking a matter further. I think people understand and accept, they don't like it, but I think that has been the reason and they have generally not taken it any further.

I'm going to leave you with this information that we've put out because I think that is important and just the last thing, as part of our systemic work, it is a matter of trying to react really quickly to complaints. Apart from Legal Aid we've got really good relationships with other agencies and in New South Wales we work closely with Fair Trading, for example. In the course of a couple of a complaints - and it only takes a couple for us to - for the alarm bells to go off - customers were saying that they had been sold devices to save energy by up to 30 per cent and that sounded very wrong to us and we got onto it very quickly. Through that sort of work we have uncovered two absolute scams - this was the first, people were being sold this device which was supposed to save energy and I think it cost \$160, COD at the post office and this is what they got. It's absolute junk. It's worth a couple of dollars. It doesn't do a thing.

Then we discovered after that one another one that was being sold to very vulnerable people that was \$2000. So we've had some very good work with Fair Trading. They got onto it very quickly and exposed it and closed them down. So that's the sort of work, I think, that comes from the Ombudsman's offices. So I think they were the main points that I just wanted to highlight and you've obviously read the submissions, so I am happy to answer any questions.

DR MUNDY: I will probably start on this issue of systemic work. It's relevant to our inquiry in regard to recent decisions by the government about the termination of funding for CLCs to do systemic work and we had the folk along from the financial services and insurance service. Has ANZOA, or are you aware of any work that seeks to value or discuss in a fairly deep way the value to the community of this sort of systemic work of what you do? We made some findings about systemic work initially and we're trying to just understand that.

MS PETRE (ANZOA): Look, it's a really good question and probably the short

answer is no. It's not impossible to do. "How do you value by closing this down and stopping all those people buying this junk - what's the cost of that?" I actually don't know but I guess from experience - - -

DR MUNDY: What about issues like identifying - you get a stream of complaints and you have a look at them and you think, "These people have got a reasonable beef, the public policy needs to be tweaked a bit at the margin and it's not" - it's an unintended consequence perhaps. Is that something you see very often?

MS PETRE (ANZOA): Yes, we do, both in terms of legislation and whole of government policy. I know it's a sad thing to say but ombudsmen are really good at finding problems. We don't see the joy of life, we see the problems and so we are actually pretty good at even anticipating what those might be and we often - for example, members of my scheme will come in and talk through a new proposal and we can pick the eyes out of it or we talk to the regulators and other people in our industry and even at that early point we are pretty good at following through the links. But then when it is implemented, we can pretty quickly pick up any unforeseen consequences where people are bringing those issues to us and we then feed that back to the relevant government department or agency.

DR MUNDY: Absent you being there performing that function, that systemic function either before the event or after the event, if you like, what's your sense of how those matters would otherwise be dealt with and played out? Would people be dragged through — and eventually banging on the MP's door gets the matter fixed?

MS PETRE (ANZOA): Look, probably. I think a lot of consumers would simply suffer in silence. I think that's the reality of it; or they would go to their MPs' offices — and we receive a lot of calls from MPs — or it would take a long time to be identified through that process. I think again ombudsmen - we're now pretty nimble and skilled about picking things up, turning them into intelligence and feeding them - we know who the stakeholders are and feeding that back. So I think ombudsmen have got that down to a pretty good art actually.

MS MacRAE: I've always wondered and this might be a bit of a stupid question but the name "ombudsman" itself people will hesitate over. Once you've joined a certain level of society, I guess, it's a word you come across but for a lot of people it's something they would rarely hear and then there is always this - we have even had people here say, "I don't like saying ombudsman. It needs to be ombudswoman," and you get all this sort of thing. Do you find that the very title itself can sometimes be a barrier to understanding what you do?

MS PETRE (ANZOA): Yes and no. I think it is a difficult word for some people and I have just seen a study today about the levels of literacy and numeracy in our

community where so many people have such levels that ombudsman would be a real challenge, I think.

MS MacRAE: I'm not suggesting — I don't know what you do about it, I suppose.

MS PETRE (ANZOA): But on the other hand I think once you develop - let me put it crudely - a brand and that has some gravitas or meaning attached to it, I think it does work more and I think because there are so many ombudsman there is an acceptance and understanding that an ombudsman is somewhere where you can go to complain. So I think it has really developed a lot since the Sackville report and so it is a gender-neutral word, of course, so we don't have any problems using it. I don't think there is an alternative and we have actually talked about it and it's up to us to really get it out there. The financial ombudsman in the UK has just done a fabulous cartoon video on ombudsman and it's very good actually. We might try and copy that at some stage.

DR MUNDY: You raise the issue on the use of the word and I should probably confess that I was the person who drafted the terms of reference for Mr Brent's role as the aircraft noise ombudsman when I was deputy chair of Air Services Australia. So I possibly committed this sin but was doing so upon the instruction of the minister of the day. Is this an issue which governments just should be careful with when setting these things up or is it more that this needs to become a protected word like "bank" is protected in the Banking Act?

MS PETRE (ANZOA): In New Zealand the Chief Ombudsman of New Zealand has been given the power to determine who can be called an ombudsman or not. We were always very wary of that but we now are becoming a little more favourable to that in the hands of the right person, like the Commonwealth Ombudsman, for example, just because we do think there is such a risk to the name. We have local governments in New South Wales and maybe elsewhere who have positions called "internal ombudsman" and if you put internal and ombudsman together, it's not an ombudsman because it's not independent.

MS MacRAE: Yes, by its nature it can't be.

MS PETRE (ANZOA): AAMI insurance company used to have an internal ombudsman. It just can't be an ombudsman. So we do think it really does some damage to that community understanding. I know the Aircraft Noise Ombudsman is working very hard to meet the - - -

DR MUNDY: He has been working very hard for a number of years and with - I think to be fair, although I am no longer a director of air services - the general support. I mean, the challenge is the matter in which he is - and the role has

developed. I just wanted to get a sense of whether you felt this was almost at the point of where we have to protect the word.

MS PETRE (ANZOA): I think I would have to say yes. I think we are at that point because we are victim of - without being too silly about it - our own success and people do want to adopt the name because of what it brings with us and I think there are real risks to that.

DR MUNDY: Just before we move off this point. ANZOA's membership is public knowledge.

MS PETRE (ANZOA): Yes.

DR MUNDY: Are there people who are - I guess I'm trying to identify how many people are purporting to be ombudsmen which would not qualify for ANZOA's membership and we can probably work that out, but I guess the question is are there what you would consider to be bona fide ombudsmen who are not ANZOA members or can we take the ANZOA membership list and say, "They are the ones that ANZOA reckons - there is no sort of someone who would qualify but has not bothered".

MS PETRE (ANZOA): No, if they would qualify we would be out there encouraging them strongly to join.

DR MUNDY: Okay.

MS PETRE (ANZOA): State government wrote to us to say they were proposing to set up a health complaints - it was a health complaints commissioner, they wanted to call it an ombudsman and we suggested that it - again, no problem with the service - but it wasn't an ombudsman because it was prosecutorial, it reported to a government minister and it just didn't fit the criteria. They went ahead and called it an ombudsman anyway.

DR MUNDY: So we have got people who should not be called ombudsmen being called ombudsmen but people who - - -

MS PETRE (ANZOA): Yes.

MS MacRAE: It is not the other way round.

DR MUNDY: I am just trying to make Vashti's research task a bit less. We had some folk here this morning from the Australian Centre for Disability Law and we were talking about difficulties of people with disability suffer in getting disputes

resolved. I am just wondering what either your own organisation or ANZOA members more broadly, how they approach these issues of dispute, particularly people with mental and physical, quite profound disabilities.

MS PETRE (ANZOA): Yes. I think most of - well, probably all of the ombudsmen do the standard things in terms of people with hearing disabilities and sight problems and, where necessary, we will go to them or many people have to have an advocate, but most ombudsmen would say that the most challenging area is mental health. We have had some people who have contacted us. It's not a matter of them not being able to reach us but their problems are exacerbated by their mental health issues and it can be very challenging.

One of my senior staff has spent untold hours - I just cannot tell you how many hours she's spent - assisting a man on the autism spectrum who got into all sorts of trouble; his bills were wrong and he had a meter on his property that wasn't being used. He asked for it to be removed. It wasn't removed. He went at it with a hammer and smashed it. Ended up being described on the network records as dangerous, which really, really upset him. He wasn't good verbally and would literally - and he would say himself, "I lose control" - and he would literally scream at everyone and then he had all sorts of billing problems, so we were trying to assist him with both the bills and the network issue about this meter.

It eventually involved hours and hours and talking to him and talking to the agencies, a home visit to him to be with him when they came to finally remove the meter, having the reference to being dangerous removed from his file, having his bills sorted out and sorting out the payments and dealing with him when he rang and just screamed for hours, literally hours on end. At the end of it when we resolved that, we knew that as an ombudsman's service we had spent an enormous amount of resources on this one case, but we just asked ourselves if we had not done that who would have?

No-one would have. No-one would have had the patience to. He alienated everyone he spoke to and we are good at dealing with that, so it is a real issue and I think a lot of the ombudsmen are saying that's an issue that we're looking at to see how we can really assist people in those areas because they - it can lead to that sort of drama that needs a lot of care and patience to address.

DR MUNDY: There was one thing, I guess, and this is bordering on an economic question, in particular with respect to industry ombudsmen. I mean we understand that some members of the scheme just pay a flat fee, some members of schemes pay essentially on a per complaint - - -

MS PETRE (ANZOA): User pays.

DR MUNDY: - - - and I suspect there are some schemes where you pay a flat fee and per complaint. That would seem to be the way these things - - -

MS PETRE (ANZOA): Indeed.

DR MUNDY: - - - this is how multi-part tariffs work. Do you have any views about the incentives or otherwise that the different fee structures might present for the behaviour of participants in schemes and does ANZOA have a view on what is best practice, pricing structure for an industry ombudsperson?

MS PETRE (ANZOA): Look, it does depend, for example, in Tasmania or Western Australia where there are - there's no competition.

DR MUNDY: Yes.

MS PETRE (ANZOA): They only have one or two companies so there's almost no point in going through the rigmarole per complaint because they're going to pay for it anyway so - - -

DR MUNDY: They are going to pay for the cost of the ombudsman come what may and how you cut the cake is - - -

MS PETRE (ANZOA): Yes, that's exactly right, yes.

DR MUNDY: You're still going to get your \$2 million a year or whatever you've got to get.

MS PETRE (ANZOA): That's exactly right, so I think it's not necessarily in those - so the reason for those different economic approaches can be that sort of reason, but where there is competition I think it's important - our scheme is a mixed fixed fee plus user per complaint fee and I think that works well because even if you don't have a lot of complaints you still have the benefit of offering an ombudsman service to your customers and so you pay a small fixed fee just for belonging to be able to offer that service. It is really the relativity of the fixed fee to the - - -

DR MUNDY: And in your scheme you would have government agencies and private entities.

MS PETRE (ANZOA): Yes, we do, yes. In the beginning they were all government owned, so I notice that's an issue for the parliamentary ombudsman but we've been billing state government agencies for a long time.

DR MUNDY: If I set up a retail electricity business, the New South Wales law requires me to join?

MS PETRE (ANZOA): It does.

DR MUNDY: So and then you just recalibrate your collection framework and stuff like that.

MS PETRE (ANZOA): Yes. But I have to say the user pays system absolutely - I've worked for the commonwealth ombudsman, the parliamentary ombudsman as well as EWON and I think the financial situation really focuses the attention of businesses on their complaints. We say if you're paying a lot it's up to you to reduce that and it does not only per complaint but per level of complaint so as complaints go on the cost of the complaint goes up and, again, it's a matter of focusing the attention. Sometimes the companies will say, "We know," but it's really important for you to try and resolve this, it's been circulating within our company for their legal team and their senior management team to deal with a complaint that isn't resolved and just floats around.

If they sent it to us, even if it does end up being a bit costly, it's often worth it to them so that they can say to the MP or anyone else, "The ombudsman has investigated it, this is the outcome, we're bound by it," and that's it.

DR MUNDY: End of story.

MS PETRE (ANZOA): So it's really important.

DR MUNDY: We made some observations about how - well, what our intention was, was to try and strengthen incentives for good behaviour by government agencies and we suggested, not so much as a mechanism of funding ombudsmen, but as to provide some sort of incentive for improving complaint management and possibly good behaviour that agencies could be levied for the use of the ombudsman service.

Now, we did not actually have in mind that this was going to be how ombudsmen would be funded wholly and solely, but the fact is that I think our view was, and probably still is, is that departmental secretaries getting a report is one thing, departmental secretaries handing over \$80,000 to an ombudsman certainly focuses the mind a bit more.

MS PETRE (ANZOA): Indeed. Indeed.

DR MUNDY: I think the Victorian ombudsman has made an observation that this

would not be appropriate given the nature of the work. I guess my question is more - is really along the lines of are there investigations of criminality by police? Is there a range of matters, particularly if government agencies are working and there is some sort of commercial character, or service, or some type of characteristic that those arrangements might be appropriate, if not in all arrangements for jurisdictional ombudsmen, particularly drawing on your own experience in the Commonwealth jurisdiction?

MS PETRE(ANZOA): Look, I think there could be. I agree. I think there are some issues and I think the police is a good example of that, but - - -

DR MUNDY: Intelligence services is probably another one that springs to mind.

MS PETRE(ANZOA): But I think the parliamentary ombudsman would be very interested in at least participating in the discussion. It's certainly not appropriate for government agents just to say, you know, "We could never do that," because we did it. Government departments and agencies in New South Wales have been paying ombudsman for a long time, since we've been there. I think it is a debate that the ombudsman would like to participate in, but it would need a lot of discussion.

DR MUNDY: Is that something you could perhaps just take back to your members that are jurisdictional ombudsmen rather than people like yourself, and just see if there's any more nuancing around it, that they could perhaps send us a one-page note or something? That would be very helpful. I guess the broader question is: we are quite mindful of - we see it all the time because we review regulators regularly. We see a lot of complaints about the conduct of government agencies and submissions have been made to us about the quality of their own internal dispute resolution processes. I guess your jurisdictional members see the outcome of those processes where they have been unsuccessful.

MS PETRE(ANZOA): Yes.

DR MUNDY: Is there any views that you have as an organisation, or drawing on your own experience, about what we can do to improve complaint handling by agencies so that they do not end up with the ombudsman, and also, I guess, how far through government could that go? The Commonwealth has a process in name. It is a question of whether it is effective or not, but I mean, one of the issues that I have a particular interest in with previous work that I have done at the Commission is local governments and how those matters might be resolved?

MS PETRE(ANZOA): To be honest, I think one of the main ways of improving internal dispute resolution is for there to be incentives for them to improve it and, until there are those incentives - and cost is one of them - why would they bother?

They can just send somebody off to a parliamentary ombudsman at no cost to themselves. I think we have one company that finally twigged. It was interesting. We'd had a lot of battles with this company in the early days - and it was a government agency at that stage - where they had so many complaints and they finally worked out that they were spending a million dollars a year on our service, and somebody had the thought, "Well, if we spent a million dollars on ourselves, then maybe we could reduce that." So they did, and they improved their internal processes.

They resourced their complaint handling groups appropriately and not only were they able to divert complaints coming to my office, but they handled other things - I mean, they handled many more complaints than came to us, and they just had a far better. Everything went quiet all of a sudden because they had understood that they sort out their own customer issues then they don't need an ombudsman. One of the better company CEOs always said his role in life was to put me out of business, and it's a very laudable aim. It's not going to happen, but good luck to him.

DR MUNDY: There is just one more thing I wanted to ask you and this is on the ongoing, vexing issue of data.

MS PETRE(ANZOA): Yes, sorry, I meant to comment on that.

DR MUNDY: You made some observations that organisations like ANZOA would be best placed to collect this data. I think that is probably a fair observation about ANZOA. I am not sure the extent that it is a fair observation for all the other bits of the civil justice system we are interested in. Is there any impediment today against ANZOA doing that and, if so, how could it be removed?

MS PETRE(ANZOA): Look, I acknowledge that is an issue for that, that, for organisations that are essentially in the same complaint handling business, our data is not always consistent. That, to be fair, can be a factor of history, jurisdiction, legislation, a whole range of things where we have to report differently, based on all those things. However, it is important - we are in the same business, and I think certainly the Energy Ombudsman, which is still a state jurisdiction, we have recognised that we have got even less excuse to have similar reporting structures. So we are working on that really hard to do that. I think while there are differences, there are enough similarities where we could do some projects to try and improve the quality of the data and make it more consistent, more telling, more useful to external stakeholders and to ourselves. We are already doing that. We have got lots of working groups trying to share information and work together, but I think we could do more in that area, absolutely.

DR MUNDY: I think we are probably done. Thank you very much for your

assistance to date - - -

MS PETRE(ANZOA): My pleasure.

DR MUNDY: - - - and taking the time to come and see us today.

MS PETRE(ANZOA): I'll leave you some propaganda.

DR MUNDY: Leave it with Vashti on the way out.

MS PETRE(ANZOA): I will, thank you.

DR MUNDY: She is the pack horse for this expedition.

MS PETRE(ANZOA): Thank you very much.

DR MUNDY: Thank you.

DR MUNDY: Could we now please have the City of Sydney Law Society. Just bear with us while we shuffle through our notes for a moment. Could you please state your name and the capacity in which you are appearing today?

MR ROBERTS (CSLS): Certainly. My name is Phillip Roberts. I'm a solicitor and the capacity in which I'm appearing today, I'm the convenor of the Practice Viability Sub-Committee and Committee Member of the City of Sydney Law Society, which is the chapter of the Law Society taking in solicitors within the CBD area.

DR MUNDY: Yes.

MR ROBERTS (CSLS): Just speak generally now, or - - -

DR MUNDY: If you would like to make a brief opening statement, that would be helpful.

MR ROBERTS (CSLS): Sure. I will try to keep it brief. In essence, I will make brief references to our two submissions, which I believe you have copies of, don't you?

MS MacRAE: Yes, we do.

MR ROBERTS (CSLS): Although I won't go verbatim through them, I will speak, however, in general terms, on three main points. One will be the background and the situation in general that I will be drawing upon and, secondly, the problem - the key problem, as we see it, in terms of access to justice, and the third one is proposals as to solutions. Just in terms of background, I just mentioned to you - and I just need to add a little bit further in terms of where I am speaking and where I am coming from so you will get it accurately. Our City of Sydney Law Society is a chapter - as I said, it covers all the solicitors in the CBD area. There are another 26 chapters of the law society all around New South Wales, each of them covering a particular area. I will be speaking, and our society speaks, on behalf of our members, which is about 600 and growing.

I don't pretend that we're speaking on behalf of the members of other chapters of the regional law societies, but nothing in it - we do have linkages to those regional law societies and there are meetings held regularly, twice a year, between the presidents of those law societies, and nothing in any of those communications have suggested to me that there's anything different to - largely, in terms of these issues, we all cover the small to medium-sized legal practices. So in terms of - and this very much sets the picture for you. If you have a look at annexure A to our initial submission. I don't know if you have it there?

DR MUNDY: Not with me.

MR ROBERTS (CSLS): No, you don't have it with you. It's not difficult to describe. I suppose the main point here is one of the assumptions about the legal profession and law firms in the legal profession is that we're largely made up of large law firms. Whether it be the media or television programs, or whatever there is a general - or American television programs - there's a general high emphasis on lawyers walking around looking very well-spun and working out of high rise buildings on four or five, or more floors and in fact, from my experience and talking not only to non-lawyers but also to students who are yet to enter the profession, there's a very high assumption that the larger law firms are the profession.

In fact, when you read many media reports about the profession you can actually see media reports where they talk about the profession, they refer to the profession, yet when the example as to what they are talking about are given they'll list 20 firms and those 20 firms are only from the large group. So they are talking about the legal profession as if it is the large firm group. When you come to the annexure A that we've got on the attachment to our first initial submission you'll see how surprising and how different the reality is. In New South Wales the sole practitioners, when calculated by a number of firms - and this was as of November last year - they made up roughly 87 per cent of the firms in New South Wales.

When you took it from firms that had two through to 20 solicitors, that took you up to yet another - well, another 12 per cent of the legal firms in New South Wales. In fact, the large law firms - I mean, if you can put that at 40 solicitors or more - they represent less than one per cent of the law firms in New South Wales. The numbers do sort of correct themselves slightly. If you're doing it by the number of solicitors - because obviously one law firm, if they've got 10 floors of solicitors and they have a thousand or more solicitors just in that one firm and it does right itself out to a certain extent, so that sole practitioners make up 40 per cent and the rest of them from two through to 40 make up another 40 per cent, and 40 or more make up 20 per cent of the profession. But still, the firms from one through to 20 practitioners make up eight per cent of the solicitors in New South Wales.

Why is that important? Why it's important is because - and I've put this view on a few occasions to - or a number of occasions in our society and I've got general agreement, the depiction of law firms and the legal profession as largely being large law firms often leads to the assumption that law firms are extremely wealthy, that they're making lots of profit. Look, I don't say this in any accusatory way; to some extent that's similar to one of your tables, I believe it's at page 221 where you have a table there. That's quite common and there's a little thing about - the couple of lines about small law firms.

The problem is that when we come to this area of access to justice the immediate assumption is that all lawyers are rich. They've got lots of money. Clients are doing badly, it's encouraged by so many of the media report which seem to focus on overcharging or misconduct issues and they'll have a photograph of a partner or whoever it was who has been involved in some sort of misconduct issue, or course driving a prestigious car and this leads naturally, if you like, to the sort of tall poppy response that these guys need to be brought down to size. I don't say that in any inflammatory way, but it does set up the scenario that leads to the sorts of processes that we've seen, which is that more restrictions need to be brought into the market in order to address the issues of access to justice.

In fact many, many solicitors are experiencing great challenges in basically surviving financially, quite frankly. I don't want to exaggerate that. It varies greatly. Some solicitors come out of large law firms, they've got clients who are large firms, they're doing relatively well. There are others - the solicitors who have only been in the profession for a couple of years but for one reason or another they've gone out to set up their own practice and they don't have those sorts of clients. So they're obviously in a very different position, so it's a great range. I don't want to exaggerate there but as is mentioned in the attachment to our first submission, you see there - and I don't want to dwell on this, but this article in 2012 refers to small firms under threat and talks about, "When you are running a small practice you have high overheads relative to other businesses, particularly around professional indemnity insurance and the like. To be constantly having to comply with increasing tide of regulation actually makes things a hell of a lot harder."

He confirms the fact that sole practitioners make up over 85 per cent of the profession in New South Wales and he talks about an estimate that the average sole practitioner in rural areas working six days a week and earning less than \$70,000 a year. One of the problems is that there's simply not enough statistics about the sector. Most of the statistics also focus on the large firm group unfortunately, so we're at a bit of a handicap to know completely what's going on but anecdotal evidence suggests that at least a significant number of sole practitioners are earning less than \$50,000 a year.

So that's the situation as it is. In terms of the key problems in this area of access to justice, firstly the lack of statistics in regarding the profession in general, particularly the small to medium size sector. I appreciate that's not exclusively the focus of your review but it's intrinsic to this process when you're dealing with a profession that's very well - lots of statistics about one part of it but not about another part of it which, on our argument, is the bulk of the profession or arguably the big end of town, if you like, because we are so many.

In regards to the problems as it comes to access to justice, one of the key problems is that as I and many of the people in our society believe it's not so much a problem of lack of resources by clients. Yes, clearly there are some clients who have low income. If you take the legal market - and when I say the legal market, I'm not talking so much about the alternative dispute resolution mechanisms or the ombudsmans like Clare Petre, et cetera - if you look at the market for lawyers there's largely three sectors. One is the high end which is large corporations and high net worth individuals. The other end is the low income individuals who don't have very much money at all and then, of course, you have a large group in between - and as you know, of course, commonly called the in-betweeners in the literature. In regard to the large or the high end of income earners, the problem as we see it is that traditionally we've gone at the problem of how do clients get access to legal services from the viewpoint that lawyers are very expensive and that the sorts of fees that large law firms charge are very expensive. Fine for a large corporation, they can afford those sorts of fees, but ordinary individuals clearly can't. The solution unfortunately, in my view, and what I put to the Commission is the solution has been, well, let's find other ways to provide services for free.

It's fine and entirely appropriate for low income individuals. The only problem is that it's meant there is no third alternative, there is no "how do we find appropriate mechanisms by which small to medium sized practices can get sufficient resources from working their practices? " In short, when the average in-betweener comes to a legal problem, they've never planned to need a lawyer. Not like for doctors or for dentists or anybody like this. Generally speaking, they go, "Oh, struth, I need a lawyer. I've maxed out on my credit cards. I'm spending money on sending my children through private school," a whole range of things where very frequently the individuals in the in-betweeners groups may very often have considerable amounts of income but it's all fully committed.

When it comes to a legal problem, they've had some sort of accident or their small to medium sized business has insolvency problems, they simply don't have discretionary cash and discretionary money, money that they can find, so they say, "I can't afford it, I don't have the money. Lawyers are too expensive." In these situations it wouldn't matter whether the lawyer is charging \$400 an hour, \$100 an hour or \$40 an hour. In many cases they simply don't have any money, any funds at hand to spend on lawyers. Coming to the solution - and I'm mindful that you wanted me to keep my statement brief.

DR MUNDY: We do not have much more time for you.

MR ROBERTS (CSLS): Sorry. All right. Sorry. You'll see in the submissions that we put forward that we propose that the appropriate thing to do is to put more emphasis on bringing the private sector to addressing these issues particularly of the

legal needs of in-betweeners and there are a range of ways. You have been involved, obviously, in the drafting of the reports and familiar with them. They're quite a bit involved in that. Two ways, for example, is legal expense insurance and obviously LEC, legal expense contributions. I won't go into detailing all of that because I imagine that you're familiar with how those sorts of schemes work, but very shortly I can say that legal expense insurance, for example, I was in Europe in January and I took time to talk to lawyers about how it works in Europe and they're very positive about how it works in Europe. They're very positive about how it works in Europe.

It has its challenges like everything else, but in the common law world it's only now Australia and New Zealand that doesn't have legal expense insurance. It seems to be the tyranny of distance and this is an appropriate time for us to start looking at this sort of development. And I'll leave it there.

DR MUNDY: Just on legal expense insurance, it is not clear to us - well, we are probably satisfied that there are no regulatory impediments for the establishment of legal expense insurance. We know that the Law Society in New South Wales at one stage did try to get a scheme up. It fell over, frankly, for lack of demand. Do you have any views on why in the absence of any apparent regulatory obstruction, I mean there is no statutory monopoly issues like there is with indemnity insurance? This market is contestable, it's enterable and no-one is in it. Do you have any views as to why?

MR ROBERTS (CSLS): Well, there is one traditional reason which is that it's not now illegal but it used to be illegal. There was a law of champerty. That's gone.

DR MUNDY: But there is nothing now. No.

MR ROBERTS (CSLS): There is no legal restriction.

DR MUNDY: You are not aware of any other characteristics other than perhaps Australians are not the world's best insurers as a general product. There is a cultural tendency of us not to insure in the way that others do.

MR ROBERTS (CSLS): I think that would be part of it, yes. Well, it seems to me that it is partly related to one of the points that I was making before which is that the way that it was addressed to - I mean clearly many people are agreed that this is a challenge and this is a problem, that not enough people are able to locate the funds to be able to pay for lawyers, but the solution that we came up with, Australia, some 20 to 30 years ago was putting a lot of emphasis on Legal Aid. Now, that's great. I used to be a Legal Aid lawyer. I volunteered at the Redfern Legal Centre. In fact, Clare Petre used to work there as well.

I used to volunteer there. I'm saying I'm a Legal Aid lawyer originally, I've got no hostility towards that. My point is, however, it has put in the minds of many individuals that there is this sort of nebulous idea, "Oh, if I have a legal problem I'll be able to get Legal Aid, won't I, and so I probably won't need it."

DR MUNDY: That's not true. The United Kingdom has legal insurance markets.

MR ROBERTS (CSLS): They do.

DR MUNDY: And they have a historically much more generous Legal Aid system than we do particularly in Scotland but to a lesser extent in England and Wales, so the fact that Legal Aid is there and present in other jurisdictions which have a developed and I much - I mean you can get Legal Aid in Scotland for defamation, so it does not seem to me a compelling argument with the presence of Legal Aid of itself. It is not going to lead to the emergence of this market because - - -

MR ROBERTS (CSLS): I wasn't suggesting that that was the only factor. I'm certainly not suggesting that that was the only factor. It may be just a, shall we say, an organic cause. Essentially it seems - and I've looked into the history of it, legal expense insurance. They call it in France "protection juridique" and it seems to have originated in Italy or France in both of those locations and it's sort of grown out of there and then across to England and the United States. It may simply be - and now 20 years ago, I believe, it went to South Africa, so it seems to be going and I understand the last five years it's come into Canada.

DR MUNDY: I just wanted to ask you, your submission at item 3 indicates that your members have concerns about the current high level of insurance - - -

MR ROBERTS (CSLS): Yes.

DR MUNDY: - - - and, as you would know, there is a monopoly insurance provider in New South Wales, even though it is subject to regulation from a prudential perspective from APRA. I just was not entirely sure but is the suggestion that you are making there that the statutory monopoly should be - or at least the Attorney-General who authorises the provision of legal indemnity insurance in New South Wales should be more vigorous and authorise more providers other than the scheme provided by the Law Society?

MR ROBERTS (CSLS): Look, I have to say that it's not - that part of the situation is not something that we've investigated, so - - -

DR MUNDY: So you are merely making the observation that legal indemnity

insurance is expensive?

MR ROBERTS (CSLS): Yes.

DR MUNDY: But not necessarily calling for - - -

MR ROBERTS (CSLS): I mean obviously that's not an issue that we've been - we've gone into in great depth. I'm simply saying that when we have our regular meetings once a week and if there's a general discussion you can bet there is going to be at least two or three in the group who are going to be hot on this issue.

DR MUNDY: Okay. No, that is fine. I do not have any more. Okay. Thank you very much for your time.

MR ROBERTS (CSLS): All right. No worries. Thank you.

DR MUNDY: Can we now have Grays Institute, please? Good afternoon, if you could take a seat and when you are settled down could you please state your names and the capacity in which you appear?

DR GRAY (GI): Good morning, Commissioners. Can you hear me okay?

DR MUNDY: Yes, no, we are fine. Could you please state your name and the capacity in which you appear, please?

DR GRAY (GI): My name is Dr Pamela Gray. I'm the trustee of Grays Institute and I appear today on behalf of that charity.

DR MUNDY: Would you like to make a relatively brief opening statement and then we will probably ask you some questions?

DR GRAY (GI): Well, I've give you some talking points and the opening statements from that is that there's a number of assumptions that are being made in this talk. Firstly, that productivity is hindered by injustice when you can compare that to the problem of worker health and well being, productivity can be hindered by worker health and well being. Secondly, the productivity can be increased if speed is increased and cost is decreased. The legal system is massive, complex, costly and inaccessible. Automation of the application of rules of law to nominated cases can greatly speed up access to justice and reduction of its cost.

Automation of the application of rules of law to nominated cases can assist dispute resolution and guide pathways to legal goals. That's the benefits of law. I've now got a number of questions that I would put and answer so that these assumptions can be addressed. Would you like me now to proceed with the questions?

DR MUNDY: By all means.

DR GRAY (GI): Firstly, how is the automation of the application of rules of law to nominated cases possible? I've worked in this research field since the 1980s and I've been in the legal discipline practising law for over 15 years and I think I'm qualified to answer these questions. The answer to that question - and this has taken me a lifetime of research - is that by the determination of a computational legal practitioner's epistemology and design of a shell accordingly, and this has been done, and the shell is called eGanges.

I've given you a list of URLs for the theses in which this is established. My son, Xenogene Gray, is on my left here today and he programmed eGanges. He's a scientist and a mathematician and a computer programmer. His qualifications are from the University of Sydney. He's got a BSc with honours advanced. The shell's

been used in teaching law. I've used it in teaching law at Charles Sturt University and degree students have learned the user friendly shell in about one hour.

The next question, what is epistemology? I have an arts degree in philosophy from Melbourne University so I think I'm qualified to answer that question. The simple answer is it's a method with logic. The next question, what is the computational legal practitioners' epistemology implanted by eGanges? The answer is that eGanges' interface has four substantive components. I brought along today some images of the eGanges interface so that you can better understand what I'm talking about. I will just hand up this first one which is the interface that shows the map of negligence rules where all those lawyers pretty familiar with negligence rules - I've got them here with me.

DR MUNDY: Dr Gray, you should not assume that my colleague and I are lawyers.

DR GRAY (GI): Okay. Well, it's actually a quality control diagram taken from Ishikawa's fishbone, quality control fishbone, so it has the advantage of giving the legal system and its processing quality control, so you can see from that that this is a river structure diagram and it sets out the rules of negligence law. The end result is deciding whether or not there's negligence. Every stream in this hierarchical structure, which we call the river, is a rule, so if you have certain things then you get to negligence and to establish each of those things you might go up a secondary stream that's another rule. If you've got those things then you get to the point on the primary stream.

The four components of the eGanges interface include the rule maps. That's the first component and that's an example of the rule maps, the negligence map. That's the current project completing this negligence app. There's about 30 questions that are required in order to complete the map with the interrogation system and the interrogation system you will see on the interface of eGanges and it provides for the user to answer a number of questions. There's a questions window there and sometimes there are notes to help the user to answer the question.

There are three possible answers and that's three of the four values so you can answer, "Yes, we've got this point. No, we haven't" or "We're uncertain" and the fourth value comes from if no feedback is given. I mean if no input is given by the user, so that's the fourth value, unknown. We don't know if we've got this point or not. The questions are put to the user and the user selects the value and failure to select a value is treated as unknown. The interrogation system is the method of taking the user's instructions, so every lawyer in their method, every legal practitioner when they first see a client will take instructions and then they will identify the relevant rules that have to be applied to that user's case in order to find

out what the consequence of those rules is.

The interrogation establishes the user's input or instructions and then the rule maps are applied to each answer and the eGanges system allows for glosses, which are relevant information relevant to the rules that's available for data retrieval to assist users in understanding the rules and the interrogation questions. There are various types of glosses that can be added and one of the types is to link the question to some other database on the web such as the black letter law, relevant black letter law on AustLii, but premises for legal induction and abduction logic are provided for in this way.

There's no automation of the induction or the abduction. There's only automation of the rules by deduction, and the fourth characteristic is the feedback windows. As input values are received from the user, they are processed and the results are shown in the feedback windows. The possible four value combinatorics used by legal practitioners applied to extensive and complex rivers of rules produces a massive combinatorics and this is the most difficult thing that lawyers have to do in their legal practice. Truth tables were devised to guide the deductive processing of the combinatorics.

As I said, my son is a mathematician and a computer programmer and he devised the truth tables to guide the processing of the input, so that with each answer, the user is given the feedback as to what result that answer has, so the automation of this combinatorics characterises the eGanges of the super expert legal system. It has the potential to significantly speed up and reduce costs of access to justice. It might also be expected that the anxiety experienced by lawyers and bureaucrats due to the unmanageable complex combinatorics might be considerably reduced, so my son's infill thesis at Macquarie University explained the eGanges in terms of its super expertise. It's super expert because it automates massively complex combinatorics.

My PhD was paid for by the Federal Government because I received an Australian postgraduate award that brought a living allowance, so that's how my work was accomplished. Once I had designed eGanges, which happened following my development of the computational legal practitioner's epistemology and my masters thesis at Sydney University Law School, I was able then to go on to a PhD and I was fortunate enough to find suitable supervision at Western Sydney University and I was able then to design eGanges as a program based on the epistemology I had developed in my masters thesis at the University of Sydney Law School.

The next question is how is eGanges made freely accessible to the public? The answer is that the mission statement of Grays Institute is to expand justice. For the 15 years that I was in legal practice in three different common law jurisdictions, I

found in the end that the law was not accessible to most people because of its cost and it was an intolerably stressful experience to prosecutors because of the delaying, the time delays in achieving the end result of any process of justice. The means of achieving this is to provide an on-line library of legal super expert systems in various fields of law freely accessible by the public. This facility might eventually reduce the costs of running the legal system and add to its effectiveness and efficiency.

The library with expanding apps was available to the public throughout 2013. In January 2014, the library was made inaccessible through the requirements for payment introduced by a change in ownership of Java, which was the software used to 2002 to program eGanges. Oracle, the new owner of Java, has worked out how to make money out of Java, which was always a free system, and they are now requiring \$500 a year to give access to the apps online, so at the beginning of this year, access was blocked and then, fortunately, when I was at Sebut, a technical conference in Olympic Park, recently, by chance I met a woman who was concerned about this and she donated the \$500 for the reopening of the library.

The other solution is that my son will put the whole eGanges system into HTML5, which is a program suitable for mobile technology, but that will take him about a year, so in the meantime, we can use the donation of \$500 to reopen the library. It's actually \$500 American, which is a bit more than we received from the donor, but we did already have \$250 from the Commonwealth Bank, so we are going to be able to make up the \$500 US.

Are there other important considerations and the answer is, yes, there's two other things to consider. Firstly, the paradox of common law justice that ignorance of the law is no excuse but reasonable access to law is not available; this is injustice and I discuss that at length in my book, which is in your list of URLs, called Artificial Legal Intelligence, published in 1980.

DR MUNDY: 1980?

DR GRAY (GI): Sorry, 1997, in Prof Tom Campbell's famous series on applied philosophy and law, so you could read that. The book is available. It is not available online but I have given you the page references and it's in the Sydney Law Library, the university law library, and you can get it on inter-library exchange.

The second point that's important is that eGanges has been offered to government free of charge, so that public servants can now produce apps for the free online library of the charity. Without reason, these offers have not been taken up and the offers have been made in several ways on several occasions since the eGanges were successfully promoted in overseas international computers and law conferences and that's from about 2005, so as you can see, it's very difficult to innovate a most

important characteristic in this day and age and at the same time give the benefit of that innovation to the people for whom it was created and in particular, government departments, so my submission today is that we need to change the attitude of government, so that they will take up this opportunity.

DR MUNDY: Thank you very much, Dr Gray.

DR GRAY (GI): I have just got a couple more things to give you. I will just hand you this bundle of papers.

MR GRAY (GI): Would it be okay if I just made a quick submission?

DR MUNDY: Please do.

MR GRAY (GI): So basically the core idea - - -

DR MUNDY: Sorry, could you please state your name and - - -

MR GRAY (GI): Sorry, my name is Xenogene Gray. I am basically supporting the Grays Institute Charity. I wrote eGanges and I'm supporting my mother in her main application but I just wanted to make a quick addendum. The essence is in order to improve productivity, what we have found throughout history is that automation is the major way to improve productivity. What we are trying to do with eGanges is to provide an automatic system that is not a black box, something that is transparent, so that people have faith or trust in actually what the decision basis is. We do actually have a copy here for you, if you are interested in having a look, but it's entirely graphical in its interface and it lets you see exactly why a decision has been reached the way it is.

It's designed to be a network structure in the same sort of way that a human thinks about things. We talked to, for example, Justice Michael Kirby and discussed how he actually thinks when he makes a decision, and it's the same basic process. You make the points. You have it structured. You make sure it's all clear and transparent, so that it can be automated as much as possible. My mother was describing the difference between deductive reasoning, inductive reasoning and abductive reasoning, so those three different types of reasoning basically encompass all of what she believes encompasses law as a whole. Deductive reasoning is the easiest one to automate and that's what we're mainly focusing on, but any system that tries to encompass or that needs to account for those two additional types of logic. That is the goal here.

DR GRAY (GI): I'd like to say one more thing.

DR MUNDY: Yes, please do.

DR GRAY (GI): Our most recent applet was the dangerous driving offence of New South Wales, and it was constructed with a Chinese lawyer, Guan Yu Zhu, also known as Frank, and his plan is that once we produce the New South Wales applet, he will then do the equivalent applet for the equivalent offence in China, and he's showed me the wording of that and it's clear to me that this computational, legal practitioners epistemology is international. It will apply to any country, whether they're common law or not. So it will apply to the Chinese dangerous driving offence. He has a copy of eGanges. He can now get on with doing the Chinese applet and I will help him, if he needs help, and that may lead on to other things. So it is an international innovation and it stands to provide for peace internationally because if you've got clearly understood law in all countries that you can access readily and at an affordable price, then that's the first step to peace internationally. So Gray's Institute, on its website, claims that it is looking for peace.

DR MUNDY: I just have one question. You say that you have offered the software to various government departments. Have they both been state and federal agencies?

DR GRAY (GI): Yes. We're currently going to approach the new AG in the new, New South Wales government. I spoke to Geoff Lee, who's the Parramatta member, about this quite recently and he says that it might work this time, but they won't even let us show - I showed Geoff Lee the workings of eGanges on this laptop in the Telopea shopping centre when he was visiting there one day. It's been offered to the - well, when the Labor government was in power federally, we offered it to the AG, as he then was. We even offered to do a whaling applet for him.

DR MUNDY: Is that Attorney General Dreyfus or one of his predecessors?

DR GRAY (GI): Can't hear.

DR MUNDY: Was that Attorney General Dreyfus or one of his predecessors?

DR GRAY (GI): Yes. No, Dreyfus.

DR MUNDY: Thank you.

DR GRAY (GI): He's a senior counsel.

DR MUNDY: Yes, I know Mr Dreyfus.

MS MacRAE: Perhaps I'm still not getting the complete context of this, but why would you offer it only to the government sector? Would this apply for private

sector lawyers? Is there a reason why you'd be looking for the government sector to take it up?

MR GRAY (GI): The major goal with making it the government sector is if the government actually created legislation in an eGanges applet, then there would be no doubts as to what was the correct interpretation. At the moment, the way the government works is they produce massive amounts of legislation that is not always very easy to interpret and so a lot of law firms have different interpretations of how that should actually be represented. For example, Layman Allen, who's a famous legal logician in America, he basically has spent his entire career just trying to piece out, for example, how you can interpret different pieces of legislation. There's a very famous paper where he takes the - I think it was about 14,000 different possible interpretations of the core of the American constitution because legal language is not necessarily very clear and his major goal was to try and emphasise that legal language should be vague but not ambiguous and, more often than not, it's actually ambiguous, which means there are multiple interpretations.

Vagueness is necessary to give the judges and anyone actually implementing the law the ability to actually have some wriggle room with cases, but ambiguity means that there are multiple potential interpretations and most forms of legislation have multiple interpretations. So to make an eGanges application that is universally accepted as the correct interpretation, it would be best if, rather than just producing large chunks of text that then get debated over, if the government, itself, produced the applications that were then concise. We offer it, so they can put it as applets for free so that everyone can access it. So the goal is not to make a lot of money; the goal is to try and spread knowledge and justice. That's the purpose behind the charity and the foundation.

MS MacRAE: How did you cope with the negligence map we've got here, given that would have been designed as legislation that was written with that - - -

DR GRAY (GI): No, that's common law.

MS MacRAE: So you have taken the existing case law and designed something that is sufficiently clear that - - -

DR GRAY (GI): Yes.

MS MacRAE: - - - you think you would get the right answer out of this map, come to the same conclusion that any Court would come to?

DR GRAY (GI): Negligence law is basically case law, so the principles of - or the rule of - negligence are pretty well known to lawyers. It's a lot easier to get to know

case law than it is to follow legislation, which is, you know, a bit here and there. We just got the widely-accepted rules and schemed them into the river. I was assisted in drawing that map by a colleague who was teaching the subject as well, Ann-Marie Scaff. And Philip Argy, who was the technology lawyer for Mallesons, also contributed one part of that map. So it was well revised. If there are any alternative interpretations or difficulties in establisher node, then you can use a gloss to explain what those vagaries are. We do provide for the vagaries that concerned Layman Allen.

We actually stayed with Layman Allen when we were on our way back from a conference in New York. We stayed at his home in Michigan and Xen put to him the solution of the truth tables and he was most impressed with that. I think he saw truth tables as the way forward, but I've given you some of the conversation between myself and my honorary advisers of the trust in this hand out. You'll see that there's discussions from honorary advisers, the leading people in this field, in the U.S., Marc Lauritsen, who I worked with at Harvard Law School way back in the early 90s, and Professor Erik Schweizhopper from the Vienna University, and Professor Giovanni Sartor from the University Institute of Europe, which is near Florence, and he's another leader in this field. So I keep in touch with what's going on in America and in Europe through my honorary advisers. I've got three advisers in Australia. One of them is the author of many texts and you'll see correspondence that we've had with him.

DR MUNDY: We will have a look through the correspondence and if it raises any issues, one of our team members will - - -

DR GRAY (GI): Contact me.

DR MUNDY: - - - get back to you.

DR GRAY (GI): You will see that there's not a great deal of progress being made in America or Europe in this area as well.

DR MUNDY: Thank you very much for taking the time to put the material to us that you have and for coming along today. We do appreciate your attendance.

DR GRAY (GI): Thank you.

DR MUNDY: Can we have Dr Ronald Strauss, please? Could you please state your name and the capacity in which you appear, and perhaps make a brief opening statement?

DR STRAUSS: My name is Ronald Strauss. I'm a career medical officer and I retired to become a full-time carer for my late mother for a period of 15 months and then after her death I was subjected to a lot of legal action and I want to convey the consumer's perspective to what went on. I believe there is a lot of room for improvement. Commissioners, do you want me to go through my points in the order?

DR MUNDY: Yes, briefly in five or so minutes would be helpful.

DR STRAUSS: Okay, I'll try.

DR MUNDY: Or 10 minutes, whatever works for you.

DR STRAUSS: All right. The first point is probably the longest to talk about but I just want to tell you, and you have noted it in your report, how difficult it is to understand and navigate the system. I was totally naive to the system. I had to find a lawyer and of course I followed standard practice I presume, going to the Law Society and I was provided with a list of practitioners and then I had to go through the process of trying to find an appropriate practitioner.

At the top end of town I had to demand to see one of the partners in a firm who had about five minutes for me. He had a brief look at the most simple of all wills and then said he was too busy himself, he could delegate it down the line and it would cost a quarter of a million dollars to defend the will. Apart from giving me a good cup of tea, it wasn't worth the exercise going to visit him.

I went to lots of other firms. Some looked very keen and I had no real idea of who was going to do the right thing for me. I was confused, so I thought I'd go to the tennis court and there was a so-called retired semi-part-time judge there. I looked for direction from him. I gave him a copy of the will and he said, "I've got an appointment with So-and-so for you. Be there at 10 am and I'll be there to introduce you to this practitioner."

He didn't disclose to me that he'd referred me to a company of which he has got a vested interest in; that he is financially involved with. Nor did he advise me that this company dealt with really corporate clients, but they were quite happy to take on my case. So it wasn't long before the solicitor told me he needed to get advice, as they do, from barristers, and he was quoting me \$2200 an hour and that he would sit in for \$550 to learn what he had to learn. That's more than I earn in a day. So I had

to terminate his services and then I had to try and take on the system by myself.

So I just feel that you have spoken about this gateway and I think it's important that disclosure and some sort of credibility gets incorporated in this gateway, because you don't want people advertising themselves as something when they're really not that thing that they're supposed to be. That was my first comment.

The next comment and this is probably one of the most important things is: how important I feel that you have this alternative dispute resolution. I'm a great believer in it. Personally I don't like the word "alternative dispute resolution". I would like "alternative resolution process". The rationale for that is that sometimes you can have a misunderstanding which if you get it early in the bud, it doesn't become a dispute. This is where we've got to go.

We've got to try and tackle things as early, as informatively as possible before lawyers can lodge their Supreme Court actions. If you could just give me a couple of minutes just to tell you how adversarial the system is - will you allow me a couple of quick seconds?

DR MUNDY: By all means.

DR STRAUSS: My mother died on 6 April in the year 2010. Within 16 days I'd already received a letter from the lawyers. Within a month they were already proposing procedural orders against me. The following month I had a junior lawyer tell me he can easily take me to court and as I expected in the third month they'd already filed proceedings against me. I told him I was a tired, worn-out carer. I was going to produce the will when I felt that I should. I had to hire the lawyer I previously spoke about and on 29 July, that's within the fourth month, I sent them a will and I was prepared there to pay their filing fees. I wanted to stop the action. There was no way they accepted that.

I also want a change made in your draft report, if you don't mind. It says "attempts to stop, parties have little control". I'd like that replaced with "parties have no control" because I was then subjected to this legal process which I found really stressful. That comes on to the next point I'm making: my mother took great pains prior to getting a will to even have a planning document. She met with a very senior lawyer. She had a very detailed planning document.

She had a very simple will. It was designed to be fair and equal and it still is designed to be fair and equal. Apart from minor little gifts on the side, all major parties to the will get equal shares, but despite that the lawyers were able to proceed with the Supreme Court action and the whole intent, as far as I'm concerned, was to try and wear me down to give major concessions to one of the parties. So I think if

we had this alternative dispute resolution process or whatever, we would be able to stop a lot of this unnecessary going to court because I'm a reasonable person but I don't want to be pushed and bullied around. Of course as this report says when you're pushed, you don't want to cooperate.

I was also quite concerned at some of the tactics that the legal profession can do in terms of you appear and they can have multiple adjournments. They can think of any reason under the sun. "Let's have another adjournment." They were even questioning mum's testamentary capacity. She worked for two years after the last will and it was a fair and equal will. Why would you want to question somebody's capacity if it's an equal will? Then of course they even had an adjournment to work out costs and apart from that, they issued multiple caveats to stop me from going on and getting probate and then in the end I lost interest in getting probate. Then they got concerned why I had lost interest but they took the interest from me.

I'm also very concerned what happens to people who don't have legal representation because I was in a very unfair hearing where a registrar in the equity division really made me feel like I was very inferior. I didn't have an appearance form. Every reasonable solicitor says that he should have adjourned it for a few minutes and told me to go and get an appearance form. When the other party produced their affidavits, he totally refused to accept anything from me and I felt in a way that I was an alien or something.

So I really think that that was wrong and then I had to ask him on many occasions to talk in plain English. Really in the year 2010 when this was - we talk plain English in this country if you've got somebody who doesn't understand what's going on. With my clients I try and make it simple. I make it as simple as possible. There's no reason why the legal profession in this day and age has to resort to fancy words in front of people who clearly are not part of that industry.

Going on from that, I'd like there to be a much more rational way to appeal on costs. I hope you don't think my simplistic analogy is too simple to be true but the car insurers these days, even some of them who work together and are owned by the same corporates, have an assessment centre where you drive your car in and it gets assessed and a decision is made. I actually believe the Supreme Courts should have a special centre for costs assessment. It should be something where you can go within days, weeks of getting a bill, so it has got a real-time flavour, not something that was handed out four years later when clearly your chance of doing any good is negligible. So I really think there has to be major changes in the way costs are assessed.

The next thing, I am a great supporter of Richard Ackland and his letters. We really have to introduce a value to be linked into the fees structure. So, in other

words if a form is completed that doesn't have much value and you can't - just because you're a fancy law firm, it shouldn't give you the right to have a fancy fee. But surely if you're doing something intelligent then surely you've got the right to demand a good fee and I'm not, you know, against that, but there has to be some rationality introduced into the fee structures.

And, finally, the thing that really upsets me the most is that there has to be strategies to prevent long-term harm to individuals and families. I have lost my family because I believe the lawyers didn't go through a true explanation of how the process should have proceeded. I really do believe that my sister and brother-in-law in America didn't really mean it to be so bad, but they have subjected me to so much pain and suffering and I feel that I'm not the only one that's gone through this and the lawyers must have some understanding of what they're doing to people.

When I walk, and I have spent a lot of time in the courts - I see people who have lost out, people who are poor. They're walking almost lost in the corridors. They're looking for free advice. They don't know where to go. These people are lost people and, you talk about case management, these people need case management. It's got to be case management not from just an ordinary clerk behind an office desk, it's got to be maybe a retired judge who's got a few hours to spend. It needs to be maybe a psychologist. Maybe it needs to also be a social worker. These people have to be re-integrated into society. Some of them just can't progress. You've got to rescue these people. People are entitled to a life.

The legal system has no right to take away life from people and I would like you somehow to incorporate this in your report because there's a lot said about pro bono and a lot of these big law firms advertise how great they are, but what are they doing to alleviate pain and trauma in some of our people who have gone through the system. So I'd like to thank you for the time and I wish you well with the report.

DR MUNDY: Thank you.

MS MacRAE: Yes. Thank you.

DR MUNDY: Have got any questions?

MS MacRAE: I feel like asking you - anything's going to make things even more difficult for you.

DR STRAUSS: Not really.

MS MacRAE: So I appreciate that it's very hard for you to re-tell that story and I'm very sorry that you've had such a tough time. Well, I just wonder, it sounds like

there was - and it was a terrible time for you with your mother recently gone, that perhaps the opportunity for something that would have been able to precede a court proceeding might have helped you in those circumstances given that your - sounds like your sister and brother-in-law might have been the parties here - that if you could have got together earlier.

Was there something when you got to court? Was there a question about whether you'd been able to look at other means to resolve it before moving into the court case in more detail.

DR STRAUSS: Well, the whole - to make it very simple, mum left everything to a trust and the other side just want cash out and they just don't want me to comply with the will and so they've used every mechanism to try and soften me up, that I'll give in and just go against what the will specifies and I believe as the executor of the will it is my duty to do what she wants. She wanted to look after the welfare of the family as required, you know. She - and these people just wanted cash out and they wanted, you know - and I didn't really - and they weren't really going to sit down, they were going to sort of tell me. They use this sort of authoritarian thing and when the brother-in-law sent me a note, an email saying he's got a barrister waiting. You know, there was none of this, "Let's work it out." It was all confrontation, and I believe it was confrontational because they had already gone to the lawyer and this is the way they were probably advised how to deal with it.

Nobody said, "Let's go to a round table with a - with some conciliation process," because if that would have been the case I would have taken myself there with pleasure. It was just this antagonistic approach that we were going to tell you what we were wanting and that we were going to do it to you and that's it, you know, and then in the end I lost interest in proceeding. I mean, you know, I had no interest in rushing for a sale or doing anything, but you know, they were just so antagonistic and this is exactly what comes out in this report. Something has to be changed. We've got to work towards a purpose, a good cause, without making it a battlefield.

And that's the other thing that frustrated me, that when I went to the registrar's sitting often I'd watch, you know, different parties. They'd be, you know, having adjournments and they're supposed to be in battle with each other and they're winking and carrying on with each other, you know what I mean? They're only battling because that's the process, you know, they weren't battling - you know, they were mates. So I think we have to change this attitude that everything's got to be a fight. It's got to work towards a purpose and a simple solution if possible. Clearly some things are very complex, some things require the standard court process and I'm not trying to change the legal system around, what I'm trying to say in cases where you could have had a much easier and quicker solution, you should have resorted to that.

DR MUNDY: And you would have thought that - and it's one of - you know, there are some matters which are not suitable to mediated facilitated outcomes, but you would have thought that matters around estates might have been in the category more likely to be amenable to that, and I think it is - the issue around the estates is something that has been raised with us on a number of occasions and the capacity for parties to also of course chew through the cost of the value of the estate because often in many cases it's the estate that pays for the resolution of these disputes, not for the party who's bringing them, so - but, look, you've raised some very helpful points for us and, again, I mean, I agree with - I mean, obviously what's occurred to you is probably a travesty of justice and, you know, hopefully we'll be able to make some recommendations that, if we're not able to assuage your pain, may prevent others from having to go through what you've gone through. So thank you very much.

DR STRAUSS: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Can we have the East End Mine Action Group, please. Could you, when you're ready, please state your name and the capacity in which you appear.

MR LUCKE (EEMAG): My name is Alec Lucke. I'm the research and communication officer for the East End Mine Action Group and this is my wife, Heather.

MS LUCKE (EEMAG): I'm the assistant secretary for the East End Mine Action Group even though it was more convenient for us to come to Sydney than to Brisbane from where we are in Bingah and we've remained involved even though we've left the area because we're a unified little group and the group asked us because I'd been the secretary for a long time and my husband had been involved for a long time you accumulate the information piecemeal over a long period of time. You can't just dump that in someone's lap and walk away.

DR MUNDY: Fair enough.

MS LUCKE (EEMAG): So we're happy to continue.

DR MUNDY: Could I ask you to make a brief statement? Can I just - to facilitate proceedings, if I may, the Commission is not able to re-try matters.

MS LUCKE (EEMAG): I realise that.

MR LUCKE (EEMAG): Understand.

DR MUNDY: And we are not in a position to make recommendations about particular matters. It is not within our statutory capacity.

MS LUCKE (EEMAG): We realise that.

DR MUNDY: If you're able to focus your remarks around systemic issues of the process rather than, you know, and obviously your experience to illustrate those points.

MR LUCKE (EEMAG): Okay. Now, when we made our submission, which is 14 pages, and in the knowledge that we were coming here what we've done is we've condensed what you were asking for, which was the nub of our issues where we thought the fundamental problem was and where we saw a need for change and also a situation that expands way beyond our own particular instance so that it's a broader issue in itself. What we have done, we have prepared a presentation and if I could give you each a copy and then present the presentation.

DR MUNDY: Yes, fine.

MR LUCKE (EEMAG): Can I hand this in?

MS MacRAE: Sure. Thank you.

MR LUCKE (EEMAG): Given EEMAG's evidence - I'm going to read this for two reasons. I would prefer to do a presentation that I didn't have to read and I would customarily do that. The issue here is very disciplined in terms of what I need to present so that I don't get off topic and waste your time and my time and still haven't presented.

MS MacRAE: Sure.

MR LUCKE (EEMAG): Given EEMAG's evidence to various Commission inquiries and studies, we are seeking recognition that our access to administrative justice has been traded off under a confidential minimum compliance contract between the executive government of Queensland and a mining company. The contract, HOPI 2006, controls socioeconomic community demands and, equally important, minimises legal exposure. That was in our EEMAG submission 037.

We respectfully request that the occurrence of confidential executive government contracts for projects be thoroughly examined and for the Commission to recommend structural change and transparency to require effective, efficient and fair governance so that the rights and interests of potentially affected stakeholders are properly considered and protected.

It is noted in the Productivity Commission's research report of November 2013, Major Projects Development Assessment Processes, that the Productivity Commission in recommendation 5.1 on page 33 supported the concept of regulatory certainty, transparency and accountability.

MS LUCKE (EEMAG): Because executive government processes are highly secretive and commercial-in-confidence, the public has virtually no knowledge of contracts, comprehension of their binding nature or the insidious effects contracts have upon them. As long as secrecy surrounds executive government contracts, there will be further victims as stakeholders, unacquainted with contracts, are driven to civil unrest and endeavours to protect their strategic cropping land and aquifers, et cetera; for example, people involved in Lock The Gate movement. Our organisation is a member of Lock The Gate.

To change the situation and ensure access to justice for third parties affected by a project under executive contract, it seems that our society must recognise the

problems that arise from executive contracts for potentially affected third parties whose rights and interests are not considered or protected under a contract and find a medium through which to inform the uninformed of the problem and - and this one is really important - obtain a court determination as to whether legislation and the role of the public servant is overridden by an executive government contract for a project or not, and establish an independent and affordable process to ensure integrity of the sides; for example, a merits appeal with hot-tubbing of experts - you mentioned in your draft report on mechanisms for expert advice - demand our elected representatives face up to evidence of non-enforcement of laws and the related evidence of official misconduct and maladministration of projects under an executive contract.

MR LUCKE (EEMAG): Going on from there, the East End Mine Action Group has existed for 19 years and the dispute has related principally to executive contract with minimum compliance clauses, evidence of science shaped to fit minimum compliance, failure of the regulatory process to enforce compliance and entitlements, and allegedly false benchmarking of the mine's environmental authority so that the mine remains in compliance.

In our experience, the initial and subsequent contracts entered into by the Queensland Government has bound the state and its regulatory and administrative agencies, including the oversight bodies of the ombudsman and the Crime and Misconduct Commission, to an unofficial policy of minimum compliance over the 35-year life of the East End Mine. We have that data and we have it in such a way that we can make those statements and back them up with the documentation.

In our submission DR168 to this Commission re leading constitutional lawyer Nick Seddon, *The Interaction of Contract and Executive Power*, the list of public law values includes openness, fairness, participation, impartiality, accountability, honesty and public law. Contract is traditionally about secrecy, no duty to act fairly, participation of the immediate parties but otherwise not concerned with third parties, no duty to act impartially, accountability only to the extent required by the contract and only then to the party, and no duty to act rationally. When traditional contract values are combined with the public purpose, the mix does not necessarily work very well. There is no, or at least a very limited, special law of contract that applies to government contracts as there is in France and to a lesser extent in the United States. The safeguards for the protection of citizens' interests and wellbeing inherent in public law are simply absent with contract and there has been no adaptation of contract to fill the gap.

Although advice on whether executive government contracts override legislation conflict, more generally it is suggested that executive government contracts are subservient to legislation and the role of the public servant. If this is so,

then governments with executive power contracts operating under an unofficial policy of minimum compliance allegedly operates ultra vires. In Queensland the science is determined by government without inclusion of independent findings. Original environmental project approvals are preserved by the Environmental Protection Act 1994, division 4, section 232(4):

To remove any doubt, it is declared that a submission made under section 160 as applied under subsection (1), that is, a public objection -

so in other words, this would be a party making an objection to a mining lease application or of that nature, and the problem that comes in is where there has been an application for an amendment to an environmental authority, and section (a):

May be made about an existing provision of the environmental authority only to the extent the provision is proposed to be amended under the amendment application, and (b) can only be made about activities carried out under the environmental authority before the deciding of the environmental application.

In other words, what effectively happens is that when an application comes in for an amendment to an existing operation to have some form of expansion, you can only object to the expansion and the amendment and that preserves the operation even if the operation is deficient and even if there are enormous problems about its operation. You can't examine those. You can't scrutinise them. You can't object to them.

MS LUCKE (EEMAG): You can't object against the inadequacy or inappropriateness.

MR LUCKE (EEMAG): We understand no legal precedent has been set in Australia to determine whether (a) contracts, or (b) the legislation and the role of the public service prevails. Our advice is that the legislation and the role of the public servant prevails but the reality is in our case that has not occurred and we foresee that similarly it will apply to other people as well.

Janet McLean, who was quoted within this Interaction of Contract and Executive Power and I presume to be a barrister, otherwise I couldn't see Nick Seddon relying upon her - Janet McLean has also commented on the scope of the executive power in relation to the fact that a contract made by one administration may tie down the next administration and other administrations into the future.

Despite the doctrine of executive necessity which allows governments to break contracts if it is necessary for the public good to do so and the possibility of

legislation to override a contract that is no longer compatible with the new policy, the ability of government to escape contracts by use of these devices is severely limited. It does not look good in the eyes of the rating agencies if governments resort to these devices to cancel contracts. There is even the possibility, contrary to the received doctrine in Australia at least, that a government which exercises executive or legislative power which is inimical to the existing contract may be in breach and liable to pay damages. McLean argues that contract ties successive governments down more effectively than does legislation. EEMAG considers our experiences are just the tip of the iceberg. Queensland Hansard of May 2008, page 1792, provides evidence that Mt Isa Mine has a minimum compliance agreement contract. In recent times we have observed the proliferation of significant project status with the valuation conducted by the Queensland Department of the Coordinator General and others without public objections or other means of challenge.

The enormity of projects like the coal seam gas conversion plants on Curtis Island and the desire for project certainty so as to raise and commit tens of billions of dollars in funding has obviously resulted in contracts between executive government and proponents. In the case of the East End Mine the central and southern pacific shale oil project and the Gladstone harbour controversy all within a 30 minute drive, so in other words it's like a cancer cluster. Regulatory compliance was not enforced, co-existence was abandoned and environmental degradation accepted with resignation and reckless indifference.

Now, what we are saying is that the circumstances are actually out there, the proof is abundant that, effectively, what's happened is that the enforcement of the regulations, which should have ensured the co-existence and should have protected the communities, didn't happen and you've got to ask yourself if it didn't happen, okay, why didn't it happen. Government control and scientific assessments were allegedly corrupted through obfuscation and inability to determine causes while allowing development activities to continue despite independent findings of adverse health, particularly with the shale oil and environmental impacts.

Recently the New South Wales Gateway process assessment found that the Kepco Coal Mine proposal at Bylong failed on 11 of the panel's 12 assessment criteria yet it got a provisional licence and seemed set to proceed. The recommendations of the independent scientific water trigger panel for the Carmichael Mine in Queensland was also reputedly ignored. We now see Federal Government proposing to divide the water trigger legislation across to the states. Why, we ask, should this occur? Well, from an entirely rational point of view is a state enters into an incentive package, that is, a contract with a developer proponent and along comes the expert panel with embarrassing findings under the water trigger legislation, the state might have to alter the contract and/or pay compensation.

If the state controls the process it is all in-house. Since EEMAG became aware of the nature of contractual arrangements between government and the East End Mine in about 2006, we have received advice from people as eminent as Julian Burnside that our best course of action was to agitate for a political solution. To date such overtures have proved futile. In our view, any political process offered to us by government has been hollow and designed to terminate the dispute on terms satisfactory only to the government and the company as they wait for us to age and run out of motivation.

From our representations and experiences we can only conclude that the COAG agreements on national competition policy, water reform and the national water initiatives where, I might add, we've made any number of submissions over time, permit mining and coal seam gas to be exempt from compliance with the principles and objectives of these agreements. Now, that's our presentation for the day, thank you. I'd like also to suggest to you that in preparation we did come with some justification, which is in this document here, and it contains a number of items which would substantiate the type of things we're saying.

It also includes at the back of it a 17-page lot of freedom of information which demonstrates in 1995 when the East End Mine received approval for a trebling of production of the mine. It came without public objections being permitted and it came with environmental approvals unchanged, so, in other words - and it also came at a time where it was demonstrated that there was an entrenched water depletion problem that hadn't been assessed. So there's any number of things that support what we're saying.

MS LUCKE (EEMAG): And there's a lot of other people out there experiencing the same sort of things. People are intimidated from writing submissions and that's why there's so much unrest out there and that's why people are out, you know, with demonstrations. We've seen them in the Leard Forest and that sort of thing - which is in New South Wales - but there's also a lot of unrest in Queensland and people are victims and they're provoked into these actions because at the end of the day you're treated like dills. Nobody told us when we started off. They reassured us that there was special conditions that the water supplies would be protected, that people's welfare would be protected, but in reality everything is secretly traded off.

And yet we went along believing that the system worked and it doesn't and it's designed not to work.

MR LUCKE (EEMAG): We thought for a long time with this water depletion issue that if we got independent science and we demonstrated to the government the extent of the company's liability that the government would then bring the company back into compliance and then fix up the issues so that there was a co-existence

factor. That's not what happened at all. They never wanted to fix it up. They weren't interested in the science and it didn't matter how much science was produced. Since 1995 there had been over 40 hydrology studies for the East End Mine. Now, it's just ridiculous.

MS LUCKE (EEMAG): And we've not been able to get a process to have a consensus sorting of the science. The regulators use the government and the company science but not the independent dissenting science and we have been to lawyers and all the rest of it, but it's way out of our price range. It's hundreds of thousands of dollars and you just can't go there.

MR LUCKE (EEMAG): The biggest single thing in our coming here today isn't to fight for our cause. It's to fight for the fact that we epitomise a much bigger, wider problem and it's a problem that people don't know anything about. I talked to Drew Hutton - it might be a name that's known to you - who leads Lock the Gate and Drew has been politically active and was a founder of the Greens and any number of things. He spent a lifetime and I've known Drew for decades and I talked to Drew about contracts which we've only become more enlightened about recently - - -

MS LUCKE (EEMAG): Researching for the submission that went in on 15 May. We stumbled across it.

MR LUCKE (EEMAG): And Drew said, well, he hadn't even thought in terms of things like that being influential about why governments wouldn't respond to community-driven concerns.

DR MUNDY: I was one of the Commissioners who worked on the major project review.

MS LUCKE (EEMAG): Oh, were you? I'm sorry.

DR MUNDY: By way of background, I also have a master's degree in environmental law from the ANU.

MS LUCKE (EEMAG): We had Dingle Smith from the ANU was very helpful to us. I don't know if you knew Dingle.

DR MUNDY: If I might finish.

MS LUCKE (EEMAG): Sorry.

DR MUNDY: The matters that you raised here about third party enforcement of environmental conditions and a range of issues, we canvassed at length in that report.

MS LUCKE (EEMAG): Yes, you did. That was good.

DR MUNDY: We made recommendations to the effect that persons aggrieved about, effectively, when regulators fail to do their jobs that third parties should be able to bring enforcement action of conditions and moreover that we also made recommendations in chapter 9 about issues about standing and issues about costs in relation to public interest and environmental litigation. We have also made draft recommendations in this report about public interest litigation and the importance of the - - -

MS LUCKE (EEMAG): Yes, you did.

DR MUNDY: - - - funding of that and the importance - we have also drawn attention to the ability of community legal services and in this particular case it would apply to Environmental Defender's Offices to be able to exist and do what you might call advocacy and public policy work. I have to be honest and say we did recommend that the Commonwealth Government repeal the water trigger because we didn't think it was an appropriate and certainly not a well-developed piece of public policy when it was implemented, but I do make in relation to your point 9 is that irrespective of whether the Commonwealth is able or chooses to delegate its powers under the EPBC Act which are a broad and long standing and have at their heart a sensible public policy rationale, in my view, and, indeed, I think in the view of the Commission.

The reality remains that decisions that are made under that delegation is subject to the application of Commonwealth law and, in particular, the decision-maker's decisions are subject to the normal appellate arrangements contained in the Environmental Protection and Biodiversity Conservation Act, which I sometimes do not get out properly. I think there are a range of issues here but the space which the Commission has - - -

MS LUCKE (EEMAG): Agreed.

DR MUNDY: - - - travelled before - indeed, we have submissions from some of the EDOs saying we have not addressed certain issues around standing and all these sorts of things, and with the greatest respect we have. I mean, as you've seen, our report is very long and it covers a very wide range of matters. What I guess I find interesting is the extent to which a contract has been able to shut down the normal probative processes of agencies like the Crime and Misconduct Commission.

MS LUCKE (EEMAG): We only learnt about the contract business when we were doing up this submission. Alex stumbled over it after he'd been talking to

Jim Leggat.

MR LUCKE (EEMAG): I need to clarify. We've known for a very long time what the Queensland Government and how they - I mean, the original mining project at Mount Larcom when it was granted in 1976 as a lease and then there was a Franchise Act with Joh Bjelke-Peterson in 1977. Now, all those Franchise Acts - they were Special Agreement Act mines. There was seven of them or something like that and all of them were bits of the disgrace in some manner or another, and they're all contractual things with legislation but what we didn't know was that, for instance, when the Goss government gave the company a capacity to shovel their expansion, a \$220 million expansion with a cabinet agreement, an incentive package, what we didn't know was the re-writing of a contract and that the contract that had existed was still there but it was reinforced and none of the things that were beneficial to us were included. It was just freshly drawn up and just life went on again as before.

What I'm saying to you is that the mine is still regulated on the same basis of what it was when it first started and at the moment the off-lease impacts - it depends whether you accept the government findings can be as much as 50 square kilometres of off-lease impacts on properties and land holders or whether you go to the independent findings, which is probably about 70 or 80 square kilometres and where the government doesn't accept that independent advice. So, you know, I mean - - -

DR MUNDY: I have to be frank with you, governments don't accept advice all the time.

MR LUCKE (EEMAG): They don't accept any advice from - - -

DR MUNDY: They regularly don't accept ours.

MS LUCKE (EEMAG): Well actually, the Queensland Government's winding back, so EEMAG won't have standing when the mine has another expansion because it may be that people only affected by the mining lease itself, not people affected by off-lease impacts may not be able to lodge an objection. But the contract is the nub of the problem and it was like a smack between the eyes when it was found out. It took me a week to get over it because I'd never contemplated people's rights being traded off like that, and that's what's happened. I mean - and I understand it's what's happened at Mt Isa as well and that's people's health. The contracts - it needs to be got out there that they exist and that they may override, it needs to be established as to whether they do override the legislative process or not.

DR MUNDY: That's ultimately a matter that a court will need to resolve. It's not a matter which we can resolve.

MR LUCKE (EEMAG): No, we know that.

DR MUNDY: Nor is it a matter which - I, with the greatest respect, would be reluctant to engage with because I know that the judiciary hold their jurisdiction dear.

MS LUCKE (EEMAG): Absolutely.

MR LUCKE (EEMAG): Yes, well the difficulty is that there apparently is a reasonable case in New Zealand with Prime Minister Muldoon when he first took office, which is not too dissimilar about whether as executive power he could do what he did, and when he was challenged it was found that he had to remove the legislation which applied. He couldn't just make a - as he did, he made a declaration publicly, "You don't need to do that because we're going to change the law." But in the meantime, the law hadn't been changed. It was found that the law took precedent and the role of the public servant was preserved.

DR MUNDY: My understanding was that contracts entered into by the state are entered into by the state as the legal entity, not the government of the day and they necessarily must endure otherwise lease hold titles would fall over and ministers - but the issue about distinguishment of contract with government usually involves an act not of the government but of the parliament.

MS LUCKE (EEMAG): These ones bypass parliament. It's - - -

DR MUNDY: I'm trying to explain the general proposition and I'm loath to comment on documents I haven't seen, but the Commission - I have advised and dealt with people with airport leases, for example, which are contracts of a lease with the Commonwealth. There is no sense in which people believe that if there was a change of government - where there was a change of government in September that contract was at risk and no-one would believe, even if the incoming government wished to set it aside, it would do anything but go to the parliament and have it extinguished. The only variation to this is, indeed, if that was authorised by some law of itself.

State Agreements Act - and I was a treasury official in Western Australia for a number of years where there are similar State Agreements Acts to the ones that exist in Queensland which were there to facilitate the building of the rail and port infrastructure at Port Hedland and at Dampier - Karratha, whatever your view is - they authorised the entering into of contracts and the contracts had the affect of the Agreement Act. But those contracts are public and they're not controversial in the sense of - - -

MR LUCKE (EEMAG): This is the difficulty that we've faced, is that we had known approximately what happened but we didn't have any in-depth knowledge. And as we've become more familiar with material we've accumulated over time - and that's what happens when you continue for 19 years, you accumulate and if you hang onto your material little pieces of the jigsaw come together. But because it's secretive and because it's commercial-in-confidence, I mean, these contracts are just not floated around out there for people to know about. Yet they're affecting their lives and they're taking away their rights, and - you know, I mean, it's just sort of - people are actually, typically with Lock the Gate, fighting and having civil unrest at the same time as they really don't understand the true nature of their problem which, in many of the cases, significant project status entered into by contract, agreed in principle before the environmental impact studies are done so that people are sort of saying, "Well, we'll go and make our submissions to the environmental impact statement". Yes, well we've done that too, just like we've come to the Productivity Commission.

MS LUCKE (EEMAG): We trusted the system at the time.

MR LUCKE (EEMAG): We go to all the things that we can to make our representations because you've got to be a participant and, you know, after 19 years we've always operated within the law. We're not radical and gone out there and chained ourselves to bulldozers, and all the rest of it.

MS LUCKE (EEMAG): We're not planning to get outside of the mine.

MR LUCKE (EEMAG): But we want - there have been 24 alternative water supplies to the land owners supplied at the company's expense and that has been like pulling teeth. But the biggest single problem was that at a time when the district values collapsed over a 10-year period - and within these two documents I'd like to leave with you, it shows you letters from two neighbours that the company provided in 1996 that said "we've acknowledged that we've injuriously affected your properties". The special conditions had injurious affection clauses. The departments would not administratively enforce any of the injurious affection.

Now, our barrister - and we did have a barrister's advice - said that the right to an alternative water supply at the company's expense, that was part of the special conditions. But equally part of the special conditions was the entitlement to compensation where there is injurious affection. And how the injurious affection came about was because in the period between 1980 and 1995 the water monitoring data was collected but it wasn't interpreted. When it was interpreted, it was interpreted at the community's insistence to coincide with this project expansion in 1995, then they found they had a problem. They tried to cover it up - the government, I mean, tried to cover it up - and they just run away from any talk about

compensation to land owners and all the controversy that ensued, all the values collapsed and that happened over a 10-year period, and for 10 years people aged, and died, and couldn't sell, and all that sort of thing.

MS LUCKE (EEMAG): There was a lot of hardship for people, too. Marriages fell apart and people's investment that they'd saved all their lives for, they'd lost their values and all that sort of thing.

MR LUCKE (EEMAG): And listening to this gentleman that talked before we did, I can empathise with him, and I can sympathise and understand with him because we've seen all that and we know all that.

MS LUCKE (EEMAG): And I did think you did a good job on that major projects one. When the report was sent out, there was a little card sent in that we were to respond on and we had family late Christmas coming up, and I put it up on the shelf and it's still sitting up there, and I'm sorry about that because, I mean, over the years I've complained a lot about government but I'll always believe in telling you when something's well done and I think it was well done.

I did send the final report off to a person in Lock the Gate because I thought it would give them heart, that it is worthwhile going back to talk to government because people do despair, and they do believe that government doesn't listen. Thank you.

MR LUCKE (EEMAG): Can I leave you these two documents which - basically, it's some of the justifications of what we talked about today. I also have written a book about these experiences. I'm happy to leave you both the book but, I mean, is that appropriate that I do so?

DR MUNDY: It's up to you. I mean, given the amount that we read I'm not quite sure we will get around to reading it.

MR LUCKE (EEMAG): No, look, it's not part of this submission. This is a bit of night-time reading. This is a bit of bedtime reading.

DR MUNDY: More than happy. Thank you very much.

MS MacRAE: Thank you.

MS LUCKE (EEMAG): Thank you for your time. We do appreciate the opportunity.

MR LUCKE (EEMAG): Very grateful for the opportunity.

DR MUNDY: I'm presuming there are no persons in the audience who wish to make a - in which case I will adjourn these proceedings until 8.30 tomorrow morning in Adelaide.

AT 3.21 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 5 JUNE 2014



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

DR WARREN MUNDY, Presiding Commissioner
MS ANGELA MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

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

Continued from 4/6/14 in Sydney

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

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

Whilst we like to conduct these proceedings in an informal manner, I would like to note that under part 7 of the Productivity Commission Act, the commission has certain powers to act in the case of false information or the refusal to provide information. As far as we are aware, the commission has never had to use those powers and I expect it won't be necessary to use them in the course of this inquiry. As I said, we like to conduct these hearings in an informal manner but we will be making a complete transcript, so we don't take comments from the floor, as we cannot record them properly. The transcript will be available on the commission's web site shortly. Participants are not required to take an oath but are required to be truthful in their remarks. We do welcome them making comment on submissions made by others.

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

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

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

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

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

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

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

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

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

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

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

Then he goes on to say:

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

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

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

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

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

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

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

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

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

MR JOHNSON: Yes.

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

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

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

think, so - - -

MS MacRAE: Or both of them.

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

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

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

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

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

particularly helpful in running that to earth.

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

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

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

MR JOHNSON: Yes.

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

MR JOHNSON: Exactly.

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

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

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

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

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

MS MacRAE: Yes.

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

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

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

MS MacRAE: Yes.

MR JOHNSON: That meant a lot to me.

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

MR JOHNSON: Yes.

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

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

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

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

MS MacRAE: Yes.

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

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

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

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

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

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

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

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

MR JOHNSON: Yes.

DR MUNDY: You were not even given that choice?

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

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

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

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

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

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

MR JOHNSON: No.

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

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

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

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

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

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

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

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

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

MR JOHNSON: The bit on the edge, yes.

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

MR JOHNSON: Thank you.

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

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

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

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

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

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

DR MUNDY: Ms Canny?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS CANNY (LSCSA): John Boersig, yes.

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

MS CANNY (LSCSA): Yes.

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

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

DR MUNDY: Correct.

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

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

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

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

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

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

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

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

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

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

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

MS CANNY (LSCSA): That's right.

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

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

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

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

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

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

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

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

MS LEHMANN (LSCSA): Yes, we do.

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

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

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

MS LEHMANN (LSCSA): Yes.

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

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

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

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

DR MUNDY: Of stuff.

MS LEHMANN (LSCSA): Yes.

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

DR MUNDY: Okay.

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

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

MS MacRAE: I see.

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

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

MS CANNY (LSCSA): Yes.

MS MacRAE: Yes, okay.

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

MS MacRAE: Yes.

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

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

MS MacRAE: Right.

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

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

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

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

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

DR MUNDY: In relation to PSA schemes.

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

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

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

DR MUNDY: Yes.

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

DR MUNDY: Thank you.

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

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

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

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

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

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

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

MS CANNY (LSCSA): Absolutely.

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

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

MS CANNY (LSCSA): Yes, it is.

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Yes.

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

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

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

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

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

DR MUNDY: Yes.

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

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

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

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

MS CANNY (LSCSA): No.

DR MUNDY: Okay, thank you.

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

DR MUNDY: Yes.

MS CANNY (LSCSA): We are quite different.

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

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

MS MacRAE: It happens.

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

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

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

MS MacRAE: No.

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

MS MacRAE: Okay, thank you.

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

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

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

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

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

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

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

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

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

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

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

MR BOUNDY (LSCSA): Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS MacRAE: Yes.

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

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

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

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

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

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

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

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

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

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

DR MUNDY: Yes.

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

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

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

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

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

DR MUNDY: Just in the last couple of minutes we have got waiting; obviously family law and associated matters are a very important part of the work we are doing. Are there any observations you would like to make, firstly, on the success of mediated dispute settlement but the other question which we are sort of passing the interest in is any observations you would like to make about the overlap between the Commonwealth jurisdiction to do primarily with the Family Law Act and all the

associated matters of child protection and family violence. I guess the question of me is, do you think there is merit in somebody sitting down and taking a hard look at - it is not a matter we can resolve - but having a hard look at that or are there better things that we could make recommendations about the future investigations on that issue?

MR RUSSELL (LSCSA): Certainly the concept of resolving a dispute outside of court has almost been a cornerstone of legal aid since legal aid was invented. The formalisation of that into the requirement now that parties have to go through family dispute resolution before they can issue court proceedings has tapped in very much to the way that we have done things. That's been the philosophy that we've always worked on. I think it's been very successful. Our success rate in resolving disputes through our lawyer-assisted conferencing and mediation services is about 80 per cent of matters.

Interestingly, the success rate in matters that are not pre-litigation, but are actually matters that have bypassed that and gone straight to court and then been referred back to us by the court is about the same level. Same level of settlement rates. I think that we must be personally reducing the amount of costs and angst for those parties who otherwise would have gone through the system and I guess we've also then meant that the court system, by default, dealt with the more serious, difficult matters which has, you know, probably helped the whole system.

I think in terms of mediation and family law it's a perfect fit and we do it, as I said - as Gabrielle just said - about trying to expand it into other areas is something we've seen. In our new accommodation we've actually purpose-built some mediation suites, if you like, so that we can provide that service with safety for people because the beauty of having lawyer-assisted mediation means that you are able to provide a service to people who may be in fear of violence or there may be other issues which might have screened them out of ordinary mediation, so I think it's worked very well.

In relation to the interaction between Commonwealth and state, there has been an attempt to try to bring those two jurisdictions together in Australia. In South Australia we have a pilot project, for example, where when you do lodge an application in the Family Court you have to complete a form which sets out the areas of risk that you're alleging are occurring within the family, so whether that's violence or child abuse or bad behaviour. Those notices are then sent to our local - our state Families SA, which is the child protection agency, who are then able to, before that first hearing or just after that first hearing, at least, to send information back to the Family Courts as to what involvement the state has had in the child protection area.

That sort of thing is happening and something, I think, family lawyers are very aware of that there is that two systems.

DR MUNDY: We hear very different - I mean obviously it is profoundly different in Western Australia, but there seems to be a multitude of ways that different jurisdictions are dealing - just interested. We'll draw this discussion to a close. Thank you very much for both the time of coming here today but also the submissions you have made to us today. Thanks very much.

MS MacRAE: Thank you.

DR MUNDY: Thank you. We will re-commence these proceedings. Sorry for the slight delay, Mr Snow. When you get settled could you state your name and the capacity in which you appear today and then perhaps if you could make a brief opening statement.

MR SNOW: Thank you. Chris Snow. I'm a journalist and a public relations practitioner and a research consultant. The latter two I haven't been practising for quite a few years mainly because the journalism has been reporting on the beer, wine and spirits industries and that's been much more palatable.

DR MUNDY: I noticed that in your CV and we will have a career development discussion later.

MR SNOW: Yes. Okay. I've also, I suppose, almost a fourth occupation that I've been for nine years advocating for consumer rights in the legal regulatory system as a result of having been a victim of the Magarey Farlam lawyers fraud case here in 2005 and I should also say that as of March I've been a member of the executive of the Consumers Association of South Australia. That wasn't mentioned earlier in my background papers. I should first apologise, I think, for the fragmented way in which I put the material to you. As you can gather, having been through the rigours of the uniform law, which followed hard on the heels of the South Australian amendments last year, it's been information overload and the information I provided I just made it confidential simply because it was not couched in accordance with terms or reference.

DR MUNDY: Yes. No, that is fine.

MR SNOW: I'll just amend those opening comments that I made there and truncate them because they're replicated in some of the points of discussion, but I concentrate mainly on legal regulation because of the Magarey Farlam affair and it exposed a pretty Draconian trust account and fidelity fund system, but then broadened into what I think is a pretty oppressive regulatory system for clients. I think that legal regulation in Australia is largely about lawyers. That's endorsed by the Consumers Federation of Australia policy.

Just as an indicator you can - this is a client being very sensitive, but you can see in the nomenclature that it's the legal profession uniform law. It's the Legal Practitioners Act, the Legal Practitioners Miscellaneous Amendments Act, when it really, to my way of thinking, should be the Legal Clients Protection Act. So it is more about lawyers than it is about our clients. It's highly monopolistic; that's a term I use. It's not a monopoly, but it's monopolistic. I don't know whether you can be a little bit monopolistic or a little bit of monopoly or not. Think that one through.

DR MUNDY: It is one of the challenges I make for my staff regularly about the use

of the word "monopoly".

MR SNOW: Yes. So I'll leave my opening remarks at that because these main points for discussion cover off.

DR MUNDY: Thank you and I notice you were here earlier when Mr Johnson gave us evidence and perhaps I could start there. Do you have any views about the way in which the regulators of legal services seem to have been - I mean there has historically been - it was - there was a self-regulatory framework where the law societies and the bar essentially regulated themselves, very much like the medical specialities do and then there's been this progression through to now the bodies like the Legal Services Board and whatever names that they might come up with around the country.

As a person who advocates on behalf of consumers, what is your view of the quality of the organisations and the quality of redress and what consumers should be able to, on the one hand, expect from these organisations and on the other, what do they get?

MR SNOW: It's a pretty broad question. I think that, as I've just said, I think the regulation is largely for lawyers. The main - as in the development of legal regulation it's all done by lawyers. It's the lawyers of government supported largely by the lawyers of opposition and they are - and the lawyer associations and then that legislation is marshalled through the parliament by lawyers. Now, the clients have had negligible contribution to it, so that's the first thing, I think, that we just don't have an appropriate say and there are many areas where I think consumer can contribute markedly to improving the whole system and you can start with education admissions where I don't think any of the education admissions committees or councils or whatever they're called have a client - a consumer component.

Your consumers, I think, in my case communication would be one of the things, but I notice in the South Australian Law Society's submission they give a rundown of what units are taught in the courses; communication, client practitioner relationships are just not mentioned. I mean that's one thing we could expect. I think - and this is giving a rundown of the whole thing - I think on business structures we don't have any say there. We could expect, I think, to be able to have a say to say these are the types of law firms we'd like to see and particularly when you have ILPs and the multi-disciplinary practices coming in, particularly when you've got structures as in the UK now. The alternative is the structures where anyone can own a law firm.

Do consumers want to see that here? Are we concerned about the fact that, well, the friendly family lawyer might be disappearing? I would much rather go to my friendly family lawyer just down the street who has been dealing with family

affairs for years rather than go to a huge multi-disciplinary practice. On the other hand, I can see the advantages of a multi-disciplinary and I think that's particularly been shown in the UK recently with some, you know, quite interesting structures there.

DR MUNDY: I guess it is a bit of the challenge of the corner store versus the supermarket.

MR SNOW: Yes. When they did call it in the UK, they were calling it the Tesco law.

DR MUNDY: Yes.

MR SNOW: I think Isobel Redmond here, she called it the Coles law, but I think the - and one of those structures that's worth mentioning I think was - with an alternative business structure - was Eddie Stobart, the truck company. It's a huge truck company. Linfox here would be the equivalent.

DR MUNDY: Yes.

MR SNOW: They had an internal legal team which had worked out a way where they can access barristers directly at a cost saving of 50 per cent. When the ABSs came in they got one pretty smartly and they were offering that right around the country in every area of the law and a 50 per cent cost saving sounds pretty good to me. That actually has just folded because they've made some changes a couple of weeks ago and I haven't caught up with why.

DR MUNDY: Just coming back to your point about consumer representatives, you would seen then, I guess - I am not wanting to put words in your mouth - so these legal practitioners boards should have, by their constitution, have consumer representatives on them rather than - we know certainly there is actually a non-lawyer who runs the board in Queensland.

MR SNOW: He's the ombudsman, yes.

DR MUNDY: Yes, the legal services ombudsman.

MR SNOW: Yes.

DR MUNDY: Well, they are all a bit different in different places but - - -

MR SNOW: He left last week.

DR MUNDY: He left last week, yes. He will probably be replaced by a lawyer.

MR SNOW: Yes.

DR MUNDY: Is that something though by way of statutory construction should be encouraged?

MR SNOW: Well, my overall position, as you'll see there, is I believe that we should have in Australia what - the system that they have in the UK and that is a lay controlled regulatory system and on that particular point I think that the commissioners - ombudsmen they should be called - should be independent. Independent of the legal occupation. Caesar must not - - -

DR MUNDY: We had the Australian New Zealand Ombudsmen's Association before us yesterday and the president of that organisation said to us that the use of the word "ombudsman" is much abused these days and independence is the first question you have got to be able to tick, so I think we would probably agree with you about that.

MR SNOW: I think also - and not reflecting on you - but I think the term "commissioner" is overused these days. When you say a legal services commissioner, what does that mean to the public?

DR MUNDY: Yes.

MR SNOW: It means nothing. Ombudsman has some meaning and probably to most people would mean something and it's the same as - it's nomenclature again - I think the same as QCs. What does that mean to the public? Some people have - Fred Nile said in the New South Wales parliament, "Everyone knows what a QC is." I don't think everyone knows what a QC is.

MS MacRAE: No. It goes a little bit outside the particular issues you have raised, but do you see the possibility of non-lawyers doing work that now is the preserve of lawyers being one area that you might be able to get a bit more consumer leverage on, on the sort of style and nature of services that are offered?

MR SNOW: Look, I'm probably very conservative on that. That's coming into also self-representation, if you bring those two together. But I do think that the professional input is vital in the legal system. I'm all in favour of ombudsmen but I would like ombudsmen trained and I don't know if there is any training for ombudsmen. Tribunal members - and I'm speaking from bitter experience of one ombudsman and one tribunal member - part-time lawyers being tribunal members, I'm not in favour of that. I think that if you're going to be dealing with issues that are traumatic for people, to use a very broad term, that you need professionals dealing with it. So in getting non-lawyers in, if they are trained properly. I think if we're

going to accept them, there must be formal qualifications required for those sorts of matters that I think you've got in mind, which might be conveyancing and wills, that sort of thing.

DR MUNDY: Well certainly conveyancing and wills to some extent are beyond our terms of reference because they don't actually go to disputes, they're more transactional in their character, but certainly it is the case that - certainly in my adult lifetime the nature of conveyancing has fundamentally changed, although it was always fundamentally different in Western Australia, but it's probably more, I guess, inherent in the recommendations and the general trends, I guess, also to alternative forms of dispute. Well, non-court-based forms of dispute resolution, if you like. They're not that alternative but a lot of that work's being undertaken by people appropriately trained but not necessarily legally qualified. So that's the sort of position and presumably following on from that your view would be that if you're going to be a tribunal member you should trot off to something that's the equivalent of the judicial college where you trot off to learn to be a judge properly, to do that sort of thing.

MS MacRAE: Can I just ask you more specifically around trust accounts and fidelity funds, because you've obviously had a lot of experience with those - Victoria and New South Wales, under the new uniform laws have decided not to go for a single trust account. Do you think that's sub-optimal or would it have been better for them to have a - - -

MR SNOW: I think that's very, very wrong. I think trust accounts are an appalling - they're run appallingly. They are - I don't like to use the word "scam", and I use that very advisedly, not emotively. They are a scam and people are - clients are forced under the legislation at times to put money in lawyer's trust accounts. They're not told that money is not safe. They're not told that the interest on that money is stripped and used to fund the whole regulatory system. They're not told that there are controlled money accounts into which they can put their money and at least get the interest on it. Yet major clients - the mega millions - they know about these controlled money accounts and also the lawyers, I believe, will advise them about that.

So what I call the SMCs - the small medium clients - get hit with the cost of the whole regulatory system or it varies. I think it's, on my figures, 95 per cent in New South Wales, 85 per cent Victoria and South Australia and then from those trust accounts you then come to the fidelity funds, and they are structured so that a client may get nothing. There are various reasons but there are caps, there are grounds on self-sufficiency in New South Wales and Victoria now, and in South Australia as we found in Magarey Farlam, the system - it's a fund of last resort which means that before you can claim from the fidelity fund in which clients have contributed most of the funds, you have to go off and sue everybody under the sun before you come back

to the fidelity fund and say, "Please can I have my money? I haven't been able to get it," and they'll say, "Well, hang on, it's capped." And in the Magarey Farlam case it was capped at 5 per cent of the balance of the fund which was set by a formula, it was about 20 million, so 5 per cent of 20 million was 1 million and the Magarey Farlam victims had four and a half million stolen. They would have had to share that 1 million.

That's been changed under the amendments, where there are now two first resort provisions. One is on hardship - the society can recommend a payment and the attorney-general has to authorise the payments. The second one is if no ordinarily prudent self-funded litigant would pursue further action to get their money. Now, those provisions sound okay, except that it will be the society that determines it and in debating it, the attorney-general, John Rowe, said both he who has to authorise all these payments and the society which determines them are vehemently opposed to first resort payments. So in other words, "Don't bother asking us." It was cynical, just a - and I will get emotive going on about that, I mean, the treatment of clients is just appalling.

MS MacRAE: How would you best reform them?

MR SNOW: A single national statutory, fully insured trust account into which clients would deposit their funds without going through lawyers hands. But that is all dependent on the other point I'd make about trust money. I have never seen anything I've read - and I have not widely read, but I certainly have never seen anything about why is up-front money justified? It seems to have been traditional and Murray Thompson, the member for Sandringham in Victoria said that the historical maxima of legal practice has been money up front, money up front and money up front. I don't know what the justification is. Why can't lawyers, like anybody else - you come to an agreement on costs, they do the work, you pay the bill and if you don't pay the bill you take the consequences.

DR MUNDY: You can sue for it like everyone else.

MR SNOW: Sorry?

DR MUNDY: They can sue for the debt like every other professional service provider.

MR SNOW: This is legislated for. I mean, it's in the legislation and also there's legislation whereunder liens can be taken out against costs. To me, this is just oppressive stuff. I did put to one lawyer/politician, "Why is it so?" and he sort of gave what I'd call a very smug grin, and he said, "It's just to make certain we get paid."

DR MUNDY: There was a time when trust accounts - you know, there were performed transactional settlement type function but that's - - -

MR SNOW: That's housing?

DR MUNDY: Yes, to a large extent now that's passed on. I mean, the way we move money between - technology has passed a lot of the transactional trusts issues away.

MR SNOW: I should say that single trust account has been put into effect in France and in the UK last year by the barristers. In France, it was initially done and has been successful I'm told in eliminating money laundering. I don't have any evidence of any money laundering here but if it's happening there, there's a fair chance but that system apparently is working very well in France and it was only introduced in the UK last year, so I guess it's a bit early to tell.

DR MUNDY: Just before we move off fidelity funds, we've made some recommendations about license fees for pro bono lawyers - people who are mid-career, women who are taking a break from work or retired practitioners who want to work in community legal centres and so on, and one of the issues that was raised with us by the New South Wales Law Society was that you couldn't possibly have free certificates because then they wouldn't have to pay into the fidelity fund. These are people who are giving it their time of free.

Given your experience with fidelity funds, you probably think no-one should pay the fidelity fund and they should go away, but would you see any problem with people who are working on a limited basis, essentially for free, to assist disadvantaged members of the community as people who should perhaps be exempt from the fidelity fund, given that the very nature of their work is that they're not holding moneys and trusts on for anyone?

MR SNOW: Yes - no I think that's entirely justified but can I - when you mentioned pro bono, my other hot topic is the funding of - and I'm sorry, I missed the beginning of the Legal Services Commission presentation - but in there, I've put my proposal for funding legal aid is that it should be funded by lawyers, and the scheme that I've put forward to you is that lawyers should make an up-front payment, an annual up-front payment, as up-front payments seem to be the perennial flavour, and that amount could be set at the required amount to cover all legal aid, but it could be recouped by the lawyers doing legal aid work. They could set the fee level at the fee level they want because that's apparently a big grizzle. I think that one of the figures I saw was that the fee for legal aid work is about the half the fee for normal practice.

DR MUNDY: Yes, something. It varies.

MR SNOW: It varies, but - - -

DR MUNDY: And certainly, the gap has widened over time.

MR SNOW: I certainly don't like that, but I mean, anybody who works far less than they should be is not ever going to really do the job and I don't think it's a good practice. I did some quick calculations on the figures I got from National Legal Aid, and I think the budget last year in 12-13 was 602 million - sorry, that was expenditure. Now, the Commonwealth contribution was around about just under 500 million and the states - sorry, that was the combination of the two, states and Commonwealth. Its clients were about 90 million.

If you worked out - took the number of lawyers - take the number of lawyers in Australia, about 60,000 - and I didn't get a - I can't get a split of how many of those are private practice and how many are court or government lawyers, how many are legal services, but about 60,000. If you multiply that by the 35 hours, which is the recommended pro bono contribution each year, multiply that by \$350 an hour, which I think is around about a mid point - I'm not certain there - that comes out around about 750 million. You add that to the Commonwealth contribution and you've got 1.2 billion.

If the Legal Aid expenditure last year was 602 - but I've only ever seen - I can't find out what the loan is except for one comment last year that it should be doubled, but if you double 602 million, you get 1.2 billion. I was quite pleased with that calculation. I think, certainly, I do think that what I put forward ought to be looked at quite seriously. It seems to me that the smart lawyers who make this contribution are going to dash out and do some legal aid work and recoup it all in the first month and will probably go on and make enough to cover their contribution the next year.

MS MacRAE: Do you have any more?

DR MUNDY: Thank you for that. That has been very helpful. We do appreciate the notes you have provided to us and look forward to - I think there is another version coming, but if you do not want to go to that effort and you are comfortable with that, we are happy to take that as it and place that on the public record, if that is easier. If there is more that you want to add, feel free.

MR SNOW: Yes, okay. Thank you.

DR MUNDY: These proceedings are now adjourned for 15 or 20 minutes.

DR MUNDY: We will reconvene these proceedings now with the Law Society of South Australia. Could each of the witnesses, please, to assist the transcript, state their name and the capacity in which they appear.

MR BAILES (LSSA): My full name is Charles Moreland Bailes, known as Morry Bailes, President of the Society.

MS HO: My name is Yan-Li Ho. I'm the Policy and Projects Officer at the Law Society.

MR HODDER (LSSA): Stephen Hodder, Executive Director of the Law Society.

MS PRIDMORE (LSSA): Rosemary Pridmore, Executive Officer at the Law Society.

DR MUNDY: Thank you for that. Would somebody like to make a brief opening statement. If you could perhaps keep it to about five minutes, that would be helpful.

MR BAILES (LSSA): Yes, I will just run over a couple of points. The first is to reflect on the concept of access to justice. You've probably heard it from others. Our view about access to justice is it's not, as it were, an economic theory; it's a fundamental, democratic right that each citizen should have. It's important to underscore the importance of law in civilised society and the rule of law. So access to justice is very important. Within that, of course, are economic considerations, which is why we are sitting. In relation to Chapter 6 of the interim report, Information on Redress for Consumers, we make the following points.

The suggestion that there should be a central website publishing lawyers' fees and rates is not something we support. In this state, we've been under the auspices of the Legal Practitioners Act 1981 for over 30 years. On 1 July, there will be proclaimed a new Act and regulations. There are accompanying cost disclosure rules that bring us into line with other jurisdictions. That, in our view, is sufficient. In terms of the publication of rates, we compare ourselves to, say, the medical industry where one can inquire about rates and so forth, but where there's no compulsion to publish them centrally. Also, lawyers' rates, depending upon the jurisdiction, are complex. They need explaining. There's actually a potential for the publication of rates to be misleading if they are not accompanied by explanation, in the same way that the rates of medical practitioners are complex and require explanation.

If I move onto Chapter 7, A Responsive Legal Profession, and if I address the National Trust Account concept. Our concern about that is simply that, in 2010, there was an attempt to nationalise the profession, so called, and one of the stumbling blocks was working out how a National Trust Account would work. On a recent

visit by the LIV president to - sorry, chief executive - to South Australia, we have learned that the conundrum has not been resolved, in as far as a uniform profession is concerned as between New South Wales and Victoria. The difficulties appear to be how to work out how to apply the proceeds of the combined trust account fairly amongst jurisdictions and the formula to be used because, between jurisdictions, the use of the combined trust account moneys is applied in different ways within the jurisdiction and, essentially, no-one has been able to put in front of us, despite repeated requests over many years, a formula for how that is to operate.

I'll say something briefly about the idea of limited licenses and unbundling of legal services, which is also contained in that chapter. We fundamentally agree that the idea of unbundled legal services is probably a wise thing to think about. The problem that seems to arise in that discussion is insurance, so the idea of going in and doing a bit of a job but not all of a job gives rise to risk. If there is legislative protection for lawyers to do that, then that is viable, if there is not, risk considerations may stand in the way. Chapter 10, Tribunals. The suggestions that tribunals should not be accompanied or allowed legal representations we do not support, at least not as a universal concept. There are obviously some tribunals where simple matters can be dealt with without representation. I will turn to the question of representation later in my remarks, but, essentially, tribunals can deal with complex issues of law and, in our view, they will be assisted by representatives but I'll say more on the question of unrepresented litigants and the problems they represent to the system.

Chapter 12, Duties on Parties. In South Australia we have just - we're at the verge of introducing pre-action protocols for two areas of law; building and construction and medical negligence. These are experimental and so we are unable to remark on whether or not they will lead to success or otherwise. The idea in those pre-action protocols is that an emphasis is placed on the compulsory conciliation before you institute legal proceedings and, in theory, that would seem sensible but we have yet to gather empirical evidence about how that may work. We have also adopted or we're about to adopt the fast track stream which runs through our Supreme Court, District Court and Magistrates Court.

Those in the Magistrates Court have remarked that they have, as it were, a fast-tracked stream of justice anyway, but it's quite applicable to our District Court. Again, that hasn't been rolled out. It's been modelled on the Federal Court fast-tracked streaming system and it's, again, experimental, so it's probably fair to ask us in another year or so how that's gone. Both of those are slated to commence in October of this year. In that chapter there's also the question of model litigant guidelines. Without being self-defeatist, model litigant guidelines are an interesting concept.

We can't point to a method by which model litigant guidelines are enforced

unless you are before the court and we've told you before, in informal sessions last year, that in some areas of law we would estimate that 95 per cent of matters are dealt outside of the formal justice resolution system, in other words, outside of the courts, so if a model litigant disregards their obligations, there is no third party to whence one can go to complain of the breach of the model litigant guidelines. That probably is something that ought to be available to a prospective litigant because at the moment there's nothing there.

I said I'd say something about self-represented litigants which is your chapter 14. Self-represented litigants are a problem for the justice system. In a notable judgment in *Thomas v Nash* 210 SASR or SASC reports at p 143, our former chief justice, Chief Justice Doyle, made some remarks. Perhaps I'll read them in to the transcript briefly. His Honour, the Chief Justice said:

I want to record some aspect of the trial. Mr Nash has acted for himself throughout. The trial has been estimated to last three days. My assessment is that it should have taken no more than two or three days. In fact, it took about nine days. The additional time substantially increased the cost of the case to the plaintiffs and the cost to the public through the use of the court and its resources. The additional time is attributable to Mr Nash's inability to present his case sufficiently, although I gave him such help as I was able to give him. On many occasions I had to sort out what it was that Mr Nash was interested in and then formulate questions for him.

Mr Nash had numerous documents upon which he wanted to rely. I considered many of them to be irrelevant. His documents were in a disorganised state. Often the court had to wait while Mr Nash found a particular document upon which he relied. All of these things contributed to the length of the case. I do not record this to criticise Mr Nash. It is not uncommon for unrepresented litigants to cause problems of this kind. I record these details to draw attention to the private and public cost that is incurred in cases like this.

This happens in other cases from time to time. I expect that it happens more often in the District Court and more often again in the Magistrates Court. The answer is not to deny to members of the public like Mr Nash the right to appear without representation nor can judicial supervision be the complete answer. The case was prolonged despite my best efforts. It might be in the interests of the state to provide legal assistance under tight conditions to persons like Mr Nash. The time saved in court would go a reasonable way toward recouping the costs of legal assistance.

In South Australia the Magistrates Court now has, I think, the highest

jurisdictional limit for minor civil claims, \$25,000, with an accompanying, essentially, prohibition because of the rules of court on the appearance of advocates. I can't speak for the court but a number of magistrates have expressed to me personally concerns about that. The concern is that unrepresented litigants are highly inefficient at litigation, understand little about what's to occur in the most fundamental way and can seriously clog up the system. The more there are the more difficult it becomes.

I'll return to my remarks about tribunals. If the tribunal was going to deal with anything of particular substance it is aided by having a legal representative not the reverse. Chapter 16, Court and Tribunals. The concept of a user pays systems is an affront to us. The affront is not caused in the circumstance where someone can afford the luxury of a user pay system. There are examples in the Federal Court of corporations, business versus business disputes where it's actually quite costly to use the court, but arguably those corporations have the capacity - the financial capacity - to do so.

Our concern is purely about the fact that access to justice or justice itself should not be a preserve of the wealthy. The idea that someone could not use our justice system or have access to our justice system because of their means or that their means forbid them is an affront to us and I return to my original remarks which is to say that justice is a democratic right not a privilege to be afforded by those who can afford it. Chapter 19, Legal Expenses Insurance. We've spoken to you about this before. When we look at Europe and when we look at some matters that make our way before our courts, legal insurance is either at play or at play in a de facto way.

Being a member of a trade union, for example, can sometimes get you legal representation. Having directors and officers insurance if you sit on a board gets you legal representation, so we insure against the risk of litigation in a variety of circumstances. Our view is that that should be a broader - that should have broader application as it does in Europe. We have for you - and I won't go into detail on the transcript - details of our legal assistance fund run by the Law Society. In fact, I'll ask to tender an extract of a publication of our law society bulletin entitled "The Litigation Assistance Fund, What You Need to Know," which is, essentially, a summary of how our LAF, as it's become known, has successfully operated over a long period of time, so I'll hand that up now or at the conclusion of the hearing.

We also have an interest in conditional fees and contingency fees, but the Law Council of Australia is doing extensive work in relation to that area and I'd rather not pre-empt what it's got to say about it.

DR MUNDY: Yes, that is work which as of last night the Commission has yet to receive.

MR BAILES (LSSA): I see. Right. Noted. I can only say that I hope that you - - -

DR MUNDY: It has caused us some significant inconvenience.

MR BAILES (LSSA): Well, I'll pass that back because I'd like very much for you to be in possession of it.

DR MUNDY: So would we.

MR BAILES (LSSA): Noted. So those are our submissions.

DR MUNDY: Okay. Can I start perhaps on the question of court fees?

MR BAILES (LSSA): Yes.

DR MUNDY: I will take you to page 78 of your submissions.

MR BAILES (LSSA): Yes.

DR MUNDY: You say that, "We note the commissioner suggests recovering the actual costs of providing the service in cases - and I quote in your submission - in cases of personal safety or the protection of children." You were quoting us there. I take you page 77 of your submission to us in the left-hand column and I will read this for the record:

The commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost providing the service for which the fee is charged except -

and I note the word "except" -

- in cases concerning personal safety or the protection of children.

So it's clear that the commission's intention is to preclude. So I would invite you to make your submission again and correct that because it's clearly misrepresenting the commission's position.

MR BAILES (LSSA): I see.

DR MUNDY: Your submission to us suggests that we are recommending or proposing to recommend - in fact, we are proposing to exclude.

MR BAILES (LSSA): I apologise and correct the record.

DR MUNDY: You may reflect, there are some other inconsistencies in your citation of the commission's recommendation, which I won't belabour now but I'd invite you to thoroughly check them and - - -

MR BAILES (LSSA): Yes, I apologise and mean no disrespect to the Commission.

DR MUNDY: Having said that or corrected that, I think it is unfair to characterise the Commission's view as in the way that has been and I think that's perhaps - in part we've contributed to that by the manner that we've set these questions out, but the reality is today that courts charge fees. The reality is, is that individuals - particularly in major cases and corporations - receive significant private benefits in actions well above the costs of the courts providing that they pay in court fees let alone what their costs - I think his Honour Justice Martin of the Supreme Court of Western Australia is known to the Bell litigation cost that court \$15 million and they didn't recover one 15th of that, for a matter for which I'd suggest had very little public benefit and very little to do with the constitutional questions of the judiciary or with the creation of other important public benefits.

So I guess the question is how should court fees be structured and who should they be levied against? Because what we're actually trying to do here, in all honesty, is trying to find a bit more revenue for the courts because you will note that our recommendations say that these moneys could be put - we might get stronger than that - but could be put to correcting a lot of the funding problems which I know the Law Society and your equivalent bodies also were concerned about.

MR BAILES (LSSA): Yes, well look, I've dwelt on that very point, because it flies in the face of logic that a litigant that can afford to use the formal dispute resolution process and, in fact, may actively choose to, should not have to pay the accompanying fees. So the best I can offer is that given by earlier submission, is that there ought to be some type of means testing because what we want to preclude is the disadvantaged not getting access, but I don't want to say that I don't have a care for those who can afford access but - I mean, comparisons could be made with the medical system where if you were meant to have a particular procedure and can afford to pay that or private insure against that, then you're entitled to do it. So I can only offer that it would be sensible to have a means test method.

DR MUNDY: Corporations don't go to hospital, though.

MR BAILES (LSSA): Agreed. Perhaps it's an incomplete comparison but we are certainly less troubled by - I mean, we're less troubled by a litigant who can genuinely afford to pay it than we are holding someone out of the justice system who can't - - -

DR MUNDY: So perhaps the notion that we tried to develop in the draft report of fees relating to the amounts - you know, if the litigation is a small claim over 20 grand in the Magistrates Court that would see a different fee structure than a much larger claim being run, say, in the Supreme Court.

MR BAILES (LSSA): At the moment, there's just no discrimination. So just take a filing fee, for example; it's 1,200 or \$1,500, something like that, in our Supreme Court or District Court. Don't quote me on it, but it's around about the mark. Irrespective of your means, your capacity to pay it or the nature of the matter, that's just to get it rolling. So it would seem - - -

DR MUNDY: Do you think those three things - however the conundrum's to be resolved - they're the three things that are in consideration?

MR BAILES (LSSA): I think so. So the - and then, of course, in some courts there's the idea of a daily fee, a transcript itself is quite expensive. Our Coroner's Court, for example, has no fee associated with appearing in it, getting transcript and getting statements because it's seen as a public service, I suppose, and in certain circumstances that's probably proper for Coroner's Court.

DR MUNDY: Because of certain litigants?

MR BAILES (LSSA): That's right. Given the nature of the court but also in private litigation it might be proper. On other occasions, a party can afford it and should afford it, and as you say business to business litigation is sometimes something chosen by parties rather than their being forced to commence it. A claimant who sues an underwriter may be essentially obliged to do that because their financial wherewithal might rest upon it whereas a business to business dispute might be different in nature.

MS MacRAE: I guess if we could just then perhaps conclude by putting on the record that I think we're actually in a large level of agreement here. You would accept that a level of court fees is appropriate, that it should be subject to the factors which we've just talked about broadly and that there is reason for differentiation and I think I'd also want to put on the record that in no way were we - and I don't think we should even have been seen to imply in any way that we would want court fees to become a barrier to access to justice. That is completely contrary to what we're trying to do here - - -

MR BAILES (LSSA): It is - I'm sorry for interrupting - in as far as our submission might represent it in that way, I retract that and refer to this exchange.

DR MUNDY: Perhaps you might reflect on that in the tone and perhaps some other comments when you come back with those directions that I've drawn your attention

to.

MS MacRAE: Can I just come back then to a particular issue that we talked about with the Legal Service Commission?

MR BAILES (LSSA): Yes.

MS MacRAE: Just in relation to this change in limit for small claims in South Australia, again I think we've - and again I'm happy to say that in an 800 page report we probably didn't write down everything quite as clearly as we might have. Our intention was never, again, to suggest that there would be complete exclusion of representation within Tribunals. We had it put to us that in some Tribunals that were intended to be dealing with lower level matters, that there had been an increase in or a creeping legalism and a concern that what was supposed to be quick, cheap and easy is no longer that way and that in some instances, legal representation in some of these forums where it wasn't originally intended to be the norm is becoming increasingly the norm. So that was the issue we're trying to address.

Having said that, we had an interesting discussion with the Legal Service Commission this morning and they were a little concerned that the \$25,000 limit was pushing into areas that were more technical and more complex, and that representation might be required in some of those cases, and had a suggestion that perhaps a staged increase in that threshold might be more appropriate. Would you have a view about that?

MR BAILES (LSSA): Yes, I do. The jurisdictional limit is at odds with other jurisdictions. I've got a feeling that some of the jurisdictions it might 12 and a half, so just sort of off the top of the head, I wonder whether there ought to be an allowance of representation at 12,500 to 25. I mean, \$25,000 for a person on an average income who might have a personal injuries claim, for example, it might be a quite significant thing. If I can make a comparison, lawyers work for Workers Compensation claimants obtaining lump sums of money for permanent impairment claims in this state through the Industrial Relations Court and Commission where there's fairly limited costs, at least until you get to a trial and claimants are charged an appropriate level, and they are better off represented, so I think we add to the process rather than take from it.

So the idea that it would be sensible to be represented in a Workers Compensation claim worth \$20,000 but not in a Magistrates Court where it's worth 25 would seem to be odd. The other thing is in other jurisdictions - I understand in Victoria, for example, there might be an entitlement to have someone appear as of right. Costs don't follow the event in that jurisdiction but you can have representation. So here the problem is not only do costs not follow the event, but representation is not allowed.

DR MUNDY: I think there are some - and I think they're typically of a small claims character where - and the point we were trying to make was that some considerable thought had been given to those for where representation was not allowed, and we're not suggesting that representation should be banned in tribunals and, clearly, that's a logical absurdity, for example, in matters such as guardianship.

MR BAILES (LSSA): Yes, indeed.

DR MUNDY: But there are fora lists, if you like, where the fora itself has been constructed on the presumption of non-representation except by leave. Leave was meant to be given for people with particular disadvantage. They might be mentally ill or something like that. What we would try to suggest was that perhaps leave had been granted a bit more often than leave was meant to be granted.

MR BAILES (LSSA): Understood. If I could turn it around and say that legislatures, however, have a habit of sometimes wanting to hold lawyers out of it and our argument is these might be significant matters, notwithstanding the fact that it is before a tribunal and we should not be precluded.

DR MUNDY: Certainly, there are - I mean, we'd be of the view there are circumstances where, for example, a person - a tenancy matter, a real estate matter, for example, a person is coming - the defendant, if you like, is represented by an officer of the company who is probably in the tribunal three days a week and, in those sorts of circumstances, a person experience disadvantage may actually - the scale may be balanced through representative.

MR BAILES (LSSA): We agree with that, as well as insurance company representatives.

DR MUNDY: Indeed, and council planning officers. You've made some observations about the new mega super tribunal that's going to be formed in South Australia. We aren't actually aware of what those proposals are, so if there's any material that you could provide to us, that would be helpful, but - - -

MR BAILES (LSSA): Certainly.

DR MUNDY: My sense was that you expressed a preference over a model that looked more like the State Administrative Tribunal in Western Australia rather than VCAT.

MR BAILES (LSSA): That's right.

DR MUNDY: Do you want to explain to us essentially why you have that

preference? I have always found the administrative tribunal in Western Australia a bit of an odd thing to understand.

MR BAILES (LSSA): Perhaps we've actually taken a leaf out of the Attorney's book here because the problem, as I understand it, with the VCAT was that a large number of jurisdictions were put in it to begin with. The result was that it got clogged up and there was a long time getting to hearing.

DR MUNDY: Yes, it is really big.

MR BAILES (LSSA): So the approach in South Australia, having learned from that lesson, is that only a few jurisdictions are going to be put into it to begin with. Guardianship, I think, is touted to be one. What is the other?

MS HO (LSSA): I think the other one may be residential tenancies.

MR BAILES (LSSA): Our model simply - - -

DR MUNDY: Sorry, just for clarification, presumably general administrative law appeals will go there as well, so it will do the state job of the AAT as well. Is that the intent?

MS HO (LSSA): I think the bill, the legislation to get the tribunal going, is sort of in two stages. They've only completed the first bill, which is just the general establishment of it, and then the functions and bodies that will go in there is the second bill and that hasn't been tabled yet in parliament. So we don't know.

DR MUNDY: Because my understanding of SAT in Western Australia - and obviously it's a bit old now - is it deals with planning-type matters, environment-type matters, and those sorts of appeals which are administrative appeals in nature. Is that going to be covered there as well, do you know?

MR BAILES (LSSA): I think the short answer is, we don't know.

DR MUNDY: You do not know.

MR BAILES (LSSA): We would like to know, a bit like you and contingency fees. We are sort of waiting to see what the attorney puts in, but I think it is to look a bit more like Western Australia than it is Victoria. I cannot really take it any further than that.

MS MacRAE: So basically, to summarise, I think you say you prefer to, sort of, start small, have a few things in that are going to fall within that mega tribunal, and if it works well, look to maybe adding to it over time rather than starting with

something that is all encompassing?

MR BAILES (LSSA): That's exactly right.

DR MUNDY: Which is really what New South Wales did as well.

MR BAILES (LSSA): In making those remarks, I'm not actually claiming to be the originator of that idea. I think that's what our attorney has signalled to us he intends, and we thought that was commonsense.

MS PRIDMORE (LSSA): We've actually a person who as the Crown - was he Crown Solicitor?

MR BAILES (LSSA): Yes, Parker J is a Supreme Court judge, relatively recently appointed, who's part time in the SACAT, South Australian Civil Administrative Tribunal.

DR MUNDY: So he will effectively be the president, or the - - -

MR BAILES (LSSA): The president, that's right.

DR MUNDY: It is being constructed at the Supreme Court justice level - - -

MS PRIDMORE (LSSA): That's right.

DR MUNDY: - - - not District Court judge?

MR BAILES (LSSA): I think the Act actually provides that it can be either a Supreme Court or a District Court judge, but a Supreme Court judge has been appointed.

DR MUNDY: At least at the start.

MS MacRAE: Could I perhaps ask about the idea that we had about having a centralised, online resource, and I appreciate your comments in your submission and your opening statement that you feel that, as long as there is adequate cost disclosure when someone fronts up for their that that should be sufficient. I guess our concern is that, given the nature of legal services, we know that it is very difficult for people who might typically only come into contact with the system, you know, once or twice in a lifetime even to have any idea at all - any idea - about what sort of legal costs they might be facing for a particular kind of matter that they have never dealt with before and may never deal with again.

Our intention here was to try and come up with something that would give

people, really, just a ball park guide. We feel pretty strongly that people commonly have absolutely no idea about what they might face. We are not suggesting that this resource would offer any level of precision, and it would not be put up as a "you should always expect that the nature of your case would fall within this range", you might have extenuating circumstances that would give you a different thing. When we put this question to the Legal Service Commission this morning, what prompted it, really, was they said, "We'll commonly have people come and talk to us for half an hour and we'll give them an idea of what their likely success rate is and what sort of cost it might be."

I said, "What do you think about putting something that's much more general up to give people an idea of costs," because they were saying how helpful that is to people. They said, "Look, certainly, the data would have to be caveated, but yes, it's doable and we think it would be a good resource for consumers." I just wondered if you'd like to respond to that?

MR BAILES (LSSA): Yes. I think the idea of a general guide is very sensible. I agree that litigation can visit someone once in a lifetime so, going back to the medical example, when you regularly see medical practitioners, that becomes common place, whereas - - -

DR MUNDY: You know it is going to cost 70 bucks to go to the doctor.

MR BAILES (LSSA): Exactly. So I think a general guide is entirely sensible. I think what we were picturing is the horror scenario of having exact hourly rates compared with exact hourly rates and attracting a potential rush to the bottom.

DR MUNDY: What we have in mind is certainly nothing that identifies individual providers. It would be of a nature of: within this jurisdiction, if you have this sort of matter, you can expect to pay something in this range with all the suitable caveats. So the person does not turn up and find out it is five grand - you know, discover it is five grand when they might have thought it was 250 bucks. That is the sort of thing we would - you know, it would need to be - it would not be totally identified and it would be averaged in ranges.

MR BAILES (LSSA): I just can't see a problem in that because, like the Legal Services Commission say, quite often, as legal practitioners, we are giving that type of advice to people anyway in a preliminary way, saying, "This is what it's going to look like."

DR MUNDY: The sort of feedback that we've had from consumer groups and the legal regulators, if you like, is that quite often the nature of complaint is about - - -

MS HO (LSSA): Overcharging. Unexpected - - -

DR MUNDY: It is not necessarily, "I'm outraged about the how much," it is actually, "I just did not know it was going to cost that."

MR BAILES (LSSA): Can I just remark on that? That is, without doubt, the most common cause of complaint: the failure to set expectations and then - because I suppose human nature tries to make someone feel good or comfortable at the beginning and then reality starts to stride in. I, having practised for over a quarter of a century, am now a believer in the fact that the bad needs to come squarely and up front and that, of course, is what our new costs regime requires. I have to agree entirely with that suggested - - -

DR MUNDY: I am not familiar with the new regime in South Australia specifically, but what has been I guess reflected back to us on this general question of disclosure in a number of jurisdictions is that it is a bit like the debate we had around product disclosure forms for financial services. To reduce complexity, we ended up reducing the font to get it on the one page. People are getting documents that are a dozen pages long. The mobile phone contract is used as another comparator.

MR BAILES (LSSA): Yes, that's right.

DR MUNDY: Are there useful things for us to say? A lot of consumer representatives say to us, "Look, it's data. It's not information."

MR BAILES (LSSA): Yes, exactly. The one concern that I have about our new cost disclosure regime is the length and nature of the statutory notice which may discourage someone to understand, rather than encourage them to understand. A straight-shooting legal practitioner sitting down with a client being frank ought to be able to convey the necessary information. One worries that you can now hide behind a statutory notice that an average person is simply not going to read. I can speak for myself. The longer the document and the smaller the font, the less chance there is that you bother with it. I also agree with that.

As to how to cure it, it is very hard, isn't it, to deal with what might be a quite complex costs question in a completely simple way but straight-speaking honourable legal practitioners can convey a complex message very simply with a great deal of practice and build that expertise up over time. I'm unsure whether that skill can be distilled into a statutory notice.

MS HO (LSSA): The society is also developing several fact sheets that are quite short and they are designed to go with the standard form I believe. That can give consumers more information about what their rights are for billing and things like that. They have been written in a very sort of easy, plain language manner.

MS MacRAE: We did hear from one of our earlier contributors that perhaps there is a place in legal education itself for a section on communication, particularly client communication. Do you think that this issue is one that is big enough to allow for that or that would warrant that? We have spoken to some of the complaints boards. They have said that very often the person might be dissatisfied with the cost but the biggest frustration is that they haven't been updated so they have been given a number at the beginning and then no-one tells them, "Sorry. We've actually worked from that now and there is something else coming." Is there, do you think, a place in the education of legal practitioners, a communication consumer sort of focus, so that that part - knowing the law is one thing; being able to deal with clients and managing that side of the business is also important.

MR BAILES (LSSA): I suppose it probably has to go into the various PLT courses that bridge getting the degree and being admitted, because we are probably employing less than 30 per cent of the legal graduates here so if it went into the substantive law degree, it might be learnt and forgotten pretty quickly; whereas if it goes into the PLT course which immediately precedes starting to practice, then it might be more valuable. We do teach ethics and practice, but I think part of the difficulty is that the PLT course is an obligatory diploma that you need to obtain to get admitted. I'm not sure that undergraduates necessarily view it as anything more than a ticket to get their ticket.

Real instruction probably ought to come when they are actually practising. The law didn't really make any sense to me until I started in a firm and then suddenly it all started to make sense, so it is probably it is that point in time. We have gone away from the old articles system. There used to be a far more robust way in which we appointed a supervisor. It was a master and servant style of relationship I suppose. Articles in the old days went for some years, so you just weren't released on the unsuspecting public until you knew what you were doing. Teaching on the job might be a very smart thing to do. You can possibly incorporate that in to making it a mandatory requirement for CPD, perhaps for a practising certificate under five years or something like that on a per annum basis. You could get it in there.

DR MUNDY: Whilst we are on the question I guess about education, we just don't see this as what happens in the university but elsewhere as well. It has been suggested to us that given the way that dispute resolution in particular is developing, there needs to be specific training in ADR and mediation. I guess the question is twofold. Do you have any views about the extent of what that should be and what that might look at and then, secondly, this other thing: where should it be? Should it be - you know, some suggest, "Turn it into the 12 apostles, rather than a priestly 11" or alternatively it is something that people really should get tickled up every three or four years in the CPD to keep them current about developments. Do you have a

view? I think everyone who we have spoken to thinks it is a good idea that we do more of it.

MR BAILES (LSSA): Yes.

DR MUNDY: The question is: where are we going to do it and what sort of character does it have?

MR BAILES (LSSA): Can I start by just making this observation because it sort of goes to the philosophy of that the formal dispute resolution system is there for? Are the courts there in order to deal with the intractable dispute or are they there at the front end to help people resolve things? I know that some judges probably under cost pressure are trying to push people away from the court into alternate dispute resolution - and I mention pre-action protocols in this state - before they institute proceedings. Another school of thought is that that is a denial of a right; that is, a right of a citizen to go to a court and require a remedy, so it's the deprivation of a right. It's an almost intractable question but the emphasis on dispute resolution is an extremely good one. I favour - - -

DR MUNDY: Our focus on this is of course that this is what our inquiry is actually about.

MR BAILES (LSSA): Yes.

DR MUNDY: That is not the court's.

MR BAILES (LSSA): I favour an approach to alternate dispute resolution which is in some way overseen by the court. I know that is not agreed to by everyone but in my personal experience, better results are achieved when the parties are driven together through some sort of formal mechanism than if they are left flapping in the breeze with a suggestion that they should go and try and sort it out themselves.

As to education, again if I can go to our Industrial Relations Commission and our Workers Compensation Tribunal, that has been very successful in dispute resolution before a matter gets to a hearing through a formal process of conciliation. I think the first thing you get to these days is actually a short hearing to define the issues but you get to a conciliation conference immediately. That is the very first thing that happens. you can't escape the process of conciliation. That's a learn-on-the-job thing, but if you are in that jurisdiction you learn pretty quickly how to resolve matters pragmatically because it is the first thing that ever happens to you.

DR MUNDY: I find your observation interesting because I used to in a previous life be an executive at a very large airport company and I was responsible for taking money from airlines and every contractual arrangement that we entered into but

worth many, many, many millions of dollars had an ADR clause so the matter never got to court.

MR BAILES (LSSA): Exactly.

DR MUNDY: Because they were largely disputes about what was in the contract. We made some observations about protective cost orders and you make the observation that the existing body of jurisprudence should be adequate to deal with it and you cite the Blue Wedges case. I presume you are talking about the one that was before his Honour, Mr Justice North in the Federal Court, the first Blue Wedges case?

MS HO (LSSA): Which recommendation is this?

DR MUNDY: 13.6.

MS HO (LSSA): 13.6. Thank you.

DR MUNDY: And you note that there is an existing body of case law which normally applies to public interest matters and you cite Blue Wedges.

MR BAILES (LSSA): Yes.

DR MUNDY: So I presume what you are actually talking about, in fact, is Oshlack v Richmond Council which was applied by his Honour, Justice North in the first Blue Wedges case. There were actually two Blue Wedges cases.

MR BAILES (LSSA): Yes.

DR MUNDY: If you would have a look at that.

MR BAILES (LSSA): Yes, we'll come back to you soon. I can't off the top of my head answer that.

DR MUNDY: No, that is fine. We are aware of the existing case law and we are not quite sure that it is clear because of issues around particularly having to give guarantees against applicant's costs which in that matter related to demurrage on a dredge that was sitting in Port Phillip Bay. But I guess the wider question is - and this is a broader question - is that there are a number of vehicles both within the courts but more broadly in which law reform is supported and brought forward and one of those is through the CLC movement. Do you have a view about the importance of good law reform identification and bringing matters forward for resolution and then how that may be of benefit to your clients to avoid matters rather than things having to be systematically picked through in court, because there is a

concern that has been raised with us by a number of people?

We had the financial services CLC before us in Sydney yesterday and they were observing, "Well, we solved a lot of problems because we see a lot of them and we go to governments and regulators and say, 'You need to fix this.'" Now, the proposition now is that that activity is not going to be funded, so a resolution to these matters may be some form of court-based advocacy which on face is less uncertain and more costly in my mind.

MR BAILES (LSSA): Yes, there's two ways to look at that. The first is that we - and I'll perhaps reference it to the earlier comments about alternate dispute resolution - the one risk is we lose jurisprudence is that if we never litigate we never know what the law is. There's substantially less cases on areas of the law in this state than probably others to tell us what the law is these days than there were 20 years ago, so that's a risk. I think the reason for that is because cases take a lot longer and cost a lot more and that's not something we laud at all. For some reason when I started practising judges banged heads together and got results a hell of a lot quicker than they do now. That's not a comment about judges but perhaps parties.

However, it is extremely expensive to privately litigate in order to arrive at a solution in law and from time to time of course applications on a contested point of law are actually supported and paid for by the state because the issue needs to be resolved, but there's a dichotomy of thought; we can't not litigate because we won't have law. If there's an ability to get cases stated and for that to be funded and for that to be done in the general public interest so that everyone knows where they stand, that's again laudable.

DR MUNDY: If I can perhaps bring you to the issue of litigation funding and contingency fees. We see them as being pups out of the same litter from an in-principle perspective. What seems to be different to us is who's putting up the capital.

MR BAILES (LSSA): Yes.

DR MUNDY: I guess there is a number of issues that we could come at this and I would just ask you to quarantine your thinking to the general. I mean it may well be that ultimately you would just simply carve out certain matters; personal injury or family or something, but as a general proposition I guess what we are trying to work out is, is should, as a matter of public policy and regulation, which we are recommending, there be a distinction drawn between the provider of capital, so, on the one hand, the litigation funder and, on the other hand, a contingency based fees arrangement and if so why and how might those issues be addressed other than a blanket ban as we have today?

MR BAILES (LSSA): Yes. Well, I'm not sure if this is a direct answer to your question but I find it illogical that there should be no regulation on a litigation funder that can effectively run a contingency based matter, but the regulated professional who runs it - - -

DR MUNDY: As does the largest funder in Australia funnily enough - - -

MR BAILES (LSSA): Right. Yes.

DR MUNDY: - - - and we are recommending that they should be regulated.

MR BAILES (LSSA): Right. Whereas the highly regulated profession that runs the litigation cannot itself do it. Also, as an economic theory, it's got the touch of the bizarre about it and the opposite to that is that in a purest economic way the idea of contingency fees just works on every level. The concern is the opening of the flood gates in terms of litigation and the answer to that I don't have, but when we're talking about access to justice and the ability to get there, it to me - I speak personally rather than it being entirely a representative position - I just simply cannot understand why we would not be embracing that concept perhaps with the necessary limitations that you've identified, but you asked me to speak in a broader way.

DR MUNDY: Perhaps one of the distinctions we can see is in that when the litigation fund was providing the capital the litigation fund was there, so the clarity - the lawyers are getting paid so the ethic questions are different, whereas - I mean so is there - I mean because we see that with an appropriate set of arrangements contingency based fees would, in fact, provide or compete at least at the margin and probably more than the margin with the funders and that as a general proposition is no bad thing.

MR BAILES (LSSA): Yes.

DR MUNDY: Do you have any thoughts about how - and if you want to come back to us on this that would be fine - but just on how those ethical questions with respect to contingency fees might be addressed in the first instance and the other thing, lots of claims are made about, "Well, look what happens in the US," and what does not happen in the US is adverse cost orders.

MR BAILES (LSSA): Yes, that's right.

DR MUNDY: And I reckon that focuses the minds of both funders' lawyers.

MR BAILES (LSSA): Yes, agreed.

DR MUNDY: So are there any observations with those?

MR BAILES (LSSA): Yes, there is. The first is that I mean a litigation funder is just merely another entity, so I mean a legal practitioner or a legal firm may set up another entity to fund, so I'm - - -

DR MUNDY: Which is I think what Maurice Blackburn does.

MR BAILES (LSSA): Right. Okay. So I'm not sure that that - I mean it might, on paper, relieve the ethical problem but - - -

DR MUNDY: I think it changes the nature of economic incentives - - -

MR BAILES (LSSA): Yes.

DR MUNDY: - - - because the lawyers are getting paid on general fees whereas they are not getting a cut of the winnings.

MR BAILES (LSSA): Sure. But if you look behind that arrangement then, you know, you might not be as comforted. The second thing is that we do it every day of the week really in - when you're seeing someone who's got a questionable claim, quite often we are carrying the contingency without openly saying it. There's no uplift because we're not entitled to, so we now carry all the risk and none of the gain and so my view is that there ought to be an entitlement to something of the gain because in an ethical sense, you know, we're exposing ourselves to the risk - - -

DR MUNDY: Of not getting paid.

MR BAILES (LSSA): Yes. Every day of the week.

DR MUNDY: So it is your view particularly in smaller type matters that conditional fees, on the one hand, and contingency fees, on the other, are likely to end up in essentially pretty much the same sort of space seeing it is only in these really large matters?

MR BAILES (LSSA): Yes. Well, in this state until the proclamation of the new act our conditional fee uplift was actually 100 per cent, whereas in interstate and under our new act it's 25 per cent, I'm somewhat dismayed by that because I think that it was not abused.

DR MUNDY: I think it is zero in some parts of the jurisdiction in New South Wales.

MR BAILES (LSSA): Well, our experience in this state was it was not abused and it allowed the claimants with questionable claims to access justice and people were

able to enter the justice system where they - - -

DR MUNDY: Because one of the questions we are asking ourselves is should there be a cap or not, so if there is any material that you may have on that particular question we would actually find that very helpful.

MR BAILES (LSSA): But I agree with you, I mean on paper conditional fees and contingency fees are, in theory, different, but in my mind they tend to merge into a very similar concept.

DR MUNDY: Yes, I think what has been put to us is that certainly in small matters they do, but if you have got a situation where the fees might - the matter might be worth a million bucks and the fees are 10 grand, then it starts to move once the matters get - - -

MR BAILES (LSSA): And the remedy of that, as you just mentioned, may be capping it at a particular point. I mean, you know the arguments, no doubt. Uncapped means that the market place determines what's a fair thing, but it might be open to abuse. Capping means that you can't go past a particular point, but people will generally lift the fees to the cap when the market may actually have a downward pressure.

DR MUNDY: From your experience in South Australia, was that, in fact, the case? Did the market go to the 100 per cent?

MR BAILES (LSSA): Yes, it did. It did, but you see, our Supreme Court rate's a bit over \$300. That meant you were charging \$600 an hour, or something like that, or whatever the double was. That's not so much out of the ball park that that's ridiculous - - -

DR MUNDY: And you were getting - - -

MR BAILES (LSSA): - - - on a risky matter. If you're carrying all the risk, you know, it does permit people - and they understand that. It does permit people to have a go. The other thing is that quite often it will be disbursements as well that are carried, so it's not just the fees. There will actually be a capital outlay of many thousands of dollars because a person just can't otherwise do it.

DR MUNDY: Just finally, so it is fair to say that, despite what we have read, particularly coming out of certain commercial firms in Sydney, that reform in this space is - the likelihood of a flood of litigation, I think, is particularly in relation to securities actions rather than other forms of actions.

MR BAILES (LSSA): Yes.

DR MUNDY: Is something that should be of passing concern, but not of - I am just trying to get an understanding. I mean, I have perhaps a naive view that unmeritorious matters brought in front of judges get dealt with in a robust way.

MR BAILES (LSSA): In Australia they do, so I think the comparison with the U.S. goes so far. I think we have got a fundamentally different culture and that's reflected in our damages claims, and so I actually have faith in the system. I think you're right. I don't think it's a misplaced faith. That said, what may spring up in relation to securities is specialist firms who look at every utterance that a publicly listed company makes versus its share movement. Is that fair game? It's probably outside my personal area of expertise. It will be prosecuted by plaintiff law firms and perhaps it should be. Perhaps it should be?

DR MUNDY: Is perhaps a way forward to 'suck it and see' and review it in, say, five years time?

MR BAILES (LSSA): I always like a review, sir. Very prudent.

DR MUNDY: So do we. We do it for a living. Thank you very much for your time and we look forward to getting that other material.

MS HO (LSSA): Thank you.

MR HODDER (LSSA): Sorry, can I just add one thing? The thought occurred to me while discussion was going on about the website in relation to fees and charges and in relation to the fact sheets and costs disclosure. I was just wondering whether, in terms of that central website, it might be worth considering having a list of questions you should ask before engaging your lawyer in a particular matter.

DR MUNDY: One of the challenges in doing that is to actually collect the data, cut off the outliers, get rid of the cheapies. You know, if you are going to talk about a dispute with the builder, we will not ask him, you know - - -

MS MacRAE: It is questions and answers.

DR MUNDY: Yes, that is quite useful. Thank you very much.

MR BAILES (LSSA): Thanks very much.

DR MUNDY: Could we please have the Family Relationships Centre of Port Augusta. I have not been to Port Augusta for years. The last time I did, I had the pleasure of meeting with the then mayor, Ms Baluch.

MS MacRAE: Who has subsequently deceased.

DR MUNDY: Yes, I think she lived a hard life. Could you please state for the record your name and the capacity in which you appear here today?

DR RYAN (FRCPA): My name's Dr Sherrie Ryan. I have a PhD, I was also a criminal and family lawyer with Legal Aid for eight years and I'm currently the manager, senior family dispute resolution practitioner and also the child consultant with the Family Relationship Centre in Port Augusta.

DR MUNDY: Thank you, Dr Ryan. We do not hold having a PhD against people here. Would you like to make a brief opening statement?

DR RYAN (FRCPA): I would. I have just been reflecting a little bit on this morning, the things I have been listening to this morning. One of the things that I think has really hit me that I would like to start with is, when you are talking about access to justice and, basically, it says that it is about how you perceive access to justice. I think I was listening this morning to different what I would say almost philosophical bents about what it means to access justice before various people. I suppose my paper particularly addresses access to justice for some of the most impoverished people in our community, but I do not want to only restrict my submission to Aboriginal people in regional and remote areas, although I think, when you look at their ability to access justice, you could almost say that - if it is seen as somebody said it is about a right of a citizen to access justice, as Mr Bailes rightly said, but I would also argue that in principle, of course, that's the most important thing in a democratic society.

However, particularly working in family dispute resolution and working in Legal Aid in the northern, remote regions of South Australia, I can categorically say that many people cannot access justice for a whole lot of reasons. There are a lot of barriers which I have addressed in my submission as well. So I suppose that is my starting point. The only other thing I would like to add is, yes, some lawyers continue to see alternative dispute resolution or family dispute resolution, when you're talking about dispute resolution in families, as something like flapping in the breeze and leaving people to sort out their own disputes. I think my paper addresses that and grounds that, in fact, that it's not flapping in the breeze at all; it's about families empowering themselves, taking responsibility, and having an obligation to their children and opening up communication, and moving forward with their family.

As a criminal and family lawyer, often I felt like I was flapping in the breeze

when I was dealing with families and their dispute and representing one client with very little thought to outcomes for those children. It was more representing my client, so I think I am totally committed to alternative dispute resolution in all its forms. I uphold the ideas in the report that it could very much be extended into the civil courts. I think it is a great idea and would even say that, even with respect to disputes over wills and estates, just from experience, I think that would be a really good thing to look at as well, just as an aside. That comes from personal experience. I suppose that's where I come from, from a position as a lawyer and also as a dispute resolution practitioner.

DR MUNDY: Could we perhaps start at wills and estates? We had quite some - moving I think is probably the right word - testimony in Sydney yesterday, which you can read when it goes up on our website in the transcript, but it does seem to us that, on the one hand, the whole will and probate system is essentially, in the vast bulk of cases, an administrative exercise and why do we need to trouble Supreme Courts with it, I guess. But in those matters where there are disputes other than putting aside very high profile ones by very right people, which are perhaps different - but in the vast bulk of these matters, they are really disputes within families. They are no different to, in many senses, the circumstances of a dissolution or the ending of a marriage and there is property that has to be sewn up. Do you think there would be - would there be any observations you would make about how the experience with FDR in the case of matrimonial termination might be thought about, in the sense of the resolution of, you know, Granny's fallen off the perch and the kids aren't quite - and dealing with those sorts of - and it might be different because there may well be interested parties in the will outside the family, but is that something that you could give us some insight with?

DR RYAN (FRCPA): Once again, the position I always come from because of my work up in Port Augusta and Whyalla, which is the town over 70 K from Port Augusta, but these are - they're towns that have been based over the years on manufacturing and, more recently, mining, but basically, working class, under class, impoverished. What I see, you know, in my role as a legal adviser with legal services and also just from my experiences there that, yes, you're right, wills and estates are often about families contesting the estate.

More recently, I was dealing with a person that I knew very well. She was in her 70s, very poor - very poor - lost her husband, second husband. She was his second wife and his daughter contested the will. The will was very badly prepared, in my opinion, and I warned the lawyer that it was likely to be contested, but that was ignored, so it was contested. Seven years later, there are no funds left in the estate. She's had to move out of the estate. She's still trying to sell it. The agreement that was made at the Court door, she had no capacity - because of her grief, absolute grief, she had no capacity to make any decisions with respect to any agreement and, of course, then she had Court orders that she didn't understand, she couldn't

understand. She had very little understanding, but I think her capacity was also limited and she had very little education.

When I saw the orders that were made that she had to carry out, I realised immediately that she would be left poverty stricken and couldn't remain in the home long term and that, at the end of the day, she had a major breakdown, couldn't afford any more lawyers, and there was almost nothing left in the estate after the legal fees were paid. She could have, of course, appealed to the Law Society Professional Conduct Board, but her mental state - and she had no funds in order to do that. So she was left penniless. You know, in my capacity as a legal adviser, there are a lot of people that came to me wanting advice with respect to estates and wills and it was nearly always about family swooping in, and that includes families where one child or two children had been made executors of the will and, of course, abused that role.

Yes, I think - and you know, with respect to the person that I was just telling you about, at no time was that family given the option of alternative dispute resolution, which I would have thought, for two impoverished families, any ethical lawyer or lawyers, that would have been the first thing they would said, "Let's try and sort this out through dispute resolution," and that wasn't made available.

DR MUNDY: This matter was presumably resolved in the Supreme Court in Adelaide?

DR RYAN (FRCPA): Yes.

DR MUNDY: So add that to the problem, they've had to trek down from Port Augusta.

DR RYAN (FRCPA): Absolutely, the costs associated with getting down to Adelaide.

DR MUNDY: And appropriately resourced organisations like your own in regional centres could perhaps not resolve all of those matters, but take a good few of them out, because I presume the skills required to solve that sort of discussion are not particularly different to the skills that you deal with in the work that you do now?

DR RYAN (FRCPA): No, they're skills that carry right across the sector. So once you have developed skills in mediation, they can be transported to a whole range of mediations.

DR MUNDY: Mediation and understanding about how families work with each other?

DR RYAN (FRCPA): That's right.

DR MUNDY: Thank you for that. That is very helpful. Do you want to - - -

MS MacRAE: One of the questions we have asked a number of participants has been in relation to the intersection between having the family law at the federal level and the intersection that there is with state and territory family violence and child protection issues. In the ACT, for example, the Women's Legal Service there was talking about the problems that can present in having to present in a range of different fora the same sort of - you have got the same basic facts, but things have to be presented in a different way and the evidence is different in different courts and how difficult that can be for women to have to - well, typically women - present in those various fora. Do you have comments about how that works in South Australia and are there things that could be done to better manage the problems that can present by having that state/commonwealth split of responsibility?

DR MUNDY: You mean within the Family Court?

MS MacRAE: Yes.

DR MUNDY: I think that proceeding to Family Court for a lot of people, particularly women, is very daunting. Proceeding to the Family Court for Aboriginal people is a non-event almost, and that's nobody's fault except that, as I said in my submission, it's totally foreign to them, the idea of heading to Adelaide from the APY Lands into the Family Court. I think that, with respect, one of the things that we get really frustrated with, as mandated reporters, is reporting to Child Welfare or Families SA. It leaves us generally feeling very, very frustrated, extremely time consuming and often takes an hour and a half over the phone, but also, if you try and go online, it generally crashes.

I know there has been many attempts to try and streamline that, but in my opinion, at this stage, it's still something that's a real barrier to efficient service. My real concern is, just with respect to child safety, that I can't imagine most people I know, most of our clients - firstly, they don't have credit; secondly, they all have mobile phones. So to sit on a mobile phone for an hour and a half to report your neighbour abusing or neglecting a child is just a non-event, too. So I think that they really need to consider how best people can access those services that need to - secondly, the other thing that really concerns me, because we have a lot of child-at-risk matters is that there's no uniform Commonwealth system of child reporting.

For instance, a lot of people who are involved with neglect and abuse of children are very transient, quite often, because they can't pay their rent and they move out, or family violence very often. So they'll move interstate. They're move

through town to town and then often they'll move interstate and they'll get lost in the system because there's no - my understanding is there's no central reporting mechanism. Probably the highest risk can be lost in the system, without any doubt at all. I have real concerns for the reporting of child abuse, real concerns, and I have real concerns about - and I know that it's all streamlined, but I have real concerns about the three-tiered approach, too, because I think then the top tier, which is the most urgent, imminent danger, is - you know, because of resources, they're the ones that are tended to and then, underneath that, you're building the case for those that are developing into something possibly quite serious.

I find that really concerning. So just as far as child abuse and child reporting, that's something that has worried me for a while. With respect to family violence, whether there's a history or a pattern of family violence, we have to make decisions as to whether it's suitable for mediation. Because we're in a remote region, we don't have the amount of services and safety mechanisms that you might find in the city, so we tend to be more conservative in our approach to family violence. I think I was saying in my submission that we case manage. A lot of FRCs have a more segmented approach, in the fact that they might three or four practitioners moving through with their clients into the different part of the process, but from the very beginning, right through the process to mediation, if it goes ahead, and then any reviews after that and then any extensions of that matter will always come back to the one practitioner, so that - and I think as I was saying before, that client doesn't have to tell their story more than once, you know, because that's very stressful, particularly if there's family violence.

So we have a - which is more along the lines of the legal services, where they also case manage. So a practitioner will get the file and then they will do the intake and assessments, make decisions on that file as to whether it should go back to Legal Aid. We do warm referrals, help them fill out their Legal Aid form and then we say, this is better having legally assisted mediation. So we're very open to other ways of dealing with a matter. We don't hesitate to refer them into lawyers if we, in our opinion, think it should go to court. We never take risks because, you know, taking risks can come back on you and that family, and we found that the case management way of dealing with matters is much more constructive and protects families. What we also are dealing with - you know, we've been up and running for seven years, and each file and then a re-partnering of either of those partners - we're onto what I call the fourth generation of partnering and, of course, as you realise family dispute resolution is about children so each of those generations have had children.

So in that way, what we've learnt to do also is that gives us a cross-check of that whole family, so we don't leave a family in isolation. We'll be able to track, say, a woman if she's going into violent relationships. The other really good thing is with my work across the region in law I tend to often identify some of the other parties as

being some of my Legal Aid clients. They still remain in the system but I think file management is a really good idea to track those families and to offer the necessary referrals, and to track any patterns of violence. So we are a bit more conservative, I think, because as I said - because we certainly have access to wrap around services but not at the level that you might get in the city, particularly with family violence. So I think that's probably where women in the country struggle a little bit.

Firstly, a lot of them - as I once again said in my submission - a lot of them don't recognise family violence at all and I'm not just talking generally here. They have no concept about emotional or financial, or social - anything like that. They may not even see family violence as pushing and shoving. They will tend to see family violence as up against the wall, hands around the neck, possibly. So there's a real lack of awareness of family violence and I think one of the things with the family relationship centres is we put a lot of energy into identifying, raising awareness, parenting education and then going up into the more remote regions we've got Aboriginal staff and we do a lot of stuff about showing them DVDs, talking about conflict. You know, "Dads, this is what the impact on your family" - so in that way, FDR or family dispute resolution is much more suitable to many families than proceeding to litigation.

MS MacRAE: You said you've been there for seven years.

DR RYAN (FRCPA): In the FRC?

MS MacRAE: Yes. What happened in these cases before you were there?

DR RYAN (FRCPA): Before the FRCs were set up in 2006 - the first round of FRCs started in 2006, we were in 2007 round and then there was a 2008 round so all in all, there's 65 centres and obviously under the Family Law Act but also we're funded through the Attorney General's department.

MS MacRAE: Was there something in Port Augusta before you were established there?

DR RYAN (FRCPA): No, it was just Legal Aid.

MS MacRAE: That's really my question. So people were really very isolated at that point.

DR RYAN (FRCPA): Yes, they generally - as a family lawyer, they were often very demanding. Sometimes they'd come in every day but going to court once generally didn't do it. Often they would come back and they were restricted about how many times they could come back because they might not have merit, but it wasn't the need for litigation, it was the need to resolve the dispute I think, but

litigation was the only avenue for them.

MS MacRAE: And one that many wouldn't take, from what you said. So there was nowhere really for people to go.

DR RYAN (FRCPA): No, and often they would come in and this is why I think FDR is really good because they'd come in and you'd immediately file an application and then, you know, you'd ask for it to be withdrawn the next day because the child was back or everything was back, so there was a lot of time wasting or eating up resources.

DR MUNDY: These applications - I mean, are you dealing with these matters in the Magistrates Court in Port Augusta or are you having to do it remotely to Adelaide?

DR RYAN (FRCPA): We don't do it at the Magistrates Court. There was some talk that we would be part of a diversion program for perpetrators of family violence, but my understanding is that didn't go ahead, there was just talk about that and we would be part of the support services if they initiated a diversion court for them, but other than that we basically deal under the family law with separating families to make arrangements for their children.

The other thing that we do is we generally always encourage - because they're often newly separated or because of the tension and the conflict, part of the service is that we offer three or six month reviews, so we don't leave them flapping in the wind, we always put into a parenting plan that we will facilitate the family coming back in three to six months time, and then reviewing the parenting plan. So in that way, it's not a final order it's about adjusting the arrangements and the parenting plan to suit the changing circumstances of a post-separation family, really.

DR MUNDY: You described before a relatively socioeconomically depressed region in which you work, so I suspect the people that you see often have multiple civil law problems, there's probably debts, there's all that sort of - are you able to support them in the resolution of those sorts of disputes which may actually, I guess, either be a contributory cause to the family relationship problem or I guess - - -

DR RYAN (FRCPA): Exacerbate - - -

DR MUNDY: Or exacerbating it, or indeed probably in some, a consequence of that problem. Are you able to assist people? Are there services where you are to assist?

DR RYAN (FRCPA): All the FRCs have auspicing agencies and many of them are faith-based, but Relationships Australia obviously isn't, but our auspicing agency is

Centacare, Port Pirie diocese. So the whole idea about family relationship services is they were situated within auspicing agencies who could provide the wrap around services. So in that way - and many of them are - you know, they share the building. What's the word?

DR MUNDY: They're co-located.

DR RYAN (FRCPA): Yes, they're co-located. So with respect to our FRC Centacare in Port Pirie diocese, which stretches from Ceduna over in the west coast, right down to near Adelaide and right up north. We have a whole lot of other wrap around services to - you know, just for families. We've got quite a large Aboriginal staff and so they can often address - they often come out of the nearby towns or in the town that the Centacare office is located, so they can often identify the specific issues, family connections, kinship ties and some traditions and customs of that particular region, and the same in Port Augusta.

So that's something that people aren't aware of when they talk about Aboriginal. They see this holistic notion but the Aboriginal culture and Aboriginal society is highly fragmented and there's no concept of wholeness at all. Without any doubt at all, their first obligation and foremost is to their families, and then everything else comes from there. So it's really important that you do employ Aboriginal staff who can advise you to give you the cultural context in which you're trying to work or you'll come horribly unstuck very, very quickly because you'll behave inappropriately even though you think that's not the case.

MS MacRAE: Do you find that getting staff that have that skill and knowledge difficult?

DR RYAN (FRCPA): Yes, it is. You know, they don't have to be professionals but they have to have come out of the communities, or they can often be invaluable to locating you into the community, to integrating you into the community, to giving you legitimacy in the community because you can't just bring your organisation, particularly if it's government funded, plonk it in the middle of a community, an Aboriginal community, and say, "You beaut, here we are."

MS MacRAE: "Here we are."

DR RYAN (FRCPA): Because it just - - -

MS MacRAE: "Why aren't you coming?"

DR RYAN (FRCPA): Yes, it won't happen. So seven years later, we haven't - we don't really any more push our centre for FDR; we push our centre as this is somewhere you can go for a whole lot of reasons, including just a public space if you

need to have some quiet time and need to engage with - you know, have a cuppa. They come and they use our conference room for meetings and morning teas and afternoon teas and get together and yarning and all this. So you don't target specifically - I think I was saying you do it - you have a very low - you know, you keep under the radar and have a very low key, backdoor approach, so they sort of don't see you coming, really, because if they see you coming, they just think, "God, here we go again. Another one."

MS MacRAE: "Another authority telling me what to do."

DR RYAN (FRCPA): Yes, so what we do is, through community engagement, we get really involved in Aboriginal community events, including NAIDOC, which is huge up there, and we have developed legitimacy and credibility through our community engagement rather than, "Here we are. We can help you sort out your disputes."

DR MUNDY: In your submission, you mentioned there is actually a number of models of family dispute resolution throughout Australia. Can you give us a bit of a sense of the spectrum and perhaps why they are different? I can possibly have a guess why, but - - -

DR RYAN (FRCPA): Basically, when the FRCs all started, the reason that I'm fairly aware of what goes on across Australia was that all the new managers were brought together about three times to Canberra for training in the overall model and all expectations, the protocols, and processes. So out of that, the different models developed. Initially, it's been an interesting, sort of, evolution, I suppose, because initially there was that real expectation that they would run along, you know, basically the social work model; that the social workers would be at the helm, they would be the practitioners, because they used to do the mediations and they have traditionally before this.

So there was that expectation that you would have people who worked in transformative analysis, or social workers, or a few people who had done conflict resolution and things like that, and then, you know, they would sort of develop these models, but I would say, within a couple of years, there was a real sense that - and particularly the accreditation, where you had to know the law and you had to know family violence, you know, the acts and legislations, there was a real sense then that this really isn't very social-worky; this is really quite legalistic. I can't speak for all FRCs, but what happened, basically, across South Australia, because we collaborate quite a lot, is that more and more lawyers got involved and more and more FRCs were looking for lawyers to give them that direction and guidance with respect to where the FRCs sat with the law.

So when we first started seven years ago, I was the only lawyer in all the FRCs,

but now most FRCs, I think, would either be looking for lawyers or would have lawyers on board, family lawyers, and we've got all family lawyers and that's just coincidental. So that's the first part. You were given the brief and then you were told, "Off you go. Develop your centre." So with us, because I'd come from a Legal Aid background, the only thing I knew was the family conferencing that Legal Aid had. Myself and another retired senior family lawyer from Legal Aid, we developed our model because that's what we were comfortable with and also, as lawyers, we were also comfortable with that aspect, marrying it up with - but I think, without any doubt at all, it's shifted very much into the shadow of the Family Court and there's a direct line between us through the pathways into the Family Court and vice versa. Orders come down from the Family Court to the FRCs.

That's basically how it's worked. So as I said, we manage because it's very much a Legal Aid approach to mediation. That's what they do. Other FRCs, like the bigger ones, Relationships Australia, they'll have what I call a segmented approach. So you'll do a first contact, then another practitioner will be - probably a family adviser will pick up and do the intake and assessments and referrals, and then it will move into maybe a pre-review and then a mediator will come along and mediate. That's segmented, so they have people slotted into various roles. That works just as well. It's just a different approach and it's very suitable, where you've got a lot of clients feeding through.

You have to get much more production line and then you - you know, but the other FRCs, most of them, I think, do have a more segmented approach. I don't know anybody else that has our strict file management approach other than Legal Aid, but it was just who was on board, who understood, who was better, you know, qualified to set up something that they would - - -

MS MacRAE: But it sounds like the nature of your client bases as well, where you said you might get, you know, four families, effectively. That file management approach would work very well for you because you need that whole, much broader picture of what's going on. It might look like an individual family, but there's all this history which would help you in addressing those issues, so - - -

DR RYAN (FRCPA): One of the reasons that I'm really strict on it, a couple of years ago, we had a matter about a year earlier to that, where we deemed the matter unsuitable because of family violence and then she re-partnered and I - the files didn't run together then, three years ago, even though - so that one had been filed, but it was deemed inappropriate because of family violence. She re-partnered, but I was dealing with a file with her new partner, who, for all intents and purposes, looked perfectly normally, and he was mediating with his maternal mother in law about the children.

The mother was in the Riverland and one of the things that she was to have no

dealing with the children at all. Anyway, as it turned out, I'd done two mediations with him and the mother in law, for her to have some time with the children, and then shortly after that he murdered the current partner. If you go back through the files, you'll see the pattern of her re-partnering in violent relationships. That's why I really like our approach because we always pull the files together and you go back and, you know, you'll always be able to see what's happened in the past because, just on the face of it, you'd never know that had happened unless you'd brought the files together.

DR MUNDY: Thank you very much for your submission and thank you very much for coming down from Port Augusta.

DR RYAN (FRCPA): Thank you. It's been a pleasure.

DR MUNDY: Again, thank you very much for your time.

DR MUNDY: Could we have Mr Tim Graham, please? Could you please state your name and affiliation for the record, please, and then perhaps make a short opening statement?

MR GRAHAM (JSA): Tim Graham, and I'm the Executive Director of JusticeNet SA, which is a pro bono legal coordination service based in South Australia, obviously. Look, I wanted to just come along today to make a few points that I didn't make in my submission. Those are, at the broadest level, I think that it's important that this inquiry is about the efficient use of public resources, at the end of the day, and there should be provision for those resources to be used strategically, with flexibility in the delivery of those services. Innovation should be encouraged, collaboration and partnerships. I guess that is where pro bono service delivery fits in well. Also in my experience it is important that services that promote access to justice should be available at all stages of a legal dispute, if you like.

Although it is very important, particularly in the civil area, for early intervention and indeed there is a lot of resources put in that area, my concern is that there is an element that leads people stranded when going to court becomes inevitable, particular in the civil area. It leaves people stranded. There are very few - negligible - services available for people with civil law disputes where court is inevitable. Indeed that is where our self-representation service comes in.

I would like to put on the record, if you like, my general support for the three recommendations in chapter 23 in relation to pro bono services or at least three of the four; namely, support for volunteer practising certificates - I referred to that in my submission; the flexibility of aspirational targets and the importance of that, particularly for South Australia and those smaller jurisdictions. Anything that can be done to support services such as the one I run in the smaller jurisdictions I think should be encouraged. We don't have the critical mass, if you like, of the larger east coast jurisdictions that enable us to fund the service easily and sustainably without government support, and certainly I support the proposal about evaluation of pro bono programs that are funded by government, even though it doesn't affect me because largely I am not.

Quickly moving on to self-represented litigants, I was reflecting while I was listening to the other speakers that my message is that when someone faces court without a lawyer and 99 per cent of the time they are not really electing to do so - they are there because they have no other option - what is happening to them, what they are facing, is that on the one hand it is an alien world. They are completely overwhelmed. I daily come across people who have no idea what they are doing, what is going on.

At the other end of the spectrum, there are those people for whom that alien world becomes their entire world. It can become all-consuming. It becomes an

obsession in extreme cases - a minority of extreme cases - but understandably it also just becomes all-consuming because so much is at stake. Again my mind it really emphasises the importance of those tailored services like the self-representation service which we are operating to provide more than just information for people. It just doesn't cut it at the end of the day for those people who find themselves facing court.

I support recommendations 14.1, 2 and 3 generally. I have words of caution about the use of SRL coordinators. Generally I think it is a great thing to have those systemic changes within the court system. I just have some concern about that proposal for them to be able to step beyond impartiality and beyond legal information or just getting information and procedural information. I have a concern about stepping over into providing legal advice. I think it is very difficult, potentially difficult, and puts those staff members in a difficult situation where they might feel like they need to be responsible to their employer - ie, the court - in terms of getting certain outcomes, diverting clients out of the courts; where in actual fact it is important that they don't overstep the line.

I have made some comments in my submissions about my concern or perhaps some of the limitations with the duty lawyer services that are right at the very end of the process but I think I can leave my opening comments at that - if you have any questions.

MS MacRAE: You talk in your submission that you would have a preference to extend the self-representation service to South Australia's District Court. Could you talk a little bit about the costs and benefits that would be involved in doing that?

MR GRAHAM (JSA): The benefits would be that the unmet need is greater in the District Court. From our research that we have done, there are more self-represented litigants in the civil side of the District Court than the Supreme Court. The proportion is greater and the overall numbers are greater, substantially greater. There is simply greater unmet need. That's the benefit. The costs - well, we have got no way to fund that at the moment. Obviously it would require more funding to be able to provide that service.

MS MacRAE: Would you see that ideally coming from the South Australia government?

MR GRAHAM (JSA): It's a state court so I think ultimately it has to.

DR MUNDY: What does the current service in the Supreme Court cost?

MR GRAHAM (JSA): The funding for the pilot was about \$25,000, so it is not much.

DR MUNDY: How long was it?

MR GRAHAM (JSA): 12 months. It is effectively one day a week for one staff member and a bit of admin and so forth. It is not much. To be honest, it is not enough. For the service to be sustainable, one of the things that I will be saying at the end of the day is that it really needs a little bit more. The coordinator needs an extra half a day at least. It operates much more leanly than the service in Queensland does. I think it is a bit too late at the moment, but from my perspective it was important to get a pilot up and running. I wanted to show - - -

DR MUNDY: If the pilot cost 25 grand for 12 months, the slightly extended, more sustainable version, might be 40.

MR GRAHAM (JSA): That's right.

MS MacRAE: Would you say the one day was sufficient or are you saying you think another half day - - -

MR GRAHAM (JSA): Another half day for the Supreme Court. If it was expanded to the District Court, it would need to be sort of three days a week. Mind you, there are additional costs that have gone in because of the set-up and because it was a pilot. If you were to extrapolate it out over three days, say, it wouldn't be - - -

DR MUNDY: Three times.

MR GRAHAM (JSA): - - - three times that.

DR MUNDY: But there are some fixed costs in it, we understand.

MS MacRAE: Just in relation to pro bono, unfortunately we ran out of time with the Law Society but they weren't keen on pro bono. If there were cost awards for a pro bono case, the lawyer that was representing in that case - their argument was that the money shouldn't go to the pro bono lawyer because that would look like a contingency fee arrangement and that is not appropriate.

On the other hand, we heard from Redfern Legal Centre yesterday and other CLCs - "If we could get some cost orders for our pro bono lawyers, that would mean we could put more money back into our pro bono fund and that would allow us to do more and it may make it more attractive for some of our junior barristers in particular and solicitors to do more pro bono work." I wonder if you have got a view on how you would see that, whether it is appropriate for them to have cost orders made and where that money should go.

MR GRAHAM (JSA): I definitely think it is appropriate that cost orders should be made. We would like to see the law in that area clarified a bit. I think it pretty much leans towards that cost orders can be made.

MS MacRAE: The uncertainty I think from what we have heard creates just a administrative burden, to make sure you have got everything set out in a certain manner.

DR MUNDY: There are really two issues in this. One is the incentives provided to the other party on the basis that they know they can litigate in the absence of a cost order to face them.

MR GRAHAM (JSA): Absolutely.

DR MUNDY: That's one issue which I think most people have agreed.

MS MacRAE: It's not appropriate.

DR MUNDY: It's not appropriate. The question then goes to, well, okay, where does the costs order go? You can deal with all the disbursements and stuff and then what is left? Where does it go?

MR GRAHAM (JSA): I don't have a problem with it going to the provider. I tend to agree with Redfern Legal Centre and also agree with the comments I think made in the Ashurst quite new submission, generally speaking. At the end of the day, pro bono matters rarely involve costs, being taken on where there is no expectation of a fee. They are not commercial matters. That's a way to distinguish them from conditional contingency arrangements. They might look similar if you think of costs at the end but they are not commercial matters and there's the fairness question about the other side doesn't face costs. To my mind - - -

DR MUNDY: And what does that mean for their behaviour as well.

MR GRAHAM (JSA): Exactly; to my mind, the important thing is that the client isn't out of pocket.

MS MacRAE: Yes.

MR GRAHAM (JSA): That preserves the pro bono nature of it.

DR MUNDY: I guess one of the submissions suggested that pro bono means it remains with the firm and the money goes back to the firm. It seems to me if the money goes to the pro bono lawyer, then their employment arrangement will see where the money goes at the end of the day and there was a point made that perhaps

more junior barristers, in particular sole practitioner junior barristers, might actually get the amount. It might not be necessarily a tremendously bad thing. Is that something you would be - - -

MR GRAHAM (JSA): That's right and I would think it would encourage more pro bono work down the track.

MS MacRAE: Yes.

DR MUNDY: We had a discussion yesterday with the Law Society of New South Wales and they were most concerned about pro bono lawyers, limited pre-practising licences and issues about appropriate payments into fidelity funds on the one hand but also issues around insurance, especially negligence insurance and things like that. Do you have any views on those two particular questions?

MR GRAHAM (JSA): Look, it's a bit outside my - - -

DR MUNDY: Particularly for people who had career breaks or they are not working for a firm who can extend their insurance to the pro bono activity.

MR GRAHAM (JSA): Yes. I take their concern. If it's a free practising certificate, then the insurance cost has got to be borne by the rest who are paying the premium, presumably. I think the risk is very low. I think it has cost benefits of encouraging people into the profession, you know, back to do pro bono work outweigh those other costs. I haven't seen their submission but - - -

DR MUNDY: So your view wouldn't be that the person being represented by the pro bono lawyer shouldn't have the protection of the indemnity insurance that a lawyer would normally be expected to have but rather, that perhaps the industry as a whole could pool the risk and spread it around, so that the pro bono certificate came with indemnity insurance.

MR GRAHAM (JSA): Yes, that's right. I think that's sounds like a proposal I would support, definitely.

MS MacRAE: I guess the one other issue they raised was if we were looking at providing free certificates for retired people who might have expertise but may not have practised for some years, whether there would be any requirements if they were to apply for a free certificate for some ongoing education of some sort or would supervision be sufficient.

DR MUNDY: How would their CPD be covered?

MR GRAHAM (JSA): Well, I think there should be requirements to undertake

CPD, for them to be able to renew the certificate. They are providing legal services like anybody else, albeit pro bono, and it's important that the recipients receive the same level of - - -

DR MUNDY: The clients, that they are getting - - -

MR GRAHAM (JSA): Exactly, yes.

DR MUNDY: - - - the full Monty not a cutdown version.

MR GRAHAM (JSA): Yes.

DR MUNDY: You mentioned briefly you don't have access in South Australia to the large firms that perhaps are available in particularly Sydney and Melbourne, I guess.

MR GRAHAM (JSA): Yes.

DR MUNDY: To a lesser extent Perth and Brisbane, I suspect, certainly not Hobart. Where do the bulk of the pro bono lawyers come from for you, so - - -

MR GRAHAM (JSA): In South Australia?

DR MUNDY: Yes.

MR GRAHAM (JSA): In the profession, the commercial firms in Adelaide, which are from the biggest here down to some of the smallest. Most of the large to medium commercial firms would be members of JusticeNet and they may provide a significant part of that money.

DR MUNDY: Government agencies, the Attorney-General's Department: the government agencies that might employ lawyers, do they participate?

MR GRAHAM (JSA): They participate in informal ways. It's interesting, the comments in the submission about encouraging the aspirational target and the way for making that a condition of government legal services. That's not really a model or something that works so well in Adelaide. There is not a lot of Commonwealth work in South Australia and - - -

DR MUNDY: I thought the whole state was Commonwealth work.

MR GRAHAM (JSA): Well, it doesn't really provide a substantial incentive here and the Crown Solicitor's Office in South Australia is very large. It's actually the largest law firm in South Australia. There is not a lot of briefing out, unlike a lot of

jurisdictions, so there is sort of the opportunity for getting some incentive around government making pro bono work a requirement for attendance. Really they are as much - - -

DR MUNDY: It should say attendance to attach.

MR GRAHAM (JSA): Exactly, but truth be said, we have got good relationships with the attorney-general and the Crown Solicitors Office. The Crown Solicitor's Office has actually adopted a formal pro bono policy. I think it's the first of its kind in Australia and they allow their employees to provide pro bono services up to the aspiration target and that works well for us, so I guess there are ways in which it works.

DR MUNDY: That obviously is readily available on the Crown Solicitor's web site.

MR GRAHAM (JSA): I'm not sure it's freely available but I am sure I can get a copy for you.

DR MUNDY: Is that something you can provide us with?

MR GRAHAM (JSA): I am sure I can.

DR MUNDY: That's a reflection of the fact that they don't put the work out in the same way that others do, so that structural issue has been to some extent ameliorated, because presumably the Commonwealth probably does most of South Australian work in Melbourne or something.

MR GRAHAM (JSA): Yes. That being said, anything that could be done to facilitate, you know, the sort of critical mass of funding for a service like ours in South Australia or other small jurisdictions is welcome. Certainly one of my concerns - I'm not sure how relevant this is for your purposes because it's about essentially state money - but a number of states, particularly Queensland, New South Wales and Victoria, have access to public purpose funding through interest on solicitors' trust accounts.

DR MUNDY: Yes.

MR GRAHAM (JSA): In South Australia, it's very limited. It mostly goes to certain sources, to certain legal service providers and there is only a relatively small amount which goes into a foundation and that's not able to provide for current funding. It's sort of a one-off thing, so we don't have the flexibility there for services like JusticeNet or new services that want to do remunerative work as there is in some other states.

MS MacRAE: Just in relation to the nature then of the services that you are able to provide - and I appreciate it's potentially more limited here, given the access to resources that you have - you have got the services that you provide in court. What's the nature of the other services that you might provide and are you able to provide unbundled services and are there barriers to that at all that are of concern to you?

MR GRAHAM (JSA): There are essentially two services. There is the court-based service for self-representation, the service which does provide the unbundled services, and we also have our referral service, which has an emphasis on representation and unless it's a referral for advice, it's generally not an unbundled arrangement. That being said, we like to try and limit the scope of a referral, so that it will be a referral, for example, to take something up to a mediation but no further, unless the firm agrees or we come back and we reconsider it.

MS MacRAE: Would you have a feel for how much unmet demand there is for that? I'm assuming you have to make some different choices about where those referrals go.

MR GRAHAM (JSA): There is definitely unmet demand and indeed, that's why we opened the court-based service and although the numbers are relatively small and it's early days, we haven't robbed Peter to pay Paul. By having people access the court, it hasn't meant a drop-off in demand for the other service and having the two services is very efficient, to be able to refer matters back and forth, and we see clients that come to us in court, repossession matters. We rarely saw those types of clients at our referral service and we are seeing quite a few at the court-based service.

DR MUNDY: I guess funding is always a challenge. I hate this language but have you given any thought to what in current popular parlance might be called a co-payment or is it just, A, that people aren't going to have the dough and, B, it's too hard to collect? Is it something that is worth considering or is there a better way of finding that funding source when matters go to court, pro bono lawyers getting paid?

MR GRAHAM (JSA): I think that's the preferred way. It would be very difficult to have some sort of co-payment arrangement.

DR MUNDY: You would have to raise money and - - -

MR GRAHAM (JSA): That's right. I mean, we couldn't do it administratively. That being said, I mean, I have often thought that I would like to see, as well as the pro bono service that we have, a low bono service, which is those firms that are willing to accept reduced fees but again, that's not a co-payment.

MS MacRAE: It's a good phrase though.

DR MUNDY: If there were a range of matters for which monetary settlements were substantial and they were more commercial - I am not talking about particularly personal injury type matters but other matters - some sort of contingency fee arrangement, would that be something you would find attractive or would you tend to work on costs only, prefer to work on a conditional fee basis rather than a contingency fee basis?

MR GRAHAM (JSA): Look, my argument is we wouldn't, because if someone is going to do it on a contingency basis, there would be someone out there in the market who will do it.

DR MUNDY: Who will do it on a contingency basis, yes.

MR GRAHAM (JSA): We do that. If there is a matter that comes to us and we think, well, someone can do this on a contingency basis, then we won't help them. We will refer them to someone who can. Mind you, there's not a lot of those outside personal injuries.

DR MUNDY: Yes, and I accept that there may be ethical reasons that personal injury and family matters might not be appropriate for contingency fees. I think we have got that message. Thank you very much for your time and your submissions and these proceedings are adjourned until 1.40.

(Luncheon adjournment)

DR MUNDY: I will reconvene these proceedings. We will now have the Women's Legal Service of South Australia. Could you please, for the record, state your name and the capacity in which you appear and then perhaps make an opening introductory statement.

MS NGOR (WLSSA): Good afternoon. My name is Zita Ngor and I'm the Director of the Women's Legal Service, and we'd like to thank the Commission for giving us the opportunity to present this afternoon. As you would have received in our submission, the Women's Legal Service is a community legal centre based here in Adelaide, but we do provide a state-wide service to vulnerable groups of women and we cover the whole of South Australia. So pretty much north, west, east and south of Adelaide. We prioritise our services to Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, particularly women from emerging communities, and also women living in rural, regional, and remote areas of South Australia.

You would have seen in our submission that we have quite an extensive outreach calendar so that we can provide services to women who live outside of greater metropolitan Adelaide. We believe that the opportunity to have face-to-face appointments and interviews with solicitors is an invaluable service that women, particularly in rural, regional and remote areas value greatly, as there are very limited services available outside of metropolitan Adelaide. The reason why we felt it was really important to appear before the Commission was to get the Commission to hear a little bit about our service and the work that we do, and the role that community legal centres play and how we can feed into some of the draft recommendations in the Commission's draft report.

MS MacRAE: I guess, perhaps, if you could open then with giving us a little bit more of an idea about your outreach services in particular. As you will see in our report, we did have concerns at the time of writing the draft about the location of some CLCs. I have to say, we have increasingly heard about the outreach services that many CLCs provide, but we would be particularly interested in that if you would like to expand on that for us.

MS NGOR (WLSSA): The Women's Legal Services - I should probably set the parameters of the funding that we receive. We receive funding - we used to exclusively receive funding from the Federal Attorney General's department, but now we receive funding from the Attorney General's department and also from the Office of the Prime Minister and Cabinet. So the funding has been split between two different departments. We are located - our main office is located in Adelaide and that was a strategic decision by the management committee of the Women's Legal Service. The majority of the South Australian population - the vast majority - do live in metropolitan Adelaide. So being located in Adelaide allows women who might rely on public transport to be able to get to our office easily.

Since we're located near the central markets, which is a major shopping hub, we often find that it's a really good opportunity for women, if they're going shopping, if they're attending to medical appointments in the city, visiting other services, that they can then pop into our office here. We did, in the past, used to also have a satellite office in Port Augusta. We've had to close that office because we found that having a physical, permanent presence was limiting the amount of outreaches that we could actually do. Since we closed that Port Augusta office, we have increased significantly our outreaches and, in the outreach calendar, you would see that we do visit a wide range of locations across South Australia. So we do outreaches regularly to Port Augusta, Coober Pedy.

We also have done outreaches for the first time last year to Ceduna and surrounding Aboriginal communities such as Yalata and Oak Valley. We also covered Port Lincoln. We do have a regular outreach to Murray Bridge, which has a large Aboriginal community nearby. We also have conducted outreaches in the last 12 months to Mount Gambier and surrounding regions in the South East. We also have an extensive outreach to the APY Lands, which we collaborate with the APY Women's Council in delivering services to Aboriginal women living in the APY Lands.

MS MacRAE: In relation to that funding that you now get from two sources, is there a level of certainty in both of those forms of finance for you, or is it a year-to-year proposition?

MS NGOR (WLSSA): We used to have triennial funding agreements. Unfortunately, over the last two years, we haven't had the triennial funding agreements and they've been rolled over on a 12-month basis. Looking forward for the services - and I did allude to it in our submission - we are looking at probably a 50 per cent reduction in the current funding that we get, which will significantly change the service that we provide to women at the moment because we do actually have a reasonable case load that we take on. With a 50 per cent reduction, we may potentially be looking at reducing the case load and not taking on any cases and becoming more of an advice and referral service.

DR MUNDY: We understand that the intention of the Commonwealth is to encourage CLCs broadly, I guess, or legal systems providers, to focus on what, I think, the attorney general describes - what have been described as front line services. By the sound of things, the reduction in funding is going to lead to - - -

MS NGOR (WLSSA): To impact - - -

DR MUNDY: - - - a reduction in front-line services.

MS NGOR (WLSSA): Definitely. For us - I mean, I suppose, for us, the biggest challenge is balancing our desire to provide a continuous service to women outside of metropolitan Adelaide whilst balancing that with taking on case work, which entails significant expenditure on our part as well because to manage cases, particularly if they do go to a trial stage, you've got briefing fees that you would incur - briefing and filing fees.

DR MUNDY: Briefly, are the character of these cases that would probably fall by the wayside?

MS NGOR (WLSSA): We predominantly do specialise in civil law areas. Family law does provide a major component of the work that we do, but we also do child protection. Consumer credit issues have been rising, and I think that's probably as a result of the current economic climate, so we have been having an increasing number of women coming to us with regards to issues around mortgages and bank re-possession, also being left unfortunately after the break down of a relationship with debts from the relationship. We also do assist women with criminal injuries compensation, particularly where the injuries have been received as a result of either a sexual assault or domestic and/or family violence.

DR MUNDY: Quite often, these women that you are seeing - - -

MS NGOR (WLSSA): Would have a multitude - - -

DR MUNDY: - - - would have multiple and fairly complex needs and probably are not the most happy people in the world?

MS NGOR (WLSSA): No, and the reality is for our organisation, increasingly, we are finding that we are becoming the last place of resort for a lot of women. So when women come to us, we are not able to refer women to other organisations because often we're the last resort for those women. So if we don't take them on, or offer some form of assistance, whether it's just looking over the documents and not actually assisting them with representation, those women then don't have anywhere to go and if they do pursue the legal matters they do end up, I think, as either self represented litigants in the courts or a lot of times - or a significant minority of the women that we assist may not take steps to effectively either protect themselves or their children, or to seek fairer outcomes in negotiations for themselves.

MS MacRAE: How does the work that you do relate - we just heard from the Relationships Centre in Port Augusta. How does the work that you do coordinate with the work that they do.

MS NGOR (WLSSA): We do get a lot of referrals from various Family Relationships Centres, both the Port Augusta one and other Family Relationship

Centres. A lot of the time, mediators may send women over to us to get some legal advice about a parenting plan that they're considering agreeing to, just to make sure that the women understand any potential obligations that might arise and alternative options, and we do get a lot of referrals from mediators, particularly where they're wanting to cover off the basis if there have been allegations of either family violence or child abuse to make sure that the women are making informed decisions before entering into agreements, and we also do receive referrals from them in instances where matters may not be appropriate for mediation, and we in turn do refer clients to family relationship dispute resolution practitioners and the major reason is because we do often say to women who access our service if you can resolve disputes amicably that is often the best possible way to deal with matters and court should always be the last resort.

MS MacRAE: We heard from the FRC in Port Augusta that, in fact, for many Aboriginal and Torres Straight Islanders, that they actually just find the whole court process - - -

MS NGOR (WLSSA): Very daunting.

MS MacRAE: - - - very uncomfortable, and unapproachable, and so I guess if I can maybe not put words in your mouth directly, but if women aren't able to come to you for your service then the percentage that may then choose not to pursue because their only other option is going to be court could well be higher because there won't be a place for them to go.

MS NGOR (WLSSA): Yes, and I mean that is a major concern that we do have, and also because we do take on women with complex needs or who have multiple barriers to accessing justice, and one of the most obvious is if a woman is from a non-English speaking background. The current Legal Aid funding that is provided to private practitioners to take on Legal Aid matters doesn't enable them to hire interpreters and as you well understand when it comes to legal documents, it is really crucial that women who don't speak English have the opportunity to have that material interpreted into a language that they understand, so that they can participate effectively in the process and provide the court with the right information.

MS MacRAE: Just wondering then if you could also perhaps elaborate - we've heard quite a lot and we've heard from a number of disability service support organisations about the difficulties that women with multiple disadvantage might have with both mental and physical disabilities. Have you got anything you'd like to tell us about not just language barriers, but the other sorts of barriers that women might face, that you're involved with?

MS NGOR (WLSSA): Women with disability - unfortunately I think that's one of the vulnerable groups within our society who often don't receive an adequate service

and it's an area where Women's Legal Services long had an interest, and we definitely would like to improve the way that we work and are accessible for women living with disabilities, and currently women with disabilities make up about 14 per cent of our client group but we are aware anecdotally that there are a vast number of women living with disabilities who don't access or access a very limited amount of support services, and in many of the cases where we have assisted women with disabilities, whether it's mental health issues, whether the disabilities arise due to mental illness or a physical disability, there are extra hurdles or barriers that these women face.

They often find the legal system extremely daunting and sometimes because of their disabilities there are a number of negative assumptions made about - well, there are a number of negative assumptions that can be made by the legal system about their credibility as witnesses and it does impact on their ability to achieve fair and just outcomes, and to give you an example we assisted a woman and with this particular matter there was no legal avenues available for her at the end, but just going through the process of getting the information was of great assistance to this woman and enabled her to move forward. But in this situation, there was a woman who was deaf and she was sexually assaulted, and she came to us because she didn't understand why there was nothing going on with her criminal investigation.

So this was more of an advocacy role that we took on in terms of getting the information, speaking with the police to find out why the prosecution did not proceed and we were able then to, with the use of a sign interpreter, to relay that information to the woman and to provide her with that information. She chose not to pursue any other avenues but for her it was just about finding out why things had happened and having somebody take the time to explain to her.

MS MacRAE: Is there anything - I know you already are constrained financially in what you're doing, but are there particular strategies that you think would - what would sort of be the first cabs of the rank, I suppose - if I can put it that way - that might help you assist those women more if you had funding available, I guess, or is that too big a question, and it might be?

MS NGOR (WLSSA): In an ideal situation I think for us as an organisation we would wish that we could maintain the current funding levels that we have because the funding that we currently have has enabled us to - particularly in the last few years, to make great strides and being able to interact with diverse groups of women, and particularly women who traditionally have been really difficult for the organisation to access, and I think for other service providers to access, and one of our greatest concerns is that with the reduction of funding, some of those activities that we've utilised to make those connections and develop rapports may not be able to continue, and then that will impact on the numbers of women from particularly vulnerable groups accessing services, and - - -

DR MUNDY: So these are relationships with women's health centres and - - -

MS NGOR (WLSSA): Women's health centres and even directly with various women's community organisations. So we have a number of different strategies with engaging with women and for some of the target groups of women it is about going to places that those women feel comfortable in going to, and being there, and engaging with them, and sometimes it does take a number of interactions before they do trust you, and to give you an example we established quite a close partnership with a group of women from one of the Muslim communities here in Adelaide, and these particular group of women, due to their religious and cultural beliefs don't readily access outside services.

They have their own doctors that they see, their own health providers that they see within the community, so it's quite a closed community to access but we were able to engage with that community and develop a relationship where they've asked us on a number of occasions to do community legal education sessions for them on a wide range of different issues.

DR MUNDY: You mentioned before that if there was a reduction of your ability to take on case work that some of these women would walk away but some of them would probably go and self represent. Do you have any views about the services provided by other legal systems providers, I'm thinking primarily of Legal Aid type services, duty solicitor services and the extent to which they're responsive to the needs of women in general, responsive to the needs of women who suffer from some sort of disadvantage and what might be able to be done, particularly at relatively little cost, to improve those outcomes?

MS NGOR (WLSSA): I'd probably start off by saying that over the last couple of years we've seen a change within the duty solicitor role. Previously the duty solicitors used to in the Family Court play quite a significant role in terms of they would look over documents and may make a one-off appearance on behalf of self-represented litigants.

All those things are really important and crucial roles and recently there has been a reduction in services that they do provide to self-represented litigants. I do think that it is having an effect in terms of dragging out court processes and using limited court resources. One of the reasons why we place such a great value on our legal advice, our legal information help line, is that enabling people to have information, and particularly legal information, helps them to make better choices about what their avenues are and whether it's worth pursuing a matter.

If those options to gain legal information are not available, then people don't have any guidelines to assess whether their matter has legal merit. So we do believe

that the duty solicitor roles are crucial but we would like to probably see a return to the roles that the duty solicitors used to play previously within the court system.

DR MUNDY: Is your sense the reason why this role has changed is simply increased burden and decreased resources?

MS NGOR (WLSSA): I think that would be the major reason. Definitely within the Family Court, which is a court that we attend at often, there is a lot more self-represented litigants appearing before the courts, a lot more than we would have seen 10 years ago.

DR MUNDY: And?

MS NGOR (WLSSA): And at the same time there is also less private solicitors who are doing Legal Aid work and a lot of the private legal practitioners are of the opinion that the amount provided under the Legal Aid funding guidelines is not enough to meet the cost of adequately representing people in court. So a lot less private solicitors are - - -

DR MUNDY: Is your sense this increase in self-represented litigants is a flow-on effect to slowing down the court; judges have to spend more time, registrars have to spend more time, matters get adjourned.

MS NGOR (WLSSA): Yes. The judges have been extremely patient and the court staff have been extremely patient with self-represented litigants. When I have been in court judges have given self-represented litigants an enormous amount of their time by providing information and general legal information about the court process, about what they need to do next in terms of, "You need to file this document. You need to set out in this document what orders you're seeking from the court." So actually giving self-represented litigants who are before the court information and instructions about how they manage their cases.

Whilst I do commend the court for taking that time out and assisting self-represented litigants, I think that that kind of work should probably be picked up either via community legal centres or by the Legal Services Commission.

DR MUNDY: So the courts are doing something and someone else's time would be better spent and they could get on doing the business of the court?

MS NGOR (WLSSA): Yes. I do mention vexatious litigants. I do provide some case studies about some of the matters that the courts are dealing with. We are seeing an increasing amount of matters of those natures where sometimes as legal practitioners you're thinking that these are not really appropriate to be brought before the court and I did put a case there that was - we shook our heads when we had to

deal with this particular matter because it did basically hinge on doorhandles on a cupboard which was the whole basis for the application. This matter was listed three times before the court before we were able to get a summary dismissal, but that's utilising court time and court resources unnecessarily.

DR MUNDY: These vexatious matters - presumably in family disputes I presume is what you're referring to?

MS NGOR (WLSSA): Yes.

DR MUNDY: They are being brought by - I presume they are being brought by male self-represented litigants.

MS NGOR (WLSSA): Yes.

DR MUNDY: If these men were represented there would be someone there that the judge would look at and say, "Mr X or Ms X, why are you here?"

MS NGOR (WLSSA): Yes.

DR MUNDY: Whereas they don't feel that they can just - - -

MS NGOR (WLSSA): Pursue that.

DR MUNDY: If they were represented they would probably get struck out on day 1?

MS NGOR (WLSSA): Yes.

DR MUNDY: Okay. Angela?

MS MacRAE: We have asked some of the other women's legal services about the intersection between the federal family law and the state-based children protection and domestic violence laws. Does that divide between the Commonwealth and the states create any particular problems for your clients and, if so, is there anything that we could recommend might reduce some of those problems?

MS NGOR (WLSSA): I think one of the things that Women's Legal Services have always campaigned for is some harmonisation between the family law system, child protection and the protection order system because for a lot of our clients there are intersections between all of those different legal arenas and it's not uncommon that you would have a woman who is dealing with a children's matter in the family law courts. At the same time there might be assault charges that are pending, intervention order proceedings and there may potentially have been involvement

with Families SA, which is our child protection agency here in South Australia.

MS MacRAE: Yes.

MS NGOR (WLSSA): What we often find quite difficult to deal with is because our child protection agency states that it has limited resources, it often relies on our clients to make applications to the Family Court to seek orders that protect the children.

In some of these matters it is our opinion that they should really be dealt with in the realm of child protection proceedings, because we have subpoenaed documents where the department has made it abundantly clear that if the other party has access to the children, that they would then act to remove the children but because of resources and because the woman has told them that she had got legal advice from Women's Legal Service, they then say, "Okay. Well, we're going to not take any action if you're going into the Family Court arena." The Family Court then has to deal with issues that should probably be dealt in the child protection arena and so there is quite a considerable amount of overlap between those three jurisdictions.

One of the things that we have highlighted, and I think was highlighted in the Women's Legal Services Australia submission, particularly with the way that the Legal Aid eligibility criteria is administered and the way that the funding is structured, you sometimes would have a woman who might be represented by the Legal Aid Commission or a private solicitor who has obtained Legal Aid funding in regards to the children's matter but in regards to either any potential child protection proceedings or the intervention order, they could be assisted by a community legal centre such as ourselves.

So sometimes women are dealing with up to two solicitors at a time in regards to their legal matters, whereas in actual fact it probably should be dealt with by the one solicitor because it's all based on the same individual, the same family dynamics, the same issues.

DR MUNDY: It's the same problem?

MS NGOR (WLSSA): Yes.

DR MUNDY: I'm just mindful of the time. There's one thing we have asked a number of CLCs through the course of the hearings today and that is what do you see as the importance of CLCs broadly, and your own in particular I guess, in advocacy and law reform issues and what other benefits that you see that those activities bring benefits in the sense of access to justice and perhaps also they may, at the end of the day, be cheaper ways of dealing with systemic problems than having to build up a body of case law until it fills the room?

MS NGOR (WLSSA): I mean, I think that CLCs in terms of the legal landscape play quite a crucial role in filling in the gaps and picking up vulnerable victims that fall between the gaps and the law reform work that we do feeds into that ethos. So in terms of law reform, community legal centres take on law reform initiatives that will have an impact not just for one person or one small segment of the community but for the wider community. We can do that in many different ways and I will give you some examples from law reform initiatives that Women's Legal Services South Australia has been involved in.

One of the law reform initiatives that we have been involved in is the campaign with other agencies and services to have a coronial domestic violence homicide review process here in South Australia and the reason why we campaigned about that was looking at trying to build up - trying to get through the coronial process some recommendations that would deal with systemic issues and particularly for us as an organisation we were passionate about this because through our work with the APY Lands we noticed during a three-year period that there was quite a significant increase in the number of Aboriginal women who were being killed in the APY Lands.

The APY Lands, there are a number of small communities there. The population group is not that large and so for the number of women who are dying as a result of domestic violence homicide, the impact on the APY Lands was enormous because it's not just impacting on their immediate families but also the family within the wider kinship structure and also within the wider community and so we were particularly interested in looking at what kind of systemic changes could occur within the system to prevent other deaths from happening and so that's just a small initiative that we took in collaboration with many other organisations here in South Australia.

Because of that campaign we were able to - for a limited time the South Australian government actually engaged a policy officer to work within the coroner's office to look at domestic violence homicides and from that we've had a number of coronial inquests which have made some major systemic recommendations and our hope is that through that process we can prevent other women from dying needlessly. I think that's the power of law reform initiatives is that it does enable us to work beyond the individual and to have a broader - to make broader changes to the system that better protect not just vulnerable people with - or vulnerable people groups within our community but also you have a long term benefit to the wider community.

DR MUNDY: In the absence of funding to support CLCs in undertaking this work, how do you think it will happen or do you think that it will not?

MS NGOR (WLSSA): Well, we've just done a stakeholder engagement

consultation this year and one of the things that a lot of the stakeholders highlighted as the strength of the Women's Legal Service was our work around law reform initiatives and policy. Even though law reform forms quite a small part of the work that we do we probably only spent about 20 per cent or even less than that on law reform. The impact of the amount of time and resources that we do put into it, that far exceeds the amount of resources that we spend on law reform.

For us, to be truthfully honest, I think that because we are often looked at at the organisation with specialist legal knowledge about domestic violence and family violence a lot of that work probably will not be picked up once we're no longer in a position to undertake law reform and so then it becomes about Woman's Legal Service, if I can say, being creative and supporting the broader community to try and pick up, if you like, and fill the gap that's been left.

DR MUNDY: Thank you very much for the time you've put in putting a submission to us and coming along here today and participating in an advocacy based public policy reform process.

MS MacRAE: Thank you very much.

MS NGOR (WLSSA): Thank you.

DR MUNDY: Could we now please have Drs Appleby and Le Mire? Thanks very much. When you are settled and all ready to go could you please state your names and the capacities in which you appear today for the transcript?

DR APPLEBY (UA): So my name is Dr Gabrielle Appleby and I'm a senior lecturer at the University of Adelaide.

DR LE MIRE (UA): I'm Susan Le Mire, Dr Susan Le Mire, also at the Adelaide law school at a senior lecturer.

DR MUNDY: Would you like to make a brief introductory comment or two?

DR APPLEBY (UA): I'm just going to make a very short statement on behalf of us both and then we'll both be available to answer all your questions.

DR MUNDY: Sure.

DR APPLEBY (UA): We made submissions only in relation to your inquiries in the model litigant obligations and so that's what I'll be speaking to. The main point that we want to stress in relation to reform across all level of governments is the need for greater clarity and transparency in this area. This will obviously assist the non-government litigant involved in litigation against the government but we think it will also provide a more certainty to government litigants and those advising government and it will also provide a proactive side by a government about the importance of the obligation.

So the detail of all of our recommendations is in our submissions. I just wanted to note four areas in which we think greater clarity and transparency would be helpful. First of all - and this is something that was picked up in the draft report by the commission - is the need to clarify who is bound by the model litigant obligations and to what extent. We think that this is probably best done through the publication of guidelines and information on the obligation, certainly at the commonwealth level this is done well and in some states and territories but in other states and territories this isn't published and there's nothing in regard to the extent to which local government is bound by the obligation.

The second point is in relation to the content of the model litigation obligations. The current articulation of the obligation in the Commonwealth Legal Services direction indicates that whilst there's an obligation to act honestly and fairly on the one hand, there's also the right to defend firmly and properly the rights of government. The issue that we have is there's no real clarity in terms of when these two areas contradict as to how they're balanced up and we think that clarity could be achieved in this aspect through illustrations, through case studies and this would clarify, again, for those involved, government and non-government alike.

Thirdly, we think there needs to be greater clarity in relation to the role of government versus the courts in enforcing the model litigant obligation. At the moment it seems that both the government and the courts are involved in enforcing the model litigant obligation, although the courts aren't necessarily limited in doing so and it's very unclear as to how they interact and overlap and we think that the roles of the government, the different branches, their powers, their enforcement powers, the level of co-operation between the two should be clarified and formalised.

Fourthly, we think there needs to be greater clarity in relation to the ability to bring a complaint and what happens with a complaint, so for non-government parties involved in litigation and feels that the government party has acted not in accordance with the model litigant obligations, we think that there needs to be a transparent, independent complaints system established. At least the Federal level at the moment, complaints, as we understand, are forwarded to the agency involved for them to deal with, to manage, resolve and then report back to the Attorney-General's department and we think that it's unacceptable insofar as best practice of dealing with complaint systems. It really doesn't tick any of the criteria.

DR MUNDY: I will not ask you to tell me which states are bad. You can just tell me which ones are good. We will work out the others.

DR APPLEBY (UA): Well, certainly those states that have acted to bring some sort of transparency as to the guidelines have really followed in the footsteps of the commonwealth, so you have in the ACT they've actually enacted something very similar to legal services' direction so it's in legislation, delegated legislation. At New South Wales and Victoria there are guidelines that have been issued, I believe by cabinet, that have come from government and then there's something a little less formal in Queensland and South Australia.

I think in South Australia the situation is there's been a crown solicitor's note that's been circulated about what the obligations are so that really actually holds, you know, no weight or formality.

DR MUNDY: We can draw conclusions about the others. Local governments and conduct of local governments as a regulator is actually something that I presided on a very extensive study of a couple of years ago for the commission and it did seem that there was no systematic way. There might be local government ombudsmen somewhere but they're typically worried about corruption rather than the way people are being treated, but one of the points that was drawn to our attention and this is a broader thing, I guess - is that it is well and good to have a system of model litigant arrangements, but perhaps by the stage that the litigation has happened, the horse has bolted, and what is really required - and I cannot remember who suggested this to us in Sydney - but what we actually need is model dispute arrangements so that, perhaps

if we could guide the disputing resolution behaviour of government agencies, we could cut off some of the litigation before had to even worry about the model litigant rules, and this goes to a whole range of issues.

I guess I am wondering, do you see a relationship between these litigant rules and - certainly, the Commonwealth has dispute resolution guidelines. Do you see these two things should - to what extent do you think they are, in practice, related and should they be?

DR LE MIRE (UA): I think within the existing Commonwealth model litigant rules, there are some gestures in that direction already, in that they are not supposed to be taking disputes that are against the public interest and so on. So I think they are clearly - there is a relationship. The existing ones gesture in that direction, but I think, as Gabrielle has stated, they need more articulating, which would then address that concern as well, I think.

DR MUNDY: Would you see that such articulation might create, if not an obligation, a presumption for some sort of mediation or other ADR process prior to litigation? This point was made to us in Sydney yesterday; that whilst obviously not all matters are amenable to mediation, a lot of particularly what you might call "regulatory disputes", where there is a profound breach, could be better resolved through some sort of obligation to mediate or conciliate prior?

DR LE MIRE (UA): I would have thought that was something that should be thought about and, even if it does proceed to litigation, there is also a number of court-sanctioned processes that would try and divert it before it actually gets to trial as well.

DR MUNDY: And the Civil Procedure Act of the Commonwealth as well, obviously.

DR APPLEBY (UA): There's certainly been some comments by the judges around the model litigant obligations as well when matters have come to Court, that the government should have acted in another way to resolve it so it didn't have to come to Court. Certainly, at the common law level, this idea of the model litigant extending, just in terms of where there's a dispute, not where there's necessarily litigation yet, it's not outside the boundaries.

DR MUNDY: Is any of that case law referred to in your submission? Pardon me for not being able to recall.

DR APPLEBY (UA): Yes, I can't recall the case off the top of my head. It's the case from Queensland.

DR MUNDY: Could you just send us an email? That would be most helpful.

MS MacRAE: You mentioned in your opening comments about content and how important it is to illustrate, where you might have conflicting objectives to work out where the balance might lie. If I can just cheekily give you - one of our participants in Sydney had said, "It's all very well having these model litigant rules, but to be honest, I've never seen it have any impact in practice on any case I've ever been involved in. Whether they're there or not hasn't made a blind bit of difference." Are you able to comment on that? He was particularly involved in personal injury cases and so was dealing with the other side being very big players. Would you have a view about that? So there's the content, in terms of clarifying what's there now, but would you say that the rules themselves provide sufficient strength, I suppose, that it will make a difference where you have a power imbalance?

DR LE MIRE (UA): I think there's a number of parts to that. How much are they - in a sense, you're not going to see the disputes come forward necessarily where they're working; you're only going to see them come forward where they don't work, I suppose. So he probably is perhaps seeing a bit of a skewed view of matters come forward, but the second issue is: can they change behaviour, I suppose, is at the heart of that. I don't see why they can't. I mean, I think policy is - if you say policy can't change behaviour, then you're kind of throwing in everything that we do. Laws, rules have the capacity to change behaviour, but I think that one of our points is that these are probably inadequate, imperfect ways to try and change behaviour. So I don't know that I'd go as far as saying that it's impossible that they can work, but I think, as they stand, both the problems with enforcement and the problems with articulation undermine the primary goal. So if they're not making a difference, it might be partly due to those, not because the aim is imperfect.

DR APPLEBY (UA): Just one point, just picking up on what Suzanne said, is the idea of enforcement and really the message that's being put out there by the current model litigant obligations is itself enforcement, self regulation, and self resolution of disputes, and that's not really putting a sign out there that these things are taken seriously by government. The other point I would like to make, too, is that I think it really depends on the area in which you're working. Okay?

So you might be working with a statutory authority that may be engaging private solicitors who otherwise don't work for government. You may be engaging a government department who always briefs the Crown Solicitor's office, or the AGS, who are very cognisant of the model litigant guidelines and adhere very strongly to them. So I think there is a large disparity across government in terms of compliance. I don't know what the personal injury sector is like, but it would strike me that might be a sector where there is low compliance.

DR MUNDY: I think his reflection was particularly in relation to some statutory

insurers in New South Wales. Of course, there is one notorious case in relation to enforcement of the national electricity law, where the ACCC claimed it could not pursue an electricity company because of the constraints placed upon it by the Commonwealth's model litigant rules. Putting that all - we did not quite understand that one, but apparently - with respect to enforcement, the model you - the model that is the case does seem not to be laced with transparency, but what is the alternative?

I mean, not wanting to recommend the establishment of yet another Commonwealth agency, is this something - given, I presume, the number of complaints of serious breaches of the guidelines is probably not very many each year, will the ombudsman be an appropriate place? We are talking about the conduct and the behaviour of public officials. We are not actually talking about a decision that they are making, which is perhaps better addressed by the AAT or some other merit review body. Would you see that the ombudsman - given its existing statutory capacity to do the job and perhaps an arrangement whereby aggrieved persons or judges, in the event that they see this behaviour - could simply refer it? It could then be published. It could be subject to the scrutiny of parliament. Would that be a framework that you think would work?

DR APPLEBY (UA): Look, I think that's a very workable idea. I think, whilst there's a lot of emphasis placed on the importance of having an independent complaints system, as opposed to the system we currently have, you don't want to over-egg the pudding. You don't want to create a brand new authority to deal with
- - -

DR MUNDY: Half a dozen, or 20 complaints a year.

DR APPLEBY (UA): - - - a relatively small number of complaints every year, particularly when the type of complaints system that we're looking for, independent from the agency involved, that's got a system of sorting complaints, that has a transparent way in which it operates, already exists in the statutory authorities of the ombudsman. The other beauty of thinking about the ombudsman is we know the states and territories take their cue from the Commonwealth. You know, the guidelines in the states and territories are largely modelled on the Commonwealth. So the ombudsman exists in all of these different jurisdictions, so it could be something that could be modelled across Australia and local governments are also subject to the jurisdiction of the ombudsman.

DR MUNDY: I guess the other attraction is the ombudsman is not a creature of the executive; it is a creature of the parliament.

DR LE MIRE (UA): Can I just add one further point that I think that reporting mechanism for judges is really important because that's where we're seeing someone picking up on problems with adherence to the litigant rules, and yet there is not

necessarily any formal reporting except in the judgments themselves.

DR MUNDY: Would we need to provide some sort of statutory basis for judges to do that, or would it be simply enough - I mean, I guess the question is: what process then exists by way of - let us assume it goes to the ombudsman. What process exists or needs to exist for judges to be able to pass these matters on? Is it simply a judge writes a letter saying, "Dear Ombudsman, This is pretty crook, have a look at it." Should that communication between the judge and the ombudsman be a public communication, or should it become public only after the ombudsman has formed a view that the guidelines haven't been complied with. We are asking judges - I know that they don't like being asked to do things, and they will think about chapter 3 of the constitution, I'm sure, and how do we make this work? I'm attracted to it, I just want to understand how we might be able to frame a recommendation without the need to - - -

DR APPLEBY (UA): I think that in a sense there is already a public avenue for judges to express their complaints. If you read through transcripts or you read through judgments, there is quite often a statement of disappointment in terms of the way which a government litigant has conducted itself in the course of litigation. Certainly, one of the possibilities that I have explored is that, in fact it's not the judges reporting to the ombudsman, but it's a much better system whereby an ombudsman officer is keeping track of these comments that are made by the judiciary, and maybe the judgments are referred by the courts to the ombudsman. It's a public comment, it's available in the transcript or in the judgment, and it's just a matter of the ombudsman collating them.

I have to think it through a little bit further, but you would have to be careful about placing a reporting obligation on a judge, particularly if it wasn't in a public sphere, not in the exercise of judicial power. I think it might be easier if it was just picked up on judgments that were already occurring.

DR MUNDY: If you want to come back to us with a short note or something on that, if you want to have a think about that. I mean, what worries me on the flip side is that some poor sod in the ombudsman's office is going to be sitting there, rooting through judgments and odds and sods, and if it extends then to local government, does it extend to their conduct, for example, in a planning tribunal? You know, what are the issues there, because not all decisions in planning tribunals are reported. So I'm interested in the data capture and how the ombudsman, they say they are going to do it, et cetera. Pretty clear - - -

DR APPLEBY (UA): There certainly could be some more cooperation in terms of the courts alerting the ombudsman, rather than a data crawl - - -

DR MUNDY: That's right. It may well simply be there's a bit a note goes round the

courts saying, "If a judge or a tribunal member makes an obligation of this type, could you please just ring a bell and let us know."

DR LE MIRE (UA): It might be that by creating the gateway, being the ombudsman, that that will do something to give them - - -

DR MUNDY: Yes.

DR LE MIRE (UA): At the moment they go only to the parties and are reported publicly, but there's no sanctioned complaints.

DR MUNDY: I wouldn't want to be the New South Wales ombudsman getting every judgment that came in and to have a squiz at it. We made some observations about the underlying rationale from what the litigant rules being about asymmetries and power; obviously the state has a peculiar characteristic to it, but what it also has, in common with other powerful litigants, is its economic capacity. We made some observations about whether it might be a good idea to extend the model litigant rules to, for example, say insurers who, when they're dealing with a personal injury claim, are clearly in an asymmetric power relationship. Do you have any thoughts on that sort of approach?

DR LE MIRE (UA): I think there's probably two reasons why I would be very cautious on that front. The first is that those private parties have different - essentially, the model litigant rules are partly founded on the fact that government has not just an economic and repeat player advantage, but also because they are supposed to act in the public interest. That's not the case for the insurer; their interest is private, so it doesn't have the same foundation.

I think that one of the arguments we have made about the model litigant rules is that they do focus a bit too much on the economic disparity and a bit less on some of the other things that should be considered in the public interest. Obviously, that is not going to work so well if you start expanding the groups. I think making these more effective might involve having another look at what other obligations government litigants have because of their public interest role as apart from their economic might, if you like. The other thing I think is, if you make these too generally applicable, then there's a danger that they just become part of the landscape and no-one pays any attention; so I think that the knowledge that they apply to government lawyers gives them some greater force than they might have than if they apply to lawyers in large organisations, say.

DR MUNDY: And, presumably, they should equally apply to all activities conducted on behalf of government when the matters are briefed out.

DR LE MIRE (UA): Exactly, yes. If the complaints mechanism was made more

robust, what sort of penalties - if "penalty" is the right word - for transgressions do you think might be appropriate?

DR APPLEBY (UA): I think if they are talking about the ombudsman, you would feed into the ombudsman's jurisdiction in terms of making recommendations for redress, and I think that you shouldn't try to limit - the beauty of the ombudsman is the flexibility. It can range from coordinating an apology and sort of a mediation between the parties, if it feels there has been a wrong, all the way to recommendation for payment of compensation, if that's where the wrong has occurred; so I think that perhaps the beauty of the ombudsman is the remedies, or the recommendations for remedies could be very broad, and I think that that would be appropriate, and it just needs to be tailored to the transgressions.

One of the problems with leaving it with the courts in the way that it's currently enforced is they have very blunt tools. It's costs orders or staying of proceedings, and that's all that has been able to be used up until this point.

DR MUNDY: So really the ombudsman is pretty well set up to do this job, other than the fact that the ombudsman can never do more than recommend. At least the court, if it makes a costs order, can enforce it, whereas the advice of the ombudsman is - a bit like the advice of the commission really - government agencies and governments can take it or leave it; so that would be the downside. Is a report of the ombudsman of any value in subsequent litigation to a party who felt they had been sufficiently aggrieved that they would have a cause of action?

DR APPLEBY (UA): I'm not sure whether, it would depend how legislation was drafted where a cause of action might arise for a breach of the model litigant obligation.

DR MUNDY: So it's currently a creature of delegator, a legal services direction is a - - -

DR APPLEBY (UA): It's a creature of delegated legislation, and it doesn't give rise to a cause of action, so it specifically states that, so that would have to change if that sort of redress were available.

DR MUNDY: And that would mean it would presumably need to find its way into primary legislation to be given that capacity.

DR APPLEBY (UA): Certainly, the prohibition on it being a cause of action at the moment is in the Judiciary Act in the primary legislation, so that would have to be amended. I think it's about 55Z(h) or something like that.

DR MUNDY: All of those, all those Zs.

DR APPLEBY (UA): The ombudsman makes recommendations, the reports are public. Generally speaking, there is a large amount of cooperation between government agencies and the ombudsman in relation to making sure those recommendations come to fruition, so even though it's a toothless tiger in a formal sense, it has been a very effective tiger in a practical sense, and I don't think we should underplay that aspect of the ombudsman.

DR MUNDY: And the information is in there and, presumably, will come to the attention of one of the senators in the estimates committee and that will cause a particular agency grief.

DR APPLEBY (UA): Or the attention of the media. It's a publicity transparency, it's not within the agency.

DR MUNDY: Anything else?

DR APPLEBY (UA): I don't think so.

DR MUNDY: Thank you so much for coming all this way.

DR APPLEBY (UA): Thank you.

DR MUNDY: You have come even further than the small business commission. Thanks very much. Thanks for your submission, and if there's anything on reflection that comes out today, just shoot us an email and - - -

DR APPLEBY (UA): I will send you an email at least with that case name.

DR MUNDY: Yes, that will be very good. Thank you.

DR APPLEBY (UA): Thank you.

DR MUNDY: Could we now have the Aboriginal Legal Rights Movement, if I'm not too far ahead of time to inconvenience you. We have a plane to catch to Perth this evening, you see. Thank you for being here early. When you get settled, could you please state your name and the capacity in which you appear and perhaps make a short opening statement.

MS AXLEBY (ALRM): My name is Cheryl Axleby. I am the chief executive officer of the Aboriginal Legal Rights Movement.

MR CHARLES (ALRM): And my name is Christopher Charles. I am the director of legal services. I am the chief lawyer of the Aboriginal Legal Rights Movement also. We are an Aboriginal Legal Service funded by the Commonwealth Attorney-General's Department as part of the NATSILS umbrella.

DR MUNDY: Or now the Department of Primary Industry?

MR CHARLES (ALRM): I'm sorry?

DR MUNDY: Are you still with the - - -

MR CHARLES (ALRM): We are still with the Attorney-General's Department.

DR MUNDY: Still with AGs, okay.

MS AXLEBY (ALRM): We have been told that we will remain with the Department of the Attorney-General.

DR MUNDY: I'm glad you understand that. Would you like to make a brief opening statement?

MR CHARLES (ALRM): We endorse the overall NATSILS' submission which obviously you have received as a broad response to the draft report. We also refer to our earlier November 2013 submission which was in more detail perhaps in relation to the same topics. We have put in a number of things that we think it will be helpful for you to hear from us about specific topics which affect us and which concern us.

You have asked for detailed explanations about good cooperation between state and Commonwealth officials and Aboriginal Legal Services. We are glad to tell you that we have an example of that. In the middle of last month, the Aboriginal Legal Rights Movement was responsible for putting on what was called a dry communities summit which was funded by Prime Minister and Cabinet, the liquor and gambling commissioner and the State Department of Aboriginal Affairs. We had representatives from most Aboriginal communities. We had the deputy coroner. We had the liquor and gambling commissioner, senior police, ALRM and doctors from

the Aboriginal Medical Service all talking about issues that arise from excessive alcohol consumption in remote communities and how to deal with it and how to get effective remedies against it through using the legal system.

Of course you would have noted also from the National Partnership Agreement report that ALRM is actually cited in that report for the work that we have been doing in the civil jurisdiction since the 1990s, working in the licensing court to get restrictive licence conditions to stop takeaway getting to remote communities. We think that is an overall benefit and a good use of the legal system by an Aboriginal Legal Service for the benefit of Aboriginal people and for a whole lot of other reasons as well. That's a generalised opening statement.

We also endorse what the NATSILS have said generally about the need for the continued recognition of Aboriginal Legal Services and for increased cooperation by the states and territories with the work we do for all of the reasons which were stated in the NATSILS' submission. That is just a generalised observation.

MS MacRAE: I guess one of the things that we have talked about a lot with many of the organisations that have come before us is the balance of work that you do between direct case work type assistance, education and information, and what you do in what might be termed the sort of law reform space and whether you see the funding pressures that you on you now necessarily changing the balance of that, particularly given statements from the Commonwealth that they are wanting to look more at frontline services and less at law reform.

MS AXLEBY (ALRM): I suppose from the perspective of the Aboriginal Legal Rights Movement board, we are very concerned about the proposed cuts to law reform and advocacy. Aboriginal Legal Services have a history of I suppose being the key agency in many states to highlight the needs and the struggles of Aboriginal people within the justice system and also across the board. Our perspective is that we are very concerned that there is a focus on that but from the Aboriginal Legal Rights Movement perspective, we don't actually have specific positions that do that. We actually share that within the responsibilities of many positions within the organisation.

I suppose from my own personal experience, I have got a history of being with Aboriginal Legal Rights for over 20 years on and off. To see key significant inquiries such as the Royal Commission into Aboriginal Deaths in Custody, the removal of Aboriginal children inquiry - there have been many significant reports that have actually commenced with Aboriginal Legal Services actually highlighting a lot of those concerns from an Aboriginal community perspective. I'm not really sure whether the government in its current context is trying to pare that back, whether it is about not having funding for services that might in some sense go against current government policies and positions. I think that is probably what a lot of Aboriginal

Legal Services feel and Aboriginal communities feel that and we see that currently in the current manner in which a lot of our services are being heavily cut.

In that context, we also get a lot of invitations by the state government to provide input into legislation and we quite constantly do that through many of the legislative changes that happen throughout the state government here in South Australia. We actually do that by invitation. We are happy to participate and to continue to participate because we feel it is very important that the government understands the impact of its legislation as it currently does in regards to incarceration rates of Aboriginal people, which we are seeing ever increasing.

MR CHARLES (ALRM): Obviously we endorse that. That is very much the strength and tenor of what the NATSILS' submission says really, particular about the importance of the states being held accountable by your commission, which is what you have done in your draft report and we are very grateful that you did state those things about the need for states to take some responsibility for the areas of legislation where they have a huge impact upon basically making our services almost untenable because there is so much more to do; there is so much more demand; there is so much more severe consequences for Aboriginal people, particularly with changes to the criminal law legislation, bail legislation and so on and so forth.

The consequence is that we have little accountability but massive results for us. The incarceration rates speak for themselves. The rates at which Aboriginal children are taken away in the need of care jurisdiction speak for themselves. Again those are matters which were covered in detail in our November submission and in the NATSILS' submission.

MS AXLEBY (ALRM): I suppose my position on that is that we are seeing a great trend in regard to Aboriginal funding being put through a lot of mainstream agencies. Our concern is also that a lot of those agencies are not meeting their targets and yet are not subjected to the same level of scrutiny that Aboriginal services are. I suppose we would like you in that context as a commission to actually look into that in that context because it is important for the self-determination of Aboriginal communities where good programs have been running for many years and have been pared back because of the cuts in funding. It is not because of governments. It is that the current policies of the government of the day really impact - to be able to improve the quality of services to Aboriginal people.

What that in a sense does - it means that a lot of non-Aboriginal services are getting increased funding to provide these services and yet are not able to do it to the same quality that Aboriginal services can deliver.

MR CHARLES (ALRM): May I provide a specific example of what Cheryl is talking about? As a result of the last government - we try not to be party political

about this but it is just a fact. As a result of the last government, we got a little bit of extra money which meant we were able to employ another civil lawyer and another child protection lawyer - enormously important because we had one person attempting to do the whole thing; let's say all of the child protection work. Now we have got two other lawyers to help her to do that work and it means that the burden is not so great. All of those positions will be closed by the end of this year because what has been euphemistically called the Dreyfus money which came to us to enable us to employ those extra lawyers ran out or will run out and the second tranche of it has been taken away.

We say that for all of the reasons specified in our first submission, the child protection work is terribly important in the context of the Aboriginal community. It is about protecting and preventing children from being chewed up through the child protection system and then the youth justice system because we have seen enough of that. Children who start in need of care then wind up in the juvenile court and wind up in the adult court. It is a commonplace. We say, look, we actually had the resources to deal with that, to begin to deal with that more effectively, and it was that particular new money which was of enormous importance to us, which has been taken away. We think that's most unfortunate. We're not being party political about that. We just say it needs to be seen into the context of how we're running our services and what we've like to be able to do.

DR MUNDY: You mentioned that you had hired someone to do civil law work and that is the primary focus of our inquiry.

MR CHARLES (ALRM): Yes, well, that's why we mentioned it.

DR MUNDY: We are interested in particularly the way that the need to meet criminal matters, particularly with legal assistance bodies, impacts on those issues. As you would be aware, and we acknowledge readily throughout the report, at the end of the day, the really intensive uses of the civil justice system will quite often present with criminal matters as well.

MS AXLEBY (ALRM): Correct.

DR MUNDY: I am sure that is probably even more so the case with profoundly disadvantaged indigenous people. But one of the many civil disputes - and I think there is a general rule - are amenable to other forms of resolution other than the courts, and one of the observations that has been made to us is that the various approaches - we will call it ADR in the broad - which might be acceptable in many contexts do not often work for indigenous people. I am interested in any views that you have on that, and are there any particular circumstances where they might work? It might be family matters as opposed to solving a consumer dispute, say, and whether there are particular groups of indigenous people for whom those things - for

example, people who live in remote areas as opposed to indigenous people who, say, might live in an urban context?

MR CHARLES (ALRM): We've got a very clear example of that, sir. Recently, we were called down to the Supreme Court by a judge because proceedings had been entered by the Crown because there was an application for some money to be spent on a funeral. There were two sides of the family who disagreed about where the deceased should be buried. It was a most unfortunate situation. There was not going to be any winner or loser, but the matter had been languishing for so long that the Department had simply taken it to Court and said, "The Court must make a declaration as to who should have the right to bury," essentially, and there were two disputing Aboriginal parties.

Eventually, the Aboriginal Legal Rights movements gave limited funding through our briefing budget to both parties, because we didn't want to be seen to be party to the dispute by acting for one party and not the other, so we funded both sides. Eventually, the judge had to make a decision. The case is *The State of South Australia v Smith and Another* [2014] SASC, Nicholson J. It might be worth your while to have a look at that judgment, in my submission, because it really highlights this point that the litigation was forced by the Crown because nobody could resolve it. What we say about that dispute is that cried out for mediation and that - - -

DR MUNDY: I think we have heard a couple of matters of non-indigenous people in estates which were ripe for mediation, and why these matters are being dealt with in the Supreme Court is beginning - - -

MR CHARLES (ALRM): Absolutely.

DR MUNDY: - - - to beggar belief for us.

MR CHARLES (ALRM): Absolutely. What we say is that culturally-specific, culturally-trained mediators who are able to deal with these very distressed families, obviously, because there has been a death and to get them to come to a solution which they would find acceptable is obviously much better than an unfortunate Supreme Court justice having to make an impossible decision. I mean, it is really the Judgment of Solomon. What on Earth do you do?

DR MUNDY: Just while we are on this whole general question of the resolution of people's affairs after they pass, it is something I think we may have to say something about. Are these sorts of disputes - perhaps not to the extreme resolution of having to trouble one of the Supreme Court bench members - but are these relatively common occurrences which could be better dealt with in some form of - - -

MR CHARLES (ALRM): Absolutely.

DR MUNDY: - - - I do not want to say "administrative", but that is close to the mark - some sort of administrative or tribunal process whereby formality is much less important and the resolution of the matter is all that really counts?

MR CHARLES (ALRM): There's another answer to that, sir, and it is a simple point. Although the judgment did not give a great priority to the question of people making a point, we point to the fact that it's not the ultimate determination. Even if somebody makes a will saying, "I want to be buried at X place," that's not going to be determinative of the matter, ultimately, but what we say is that it will be a big help. So we are, in fact, through the Aboriginal Legal Rights Movement, through our newsletter, making specific recommendations to the Aboriginal community at large, "For goodness sake, make a will and in your will specify, on your decease, where you want to be buried."

DR MUNDY: Does that at least give someone a - - -

MR CHARLES (ALRM): Precisely. That's a partial solution to it.

MS AXLEBY (ALRM): But on the other side of that coin is that we're restricted by service delivery directions to be able to provide support services for people to be able to make wills, which we find frustrating in that context as well. So our service delivery directions tell us that we're not able to provide that support - - -

MR CHARLES (ALRM): Exactly.

MS AXLEBY (ALRM): - - - to assist people in the community in regards to assistance with wills and actually helping them to actually develop the wills whereas, in the past, Aboriginal Legal Rights used to do that very well.

DR MUNDY: When did that occur?

MS AXLEBY (ALRM): I'm not sure. Chris, you might be able to answer that?

MR CHARLES (ALRM): It was essentially around the time when the tenders took place. It was early to mid 2000s, when the Commonwealth really became very strong in determining what kind of cases we could and couldn't do.

DR MUNDY: Presumably, I would have thought, the cost of providing such advice is relatively small. It is the sort of thing you would expect was amenable to some sort of standardisation and so on, and would it be your view that matters like the one Mr Charles outlined to us, but more broadly, could be - not perhaps in all cases, but certainly in many - avoided at significant cost to your limited budget and also the time of the Court?

MS AXLEBY (ALRM): Absolutely, and we are a very strong advocate in regards to looking at developing, you know, culturally safe mediation support services for our community because we think that not just only with wills and death, et cetera, you know, family law cases. There's a whole range of areas that we think that would greatly benefit our community. I know that when Native Title came into being that there was a consultancy in Queensland, an Aboriginal mediation consultancy, that went around the whole of Australia and trained up Aboriginal mediators and it was a very good program. I think it was about a six-week run program - it might have even been a 12-week run program, I think - but it was a very good program and the aim of that program, that training, was to actually train facilitators in regards to negotiating and talking to people about the native title legislation, and particularly to be involved in helping claim groups with disputes.

That was a very good program, and we still see some of the mediators around doing that kind of work today. That's the sort of level I think that we need in regards to actually having trained mediators within our community because I think there's also a role of Aboriginal elders to be trained up, so that it is more culturally specific, to actually do that, similarly as they do here in South Australia with the courts, where they actually have Aboriginal elders doing representation, support representation, and providing advice to magistrates in the Nunga courts here in South Australia.

MR CHARLES (ALRM): May I mention, just to further Cheryl's point, there was this organisation called NADRAC, the National Alternative Dispute Resolution Aboriginal Corporation, or whatever it was. That put out wonderful reports, which we endorsed with great enthusiasm. It was terrific, and yet the Commonwealth funding to facilitate it and make it happen never occurred, but the impulse from the Commonwealth, having recognised the importance of it, having written reports about it, seen the virtue of it, was all done, and yet the impulse to put it into practice lamentably was lacking. We say, look, again, your Commission might want to have a look at this. Let's revisit NADRAC and let's revisit the need to create effective alternative dispute resolution - - -

DR MUNDY: I think it is fair to say that NADRAC is dead, but its constituent individual parts continue to be vibrantly alive.

MS AXLEBY (ALRM): Yes, there you go.

DR MUNDY: We have had significant engagement, particularly with Professor Sourdin and Gormley SC of the Sydney bar.

MS AXLEBY (ALRM): I suppose, just also getting back to the question where you were talking about the child protection context, prior to coming back to Aboriginal Legal Rights, I worked 10 years in child protection and also in youth

justice. So from my experiences, and particularly when we're looking at Aboriginal families and at the point of removal of children, there already is legislation in place within the state for a process in the context of actually have family conference meetings with families to actually look at the best opportunities for children, looking at and exploring, I suppose, the opportunity for families to actually have a voice. I can say that from my experience that I have not seen that work to the flavour of the context of the legislation that it was developed under and hence I feel that having an external independent context for that would be really valuable, because I think having them sit under the one state body, it doesn't allow for those departments to, I suppose - well, not for Aboriginal families in particular to actually be able to have an independent voice and a representative at that level, ensuring that the departments are sticking by their relative policies and processes as well.

MS MacRAE: Just since you have raised child protection, when we were talking to the Family Relationship Centre in Port Augusta, they were talking to us or raised a concern around the lack of a national register in relation to child protection and their concerns that people might move interstate and fall through the cracks and disappear and have some very distressing consequences as a result. Would you have a view about that? Is that a concern you would share?

MS AXLEBY (ALRM): Well, I can only talk about from my experience when I was manager of a (indistinct) office in that context, and I know that there were a couple of cases and one similar case here in South Australia where had that been in place, at least for the children, what was discovered here in South Australia wouldn't have been the case.

MS MacRAE: Are there other issues that you would like to speak to around the intersection of Commonwealth law and state and territory law in family law and then child protection and domestic violence? Do those issues around the crossover between Commonwealth and state responsibilities impact on on-the-ground services and how women in particular fare in legal proceedings and other dispute resolution?

MS AXLEBY (ALRM): Yes. Again from my experience - I was working in the Public Service for over 10 years - family violence, child protection, youth justice were probably key areas that I was fairly involved in and what I have seen is there has been a lot of goodwill by the Commonwealth to try and get a national focus on these issues within the states. I think some of the dilemmas about that is - well, if we look at the Aboriginal Legal Rights Movement as a classic example, where other legal services in other states do get state support. Here in South Australia, it's unfortunate that we don't get that same support by the Attorney-General's Department here and it's not a criticism of the Attorney-General's Department but it's a reality in that context where there could be a lot more collaboration and looking at, I suppose, working more effectively together to try and address some of the key pressure point areas that we are currently facing here in South Australia. In the

context of some of the experience I have seen with Commonwealth funding coming through state agencies - my experience again - that a lot of the Commonwealth money that's put in there doesn't really get to reach the target group from my experience.

MR CHARLES (ALRM): Another example of that, I think, is from our tragic experience in the State Coroner's Court in 2002 and you can find it on the coroner's web site, the case of the death of Kunmanara Hunt, who was a young Pinjarra woman who tragically died from the effect of sniffing petrol eventually. She had a number of children who were probably affected by in-utero petrol which made it even more complex as a case. She was unable to look after them. The Welfare Department knew nothing and it relied upon the APY Women's Council to do all the child protection work to look after those babies.

MS MacRAE: Yes.

MR CHARLES (ALRM): And obviously there were cases that cried out for attention and yet the state bureaucracy was not dealing with it and the Women's Council did the whole lot. I think that case speaks for itself and not even inter-state. That's within the State of South Australia and I just simply refer you to the State Coroner's Court findings, the 2002 findings in the matter of Kunmanara Hunt. It speaks for itself. Further than that, obviously there were always going to be overlaps and confusions as between Family Court orders and, for example, state restraining orders. That system frankly needs to be rationalised and it never has been. We note that there is the inter-state or intra-state legislation now in relation to the tri-state cross-border legislation that hasn't had a lot of impact yet, I think because it's such complex legislation actually.

DR MUNDY: This question of multiple orders that relate essentially to the same matter, the same set of people - and Angela and I both have a close association with Western Australia, where these problems don't seem to be as prevalent. They still happen but they are not as prevalent. Is there something that can be done by way of state judicial officers exercising authority under Commonwealth law as they do, and particularly in the superior courts, every day of the week? We seem to be able to trust - - -

MR CHARLES (ALRM): There's nothing in the constitution, sir, which prevents a state court from being vested with the jurisdiction.

DR MUNDY: And indeed all Commonwealth criminal matters are brought from the Supreme Courts.

MR CHARLES (ALRM): There are other areas where state courts are vested with federal jurisdiction. It's not just - - -

DR MUNDY: Would a set of circumstances where these matters could be dealt with collectively by one judicial officer significantly improve outcomes for people?

MR CHARLES (ALRM): One would think that the confusion that occurs at the moment between state restraining orders and Family Court orders speaks for itself and the resolution to that would appear to be possible by vesting state courts with federal jurisdiction to a certain point.

DR MUNDY: It would mean if there were two orders, they would be issued by the same person at the same time.

MR CHARLES (ALRM): Precisely.

DR MUNDY: There is no question of malfeasance on behalf of these judicial officers but you have two people doing something similar at different places.

MS AXLEBY (ALRM): That's correct.

MR CHARLES (ALRM): You have the interaction of the two orders and then the obvious example is the Family Court order makes allowance for visitation rights upon the child and then there's a blanket state restraint order which makes no such rights or puts no such allowances, even though the federal officer has thought about it very carefully and made a very careful decision on it, and that's the sort of example which speaks for itself.

DR MUNDY: In those circumstances, is access then made available of the - - -

MR CHARLES (ALRM): Eventually people work it out and seek a variation to the state order and it's very complicated and it takes for ever and it's a gross duplication of effort.

DR MUNDY: And presumably causes no end of distress and confusion to the parties.

MR CHARLES (ALRM): Precisely.

DR MUNDY: Who probably find the whole judicial process somewhat alien to them and very threatening.

MR CHARLES (ALRM): Precisely.

MS AXLEBY (ALRM): That's right and in saying that, like when I think about the difference between the family law context court system, which I think from my own

experience again is probably a better system to actually - even with some of the child protection issues in that context because you have got, you know, the Commonwealth being a little bit more removed from the state agencies who are actually performing that role. Hence there's a lot more again, I think, balance in regard to decision making being made about family's rights if that were the case.

DR MUNDY: I will just mention the NATSILS submission. I think it's fair to say that NATSILS was relatively comfortable with the notion that culturally appropriate ADR wasn't a bad thing.

MR CHARLES (ALRM): Absolutely.

DR MUNDY: They do note at page 5, I understand, that this would lead to an increased demand for the provision of Legal Aid services.

MS AXLEBY (ALRM): That's correct.

DR MUNDY: Is this because your view is that a legally assisted form of ADR is probably the most appropriate?

MS AXLEBY (ALRM): I think it's also about the confidence that the Aboriginal community has within Aboriginal legal services to be able to play that advocacy in a support role.

DR MUNDY: The natural agency to do it, so why go and skill up someone else.

MS AXLEBY (ALRM): Yes, absolutely and in that context, you know, you would probably get a lot more Aboriginal people willing to undergo that process if there was that support and opportunity there.

DR MUNDY: It's your view that those people doing that work would necessarily need to be lawyers or simply appropriately trained ADR practitioners employed by yourselves. It's what are we here with: are we looking to put the brand of your organisation, with its trust and its reputation, in the room or do we need to put your lawyers in the room? Because I'm just trying to understand. It's not to say we are going to put anyone in the room but an appropriately trained ADR practitioner who may not be a lawyer.

MR CHARLES (ALRM): The simple answer is this. I suspect that having regard to the demand that we get at the moment, you could just about have a full-time highly qualified ADR person to resolve the South Australian disputed funerals. We're getting a lot of them. Not all of them get into the Supreme Court but we are getting them in the office quite frequently. As I say, we can deal with it partly by if we were given the means to do more about wills, that would help. That would help,

but the demand is there now and there are, I suspect, a good deal of other kinds of disputes between families which are really not amenable to legal resolution but which are better resolved by properly skilled mediators.

DR MUNDY: Indeed, I think it was a question we put to the Family Relationships Centre at Port Augusta, would they be - a natural organisation, if we wanted to get these sort of wills and probate matters - you know, will, state matters - out of the courts and into some facilitated place, would they be an appropriate organisation to deal with it, and their answer was "well, we deal with families". They're mostly - not always, but a large number of them - - -

MR CHARLES (ALRM): We point to the very specific need which Cheryl is very strong about, about culturally trained to deal with specific issues within Aboriginal families, between Aboriginal families and it's very culturally specific, it needs a lot of extra learning to do it properly.

MS AXLEBY (ALRM): Just on that point, just going back to the question that you raised, I think you'd have a balance of both. You know, legally qualified practitioners and in Aboriginal Legal Services, one of the reasons that we're so unique is that we actually have Aboriginal field officers who are that connection and they're paralegally trained, and maybe getting them skilled up in the mediation processes would be ideal. So you've got again - and again, there is a really important CLE, Community Legal Education, context that should go with that.

DR MUNDY: We probably need to draw this discussion to a close but - - -

MR CHARLES (ALRM): Could I raise one more topic, sir?

DR MUNDY: Yes, certainly.

MR CHARLES (ALRM): One matter which we thought was very important was your draft report said a lot about ombudsmen. That's terrific. What we say is that there's a specific context where it needs to be extended and the state ombudsman of South Australia has a jurisdiction which covers prisons and Aboriginal prisoners by implication. So also prison inspectors under the Correction Services Act have powers to inspect prisons. Their jurisdiction is dramatically limited, however, to whether or not the discretions under the existing Act are being properly administered, which means it is a very narrow focus and the department can get away with an awful lot, to be quite blunt.

What we say is that the Western Australia model of a prison inspector with specific Aboriginal prison inspection standards is a much better result and a much better outcome for Aboriginal people in particular and for prisoners we suspect in general, and for the improvement of the standard of the prison administration, and we

say there is a process of implementation of the optional protocol and the convention against torture. The obvious model for that in Australia is the Western Australia Prisons Inspectorate and we say that would provide independent standards of consideration of whether or not prison administration is acting properly, whether or not the particular needs of Aboriginal prisoners in particular are being properly met.

For example, we note that the Western Australia inspector has written specific Aboriginal inspection standards about the particular cultural needs of Aboriginal prisoners. Now in South Australia it's all banged in together, frankly, and it's unsatisfactory. Look, when we say that we are not criticising the state ombudsman. We are simply saying that it could be done better by a Western Australia style prison inspectorate and we site the example, for example, in South Australia the state ombudsman has recently done quite a lot of work on the appalling standards whereby prisoners who are being hospitalised are shackled to their beds, and the South Australian ombudsman did a big report on it, and looked at it in great detail, and came up with strong recommendations and some strong observations. That's got to be of some narrow focus, but it doesn't deal with the systemic question as an inspector-style model could do.

DR MUNDY: Just on the discussion we had about wills and similar, if you'd like to reflect on that discussion, perhaps discuss it with some of your colleague organisations elsewhere, we'd be very happy to receive a subsequent because it's an issue that's only come - - -

MS MacRAE: Come to use from the hearings, really.

DR MUNDY: - - - come across and we think it may lead to much better outcomes for people and much less costs to the system.

MR CHARLES (ALRM): I know from talking to my colleagues that the other Aboriginal legal services have the same problem with these very distressing cases of contested funerals. It's not just South Australia where they happen, but the South Australian Supreme Court reports have got, to my knowledge, three Supreme Court judgments. One went to the Full Court, for goodness sake, about the contested funeral. It's not as though there are - other than emotional and family distress issues which are being litigated, it's not as though there's going to be a big damages claim which is appropriate use for a civil court. It's putting a judge in the impossible position of having to make Solomon's judgement.

MS AXLEBY (ALRM): And also the cultural context of it does get lost within the legal system.

MR CHARLES (ALRM): Absolutely.

DR MUNDY: It's an issue particularly in Indigenous communities but also a lot of other people, too. Thank you very much for your submissions and your time today.

MS AXLEBY (ALRM): Thank you.

DR MUNDY: We are going to have a brief pause while the next witness comes up.

DR MUNDY: Could you please state your name and the capacity in which you appear and then perhaps make a brief opening statement.

MR LINDSAY (SABA): Sure. My name is Alan Lindsay and I'm appearing as a representative of the South Australian Bar Association. I think I emailed through just some dot points yesterday and there are a small number of points that I would like to address in relation to your draft report. My understanding is that you have or will receive responses from the Australian Bar Association and from the New South Wales Bar.

DR MUNDY: We have certainly seen the New South Wales Bar Association submission and them in person. We haven't seen the national Bar. I'm looking at Mr Smith and he is going to tell me we will see them in Melbourne next week.

MR LINDSAY (SABA): Understanding what those associations have said to you, there are a couple of additional points that I wanted to make, some of which are about local conditions in South Australia. Others aren't. The first one is in relation to draft recommendations 10 and 10.1. The underlying theme is the distinction between an adversarial process and adversarial behaviour and it emerges in those draft recommendations, in particular draft recommendation 10.1, the restrictions on the use of legal representation in tribunals, which as I read it is based significantly on what's described as creeping legalism, but the draft report has at least an anecdote of a judicial officer recording occasions when he was not particularly assisted - - -

DR MUNDY: We didn't feel the need to use all of them.

MR LINDSAY (SABA): Yes, but equally I understand there are anecdotes of judgments where they did receive assistance. The point I wanted to make about that is that - and although it's implied in the draft report, it doesn't seem to be expressed; that is, the nature of the adversarial system which assumes that where there are disputes of fact or opinion, that a particularly good way of getting to the bottom of those is to test each version and for a neutral person to make an assessment.

It, one has to accept, can be an expensive way of doing that but it's an issue of the quality of the ultimate decision and that is an accepted advantage of the adversarial system. The SSAT is used as an analogue for tribunals. It really does have a more inquisitorial role than a number of other tribunals.

DR MUNDY: If I might interrupt, the issue we have here - and we perhaps didn't express it as well as we could have - was there are a number of if not tribunals then certainly lists within tribunals that have been set up deliberately so that they would not be adversarial, that they would be more inquisitorial, typically led by a tribunal member but sometimes a judicial officer working within that tribunal.

The issue here - and we will correct our language and make it much more apparent - is that there does appear to have been in those foras which have been deliberately established to operate in that way with a capacity for the presiding officer, whatever the nature of that office might be, to allow by leave representation, not necessarily by a lawyer but probably more often than not by a lawyer, where one party might be disadvantaged. They might suffer some form of disability or something.

The only observation we were seeking to make is that the characteristics of those fora which were established to be non-adversarial and participant-driven - the leave has been easier to get over time and that's the point we're trying to make. We're not trying to make a blanket observation about the merits or otherwise of adversarial systems, but rather in those foras which for apparently good reasons have been established to not be of that character, they appear to be creeping that way.

MR LINDSAY (SABA): Yes.

DR MUNDY: I think our point would be if you want them to be adversarial, make them adversarial by virtue of their design, because it leads to expectations of people and things like that.

MR LINDSAY (SABA): Yes, I understand that. The point I'm making is that if I think as it's proposed one of the filters for whether or not legal representation might be allowed is whether it would be of assistance - then the point I'm making is that that process of testing the evidence will almost always be argued to be of assistance, so it's quite a coarse filter.

The second point I make about it is to the extent that that criticism, if you like, is aimed at adversarial behaviour as opposed to the adversarial system - that is, representatives perhaps going outside of their duty. At least in South Australia and I think nationally our bar rules already impose duties of getting to the heart of the matter and getting only to the heart of the matter so far as that can be - - -

DR MUNDY: I think, though, you will concede by virtue of your experiences that some adversarial behaviour, particularly seen not necessarily by members of the bar but by other persons who may not necessarily even be solicitors, is not always directed at getting to the matter.

MR LINDSAY (SABA): Yes. I recognise the problem. The point I'm suggesting is that in relation to at least the Bar Association a remedy is an existing one and it's a remedy that can be used and managed by those controlling the tribunal. It doesn't require a systematic change from our point of view.

DR MUNDY: Okay. I take your point.

MR LINDSAY (SABA): The second issue that I wanted to address is recommendation 11.1 and 2, the fast-track recommendations. The point that I wanted to make on the basis of our local experience is that there is a significant relationship between funding and case management. As you probably know, in the District Court and Supreme Court in South Australia the case management is done by masters. Most of the loads of each of those courts are crime; 90 per cent of thereabouts. The judges do not have control of their calendars. They come to civil cases irregularly and for short stints.

So all of the problems that are listed in the draft report emerging from case management we experience a lot when we're managed by masters. Masters exercise interlocutory caution and judges, when the case gets to them in our jurisdiction a day or a couple of days before the trial commences, might bring a different perspective to it. The uncertainty of case management, the repeated attendances, all of those problems, in our experience even with a sufficient number of qualified masters ends up in producing a number of those problems and the issue - it has been raised repeatedly over a decade.

The profession has expressed its preference for docket management and case flow management but in a system where the civil work is the minority of it, the response we get is, "We don't have the funding for it. We don't have the funding for judges to do it." Our experience has been that intermediate management by masters is very difficult to improve upon, so we think in our jurisdiction there is quite a connection to funding.

DR MUNDY: Would you expect that this could be a common issue - I guess what I'm trying to get to is, is this fundamentally a question of size and scale inasmuch as where there is both civil and criminal matters, the criminal matters are going to predominate. They typically will, for good reason perhaps, get brought on more quickly. That makes the docket system harder to manage. An absence of framework of a specific list of civil judges - you're probably going to really struggle. The point that has been made to us by presiding officers of some of the more specialist environment courts is that they're relatively small and they just have to work in a different way. Is that essentially what you're - - -

MR LINDSAY (SABA): Yes, I think so. I can give you another example I'm familiar with; for example, the Northern Territory, which has intermediate management by masters, predominantly a criminal case load. It experiences the problem less than we do because it has a smaller number of judges and it has one master and more predictability in the way those things are handled.

DR MUNDY: It's so small that it actually makes it easier, in a sense.

MR LINDSAY (SABA): Yes, that's right. We are a jurisdiction that's bigger than that. We have a much larger number of judges, very broad experience, no selection criteria for judges, no specialists lists, no performance indicators for judges.

DR MUNDY: A bit like commissioners.

MR LINDSAY (SABA): Yes. In our size jurisdiction it's a significant problem.

DR MUNDY: Okay, yes, and I think it's probably fair to say that the Federal Court is peculiar in its own right and may actually be very well set up for this - it may be a horses for courses matter.

MR LINDSAY (SABA): The Federal Court not having a criminal jurisdiction has that advantage. I have always been struck by the fact that I think it's now the last four heads of the rules committee that used to manage civil procedure reform in South Australia in the state, the last four of them have ended up as Federal Court judges.

DR MUNDY: All right. We do take your point. I think your point basically is that circumstances might rule the case.

MR LINDSAY (SABA): Yes, and so with all the will in the world in our jurisdiction we need more funding to be able to achieve that.

DR MUNDY: Yes. I think you had some comments you made about chapter 12?

MR LINDSAY (SABA): Yes.

DR MUNDY: Sorry, I hope you're happy just to deal with these as we go and have a bit of a chat about them.

MR LINDSAY (SABA): Yes. I did also want to make a comment about draft recommendation 11.2 and it's a general comment as well. It's hard to speak against the idea that more data should be gathered, but our experience is that it has been tremendously difficult just gathering data from courts and courts administration. Adding the task of putting private data into that we would expect will be slow. Even if one gathers much more data, the analysis of it is never, in our area, going to do much more than assist what is generally robust trial and error, is our approach to change. The data is subject to any kind of analysis. We are ultimately a trial and error area and the issue is the robustness with which we approach change.

DR MUNDY: We probably better than most agencies understand these challenges.

MR LINDSAY (SABA): Yes. So I think that's a priorities issue. No doubt extra

data will be valuable but one wouldn't want to delay waiting for that.

DR MUNDY: No. Welcome to our world.

MR LINDSAY (SABA): Yes. I think the commission understands also the issue of not being able to measure quality pursuant to the RoGS Report.

DR MUNDY: Yes. We have received some robust advice from the former chief justice of New South Wales on this point and more recently from the chief justice of Western Australia who I'm sure will give us another serve tomorrow.

MR LINDSAY (SABA): Yes. I have followed in the RoGS Report the inability to define quality indicators for about a decade now I think. So 12.1, the pre-action protocol, some local information I guess, there is a committee that has developed some pre-action protocols, as the draft suggested, targeted to particular areas and developed with the assistance of members of the profession in those areas. So there's one in medical negligence and one in building and construction. They are the two targeted ones. They will be run somewhat experimentally.

DR MUNDY: Is it possible for us to get copies of those?

MR LINDSAY (SABA): Yes. They are in what's now called - it used to be called Practice Directions. It's now called the Civil Supplementary Rules. They come into force on 1 October. I will email them to your staff.

DR MUNDY: Yes, if you could email them to our staff, that would be helpful.

MR LINDSAY (SABA): So that is a result of discussions about trying it and trying it in target areas and each of those have been developed by looking at the Wolff report, the Jackson analysis of the Wolff Report, and comparing it to local conditions.

DR MUNDY: So picking these two areas, would I be right in saying you have landed on them because quite often there's a lot of argy-bargy at the start about facts and documents and evidence and they seem to be areas in which it would be both rich in those sorts of questions.

MR LINDSAY (SABA): Probably slightly different reasons for each. Building and construction, because they are disputes and if they go off the rails are terrible, so there is a serious impetus to get at it early and to have a structure for getting at it early and it's a rich area for disputes, and also because in our jurisdiction there are a relatively small number of people that practice in that area, so the chances of getting them to abide by a protocol is high.

DR MUNDY: They have all got an interest in this.

MR LINDSAY (SABA): Yes. In medical negligence it's slightly different and one of the reasons we chose that was because there are probably only one or two insurers and we engaged them in the process as well as plaintiffs and we're rather hoping that they will collect private data about the effectiveness of the pre-action protocols.

DR MUNDY: Is there an expectation - I mean, in a sense pre-action protocols act a bit like ADR in that they hopefully narrow the matters ultimately and at least seek to get a starting point on fact. I mean, presumably going forward, medical negligence claims which are ultimately insurance matters, we know that there has been some arrangements put in place in Victoria - not for medical negligence matters but I think motor accident matters and WorkCover matters - - -

MR LINDSAY (SABA): Yes.

DR MUNDY: - - - where there is a single statutory insurer.

MR LINDSAY (SABA): Yes.

DR MUNDY: That they have been able to work on a pile of pre-action protocols which have actually seen many more matters settle early, in fact settle without having to trouble the bench. Is that an expectation of this process that you have, that perhaps there will be less matters that ultimately go to trial?

MR LINDSAY (SABA): Yes. That's the entire point of it, yes.

DR MUNDY: Obviously those matters that do go, the expectation is that they will be dealt with more expeditiously.

MR LINDSAY (SABA): Yes. We have got a couple of slightly different features in our jurisdiction. There is an issue like a dual pre-action protocol in our rule 33 which is an obligation for parties to exchange contractual standard offers and counteroffers prior to the issue of proceedings. That has been around for a long time, it's relatively commonly breached and it doesn't have a component that requires people after they have exchanged offers to talk to each other.

So part of the medical negligence protocols in the building ones, it builds on that, it adds more substance to it and it adds a very specific ADR component. Our ADR component under the rules is a settlement conference that happens after institution of proceedings which is rather a waste of time and money to go from pleadings to a settlement.

DR MUNDY: The horse has bolted really, hasn't it?

MR LINDSAY (SABA): Yes. The intermediate step of converting the dispute into pleadings takes resources but doesn't add to being able to solve it. I guess the other thing I would say about that, and it's experimental, is we have now a thing called a litigation plan which is not well regarded yet by the profession, the idea being that if proceedings are instituted, the ability to manage it will have, first of all, the failed pre-action protocols plus a litigation plan that describes how the parties plan to run it from there and that might assist with the - - -

DR MUNDY: It's not well regarded because it's not well understood?

MR LINDSAY (SABA): Regarded as additional work and not well understood, yes.

DR MUNDY: All right.

MR LINDSAY (SABA): Otherwise I have one general comment about costs which fits in in I think recommendation 13.2. It's specific to barristers in civil litigation which is: the alternatives to time costing for us are limited, if they exist at all. We only have our time. We don't have repeat clients and we can't share any result.

DR MUNDY: I think our thinking has generally been around - this is really about solicitors rather than barristers and, without meaning any disrespect, I think our economic approach is that barristers are really another cost to solicitors in a disbursement sense. No, I don't think we had any - there have been some members of the Sydney bar who have reflected to us that they do charge on a fixed fee per matter basis because they have got a pretty good idea - and to the extent that it's - but no-one has really raised with us the billing or charging issues; in fact there have been virtually no issues I think about the bar really at all.

MR LINDSAY (SABA): Yes.

DR MUNDY: I think to be fair we had expected to get some at the start but I guess the issues about reform of the bar seemed to have been much more expeditious than long-held issues about reform of the other legal profession.

MR LINDSAY (SABA): Yes. The other issues that the commission looked at don't apply so much to us either in that we sell only to solicitors who are sophisticated purchasers and in our jurisdiction no prices and check prices and understand value - and they're the ones that make the decision.

DR MUNDY: Do you have direct briefing in South Australia?

MR LINDSAY (SABA): We do in theory but I'm not sure of the extent of it in

practice.

DR MUNDY: I know when I was in private enterprise it was no uncommon, particularly technical matters around building contracts, that the company secretary would turn up, who happened to have a practising certificate, and introduce you to the relevant barrister and that was the last the company secretary would see the barrister because the instructions had been issued and Mr Smith was going to provide the rest of the detail.

MR LINDSAY (SABA): Yes. That happens but I wouldn't think it was a big part of the business here.

DR MUNDY: All right.

MR LINDSAY (SABA): They're the matters I think that I wanted to - - -

DR MUNDY: Thank you very much for taking the time to come and speak with us today. Are there any members of the audience who wish to make a comment? Yes? You will need to come up and speak but it needs to be very brief. Thank you. If you could state your name and the capacity in which you appear for the record please?

MR SNOW (CA): Chris Snow, Consumer Advocate. Following this morning's submission you made a very tempting offer this morning not to put anything more in but I think I have to just on the grounds of transparencies - - -

DR MUNDY: Yes, that's fine.

MR SNOW (CA): - - - seeing I have been rather critical of people; secondly, I did have a conversation with Mr Johnson this morning and I'm hopeful that we will be able to give you some professional accountancy figures rather than the rather rubbery ones that I have submitted. In light of what Mr Bailes said about the reason for the national trust account idea falling through, I think I will be strengthening what I said about that. They are the only two points for the submission but can just one question you asked this morning, I said it was a broad question about what consumers expect. I tried to give you a detailed answer rather than a broad one which was that consumers should expect lay control of the system with an awful of lay involvement in it.

DR MUNDY: All right. Thank you very much.

MR SNOW (CA): Thank you.

MS MacRAE: Thank you.

DR MUNDY: There being no further comments I adjourn these proceedings until 8.30 am tomorrow morning in Perth.

AT 3.41 PM THE INQUIRY WAS ADJOURNED UNTIL
FRIDAY, 6 JUNE 2014



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 PERTH ON FRIDAY, 6 JUNE 2014, AT 8.32 AM

Continued from 5/6/14 in Adelaide

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DR MUNDY: Good morning, and welcome to these hearings of the Commission's inquiry into Access to Civil Justice Arrangements. My name is Dr Warren Mundy and I am the Presiding Commissioner in this inquiry and with me is my colleague, Commissioner Angela MacRae.

Before proceeding any further, we would like to pay our respects to the original owners of the land on which we meet today, the Noongar people, and indeed our respects to the elders past and present of all indigenous nations who have continuously occupied this continent for over 40,000 years. The purpose of this round of hearings is to facilitate public scrutiny of the Commission's work, to get feedback and comments, invite people to put their views on the record that we may draw on them for our final report.

Following these hearings in Perth today, there will be hearings in Melbourne, Hobart, Darwin and Brisbane. Hearings in Canberra, Sydney and Adelaide have already been completed. This bit gets tricky; it changes day to day. We intend to complete the report and provide it to government some time in September in accordance with the Productivity Commission Act. The government must release the report within 25 sitting days by way of tabling in both houses of the Federal Parliament.

We do like to conduct these hearings in an informal manner, although I would note that under Part 7 of the Productivity Commission Act, the Commission has certain powers in the case of false information or refusal to provide information. The Commission to date has never had occasion to use those powers. As I said, these are informal hearings but we do take a transcript for the record and to ensure full transparency. One of the downsides of that of course is that it is very difficult for us to take comments from the floor and properly reflect them in the transcript, although at the end of the day I will provide a short period of time for any observer to make some brief comments. We do not require you to take an oath but do require you to be truthful at all times and the transcript will be available in a few days after the hearings.

In order to comply with occupational health and safety legislation, I am required to advise you of the evacuation procedures for this building. In the event that there is a "whoop whoop whoop" sound which indicates that there is a hazard in the hotel, an announcement will be made to ask you to immediately proceed to the nearest emergency exit and assemble in the carpark on the corner of Hay and Irwin Streets till the situation has been cleared by Mercure Hotel staff. Do not use the lifts. Wait at the assembly point for further instructions by hotel staff or the Fire and Rescue Service and do not re-enter the building or leave the assembly point until instructed.

DR MUNDY: That is the preliminaries. Could we please have Matthew Keogh of

the Law Society of WA? Once you get yourself settled, could you please for the transcript provide your name and the capacity in which you appear?

MR KEOGH (LSWA): My name is Matthew Keogh and I am the vice-president of the Law Society of Western Australia.

DR MUNDY: Would you like to make a brief opening comment, Mr Keogh?

MR KEOGH (LSWA): If I may. Thank you, Commissioners. I appear here on behalf of the Law Society of Western Australia which is the peak body and the voice of the legal professional in Western Australia. The Law Society is also a constituent body of the Law Council of Australia and I understand that yesterday the Commission will have received the Law Council's substantive submission which the Law Society - - -

DR MUNDY: Yes - about two weeks late, Mr Keogh.

MR KEOGH (LSWA): I understand that. That is something I will address in my remarks if I may. The Law Society had a great deal of input into that submission and so my remarks will be addressed towards that submission, with a particular Western Australian focus.

I thought it may be useful to give you a very brief snapshot of my own career and background in the access to justice space because it may open up some other areas or questions and dialogue with the Commission. My introduction to the law came through my grandfather who ran an outer suburban, semi-rural legal practice. His clients were largely farmers, those working on farms and those moving into the urban fringes of Perth from the 1960s through to the 1990s. Many of his clients were not well off at all and it is through speaking to him, my grandmother and my mother that I got to learn about pro bono and indeed he was a volunteer at one of Perth's first community legal centres, the Gosnells Community Legal Centre. It was not uncommon for him to receive payment in crates of oranges or bags of apples.

My mother ended up taking over that practice and it became mainly a family law practice, working in disputes of child access and the division of what really were the family's net debt position, as well as domestic violence. I ended up working mainly on small commercial matters - leasing of small properties, commercial disputes in the Magistrates Court, criminal matters, wills and probate. I also became involved in Starick Services which is a service in the south-east of Perth which runs women's refuges for victims of domestic violence. It also provides an outreach service, a particular innovative service providing trained officers, not lawyers, at police stations to assist those seeking violence restraining orders. One of those officers was also placed at the Armadale Magistrates Court.

I subsequently moved to work as a prosecutor at the Commonwealth Director of Public Prosecutions. Whilst I focused on commercial crime the office also prosecuted Centrelink defrauders, drug importers and tax evaders. At that time I got involved with the Law Society and have been involved with the Society's Access to Justice Committee which runs its law access program, as well as its Human Rights and Equal Opportunities Committee.

Recently I have been a representative on the Law Society's reference and steering groups to investigate the need for better pro bono and access to justice coordination within Western Australia and to look into the establishment of a public interest law clearing house or PILCH or other mechanism to improve those services. That work involved an externally produced report which the stakeholders agreed with the society should then seek to enhance its existing law access program in a coordinated way with those stakeholders and I am involved in the implementation of that enhancement project at the moment.

Last year I also became the Vice-Chairperson of Street Law in WA. The Street Law Centre is designed to service those who are homeless through an outreach model, meeting with those clients who are needing legal assistance, be it civil or criminal, where they access other services. My day job, however, is a senior associate in the disputes group at Herbert Smith Freehills which is one of the world's largest law firms - we are the largest private legal practice in Perth - working with of course local and multinational energy and resource clients, mainly regarding regulatory disputes and investigations. Across that field of activity, I have personally been exposed to many of the issues confronted by those seeking access to the civil as well as to criminal justice systems, from the very small to the very large scale; matters involving tribunals and Magistrates Courts, all the way through the High Court and international expert determinations.

With that introduction of myself, I just wanted to make a few comments around the draft report and I will start with this, which is that of course article 10 of the Universal Declaration of Human Rights states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of their rights and obligations or of any criminal charges against them.

In this life, it is important to properly position any discussion regarding access to justice around the centrality of the concept of the rule of law, the role of the courts and the importance of equal access to justice for all. Seen from this position, the courts cannot merely be seen as agencies of government left to compete with other branches for finite resources. The courts are a central pillar of the third arm of government in Australia's constitutional democracy. Courts uphold the rule of law and maintain a system of good government, trade, investment, commerce, personal and contractual relationships and many other aspects of our society and personal lives. Indeed, they are an institution in the true sense of the word, not mere dispute

resolution and service providers.

Requiring courts to be self-funding will make the courts inaccessible to most except the very wealthy or the most disadvantaged Australians who may be granted a fee waiver or exemption and those willing to risk significant sums of money to litigate their case, often unrepresented. It will mean those engaged in bitter family disputes, serious commercial disputes, challenges to administrative decisions, and workplace disputes will have an extremely strong disincentive to enforce their rights through the courts. This may be despite the fact that there is no alternative but to litigate. Such a disincentive correspondingly damages the effectiveness of all other dispute resolution processes.

Put simply, courts are the backstop. If they are not accessible, then they are not effective as a way of enforcing legal rights. If they are not effective, then people will not have regard to what the views of courts are, or what a person's legal rights may be, knowing that such rights cannot be enforced by them in any event. If this occurs, it is a breakdown of the rule of law. Further, access to justice also encapsulates notions of equality, equal and fair access based on principles that justice is not a commodity for sale. It is a right. Legal Aid Commissions, community legal centres, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services were all established in recognition of this principle. However, now they can only really help the most disadvantaged, leaving a large number in the middle who cannot afford justice.

An important aspect of this is the quality of justice delivered. The quality of justice is not an economic factor where you pay more for a more just result. It must be binary. The outcome must always be just in order for there to be a justice system. The question then becomes how do we deliver a just resolution of disputes most efficiently, so that all people have access to the justice system. It's important to note, of course, that family law is an important area of the civil law in Australia and for many, their first if not their only interface with the justice system at all. Any consideration of access to justice must have proper regard to access to justice in determining child access and property division disputes in a family law context, which now extend to de facto couples regardless of gender. Of course, another important area of civil justice is that of workplace disputes. Finally, before addressing some more specific topics - - -

DR MUNDY: Mr Keogh, we only have half an hour for you this morning and you have gone through about a third of that already, so we need time to put some questions to you.

MR KEOGH (LSWA): Yes, I was just finishing up. I just wanted to highlight the point in the 2009 PWC report that was highlighted in the Commission's draft report, that the ratio of between 1.6 and 2.25 in every dollar invested in the legal aid system

is a benefit. This must highlight the pressing need to actually significantly increase legal aid funding across the board. I am prepared to address a few specific issues but I thought I would see if there were any questions that you wanted to raise with me first.

DR MUNDY: Thank you. I think it is fair to say that what we intended to say with respect to court fees seems to have caused a number of law societies and indeed his Honour Martin J some concern but our point is this. Courts, whether we like it or not, receive their funding from the executive - well, from the parliament. They get special appropriations and they get them. Court fees are charged. They are levied. I presume that you are not suggesting that they should be abolished.

MR KEOGH (LSWA): No.

DR MUNDY: So, therefore, the question which is begged for us is how should they be structured and how high should they be and upon whom should they be levied. I am sure you are aware of the Bell case and the costs that that imposed upon the Supreme Court of Western Australia and the amount that it was able to recover in fees and the difference is in excess of \$14 million.

MR KEOGH (LSWA): Yes.

DR MUNDY: I am sure you don't think that's reasonable, fair or just. Our purpose here is actually, to be frank, to find resources that enable the courts to be less dependent upon government and to improve the quality of services that they provide and therefore the quality of justice. That's what we were trying to get at, so - - -

MR KEOGH (LSWA): Can I just address that one point?

DR MUNDY: These are our hearings. Could you please just reflect on how we perhaps should think about fees being set.

MR KEOGH (LSWA): I think the first point you made a reference there to being less dependent on government. As you pointed out, the costs of the courts are appropriated by parliament. They are one of the three arms of government. They are an essential institution. No-one is suggesting that parliament, for example, have to extract fees in other places. It provides obviously a public good as the legislature.

DR MUNDY: But the government provides many other services that it charges for.

MR KEOGH (LSWA): It does provide many other services, some of which it charges for and a further sub-set of those are charged for on a cost recovery model, driver's licences being an example in this state. It is accepted that courts should charge fees. It is accepted generally that the way in which those fees are charged

should in some way be matched to the nature of the matter being brought and the nature of the tribunal to which they are being brought. That concept I don't think anyone has great difficulty with.

DR MUNDY: Can I just stop you there.

MR KEOGH (LSWA): Yes.

DR MUNDY: We agree, because the nature of the tribunal in fact reflects it in some sense, the justice, will give you some sense - - -

MR KEOGH (LSWA): And the nature of the dispute, yes.

DR MUNDY: The nature of the dispute, yes. Is the character of the litigant relevant and the nature of the matter?

MR KEOGH (LSWA): The nature of the matter and the character of the litigant are going to be relevant. They are not necessarily going to be synonymous with each other.

DR MUNDY: No.

MR KEOGH (LSWA): The classic example really is actually, and one that we see a lot of applications but ones that are usually not able to be assisted in the law access space, are the mum and dad family company. Australia is one of the most corporatised environments in the world. There are pros and cons about that but we have many, many micro businesses that are running on an incorporated basis which means if they run - - -

DR MUNDY: The director and sole shareholder is one of them.

MR KEOGH (LSWA): Yes, there you go. If you were to run into a dispute that had to go to the Federal Court or to the Supreme Court as a Pty Ltd or company of any form, you would be sluggish with a corporate fee.

DR MUNDY: Yes.

MR KEOGH (LSWA): No-one is pretending it's easy to slash through and go, "Oh, we can easily distinguish between very wealthy companies and very small ones and companies that are bringing large Bell-like litigation and those that are bringing small litigation."

DR MUNDY: And why should we discriminate between a sole trader on the one hand and for economic purposes an identical entity on the other that happens to be

incorporated? Is that the answer?

MR KEOGH (LSWA): That's the issue I'm drawing. That's right. That is an issue that is not currently properly addressed in the fee structures of the courts. I think the fee structure point that you make and that the Commission has turned its mind to in its draft report in a way is largely ironic, I have to say.

DR MUNDY: Right.

MR KEOGH (LSWA): One of the large geneses of this referral to the commission arising was a concern that the increases in Federal Court fees two years ago, I think it was now, was so high that they posed a barrier to access to justice. The implication of what's in the draft report, that those fees should be higher, seems quite an interesting result and I think quite a contrary result to what was probably intended.

DR MUNDY: We have received no instructions as to what the purpose of this inquiry is, Mr Keogh.

MR KEOGH (LSWA): I understand that, nor should you, but the background genesis of that seems quite interesting. In any event, to address the point, I don't think people have difficulty with the differential fee structures between different types of courts and tribunals and different types of cases and to some extent different entities where the nature of the entity linked with the nature of the case would demonstrate that the cost of the proceeding overall and the potential benefit of the proceeding were justified. That should be appropriate, but to go with what would be some form of full cost recovery model in any circumstance would be so high that it would defeat the purpose of having the courts in the first place in nearly all instances - and would remove, and I should say this, would discount the public good that is derived from the settlement of those resolves, those disputes, both for those parties and the general idea of having the courts as the main determiner of disputes in this country.

DR MUNDY: It may well be the case the courts aren't the main determinator of disputes in this country. Ombudsmen do a lot more work than courts, for example, in resolving disputes. I just want to come back to this question of public benefits.

MR KEOGH (LSWA): I really should say "ultimate" instead of "main".

DR MUNDY: Yes. This question of public benefits, because at the end of the day, if you are what we are, and that's economists, it is a no-brainer for us to say there are a pile of public benefits over here and the private parties shouldn't have to pay for them. That's not a proposition that we struggle with, and indeed that is, if you read the material we have written, the question is what is the extent of the public benefit? It also brings us to questions, as you would no doubt be aware, of issues around

public interest litigation, which we actually suggest the government should provide for.

MR KEOGH (LSWA): Yes.

DR MUNDY: So I think we understand the nature of public and private benefits. I guess the question that's in our mind, particularly in commercial matters, not issues about deportation of immigration violators, all those sort of issues, with children at risk, but in essentially commercial matters of a routine nature. What's the character in these public benefits?

MR KEOGH (LSWA): Okay. To take an off-the-cuff example, landlord-tenant dispute.

DR MUNDY: Yes.

MR KEOGH (LSWA): Whether it's a commercial tenancy or residential, but let's say it's commercial, and a dispute around the tenant has left. They have caused damage to the property. That should be remediated. It hasn't been. It's damage that is more than the bond, so it's not easily recoverable by the landlord. If the cost of pursuing that is too high, it will never be pursued. If that is - and more quickly than it already is within the knowledge of the exiting tenant, they know that they can basically get away with not doing, as long as the damage they caused is not extreme, they just won't be pursued; at the end of the day they won't be pursued, and that is the current situation, and that's not good. We want to see that get better, not worse.

Even when I was a very junior lawyer working in an outer suburban practice, I would often have people come to me about multi-tens of thousand disputes, which had got to an intractable position, by which I mean the other side was just standing there with their arms crossed and saying, "Well, go me." You would have to sit down with them and step out, even in a Magistrates Court, you are outside the small claims jurisdiction, so are more than \$10,000 but you are less than 50, or now 75, let's have a look at how much this is going to cost for us to draft the proceeding, send it off, get it back, see what they do. There's a point there where you start going, "Well, is it worth the stress to you? Is it worth - you may not win, but even if you win, you might not all of it. How much are you going to spend on it?" Legal fees are one part of that, court fees are another part of that. There are many points to that.

If that issue doesn't get resolved for them, that's a problem for them, but it becomes a systemic and public issue because it becomes basically known that you can get away with stuff. That's the problem. The courts cease to provide what I described earlier as the backstop of the rule of law. The rule of law only works if it's enforced. If people know it will never get enforced below a certain level - - -

DR MUNDY: So your basic proposition is that if fees are set too high, too many matters aren't brought, then the law begins to lack credibility through an absence of enforcement?

MR KEOGH (LSWA): The law, not only does it lack credibility, you actually develop a state of lawlessness. People know they just don't need to do things.

DR MUNDY: Yes, okay.

MS MacRAE: I guess, just around that discussion out, I think there has been a lot of misrepresentation of what that report actually says about fees. In our discussion here, I think there is very little that we would disagree on. I think it's just a matter of we are looking for, and I guess in some senses in the draft we were keen to incite a response. So, we did want to put a proposition that there is scope for increasing court fees and I think you're right to suggest that our report does imply some level of increase, and I think I would agree with you that things like having fees in particular courts just set at particular levels, and there's no systemic assessment of how do we set these fees and what is a reasonable fee and how should they be adjusted, I think we are all in very firm agreement about that; so I just think the more we can help you to turn your mind to the issue the way that we are trying to address them, rather than full cost recovery is never going to work, because we actually agree with you on that completely, it would really help our cause if it was possible for the Law Society to give us a bit more feedback on what might be possible, rather than what's wrong with full-cost recovery, because we actually do agree about that.

MR KEOGH (LSWA): I suppose, in terms of what may be possible, one of the things that has to sit with that is to what degree do you want courts' administrative wings to be engaged prior to the commencement of a proceeding in sifting through the relative merits of whether someone is or isn't entitled to an exemption, reduction - like there are processes at the moment, and there's very few people that fit into those criteria, and those criteria are - some would argue, not in all cases, but in some cases, they are applied laxly. There are cases where defendants would be asking, "How did this get commenced?" They then have to pay a filing fee, but the court has only got so much resources to spend on that, so they have to deal with that as best as they can, but they are very minimal criteria that they are applying, so it's not too difficult. The more you set up a structure that requires them to make that assessment is an increased cost to the whole system again on having that assessment.

DR MUNDY: Yes.

MR KEOGH (LSWA): It also becomes, not only a delay factor, but an issue of consideration of, "Do I now need to go through four weeks of approval process before I know whether I'm going to get a filing fee exemption or reduction, or if I fit in that category, or this category, before I - - -"

DR MUNDY: We do make the point that it does appear to us, I think our view on the current state of waivers and similar matters is pretty much the one you have just expressed, so we have made recommendations that these waiver arrangements must be really clear, really apparent and simple, with an extraordinary out clause so that there isn't an injustice committed. Generally, I think we agree, it should be some sort of presentation or some sort of healthcare card. Is the person legally aided or - you know, particularly if they're legally aided, because then it's just bits of the state passing money back and forward between each other; so I think we generally agree with the proposition that you don't want the thing to become so complicated you spend more time administering the - - -

MR KEOGH (LSWA): I suppose one of the obvious issues is, okay, health card or not, you're an individual and you are okay for a fine to a certain level. The question is how do you distinguish between the company that is effectively the incorporation of a sole trader, or mum and dad, and Westpac?

DR MUNDY: I think we can agree that probably where the difficulty is is probably in those small commercial disputes, perhaps minor planning, the things that have an economic rather than an individual character to them, and where they are relatively. We are not talking about Bell or C7 or the Reinhart family trying to sort out the family trust, we are talking about what we might - and maybe the definition shouldn't be on their legal character, but on some basis of - we hate this - what is a small business? That sort of - looking forward past the corporate form.

MR KEOGH (LSWA): Yes, and gets into all those other difficulties of his making - - -

DR MUNDY: There is always going to be a boundary and there's always going to be someone who falls over the line. Can we take you on to some other matters - - -

MR KEOGH (LSWA): Yes, of course.

DR MUNDY: - - - in the couple of minutes we have left.

MS MacRAE: I would be interested, just given that the pro bono sector is still sort of becoming more coordinated, and I appreciate there has been a lot of work done here to try and get the pro bono sector working in a more coordinated fashion.

MR KEOGH (LSWA): Yes.

MS MacRAE: We have had a bit of a difference of view from various parties about how - well, the first thing is we are suggesting is that where pro bono clients, or where are clients represented pro bono, that costs orders should be able to be

provided for.

MR KEOGH (LSWA): Yes, and they are in Western Australia.

MS MacRAE: Where do you think that money - I would be interested in where does the money go?

MR KEOGH (LSWA): Where does the money go?

MS MacRAE: Where the money goes, is that appropriate?

DR MUNDY: So if you act for someone pro bono and you win - - -

MR KEOGH (LSWA): The law is costs can be recovered.

DR MUNDY: Where do they go?

MR KEOGH (LSWA): To the lawyer.

DR MUNDY: To the lawyer.

MR KEOGH (LSWA): I think it's important in a discussion of costs to realise what costs are. Costs are the costs of the lawyer and disbursements. The costs of the party's time is completely irrelevant to the discussion of costs, so if there's a lawyer, there's costs. If there's no lawyer, there are no what I call costs in the system, other than filing fees and disbursements and experts' reports. So there is a provision in Western Australia that allows for a person to be represented pro bono, but if they are successful to claim costs from the other side, which will only be to whatever level the lawyer would have charged if they had been charging.

DR MUNDY: Yes.

MR KEOGH (LSWA): So no-one is ahead, and at the end of the day if you look at what the costs scale that you get under costs versus what would be privately charged fees, no lawyer would regard themselves as ahead.

DR MUNDY: It has been suggested to us, forgive me, I can't remember by whom, but it has been suggested that in those circumstances, say a lawyer who works for a firm such as yours, which has a well-established pro bono scheme, I presume - - -

MR KEOGH (LSWA): Yes.

DR MUNDY: It has been suggested that the pro bono fees that you might earn in that regard should be paid into whatever the firm does to support its pro bono

activities. Obviously, if that's what Freehills wanted to do, they would do it.

MR KEOGH (LSWA): I think that is actually what we do. To take our firm as an example, we have an organisation which is called the Freehills Foundation, which is what funds the sort of pro bono work that the firm does and it takes in the funds, so that's I think a reasonably common set-up across the large firms.

DR MUNDY: The smaller - I mean, it has also been - - -

MR KEOGH (LSWA): The smaller firms, if they got money in costs, effectively that is going to fund their pro bono work.

DR MUNDY: Yes. Yes, the incentives all sort of work the same way, irrespective of whether - junior barristers are doing work pro bono, I guess is another one.

MR KEOGH (LSWA): Yes.

DR MUNDY: As you would be aware the situation isn't the same in all jurisdictions.

MR KEOGH (LSWA): No.

DR MUNDY: One of the reasons why we were coming at this issue was about the relative incentives of the parties in the event that one party was represented pro bono in the absence of - so not in the West Australian circumstances. Obviously, the same behavioural incentive for the other side exists if the person is self-representing, because they won't have the costs. It's the incentive to settle. Do you have a view that in the event that a self-represented litigant, and they can get their disbursements - - -

MR KEOGH (LSWA): The self-represented can always get disbursements.

DR MUNDY: Yes, but I guess the question is not so much from the equity but the incentive characteristic. The suggestion is that if the litigant is self-represented and there is an incentive on the other side to drag the matter out because there is no fear of a costs order.

MR KEOGH (LSWA): No, I completely understand the question, and that's one of the rationales for why that order exists in Western Australia, is that it puts - there's a few reasons. It means that where you've got a matter, the represented, the non pro bono client is not advantaged by the fact that there won't be any costs against them if they decide to do exactly that, so they are going to take a more commercial approach to the overall litigation. The other fact is that overall, both for the non pro bono party and for the courts, and therefore for society, everyone is better off if

there's a lawyer on both sides. It will just run more quickly. It will be more efficient, and points that shouldn't be taken won't get taken; so whilst it to some degree incentivises getting a lawyer involved in the first place, it's in no way compensatory, but it does serve exactly that purpose in terms of the incentive of both parties to reach agreement, because of course the pro bono client is always exposed to the potential costs order from the other side, other party.

DR MUNDY: As is the self-represented?

MR KEOGH (LSWA): That's what I mean, yes.

DR MUNDY: So in Western Australia if I turn up and represent myself and I win, will I get a costs order?

MR KEOGH (LSWA): You will only get a costs order for any disbursements, but if you are represented pro bono, then there's an opportunity to claim costs.

DR MUNDY: So the incentive for the self-represented to get a pro bono lawyer? If I can't get one, that may be a reflection on the merit of my case.

MR KEOGH (LSWA): It may be.

DR MUNDY: What if I can't get one - - -

MR KEOGH (LSWA): That's one of the fundamental issues, so to be fair, that's what the law access system the Law Society runs, is set up to try and avoid, and we run a system where, I mean we do look at the financial background of the applicant, but also what's the merit of the case. We're not going to send a member of the profession a case, take this on, without having looked at it. We have a panel that will assess it, say, "We think this at least is an arguable case." It may be at the end of the day that it doesn't, but then a lawyer will at least have said, "Well, the society says it looks okay"; and then when they sit down with a client say, "Look, this has nowhere to go". That actually is quite effective as well in terms of taking people who shouldn't be in the system out of it.

DR MUNDY: Yes, it acts as a screen.

MR KEOGH (LSWA): Yes, but we can only provide so much of that service.

DR MUNDY: No, we understand. Can we just ask you about, I guess continuing on self-representation. Again, I think there has been a little bit of misunderstanding inasmuch as we made some recommendations about creeping legalism, particularly in the context of tribunals.

MR KEOGH (LSWA): Yes.

DR MUNDY: It was meant to be an expression of there are, as you know, some tribunals that are set up with the purpose of being self-representing places, small claims, some other known sort of matters, but they are quite common in Victoria.

MR KEOGH (LSWA): Yes. I understand what was being put.

DR MUNDY: I guess what we were trying to explore there was the circumstances where it does appear to us and has been put to us by tribunal members, both judicial and non, that leave, which is provided in those fora is possibly being given more often than it should, and it's picking away under that. The proposition that's advanced is that the presence of representation, it need not necessarily be legal representation, we might add, is slowing these processes down. One of the suggestions that has been made to us about tribunals more broadly has been making it very clear in the tribunal rules, placing a duty on all parties to assist the tribunal in fair, fast, equitable, and I understand many of the court rules have those propositions in them as well, is that something that you would be uncomfortable with?

MR KEOGH (LSWA): As a starting proposition, we are uncomfortable with the idea that lawyers are not allowed to represent someone in any jurisdiction.

DR MUNDY: But the fact remains that they are.

MR KEOGH (LSWA): They are in some jurisdictions, that's right, that remains a fact, and it's something that we continue to remain uncomfortable about, and as a general proposition we don't believe lawyers slow up any of those processes, indeed we think they probably result in them being resolved more quickly, not in all cases, and, like every profession, there are people that don't operate in the way that would be as conducive as others.

DR MUNDY: And lawyers, when they turn up and act may correct an injustice, which may slow the process down?

MR KEOGH (LSWA): The next point I was going to make was one about this idea of justice, and lawyers are going to stand up to make sure that the process does act in a just fashion. We are not opposed to any tribunals or courts being set up in a way that is an user-friendly to an unrepresented person as possible. I will make the observation that where people are assisted or represented by non-lawyers, quite often that can result in the slowing down and the bogging down of those matters. For the exact reason that you draw attention to, lawyers will work to resolve the matter, and that is their obligation whether they are in a tribunal or some other body, their obligation to the court as a professional lawyer is to do that; others, that is not, and it's not their training. It's just not their default mode necessarily, and that is why you

will see other representatives have difficulty.

DR MUNDY: I think we would in this space encourage any recommendation to be in the language of all participants, rather than just representatives.

MR KEOGH (LSWA): Yes, of course. All participants in any system that is driving towards the resolution of a dispute should work towards the resolution of the dispute; we have no problem with that at all.

MS MacRAE: Can I just ask, you would have seen in our report that we've suggested that it would be helpful, given the difficulty that consumers have in accessing what they can reasonably expect as a fee from a lawyer for various sorts of cases - again there seems to have been a little bit of misunderstanding around what we're proposing here, so we certainly weren't suggesting that we have a web site where we would look at a particular point estimate of a fee for a particular kind of case.

What we wanted to do was to look at, you know, "I'm Joe Blow. I've never had an interaction with the legal system before. I have a case now that I'm thinking I might want to bring" - and it might be a tenancy matter, or it might be a small claim for a business loss or debt - "but I have no idea what it's likely to cost me," and what we were looking at was trying to get a centralised web site that might be able to give me a range of potential costs for a typical kind of case that has these kinds of features, obviously heavily caveated and obviously given as a guide rather than, "This is what you should necessarily expect." But trying really to give people some ballpark kind of idea so that when they make their first inquiries they've got some idea about what they might reasonably expect. Do you think that's a reasonable proposition?

MR KEOGH (LSWA): Yes.

MS MacRAE: We've had differences of view about whether that's something that would be helpful.

MR KEOGH (LSWA): I don't think anyone - so everyone hears that idea, and I think it's a great idea. The first concern that I think arises for us generally is, to use this as an example, when I first started practice I used to do a lot of what we call standard wills. Charged \$110. In that 18 months I don't think I did a standard will, but I only ever charged \$110 for the will because we told everyone our standard will was \$110. In theory it sounds great to say, "Oh yes, standard case on this will be in a range of this to this." There is no standard case. Everyone will think theirs is the standard case and you can put as many caveats on any web site as you like, it's still going to be difficult to get - the concern is really one of misunderstanding and one of false expectation, and that will lead to more cost disputes, more references to complaints bodies which are not justified than the current sit. But as a general

proposition it sounds fine, though working out what those costs would be, good luck.

MR MUNDY: Yes. The difficulty we have, and I'm sure it's a problem, talking to the complaints bodies is that people go into litigation, they're given information under the disclosure rules. The information under the disclosure rules looks like a mobile phone contract, and old product description document from - it's too - it's not meaningful. It's data, not information.

MR KEOGH (LSWA): Yes.

MR MUNDY: What the complaint bodies tell us is indeed exactly the point you raised, Mr Keogh, that it's about expectations. Most of their work is ticket shop, pardon my aviation parlance, but that's what it is. It's the expectation that they have relative to the outcome, and I guess what we're - and I guess the other observation that you'd probably make on this base is given the notion of information asymmetry, people do these things rarely, they have no sense of judgment about them, if anyone has got judgment about this, it's going to be the lawyer.

MR KEOGH (LSWA): Yes.

MR MUNDY: That goes on to the question of well why shouldn't we have fixed fees because the only people able to manage the risk, I accept possibly not very well, but the only ones who have got hope are the lawyers. So that's what we're trying to get at, is trying to actually help people understand. Now, we know that there's disclosure arrangements in all jurisdictions, and I guess our sense is some benefit, but more meaningful to consumers than others. That's what we're trying to get.

MR KEOGH (LSWA): Yes. I don't think anyone has a problem with trying to do as much as possible to alleviate that misunderstanding issue, and I suppose there's two issues - concerns. One is how do you describe the matter? So if you're going to say, "Okay. Well, this matter will cost in the range of X to Y," how do you describe what the matter is?

MR MUNDY: It's not a bag of apples.

MR KEOGH (LSWA): Yes, and make it quite clear that it's only this to this, and it's not - and it goes this way or that way. Only if your matter fits exactly in that square are we talking about, and then okay that range." Now, if you can narrow that down very clearly, you can probably get a range out this end, but the warnings across the top and at the bottom and at the side would need to be so very clear. It's something that could be worked towards, but I think it would be - you can do it. The other - but the thing I want to add to that is this might go to your bundling of services, but quality of service. Not quality of service per se in terms of are they doing the right thing or wrong thing by the client, or are they doing what is required

to get the matter done, but what a number of I would imagine the boutique and larger firms would say is, "Yeah, that's a range, but we're not going to do it for that." Well, why? Well, we provide a very different all-encompassing service for what you get for our fees. Now, that's a commercial issue for those firms to have to discuss, but it's one that at the moment is discussed with the potential client on the basis of the client having said, "This is my matter. These are the issues I'm confronting," and then that response of, "This is where we think the fees will be," tailored to that client. Having this sitting off on the side will make that a very different conversation.

MR MUNDY: Yes. All right. Look, I think - - -

MR KEOGH (LSWA): It's not a - some of the services are, but it's really not a commoditised service.

MR MUNDY: Yes. No, we understand that. Look, we are going to have to draw it to a close.

MR KEOGH (LSWA): Yes.

MR MUNDY: Thank you very much for your time, and I hope your recovery is going reasonably well.

MR KEOGH (LSWA): Thank you. Sorry. I had the surgery last week, which is affecting my nose. But can I just make - - -

MS MacRAE: Believe me I do understand that very well.

MR KEOGH (LSWA): Can I just make one point which goes to a number of the comments you have made, which is about why have submissions focused on particular areas. The professional bodies were the main responders, whether they're from not for profit areas or law societies or the Law Council. Whilst they do have some employed staff, are volunteer organisations and no submission leaves anywhere without it being signed off by those volunteers who run those organisations, like myself. Particularly for the Law Council, which is a federal body, it has to collate all of our views before it can do anything with it, and then have, you know, as with all federal bodies, an interesting fight around what the agreed position is.

At 900 pages, and I think I printed it four pages per A4, it's pretty thick. It's a lot of - you know, no-one is criticising the quality of the work, but the time given to respond to it, given the nature of the bodies that were going to be the respondents to it, will lead and has led to people focusing on the stand-out points or, "If we take that to the extreme, it might mean this." So just in relation to those comments you were making, I think that's why you found that approach taken, because of the very limited time for people to give it full and proper consideration. Having said that, the

Society, and I'm sure the Law Council, are very happy to continue to engage and work with the Commission on all of these issues, and would really like to see not just issues we've canvassed today but particularly funding for Legal Aid services addressed more clearly and really made a focus as well going forward. Thank you.

MR MUNDY: All right. Thank you, Mr Keogh.

MS MacRAE: Thank you.

MR MUNDY: Can we please now have the Northern Suburbs Legal Centre. Could you please for the record state your name and the capacity in which you appear today?

MS MERRIN (NSCLC): Yes. Good morning, and thank you, and I'd also like to acknowledge the Noongar people of this land and pay respect to their elders. My name is Karen Merrin. I've also got a thing in the throat this morning. I'm the manager of the Northern Suburbs Community Legal Centre, a member of the Community Legal Centres Association, and a member of the National Association of Community Legal Centres. But today I'm here in the capacity from - my point what I'm trying to talk about today is about preventative education in access to justice and how important that is, and also partnerships. I acknowledged the National Association of Community Legal Centres have submitted and will appear. I also acknowledge - - -

MR MUNDY: Has appeared.

MS MERRIN (NSCLC): Has appeared, and the Community Legal Centres Association of WA will be appearing here today. Just a little bit about my background. I'm probably in the twilight years of working in community legal centres. My background is I came out of the Pilbara some 20 years ago where I worked in family violence in the indigenous communities. I moved to Perth and moved into a small community legal centre, and then was the project officer for setting up the Northern Suburbs Community Legal Centre, which is now one of the biggest in Western Australia. So that's my background, and I'm very passionate about community legal centres, and I have seen so many reviews, so many inquiries into access to the law over my time that I thought this time I'm going to come and speak, so here I am today.

MS MacRAE: Well, thank you for doing that.

MS MERRIN (NSCLC): So today I really wanted to talk about where we came from firstly. The Northern Suburbs Community Legal Centre was established in 1995 from the social justice statement. There was two in WA was established at the same time. We're a generous community legal centre, and we have responsibility for eight local government areas, which starts in Perth, ends in Yanchep in the north, goes into the Swan and out to the coast, and in the 2003 review of community legal centres, our area was 30 per cent of the state's population. So it was quite big.

We have two offices, one located in Mirrabooka, which is a very ethnic diverse area, and one at Joondalup, which is also diverse, but diverse in a different way because it's mostly European migrants and English migrants, whereas in Mirrabooka we have really ethnic diverse Africans, Macedonians, Italians, and Vietnamese, and Chinese, and huge diversity.

When we started we had an annual income of \$200,000 which was community legal centre program Commonwealth, and now we have an average income of about \$1.5 million, of which the Commonwealth community legal centre program is a small amount, rather than a larger amount as it used to be. So we also have a number of partnerships, and we are funded also by the McCusker Charitable Foundation for one of our programs, funded by the Department of Commerce, the Department for Communities and Local Government. We have had partnerships with Legal Aid, and we're funded by Legal Aid, and we're funded by the Legal Contributions Trust Fund.

But what I wanted to really talk about today was the importance of those partnerships and in particular some partnerships like for instance the Edith Cowan University. We went into partnership when we were seeking accommodation in Joondalup, and a member of the Edith Cowan University was on our board, and they suggested that we talk to the school of law and justice at the university, and so we did, and we were able to secure a very small office for one day a week. We now actually have an office on site. We have six staff in that office, and we also have the program. We run a program with the university for students from the school.

So they do a placement at our office, and we're very proud of the fact that over the years we have developed such a good program with the university that we now have a number of students, some who are - one who is here today, who have graduated, done their school of law placements with us, and are now lawyers working with the agency. In fact I think there are only two lawyers of the nine that work in our organisation who were not graduates from university, students or volunteers at the agency. So we've done a lot of work on that.

So in about 2009, I think it was, we recognised that we couldn't cope. We could not cope with the demand or the requirements, particularly of our ethnic communities, and we had some very good examples, one of which I've written in my submission, about some young people who - or people who were newly arrived migrants, and they had come in to see us at various times and over a series of weeks we were finding more and more of these people who were signing up for Internet access to a very big Internet provider, and none of them had computers we discovered. None of them had computers at all, but they had signed up because they saw these people with suits and thought they were government people, and they had to sign these documents.

So we developed a very big education program, and this program has now really got extremely large, and so we are working on that as being some sort of self-sufficiency for the agency because it's really difficult to be able to find support to develop those education materials. I think what's important is that I read in the report that there seemed to be some thoughts that community legal centres perhaps were reinventing the wheel when Legal Aid were providing some materials, and that's not the case.

The sorts of education that we develop are totally different, and a lot of that is interactive education where we have difficulties with languages, and we also develop a lot of DVDs. So we've got visual presence around what it is that our clients can view.

We work in partnership, and I think this is really important, in partnership with so many agencies, so many, and more recently we've just developed a partnership with the WA Police and they are funding us for some work in education around family violence in African communities, and you may - or violence in African communities, and you may have seen only this week that - you may not have, but it was rather a large ethnic violence riot in Mirrabooka where we're located, and we're involved with the police in solving issues around that all the time.

So I guess my submission today is all about working in partnership. We also have this partnership with Anglicare WA where we were the first ever community legal centre to go into partnership in a family relationship centre, and that's based in Joondalup, and we work in that family relationship centre giving advice to their staff, as also giving advice to the clients when it's required. We encourage mediation, but we also give advice as to their rights and responsibilities.

So I think that's all I really want to address today, is that I think that access to justice has not considered the more preventative models. We talk about courts at one end, but most of our clients, unless they have support or they have representation, really do have a difficulty in accessing the justice system, and I was interested in what Matthew was saying because one of the big areas for all of community legal centres is property in marriage. Property in marriage is a huge area in terms of people not being able to access the system, and I'm happy to talk about that if you want to.

MR MUNDY: We had some evidence yesterday in Adelaide, and the day before in Sydney which was essentially a family matter, but at the time of the passing of a member of the family and the dealing with wills, and it struck us that there seemed to be a lot of - well, the question that struck us is why these matters are immediately in the Supreme Court, but beyond that there seemed to be matters which are very much of a family character, brothers and sisters fighting with each other, and we're just wondering whether what we've learnt through family relationship centres and mediation in the family context more generally might actually be able to be brought to bear on disputes within families about wills because the stories we heard were really quite - one was about members of family debating an indigenous burial site, and we just didn't - and some poor old chief - some poor old justice, Supreme Court judge in South Australia had to sort this out.

MS MERRIN (NSCLC): Yes.

MR MUNDY: Clearly not what he's trained to do, probably not what he wants to do almost certainly. So it just struck us that given these mediation processes are now - no-one tells us they're not working, everyone tells us they're the best way to go, whether the remit could be extended and provide some assistance to people who are at a pretty unhappy time of their lives probably.

MS MERRIN (NSCLC): Okay. I probably need to answer that in - there's two parts to that. In terms of indigenous families and burials, we recently represented one side in a dispute over a burial of a young person and it's something that we all avoid doing, I have to say. Everybody avoids doing it, I think, in the sector - in the legal sector, and it's very time-consuming, it's very emotional, and I don't think there's a satisfactory outcome for anybody in the court system.

DR MUNDY: No.

MS MERRIN (NSCLC): I think mediation probably is the way, but I'm not sure that would always work, and the Department of Justice used to have a mediation - I'm not sure whether it still exists here, but it had a mediation centre for indigenous families and burials. But the other part of that when you talk about wills, we also have a unit in our office which is the Older Person's Rights Centre and we have - it's on elder abuse. It's about elder abuse and elder abuse is defined as the same as family violence, so it's physical, it's mental, it's social, it's isolation, it's all of those things, and financial.

But elder abuse is a growing industry in this country and it is about family members taking advantage of an older person, and I think it's 5 per cent - approximately 5 per cent of West Australian older people over 60 years of age are abused by a relative or a carer. So we have 1.2 lawyers and two students, I think, and a social worker working in that area and it's - there is no outcome quite often. Quite often it's about mum who said, "I will help you out now and I will give you some money or I'll sell my house and you build the granny flat" and I shiver when I hear about granny flats, and I - "We'll build the granny flat and then you can move in for life and we'll all be happy."

It doesn't work like that and more often than not quite often the couple will break up and they're in the family law dispute or they - you know, they will fall out, or a daughter-in-law or son-in-law will fall out with grandma and then grandma gets moved out and I often relate the story of one day we were about to leave the office and it was about 5.30 in the afternoon and an old lady turned up in a bowling outfit and she'd been locked out of her house by her son and wasn't allowed to go back there and we had to get her into a women's refuge.

So one of those issues are they're all Supreme Court actions. Most of them would end up - financially would end up in Supreme Court actions. They can't

afford it. We can't represent them, so we really heavily rely on pro bono, which is not always - - -

DR MUNDY: I guess one of the things we're trying to get our heads around is do the - given the nature of these things do they really - because the Supreme Court is an expensive place to be and whatever the assets are you can chew through.

MS MERRIN (NSCLC): Yes. Yes.

DR MUNDY: Is there some sort of less expensive, less formal arrangement that might be worth thinking - we've thought about it in all sorts of other interactions between people.

MS MERRIN (NSCLC): Yes. I think mediation is probably the answer and we've often talked about needing a mediation service for these - because quite often there is no legal recourse to the client because often they've freely given the money, you know, they've gifted the money and/or gifted their house and to get understandings and without any agreements in place and not being able to get them back, you know, so quite often it is about the best way to do it is to mediate it, and I think also in a lot of other areas mediation is the way to go and we quite often do that, and a lot of our cases end up in the tribunals, the State Administrative Tribunals, which are - - -

DR MUNDY: Less formal.

MS MERRIN (NSCLC): Less - yes, they're less formal and they're more able to be managed, yes.

MS MacRAE: Did you have a view just about the earlier evidence we had in relation to representation in tribunals? Did you have a view about the necessity for representation and whether in some cases it does tend to - I mean, one of the things we've heard, I suppose - if I can describe it as the prisoner's dilemma - that one side gets represented and so the other side then feels that even though they were going to come along unrepresented, oh, we've now got to at least match that because if we don't, you know, we're going to be disadvantaged and both sides end up with many more costs than they otherwise might have.

MS MERRIN (NSCLC): Yes. It's interesting. When I first came to Perth I actually worked in the - what's now Centrelink, but it was the Social Security Tribunal - well, worked - I worked for Community Legal Centre and we represented - and I'm not a lawyer, and so I was able to represent in the Social Security Tribunal and I thought that paralegal did a very good job of that sort of representation. Very committed to their work and were, you know, often up against lawyers who were working for social security, but in terms of - I was listening with interest in Matthews reference to the Tenancy Court.

In the Tenancy Court in this state - and we have advocates in court nearly every day - in the Tenancy Court in this state if you're - you're not allowed to in some cases attend if you are a lawyer, but if one side's saying we want to bring a lawyer then the other side has to agree that that's okay. So in the case of - say, the Department of Housing versus Tenants and we represent Tenants, we've been employing young graduates who are not lawyers, who have not been admitted, but unable to get positions or, you know, and they're just doing their graduates, but the Department of Housing won't allow us to have them appear in court because they are graduates so they have a legal qualification so they can't appear.

DR MUNDY: And what's the nature of the people who appear for the Department?

MS MERRIN (NSCLC): Well, the Department has two ways of appearing. If we say that we're going to have a graduate appear then they will put it to their legal department and they will have a lawyer appear which means then we have to go through all the affidavits and the evidence, et cetera, but if we say we've got an advocate appearing then a person from the Department will appear who's also an advocate for them. So it's very interesting, so in the Tenancy Court here it's something we've been trying to address, but what it means is that if - we can employ paralegals but they can't be graduates.

DR MUNDY: I mean, is there any difference in the outcomes from when you've got lawyer against lawyer as opposed to advocate against advocate?

MS MERRIN (NSCLC): No, none at all.

DR MUNDY: Other than cost.

MS MERRIN (NSCLC): Other than cost, yes. Yes, it's a very interesting - because the advocates are well-trained. They're well-trained, and they do a lot of work. That's their job. That's Tenancy. They know the work.

DR MUNDY: And, presumably, the people representing the Housing or Homes West or whatever it's called - - -

MS MERRIN (NSCLC): Know their work as well.

DR MUNDY: They do it as well and - - -

MS MERRIN (NSCLC): Yes, they do, and so we have this - at the moment we have the three strikes policy in WA. We've got - we're in court two or three times a week representing our tenants and, you know, they're backed up. We're backed up by lawyers, so our lawyers will check their work, make sure that they're doing the

work - but they also just represent on a daily basis in the courts.

Our advocates, in fact, are on duty at the duty Joondalup courts and shortly to be on duty at the Perth courts for the Tenancy Courts, and they give advice on a daily basis.

MS MacRAE: Yes. So what, ideally, would be the rules of that court then in terms of representation, do you think?

MS MERRIN (NSCLC): Well, I think it - for us it's about what is legally qualified.

MS MacRAE: Right.

MS MERRIN (NSCLC): Do you have to be admitted to be legally qualified or not? That's our argument that if you're a graduate and you know the law are you legally qualified and should you be able to represent as a paralegal?

MS MacRAE: Yes.

MS MERRIN (NSCLC): But I think, ideally, for me, ideally I think it would be that you don't have lawyers in that court. That would be my view. Probably not the view of my lawyers who work with me, but it's certainly my view.

MS MacRAE: Yes. Thank you.

DR MUNDY: You've mentioned that you partner with a lot of organisations.

MS MERRIN (NSCLC): Yes.

DR MUNDY: And one of the issues that we've bridged in exploring is the whole notion of referrals so that other people who work in community-based organisations they - in South Australia they actually have a TAFE program specifically to provide legal training for community workers who are not lawyers.

MS MERRIN (NSCLC): Yes.

DR MUNDY: Is that something that happens in WA?

MS MERRIN (NSCLC): We did have one. Legal Aid certainly had one, and there was one - a very successful one - that ran out of Geraldton Resource Centre and it was quite a few people throughout the industry actually accessed that remotely, but at the moment, no, it doesn't. It relies on each agency to train their own. But there is some very successful training within the community legal centre sector. We do some very good training. For instance, today there's some tenancy training on for

advocates so, yes, there is some really good training and it's usually run by lawyers and we even have court days where they learn how to develop their skills for court advocacy and probably two or three times a year those courses are run.

MS MacRAE: In your opening address you talked about the importance of prevention and preventative education.

MS MERRIN (NSCLC): Yes.

MS MacRAE: How as an organisation, given that you're always going to be very strapped for resources, do you determine what sort of proportion of work goes into your preventative work, and what sort of methods do you use knowing how difficult it is in those cases, how do you try and measure the success of what works and what doesn't in relation to that sort of education?

MS MERRIN (NSCLC): Most of our preventative education is developed around our CALD communities, culturally and linguistically diverse because they're a very captive audience at the moment because they're newly arrived migrants. So we work with our partners like MercyCare and the TAFEs. We deliver education into two TAFEs, three actually, but one in Thornlie, the central one in Perth, and one in Balga, so there's three TAFE organisations or Polytechnic north, Polytechnics they're called. So part of the development is we talk to our community organisations.

We have meetings, regular meetings and we discuss about what it is that we need to develop, how do we deliver that education, who was our target audience, and probably one really good example is a program called our four-day rental course, rental ready course and we do that with MercyCare. It's a MercyCare program and they actually pay us to do part of that course. So it's a four-day course where people coming out of refugee camps, now they may come from Burma where they're born in a refugee camp or, you know, some African nations where they're, you know, Kenya, they're born in the refugee camp, and they come out and they don't have the skills to rent properties in Australia. They don't understand what are the standards that you need.

So during that course, for the first two days of the course, it's about the practical side of it, and MercyCare run that course, and so it's about how you even clean, how do you clean, you know, how you can make products that are cheaper, et cetera, et cetera, and the last two days of the course is about their rights and responsibilities in the tenancy and we run that part of it. The feedback from that then comes from the clients themselves who, you know, interact with both agencies over a period of time. So we keep an eye on what's happening within the tenancies. So that's probably a good example of how it works.

MS MacRAE: Yes, okay. Thank you. What sort of governance arrangements do

you have when you have a partnership? What sort of arrangement do you have? Is it a sort of formal contract that you enter into, or is it a - - -

MS MERRIN (NSCLC): No, not normally. With some it is. Well, you know, for instance this partnership we've got with the WA Police at the moment, that is an informal partnership but it's funded by the WA Police. So the WA Police have funded us quite significantly and the Department of Child Protection are about to put some more money into that in terms of doing some translation. So the partnership is informal but every week there is a meeting between all the groups that are involved and they have Department of Child Protection, the WA Police, us, MercyCare, a number of psychologists and, you know, just a whole range of people involved in it on a daily basis.

MS MacRAE: Right.

DR MUNDY: You mentioned funding there. I guess one of the issues or one of the issues we're asked to bring our mind to is the funding of legal assistance broadly. Can you just give us a rough outline of what your different funding sources are.

MS MERRIN (NSCLC): Yes, okay. So we have Commonwealth Community Legal Centre funding and then we have funding for our Joondalup office which comes out of the state contribution's legal trust fund which is actually a grant, so it's usually - it's not a funding agreement as such, so it's more of a grant that comes each year and depends on the interest raised on where it comes from.

DR MUNDY: Yes, we understand.

MS MERRIN (NSCLC): Department of Commerce funds us for our tenancy program, it's probably the better funded program of all of them, and that's part of a tenancy network which I think is really important to understand about Community Legal Centres. We're very good at making a little go a long way. So we have - there's two really good partnerships around that and one is tenancy, the tenancy network which is like a hub and spoke model which we developed many years ago with the Department of Commerce, and the other one is the family relationship Community Legal Centre partnership which was a small amount of funding that came from the Commonwealth and we managed to, rather than fight one another for it, we set up this whole huge network which works very well.

So the Department of Commerce, Department for Communities which funds, believe it or not, a legal program for the Older Person's Rights Service, McCusker Foundation, WA Police, and until recently we had a partnership with Legal Aid WA where they referred all their family law conflict issues to us, but that ran out in February due to lack of funding and now they have developed another way of doing that and that's through paying us on an hourly rate.

DR MUNDY: The Commonwealth has recently withdrawn some funding for Community Legal Centres. Are you able to give us a sense of the impact that that has had on yours.

MS MERRIN (NSCLC): This is amazing. I think having been around for 20 years I knew it was coming. I think I have to say that. Change of governments brings changes to Community Legal Centres which is unfortunate because there's no stability in the way in which we can move forward. We were one of the agencies that lost funding. We gained it and it finishes in 2015. It makes a big difference to you. We will lose at least one staff, probably one and a half staff out of nine lawyers at the end of 2015 so we can't commit beyond that. So it does make a difference. It's a huge difference.

DR MUNDY: So when you lose a staff, what won't happen that is happening today?

MS MERRIN (NSCLC): Well, then we will need to drop the amount - we were funded for family violence and for family law children's issues and so that will mean we will be down probably 1.5 staff in that program, so that will be 1.5.

DR MUNDY: You will do less of it.

MS MERRIN (NSCLC): Less of it.

MS MacRAE: Out of how many would you have now, how many now?

MS MERRIN (NSCLC): In family lawyers we have four.

MS MacRAE: Okay. So you're losing one and a half out of four, so nearly - - -

MS MERRIN (NSCLC): Yes. So we would do less of it, and it's never ending, our waiting list is huge for appointments. I don't think anybody who has not worked in the community understands just what a waiting list is like. It's huge. We would have on a daily basis probably 10 to 12 appointments on a daily basis in each office on family law alone, and you can only do so much. So we work on a program where we do advice, and if they meet merit then we do minor assistance in a lot of cases, and sometimes representation and we do represent in courts a lot. But minor assistance can be quite time consuming as well because it's about preparing documentation for the court, teaching them how to go to court, answering their calls when they ring up and they're in court and they say, "What do I do now? This has happened. I didn't know that was going to happen."

DR MUNDY: So that minor assistance services really is sort of an unbundled

service.

MS MERRIN (NSCLC): It's definitely unbundled service and it's probably the biggest part of Community Legal Centres' work, yes. But also I think changing direction, when we decided to do the education program, changing direction is not easy when you decide to do something when you're funded because normally we need to put in long-term planning, you know, three to five-year planning, and when you say, "I want to change direction and do more education and preventative work," you have then got to negotiate with everybody so that you can change figures and come back to a reasonable figure.

MS MacRAE: I can understand if you've got these big waiting lists it's hard then to - - -

MS MERRIN (NSCLC): Yes, it's very hard. It's very hard, yes.

MS MacRAE: - - - ask everyone that even though you might say that, given the outcomes here, we think we're really helping more people in total, but it's harder to demonstrate that when you're against a big queue.

MS MERRIN (NSCLC): That's why one of the reasons, I think, when we're talking about access to justice, we must talk about education, it's a big part of it because it's so important that people understand it, and I'm not talking about education as just being pamphlets because most people can't read half the stuff that comes out. I mean, most of our clients are what I call "formaphobic", they have no idea. You know, you put something in front of them and they just freeze, they have no idea.

DR MUNDY: Has anyone done any evaluations of your effectiveness and the outcomes and the benefits of your education programs?

MS MERRIN (NSCLC): We have in terms of with feedback from clients and feedback from the agencies that we work with, and it's really very interesting because we've had a drop-off in the number and particularly in the number of small debts and particularly in traffic was a big issue. I think - to understand just how bad the traffic issues could be for some of these emerging communities is to understand some spin-offs that have happened in some of our programs. We were working with the Migrant Resource Centre, Metropolitan Migrant Resource Centre, and we were teaching women how to - ethnic women on how to read and understand the learner driver's forms that you have to pass the test for the learner's driver, and then through a number of weeks we found out that, in fact, most of them when they got their licence were going to go from the house to the shop and house to the shop and back again and they would never do anything else and we were asking them why and we found that none of them could read a map, none of them could read a map.

So we then had to do some work around driving and, you know, getting around your suburbs, et cetera, which is an interesting thing because those people now are the people that are the responsible drivers in our area, you know. Now we don't have those people rocking up at the front door with learner's permits and driving their own car without another person in the car. So it's really interesting, but there has been some work done around it, but I think that what Community Legal Centres are so good at doing is tailoring education to meet their communities.

So you know in bigger organisations you might - government organisations put out blank and they put it into different languages but what they don't understand is that a lot of people can't even read their own language let alone - they can't write it or read it, they can speak it but can't write it or read it. So we're very good at working with the communities that surround us and that's how we develop our programs.

DR MUNDY: All right. We probably need to draw this discussion to a close.

MS MERRIN (NSCLC): Yes.

DR MUNDY: But thank you very much for coming down from the northern suburbs and we wish you well.

MS MacRAE: Thank you.

MS MERRIN (NSCLC): I'm going to hang around.

DR MUNDY: Could we now have Zak Crafford, please.

MR CRAFFORD (LA): Good morning, Commissioners, and thank you.

DR MUNDY: Could you please state your name and the capacity in which you appear, please.

MR CRAFFORD (LA): Fair enough. My name is Zak Crafford and I'm the founder and chief executive officer of a company called Legalwise South Africa which has established a subsidiary here called Legalwise Australia.

DR MUNDY: Okay. Would you like to make a brief opening statement, and you don't have to if you don't want to, and then we'll put some questions to you.

MR CRAFFORD (LA): I think as an opening statement that might work best, not having been aware exactly what the process would involve and who would have read the submissions is perhaps to explain a comment I made in my submission, or one of them, that it's currently an Australian owned company, abroad being South Africa, that does legal expenses insurance which has been mooted by a number of people in the submissions. So currently Australia owns a legal expenses insurance company in South Africa and the statement I made in the submissions perhaps which also for clarification is why we say it's an Australian owned company and it will also explain my accent to an extent, which might surprise a couple of people.

So while I'm not born and bred Australian, I am now an Australian and I own control of that company which means the company is now owned by Australia. So I guess it might be a good idea also as an opening statement to explain legal expenses insurance which is a bit of a cinderella in the insurance world and often misunderstood. Legal expenses insurance can be a pretty technical type of insurance or a very - for lack of a better phrase, emotional kind of insurance. If it's technical it's as simple as a householder's policy containing a clause to the effect that a person has legal expenses insurance for a couple of matters.

When that person does have a problem the person goes to a lawyer, the lawyer does the work and gets paid. Now, that model does not work well and it only works in one country in the world because of their regulatory environment and that's Germany. The model that works best which is the one that we have in South Africa and we tried in Australia, we tried to set up the company, it was not successful, but that model is what I would call the interactive model where the insurer through its own band of paralegals pretty much the same as community legal centre would be the first port of call for a customer.

So a customer would phone the insurance company or the vision of it with a legal problem and what would happen now, which is quite different from community legal

centres, is because it's a commercial entity with a profit motive, the insurer, like any insurance company, would try to mitigate their losses. So it happens with all insurance, a motor car insurer would do certain things like get a couple of quotes from different panel beaters, to ensure that they are managing the loss. So what a legal expenses insurer does to manage the loss, when the customer makes contact initially they look at the problem, and in order to make sure, as I've said in some submissions, that that small problem does not turn into a massive problem, they would intervene on behalf of the customer or the policyholder.

By intervening they would do similar things to what the people who work for community legal centres or legal aid would do, and that is get in touch with the third parties, "This is the problem. Can we resolve it?" The big difference though between a legal expenses provider and a community legal service centre, for instance, is that there's now financial muscle behind this policyholder and eventually society knows, the private sector knows, that a person with such an insurance policy, if it can't get resolved through their own paralegal people that that company will eventually send the customer to a lawyer and now it becomes a full-blown adversarial situation.

In society by and large not many people are interested in adversarial situations. So invariably when people are faced with a prospect, let's say the opponent of a customer is faced with a prospect of either resolving the matter there when it's still a small problem or allowing that matter to go to lawyers, invariably that person would want to settle the matter and that would get settled. I think I cannot say more for a opening statement. I am also going to try to be short to try to help you make up some time.

DR MUNDY: Thank you very much.

MS MacRAE: Could you just say a little bit more about why the German model does work in Germany and why it wouldn't work here?

MR CRAFFORD (LA): The reason the model in Germany I wouldn't say doesn't work because it's very big the insurance there, but their regulation environment prohibits - it's probably the most prohibitive in the world in terms of what is defined as legal services and who can provide it, and even so strict as to say that the insurance company cannot even negotiate with the insurer, with the lawyer, around fees. So in Germany fundamentally lawyers can charge what they like. A customer cannot go to a third party to ask a third party to negotiate with a lawyer for lower fees because the Germans say that interferes with the freedom of choice.

So every single thing - there the insurance company is not involved at all. A customer's only contact is with a lawyer. Now that gets very expensive because the insurance company has absolutely no control over the lawyer, so it gets very

expensive, but the product is still popular there, and it's still bought notwithstanding the fact that it's very expensive. Perhaps in the German economy there are flexibilities that allow people - notwithstanding the expense of the policies there, they're still buying, because the business is huge in Germany.

DR MUNDY: Is that the jurisdiction where the policies typically attach to household insurance, or is it a discrete - - -

MR CRAFFORD (LA): No, in Germany - I put it in my submission, but for the benefit of other people, very interesting - this insurance started in France, and it started as a result of the Le Mans motor car race going on. There was a horrific accident, very serious injuries, a number of people dying, and the victims, in order to get compensation from the insurance company, were not successful, and they formed a pool of spectators and people who were injured. They formed a pool, and with that pool they sued the insurance companies, and they were eventually successful. The original name for legal expenses insurance, because of that incident, was in fact called "insurance against insurance companies". So it was primarily aimed at helping people against insurance companies repudiating claims.

So it started not in Germany, but it then took off in Germany after that. Perhaps because of how it started in Germany, the first product was a product that helped people with motor car related offences. At the time in Germany, it was still pretty much a Sunday sport. I guess one could call it moon driving but in really fancy Porsches and Mercedes-Benzes and stuff on their very sophisticated highways. Obviously there would be accidents and people would get prosecuted, and the first insurance office that got started in Germany was only for motor car related prosecutions. Because of how it started, they then expanded, then they had a policy for home owners' legal protection, and then for this, and then for that, and then for that. So they started off with that and eventually branched out.

MS MacRAE: So as a consumer, then, in that instance, do you get a choice of which of those kinds of insurance you take out, or you just buy your legal expenses insurance and it covers the lot?

MR CRAFFORD (LA): Generally they will select.

MS MacRAE: Right.

MR CRAFFORD (LA): They will select one for motor prosecutions, or household - - -

MS MacRAE: Is that what you do in South Africa?

MR CRAFFORD (LA): In South Africa we have exactly the opposite way. We

bundle everything together. Everything that a person could conceivably have a legal problem with, bundled it together, and it's just one product.

MS MacRAE: And it's civil - you don't cover criminal matters?

MR CRAFFORD (LA): Yes.

MS MacRAE: Criminal as well?

MR CRAFFORD (LA): Yes.

MS MacRAE: Okay.

DR MUNDY: You can insure against criminal fees, you can't insure against fines. When I was in the UK at some point, I can't remember when, I had a discussion with the insurance association there about before and after the event insurance. It was largely around personally negligent matters, I think that was the issue. I guess what we're interested in understanding is, given these legal insurance products seem to have got a foothold in other jurisdictions, and seeing that we have struggled to find any regulatory barriers for the establishment here, I mean, what's really going on here? Why haven't we seen the emergence of the products here? It can't be because of the presence of a common law as opposed to civil law system, because these products are available in the United Kingdom and Canada, so that's not the issue. Ditto costs orders. So what is it that you think is driving this, or not driving it, probably more to the point?

MR CRAFFORD (LA): My view is that Australia is unique, and it's unique in the sense of it having extensive services that the public has access to, like the lady who spoke earlier, legal aid, all these community legal centres, the complaints facilities, private enterprise for people who have problems. It's very extensive. Of course there's a history in Australia of legal aid perhaps having been very elaborate in days gone by. It might become a little bit more restrictive now with economic pressures. But I think a number of factors have led Australia to arrive at a point of people perhaps not needing this kind of an insurance, because there are so many other things available.

Whether things are going to change or not is a moot question, but I think there is scope. Even for the sorts of matters that are dealt with currently by legal aid and community legal centres, if there was an alternative available, many people who are currently trying to use those services might be inclined to just pay the premium and have the legal expenses insurance and have a choice of where they go to and how their problems get resolved. So I think Australia is pretty unique, probably similar to Norwegian countries, Sweden, where legal expenses insurance is almost virtually nonexistent, and it's a question of whether things will change in Australia.

DR MUNDY: Do you know whether legal - I take your point, I mean, I perhaps observe that the United Kingdom, particularly until recently, has had a much more generous legal aid system, and particularly Scotland, and Scotland continues to have - you can get legal aid to run a defamation case in Scotland. I mean, I'm wondering whether - I mean, the nature of the matters that are legally assisted in Australia which aren't criminal matters primarily relate around family law issues and, in the broad, protection of children, violence in the home, not so much to what you might call suing the builder for a dodgy kitchen reno. So are they the sort of matters that are getting pursued in insurance typically, those more - I'm trying to say more economic matters, or consumer protection matters - or is it in the broad?

MR CRAFFORD (LA): No, I think it's in the broad. I think - often what is misinterpreted, what is visible and what people see, patterns of usage, and that can be quite misleading. What one sees when you have legal expenses insurance that's freely available and sold by virtue of mass marketing to consumers publicly, then it becomes clear only what the need in fact is amongst consumers. The need amongst consumers, if one looks at the patterns, is not for those big things that go wrong, it's for the everyday stuff. You've got a problem with a neighbour, you need somebody to just maybe write a letter, not too threatening, but some sort of a letter. Nobody can go to a lawyer for that, it's just not practical, it's too expensive. Often in the day-to-day environment of such an operation, one sees that 90 per cent of the matters that come to you are, for the insurer, very small problems, but for the end user, perhaps a more significant one.

DR MUNDY: You mentioned paralegals before. So what you're saying is that in many cases, these disputes, the service that's being provided to the insured consumer is actually the service of a paralegal, it's not the deployment of - properly supervised, but not the deployment of - - -

MR CRAFFORD (LA): You're absolutely correct.

DR MUNDY: Okay. So obviously for such a market to develop and make sense, there needs to be a framework by which paralegals are allowed to do this work. I presume there's some form of training or some sort of - one of the things we've been suggesting is that a lot of what we call broad legal work mightn't need a fully qualified, admitted solicitor to do. So that's the sort of service that's being provided by the insurer as well as what you might call a traditional insurance service in the event that you do have to incur substantial costs.

MR CRAFFORD (LA): You've summarised it exactly a hundred per cent correctly. So the paralegal work - and I saw in the submission I think the Law Council appeared negative towards the idea of this other layer of people performing legal services. I think that's a very good idea to formalise that. It's easy enough to

put in place professional indemnity products et cetera and to control such a - - -

DR MUNDY: It's a bit like the debate between doctors and nurses.

MS MacRAE: I guess the other question: you talked about the need for a sufficiently large insurance pool. When you were looking to try and establish a market in Australia, did you have a sort of target of how much sort of capital might be involved and what sort of coverage you might require just to make it viable?

MR CRAFFORD (LA): Yes. In Australia anybody doing this as one company would need at least 10,000 customers in a short space of time.

DR MUNDY: What would the annual premiums be, roughly, if you had to get - - -

MR CRAFFORD (LA): In the order of \$300, \$360, \$400 maybe.

DR MUNDY: Three or four hundred bucks a year?

MR CRAFFORD (LA): Yes.

MS MacRAE: What sort of arrangements are there - if we take the South African example, do you have a kind of - the word has gone out of my head. You know, when you make a payment, when you make a claim. What's the word? An excess. Or is there a limit on how many claims you can make in a year, if you had multiple - - -

MR CRAFFORD (LA): No, there's no excess. We used to have it to prevent people from getting two lawyers with two legal issues, if you like. But it soon became apparent that it's not the kind of insurance that's abused. There's no real incentive. There's no real tangible benefit, if you like, by abusing this. All sorts of other forms of insurance, there's a tangible benefit by abusing it. Either you're going to get a TV set replaced or get some tangible benefit. With this environment, with legal expenses insurance, there's no benefit other than having to get into your car and go and sit in front of a lawyer, which is not exactly - - -

MS MacRAE: Part of the problem - it's bigger than it is, doesn't help you.

MR CRAFFORD (LA): Yes.

MS MacRAE: It's not like the money is going to come to you if you somehow manage to inflate a fee or something.

MR CRAFFORD (LA): Exactly. The money doesn't - it goes through the lawyers to the end beneficiary. So we have it, but it's not a requirement, generally speaking,

anywhere at all.

DR MUNDY: So presumably, if I'm a policy holder, I've got a claim, I need to ring you first and talk about that matter, as opposed to, say, with health insurance, I'll go to the doctor or the surgeon or whatever and I'll just present you with the bill and you'll pay on it. So you've got to see it before I go to - - -

MR CRAFFORD (LA): Absolutely. That's the trick.

DR MUNDY: Because that's the way you manage your risk.

MR CRAFFORD (LA): Yes.

MS MacRAE: Sorry, just to be clear, some of the earlier discussion from Dr Mundy, would you have in-house paralegals that would do some of that work directly, or would it always go out - - -

MR CRAFFORD (LA): No, absolutely in-house.

MS MacRAE: In-house. Okay.

MR CRAFFORD (LA): Just to give you an idea, in South Africa, for instance, we've got a million customers, roughly, just short of a million, and 600 legal advisers servicing those customers. So they are in the sort of situation of a fully admitted lawyer being in charge of a team.

MS MacRAE: Okay.

DR MUNDY: Bearing in mind my periodic discussions with my mobile phone company, is there scope for there to be - if it could emerge here, is there scope, or are the jurisdictional issues too great, that the paralegal management could be dealt with offshore? But I guess the laws are just so different you'd have to do it here, wouldn't you? I'm just thinking of, do you need to - you could service all of Australia from Perth, presumably. How would you get around the jurisdictional issues between states, because a lot of these smaller claims matters, particularly - it might be a tenancy matter which is quite jurisdictionally specific. How would you get around that?

MR CRAFFORD (LA): Well, one way we had to establish one in each state, to get around those state-bound laws. It's a problematic thing, I think, for the Australian economy as a whole, the fact that every state has different laws for everything.

DR MUNDY: So these workers that are providing these paralegal services effectively work in a call centre, so they would be located and supervised by the one

person, so you would need multiple sites around the country?

MR CRAFFORD (LA): Yes.

DR MUNDY: It's phone based, or you can go into the office?

MR CRAFFORD (LA): In South Africa they're offices, but I think what we started exploring is to in fact - because the number of people who qualify as lawyers and only lasts for a year or two in the profession apparently is very significant, whatever the reasons are. So there's a huge pool of suitably qualified people sitting at home, if you like, who could be utilised, because for this kind of a service, a person doesn't have to sit in an office, doesn't have to work certain hours. It would be easier to have a band of people, with their three hours available, this one, this one, all operating from home.

DR MUNDY: And they, depending on technology, can do it by Skype or something like - - -

MR CRAFFORD (LA): Exactly.

DR MUNDY: All right. Thank you very much for coming along. This is one of the conundrums we face as to - we can't make any recommendations about why it's not happening but, anyway, thank you very much.

MS MacRAE: Thank you.

DR MUNDY: We might briefly adjourn for five minutes.

DR MUNDY: We'll recommence. Could you please state your names and the capacity in which you appear for the record, please?

MS GULDBAEK (WLSA): I'm Heidi Guldbaek and this is my colleague Arlia Fleming and we're attending on behalf of Women's Legal Services Australia.

DR MUNDY: Would you like to make a brief opening statement?

MS GULDBAEK (WLSA): Yes, please.

DR MUNDY: Could I just ask you to speak up a little bit?

MS GULDBAEK (WLSA): Sure.

DR MUNDY: Because I'm a bit deaf, particularly when I've got noise at my back.

MS GULDBAEK (WLSA): I can relate. Okay. We'd like to start by thanking the Commission for this opportunity today and we commend the Commission on the work it's undertaking to improve access to justice for Australians who face disadvantage. We'd also like to take this opportunity to acknowledge that we're really humbled to be meeting on the land of the oldest living culture on Earth. Accordingly, we pay deep respect to the Whadjuk elders of the Noongar nation, past and present, and to all Aboriginal people facing the ongoing effects of colonisation of this country.

Women's Legal Services Australia is a national network of community legal centres specialising in areas of law that disproportionately affect women and children in accessing justice. Members of WLSA regularly provide advice, information, case work and legal education to women and service providers on a range of topics in the areas of law that women and children are most susceptible to, including family law, child protection, domestic violence and personal protection orders, reproductive health rights and discrimination matters.

We exist to promote powerful and effective advocacy for women who are disadvantaged in their access to justice. We have a particular interest in the intersection of violence against women and the law, and ensuring that disadvantaged women such as Aboriginal or Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women with disabilities, rural women, women from lesbian, gay, bisexual, transgender or intergenderal or queer communities, young women, older women and women in prison, are not further disadvantaged by the system.

Our respected specialist legal centres provide holistic, high quality and responsive legal services to women from a feminist framework that places the client

at the centre of our interactions and responds to them as a whole person rather than just a legal problem that needs a solution. Some of our members have been in existence for over 30 years, and we have members in each state and territory. We also encompass members who are not specialist CLCs but who support our aims of achieving access to justice for women. We are a network of the National Association of Community Legal Centres, also known as NACLC, which they will be providing a response to the draft report on access to justice arrangements and - - -

DR MUNDY: They have.

MS GULDBAEK (WLSA): They have, yes - and we support and endorse their submission, and our submission provides supplementary information specifically in relation to improving access to justice for women. In our submission we highlight three key principles that we consider necessary for breaking down systemic disadvantage and discrimination against women to ensure equal access to justice for Australian women, namely; increase funding for legal assistance service providers assisting women, and for all legal assistance service providers, reforming policies and laws that hinder access to justice for women and perpetuate gender inequality and better recognition of women's systemic disadvantage and their legal needs in the provision of legal aid.

Our submission outlines the barriers women face in accessing justice because of their gender and how those barriers intersect with barriers created due to other vulnerabilities, such as belonging to the different marginalised groups I mentioned earlier. We highlight the importance and the need to continue funding and increase funding for women's specialist legal service. We provide an overview of the work Women's Legal Services undertake.

We address some of the misunderstandings or generalisations within the draft report in relation to legal assistance service providers. We highlight the importance and the necessity for CLCs to be funded to undertake policy and law reform. That's particularly important to us given the existence of our network. It's about advocating for access to justice. We provide examples of some particular areas of law in which women struggle to access justice.

We advocate for better recognition of the systemic disadvantages experienced by women in navigating a justice system that's inherently gender biased, the legal needs of women to be better identified and prioritised in the granting of legal aid and the funding of women's legal services and we provide case studies to assist us in conveying these arguments, and we also provide some suggestions in relation to the collection of data. I'm the national law reform coordinator for Women's Legal Services Australia and my colleague, Ms Fleming, is a case worker from the Women's Law Centre of WA. So we hope to assist you today with any queries you have in relation to our submission and also the typical services provided by Women's

Legal Service.

DR MUNDY: Okay, thank you.

MS FLEMING (WLSA): I'd just like to briefly add, if I may; it may assist yourselves to understand sort of where I'm coming from. I've worked in the sector since 2005 where I started off as a volunteer in a community legal centre doing my undergraduate law degree. I've since then worked in the sector and have now been six years in practice, mainly in civil and family law. So I think I do have a different perspective, coming from that background, and feel very passionate about working in the community centre because, as Heidi mentioned, our core business is increasing access to justice.

DR MUNDY: Okay, thank you. You mentioned issues around advocacy and law reform and your submission deals with this at some length. You're probably aware of recent - we'll call them realignments of Commonwealth funding priorities - to what I think have been referred to as "frontline services." Are you able to give us a sense of what those funding realignments - the real impacts that they will have on the work of the organisations that you represent, and I guess also the people that those organisations - the women and children that those organisations seek to support and protect?

MS GULDBAEK (WLSA): I'll try my best. I think that because there's no - I guess community legal centres operate differently and it can be rare to have a worker that solely undertakes policy and law reform, and because of that often case workers are cramming that in with everything else that they do, and I think the spirit of the caveat that's being put on the national partnership agreement is to increase these frontline services that CLCs undertake, but unfortunately the existence of CLCs is three prongs and one of those prongs is policy and law reform in terms of really being able to - as Karen was saying, access to just about court representation and minor assistance. It's really about other preventative strategies.

To see those kind of services cut out I think will have a substantial impact, because in relation to one of the case studies we provided in our submission, it actually can be - besides the fact that actually it keeps women and children safe by identifying barriers to accessing justice, it saves the government money in the long-term by actually recognising laws that are disadvantaging people early on in the piece.

MS FLEMING (WLSA): Sorry, just to expand on that; the specific example I think that Heidi is referring to is in relation to the Violence Restraining Order Act in WA that underwent quite a lot of amendments, and unfortunately there were some unintended consequences that parliament didn't really realise that were going to happen, and so when the legislation is being interpreted by the courts Heidi's submissions to parliament have ended up in subsequent amendments to address these

issues which saw women going to two different courts to seek a violence restraining order; one for themselves in the Magistrates Court, then heading off to the Children's Court to seek a violence restraining order to cover their children as well.

Both courts dealing with exactly the same matters, potentially going to trials on the same issues in two separate courts. Now, that's clearly an incredible cost to the system, let alone an injustice to those particular individuals. So I think that's a really clear example of why law reform and policy advocacy is needed. We need to be able to address the systemic issues that our case workers identify.

DR MUNDY: So if the government persists on it's apparent current course of action, what will that actually mean? I mean, will your position become defunded, Heidi, or will frontline workers such as Arlia just not do this or it's been suggested you'll do it on your time, or how?

MS GULDBAEK (WLSA): There's a number of strategies that we have to explore and, you know, it's hard. We have to look at perhaps lobbying for different funding sources to undertake the work we do or perhaps we have to, as Karen had alluded to before, restructure the directions which we take. So maybe we have to be more focussed on community legal education and educating the government in relation to access to justice.

MS FLEMING (WLSA): I think it's just important to note too that the large amount of law reform and policy work that is done is about responding to government inquiries such as this.

MS GULDBAEK (WLSA): Yes, we are very aware of it.

DR MUNDY: I think our draft recommendation in this space gives you a pretty fair idea of the value that we place upon people who bring us evidence. Without that we may as well not exist, frankly. You mentioned this issue about two courts, and you of course are in the fortunate position of not having to deal with two - at least courts in different jurisdictions, and I guess it's - I mean, I don't know the extent to which you're able to comment on matters elsewhere.

But we have raised this question of a number of women's CLCs that have appeared before us. So I guess we're both interested in the Western Australian perspective and also Heidi perhaps what the national perspective is across the board, if you have any oversight of that. What are the consequences of matters being dealt with in different jurisdictions? You have some matters being dealt with in the Federal Family Court, other matters are being dealt with in the jurisdictional courts. I mean, do you I guess particular have any sense from your colleagues interstate whether you've got it easier and the people you represent are getting better outcomes than your colleagues in the east?

MS FLEMING (WLSA): Well, just to clarify - I did mean to mention this - I am actually from New South Wales. I have worked in generalist centres as well as at Womens New South Wales as well.

DR MUNDY: How long have you been here for?

MS FLEMING (WLSA): Almost three years.

DR MUNDY: You've got a long way to go before you're accepted.

MS FLEMING (WLSA): Yes, exactly. So I do have a perspective.

DR MUNDY: Yes. Well, that would be very interesting if you could share it with us.

MS FLEMING (WLSA): Yes, so quite simply, I think what happens when women, particularly who have been in family violence situations, they're retraumatised by going through the system, having to go to different services, different courts, retell their story over and over again. It's simply horrendous for them to do.

MS GULDBAEK (WLSA): Secondary victimisation.

MS FLEMING (WLSA): Yes, and there's a lot of emerging work coming through around trauma informed practice, which we're all quite interested in and taking steps to implement that in our own services, and I know that government departments, such as in WA the Department of Child Protection and different other agencies are doing work around this area to ensure that we are providing appropriate responses to people. We're not sending them off to a million different services and asking them to retell their story, but we're trying to link in together, we're working together. There has been quite a lot of work done around the intersection between child protection and family violence and family law and there's some interesting academic work being done around single court to deal with the whole - - -

DR MUNDY: Where is that work being done? If you could shoot us some links to that work, that would be very helpful.

MS FLEMING (WLSA): I believe one of our colleagues from Legal Aid did a study through the Churchill Fellowship a few years ago, I think.

MS GULDBAEK (WLSA): We can take it on notice and provide that - - -

DR MUNDY: Yes, if you could send it to us.

MS FLEMING (WLSA): Yes. But it is a very, very interesting point. But I think there's a lot more work that needs to be done in terms of creating one court to deal with all these different issues.

MS MacRAE: Would you say that it does seem to work better in the Western Australian jurisdiction where you don't have that speak to the Family Court, to the national level, or you're not able to say.

MS FLEMING (WLSA): So we do have a separate Family Court though in WA.

MS MacRAE: Yes, sorry, but having it in the same jurisdiction, does that give you an easier - - -

DR MUNDY: The fact that it's a state court or a federal court, does it make any material difference?

MS FLEMING (WLSA): I would say not.

MS GULDBAEK (WLSA): I think there's pros and cons for both models.

MS FLEMING (WLSA): Not really a material difference in my experience, coming from New South Wales. It is still a separate court. There is some efforts being made to talk about information sharing and protocols around that kind of thing. But it's still at very, very early stages.

DR MUNDY: So the solution possibly relies more in courts and protection agencies talking with each other rather than worrying about some sort of jurisdictional question?

MS FLEMING (WLSA): Yes, potentially. But there is a lot of work that needs to be done around that and consultation.

MS GULDBAEK (WLSA): Ideally, like the national sense from WLSA, I think we had set that out in our previous submission, is ideally a one-shop court would profound, but provided it's consultative.

DR MUNDY: We understand there was a trial done in Bendigo I think - lots of things seem to happen in Bendigo - whereby I think the magistrate was sitting and dealing with child protection and family violence matters, but was also dealing with Family Law Act CTH matters as well, because they can.

MS FLEMING (WLSA): Yes, that's right, and similarly in New South Wales the local courts can hear family law matters, depending on the circumstances. However,

in WA we have country circuits, so the Family Court will travel down to Bunbury and regional areas. But the Magistrates Courts here don't hear family law matters, and unfortunately restraining order proceedings sometimes there is this pressure on parents to make agreements about potentially the father who's subject to a violence restraining order, having contact with the children and they're pressured to make those agreements going through the violence restraining order process in the Magistrates Court, and clearly those proceedings are properly dealt with in the Family Court.

DR MUNDY: So there's no jurisdiction for the magistrate sitting in Kununurra, which I presume doesn't get visited by the Family Court on circuit particularly regularly.

MS FLEMING (WLSA): There is some circuits. I can't remember off the top of my head, I don't practice that far.

DR MUNDY: Yes, but basically the Magistrates Court is the best they're going to get, so they've got to come to some sort of outcome in that arrangement?

MS FLEMING (WLSA): Yes, but the Magistrates Court doesn't have the same powers to make parenting orders that the Family Court does. So we're seeing a problem and this is a national problem, it does happen in New South Wales as well, where magistrates are concerned about the contact with the children and there's just a pressure put on parents to make an agreement, and sometimes that's written up outside of the court if there's some lawyers in assistance. But other times parents just sort of make really ad hoc arrangements without proper legal advice.

DR MUNDY: Okay. Ange?

MS MacRAE: You talk a little bit about the problems and the - if I'm not putting words in your mouth - the sort of gender bias sometimes in the way that grants of legal assistance are given. What sort of training do you think might be required for LAC panel lawyers to help them improve the way that they make their decisions and who would pay for that, how would it be provided?

MS GULDBAEK (WLSA): Well, there's probably a number of options that could happen and it probably would need to be consulted with various stakeholders to work out precisely how that would operate on the ground. But in terms of some of the issues that they would need training on, there's probably a range. We're specifically concerned about, I guess, on a fundamental level understanding family and domestic violence and the impact that that can have on a person, and as Arlia had alluded to previously, perhaps trauma informed approach to practicing as well.

DR MUNDY: Could you just explain for the ignorant Commission what a trauma

informed approach actually is?

MS FLEMING (WLSA): So at its essential core, and it is quite an involved area, but it's about understanding people's behaviour and why they might be behaving in certain ways and seeing that through a trauma lens. So many of our clients have experienced trauma from quite a young age and from our perspective, and I know many other services are interested, rather than turning people away because they're difficult to work with, have complex issues, we try to understand where they're coming from, and we put measures in place, try to provide that holistic kind of service.

As is mentioned in the submission, we don't just focus on people's legal issue as a discrete kind of thing. We know, particularly in family law, there needs to be a range of supports in place for families and children. So we work very well with other services in informal and formal partnerships to ensure that people have a range of support services around them. I'm not sure if that really answered your question.

DR MUNDY: No.

MS MacRAE: Yes, that's fine. Are there some jurisdictions where you find that's easier to do than others? I assume for example in the Legal Aid Commission's defence, and you'd probably accept this, that they would say that sometimes it's a matter of funding and they'd like to take a more holistic view for the people that come in the door, but the queue is so long that they're really forced to look at a narrower - - -

MS GULDBAEK (WLSA): Well, I think that in-house lawyers probably do have this kind of training. But when I referred to the panel, I mean the private lawyers that sign up might not necessarily be exposed to training, that includes understanding these kind of social problems and how to work with clients on the fundamental level because I guess what we sometimes worry about is seeing good intentions lead to consequences that - - -

MS MacRAE: Bad outcomes.

MS GULDBAEK: - - - put women and children at risk.

DR MUNDY: I guess the flip side of that, as probably both of you mentioned, that a lot of your members work quite closely with a range of other community sector workers and one of the things that I think we talk about a bit of length is this idea of training of those people to recognise legal problems when they see them and warm refer them on.

MS FLEMING: Yes.

DR MUNDY: We noted - we learned yesterday - we might have learned from the submission, but in South Australia, they actually have training courses, you know, certain TAFE courses, for community workers. Is that something that, nationally, people would think was a useful idea?

MS FLEMING: I believe so on the whole and, in actual fact, we already do quite a lot of that sort of thing. So the service providers that I work with on a daily basis, and I manage a prison outreach program, I work with them all the time about identifying legal issues. We haven't got a formal tool in place and, in some circumstances, that does work quite well and we're familiar with the Homeless Persons Legal Service format with the legal health checks. It's a very, very interesting thing and I think it would increase access to justice more broadly. However, there are some concerns around that, in terms of training and quality assurance, that sort of thing. I think if it was pursued, those would be the main kind of concerns.

DR MUNDY: If done properly, it would be a good thing.

MS FLEMING: Yes, of course, to have someone helping an individual identify their legal issues because we do encounter that all the time. People might tell you a story, but then not necessarily identify that it is a legal issue, or that there is a legal remedy there.

MS GULDBAEK: And that's something that Women's Legal Services regularly do, as Arlia said, and I just wanted to provide you with a quick example maybe of that. So this is a toolkit for GPs in New South Wales. It's been developed by the Women's Legal Service of New South Wales. It basically helps GPs to understand what family and domestic violence is, different indicators, initial safety planning, how to ask a patient about family and domestic violence, and then it provides a bit of information in relation to different legal problems that might be arising and, I guess, how to get it into the case notes as well, and information on what's going to happen if they'll be subpoenaed, and different tactics for dealing with this clients and referrals and support. That's, kind of, a partnership and it's been recognised by the New South Wales Medical - - -

MS MacRAE: The AMA, the Australian Medical Association.

MS GULDBAEK: The Australian one, yes.

DR MUNDY: So the AMA, and presumably the division of general practices as well, are supportive of that. They do not find it threatening or, "How dare you lawyers tell us doctors what to do?"

MS FLEMING: I don't believe so. I think lawyers and doctors are both in helping professions. We generally want to assist our clients to improve their lives of their families, as well as themselves.

MS MacRAE: Just as far as that goes, I imagine that the other reason, I suppose, for reticence might be that doctors do have a concern that, "If I get involved in this, am I somehow going to get involved into the dispute later on and I'd rather not be." So you mentioned that, you know, you are helping them in terms of what would happen if you are subpoenaed and that sort of thing. Are you able to comment on how much, in a community worker's mind, that concern around, "I'm going to get dragged into something here that I don't want to become a part of, but maybe for very good reason I'm worried about the impact that's going to come back on me," how much of that is a barrier and whether there's other ways to address that?

MS FLEMING: It is a huge barrier and I believe that the development of that toolkit was in response to that. There was another publication that Women's Legal Services New South Wales has about counsellors and subpoenas, particularly around family violence. It is quite common for the Family Court to want records from people to give them some independent information rather than just hearing it from the parties that are very emotionally involved. It's important on another range of legal issues that we are able to access records from doctors, and part of the problem that we have as lawyers is that sometimes those records aren't quite as good as they could be and I think GPs generally are, as I said, wanting to assist people.

So when we explain, "This would really help us and it would in turn then help the client," then I think that we can then overcome those issues, but it is a huge barrier. I hear it from the people that I work with in non-legal services, that they're concerned about providing their notes and going to Court. Obviously, they get very little training around those issues.

DR MUNDY: I guess the point is, in part, that their notes are essentially for their own purposes and, therefore, they are not put together for subsequently being used as evidence, but can I - sorry?

MS MacRAE: I just had one further thing. Is there conversely a concern that if women feel that what they are divulging to their medical practitioner might become part of a legal proceeding and there is some concern that, "If I voice these issues and it somehow then comes public" - for those that are in a threatening and violent relationship, that they are then concerned to raise those issues with other professionals?

MS FLEMING: I think the aim of particularly the counsellors and subpoenas and this GP toolkit is to alert medical professionals to the fact that they have the right to claim privilege and protect their client's information and interests. But obviously, in

some circumstances, it's going to be helpful. We hear from - and I think it makes logical sense that many, many people go to speak to their GPs about their issues, whatever they may be. If GPs can assist that person, as I was saying before, to identify that legal problem that might not be exactly clear to begin with and make appropriate referrals, early intervention, prevention stuff, I think the pathway is quite clear.

DR MUNDY: I guess, the data from the law survey would tend to suggest that, outside family members, medical practitioners are typically the place where people are most likely to go to get assistance. Can I just - I am just mindful of time, but NAPLC has suggested that, in Western Australia, there is a good collaborative model for sorting out legal assistance priorities in the broad, and it involves the Commonwealth, Legal Aid WA, and the CLC sector. Is that a process that you are in a position just to give a thumbnail sketch of how it works for your organisation? Is it really beneficial?

MS FLEMING: Absolutely, it's beneficial. We, on a daily basis, would make warm referrals to other services. Our service is incredibly stretched. We turn people away on a daily basis, so we necessarily - we need to have those relationships with other organisations and we don't make clients just call around other places. We do in some circumstances, obviously, if they're in a position to be able to do that, but we try to prevent people from repeating their story and being re-traumatised. So quite often, a receptionist will be calling other services, saying, "I've got this person who needs this kind of assistance. Are you able to help her?" I think Karen mentioned earlier that there's a program with Legal Aid where they refer conflicts of interest to different community legal centres, depending on where the client lives, yes.

DR MUNDY: I guess what we are interested in, also, is the extent to which that forum, if you like, is involved in determining consistent priorities for assistance across the state. Is that something you are able to comment on?

MS GULDBAEK: We are probably not able to comment on that, but we could take it on notice and get back to you.

MS MacRAE: I think you are going to hear from the state CLC association.

DR MUNDY: Sometimes we find that organisations and their associations have different views. That is when our job gets fun. Just bear with us. I guess just finishing up, we know that family law matters - I do not think you were here earlier, but it does seem to us that good progress has been made with respect to non-Court-based forms of dispute resolution. Call them ADR, call them what you like. Without going through that, and there is a significant body of work, what more do you think needs to be done to facilitate better outcomes, particularly for women who are suffering some form of additional disadvantage? Mental health issues

perhaps and so on, and then secondly we've heard a bit of evidence around the place about disputes regarding wills. We're just interested whether that is a matter that you see very regularly and if so might non-court based resolution processes to those disputes be an improvement on having to trot down and bother the Supreme Court?

MS FLEMING: The latter part of the question might be a little bit outside of our area of expertise. Wills and estates don't fall within our case work areas.

DR MUNDY: What do you do if you get a woman who comes in and says, "I've got this problem, I've been caring for my mother, she's passed away, my siblings are now - the will is" - where do you send them?

MS FLEMING: We would try and refer them either to a general CLC who does have some experience in that area or potentially the Legal Aid.

DR MUNDY: The first question?

MS GULDBAEK: So in relation to what more needs to be done to assisting women outside of court in relation to family law - - -

DR MUNDY: Yes,. what more needs to be done in the ADR space? Do we need to do more for women with mental health challenges, do we need to do more for Indigenous women? That's the sort of - - -

MS FLEMING: Shall we answer yes? We do need to do a lot more.

DR MUNDY: My next question is what?

MS FLEMING: Yes, so we do already have partnerships with family relationship centres where we regularly go and provide legal advice to those people. I think there is potential for that to be expanded. We - I think all of our members, really, operate from an area of trying to assist women to resolve their issues. We have a lot of skills in negotiation, we often are assisting people to resolve things outside of court already. I think if we were provided with more funding we could do more of that and maybe I could just provide you with a short example; I was at the Womens Prison yesterday. I encountered a lady who has been refused Legal Aid for her family law matter. It's been programmed to trial already. She will be left without representation. The father has legal representation, from what's known to be quite a litigious law firm in Perth and she'll be incredibly disadvantaged.

While she's sitting in prison, she will be able to appear via phone in the Family Court. She won't have anyone to assist her to prepare documents, which is of no assistance to the court and they will be left in a very difficult situation trying to decide about her contact with her children. She's due for release in November, so it's

not that far away and what I will be doing for her is trying to assist her to make some arrangements for contact while she's in prison, and potentially if we can avoid a trial and give her some time and space to readjust to being back in the community, link in with some services to address the issues that you've been referring to and essentially we try and encourage people to build up a relationship of trust where that's possible, and increase communication and cooperation, which we would talk about in family law as being the best for children. So I hope that was a little bit of a good example.

DR MUNDY: That's helpful.

MS MacRAE: Sorry, could I just ask you to be a little bit more specific? How will you avoid getting to court if the other party's sort of insisting that's required? What options do you have available?

MS FLEMING: So at the moment it seems like there hasn't been any attempts really at negotiating. It's at the father's instigation that the Family Court proceedings have commenced, so I will be doing my very best to say that this is just not the best thing. It would be a ridiculous situation to end up with some final orders for her contact with her children when she's going to be released in November. So of course, the situation is going to change and it's just impractical.

MS MacRAE: So in the absence of your assistance in that case, her only option then would be to try and make that negotiation herself, which would be - I assume - very awkward for her.

MS FLEMING: Actually, she's not really in a position to be able to do that. Her knowledge of the family law system is very low, her literacy skills are not that great and we see people all the time who are quite confused around terminology, the things that they write in their court documents are then quite confusing for the court, has to try and clarify exactly what they're trying to ask for. It's a very frustrating thing for the court to be dealing with self-represented litigants.

MS MacRAE: Thank you.

DR MUNDY: We might leave it there. Thank you very much for your submissions and your time coming here today.

MS GULDBAEK: Thank you.

DR MUNDY: We will now adjourn for a cup of tea until 5 past 11.

DR MUNDY: We will reconvene, thank you. Could you please state your name and the capacity in which you appear for the transcript?

MS KANE (CLCAWA): Sara Kane, the Deputy Chairperson of the Community Legal Centre Association Western Australia.

MR KIERAN (CLCAWA): And Philip Kieran, Deputy Director of the Community Legal Centre Association of Western Australia.

DR MUNDY: Would one of you like to make a brief opening statement?

MS KANE (CLCAWA): Yes, that would be me. Thank you .

DR MUNDY: Off you go.

MS KANE (CLCAWA): The Community Legal Centre Association is the peak organisation representing 28 community legal centres and family violence prevention legal services throughout Western Australia. All CLCs in Western Australia have participated in a national industry-based certification process that supports good practice in the delivery of quality community legal services. All WA CLCs are located in areas of most need. Two major reviews of CLCs have been completed in Western Australia, the first being in 2003 and the second in 2009. Both of these reviews provided evidence-based legal means assessments.

Those two reviews drove funding, planning and location of community legal centres in Western Australia for at least the last decade. We would like to respond directly to some of the recommendations made in the draft report, in particular, regard to the funding arrangements. The Community Legal Centre Association of WA supports a funding model that is equitable, transparent, accountable and needs based. We do not agree with the Commission's premise that the CLSP funding does not link with needs, is not responsive to demographic changes and does not incorporate evidence-based considerations, particularly in Western Australia.

We do not support the procurement process for legal assistance that creates a conflict of interest, for example, where a government agency is the program administrator and also potential bidder for the funding and we would caution with the use of an open tender process as being the best option without further consideration of the pros and cons of such a system. There are a range of procurement options that the WA government currently use in partnership with not-for-profit for the delivery of community services. These include preferred providers, direct negotiation, project grants and open tender, all of which are based on clear criteria, consultation, research, market testing and what will deliver the best outcomes for the community receiving the services.

Procurement options should also consider the true costs of delivering such services, particularly in rural, regional and remote areas with costs such as travel, salaries, infrastructure, housing and maintenance significantly high than the Perth metro area. Similarly, Western Australia costs are generally higher than other states. The Association supports a collaborative approach to distributing legal needs assistance funding based on needs, such as using the results - the recommendations - from the 2003 and 2009 reviews. We also support using the mechanism of the WA Community Legal Stakeholder Consultative Committee to decide where this funding is allocated.

Membership of that committee includes the Community Legal Association of WA, Legal Aid WA, the Law Society of WA, the Commonwealth Attorney-Generals Department and the WA Department of the Attorney-General. We feel that this model would promote collaboration and not hinder it. The ability to participate in law reform and policy work is also absolutely essential to the work of community legal centres in advocating for just and fair laws for vulnerable Australians. This work is often completed in partnership with government or when government calls for legislative or policy review submissions such as this report and review or by regular funding meetings to report on trends.

Law reform work assists community, the government and the economy. We also acknowledge the need and the importance of economies of scale to maximise efficiencies and promote agency collaboration. Currently the CLCs - the specialist CLCs - are investigating a co-location project. We also have a national shared professional indemnity insurance scheme, reciprocal training and mentoring, shared research and mutual policy sharing. The Association continues to investigate more collaborative cost saving projects going forward.

Finally, an independent economic cost benefit analysis of community legal centres shows there was a return of \$18 in benefits to the community for every dollar invested in the community legal centres as they're currently funded. Moving on to pro bono and volunteer support recommendations. CLCs attract, as you may be aware, significant pro bono and volunteer support to deliver a range of legal and non-legal services and this support can range from lawyers providing direct services to clients, lawyers providing advice to the centre or law firms picking up matters on behalf of a community legal centre, also research, publications, printing, admin, fund raising and university students and people from the general community volunteer on our boards.

This enormous support would not be provided to government nor to a for-profit commercial entity. In some cases the value of volunteer and pro bono support matches or even exceeds our funded budgets. The financial value of pro bono and volunteer support is in excess of millions per year. In terms of the eligibility

recommendations the Community Legal Centre Association will welcome any opportunity to collaborate in defining priority and developing an assessment framework. Criteria should consider though the lived experience of a person and not be too rigid.

This would encourage people to engage and be willing to tell their story. Best practice involves an assessment of the interplay between disadvantaged and vulnerability indicators rather than a red tape approach and these factors can include income, capacity of the client to self-advocate, severity of the legal issue, the impact to the individual and community if no legal assistance is provided and personal circumstances of the clients such as language, age, disability and also let other legal options that may be available. Further marginalisation, discrimination and alienation of people should be avoided if common eligibility criteria are established.

We also want to ensure that if an eligibility criteria is established it doesn't worsen the already high turn-away rates that CLCs experience due to restricted funding and resources. In regards to the single point of contact, CLCs of WA support any initiative that simplifies and increases legal assistance access and referral for people. Phone and web-based services can complement our existing services but shouldn't replace locally-based points of contact or further legal assistance. The resources for these centralised contact points should also not come from existing already over-stretched legal funding.

A best practice model in relation to complex social problems and high need clients is of a no wrong door approach. This is where service providers can work towards greater integration in the entry assessment processes to minimise the need for clients to re-tell their story and to refer people to the most relevant and responsive agencies. In regards to the idea of legal health checks, they're useful in two forms; firstly, for lawyers and non-lawyers within the legal assistance framework to assess and plan for legal need. Secondly, they're a good tool for general agencies to identify if a referral into a legal assistance agency is required.

WA CLCs already work in partnership with referring agencies to facilitate early identification of legal need. If legal health checks are used, the tools must be developed with legal assistance agencies. It's not appropriate for non-legal agencies to develop legal health checks. All people using these legal health checks should be trained and supervised in understanding the background, context and use of such legal health check. Moving on to the data systems recommendation. The Community Legal Centre Association supports the reform to the collection and reporting of data and, again, welcomes any opportunity to participate in the design and development of this data system.

Any new data that's collected needs to be de-identified and ensured that does not breach confidentiality. The system must also recognise multiple sources of funding

and collaboration will be required between major funders at a state and national level. CLCs must also be able to access their own data securely and in a timely manner. Peak bodies such as the Association should also be able to access regional, state and national aggregated data to assist with our policy planning and training needs. And, finally, in regards to the use of non-lawyers with limited licences to deliver services, we, again, support this measure that enhances the ability of non-lawyers with specific training and legal supervision to provide services as part of the legal assistance framework.

However, this must occur within a properly established and supervised legal practice. CLCs already use this multi-disciplinary practice to provide better, more comprehensive services to a range of people and link it to the local community to improve service, access and referrals. Quality training, mentoring and supervision is essential to better utilise these services of non-lawyers. In conclusion, clearly we do have an access to justice crisis in our country and I think the government acknowledges this crisis by requesting the review.

CLCs strive to better meet demand, ensure access to justice, attract and retain capable staff, create innovative services, are responsive and work in a balanced way, however, to ensure that this essential work can be done and continue in the best possible way we need more guaranteed, long term, accessible investment from the Federal Government.

DR MUNDY: Thank you. Can I briefly bring you to something that was in the NACLC submission with regard to what was referred to as collaborate approach that is being used in Western Australia in order to determine priorities and principles for allocation of funding across the state? Now, what I am not asking here is about referrals and things like that, but as establishing the broad approach. We are probably attracted to a model where the states - that funding is provided by the Commonwealth at state level and then people on the ground in the states do further work with whatever resources the states are prepared to put in. So can you just explain to us how that model in WA works?

MS KANE (CLCAWA): Yes, I think it's regarding those two major reviews that I mentioned in 2003 and recently - well, the most recent being in 2009 and we've revisited those reviews and they're still quite relevant in terms of addressing where the areas of most legal need are, and that was done in collaboration with the WA stakeholders committee - no?

MS MacRAE: Yes.

MS KANE (CLCAWA): Yes. So that was a partnership between the association, Legal Aid and a range of other government organisations to look, with the use of an external consultant - so it was an unbiased approach - of researching what the legal

needs are in our local community - well, our state - and looking where the priority areas of the areas of law and also the geographic areas that were requiring legal services and that's how we helped map out where the areas of need are and where the funding should be prioritised.

DR MUNDY: Is this just a one off event or is it an ongoing review and follow up, and tweaking sort of arrangement?

MS KANE (CLCAWA): Yes, well because we've done two now in 03 and 09 we're probably due to do another one soon, so I think it would just be - I would foresee that as an Association, we would like to see that as an ongoing arrangement and good practice to be able to work with, yes, the federal and state governments in terms of how to best use that funding.

MS MacRAE: What happens then in relation to that review? Say the 2009 review said "look, we've got a growing need, we've heard earlier that the migrant groups are coming now to particular areas and there's a different sort of need here than what there was six years ago or whatever. How do you transition away? One of the issues we've had - and it might be more of an issue in some of the other jurisdictions, perhaps more so than WA - but sometimes the location of CLCs in particular will have a particular community focus as you'd expect, and there's volunteers and pro bono resources all linked to the location of that CLC and yet you might say that the real need for some of those services has now moved. How do you sort of marry those issues?

MS KANE (CLCAWA): I think just - I mean, at the moment we've got - like, we're always assessing where centres are based and if there is an area emerging of needs, such for us it's in the eastern corridor out through Midland, and further north beyond Joondalup now there's a legal need stretching - poor northern suburbs, who I think you heard from before, they service - - -

MS MacRAE: They keep stretching.

MS KANE (CLCAWA): Yes, moving on. Similarly, the southern corridor. So we're - as an association, definitely, and that all is in those reviews about that is the predicted area. So it's working with government and this is part of the process, is looking at how do we get funding to service those needs? And at the moment in Western Australia, all the centres that are currently based in geographic areas are where the area is of most need. I mean, we've got them in Gosnells, Midland, Fremantle, Mirrabooka, Joondalup, Victoria Park. So they really are entrenched in those areas where there's most need and I think yes, there's areas of more emerging needs as it moves forward, absolutely, geographically. We just probably need the funding to - - -

DR MUNDY: Do you get money from the state government as well as the Commonwealth?

MS KANE (CLCAWA): Yes.

DR MUNDY: Roughly how does it look?

MS KANE (CLCAWA): I'm not sure. I might have to take that on notice in terms of the percentage which I can get you.

DR MUNDY: I mean, even if it's aggregated across the state, or whatever, I'm just interested because some jurisdictions do provide funding and others don't, but I'm - - -

MS KANE (CLCAWA): I think Western Australia does, yes, but it's certainly a smaller portion than the federal government.

DR MUNDY: You mentioned advocacy and law reform.

MS KANE (CLCAWA): Pardon?

DR MUNDY: You mentioned advocacy and law reform, and you'll no doubt have noticed that we make some recommendations in support of advocacy and law reform. The Commonwealth appears to be shifting its focus away from advocacy and law reform. How is that going to affect your members on the ground in Western Australia and are the funding reductions that are apparently associated with this refocussing actually falling on advocacy and law reform, or are they actually falling on online services? Sorry, front line services.

MS KANE (CLCAWA): Front line services. Absolutely.

DR MUNDY: Well, maybe online services.

MS KANE (CLCAWA): Yes, well both. Absolutely. Any funding that we receive - I'm pretty confident to say this - I don't know of any community legal centre in Western Australia that has a dedicated funded policy position. All the funding that I'm aware of goes directly to frontline services. So if they're talking about any cuts, I don't know where any of that money would be coming from. Any law reform that I'm aware of that is done by centres is generally on top of the casework and client work with the support of pro bono volunteers, and it's generally in response to government court inquiries such as this. So, you know, minimum wage reviews, access to justice, anything that's called - equal opportunity, Australian Human Rights Commission.

So it's really important for our clients because we're the ones that are directly delivering services at the coal face and we're hearing where the laws are working and where they're not, and we're best placed to be able to work with government in partnership to talk about what are the emerging areas of legal need, what are the trends, how best would it be to meet that need? I think that's part of that advocacy and law reform process, and it can be done in partnership and collaboration, and it's certainly not done with any threat or malice, it's always done in partnership with the best intentions of the laws being accessible and fair.

So any funding cuts would directly affect our frontline services and we would strongly encourage the importance of that work, just to better Australia. Better access to laws, better understanding of laws and also if we can see where improvements can be made, not just in the legislation but the policy around how that legislation is delivered or practiced, then yes, I just think that improves the situation for everyone.

DR MUNDY: Just one other question on these more recent cuts; are you aware of what the impact will be in particular on the WA EDO?

MS KANE (CLCAWA): Yes.

DR MUNDY: Can you tell me what it is?

MS KANE (CLCAWA): I think they will be - - -

DR MUNDY: Because they're not appearing because us, so I can't ask them and you're the closest thing I've got.

MS KANE (CLCAWA): Yes, look I think it's going to have a pretty huge impact and I think - only because they've got - they've lost their federal funding as far as I'm aware and they've got state funding to perhaps get them across the line for another year, and then they're - then that's it, unless they can find funding elsewhere.

DR MUNDY: What do you think the consequences of - I presume in that year their activities will contract but moreover - if they were to shut up shop?

MS KANE (CLCAWA): Well, it will be huge in Western Australia because we've got such a huge mining culture and I think their office is really important in maintaining the community - sorry, representing the community responses in environmental protection, and we've got a few big issues in Western Australia at the moment that the EDO are working on and have a lot of community support behind them. So if that office goes, that will be a huge impact on our community and the environment in Western Australia.

DR MUNDY: Would you characterise their work as case law or as law reform?
Given there's those three areas that - - -

MS KANE (CLCAWA): I think it covers everything, to be honest. I think it is case work for people that are obviously approaching them and communities that are approaching them, but also what they're identifying is certainly going to assist in law reform, and their role is certainly education through that process. I think it covers all three areas.

DR MUNDY: Thank you.

MR KIERAN (CLCAWA): Would you like me to pass on to the EDO that - - -

DR MUNDY: We would be more than happy to receive a submission from them. They have been very helpful to the Commission in the past and we'd be happy to hear from them again.

MS KANE (CLCAWA): Yes, we'll pass that on. I just think they're probably under resourced and under the pump at the moment.

DR MUNDY: We appreciate that.

MS KANE (CLCAWA): Yes, so - but we will take that on notice.

MS MacRAE: Even just a page, you know?

MS KANE (CLCAWA): Yes.

MS MacRAE: If that's all they had time for, just on the key impacts that they're likely to see would be helpful.

DR MUNDY: We had evidence from the ACT EDO on Monday, they indicated they will probably close their doors.

MS KANE (CLCAWA): Yes, EDO WA are pretty confident that would be the track within a year.

DR MUNDY: Yes, the suggestion was that the smaller - the women who appeared before us wasn't quite sure about New South Wales and Victoria, and maybe Queensland but the rest - the one she was really not sure about was WA. But Tassie, South Australia are probably gone.

MS KANE (CLCAWA): Yes.

MS MacRAE: Sorry, can I just turn very briefly, just back to these 2003 and 2009 reviews? The reason I return to them is because people keep mentioning them as though - - -

MS KANE (CLCAWA): Yes. Sure.

MS MacRAE: This the nirvana. So those reviews are publicly available, are they, or not?

MS KANE (CLCAWA): I think so. They certainly were available on the consultants' website, but we can forward that to the Commission, both those reviews and - - -

MS MacRAE: Okay. That would be helpful.

MS KANE (CLCAWA): Yes.

MS MacRAE: Because we've heard quite a lot about what they do.

MS KANE (CLCAWA): Yes.

MS MacRAE: But it's very hard to really get a handle on it.

DR MUNDY: And if you're concerned that they're not entirely publicly available we're more than happy to accept them on a confidential basis.

MS KANE (CLCAWA): Yes.

DR MUNDY: So if we want to use any material from them we'll come back to you.

MS KANE (CLCAWA): Yes. Wonderful. Yes, that should be fine. I'll get them today.

MS MacRAE: Okay. That would be helpful. And, sorry, just to clarify what the review was doing, it was looking just at the CLCs or that collaborative approach was looking at legal need generally and so it considered LACS and those things as well in the - - -

MS KANE (CLCAWA): Absolutely. Yes.

MS MacRAE: Yes. So it was the whole - - -

MS KANE (CLCAWA): Absolutely.

MS MacRAE: So it was the whole legal assistance - - -

MS KANE (CLCAWA): Framework.

MS MacRAE: Framework for the whole of WA.

MS KANE (CLCAWA): Yes. Yes.

MS MacRAE: Yes. Okay.

MS KANE (CLCAWA): And anything - you know, even - - -

MS MacRAE: All right. That's what I thought. I just wanted to clarify.

MS KANE (CLCAWA): - - - areas that weren't covered that, you know, that aren't currently covered by funding and that's where those areas of need, I think, consumer - and there was a few other specialist areas of law but also at the time it was wheatbelt and Joondalup and a few other areas - - -

MS MacRAE: And in relation then to those areas where they could see there was additional need, was there - did the recommendations in those reviews go as far as saying this would be an area well served by a CLC or this would be well-served by a LAC office or did it just - was it a higher level - there's an area of need here? We need to sort of sort it out.

MS KANE (CLCAWA): Probably firstly identifying the need and that where, if it was very much community based and supported then generally a Community Legal Centre.

MS MacRAE: Right.

MS KANE (CLCAWA): Because they're more connected with the community at a grass roots level and supported and volunteer - - -

MS MacRAE: Yes.

MS KANE (CLCAWA): So I think generally it would be always Community Legal Centre.

MS MacRAE: Okay. Thank you for that. I just wanted to clarify.

DR MUNDY: You were just talking about some specialist CLCs. My recollection is there was once a mental health CLC in Western Australia.

MS KANE (CLCAWA): Yes. Yes.

DR MUNDY: Is it still ongoing or - - -

MS KANE (CLCAWA): Yes. Absolutely.

DR MUNDY: It had some funding reductions recently but it's obviously got through that somehow.

MS KANE (CLCAWA): Yes, like all of us. We've all had shavings off our budgets, so yes, they're certainly very much - very active and - - -

DR MUNDY: NACLC in their submission to us gave us a - what they call a minimum based funding level when they're sort of presumption was a staff of about five is the sort of the minimum that you need.

MS KANE (CLCAWA): Yes.

DR MUNDY: And obviously some CLCs are much larger.

MS KANE (CLCAWA): Yes.

DR MUNDY: Do any of your members fall below that - what - if that were the critical mass, do any of yours fall below that?

MS KANE (CLCAWA): Yes, I think there'd be a few. I'd have to take it on notice to actually do some - and actually ask some of the centres, but I would imagine there'd be a couple definitely.

DR MUNDY: Would they be regionally based ones or would they be - - -

MS KANE (CLCAWA): Yes, both, and there'd be a couple of metro, particularly in the areas of community legal education. It's always one of those roles that I think gets cut back first and not funded so, yes, absolutely, and I can - I'll take that on notice and - - -

DR MUNDY: And do you think that five is - is that a reasonable guess at what a sustained - minimally sustainable organisation looks like?

MS KANE (CLCAWA): Yes. I mean, I'd hesitate to say yes or no.

DR MUNDY: Well, let me put it to you another way.

MS KANE (CLCAWA): Yes.

DR MUNDY: The minimum number isn't 20.

MS KANE (CLCAWA): No.

DR MUNDY: And it's not none on this, so it's - if it's not five it might be seven, is that the sort of - - -

MS KANE (CLCAWA): Yes, that's right. Yes, I'd say, like, I mean, you'd want a couple of solicitors and community legal education, admin.

DR MUNDY: Yes.

MS KANE (CLCAWA): I think that's from - I'm just looking over to my colleague. I think from memory that - I know the NACLC's report that they've got a base framework of funding as well.

DR MUNDY: Yes.

MS KANE (CLCAWA): And the minimum number.

DR MUNDY: No, no, that's - - -

MS KANE (CLCAWA): Which we'd support.

DR MUNDY: That's fine.

MS MacRAE: But part of the way of getting scale, if I understand your submission correctly, is to - you've developed some of these complementary services that you're providing, so things like financial counselling and disability advocacy.

MS KANE (CLCAWA): Yes.

MS MacRAE: Can you just tell us a little bit more about that and how successful that's been and whether you've got sort of plans to develop those sorts of services further.

MS KANE (CLCAWA): Sure. Sure. They're mainly in the generalist centres and, for example, Tenancy is - have - a lot of the generalist community legal centres within the metro area and regional centres have tenancy advocates that are supported by our specialist service. Our - - -

MS MacRAE: We heard a little bit from Karen earlier about the one there so that's good.

MS KANE (CLCAWA): Good. Great.

MS MacRAE: So that was good. Yes.

MS KANE (CLCA): Sorry. Yes, so - and they're supported by the Tenancy Service, Community Legal Centre in Perth and the other ones are disability, I know, have a disability advocacy service at Sussex Street in Victoria Park and a lot of generalists have the financial counsellors as well, and it's really important - I know in Gosnells, for example, they've got that multi-services approach where they've got the legal teams but they've also got tenancy advocates, financial counsellors, mediators, and what is important about that is that is when a client comes through the door then they can bundle that - they can provide that person with a multitude of support.

So, yes, it's really important that that continues to get funded, and I think it's really important for prevention of unnecessary legal litigation and things that we may be able to sort out locally in a couple of appointments and proper referrals and support rather than going through that litigious process and costing the costs and them and everyone emotional and financial impact.

MS MacRAE: And does it mean that you can use - some of your resources can be lower level trained, so you can use sort of paralegals and advocates rather than fully-trained lawyers for some services where that's more appropriate?

MS KANE (CLCAWA): Yes. Yes. But I would - like, yes, to use that model and a lot of the community legal centres are, but they all are supervised by solicitors.

MS MacRAE: Sure. Sure.

MS KANE (CLCAWA): And I think that would be something that we'd want to emphasise that if - and we support the model of using, like the non-licensed or non-lawyer - sorry - the licensed non-lawyers model which we already do, but they're all very much within a legal practice framework and supervised by solicitors.

DR MUNDY: Yes, I think there's been a little confusion around that question - that bit of the report because we're actually - what we had in mind was something that's done in Washington State.

MS KANE (CLCAWA): Okay.

DR MUNDY: Where people have a limited practicing licence within family law.

MS KANE (CLCAWA): Okay.

DR MUNDY: So they're not in any sense undertrained or lesser trained but they're just trained in that box.

MS KANE (CLCAWA): Right.

DR MUNDY: So they don't have all this other - you know, they probably haven't done property or whatever. So it's a different model of legal training. You drew attention in your submission and in your comments today about this model for partnership procurement, if you like, in WA.

MS KANE (CLCAWA): Yes. Sure.

DR MUNDY: And I - again, I think I am absolutely certain we didn't say that competitive tendering was the preferred approach. We were very deliberate in saying that.

MS KANE (CLCAWA): Okay.

DR MUNDY: I think our staff might have preferred us to say that but we didn't. Can you perhaps just flesh out how that works, how it deals with conflict of interest and how it deals with value for money?

MS KANE (CLCAWA): Yes. Sure. Well, I know it was through the Economic Audit Committee within Western Australia that - and a partnership forum that was established that they looked at - that involved government departments and also community agencies - that looked at developing this procurement model and it has worked, as far as I'm aware, so far where, particularly where there's preferred providers, so I know, for example, at our centre we do a particular area of law that provides support to the Department of Commerce and we're the only ones that do it so we've got a preferred provider type - - -

DR MUNDY: So you've been doing it. They're happy with it.

MS KANE (CLCAWA): They're happy with it.

DR MUNDY: Yes.

MS KANE (CLCAWA): We do - we've got a track record for effectiveness but also efficiency, so we become a preferred provider and we negotiate a contract with - directly with the Department of Commerce for that. In terms of - and obviously there's project grants. In terms of open tender I know that the tenancy, we've just been through that process, the Association with the new tenancy service with the Department of Commerce and, yes, I think because we had such a good track record in delivering the services that did factor in, but I think there was involvement - I'm

not sure - about any of the tender process that actually went through, but I know there was different agencies that applied for that contract and the commerce managed that conflict. I'm not sure how they would have - - -

DR MUNDY: So what were the character of those other agencies? I mean, were they - - -

MS KANE (CLCAWA): They were not-for-profits.

DR MUNDY: Yes.

MS KANE (CLCAWA): And there was also - I don't know in this particular process - in that particular tender, sorry - if there were for profits, but I know there was a number of for profits in the housing sector that applied.

DR MUNDY: Okay.

MS KANE (CLCAWA): But you might need to speak to commerce about more of the information about that, but yes, I think there is in Western Australia - and it might be worthwhile speaking to finance department about that new procurement set-up because it's quite unique and it seems to be working in partnership with agencies rather than - - -

DR MUNDY: Because certain the case is that we recognise the community nature of these services and the last thing we want to do is to destroy all of that, but you know, it is an ongoing and legitimate public policy concern about value for money and how do we test that we are getting it, although I do not think we have seen an awful lot of CLCs that look like they have got a lot of fat on them.

MS KANE (CLCAWA): No, no, and also, like I mentioned, a lot of community legal centres' funded budgets are matched by pro bono and volunteer support.

DR MUNDY: We appreciate that. Sorry, one of the problems of being in front of us on day five is I am never quite sure whether I have asked you this question today, or whether I have asked somebody in Sydney on Wednesday. We have found a new issue, and when the staff read the transcript of these proceedings they were tearing their hair out. It seems to us at the moment that the vast bulk of matters dealing with disputes about wills and the issues around the end of people's lives end up pretty rapidly down at the Supreme Court, not a place known for speedy resolution of matters or also simple, apparent procedures.

We have heard a couple of really quite tragic stories, one about an indigenous family who were having a fight about burial sites, another about a man who cared for his mother and there was a dispute with the siblings and stuff. We just wonder whether,

when we have made such apparently to us, I think, good progress on the use of non-Court-based dispute resolution processes dealing with disputes - other disputes - within families, with and without violence, but whether there is any recommendations we could make about this. You know, I was the executor of both my parents' estates. It was pretty straight forward because there was only me, but it did seem to me a bit odd that I had to trouble with the Supreme Court as the executor of my father's will so that I could give all the money to me and still put on all the liabilities of the estate going forward, and that is the vast bulk of them.

There are only about 150 disputed estate matters in the country and I suspect a lot of them are resolvable through mediation. Is this something in your normal - your members see - the general CLCs because people will come in, they might not be able to afford a lawyer. They might have worked out to start to dispute the thing in the Supreme Court is going to destroy the value in the estate pretty quickly. I am just wondering if there is something useful we could recommend- because this goes to our issue about people not being able to access advice and services of moderate means. There might be house involved and they could chew through a quarter of the value of the estate without much trouble.

MS KANE (CLCAWA): Yes, I mean, I think - I might have to take some of that notice. I know, generally - - -

DR MUNDY: If I could ask you, how many of these sorts of relatively low-grade familial disputes at the end of someone's life do you see?

MS KANE (CLCAWA): It might be something we could take on - - -

DR MUNDY: They might be isolated and we have just seen two of them because these people are really angry about them.

MS KANE (CLCAWA): Yes, because it would be interesting to actually ask the members, particularly the generalist centres, about how many inquiries they're actually getting. I know there are not anything that - or many - well, I am on Hansard, but I don't know how many generalist centres actually provide any advice on that because I do understand that it's quite a particularly complicated area and it's very specialist and centres certainly don't have the resources to spend on that at the moment within their current funding contracts. We could ask them how many inquiries they're receiving - - -

DR MUNDY: That would just be really it.

MS KANE (CLCAWA): - - - and we're they're getting referred.

DR MUNDY: I mean, I appreciate it is not within their funding contracts. I guess

what has motivated us, in part, is: is the Supreme Court really the right place for this in the first instance. A lot of it is essentially administrative and a decent ADR process sitting on the side. There will always be the things that raise issues of law and equity in estates, but I do not think it is a lot. Some people are having a shocking time.

MS KANE (CLCAWA): We can certainly ask the members about how many inquiries they receive.

DR MUNDY: If it is too difficult to answer, that is fine. It is just something we have come across. Look, I think that is about all we have. So thank you very much - - -

MS KANE (CLCAWA): No, thank you for the opportunity.

DR MUNDY: - - - for your submissions. We look forward to - I would just hold off a couple of days because, when the staff read the transcript, they might tell Angela and I, "Yes, we have got them," but we will get in touch earlier next week and let you know.

MS KANE (CLCAWA): Sure, about those questions on notice?

DR MUNDY: No, about those two reviews.

MS KANE (CLCAWA): Yes, sure.

DR MUNDY: Angela is sure they have not got them.

MS MacRAE: I am pretty sure they do not.

DR MUNDY: So why do you not just send them?

MS KANE (CLCAWA): Yes.

DR MUNDY: Thank you very much.

MS KANE (CLCAWA): No, thank you for the opportunity.

DR MUNDY: We will now have WA Dispute Resolution Association. Good morning. Could you please state your name and the capacity in which you appear?

MS CIFFOLILLI (WADRA): My name is Nicoletta Ciffolilli and I appear as a member of WADRA.

DR MUNDY: Thank you. Would you like to make a brief opening statement?

MS CIFFOLILLI (WADRA): Possibly to introduce WADRA because it wasn't in the submission, so to let you know that WADRA is a not-for-profit body and it's incorporated and composed mainly of member organisations that are involved with representing dispute resolution educators, practitioners, and supporters. To give you an idea of some of the membership, we have many of the state and federal courts as members, also providers of dispute resolution services, and many of those are funded agencies, and also some organisations that might not immediately come to mind, for example, the Institute of Chartered Accountants and the Australian Property Institute is also a member. So it is quite a broad membership.

I suppose, as a member organisation, as a body of those types of members, we support the use of ADR, in terms of improving equity and access to justice and civil dispute resolution processes, but with the proviso that ADR may not always be appropriate and so it is important that citizens in a civil society also have access to courts and tribunals.

DR MUNDY: Angela, do you want to start?

MS MacRAE: I guess one of the key questions that always comes up in ADR is: when is it appropriate and when is it not? I think I would be interested in your views about how far we have gone along the road, to the extent that it is used now. I think you'd agree it is being increasingly used. Are there areas we have gone too far? Are there areas we have still got a long way to go? If you would like to comment on that in general terms, I think that would be helpful.

MS CIFFOLILLI (WADRA): In terms of when it is appropriate, timing is an important issue there as well because sometimes it can happen too early and sometimes too late. It was interesting to hear your comment about some tragic cases that you have heard about and, when they have been familial disputes, how filing in Court is not always the most appropriate way to resolve the dispute. Certainly, in those cases, where there is an ongoing relationship, commencing proceedings in Court can actually create more tension, more aggression, and bring the parties further apart.

Often, the other types of processes like mediation are overlooked and, in those situations, if they happen at an earlier point, then much of the tension that is created

as a result of going through Court proceedings and interlocutory processes over a period of time is dissipated; it does not happen. We would say - I mean, I think in your report, you talk about triage and that is clearly very important because that could be one of the elements of working out, "Is this a case that's suitable for other processes, dispute resolution processes," and an ongoing relationship would certainly be an indicator in favour of other dispute resolution processes.

MS MacRAE: Does that work quite well, do you think, in the institutional arrangements we have in place now?

MS CIFFOLILLI (WADRA): In different states and territories I think the set-up is different. In WA mediation happens within the courtroom pretty much. I mean, there are private providers of those services but often the public may not be aware of those services, so their first port of call would be the court and that's the difficulty. It continues to break down the relationship because people aren't aware that they can go elsewhere to resolve the particular dispute that they have; but that is not to say that when it does get to court, it can't be resolved in a better way for that family as a result of having gone through mediation within the courts because of the mediators at court, some of the registrars, do adopt and follow a facilitative-style of mediation which allows relationships to be healed and restored.

MS MacRAE: Is there a case, do you think, for more pre-action protocols that might require that mediation happen? I guess I would be interested in your views about the Civil Dispute Resolution Act and the requirements that there be genuine steps and those sorts of things - whether that has been successful and should be rolled out more generally.

MS CIFFOLILLI (WADRA): I don't know how the federal legislation is working so I can't comment on that. Certainly in terms of pre-action procedures in the Family Court - and I suppose there is a distinction between using pre-action as a sanction or a mandatory format as opposed to an incentive. With parenting matters, as you would be aware, the requirement in order to file at court is that parties need to have a certificate. They must undergo family dispute resolution. That is different to the property set-up where if they go through mediation or other form of alternative dispute resolution process, then they get benefits. They still have to then file at court, which is that they don't need to go to a conciliation conference so that saves them time and effort. I suppose it depends on which approach - the carrot or the stick - you ought to take, as to how you might legislate for pre-action or mandatory ADR before filing.

MS MacRAE: Are you aware of any research that has been done to measure the effectiveness and benefits of ADR and what sort of factors should we be considering if you are wanting to do some of that?

MS CIFFOLILLI (WADRA): There is quite a bit of research that has been done on the benefits and the success and effectiveness of ADR. They tend to have been done in particular jurisdictions in the sense of the geographical jurisdiction and also the subject matter. I can certainly email you some of those references if you are interested.

MS MacRAE: Okay. What was that for?

MS CIFFOLILLI (WADRA): They tend to come to more or less the same conclusion: that ADR is useful. It has many benefits, but the type of benefit that it achieves depends on what the particular study or research was looking for. Is it looking for reduced hearing time? Is it looking for the number of cases settled? Is it looking for satisfaction amongst the participants? It just depends on how you're measuring the particular success of that process, what outcomes it provides.

MS MacRAE: One of the suggestions I guess is that where you have a major power imbalance between parties, ADR may not be the most appropriate method. Would you have a view on that? Where there is an imbalance, what are the best sort of methods to try and reduce the influence that might have in a mediated outcome?

MS CIFFOLILLI (WADRA): Again there are different views on that between different practitioners so it is difficult to represent everybody, to give you one answer to that, but generally a triage - or if the mediation includes a pre-mediation step, then that's the point at which that could be assessed. Ultimately most mediators would agree that in order for mediation to be appropriate, it is important that all participants are able to participate in a way that allows them to be able to speak their mind and say what is important to them so they don't feel that they are under duress or being made to agree to something that they wouldn't ordinarily agree to.

Power imbalance is only one of the factors in determining whether ADR or mediation is appropriate. The fact that there is a power imbalance isn't of itself a reason for it not to be successful. There are other things that can be brought into account to make sure that that power imbalance doesn't have an impact of a kind that would basically destroy or nullify any benefits that could come out of that process. The intake or the assessment process is really important to determine: is this something that is suitable for mediation or ADR or really is it something that belongs elsewhere, like in the court system?

MS MacRAE: Just in relation to the qualifications of the mediators themselves, do you see value in a national system of accreditation? What form should that take? Are there things in the training that might be required? For example, we have heard from advocates in the disability area and others from the Aboriginal and Torres Strait Islander communities saying that mediation requirements for those sorts of specialist groups can be quite different and that there can be very special skills that you need to

give a good mediation for groups that might have those special needs. Is there anything you would like to say about the forms of training and where that might lead to in terms of accreditation and use of mediation services?

MS CUFFOLILLI (WADRA): The national mediation and accreditation standards, as you know, are not mandatory but well informed purchasers of ADR services would generally be aware of them and would ask for that accreditation as part of their requirements when engaging ADR providers. The difficulty is that in the community which is not so well informed about ADR services they may not be aware that such a thing exists and they should be looking for this when they are searching for a mediator, for example. You might have, as has happened in the eastern states, some flamboyant figures who have held themselves out as mediators when they actually have no training, no qualifications and are probably on the other side of the law, as has been reported in some newspapers.

It is important for there to be a system of accreditation and in many ways that really should be mandatory in order, one would say, for public certainty, for ensuring that the public can be assured of a quality of service and know that the person who is providing the service knows what they are doing. Then there needs to be a system of accreditation and one that is mandatory.

As to the different nuances, I think there is a strong difference there as well as to whether a provider of ADR services needs to have specialist knowledge or skills, whether it is in legalities, in procedural matters or in cultural matters; but that could be accommodated, one would think, in terms of sort of having subheadings of accreditation or types of qualifications. They may have experience having done some extra work or training in cultural knowledge of particular areas or tribes or whatever was required there or particular areas of law, if that was thought important.

Some users of ADR services or mediation services feel that sometimes those qualifications can be a hindrance to providing the service because that knowledge gets in the way of a truly facilitative-style of delivery of a service, so rather than being open and impartial, some of that assessment or thinking of using their own knowledge is brought to bear and that can actually be a deterrent, not helpful.

MS MacRAE: Okay.

MS CUFFOLILLI (WADRA): So that's where the tension lies, in the sense of, yes, it is good to have those qualifications or maybe not. If it's a process driven service then is that really necessary.

DR MUNDY: In matters which I've been involved in there have clearly been cases where it was to the benefit of the parties that the mediator started out with this base level - sorry, it's probably unfair. A significant body of knowledge about how the

matter in broad was dealt with but I see your point. It really is then ultimately up to the consumer really - you probably want to be able to access both, I would have thought.

MS CIFFOLILLI (WADRA): It would be up to the consumer and I suppose that's the important point; that if the consumer knows then the consumer can decide for themselves, "Is this what we want?" With family dispute resolution practitioners, it's understood that they have a certain knowledge of developmental psychology, those kinds of things.

DR MUNDY: Yes, there's a guy in the Magistrates Court in South Australia who mediates small building matters. He is a builder.

MS CIFFOLILLI (WADRA): Yes.

DR MUNDY: I wanted to just touch on this issue about mandatory registration. I'm just interested in how we might do this. Would we do it by reservation of the use of the word "mediator", "arbitrator", but I can see that word reservation probably becomes problematic. I don't disagree with the proposition. I'm just trying to think through how we'd do it. Would we do it nationally or would some states want to do it themselves? Don't know if any of them mind. If we were to think that was a good idea, we will help governments out by making recommendations to them about how to achieve it because otherwise they'll flap around. How do you think it should work? I take your point about having subsequent lists as well.

MS CIFFOLILLI (WADRA): So how to achieve accreditation, say, of mediators or an arbitrator?

DR MUNDY: Yes, and I take your point. For the protection of consumers, they want to know that this person has got some sort of skills even if they don't - you're on the list. How does the list get administered because if it's going to be mandatory, it has got to be enforced by law.

MS CIFFOLILLI (WADRA): At the moment there is a non-mandatory accreditation system which is different to a regulatory system.

DR MUNDY: Yes.

MS CIFFOLILLI (WADRA): It's administered by registration or accreditation bodies, so then you have these different organisations that accredit their members if they comply with certain requirements.

DR MUNDY: But at the moment I can go out and offer mediation services.

MS CIFFOLILLI (WADRA): You can, exactly.

DR MUNDY: That's the circumstance we might wish to prevent.

MS CIFFOLILLI (WADRA): So that's where as in other professions you can't hold yourself out to be doctor or a lawyer because it's governed by legislation that provides certain sanctions for those things.

DR MUNDY: Yes. The trick I'm having here is I can define in legal terms what a lawyer is. It's a person admitted to practice and we know what that is. I'm not quite sure how we do that with mediators. Is it just accreditation by someone? Is that enough do you think?

MS CIFFOLILLI (WADRA): There are different ways to go about it.

DR MUNDY: Yes. No, I'm just trying to think through what they might be.

MS CIFFOLILLI (WADRA): If you were to perhaps have a group of individuals who were recognised in that field or organisations that are now accrediting that could give advice in terms of how that could happen, so if you were after a centralised system they could give advice in terms of how that could happen. There might be a broad definition that could be used as to what mediation is or what a mediator is. It could be governed by certain qualifications because at the moment, in order to be a doctor you have to meet certain criteria, so it could be based on that, a sense of if you had these qualifications, these number of hours, whatever that is, then you can call yourself a mediator and if you haven't met that criteria then you can't.

DR MUNDY: Given there does seem to me to be a bit of overlap between people who act as mediators, conciliators, arbitrators if nothing other than probably administrative purposes, would you see that we want to run that. Rather than having someone who deals with mediator accreditation, you might have someone who deals - you may have a body that deals with ADR practitioner - a bit like we've amalgamated a lot of the registration of paramedical professions into one place. Would that be a problem, do you think, other than the fact that the mediators and the arbitrators could have a squabble?

MS CIFFOLILLI (WADRA): Nationally you've got the Australian Health Practitioner Registration Regulation Scheme and so that seems to work in the sense of if you're a chiropractor, you get registered under that. If you're a doctor or a psychologist, so you could do - - -

DR MUNDY: Yes. So that would be a model for ADR practitioners?

MS CIFFOLILLI (WADRA): That could be a model that might be appropriate,

but obviously if you're not a doctor, you can't be registered as one, as a chiropractor, and then be a doctor, so there's, yes, defined headings.

DR MUNDY: Can I just take you to summarise? We've been mindful in various places that there are a lot of what are effectively business disputes which because of costs and things lead to access issues. The Commission has done a number of pieces of work suggesting that small business commissions are organisations of some merit and use in the resolution of these matters. Could you just give us any insight from an ADR's practitioner's perspective perhaps how you see the work that's done by the Small Business Commissioner and the Small Business Development Corporation here?

MS CIFFOLILLI (WADRA): I think they've been successful to the extent that when they've been used, and they would be able to give you the figures on that, most of them end up being resolved reasonably quickly at a very reasonable costs. I think it's something less than \$200 filing fee. So I would have thought for any business person, when you consider that, I think the filing fee in the courts - I think just the Supreme Court is about \$900 or something like that.

DR MUNDY: Yes.

MS CIFFOLILLI (WADRA): If you could have a dispute resolved in a matter of a month or some months at such a reduced fee and hopefully still maintain a good relationship. Let's say if it's a leasehold dispute then I would think that that must be a positive outcome.

DR MUNDY: There have been some observations made around a similar Commonwealth body that has been formed, and that it is not only a dispute resolution arrangement but it is also an advocacy and policy entity. The institution having multiple roles, is that something you think is highly problematic or is it something that if the institution is run on a sensible systematic basis people shouldn't be all that worried?

MS CIFFOLILLI (WADRA): I suppose if an institution is providing information and advice then if we take the Small Business Development Corporation then the consumer or the customer can decide once they've got that information, "This is something that I would like to have resolved here as part of mediation," or I think, "No, I need to go and file somewhere else." So they have that option. Whether then the services are provided I suppose it seems to work here. I don't know what - - -

DR MUNDY: No, you've got no sense that people are thinking there's some sort of profound conflict within what is a longstanding structure of the Small Business Corporation..

MS CIFFOLILLI (WADRA): Not there, no. I haven't heard that, no.

DR MUNDY: Are there any other areas of government where you think this sort of specialist functional mediation for small business or for something else would be quite useful because one of the things we're concerned about is actually the prevention of disputes and dispute resolution arrangements within government, but also particularly with local government where a lot of business and trees and dogs and all sorts of things happen. Is that an area you think that is an area which people could look at as a way of reducing - we certainly found significant issues with engagement with local government by businesses?

MS CIFFOLILLI (WADRA): I think that's a very important area where ADR could be introduced. At the moment anecdotally I think it's done on an ad hoc basis according to different councils have different rules about that. Some of them provide ADR services or mediation services, some don't, and then they disappear and then they come back. So there's no concerted effort or any organised effort in terms of having these kinds of services available to ratepayers, whether they be residents or businesses. I would imagine that probably the Local Government Association, the overall body, might be something - might be interested in looking at something like that, but they would need to speak for themselves about that.

MR MUNDY: Okay.

MS CIFFOLILLI (WADRA): Yes.

MS MacRAE: Just one of the other things which we've raised with a couple of other participants is just that there's obviously public benefit sometimes in having something decided in a court, it's public and on the record, and precedent can be set. Where things are mediated, that can often be done privately and without anything on the public record. Do you see any innovative ways to try and deal with that so that where there might be something usefully reported - I think there's an example in your - might have been some of the material that you provided to us, that vocational matters in the State Administrative Tribunal that take mediation outcomes, that the tribunal can turn them into consent orders and make them public if they think there's something there in the public interest. Are you aware of that in the - think of ways it might be able to be broadened out, or are there - or, you know, do you see this as an issue that should be pursued?

MS CIFFOLILLI (WADRA): I suppose the question is whether it is an issue, and I think it's assumed that it is important, but I'd be wondering why it's important. Certainly it's important for a civil society to have a rule of law and for people to know about that rule of law, and in civil disputes to understand what the expectations are, but then within that knowledge and understanding and context for people to come to their own decisions about contractual matters and what have you. So I think

certainly for the purposes of professional regulation, it's important that members understand what the expectations of them are as a practitioner in that particular field, and I think that's why the SAT model is a particularly useful one in contractual matters.

I'm not sure how important it is for the general public to know that a particular dispute between X Corporation and Y Corporation was resolved for X number of dollars, whether that really makes a difference or not, and I know that the chief justice is coming this afternoon, and I know he's written and spoken about the issue of there are those cases that have to go to court because they make, you know, public policy and law, and precedent, and so I think he's better placed to talk about that aspect.

MR MUNDY: Yes. I guess the other issue, and this is probably a bit more - well, it's probably of a bit more concern to us is people concerned about public policy rather than the rule of law and his Honour is much more learned in that regard than we are, is that services like Ombudsman have a particular public policy attraction in that they see a range of matters, and without having to deal with the character and the nature of each one of them, they're able to identify systemic problems.

Now, we can - you get a less - a capacity to some extent in some lists and tribunals for that if they're quite specialist. You get it from the courts if you trawl published decisions, but in mediated outcomes where the matter - the ability to identify systemic public problems is significantly reduced, and this is in fact a point that's been made by some of the consumer advocacy CLCs, and we just sort of - we absolutely get the - I mean I guess it comes back to the question of well, yeah, but how many of these sorts of issues do you think are really going to pop up, whereas if we're talking about phone bills, it's a different story. Do you have any views because that's - I guess we're as much concerned about the identification of public policy problems and their resolution as you establish a precedential law.

MS CUFFOLILLI (WADRA): I suppose if I can distinguish between disputes between members of the public, and disputes between a member of the public and, say, a government agency.

MR MUNDY: Yes, sure.

MS CUFFOLILLI (WADRA): So let's say for example the AAT. There are conciliation conferences in the AAT and mediations there. So matters are resolved at that point without going to a hearing. Now, it may be that in the course of doing many of these conferences and mediations at the AAT a conference registrar may see a systemic issue that keeps appearing. Question is what ability does that conference registrar have to do anything about that, or to report that, or to take action as a result?

To an extent that would probably also apply in the case, say, of a mediator who is perhaps involved in a number of mediations where it's with the same, say, company and the same issue arises. What can that mediator do about that? So one of the questions may be for your group of people who perhaps are going to be working on an accreditation system is should there be as part of ethics or the regulation of mediators that when these things come up, that that seemed to be an exception to the rule of confidentiality and that they may be able to report those things to a body, or whatever action needs to take place.

MR MUNDY: Or even in a de-identified way if they see - - -

MS CIFFOLILLI (WADRA): However it happens, yes.

MR MUNDY: Okay.

MS CIFFOLILLI (WADRA): I mean that's just - - -

MR MUNDY: Now, it's just an issue that's - I think there are some - particularly the AAT, I think, does perhaps informally, if they see a lot of something, ring up the ACCC and say, "Oi."

MS CIFFOLILLI (WADRA): I only raised the AAT - I didn't mean anything about that.

MR MUNDY: No.

MS CIFFOLILLI (WADRA): It was just an example.

MR MUNDY: No. But I know in certain special tribunals - specially some VCAT, that - - -

MS CIFFOLILLI (WADRA): Yes, and I suppose that's where the Ombudsman - their particular role is to look for those things, and they're very - yes, they're open about - - -

MR MUNDY: Well, that's their statutory duty.

MS CIFFOLILLI (WADRA): That's what they do, yes.

MR MUNDY: Yes, their statute requires it.

MS CIFFOLILLI (WADRA): Yes.

MR MUNDY: All right. Well, look, that was very helpful. Thanks for coming

along today.

MS CIFFOLILLI (WADRA): Thank you.

MR MUNDY: And thank you for the material you've provided to us.

MS CIFFOLILLI (WADRA): Thank you.

MR MUNDY: Can we have Legal Aid WA, please? Could be our budget cuts come through and we'll only be able to afford three chairs next year. Once you're all settled, could you please state your names and the capacity that you appear for the benefit of the transcript?

MR TURNBULL (LAWA): George Turnbull, Director of Legal Aid for Western Australia.

MR BRADSHAW (LAWA): Malcolm Bradshaw, Director of Business Services, Legal Aid WA.

MR PAYNE (LAWA): Lex Payne, Director of Regions, Legal Aid WA.

MS STEWART (LAWA): Jane Stewart, Director of Legal Practice Development, Legal Aid WA.

MS HARRIS (LAWA): Allison Harris, CLC State Program Manager, Legal Aid WA.

MR MUNDY: Thank you. Mr Turnbull, would you like to make - or at least one of your colleagues is going to make an opening statement on your behalf. Would you like to make a brief - and that's "brief" means single digit here in minutes.

MR TURNBULL (LAWA): Okay. All right. Well, look, I think the main issue that we saw arising out of the draft report was the endorsement that the Commission appeared to have given to the distribution model that the Commonwealth has adopted for the allocation of funds to Legal Aid Commissions around the country. We don't agree that it is - I think it's described as a model way of distributing these funds. We don't agree that it's a fair distribution certainly in its application, and I suppose we would suggest that the Commission might want to review its position in relation to that.

One of the recommendations in fact, I think it's 21, recommendation 21.4, recommends that the Commonwealth should adopt that particular formula for distributing the community legal services program funding. Now, if that were to be adopted, on my reckoning that would mean that the CLC sector in WA would suffer a 30 per cent reduction in funding. So certainly that's the main issue that we would want to canvass with the Commission. We've also mentioned in our latest submission the difficulties associated with delivering services in regional Western Australia and on the positive side we've suggested a profit base that we've developed which would, in effect, overcome some of the difficulties in recruiting and retaining lawyers in country Western Australia and we've also suggested that in relation to the CLC sector that we have no interest in tendering for any of that business, but rather we would see the sort of processes that we've had in place in the past, which,

effectively, a collaborative approach to determining the areas of high need and where the, you know, appropriate funding should be placed. Essentially that's in a nutshell what we would like to convey to the Commission.

DR MUNDY: Thank you for that. Look, I think it is fair to say that we have done a fair bit more work now on our thinking with respect to funding because we obviously left unanswered the question of what level of funding might be required and we are still working on that, but I guess as a broader principle - and I do understand that Western Australia always has issues with the distribution of funding from the commonwealth. I was a treasury officer in this state under Mr Bradshaw. I guess the question comes to this: is how should the commonwealth, whatever amount of money it is prepared to allocate to legal assistance - and let us leave aside for the moment the different institutions performs in - how in the broad should the commonwealth think about the allocation of legal assistance between jurisdictions? I mean obviously the Northern Territory, Queensland and, to a lesser extent, New South Wales and South Australia, do we experience a lesser degree of what you might call geographic disadvantage.

How should we think about that? Should we recommend that the commonwealth allocate it on a per capita basis or - - -

MR TURNBALL (LAWA): Well, if you were to do that, of course, that would assist us considerably, but we would say that that's probably not the appropriate way.

DR MUNDY: So help me out here.

MR TURNBALL (LAWA): Well, I mean you'd take account of, I suppose, what are the obvious issues, factors such as the level of indigenous clients that we have in our client base. It's approaching 20 per cent in our case. I think you'd take account of the remoteness and the costs associated with delivering services in regional and remote Western Australia. It's quite expensive, as you can appreciate. There are parts of the state where just the cost of living is quite high.

DR MUNDY: Yes. That would go to the question of the costs of staff.

MR TURNBALL (LAWA): Yes, indeed. Yes, indeed. So I mean I don't think there's any kind of - I think there's no particular magic solution but I think all of the usual sort of indicators of - - -

DR MUNDY: So on the other side, some jurisdictions would perhaps suggest that they should be given, if you like, consideration for lower than national average incomes given that economic outcomes can be an indicator of disadvantage as well, so that broader - all the things we understand that cause cost disadvantage and service provision is the sort of thing you have a view of.

MR TURNBALL (LAWA): That would be a factor, but I think you'd need to look more closely at the sort of services that you're providing and the sorts of clients that you're actually dealing with.

DR MUNDY: So we would need to think about the services, how much it costs to provide them and I guess indicators of disadvantage which might tell us about levels of demand.

MR TURNBALL (LAWA): Yes, except I'll qualify it this way: the demand is - it's, in a way, demand can be a little bit misleading because frankly we're so far short of being in a position to meet demand that we have to prioritise what we do and it's really a supply-driven process that we operate under. It's not demanded. So you've got to look quite closely I think at the sorts of priorities that you have when you are determining who you'll assist.

MR BRADSHAW (LAWA): Commissioner, if I could make the point, I think it's important that in determining the allocation of resources, commonwealth resources, there's a more detailed consideration given to particular regions within a state rather than considering averages across the state. In a jurisdiction like ours we have massive differences and so in a region such as the south-west or the metropolitan area, the level of disadvantage or the intensity of service delivery is nowhere near the level of intensity as it is in, say, The Kimberley.

I think our submission referred to child protection matters which fall under the civil jurisdiction and if you dig into the reports of the Department for Child Protection you'll see that the number of applications as a proportion of the Aboriginal population is absolutely massive and so that level of intensity creates a level of demand and a level of cost which far outweighs and has a far greater impact than any sort of state-wide average would indicate.

DR MUNDY: I think we understand that averages are misleading.

MS MacRAE: I mean I guess one of the reasons for choosing the Grants Commission determinance is that they are tasked with looking at a very much finer detail on a lot of these areas of both service delivery and revenue raising capacity. In one sense they seem the obvious choice because they do do a level of detail across the states for a whole range of things. Would it help, do you think, as a start for you to be given more detail of exactly how that formula works and I appreciate it's presenting the Grants Commission, but is it a place to start to just better understand how the current formula works and then you might find that quite a few of the factors that we are talking about here are actually already taken into account and then find out where is it lacking and where is it - is that helpful?

MR BRADSHAW (LAWA): That would be a brilliant place to start. It's been difficult for us to determine what the elements are of that.

MS MacRAE: I just remember from the tenor of the discussion before I am thinking, oh, we might be building a whole new range of effectively Grants Commission relativities here.

DR MUNDY: And I think perhaps the other issue, Angela, is that a lot of the issues that plague the Grants Commission are actually on the revenue side. That is always where Western Australia is taken in there, and it may well be there is an appropriate way to proceed. Now, there is a disadvantage in the expenditure model and if you would carve that out it might - - -

MR TURNBALL (LAWA): Can I just point out, perhaps what I was trying to say earlier - you've got to look closely at what your service priorities are because if you look at what we actually assist, what we actually aid people with, it's primarily family law matters - if we're talking about commonwealth - primarily family law, predominantly, and it's therefore, I think, more relevant to look at the circumstances where families are in disarray, if you like, all sorts of - rather than just the broad indices of poverty, for example.

DR MUNDY: And presuming such data is available nationally, let us assume for the sake of discussion is a notion where the commonwealth said, "Look, we're funding family law matters because it's a federal matter, the revenue capacity of the states in that consideration is irrelevant because we're talking about citizens and the commonwealth, so what we need to do is bring our mind as to how to distribute money for the family law needs of Australian citizens on the basis of their needs."

MR TURNBALL (LAWA): Yes.

DR MUNDY: That sort of approach would be something and that would lead to pockets all over the place of - okay. No, I think we understand. Just on that question, do you think as a matter of principle the commonwealth should fund legal assistance to its citizens or should it fund its citizens to undertake matters within its own jurisdiction putting aside the issue of family law and the quirk of that, let us assume for the funding sake it is a commonwealth matter?

MR TURNBALL (LAWA): Well, I think we would certainly prefer the system of pooled funding where the commonwealth actually took a broader share of the responsibility for all of the legal needs.

DR MUNDY: We make a recommendation that the civil law needs when commonwealth considering - well, indeed, the states as well - are considering the funding of organisations such as yours that the civil law funding should, essentially,

be cut out and ring-fenced and clearly identified. Subject to the caveat that this does not mean reducing funding for civil law or for criminal law, what would be the impact on your clients and operationally of such an arrangement?

MR TURNBULL (LAWA): If we quarantine funding - - -

DR MUNDY: Well, if the commonwealth came along and said - or the state, "If you're funding was identified as civil and criminal would that have any particular impact, particularly if you couldn't shift money between the two?"

MR TURNBULL (LAWA): I'm not sure if - - -

DR MUNDY: Or is there so precious little civil money that - - -

MR TURNBULL (LAWA): There is previous little civil money. I think, you know, I think it's - nationally it's about 2 per cent of our grant of funding at least.

DR MUNDY: Pick a number like that.

MR TURNBULL (LAWA): Yes.

DR MUNDY: Yes.

MR TURNBULL (LAWA): That's not to say we don't have civil.

DR MUNDY: No, I understand.

MR TURNBULL (LAWA): Yes. Yes.

MR BRADSHAW (LAWA): I suppose the general concept of ring-fencing creates a level of organisational inflexibility and we, you know, pull the levers backwards and forwards in response to demand for certain services.

DR MUNDY: Yes. Would it create a risk for dealing with clients with particular complex needs which were both of a civil and criminal nature, given that we understand that a lot of people with particularly complex clients - and certainly this is the point that Mr Grant in New South Wales has made to us - that, you know, they present with a whole bundle of needs. Would that sort of ring-fencing demarcation need to be thought through at an operational - well, client management level?

MR TURNBULL (LAWA): Yes. Well - - -

DR MUNDY: The last thing we want to do is to create a whole bureaucracy over 2 per cent of the expenditure.

MR TURNBULL (LAWA): Well, you know, it comes down, I think, basically to the question of how much funds you've got available. I mean, the reality is that if you take our broad - you know, our overall position, it's dominated really by criminal law matters and family law matters.

DR MUNDY: Yes.

MR TURNBULL (LAWA): And even in the criminal law area we're really sailing very close to the wind, very close to the wind, particularly in relation to Magistrates' Courts' work where people are being left without representation in circumstances where they're likely to go to prison. Now, that seems to me to be very very - a very unfortunate circumstance. So, you know, we've still got a long way to go in terms of if we had had just the one pool of funding, I think, to seriously weigh up whether or not we should be putting more funds into the criminal law system rather than the civil law system.

DR MUNDY: Yes. Sadly, that isn't a matter with the Attorney referred to us. Can we talk a bit about the lawyers? I guess probably one of the issues - the point's been made was that the rates for legal aid work. Now, they have diverged over time. Do you have any views on mechanism that could be put in place which, I guess, to some extent, if they were put in place would lead to an objective basis for a funding model, but how one might peg legal aid rates to something that's objective and, if so, how might that work?

MR TURNBULL (LAWA): Well, of course, scale rates do exist in some jurisdictions.

DR MUNDY: Yes.

MR TURNBULL (LAWA): And I suppose you could use that as a benchmark.

DR MUNDY: We're told 80 per cent of scale used to be the rule.

MR TURNBULL (LAWA): That was the original circumstance. You could look at the possibility of what - the commonwealth, for example, or governments fund their own legal services.

DR MUNDY: Yes.

MR TURNBULL (LAWA): And perhaps use that, again, as a mark.

DR MUNDY: Yes.

MR TURNBULL (LAWA): You could - - -

DR MUNDY: So, effectively, take you on to the panel.

MR TURNBULL (LAWA): Yes.

DR MUNDY: And fund you as according to panel. Okay.

MR TURNBULL (LAWA): Of course, our underlying rate here is about \$140 an hour, which is - - -

DR MUNDY: And what's the panel rate, do you know?

MR TURNBULL (LAWA): I wouldn't know the answer to that, I'm sorry, but it is - - -

MR BRADSHAW (LAWA): Yes. But the scale rates - we'll provide them to you, but my recollection is we are well below half of scale at this point.

DR MUNDY: It'd just be interesting for us to know, say, if you went to 80 per cent of scale what would be the additional costs per annum?

MR BRADSHAW (LAWA): Okay. We, in our submission that we've been preparing for Treasury, it was going to be our suggestion that we went to nothing more than, say, 50 per cent of scale, but the scale pegged - or our rates pegged to the rate of increase of scale.

DR MUNDY: Yes. So you pegged it at 50 per cent of the scale and they went up with scale.

MR BRADSHAW (LAWA): Yes. So at the moment the differential between scale and our rates gets bigger and bigger.

DR MUNDY: Yes.

MS MacRAE: And can you comment a little bit about the - how you do attract lawyers into your rural and remote areas and what sort of shortages you're still seeing there?

MR TURNBULL (LAWA): Sorry, if you were?

MS MacRAE: Attracting lawyers to rural and remote areas, what sort of - - -

MR TURNBULL (LAWA): Yes. Yes. Well, Jane Stewart, who has come with

me today, she actually was instrumental in developing this scheme that we call a country lawyers' program, which we thought - well, which does, in fact, work quite well. It's kind of a - it's a proven success story and maybe Jane might like to just give you a bit of a rundown on that particular approach.

MS STEWART (LAWA): So the model that we adopted for country lawyers was a one employer model because one of the problems for lawyers going out into the regions is that each public sector agency has a different rate of payment and different conditions. So we chose the Legal Aid rate because it's the higher rate and has housing options attached to it because the other major problem, particularly in the north west of WA is housing.

MS MacRAE: Yes.

MS STEWART (LAWA): You know, at its peak, \$2000 a week for a house, which is more than some of these lawyers' salaries.

DR MUNDY: It certainly was more than what we paid aviation fire fighters when we sent them to Karratha.

MS MacRAE: Yes.

MS STEWART (LAWA): So we found if we had a model where there was one employer with portable conditions over your rotations and subsidised housing that - and professional development opportunities and networks was the third key cornerstone of the program.

MS MacRAE: Yes.

MS STEWART (LAWA): So that younger lawyers coming into the program spent six or 12 months in Perth in the Legal Aid Commission before they went out, so that all of their professional networks were established. More senior lawyers spent a shorter time in Perth, maybe a month, so that they could at least have someone to call and have professional networks established, and then a model which allowed portability of cross-rotations through community legal centres through Aboriginal Family Violence Prevention Services through Legal Aid Commissions and through Aboriginal Legal Service so that you had portability of your conditions, the same salary and government housing, and our experience was that if you provided all of those things and professional support that we could fill all of the gaps in Western Australia and did while the program was in full flight.

MS MacRAE: And is it the sort of thing that's transferable across jurisdictions?

MS STEWART (LAWA): Yes. We've certainly looked at that, particularly in the

north west. There - yes, and a lot of our lawyers who were interested in coming to WA are actually from other jurisdictions. So we've had a large influx of lawyers from the east coast coming across to get the opportunity to actually do appearance work in WA because we have a peers profession and there's a lot more opportunity to actually appear and get runs on the ground. So we've had a - not only a lot of interest nationally, we've also had a very significant retention rate in the regions after the program has finished for the particular lawyers. I think it was 57 per cent, was it? Yes, 57 per cent of lawyers going through the program have actually stayed in the regions once they've finished their contracted time.

DR MUNDY: Is that a function of the region they're in?

MS STEWART (LAWA): Sorry?

DR MUNDY: Is that a function of the region they're in? Are they more likely to stay in Margaret River than they are in Port Hedland?

MS STEWART (LAWA): No, it doesn't operate that way, and what - one thing that we discovered in the program within the first year or two, initially lawyers were wanting to go to Margaret River to Broome, but very quickly that changed to where you were going to get the best legal work and where you were going to get the best professional support.

DR MUNDY: Okay.

MS STEWART (LAWA): So there was a very clear shift from I want to go to Albany, I want to go - - -

DR MUNDY: So when you say they - so when the program finishes they obviously finish somewhere.

MS STEWART (LAWA): Yes.

DR MUNDY: And, like you say, 57 per cent of them stay where they are.

MS STEWART (LAWA): They either stayed where they are or they stayed in the region.

DR MUNDY: Regions. Okay.

MS STEWART (LAWA): Whether they put their own shingle up or whether they worked in another centre, but they're practising in regional WA.

DR MUNDY: Okay.

MS MacRAE: And so how long have you had the program running?

MS STEWART (LAWA): Six years.

MS MacRAE: Okay. Okay. And do you think then that's giving you a sort of systemic base now, is it getting easier, given that more of those people are staying, is that making it easier for you to - - -

MS STEWART (LAWA): Well, it was until the funding was significantly cut and now for the first time this year we're coming back to vacancies which can't be filled again. The funding model relied on a team based at Legal Aid in Perth to administrate and facilitate the program and there were some additional incentives for community legal centres and Aboriginal Legal Service Family Violence at the beginning to take lawyers, and the funding has been cut significantly now, so the program has still got lawyers running through it but the funding from the Commonwealth has significantly dropped and we're now starting to see the gaps coming back.

MS MacRAE: So you're maintaining the payments software for individual positions but the number of positions has been cut. Is that how it's worked.

MS STEWART (LAWA): Yes.

MS MacRAE: Yes, okay. So what sort of proportion of vacancies have you got now? How much are you - - -

MS STEWART (LAWA): We've got at least six - or six to eight in the family violences.

MR PAYNE (LAWA): Yes. We've got six to eight, but most of them are in the family violence legal protection program and they're uncertain at the moment as to whether they would like to fill a vacancy from the country lawyers program or employ direct, or what is going to happen because their future funding is uncertain.

MS STEWART (LAWA): It's very difficult for us to broker the attraction of these lawyers where the funding model is six months. So the position that they can be offered is only for six months because the agency doesn't know whether they're going to be funded.

MS MacRAE: You're asking someone to move to a remote or a rural area so we can only guarantee that we'd be able to fund you for six months.

MS STEWART (LAWA): Yes. That's a very, very big ask.

MS MacRAE: Yes. I can imagine that would be.

MS STEWART (LAWA): For the lawyer to uproot and do that for such a short - - -

MS MacRAE: Yes, of course.

MS STEWART (LAWA): Whereas when they were in the program in its full swing, the lawyer was guaranteed four years or three years as a contract.

MS MacRAE: In dollar terms then, how much has that funding been cut? What sort of - - -

MS STEWART (LAWA): Significantly. What are you down to now? We can certainly let you know.

MS MacRAE: Okay. Thank you.

DR MUNDY: Just while we're on the question of funding cuts, when we had your colleagues from the ACT before us on Monday in Canberra, they were able to indicate to us the on the ground consequences of the recent budgetary decisions of the Commonwealth. New South Wales was a little bit less able to be precise because I think they're a much bigger organisation so money - funding and expenditures are probably not as closely tied up together as each other. Are you able to give us a sense of what will be the impact on yourselves and also whether the view that these reductions are a refocussing on outcomes rather than perhaps advocacy and law reform?

MR TURNBULL (LAWA): Well, in our case, I don't think it had anything to do with the latter. We directed those funds towards independent children's lawyer appointments in the Family Court primarily. We set aside some of the funding for the employment of an Aboriginal liaison officer in the Kimberley. In relation to what we've committed already, we've committed pretty much fully the funding that was provided.

It's uncertain to what extent we will need to adjust our future plans in the sense that where we've made these commitments to independent children's lawyer it's a long-term situation. These cases will sometimes drag on for years and so the initial funding that we provided might well be expected to be followed by further applications for further funding. So if that were to occur, then we would need to adjust what we call our commitment budget for next year.

DR MUNDY: So these independent children's lawyers presumably will stay with

these children potentially - - -

MR TURNBULL (LAWA): For years.

DR MUNDY: - - - for a long time so at some point you will need to make a decision whether you continue to provide that or whether you resource it from somewhere else.

MR TURNBULL (LAWA): We will continue to provide what we've already committed to, but the effect of that will be that it will reduce our ability to be able to fund further matters.

DR MUNDY: So those kids with those independent children's lawyers, they're there, but if kids were to present in future they might not be able to be supported in the same way.

MR TURNBULL (LAWA): That's right.

MS MacRAE: We've talked a bit about the Commonwealth level of funding for jurisdictions. We're also interested obviously in the funding within the jurisdiction and we've heard in quite a few submissions about some reviews that happened in Western Australia in 2003 and 2009 and they have been held up as a bit of a model that we might want to look at closely because it seems to have been a very well received distribution method or methodology that seems to have got support across the sector. We did ask our previous participants about those reports and they thought they were public but weren't entirely sure. Are you able to advise us if they are?

MS HARRIS (LAWA): Yes, we have brought them with us today to hand up to you.

MS MacRAE: Okay, great. Thank you.

DR MUNDY: Did they send you a text message or something?

MS MacRAE: I guess if you could just in broad terms talk about what you like about that method, whether you see - I mean, there's been one in 2003, 2009. Is there one on the horizon? Would you support one on the horizon, and what it means for you on the ground in the way services are funded here?

MS HARRIS (LAWA): There's a link on the Legal Aid web site as well, all the reports are up on our web site and the demographic study and that's in our additional - - -

DR MUNDY: Yes.

MS HARRIS (LAWA): I think it's in the footnote, you just have to look for it there. The first review was initiated by the Commonwealth under the CLC program and agreed with the state. So it was between the Commonwealth and state attorney-general in 2003, the very first one, so it was a joint Commonwealth state review and was chaired by the director of Legal Aid, so George was the chair in our state, and it had representatives - - -

MS MacRAE: So every state had one at that time, did they?

MS HARRIS (LAWA): It was a rolling plan for it to go round Australia.

MS MacRAE: Rolling state?

MS HARRIS (LAWA): It was rolled out in varying degrees of success or how it worked, I think. In WA it was very successful. So we were - - -

DR MUNDY: Was Mr Williams the Commonwealth attorney then?

MS HARRIS (LAWA): Gerald Williams. We took in WA a very cooperative approach and I think that was the key to our success. We spent a lot of time in getting the terms of reference right and agreed, and we probably spent more time up-front doing that than other states did, so that made it much more enduring, I think.

MS MacRAE: So was it effectively a repeat exercise in 2009?

MS HARRIS (LAWA): What happened is we got our recommendations coming out of that review and one of the recommendations was to set up a CLC stakeholder committee. So to give the review life beyond the review report. So we then established a CLC stakeholder committee that mirrored the representation of the review committee. So we then had a body that looked at how the recommendations were implemented and had the same level of representation. The key to that, we had the state government, the Commonwealth government, the Law Society and the sector represented and Legal Aid. We then engaged in an update report. That committee determined, by the time we got to 2009, it was time to revisit the report and see how we were tracking and we did the update report. We've got that here as well.

MS MacRAE: Yes, okay. Obviously we're some years on from that now. So has that committee remained established and still doing work relative to implementation of that - - -

MS HARRIS (LAWA): Yes. The brief is to meet twice a year and according to need. So we have met more frequently when things have been happening. Clearly

we're probably going to be having a lot more frequent meetings after we get your report. Big issues that are affecting the sector.

DR MUNDY: I guess what we're attracted to is that this model in Western Australia has been held out by the CLC's association in New South Wales as the way to go and I think it's fair to say that we're attracted to the notion that the most efficient use of scarce resources will usually be determined on the ground not from an office in Barton, and so I guess what we're trying to find is an institutional framework which if the Commonwealth was prepared to allow this degree of flexibility to the states we probably as responsible Commonwealth officers we want to mandate a structure for that process and this seems to be the best cab on the rank at the moment.

I guess the question I'd have for you is that if the framework that you're talking about and the liaison work you're dealing with was to become an accountable mechanism for the disbursement of Commonwealth money, what else do you think would need to be done with it to satisfy sceptical officers in the Commonwealth Department of Finance?

MS HARRIS (LAWA): Part of the initial review we did a very detailed demographic analysis. So we engaged consultants and we looked at all 124 local government areas in WA and we mapped this advantage. We used CIFA as the basis which is very popular. At that time it was not as popular, and then we also engaged the WA Crime Research Centre to add in variables of disadvantage, so domestic violence report statistics, and we got a very good tool that worked for WA and then we mapped areas and then we overlaid centres and that's how we got our gaps and our existing locations.

The recommendations we ended up with were a blueprint for services that we have used since 2003 and in cooperation with the Commonwealth, so when the Commonwealth has had one-off money - I think in your report you had varying views from different states about whether it was haphazard and money going - when the Commonwealth rolled out one-off money. Well, in WA it really wasn't haphazard because we had our blueprint and we knew what we were asking for and the Commonwealth was on the same page. Talking about funding cuts, we only talked about the Legal Aid impact of funding cuts, but there is coming cuts to CLCs as well where we're going to lose in 2015 a million dollars off that new funding that rolled out.

DR MUNDY: That's what is euphemistically called the Dreyfus money.

MS HARRIS (LAWA): Yes, that's it. For CLCs in WA, that's 1.185 million and will take funding down from 5 million to 4 million. It's really significant.

MS STEWART (LAWA): What Allison is also not saying is that in WA, in the country lawyers' model and in the CLC stakeholder model, there's a really high level of collaboration between all of the various agencies and all of the agencies are actually able to get together and work together to create a better whole and solve a problem holistically than perhaps some of the other states have been able to achieve.

DR MUNDY: Is it fair to say that at least as far as the Commonwealth Attorney's Department is probably concerned, the model that you have is - they will use it, it's credible to them, they're comfortable with the outcomes that it's seeking to deliver and its processes.

MS HARRIS (LAWA): I think so. I think definitely they have had representation on the committee and they endorse it and they haven't been involved at all levels. There's probably a few levels in terms of funding models. There's the distribution, identification of need and location of centres, and then there's the funding model per centre which is another issue that sits outside that, so there's really levels of funding models. There's the global distribution - - -

DR MUNDY: That's what we're trying to find, somehow the structure whereby local needs and the interaction between the services you provide and the CLCs can be dealt with in a sensible way by people that know what they're doing and it's adaptable and stuff, rather than recommending hard and rigid rules which inevitably won't work across the country.

MS HARRIS (LAWA): I think in our submission we gave Geraldton as an example, but in all our regional areas that really works with all, so we have a mix model, so we have Legal Aid, the CLC, a family violence and an ALS and they're not mutually exclusive. In Albany and in the Goldfields, you really need all of them and, as George said, they don't meet the demand even with all of them, so the mix model is very important in WA and works really well.

MS MacRAE: Just in a practical sense, it sounds like the CLCs are effectively going to lose 20 per cent of their funding. Would you go back to the sort of model of need and look at that within the sort of parameters that are set out in that report? Is that one of the ways you would look at it, or is that report a little bit too high-level for that?

MS HARRIS (LAWA): Certainly the funding that is going to be lost - one centre that is hugely at risk is the Pilbara CLC, so they are potentially facing a double hit because they're losing their additional money which funded a lawyer that they really needed. There has also been an administrative change, which I don't know if you're aware of, within the AGD of transferring the indigenous money back to the Department of Prime Minister and Cabinet.

MS MacRAE: We have heard about that.

DR MUNDY: I thought the ATSILS will stay in AGD.

MS HARRIS (LAWA): This is a little pocket of indigenous money for CLCs.

DR MUNDY: Yes. See, this is why we find this all very - there are all these little pockets of money.

MS HARRIS (LAWA): Yes, but for the Pilbara this pocket of money is really significant because that has been cut 5 per cent in that transfer, so straightaway they lost 5 per cent for the transfer, and that money is at risk, so if they then lose - so that's potentially another lawyer. If in 2015 they get a double hit, the sustainability of that - we are going to have to look at what's happening for them. They can't afford to absorb that.

DR MUNDY: That's the Pilbara. Is that just a general community based Pilbara CLC?

MS HARRIS (LAWA): Yes.

DR MUNDY: It's not an indigenous - - -

MS HARRIS (LAWA): No, but it has a lot of indigenous programs.

DR MUNDY: Yes, I know. I appreciate that.

MS HARRIS (LAWA): Yes, but it's a generalist centre. It's not indigenous specific. That's the issue about whether that money was legal money or indigenous money and all of those questions that you're probably really aware of. They're the unintended consequences of moving money around that have big impacts for agencies that aren't multi million dollar agencies, but on the ground big consequences.

So, yes, there will be a bit of that. The committee can look at that. Then when we have these kind of issues, it might be looking at funding to supplement, so we do have a bit of trust funding - which you have probably heard about the Public Purposes Trust and the Legal Contribution Trust. Never reliable money, never consistent, not government money, but it can save centres. It can tide them over. So there will be a bit of that going on, I think. We're already working with the EDO. Their funding cut commences on 30 June.

DR MUNDY: Yes, we did ask questions - I mean, we have certainly been told that the EDO in the ACT would have most certainly closed and that most other small

jurisdictions will go. I asked the CLC Association their view on the EDO. It wasn't a particularly encouraging one.

MS HARRIS (LAWA): No, but we definitely are working with them as a centre of - yes.

DR MUNDY: Can we perhaps move on to some other issues other than funding which are probably marginally cheerier. We had the Disability Advocates Network of Australia before us in Canberra on Monday and they raised some issues about the way in which people with a disability, particularly I guess people who are disadvantaged more generally, deal with unbundled services, be they minor advice or those sorts of things. We're very in favour of unbundling and we appreciate the Legal Aid Commissions do it all the time.

I guess one of the things we would be interested in your thoughts of is the extent to which those models might be able to be moved into a private provision context, so people who need those services but perhaps can't access them through Legal Aid can still access unbundled services. Particularly we're interested in the issues around the ethical questions about unbundling and the negligence questions about unbundling because we're not sure where the truth lies.

MR TURNBULL (LAWA): It is a difficult question.

DR MUNDY: That's what I'm paid to do.

MR TURNBULL (LAWA): I mean, you're absolutely right. We do it all the time; you know, assist people with preparing letters of negotiation or court documents or you name it. It's not in a solicitor-client context but I can see that it maybe is a fine line at times.

DR MUNDY: We have had examples given to us of a solicitor helping someone prepare a court document, really trying to do the right thing. The client goes in, isn't particularly articulate. The poor solicitor gets dragged in and gets berated from the bench. Therefore, that solicitor won't help again.

MR TURNBULL (LAWA): Yes.

DR MUNDY: Do you self-insure or do you commercially insure?

MR TURNBULL (LAWA): It's the state government that effectively insures us.

DR MUNDY: The government. So claims of negligence against your lawyers?

MR TURNBULL (LAWA): Yes, the Commission assumes responsibility and the

Commission - - -

DR MUNDY: Okay. It's probably not something we can proceed - but do you find that people with disadvantages, be they mental health, indigeneity, disability, need special care and attention assistance when they're using unbundled services?

MR TURNBULL (LAWA): Absolutely.

DR MUNDY: How do you address those issues?

MR TURNBULL (LAWA): In a variety of ways. If it's a language issue, obviously you need some ability to engage an interpreter.

DR MUNDY: Yes.

MR BRADSHAW (LAWA): There's also the issue of staff training. Do you want to talk about that, Jane, because I suppose we don't have the resources - - -

DR MUNDY: I think that's getting to the point I'm trying to get to.

MR TURNBULL (LAWA): We don't have the resource capacity to have specialist areas that deal with people with particular problems, so our approach is to train our lawyers to deal with a variety of situations but, Jane, you can probably talk more about that.

MS STEWART (LAWA): Yes. We do a lot of work in the professional development of lawyers across all of the special circumstance areas because they are fundamentally our core client group. It is not only about having skills to be able to deal with those particular groups; it is having skills as a lawyer yourself to be resilient enough to be able to keep going and to be able to provide those sort of services day in, day out.

We do look at the professional wellbeing of the lawyers and we have done a lot of work in this space in the last four years. We look at having rotation policies for junior lawyers to make sure that they are not burning out. We do certainly have lawyers in specialist skills areas in therapeutic courts, for example. We have a star court which is a mental health court. We have intellectual disability courts, Drug Courts and family violence courts where lawyers are specialising in those groups but their rotations through those positions will be short. They might be there for six or 12 months and then they will move on and do something else, because you can't be a lawyer working in family violence forever. It is too emotionally and mentally draining on the lawyer.

We spend a lot of time professionally developing. We have spent a lot of time in the

last six years since continuing professional development became compulsory in Western Australia to make sure that there are really good in-person and online materials, not just for Legal Aid lawyers but for all lawyers practising in the areas of family and criminal law predominantly to be able to get really good training in all aspects.

We have an annual conference every year that we run and the last summer series had a double session on resilience for family lawyers in particular, helping them to recognise how to work in the context of constant demand and constant pressure on your own health.

DR MUNDY: Despite the reactions of some, we are also quite interested in public interest litigation and we do recognise the public benefits that the legal system and the courts provide, although you mightn't tell that from some people's commentary. We have proposed or at least given consideration to the creation of a public interest fund for public interest litigation. I guess my first question in this regard is: if such a fund were to be established, and let's assume it was a state-based fund, would you see yourselves as the appropriate body or somebody else, or just a fund with a board of trustees providing advice to the attorney perhaps?

MR TURNBULL (LAWA): I'm not sure that we would particularly welcome a view about that.

DR MUNDY: You don't particularly welcome it because it would be another administrative burden.

MR TURNBULL (LAWA): Yes.

MS HARRIS (LAWA): And WA is unique in that we don't have a PILCH. We don't have a public interest law clearing house. It has been mooted and it has been in development but we don't have one in our state, as exists in other states.

DR MUNDY: I think we are probably about done. Thank you for bringing those documents. We will now adjourn these proceedings until 1.45 when we will have the chief justice.

(Luncheon adjournment)

DR MUNDY: We'll reconvene these proceedings. Could the next participant please state his name and the capacity in which he appears.

MARTIN AC: My name is Wayne Martin, and I appear in my capacity as Chief Justice of Western Australia.

DR MUNDY: Your Honour, thank you for taking the time to be with us here today. We really do appreciate it. We note that you are the only member of the judiciary who has been able, but hopefully this may set a precedent and some of your brother and sister judges may also assist us in this inquiry. Would you like to make - - -

MARTIN AC: Yes, certainly. There's a few topics I'd like to address. But first, at the risk of sounding sycophantic, can I commend the Commission on its draft report, which I think is an exceptional piece of work produced in a relatively short period of time and which will, I think, make an enormous contribution to discussion and debate in these important areas. The first topic I want to address is really to make similar remarks in relation to the Commission's recommendations with respect to the improved provision of information to consumers, which I think is a very, very important area.

I think the notion that there be a central point to which people who are in a dispute can go for information about the most appropriate means of resolving that dispute, a kind of advice as to triage, I think is very, very important, and I think greater consumer information about legal services is also very important. We have a very ill-informed market on the part of consumers with respect to legal services. They don't know the nature of the services they need, they don't know the nature of the services that are provided, they don't know the basis upon which they're going to be charged very often, and they don't know the quality of that service. So anything we can do to improve a proper functioning market in the market for legal services I think is enormously worthwhile.

The second topic I wanted to address concerns self-represented litigants. There is, I think, a tendency amongst some members of the judiciary to regard self-represented litigants as a threat. When we're talking about access to justice, I think they are an opportunity, and we need to see them as an opportunity, in the sense that they are the people who, if you like, have the courage to take on the system without the assistance of legal representation. That, I think, should be encouraged and it's incumbent upon us to do everything we can to assist them in exercising their right of access to the courts.

The reason I think that some judges tend to regard them as a threat is in part because of a failure to distinguish between self-represented litigants and what we now call querulous litigants, and what we used to call vexatious litigants. There's a vast difference between the two, of course. Virtually all querulous litigants are

self-represented, but only a very small proportion of self-represented litigants are querulous. But it's the querulous ones who cause all the trouble, attract all the attention of the judges, cause them great frustration, and so they tend to give the rest of the cohort of self-represented litigants a bad name.

So leaving aside the querulous, I think in terms of the self-represented litigants who genuinely wish to exercise their right of access to the court, it seems to me that we can do much better in providing assistance to them. The Internet these days provides an enormous opportunity for the provision of information to prospective litigants about how they can exercise their right of access to the courts, and it provides us with the opportunity to provide forms in user-friendly ways, which can be completed online and submitted to the courts, making the whole process easier. That also has an aspect for another topic I want to address, which is regional disadvantage.

So I think the courts can do much better about making ourselves accessible to self-represented litigants. Also, the Internet can of course provide information about the substantive legal issues. It can be provided in a simplified form, there's an awful lot of information on the Internet now about the law and legal subjects. It's written usually in a form that's intended for digestion by lawyers. I think we can do better about providing that in a way in which it's more readily understood by ordinary members of the public.

The other thing I think we could do is provide greater assistance at court counters and in court offices to people who wish to exercise the system. I visited the subordinate courts of Singapore a little while ago and they have a self-represented litigants' office, and you go in there and they've got an array of counters, about four or five people behind the counter, you take a number, go and sit and you wait your turn, your number comes up, and they'll go and give you assistance about negotiating the system.

Of course that requires the application of resources, but from a total cost of courts perspective, if you look at the cost that is being consumed by the extra time absorbed by self-represented litigants at the moment, it seems to be that a little bit of investment and provision of assistance would first of all have an economic dividend, but also a very significant access to justice dividend in terms of really improving the capacity of people to use the system without legal representation, because the reality is, whatever we do, legal representation will remain out of reach for many ordinary Australians. So I think there is a lot we can do there. Returning to that small group of querulous, I think there's something - and I'll come back to this - we ought to be a little more active about barring their access to the courts, because they are a serious problem and they are consuming resources that we could better make available to other people. I'll come back to that in a minute.

The next topic I wanted to address was costs awards; that is, costs awards by courts

in front of one party against another, and particularly the Commission's recommendation that there might be means for capping the awards on costs. The point I want to make there is that experience shows that the costs that are awarded by one party against another are not a particularly effective means of maintaining the costs that are charged by a lawyer to their client. At the moment there is a large gap already between the costs which you recover if you're successful and the costs you pay to the lawyer. Usually you might get half back if you're lucky, two-thirds if you're really lucky, but you wouldn't get any more than that. So you're always going to be a third out of pocket under the current regime.

So the market forces haven't encouraged litigants to say, "I'm only going to let you charge me what I'm going to recover from the other party." Perhaps the best example of that is the United States, where there is no capacity to recover costs, and yet legal expenses are still out of control. So placing a cap on recoverable costs doesn't seem to me to be very likely to actually have a flow-on effect of reducing the costs that are charged by lawyers, and the effect of the cap is that you would simply - if that doesn't have that effect, then you're just increasing the gap between the costs paid by the successful litigant and the amount they recover. That's to the disadvantage of the successful litigant and to the advantage of the party in the wrong. So I'd caution that sort of approach, attractive though it might seem.

In relation to pro bono costs, certainly in our court, and I think in the Federal Court, there are mechanisms for lawyers acting pro bono to recover costs in the event successful, and I think that's a good thing. In relation to awarding costs in front of self-represented litigants, as the Commission proposes, I wouldn't support that. The award of costs in somebody's favour is meant as a form of indemnity against costs they've actually incurred, it's not meant as a form of reward for success or for the time they have invested into the process.

So it doesn't fit ideologically into the concept, but my real concern is that it could work to the disadvantage of losing self-represented litigants, so that if you've got, as you commonly do, one self-represented litigant moving against another, it could be to the enormous disadvantage of the unsuccessful self-represented litigant if the other party has an award of costs even though they're not legally represented. So that could discourage participation from the other self-represented litigant. The next topic I wanted to address was court fees. Commissioner Mundy, you've had the misfortune of hearing me speak on that subject before, and it's all in a paper that's on the Internet, so I won't repeat what I said.

DR MUNDY: We have studied it closely, your Honour.

MARTIN AC: Yes. I won't repeat what I said there. Put shortly, my concern is that courts are not just another dispute resolution service provider, we have a constitutional role. But moving on from that proposition, which I know has been fed

up to you by the judicial conference and others. When you look at court fees, it's hard to devise a solution that fits all litigants and all types of litigation.

If you give an example from our court, the Bell case ran through our court, it was the second-longest-running trial in the history of the state, it consumed enormous resources of the court - on a conservative estimate, it cost us \$15 million to run that case, we recovered probably around between \$700,000 and \$800,000 in fees. So the taxpayer of Western Australia subsidised the parties to that case, who were on one side an insurer, and on the other side a whole lot of banks, to the tune of \$14 million, and that's \$14 million that the legal system of this state could have invested much better than in that case.

There are other cases in our court between very substantial - sometimes corporate enterprises, big mining companies, fighting each other, big families who have substantial incomes. You can probably guess the people I'm talking about. I struggle to see why the taxpayer of Western Australia should subsidise litigation of that kind at all. So I think there's a lot to be said for a regime in which there is a capacity to full cost recover from those sorts of litigants, and I have proposed in the past that there be a discretionary scale on a full costs recovery basis. But it's not been attractive, and as far as I'm aware it's not going anywhere.

The other end of the scale, if you have, as we currently have and most courts have, complete fee waiver for anybody with a pension card, then you really are encouraging the querulous litigants, because they have a free go and not uncommonly you find people have structured their affairs so that they don't have assets so they do get a pension. They might be retired, they've got time on their hands, they're looking for a hobby and their hobby becomes litigation.

Because they don't have any assets they're not at risk at an adverse costs order. By presenting the pension card they can come into court and bring as many applications as they like until their heart's content. I think we need some kind of a mechanism to provide a modest discouragement to all people so that what we've proposed and what I think - I hope - the government will come up with is that there should be a modest fee payable by everybody. What we've proposed and what I've proposed in this state is that that fee should be set at one-third of the fee otherwise payable up to a cap of \$100, so that there is - you've got to at least pay something so that even people with a pension a hundred dollars shouldn't be beyond the reach of even a pensioner when you look at the cost that the taxpayer pays.

There should be some mechanism that discourages and I'll just mention there was a joint report of the House of Lords and House of Commons committee on human rights, 9 April 2014, where they observed that: restrictions on access to justice are, in principle, capable of justification - discouraging weak applications and reducing unnecessary delay and expense.

So I think a modest curtailment, because we do have litigants who just endlessly - litigate endlessly and the process for having them declared querulous is not terribly sensitive or is quite cumbersome.

Between the top end and the bottom end there's a big gap in the middle and I think that is most of our cases. If we were to go to full cost recovery for that big gap in the middle in the case of our court we'd have to increase fees by 500 per cent and I think that would be a substantial disincentive. The second last topic I wanted to address - and I know I'm trespassing on your time - but in regional and remote Western Australia, in this state, of course, we're very - well, we ought to be more sensitive and I hope I am sensitive to the needs of the vast regions of this state - I am well aware that it's very difficult for people outside the metropolitan area to access to the civil justice system.

I think we need to get smarter about better use of information technology in that regard. Electronic filing, I've already mentioned - the provision of virtual hearings. We use AV a lot in our court system but we ought to get better at offering virtual hearings to people outside the metropolitan area and, again, the provision of information by Internet, by electronic means, because the reality is, for example, if you're looking at civil law, there are no private lawyers resident anywhere in the state between Geraldton and Broome, so that the only lawyers - which is a vast area of coastline if you know the geography of this state - so there's no private lawyer resident in Karratha, there's no private lawyer resident in Port Hedland, notwithstanding that they are substantial centre in their own right.

For the folk of those regions it's very difficult to get access to legal advice, so we need to get better about giving them information which they can access by the Internet. The lawyers in those towns, if you take Port Hedland for an example - and this goes back to the issue of the funding of the legal aid services providers which the Commission has addressed - in Port Hedland there is - or at least there was last time I was there - there's the Western Australian Legal Aid Commission, there's the Aboriginal Legal Service of Western Australia and there's the Family and Domestic Violence Service. Three separate organisations, three separate offices, three separate telephones, three separate human resource agencies and when the magistrate is in Port Hedland they'll go down to Port Hedland and the bailless lawyer will deal with 65, 70 per cent of the cases, the legal aid lawyer will deal with 20 per cent of the cases and the domestic violence lawyer will deal with five or seven per cent of the cases.

The Aboriginal Legal Service lawyer is worked off his or her feet and really can't cope and can't provide the same sort of level of service as we ought to be able to provide to those folk and I say that with no disrespect to the Aboriginal Legal Service who I think do a great job. All three agencies are taxpayer funded. We

ought to find a better way of spreading the load of representing the people of that region, but I think it's capable of being - there are conflict of interest issues, there's specialisation issues, but I think they are all capable of being addressed. Chinese walls can be built, legislation can solve conflict of interest problems.

If you accept, as I think we all must, that there is a very limited amount of funding available in the legal aid sector, we've got to get smarter I think in getting better value for that money and I have to say I've promoted that proposition in legal aid circles before and it's been very unpopular, so I have to disclose that right away.

DR MUNDY: It probably leads to less legal aid bureaucrats as well.

MARTIN AC: Well, yes, I don't know what it is but it seems to me to be I just get concerned that we're missing opportunities. The final thing I'd like to address before I invite questions is an alternative dispute resolution, which, as I said before, is something of a misnomer because that is the predominant means by which most disputes in our court are resolved. Less than three per cent of our lodgments go to trial and that's pretty standard across the system. I think it has a lot of - provides a lot of opportunities that litigation doesn't provide. It provides the opportunity to add value, it provides flexibility, it provides opportunities for cheaper, quicker, more sensitive, more sensible resolutions.

We strongly encourage it in our court. We subsidise it. We offer mediation at a fee of \$222 from one party only, but if we didn't offer that service our backlog would have broken our back years ago, so, you know, I think it is - all the courts of this state offer court-based mediation services and I think it's worked very well. There is a slight problem with it because, of course, we're offering that mediation service in a context - in an adversarial context - so at the same time as we're offering a mediation service we're running a case management stream in which the parties are adopting adversarial and protagonist positions and there's a terrible tension there.

We do our best to try and resolve that, but, again, I think it'd be good if we could think of better ways of resolving that. Maybe by providing mediation - subsidised mediation - prior to the commencement of litigation would be a good thing, but, again, you'd need government to invest in the resources to do that and I haven't done the economic feasibility of that, but certainly ADR is, I think, a very, very important part of the dispute resolution framework. Now, that's all I wanted to say and I can take any questions.

DR MUNDY: Thank you, your Honour. We will just start with ADR. It has been expressed to us through a range of people from different backgrounds that one of the downfalls of ADR is that the outcomes occur in private. I guess we would be interested in your views in a number of contexts. I mean one of the attractions, for example, of ADR, perceived by the statutory or industry ombudsman is that it

identifies problems in public policy which can be then aired where they are systemic and dealt with in a way which is better than leaving these matters to be resolved ultimately in the courts and then for it to be discovered the parliament needs to get on its skates.

The other issue and we are very mindful of the role that the courts play in the establishment of precedent and development and the law and I am just wondering whether you have got any views of is there a risk in the rollout of ADR that in some way the development of the law characteristic of the courts, particularly the superior courts, I guess not so much the Magistrates Court or the tribunals, is it somehow put at risk or is there something we can do to mediate those issues?

MARTIN AC: I think, of course, the more cases that go to court the more precedent there will be and so the law will be augmented every time a case is decided. I think it possibly depends a bit upon your perspective so that if your perspective is that of a lawyer looking at the structured development of the common law then you probably think the court decision is wonderful and if you view it from the perspective of the party, you might say, "Well, why should I pay a lot of money and devote years of my life to the development of precedent which next year is likely to be changed by legislation anyway?"

From the perspective of the party, confidentiality is a key bonus, I think, to mediation because they don't have to air their dirty linen in public. There are, I think, undoubtedly there are competing interests here. Even though only three per cent of our cases go to adjudication that's still a sufficient chunk, I think, to enable the law to develop incrementally. The other point, I guess, I'd make is that without disparaging in any way the business in which I'm engaged, the role of the common law and precedent has diminished significantly over the time I've been in the law because of the intrusion of the legislature.

If you look at the areas of the law now that are truly common law, there are very few left. The law of contract is about the only one that I can think of that hasn't been the subject of significant legislative inroad. Even the law of tort is now very subject to statutory inroads through the civil liability legislation and virtually every other area of the law has been the subject of significant statutory inroads. In those areas of the law the primary function of the courts is statutory interpretation, and of course if the courts come up with an interpretation of a statute the legislature doesn't like, they change it. So it's an expensive - from a party's perspective, saying to them, "Well, you must go through 48, 24 months of trauma and great expense to explain what the legislature meant in this provision of a statute," they'd probably say, "Well, that's not a very attractive proposition for me.

DR MUNDY: Can we just, whilst we're on the broader question of the development of law and I guess law reform, from your perspective of a presiding

judicial officer, and obviously watching this over a long period of time, how important is the role of community legal centres and other advocacy bodies for the development of public policy and ultimately the development of law?

MARTIN AC: I think the CLCs have been an enormously advantageous development across a whole range of fronts. For a start, they provide a shop front that wasn't previous available, so people can go down there, and get an immediate response, which I think is enormous advantageous. But also, because they are seeing people who wouldn't otherwise be seen by lawyers, they're identifying problems that wouldn't otherwise come to the surface, particularly the specialty CLCs that we've got, like the Homeless Peoples' Law Centre in Perth that I'm involved with, the Mental Health Law Centre that I'm involved with.

Because they are seeing people with those particular problems, and the problems caused by being either homeless or mentally ill in terms of access to the legal system are profound. So they are powerful advocates for people who suffer from those disadvantages. I don't think they get listened to quite enough, but at least they are there advocating, and even Law Reform Commissions have a very patchy record in terms of actually achieving change, because of course it's dependant upon acceptance by the legislature. But at least they do - they gather information, they look at things from the perspective of those groups that otherwise wouldn't be represented in our society, and I think that's very, very important, and I think when you're looking at the significance of those groups I think that's often underestimated, the contribution which they make as advocates.

MS MacRAE: Are we right in understanding that the mental health CLC nearly went under recently?

MARTIN AC: Yes, that's true.

MS MacRAE: So what saved the day?

MARTIN AC: I'm not exactly sure. Sandy Bolter would know, she's the principle legal officer there. But it was a fine run thing. They were on a funding cycle, like a lot of these groups are, including money from - it wasn't just Legal Aid Commission, there was another source of funding. It might have been the Health Department.

MS MacRAE: Right, okay.

MARTIN AC: And that cycle wasn't - we created a Mental Health Court in this state about a year ago and funds were made available for representation of people in that court by reference to a competitive tender. They didn't get the tender, the Legal Aid Commission did, and that made it difficult for them to continue. But last I heard from Sandy, they are still going on.

MS MacRAE: Right, and I guess it would seem to me - and you'd know better from your experience - but quite a lot of the problems that you experience with querulous litigants are probably also related to mental health.

MARTIN AC: Yes.

MS MacRAE: Are there ways that services from the mental health sector and the way that courts interact with them - is there some sort of structuring there that might give an outward path for - - -

MARTIN AC: Well, querulous litigant is now I think referred to in the American diagnostic manual. It's actually a recognisable condition, recognisable psychological condition, and you see it and it's very tragic. It becomes a real obsession for people and it can dominate and ruin their lives. It's very difficult to treat though, as I understand it, and for some of the people that I've dealt with, the worst thing you can do is give them a trial. Because once there's a trial then subject to the appeal process they can see the end in sight, and that's the last thing they want.

So, you know, it's very difficult - they want this thing to just keep on going and going and going. In terms of provision of assistance, I'm afraid that in the competition for scarce mental health resources, querulous litigants are probably not going to be on the top of the pile, when you've got - in the criminal justice system mental health is a much more significant issue, where you've got at least one third of the people in Western Australia's prisons have a recognised mental or cognitive disability, and that's probably an under diagnosis. It's probably more like half. Understandably, the authorities are going to direct the resources, I think, more in that direction rather than in easing the burden of the civil courts, and I wouldn't quarrel with that allocation of resources.

MS MacRAE: So you talked about maybe dealing with those matters. I guess the question is, do you have sufficient powers to deal with those people - - -

MARTIN AC: It ought to be a little easier. We had new legislation about 12 or 13 years ago. It's still a bit clunky. It's cumbersome in the sense that we often initiate the process because there's no one other party that has a sufficient interest in having these persons declared querulous, because they see lots of different people. I mean, there is power under the act for us to simply declare somebody, but that is a bad look, because we can't be both the accuser and the determiner.

So what we do is we send it to the state solicitor's office and say he should apply on behalf of the attorney-general for an order and then the judge who's involved in that process doesn't involve themselves in the process after that. But it takes a long time and it's quite cumbersome. Victoria, as I understand it, has new

legislation that's going through the parliament there that I think makes it easier, and enables the orders to be more targeted, so that you can constrain people in certain areas from doing certain things, not just generally declaring. So I think we'll have a look at that Victorian legislation and maybe make some recommendations to government about that. But the short answer is, it ought to be easier and it ought to be quicker.

MS MacRAE: Just if I could just come back to ADR just for a moment, we've received a number of - or a fair amount of evidence around wills and probate and estates, and we weren't really expecting to because in one sense it doesn't really sit within our terms of reference. But I think it's an area where people have indicated that there's been matters that they felt that it's been unfortunate that those things have gone immediately to the Supreme Court and that very often these are familial matters and it would be much better to deal with them in something more like an FDR sort of context. Do you have a view on that?

MARTIN AC: Well, I agree entirely with that and it would be good if there was a service available to enable that to happen before they got to the door of the court and maybe the CLCs provide that, Legal Aid Commission maybe if they're eligible. But very often there would be people with not insignificant resources - not wealthy people, but with resources. In recognition of that, we've now modified our procedure. The most common form of dispute is under what used to be called Testated Family Provision Inheritance Act, so that the allegation is that the deceased did not make adequate provision for one or other family member out of their estate, and so somebody will (indistinct) "I was wrongly treated."

We now have a process which we've implemented whereby we say that the only evidence that parties to that dispute are allowed to file is evidence identifying financial value of the estate and the financial position of each of the prospective claimants on the estate. Because that's all you need to know to resolve those cases. If you don't do that then they'll file affidavits about who was rude to Auntie Nelly and who didn't go and visit her in the hospital and who was good to her and who did what and to whom, and it's all irrelevant, and once those affidavits get filed, the case assumes a life of its own and it's not about the money any more, it's all about vindicating the dispute within the family - a particular party's position of the dispute within the family.

As soon as those affidavits are in, as soon as we know what the value of the estate is, what the financial position of each party is, they go straight to mediation, and the settlement rate at those mediations is very, very high. The other thing we've done is that the default position used to be that the costs would be borne out of the estate, so that people could, as it were, have a go, make a claim in the knowledge that they probably weren't going to have to pay for it. We've changed that default position. The default position now is loser pays out of their own pocket. So both of those

things have contributed to - as I say, the settlement rate is very, very high, we hardly ever have any of those cases go to trial. So we're doing the best we can to provide an early mediation as soon as possible to mitigate the sort of problem you mention.

MS MacRAE: But it would be a case, from what you're saying, that you have a preference if it was possible (indistinct) to allow the mediation to occur before it gets to court.

MARTIN AC: Absolutely, and, you know, families ought to be able to go and say, "Look, we've got this problem. We think dad didn't do the right thing. Is there somewhere where you can go to get this sorted out sensibly?"

DR MUNDY: Is the traditional institutional form of wills being in probate, even in non contested matters, having to be dealt with in the Supreme Court part of bringing these matters to you? Given we know that the vast bulk of wills are uncontested and it does strike me that it's bordering on an administrative - - -

MARTIN AC: It is, it's purely administrative.

DR MUNDY: Is your view that your court is the best administrative vehicle to deal with this?

MARTIN AC: I think it is because although it is purely administrative, our role is to be ever vigilant for the problem case, and when there is the problem case, you've got to have the skills to deal with it, and I think our court is the place that has the skills to deal with it, and I say that - 98 per cent of the probate cases dealt with by our court are dealt with by administrative clerks who are very lowly classified, and in my view under-remunerated. So shifting that function to another court wouldn't save any money because it would still be clerks at the same level.

But when there is a problem - it's all signed off by one of our registrars. So if there is a problem, we have a registrar who is trained to spot the problem, and then if there is a problem, they can elevate it to a judge, and we have judges who are specialists in that area who know how to deal with it. So I don't think shifting it down the judicial hierarchy would actually save money for the vast majority of cases, and when there is a problem it's important that it be in our court to have it sorted.

MR MUNDY: So it's not a burden on you.

MARTIN AC: Well, one of the problems we've had recently is that because of staff shortages our processing time has blown out to times that I find unacceptable. Our target time is two weeks. It's now between nine and 10 weeks, and for families that are in grief and might need access to funds to put food on the table, that's too long. But shifting it to another court won't improve that situation.

MR MUNDY: That's simply a processing issue.

MARTIN AC: That's just processing issues.

MR MUNDY: That's not matters in dispute.

MARTIN AC: Yes, not matters in - that's non-contentious probate.

MR MUNDY: Can we bring you back to this vexing issue of court fees?

MARTIN AC: Yes.

MR MUNDY: I saw during the course of the week where his Honour Justice Rares of the Federal Court has appeared to hop on your cart. I think it's fair to say that I don't think that we and the judiciary and the legal profession are actually very far apart on what we're trying to achieve.

MARTIN AC: Good.

MR MUNDY: I think perhaps we may have - perhaps we need to undertake a redrafting exercise, but I think we are - I mean we are coming at this from an analysis that there are public goods and private goods produced in legislation, in litigation, and we acknowledge both. We suspect there are more private goods generated in some matters than others, and I think the issue for us is really making sure that the community isn't providing a heavily subsidised service for people who could have gone and had it sorted by ADR anyway.

MARTIN AC: Yes. Look, I agree entirely with that and, as I say, the problem is that you've got a spectrum, a whole spectrum of cases dealt with in any individual court.

MR MUNDY: Yes, and I guess the other thing now thinking it's sort of moving this way is really at the end of the day I mean it's the total cost of the litigation that actually is going to influence whether people proceed or not.

MARTIN AC: Yes.

MR MUNDY: Who gets the bickies in that process, whether it's the courts or the lawyers, is not going to determine years of behaviour. I was interested in the comments you made about cost awards. The sense I was getting almost was that you didn't think that tinkering around the margins with issues around trying to restructure the nature of costs awards - and some courts have been trying to do this around the - South Australia seem to be particularly innovative in this space. I'm not trying to put

words in your mouth, but I'm just trying to understand. Do you think those activities are ultimately not going to do an awful lot for - because what we're trying to do is find incentives to get matters resolved more quickly.

MARTIN AC: Yes. I think putting a cap on the costs that you can recover from the other side won't have any impact on the costs that lawyers charge their client and because you don't know whether you're going to win or you're going to lose, it's the cost that you're going to be charged by your lawyer that's going to determine whether you go on or not, although if there is a cap on the costs that you might be ordered to pay, then that might have the perverse opposite effect of what you're intending because you won't then be as discouraged as you might otherwise would. You might pursue a hopeless claim.

So for me the focus ought to be on the costs that lawyers charge clients. We have a scale of costs in most courts that sets out what the scale ought to be, but we also allow lawyers and clients to contract out of that scale, and invariably they do. So unless you're going to enforce a regulated market for legal costs, which I think would - if want to pick a fight with the Law Council, that would be a good way to do it but - - -

MR MUNDY: Regulating prices is not something that the Commission is known for.

MARTIN AC: No. So unless you're going to go to that level, then I think all you can do is encourage market structures that will improve competitiveness within the market for legal services, as I mentioned earlier. Greater information, encouraging unbundling of legal services, which is one of your recommendations and I think very important enabling people to say, "Well, all I want you to do is draft the statement of claim. I can do the rest," or, "All I want you to do is take me up to this point, and I want a quote for this amount," and I think the market is already encouraging more lawyers to move to fixed fee pricing, which I think is helpful, and I don't really understand why the legal profession has been so slow to move into that area. If somebody can agree to build a 35-storey building for a fixed price, you would have thought that it would be within the wit and ingenuity of mankind to do a legal case for a fixed fee too, but it doesn't seem to happen.

MR MUNDY: Of course the people with the greatest capacity to understand and manage the risk - - -

MARTIN AC: Indeed.

MR MUNDY: - - - in the transaction are the lawyers.

MARTIN AC: Yes, quite.

MR MUNDY: One of the recommendations that we make, and I'm pleased that we have your support in relation to better consumer information, is an idea that there should be information made available that would give people some idea of the costs they might expect to incur in various types of litigation. I mean I understand that this is a difficult thing. The Law Councils - law societies I think in general advance the proposition that this is simply not possible, and they refer to medical matters as a comparator. We note that in America these sorts of things are done. Do you think this is an imponderable?

MARTIN AC: No. I think it has to be possible. There are many other sectors of commerce in which fees are set on the basis that there will be overs and unders, and over the overall scheme of things then they will even themselves out, and if you take, for example, we were talking earlier about non-contentious probate, with our encouragement the legal costs committee of this state has basically set a fixed - a flat fee for non-contentious probate matters. I think it's \$1500.

That's, I think, very sensible because then people know when they go in to see their lawyer, they say, "How much is it going to cost?" Well, the scale fee is 1500 bucks and, you know, unless there's some real contention to it I think - it gets harder the higher up you go in the legal system, but if you take, and I don't know a whole lot about family law, but there must be cases for example within the Family Court in which - and of course costs aren't generally awarded party-party in the Family Court, but there must be a certain sameness to a lot of the cases in the family law jurisdiction, you would have thought, that would enable fees to be set on the basis that the lawyer will win some and the lawyer will lose some, but at least the client will know what the cost is going to be.

MR MUNDY: I mean it is not our intention that these issues should apply to major commercial development. What we are talking about is providing information to the ordinary citizen, not to BHP.

MARTIN AC: I think there is a massive problem with clients being required to go into litigation on a completely open-ended basis where they do not know how much they are going to be asked to spend. You would never build a house on that basis. You would not buy a car on the basis that we will order the car now and they will tell you when it gets delivered how much it is going to cost. Why do we expect litigants to do that? It is just unreasonable, I think. I really think the profession ought to get a bit smarter about pricing its services, and I can not see why it can not be done.

MS MacRAE: Can I just ask a little bit? I was very interested in your comments about the distribution within jurisdiction between the various legal assistance services. I had the impression from your comments about CLCs that, if anything your feeling would be that they are in the general landscape under-funded. Well, the

whole landscape is under-funded.

MARTIN AC: Well, the whole legal - - -

MS MacRAE: The whole legal landscape of course.

MARTIN AC: I mean we're talking about civil law here.

MS MacRAE: Yes.

MARTIN AC: Aside from the CLCs there is virtually no legal aid. CLCs and some family law, there's virtually no legal assistance in the civil area pretty much.

MS MacRAE: Yes. But just in relation to that particular sort of town example that you gave us, is there a sort of a model that we might look at that would give us a better handle on how those things should apply?

MARTIN AC: Not that I can conjure to mind. I mean the reality is that if you've got a civil problem in Port Hedland, none of those services are going to be of any use to you. Possibly for the Aboriginal people, they might get some civil assistance from the Aboriginal Legal Service, but the reality is they are so under-resourced these days they can't service their criminal clients adequately, so they have had to make the decision. In terms of the allocation of resources, I'm sure they would be focusing on crime rather than civil.

MS MacRAE: Yes.

MARTIN AC: And that's, I think, the current trend with most legal aid providers these days. The whole focus is on crime.

MR MUNDY: Perhaps just in closing, we've made some recommendations about litigation funding and the ways in which lawyers charge, and particularly contingency fees.

MARTIN AC: Yes.

MR MUNDY: One of the issues particularly with respect to contingency fees is that it puts the lawyer in effect in the role of both the financier of the transaction and the administrator of the litigation, whereas in a funded arrangement there's a different set of roles. It's an issue of some notoriety and has been a matter of comment by the Commonwealth Attorney. I guess I'd be interested in your views both as a practitioner at the bar but then in your judicial capacity about the reality of the incentives that people talk about in this space and your view as to whether there is a huge danger here or not and perhaps any other comments. The kernel of the debate

seems to be around securities based class actions and whether there's something peculiar there about the securities law that could be dealt with rather than a blanket approach.

MARTIN AC: It seems to me that the critical thing in either contingency funding or litigation funding is that you have to ensure that whatever arrangements entered into, the decision to settle is made by the client not by the funder. So that's true in either system. It has to be the client's decision as to whether or not they'll settle, so the funders, whether that be the lawyer who's targeting a contingency arrangement or a litigation funder has to accept that they are in the hands of the client because otherwise you're effectively selling the action to the litigation funder and the potential for conflict which you identify becomes very real.

Having said that, the reality is that although we don't have contingency funding in any jurisdiction in Australia of which I'm aware, no-win no-fee funding has been around forever and is very prominent in the field of personal injury. In that area the lawyers very often in a big personal injury case will have put out tens, perhaps hundreds of thousands of fees in getting expert reports, their own time and so on and so forth. They have a very real commercial stake in the outcome of that case and they bring that stake to bear when they're advising their client in the settlement negotiations which always precede the trial.

As far as I'm aware, that hasn't been a problem. As far as I'm aware, the lawyers have been and the clients have been able to manage that. I'm not aware of a lot of evidence to suggest that lawyers have overborne their clients into taking an inappropriate settlement in order to mitigate their own personal risk of an unsuccessful outcome. So the risk is certainly there. I think you're mitigated by making sure that any acceptance is subject to client approval.

Ultimately the courts as supervisors of the actions of its officers as lawyers, have a supervisory capacity there. So any client who was unhappy with the services of a lawyer could ultimately take the issue to the court and say, "I want you to rule upon whether or not this settlement is appropriate," but you wouldn't have to because if you preserve the client's right of determination at all times then that issue would never arise.

DR MUNDY: So the only thing that we might really be concerned of from a consumer protection perspective, if you like, is that clients aren't being overborne; they're not being - - -

MARTIN AC: Yes, I think that's the real issue.

DR MUNDY: And perhaps information - like we do in so many other things.

MARTIN AC: Yes.

DR MUNDY: Mandatory information as to what your rights are, "If you become aggrieved in this matter, you have an absolute right to draw this matter to the court's attention if you feel you're being" - would not, you think, place an unreasonable burden upon the judiciary.

MARTIN AC: No, I think that would be entirely appropriate. In relation to litigation funding, I read your recommendations with interest. I think litigation funding is a good thing because it's one of those things that augments the capacity of people to take cases to court. I know the Commission is not wildly enthusiastic about over-regulation and I don't propose that it would, but I really think the only thing you need in that area is to ensure that the funders meet solvency requirements.

DR MUNDY: That's what we suggest; they hold a financial services licence.

MARTIN AC: Yes, that's all. You don't need any more regulation than that. I think anything else would be an interference.

DR MUNDY: And anything else we need, the courts have got already.

MARTIN AC: Exactly.

DR MUNDY: So really all we need to do perhaps is some sort of interim - so that the users of this - - -

MARTIN AC: Yes. So long as they've got the capacity to meet an adverse costs order, that's all you need to know I think, but otherwise they're a good thing. I can understand people who've been sued by people who are funded by litigation funders don't like them and that's understandable but they do, I think, augment the very limited means by which people who can't otherwise afford to go to court can have their cases properly presented.

DR MUNDY: You wouldn't be concerned as some appear to be that freeing up these arrangements, particularly with contingency fees which might look like other forms of billing arrangements we allow, and litigation funding - you're not concerned that freeing up those arrangements would lead to a rush of non-meritorious blackmail, or email type litigation?

MARTIN AC: No, I'd be very surprised if that happened. Ultimately there is a professional obligation on every lawyer in Australia to only bring cases before the courts that are meritorious. If lawyers don't comply with that professional obligation, they can be sanctioned. It's unprofessional conduct to bring an unmeritorious claim or to bring a claim for an improper purpose. I think that's the ultimate sanction. I

think litigation funding and those - I guess with contingency there ought to be a capacity for the court to review the nature of the arrangement, so that if the reward for the lawyer is disproportionate to the risk then there ought to be - - -

DR MUNDY: We had suggested that maybe there should be a cap on the percentage.

MARTIN AC: Yes, sure.

DR MUNDY: Or alternatively, perhaps one device is that such arrangements must be lodged with the court.

MARTIN AC: I think a fee uplift, that is to say, if you win you get a percentage of the fee otherwise payable, rather than a share of the proceeds is preferable rather than the American model which you get a share of - - -

DR MUNDY: The winnings.

MARTIN AC: - - - the winnings and I think that's - - -

DR MUNDY: Probably in smaller matters they look like the same thing anyway.

MARTIN AC: Yes. I think uplift is better than contingency.

DR MUNDY: I think we'll probably draw it to a close. Thank you very much for your time today.

MARTIN AC: Thank you very much for your time. It's been an absolute pleasure.

DR MUNDY: These proceedings are adjourned until 8.30 am next Tuesday in Melbourne.

AT 2.37 PM THE INQUIRY WAS ADJOURNED UNTIL
TUESDAY, 10 JUNE 2014



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 MELBOURNE ON TUESDAY, 10 JUNE 2014, AT 9.21 AM

Continued from 6/6/14 in Perth

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DR MUNDY: Good morning, ladies and gentlemen, and welcome to these hearings for the Access to Justice Arrangements Inquiry. My name is Dr Warren Mundy and I am the presiding Commissioner on this inquiry and with me is Commissioner Angela MacRae. Before proceeding any further, I'd like to pay my respects to the elders past and present of the Wurundjeri people of the Kulin nation and also to the elders, past and present, of all other indigenous nations who have continuously inhabited this continent for over 40,000 years.

As you would be aware, the commission released a draft report on this inquiry in April of this year. The purpose of this round of hearings is to facilitate public scrutiny of that draft report and to get feedback and comments, particularly from people who wish to be on the record in relation to that, from which we may draw for the final report.

Following these hearings today, there will be another day of hearings here in Melbourne, followed by hearings in Hobart, Darwin and Brisbane. We have already concluded hearings in Canberra, Sydney, Adelaide and Perth.

When the report is complete, it will be provided to the government some time in September and following the provision of that report, the government has 25 parliamentary sitting days to release that report publicly by way of tabling both houses of the federal parliament.

Whilst we do like to conduct these hearings in a reasonably informal manner, I would like to note that under Part 7 of our act, the commission has certain powers to act in the case of false information or refusal to provide information. As of this date, we are not aware of any action by the commission in that regard.

There will be a full transcript taken of these hearings so that they can be public but a consequence of this is that it is very difficult for us to take comments from the floor. As such, as will provide a short time for anyone who wants to make an additional statement who isn't on the speaking list. Participants are not required to take an oath but of course must be truthful in their remarks.

I am obliged to advise you that under Commonwealth health and safety legislation, in the unlikely event of an emergency requiring evacuation of this building, you should follow the green exit signs to the nearest stairwell. Do not use the lifts and follow the instructions of the floor wardens. The assembly area is in Enterprise Park situated at the end of William Street on the bank of the Yarra River, which is down there for those who aren't from Melbourne.

That's the preliminaries completed. Could I please ask you to state your name and the capacity in which you appear here today?

MS YOUNG (PTO): Janine Young, Public Transport Ombudsman.

DR MUNDY: Would you like to make a brief opening statement and then Angela and I might ask you some questions?

MS YOUNG (PTO): Sure. Thanks for the opportunity to present to the Productivity Commission's Access to Justice Arrangements Inquiry. In addition to my written submissions on the commission's draft report, as a member of the Australian and New Zealand Ombudsman Association I have also contributed to and endorse that submission.

As Victoria's Public Transport Ombudsman I believe I am well placed to comment on some of the commission's draft report findings, recommendations and information as they relate to industry-based ombudsmen. I will focus on four points: the opportunity for ombudsman offices to play a bigger role in addressing unmet legal need; increasing public awareness of ombudsman offices by government and service providers; provision of information about ombudsman offices to and by providers of referral and legal assistance services and systemic issues, a vital part of ombudsman work.

The Public Transport Ombudsman Limited complies with the national benchmarks for industry-based customer dispute resolution schemes and we utilise the principles of alternative dispute resolution to effectively and efficiently handle complaints. Importantly we focus on identifying, investigating and reporting about systemic issues facing the public transport industry.

The PTO scheme is relatively small compared to some other industry ombudsman schemes and we punch well above our weight. We oversee an industry that recorded in excess of 550 million passenger trips in 2012-13. We refer and investigate individual complaints about many different aspects of the interactions between consumers and public transport operators, including ticketing, provision of information, infrastructure and rolling stock, staff behaviour and, most significantly, accessibility for vulnerable consumers and people with disabilities.

Vitality, we look at the systemic nature of those complaints and we feed that back to industry for action and we follow that up, but my office and perhaps other ombudsmen can play a bigger role in addressing unmet legal need. Ombudsmen provide consumers with a user-friendly option for seeking recourse. The flexibility and informal nature of schemes such as the public transport ombudsman make them particularly suited to accommodating the needs of disadvantaged and vulnerable consumers.

At the PTO we work with the consumer and the public transport operator to

facilitate a fair resolution of the complaint. Our process of shuttle negotiation allows the flexibility of communications and allows us to oversee the development of a resolution, while remaining independent of the parties. My staff are appropriately trained and mentored to recognise and take into account the legal rights and responsibilities of both parties to the dispute, rights which sometimes are unknown or ignored by parties to the complaint.

Disadvantaged and vulnerable consumers are the most likely to experience difficulty accessing public transport and perhaps are the least likely to be aware of their right to complain. Equally they are often the most reliant on public transport services.

Since becoming Public Transport Ombudsman in 2010, I have focused on promoting and increasing accessibility both to public transport services and my office. However, I believe that lack of public awareness is still a major barrier to the accessibility of alternative dispute resolution services like ours, especially for vulnerable people and those with disabilities, those who are most unlikely to complain.

I therefore strongly support the commission's draft recommendation that the profile of ombudsmen offices should be raised and agree that government has a role to play. I work hard at raising public awareness of the Public Transport Ombudsman through Outreach and community awareness programs and ensuring public transport operators provide consumers with information about my office. However, unprompted awareness about the existence of my office remains low.

Clear practical and accessible information about the various avenues to alternative dispute resolution should be more widely available to consumers. There are a number of agencies that consumers may access when they have a dispute such as Consumer Affairs and the ACCC. These agencies should have prominent information to provide to consumers. Links to ombudsman offices could also be provided on the web sites of other government departments such as Centrelink.

Like other industry ombudsmen offices, my staff refer consumers to more than 40 organisations. Anyone who contacts my office will be redirected if necessary to the right organisation. Frontline staff at relevant government agencies should also be appropriately trained so that information and resources about ombudsman services are front of mind when consumers contact them; but it is not just the role of government agencies to increase awareness. Industry's role in promoting ombudsman services is crucial as service providers are generally the primary source of information for consumers.

I therefore strongly agree with the draft recommendation that service providers

be required to inform consumers about avenues of complaint. The Public Transport Ombudsman requires public transport operators to promote awareness of our scheme in complaint correspondence, publications and on their web site, but it does not always happen and it should, and it should occur as a matter of course and not with reluctance. An organisation which proactively endorses and refers its customers to an ombudsman scheme increases consumer confidence about that organisation and the industry it belongs to.

It is my experience that both service providers and consumers ultimately benefit when service providers view complaints, whether to an internal complaint process or to an external ombudsman, as an opportunity for review and business improvement. A mature and involved approach to industry ombudsmen by operators facilitates the building of relationships with consumers after complaints have been resolved. This is particularly important in the public transport industry in Victoria as consumers cannot choose an alternative service provider.

Taking this one step further, referral and legal assistance services are ideally placed to direct consumers to the appropriate ombudsman service. Providing referral and legal assistance services with information about ombudsman schemes will allow their staff to make better referrals and free up their resources to assist more consumers.

Over the past three years I have been invited to speak at a handful of Community Legal Service Centre annual general meetings about my role. The reciprocal sharing of information which occurs at those meetings and through the relationship which is then established is mutually beneficial and, of course, to the benefit of users of our services. I also believe that referral and legal assistance services can play a valuable role in identifying and referring systemic issues to ombudsman. The investigation of systemic issues is an important function of my office and enables us to address often large-scale problems that are identified through individual complaints.

In my written submission to the draft report I provided the information requested by the commission about the cost of the PTO undertaking systemic issue work, including systemic investigations and submissions. I am of the view that this cost is linked to the real value of an effective industry ombudsman office - the consumers, the industry it oversees and other key stakeholders.

This value can be summarised as being the fact that the timely identification and resolution of systemic issue investigation limits the ongoing impact of the issue on the travelling public; assists operators to improve their practices and procedure, which in turn further reduces complaints; alerts regulators and government to the issues impacting consumers which may need to be addressed via franchise

agreements, contractual obligations or public policy; and it creates an industry culture of complaint analysis, putting the onus on identifying and addressing systemic issues at the coalface. Additionally, the publication of systemic issues by my office supports a culture of accountability and ongoing improvement and informs all the parties of their rights and responsibilities.

Before concluding, I would like to reiterate the concern expressed in ANZOA's submission that the confidence of the public in the role and independence of ombudsmen is at risk of being undermined and diminished as a result of the term "ombudsman" being used to encompass agencies that do not conform to the accepted ombudsman model. The ANZOA submission notes that the commission has included ANZOA's essential criteria for describing a body as an ombudsman in the draft report and requests that the commission recognise the importance of the ANZOA criteria by including them in the final report. Thank you.

DR MUNDY: Thanks, Janine. Could we perhaps start on the question of how you collect revenue from industry participants? Some of your colleagues have indicated that charging on the basis of fee per complaint makes managing budgets difficult. Can you just briefly talk through it? We note that you charge on a flag fall and a trip basis.

MS YOUNG (PTO): Yes.

DR MUNDY: It looks like a taxi charging system. How do you manage your resources given that pricing structure and why did you arrive at the structure that you arrived at?

MS YOUNG (PTO): It's a fixed levy and a variable levy. The fixed levy is a significant one, being that the passenger carrying operators and myki, Public Transport Victoria, pay a fixed levy of \$120,000. The smaller and non-passenger carrying - Southern Cross Station, VicTrack and Transdev, the new bus company - pay 45. That covers approximately the fixed operating costs of my scheme. The rest is based on a user pays basis on their share of complaints that we handled in the previous calendar year.

In my office we have gone from around about 12 to 14 hundred complaints a year up to four thousand, four and a half thousand over the past three to four years, so that's about 135 per cent increase. Our budget has only gone up by about 30 per cent over that time and it's because of economies of scale. What it means is that a key part of our work is looking at what's coming in the door, analysing complaints, you know, what work, what resources we need to manage it, and making sure that we have got the funding to do that.

The funding process - it starts in February. I put a draft budget to my budget committee. It goes to the board. It's then approved by the members at a general manager in May annually. It means that both for the tracking of complaints from an issues perspective but also from an economic perspective for the scheme, we have to be right on the money for what we're doing so that we can keep on track of that.

When myki was in its heyday of implementation the complaints were going up from 1800 to three and a half thousand in one year. That's when you really have to focus on what you're doing and have good relationships with the schemes. It was the Transport Ticketing Authority at the time and they were open to us going to them for a special levy if something had pushed us to the level that we were beyond our resources and beyond our budget. We also have a cash reserve that's equivalent to two months' operating expenses so that if we had to, say, all of a sudden employ two or three people, we have got the scope of doing that while we go back to industry and say, "We need more funding and it's for these reasons."

MS MacRAE: What proportion of your funding would go on those systemic issues that you talked about and how much would be complaints, roughly?

MS YOUNG (PTO): The way I worked it out is that I would say I have about .5 of an FTE that's committed to working on systemic issues nowadays, so we have 12 people - we have 11.9 FTE in total and together with our policy and research officer and the work that I do and our operations manager, we are putting probably a day a week or thereabouts towards systemic issues.

We're very economic in what we do. We have to be because we are a small scheme. I guess I probably work longer hours than what I should in making sure we keep on top of some of those things, particularly when myki was being implemented and there were major systemic - or a number of systemic issues arising out of that. It's a key part of our work. If we didn't do it, we would have more complaints and therefore we would need more staff.

MS MacRAE: Yes, of course. In fact I'm surprised it's not a bit more than that, so that's interesting. We asked for that information and I appreciate that you have now provided that. Would you see value in publishing that data about what you spend on systemic issues?

MS YOUNG (PTO): I haven't considered it in the past but I can work out an average cost per case for a referral case, for an investigated case. There's no reason why we wouldn't include that in our annual report - you know, a report on systemic issues, those that we have resolved, those that we're investigating - so there's no reason why we wouldn't talk about the resource.

MS MacRAE: We could just see some value in it. Obviously when we're looking at the role and the place of the ombudsman in the whole sort of dispute resolution landscape, it's quite useful to be able to separate those things, and I guess we're not the only people is the reason I'm asking, so it might be helpful in future rather than having it requested.

MS YOUNG (PTO): Yes.

MS MacRAE: Just in relation to the word "ombudsman" - we come back to this - you talked initially about how important your service is for people with disabilities and other disadvantaged groups. Do you find that the very title that you have is a bit of a barrier or do people understand what an ombudsman does and are able to come to you fairly readily?

MS YOUNG (PTO): You can look at it from both sides, I guess. I remember I previously was at the Energy and Water Ombudsman and we did a survey and it included asking for, "Who would you go to?" and part of the survey responses - it was free text - I think we got around about 20, 25 different spellings of the word "ombudsman", including one that said "on the bus man". So the word is out there. It is known, I guess, and it's more known now than perhaps it was 11 years ago when I started in this area. Some of the general awareness research that I have seen, people would say they would go to someone like an ombudsman or a commissioner, so I think it has more understanding and the media pick up on it more nowadays than, say, 10 years ago.

When I first started working at the Energy and Water Ombudsman, AAMI the insurance company had an internal ombudsman that supposedly escalated complaints went to for this person to have an independent look at how they had been handled. I worked at Ford Motor Co for a long time in complaints area. The culture of your organisation is something that you cannot separate from looking at an escalated complaint, so that independence is something that we hold onto very strongly.

DR MUNDY: Is the real issue here the occasional corporate consumer facing company or is it really governments just bandying the word - you know, like the Food and Grocery Ombudsman and any number of others which we were able to - are the likes of AAMI the real target of this or is it government?

MS YOUNG (PTO): In fact some of those companies responded to letters from ANZOA and took that title away, recognising it. No, it is the wider use by governments of appointing ombudsmen when they are roles that are advocates for consumers. I have to have that discussion often, probably every week, with either the industry or with consumers about the fact that we're not an advocate. If there's somebody that's appointed as an advocate for a particular industry or a consumer

group, then they should be a complaints commissioner or they should have another title or be known as an advocate, not as being an independent ombudsman.

DR MUNDY: So even if they have some sort of dispute resolution capability like some of the small business commissioners do, because they have this advocacy role or in some cases a public policy role and a service provision role, particularly in Western Australia, you'd say just call them commissioners and don't call them ombudsman?

MS YOUNG (PTO): That certainly would be my position, yes, and I think that makes it easier for consumers too, to understand the differences.

DR MUNDY: Yes. I don't think small businesses are not going to go to small business commissioner on the basis he is not an ombudsman. You mentioned you've got some government agencies that are members of your scheme. We've made some observations about extending cost recovery for the jurisdiction of ombudsman into handling of complaints from government agencies. Do you have a sense that the private sector entities of a party or scheme behave any differently to the public sector one in the face of the fees that you charge them?

MS YOUNG (PTO): At this point in time, no, and that's because the current franchise agreements for the private sector companies actually enable them to - their franchise agreement covers the cost of the ombudsman scheme, so therefore, they're not really financially being penalised for complaints that come to my office. I understand that that's something that would be addressed, so Transdev, the bus company that now has the franchise for 30 per cent of Melbourne's metropolitan buses, has it that it itself is paying for the cost of the ombudsman, so the fixed levy and the variable levy. So it's coming from its bottom line which is the whole model that actually is there to drive a better complaints focus.

DR MUNDY: So the new bus franchise isn't recovering the cost?

MS YOUNG (PTO): No.

DR MUNDY: But the older rail ones are.

MS YOUNG (PTO): Yes.

DR MUNDY: This is just an aside but do you think the complete cost recovery model is the appropriate one or do you think given there's fixed and variable components, that the variable component is the bit that really needs to be not recoverable?

MS YOUNG (PTO): I've never really split it and thought about that in my mind but if you look at other industry ombudsman schemes, they're fixed costs that they're passing on to their industry members. It might be, well, it is in some - it's quite small. For example, the Energy and Water Ombudsman of Victoria which I'm most familiar, the fixed levy that Origin and AGL, both large companies, pay is \$20,000. It's the variable levy that drives them, so I think - - -

DR MUNDY: So it's the variable which you don't want being recovered but - - -

MS YOUNG (PTO): Yes, you want the organisation responsible for the complaints paying that variable levy and taking that message that we need to do better.

DR MUNDY: Yes, okay.

MS YOUNG (PTO): I guess my personal view would be that the variable levy should be the higher levy than the fixed levy to drive that business through.

DR MUNDY: But you haven't seen any particular behavioural differences between government and non-government agencies?

MS YOUNG (PTO): No.

DR MUNDY: Okay, thanks.

MS MacRAE: You also have an auditing role as I understand, so you're billing six-monthly? Is that correct?

MS YOUNG (PTO): No.

MS MacRAE: No?

MS YOUNG (PTO): No.

MS MacRAE: Okay. No, okay.

MS YOUNG (PTO): The original strategic plan that I inherited when I started said that I should go in and audit their complaint systems and I pointed out that could then impinge on my independence and it could create issues in operating. If I went in and I said somebody's complaint handling system through an audit appeared to be very robust and resilient then they might say, "Why are you taking complaints against us," but I encouraged them to have independent audits of their complaint handling systems.

MS MacRAE: So you have someone independent of you doing that task - - -

MS YOUNG (PTO): They should have, yes.

MS MacRAE: Yes, okay.

MS YOUNG (PTO): I would recommend they do.

MS MacRAE: Is that widely adopted, do you know?

MS YOUNG (PTO): No, I don't think it has been adopted to any degree. I know one of the operators, V/Line, had their complaints system audited as compared to the International Standard for Complaint Handling but I'm not sure that the others have taken that step yet.

MS MacRAE: Just from your experience previously with the Energy and Water Ombudsman, is that something that they have in place? Do you know if there's audits by them?

MS YOUNG (PTO): It wasn't - - -

MS MacRAE: No, okay.

MS YOUNG (PTO): It wasn't something that we saw occurring.

MS MacRAE: But in your view it would be best practice if it was?

MS YOUNG (PTO): It certainly would be, yes.

MS MacRAE: Could I just ask: at the beginning you implied at least that there was a reticence among the service providers but also potentially, and I'm not sure if I was misreading you, some of the government agencies like Centrelink and the ACCC, just about making your availability and presence advertised in that, if I can call it, or promoting it that there had been some resistance to that. Would that be a reasonable - - -

MS YOUNG (PTO): Not from the government agency perspective.

MS MacRAE: No.

MS YOUNG (PTO): I'm not sure of the extent that they do. I know I provide information to organisations such as Consumer Affairs Victoria, let them know that we exist so that they can refer consumers. Some of the service providers when I first

took on the role as Public Transport Ombudsman were very reluctant to put direct information about the existence of my office on their complaint correspondence.

It had been agreed by the CEOs of those organisations in 2007 but in 2011 was when it finally was agreed that they would put that information there, but there are occasions when I have complaint correspondence that comes to my office that has no evidence of any information about my office on that. It's on their web sites but the person with the complaint and getting that correspondence, they need to know then and there that the Public Transport Ombudsman exists.

MS MacRAE: So that's still a bit of a battle are you saying?

MS YOUNG (PTO): Sometimes it can be, yes.

DR MUNDY: Is your scheme a statutory scheme or a voluntary one?

MS YOUNG (PTO): It's not a statutory scheme. It's not a voluntary scheme either. As a condition of the franchise agreement the operators are members of the scheme.

DR MUNDY: So it wouldn't be beyond the wit of the government of Victoria to make the publication of such notice as a condition of the franchise?

MS YOUNG (PTO): From 1 December 2013 Public Transport Victoria introduced as part of its customer advocacy a customer advocate team. It went out to all of the operators then and said that they must put information on their letters about the existence of the Public Transport Victoria Advocacy Team and the Public Transport Ombudsman because consumers have the right to choose, so I guess it has introduced that step and it will be auditing against that I understand from about the middle of this year.

DR MUNDY: So what's the policy rationale between having the right to choose between external complaints mechanisms?

MS YOUNG (PTO): It's the right of a consumer to go to the Public Transport Ombudsman. The introduction of the Public Transport Ombudsman Victoria Advocacy Team, I guess it's an additional step in the internal dispute resolution process, one that we worked very closely with PTV to make it as acceptable to us as it could be, but one which I believe if there is an additional step in the ADR process, it can be a barrier. It can cause complaint fatigue, so it's one that I'd probably prefer didn't exist; that it just referred complaints to my office and that we developed a reporting process instead.

MS MacRAE: When we were looking at trying to compare the relative efficiency

and effectiveness of ombudsmen one of the measures we were left with was looking at costs per case because, well, it was just something that we do have some data on, but we were aware that it is a crude measure and probably not the best around. Do you have any suggestions about how we could look at deficiencies that might be there for certain ombudsmen and how we might better be able to identify leading practices?

MS YOUNG (PTO): I guess I could only call on my knowledge from both working at the Energy and Water Ombudsman and being Public Transport Ombudsman. I guess looking at it from a costs per case basis enables you to drive efficiencies within your - you have to look at your policies and processes. Looking at the benchmarks, effectiveness and efficiency are two of them that we hold up very highly. So at the same time you can't disregard either customer/consumer satisfaction with the outcome of complaints and their satisfaction with your service and the industry satisfaction with how the ombudsman relates to it and works with it to resolve complaints.

Putting a value on quality and on that feedback is just very difficult to do, so getting back to that cost per case perspective I suppose and if you truly looked at and excluded the fixed costs and just purely focused on the variable costs, it is, it is very challenging to do.

MS MacRAE: It would be fair to say, would it not, that some of your cases would be much more complex than others, so the cost - it's the obvious problem with the cost per case but some are obviously going to be a lot more expensive than others because of the nature of the complaint.

MS YOUNG (PTO): We actually collect and our staff record the minutes spent on any case, and even if I get involved in an investigation, I'm contributing to that too, so we can actually work out the cost of the minutes that we spend and, therefore, the value of a complex investigation as opposed to a referral. A referral we might spend about 16 minutes on. A complaint that we're investigating that has a whole range of complexity, we might spend hours and hours and hours on. In some schemes they actually have a way of, once a complaint gets to a particular level they're charging the member of the scheme based on the minutes spent, and the encouragement there is for the member to resolve it as quickly as possible, not let it escalate. The danger with that though can be that sometimes commercial entities will say, "Well the business case for resolving this, do we spend a lot of time on it, or do we just put some money to the consumer to make it go away?" That might be the better economic outcome for them, but that doesn't resolve the actual complaint or prevent it from happening. So it is quite a complex issue.

DR MUNDY: You mentioned in your most recent submission that you support

improvements in the legal education curricula for alternative dispute resolution. I mean in your experience both in your current role and previously, to what extent do you think lawyers are well educated about the roles of ombudsmen?

MS YOUNG (PTO): I think those that have taken up the electives that might explore alternative dispute resolution are quite savvy about it, and those that see the law in a black and white context and that there's no so much a role for ADR in Australia can be quite reluctant to see the benefits in it. You know we have people applying for roles and working in our office that have practised in the law and say, "Actually I don't want to be in the dispute part of it, I want to be resolving things."

So I guess it's how the individual takes up and sees that view. But I think there would be a benefit for all in, say, if there was an alternative dispute resolution rather than an elective subject, making it a mandatory one so at least there's that awareness to say well actually, you know, should this go through a legal course of cost and time and everything else like that, or is there somebody better that can manage this quite quickly and resolve the complaint and move on?

DR MUNDY: Are there very many instances where aggrieved consumers rather than coming to yourselves end up in a small claims tribunal, or in the Magistrates Court?

MS YOUNG (PTO): Not to my knowledge, and the reason being the cost of it. You know, having a free and accessible ombudsman service. We're not there to make people happy. Some people aren't happy with the outcome of the investigation. We tell them what their rights are, we tell them where they can take it, we'll provide information about local community legal centres, whatever it might be. I've only known of one case where an ombudsman made a binding decision and the consumer then took the matter to the court.

DR MUNDY: Yes. I'm more interested in the other way around.

MS YOUNG (PTO): Beforehand.

DR MUNDY: If someone fronts up presumably at the small claims, VCAT or in the Magistrates Court, would your expectation be that those more adversarial dispute resolution forums would effectively triage it and say, "This really doesn't belong here. Why don't you go and talk to the ombudsman?"

MS YOUNG (PTO): I think them referring it to an industry ombudsman would be a much more effective use of their resources and ours.

DR MUNDY: Is your sense is that what they do, or the community knows where to

bring it?

MS YOUNG (PTO): I don't know that we get a lot of cases referred from those agencies, but that could be that there's not a lot of people that go to those organisations.

DR MUNDY: So they would be more likely to go to a community legal centre or some sort of hotline service - - -

MS YOUNG (PTO): Yes.

DR MUNDY: - - - who in effect would triage it and send to you anyway if people genuinely didn't know. The lawyer wouldn't be their first port of call.

MS YOUNG (PTO): Generally no.

DR MUNDY: Okay.

MS MacRAE: Just I guess just coming back to this issue about the extent of disadvantage of many of the people that would come to you, we've had quite a lot of evidence from various groups representing people with disabilities. Just wonder if you could tell us a little bit more about how you try to target your services and the awareness raising to those groups and what sort of challenges that presents for you.

MS YOUNG (PTO): Yes. When I started in August 2010 in this role one of the things I - I knew there was something missing right from, you know, the first couple of weeks and didn't put my finger on it for a couple of months, you know I suppose getting my feet under the table, under the desk so to speak. But I realised we didn't have a very effective outreach program, and then I had to think well actually who should we be targeting this at?

Starting at the premise that industry ombudsmen really are established to provide an access to justice for vulnerable consumers, and having come from the Energy and Water Ombudsman, I knew that it was people that were, you know, suffering from poverty, couldn't afford their electricity, gas or water were being disconnected. The outreach program there was very direct and very effective: financial counsellors and that sector. So I had to really sit back a little bit and say well what sector should I be directing my awareness program to, and fortunately I was invited to attend and speak at the Travellers Aid AGM in late 2011 - late 2010, so I got an insight then and thought it's about accessibility.

I knew nothing about disability or accessibility issues, but I thought I've just got to learn about it, and so then I started just cold calling and going to organisations

like Scope, Vision Australia, Guide Dogs Victoria, anyone that I could to actually start building relationships and get out there and talking to that sector. In February-March 2011 I had an independent engagement survey carried out to identify whether going to all those agencies - I think we went to about 26 different agencies and organisations - saying, "Do you know about the existence of the PTO? Is that recent knowledge given I'd been out and trotting the bitumen for a little bit, and are your clients likely to lodge complaints with my office?"

It was 54 per cent had recently become aware. Some still weren't aware at all. But the overarching thing was, no, their clients wouldn't probably lodge complaints, and I sort of guessed that was the answer, and the next question was why wouldn't they, and it was distrusting systems, will somebody help, "Why should I waste my time now, nobody has changed anything in the past when I've complained," or, "Actually I feel more vulnerable if I complain because they might know that I'm the blind person using Watsonia Station, or the person with the wheelchair getting on the tram at whatever," so feelings of identification. So gradually I've been just trying to break that down through going out and repeated visits and building those relationships.

We put out a report in September 2013 on closing the accessibility gap, and it focused on 173 complaints that came to my office from people complaining about accessibility issues in 2011-2012, and it came up with 14 recommendations, and they were all recommendations, and it was all focused on the easy things to fix like not building a ramp that might cost millions of dollars and be out of my jurisdiction, but providing better information, making sure that operator staff were trained to communicate with people, vulnerable consumers, people with disabilities, having available signs, signage, announcements recognising that if you're visually impaired and hearing impaired, it's a real - you know, that's even a worse situation to be in, but really about, and particularly about training staff to accept and acknowledge diversity and disability issues and to offer assistance.

That report has been positively accepted by the industry and Public Transport Victoria's public transport operators committee are working to implement some of those things. It's a work in progress. I'm still learning more and more about it every week, but it's something that - another thing that is, you know, the key value of what my office can achieve.

MS MacRAE: Do you have any feel at all, and this is probably the most difficult question and one that we've been asked to look, and we find it extremely difficult system-wide, but do you have any feel at all for the extent of unmet need because, as you've said there, there's going to be a whole lot of people that for whatever reason, even if they're aware of you, may not make a complaint. Do you have any feel for that at all in your space?

MS YOUNG (PTO): Only it's probably like the iceberg, and we see the tip of the iceberg. I was talking to a commuter a couple of weeks ago who boarded a train at Seymour to Melbourne and was put in the luggage compartment. She had MS, so she has some ability to walk. She was then assisted by the conductor to a seat, and I know V/Line are doing lots to make sure that that doesn't happen, but still it does happen sometimes. Now, this was a very savvy, resilient businesswoman, so she had the confidence, you know, to do that. If she weren't then that might have been the last train trip that she'd ever have because it's just too hard and, you know, I'm just not confident there.

MS MacRAE: Yes.

MS YOUNG (PTO): So there is very hidden - there's a lot of hidden need.

DR MUNDY: Are we done?

MS MacRAE: I think so.

DR MUNDY: All right. Thanks very much, Janine. It's been very helpful.

MS YOUNG (PTO): Thank you.

MS MacRAE: Thank you.

DR MUNDY: Could we have Transformation Management Services, please? When you're settled, could you please state your name and the capacity in which you appear and then perhaps make a brief - and brief means single digit minutes - opening statement please?

MS WALLACE (TMS): Nerida Wallace, principal, Transformation Management Services.

MR HALL (TMS): Michael Hall, principal of Transformation Management Services.

MS WALLACE (TMS): Commissioners, we are here, this is our fourth presentation. We have given you a presentation document, just going through the points we would like to make this morning. The Transformation Management Services is a consulting firm that has been looking at justice systems for the last nearly 25 years. We have had a look at your overview document and we are here to assist you with some of the requests for information in that document. We have provided you with some papers given to conferences and publicly available papers. We have others we are happy to make available to you.

Our focus is on looking at some of the research outputs we have been able to glean over that period of time. We are in the wonderful position of working with workers compensation schemes, motor accident compensation schemes and Magistrates Court and ombudsmen actually. In that period of time those organisations had the funds and incentives to look at the systems to reduce costs. That means we have been able to do that sort of research which you wouldn't generally find in the civil jurisdiction because you have got separate interests on either side and no incentives.

MR HALL (TMS): In addition to that, we are an IT company as well. We have developed innovative software. I have been granted my first US patent for some of that in January this year. We have built case management systems in a number of jurisdictions and similar areas like police, so we are aware of the system procedures.

As part of our consultancy work we have analysed the computer system outputs of a number of major systems - workers compensation and the Victorian court system. We have actually had data dumps and compared them to case analyses where we have taken multiple data points from numbers of files.

MS WALLACE (TMS): This morning I want to give you some evaluation data, a couple of key points that we think are important and some specific responses on courts governance. Michael will talk about technology and the courts and also informal and formal aspects of ADR and the application of compulsory ADR, and a

couple of short responses that I will give you. We are happy to take questions obviously and probably can answer a number that aren't in this paper.

In terms of our findings, I think the key finding is that disputes are dynamic and not static and should be treated as such. I have had so many conversations with CEOs in this area. They see disputes as widgets or fixed entities like Volkswagens. They are not. They are behaviourally driven and the learning from our research is that if you intervene at certain points in the life of a dispute, you can modify the outcome and the cost of that dispute and certainly introduce justice into it. I suppose the observation is that - - -

MR HALL (TMS): In aggregate, the systems that control those disputes can be managed so that triaging it, which you have alluded to before, is one of those behavioural drivers or behaviour control mechanisms, and there are a number of others.

MS WALLACE (TMS): I suppose the key piece of research was with Comcare in 1996. I am sorry about the age of this stuff, but what we found there was that if the claims officer at the time of the appeal rang the person making the appeal, the likelihood of that matter going to the AAT reduced from one in three to one in five. That was a significant finding. That effect multiplied if that same personal contact was made at the next level up.

You can see on page 5 that we have got this rather dramatic graph. I remember sitting with Peter Shergold and he said, "Make my graph go down" and we were able to do that. That was because they changed the way they managed those disputes.

MR HALL (TMS): The actual intervention was far more pervasive. It involved counselling of the people involved in the tasks, having them deal with the concept of a telephone, sitting around in a circle putting a telephone in there and asking them to talk about it, so it was quite a psychological approach. That is my background - a psychological approach to dealing with how they deal with clients, changing the way they perceived disputes.

MS WALLACE (TMS): I have given you a quick example on page 7 where we had two identical types of disputes in Western Australia and in Victoria - workers compensation disputes. You can see there, for instance, that in Western Australia 84 per cent of their disputes were resolved at conciliation and 65 to 70 per cent in Victoria, and another 25 to 30 per cent went into the Magistrates Court but in Western Australia the bulk was resolved outside of the court system. It reinforces the point that the type of dispute shouldn't dictate how the system is designed.

MR HALL (TMS): These systems were very comparable in what they did and

what they tried to achieve. I suppose it underlined for us that the decision to allow cases to proceed to an adversarial resolution was a choice that the system designers made.

MS WALLACE (TMS): Just looking at page 8, this is a recent study. It has now been published on the MAA, Motor Accident Authority, web site in New South Wales. It is called the CARS review. That was a very comprehensive review we did a couple of years ago, and we updated it for them over Christmas. This graph is interesting. Again the total legal payments came out of the Motor Accident Authority fund - sorry; not the fund but the insurers. Usually they lose these cases and the costs are paid but the green part of that graph you can see quite clearly is increasing. They were negotiated settlements in the first six weeks of the District Court process.

If we start at the top, you can see "Not Represented" and "Represented". These were matters that were negotiated at first instance between insurers and injured motorists. The blue - CARS - is the ADR system or actually an inquisitorial system that they have got running. You can see that was a fairly static number of cases resolved. "CARS Assessment" is where they actually made a decision. "CARS Exempted" are matters that statutorily are exempted and move into the court system. "Court Other" are matters that were negotiated.

Of course the question was: why can't we have those matters being resolved in the cheaper forum? The point of that is to say that the way the system was designed meant that it was in the insurer's interest to move that case into the courts to negotiate and obviously there were legal benefits as well. Again it is a system design issue. There is more to that story but we won't go into now.

Our learnings are that better designed systems get the right economic and justice outcome. The research would have to be directed to support the essential intervention function, so if you don't have the resources, the coordination triage resources sitting at the right part, then obviously that is not going to happen and cases will move into more expensive forums.

Our view on governance is that you have got to have local control over the budget. Everywhere we have been, we must have looked at 30 systems now. There is this massive tension between the funding body and the court and tribunal. It depends very much on the personalities, how well that tension is managed. The worst situation was a member of the judiciary appearing at a board meeting and having an argument with the CEO that resulted in one of them having a heart attack. It is always there. It's just a matter of what shape it takes. It's just about getting that balance right and moving the control of resources and the expertise to manage them back into your dispute body.

Too often we've seen a lack of control over resources inhibiting change. Over decades we've seen that. I've put in courts' governance on page 10 why we think courts' governance is the way to go and we think that the gaping hole in more efficient court and tribunal system in Australia is the expertise necessary to understand and influence and run the external justice system. So that is all of the key participants in those systems. If you don't have that management function at the centre the system is out of control and you have both heard some of the comments I made at the conference on timeliness about control. So that's quite important. I've made my points there. Do you want to talk about IT?

DR MUNDY: Just briefly, because we are chewing through time.

MR HALL (TMS): I thought you would know the problems with IT systems in courts; I thought I would jump to a solution. The perspective we have is in looking at different court systems and also developing new innovative software in different environments. What we believe the solution is in the long term is for government to take a different role for different independent court systems or tribunal systems not to grow up independently, but government's role should be as a broker of the information structure. This could be set up with new technology and I'm afraid we're probably on different planets here about how we understand this, but new technology and ours allows the growth of systems in independent forums that are linked but not driven by traditional data structures.

The government's role would be to define the standards of communication, the data dictionary, and to broker those in the long term. Perhaps pilot some systems but then open the API to open source, in an open source way to any group to develop its applications to interface with that system. Government would then extract the metadata that it needed for reports and analysis from that system, assured that compliance with those data standards was met.

MS WALLACE (TMS): We think there's a real role for government to step in here and set that up. A recent example is a cuing app so people can look at their phones and sit in the local coffee shop and get a note to say, "The Magistrates Court case is on in 10 minutes." Yes, that can be built if the company has got access into the database run by the Magistrates Court. If there's a common set of definitions any organisation can do that, any system can be built, and this is the way technology is going now. So the days of building the great big brother system are well and truly over and, in fact, have been unsuccessful, you need a whole lot of little economic activities going on to drive it.

I've just got some quick points. You've got to have compulsory ADR. You've talked about triaging already, we think that's important. We think that industry

ombudsman schemes operating under legislative licence should also be subject to your PC recommendation 9.3 for reporting. I haven't put a submission on that, I'm just drawing on experience in recent years with those ombudsman schemes for clients. We think specialist courts and tribunals should be avoided. You can have specialist panels within courts or tribunals, but otherwise you have creeping legalism, we've got plenty of examples of those.

Again, we need higher quality court administrators, trained, qualified, accredited and recognised, it's very hard to employ court administrators with requisite experience, and court counsels or tribunal counsels should include high level commercial service retail industry experience.

DR MUNDY: Thanks for that. Can I just bring you to one of your last points first, and that's specialist courts and tribunals.

MS WALLACE (TMS): Yes.

DR MUNDY: I'm sure Preston J of the Land and Environment Court in New South Wales would not agree with you.

MS WALLACE (TMS): I'm sure he would.

DR MUNDY: I guess whilst there are some bits and pieces specialist court, you know, little very specialist. I mean, the Land and Environment Court in New South Wales seems to provide a place where people can go with a dispute and then the court finds the appropriate forum, whether it be a mediated settlement by a Commissioner or some sort of administrative process, or indeed whether it needs to be judicially resolved and then, of course, it performs the appellate functions from decisions under the environment legislation and the planning legislation.

So how would you see - I mean, is your view that we should just take the Land and Environment Court and break it up and send part of it to the District Court, part of it to the Supreme Court and part of the new New South Wales Administrative Tribunal, or should we just try not and create any more?

MS WALLACE (TMS): We should try not to create more and, in fact, we should take the lessons from that court, and it sounds like they have got the model absolutely right with the front door triage and the different services within it, and you wouldn't be doing any amalgamating until the courts were in that space too. The difficulty with specialisation occurs where you get creeping legalism and you get a specialist industry around that specialisation which enables the prices to increase. So what you're trying to do is have a broader organisation that deals with disputes regardless of subject matter in the best practice model which obviously they're

delivering on.

DR MUNDY: What are practical examples of where specialists courts have led to the problems you described?

MS WALLACE (TMS): Probably the best one is the Workers Compensation Court in New South Wales. In 1999 the unit cost of a dispute to the Workers Compensation scheme at that time was \$25,000. It was very much like the District Court, it operated in the same way. The chances of getting change into it were very, very difficult. Western Australia has had a similar problem, I think five years previous to that. So the change to come out of that was the Workers Compensation Commission. I can't remember the actual figures, I can get them for you, but it was in the billions of dollars in savings and the unit cost went down to - I think at its worst was \$5000, and that was a change to Workers Compensation Commission. I won't talk about recent changes, that's a whole other set of problems.

DR MUNDY: That commission, I understand, is headed up by a District Court judge, Judge Keating.

MS WALLACE (TMS): Yes, that's right. Very similar from what you described the Land and Environment Court, but that commission has gone through changes of recent times and, in fact, they have set up a statutory triage which I'm not sure is going to work but we'll see how it goes.

MS MacRAE: So with that general finding of yours, as a result of that, would you say that something like VCAT which has all the tribunals sort of effectively under one roof would be the model that you would most endorse?

MS WALLACE (TMS): Yes, I would, because it enables people to move into - the judicial officers, the members, the referees, into different spheres, and their skill is in decision-making and dispute resolution. The expertise of a particular subject matter should be an adjunct, not the core of what they do. If it's the core of what they do, you get poor decision-makers and poor dispute resolvers. So it's about saying, "What are you in the business of doing?" "You're in the business of resolving disputes and making good decisions." So you have to say that's the core and we move people around to keep them healthy and ensure that the quality of the decisions is maintained at a high level. I should say these comments come from years of discussions with the heads of judiciary and heads of tribunals and just observing what goes on.

DR MUNDY: Because creeping legalism has been raised with us and I think it's fair to say VCAT has been named as perhaps an example of such fora and I think the two sources of this creeping legalism or dissatisfaction with outcomes in VCAT on

the one hand have been inappropriate representation by third parties, be they legally qualified or otherwise, in fora which were meant to be legally represented as the norm, but also a lack of skill and ability in decision-making by tribunal members.

MS WALLACE (TMS): Exactly.

DR MUNDY: So it's not enough to construct the institutional forum. Do you have any view on this issue about representation in particular?

MS WALLACE (TMS): I'll get Michael to just give you this cycle we gave to you in 2003.

MR HALL (TMS): In 2003 the Productivity Commission cycle - - -

DR MUNDY: Sadly neither Commissioner MacRae nor myself - - -

MS WALLACE (TMS): That's the creeping legalism solution and we've mapped that. We mapped it in schemes. They change every five years but your question was in relation to what to do about representation.

DR MUNDY: We've upset the Law Society and counsels by suggesting that perhaps lawyers aren't always prepared.

MS WALLACE (TMS): Well, in workers compensation we have in Victoria two - I wouldn't call them paralegal organisations, but they're organisations funded by WorkCover to assist people through the conciliation process. Conciliation - how many do they do? I think it's around 17,000 disputes a year. They have got 40 conciliators, so they're really working quite hard. Most of those cases are heard or dealt with half a day each. If both parties agree and the conciliator agrees, legal representation turns up, but the fees don't incentivise that. They resolve the bulk of matters.

I think you've got to assist people through these processes in some way. You've got to provide them with navigation advice. I'm very impressed with the Justice Connect model. I think that's the way to go, unbundling legal services and assisting people in that way so they get the right service at the right time.

DR MUNDY: But providing them with advice and assistance isn't the same as providing representation, particularly if the other party might be unrepresented. I mean, the concern is, of course, if one party is represented, the other isn't and - - -

MS WALLACE (TMS): I think you'll also find - certainly the lawyers I have spoken to with the self-represented litigant work we've done have said the cost to

them is far greater of having an unrepresented party on the other side. So have we got some solutions on that - probably some cost incentives, but also some provision of what we've done in workers compensation, some sort of assistance. We haven't got paralegals per se in Australia, but why shouldn't we, and we've certainly got a lot of law graduates with nothing much to do.

DR MUNDY: In a forum which is narrow and defined like workers compensation or - - -

MS WALLACE (TMS): You've got far more control, yes.

DR MUNDY: That presumably is fora in which non-legal - well, not admitted, I won't call them not legally trained, but people who are not admitted solicitors may actually be able to provide the assistance which may require skills - you know, doesn't require a broad knowledge of the law and may require skills that are not legal in their character, so are the sort of limited licence that we talk about and we've seen develop in Washington state with respect to family law matters. It might be an appropriate - - -

MS WALLACE (TMS): You have got to match that with conciliators, which they have done, who have got enough legal understanding to say, "No, hold on. We're settling this over here, but that's actually outside the legal framework," and that's not justice. You can have that paralegal model, but you've got to have skilled decision-makers and, in fact, when they changed the magistracy in Victoria to bring in barristers and solicitors to be magistrates that was the argument, that you needed to have decision-makers who had that knowledge to be able to offset the lack of representation or the inappropriate representation that people in those lower courts were likely to have and I think this is the same, you can't put somebody without that understanding, and they can be trained to it, into that sort of forum with paralegals, you can't do it.

DR MUNDY: That's similar in those sort of things, conciliation and types of forums, you may also want the people doing the conciliation to have other skills like understanding people who have experienced former workplace injury or loss of family members or something - - -

MS WALLACE (TMS): Absolutely.

DR MUNDY: - - - most law graduates don't emerge from university with.

MS WALLACE (TMS): No. You need experienced people to come in and, in fact, I think the first time we set up Conciliation Victoria, we brought in five retired magistrates and they just ate the work as you would expect, but that's understanding

— it's a high stress environment, people are sick. The legal issues aren't clear and there's an underlying longstanding conflict generally in the employment environment. So it's complex.

DR MUNDY: And the consequences are large.

MS WALLACE (TMS): The consequences are very large for people.

DR MUNDY: Potentially large.

MS WALLACE (TMS): Yes.

MS MacRAE: You mentioned on one of your slides, and it might be because it was a shortened version obviously, but you said there should always be compulsory ADR. I'm just interested in that, if you thought there were any cases where you wouldn't necessarily want ADR to be compulsory. We have heard a range of views around whether it's appropriate in all cases.

MS WALLACE (TMS): I think it should be the default position and it should be known to be the default position. There is an argument and we have proposed to have the triage or what we call screening and streaming and, in fact, we have set something like that up in the Magistrates Court here where you've got your most experienced person at the front door looking at the case and saying, "This has got to be fast tracked to a magistrate or to a decision-maker because it's complex and the manner of the dispute is not amenable to" - or they have already been through a number of mediation processes. The reason you make it compulsory, so you give the court the power to divert, but the reason you make it compulsory is you're setting an expectation again of society of influencing the system that you're dealing with to get that matter resolved.

MR HALL (TMS): And if you don't, you end up with what they have in New South Wales which is shown on that graph which is all of these cases increasingly get through the mediation system and conciliation system and go to the court and then collapse because the cost scale is much higher if they do that.

MS WALLACE (TMS): Yes. So you've got to get people to a table and you've got to get them to a table with all the relevant information and you've got to give people an opportunity to be heard and you've got to have a skilled mediator or facilitator there with a quiver full of different solutions to put on the table that are specialist to that area to say, "This is how we can resolve that one," and then you've got to have satisfaction surveys six months after to make sure there's been no coercion and concerns over the justice of the outcome, and you can, our research shows you can, you know, get what, 80 to 85 per cent of matters in that process can

be resolved.

DR MUNDY: So the issues, those which I suspect are a relatively few number of issues, that enter the legal system via the Magistrates Courts which have serious matters of law that need to be resolved, triaging, the same magistrate or senior registrar will spot them and pump them away. The other issue that's been raised of concern, I think it is of concern to us, is that in the event if you go down this path, outcomes will be resolved, they will be resolved essentially privately and will not see the light of day.

Now, that raises concerns - and I think they're concerns that we see, if there are a stream of matters which all look the same and they're resolved privately, how do those facts get drawn to the attention of relevant policy makers so that the policy issuer can deal with it in a way which is probably cheaper than having to have them mediated or dealt with in courts. Now, we know how ombudsman do this because they have a statutory duty to pick these things up and report them, but if we have a stream of ADR - it could be something as simple as, I don't know, claims against - a motor vehicle type matter. So it may well be against an individual business or it may be something systemic within the law that's leadings to injustice.

MS WALLACE (TMS): Yes.

DR MUNDY: How do we identify those systemic policy or perhaps provider issues within that context?

MS WALLACE (TMS): You've got to have a feedback mechanism. I think we did quite a bit on feedback mechanisms.

MR HALL (TMS): With the appropriate IT system, you could cull a lot of that information from the metadata in the same way that you can identify credit card fraud, with patterns of behaviour, and it's exactly the same mechanism. What you need is enough data points captured by the system as it does its normal business, to enable you to then go back and do those analyses.

DR MUNDY: So we've had 18 of these in the last two months.

MS WALLACE (TMS): That's right.

DR MUNDY: And in the - - -

MR HALL (TMS): That employer, or that industry.

MS WALLACE (TMS): That's right. But the courts don't necessarily - and the

tribunals don't either - necessarily have a legislative mandate to provide information back to government on policy issues.

DR MUNDY: They do report decisions on occasion.

MS WALLACE (TMS): They do report - - -

DR MUNDY: Whereas ADR decisions won't be reported.

MS WALLACE (TMS): That's right. Well, my view would be you need to provide some - if you talk to them, they'll say, "We've got no resources to do that work." So they rely on the law societies or the bar councils to make those representations if they do, or other - - -

DR MUNDY: Or community legal centres.

MS WALLACE (TMS): Community legal centres are probably playing that role. But I've said in there we need a standing - we said in 2003, the Workers Compensation Research Institute in Boston, Massachusetts is a classic example. We haven't got anything like that in Australia. We've got our Centre for Justice Innovation, but we haven't got - and there's a few other centres around Australia that are looking at justice systems. They're badly funded, they don't have the capacity to get the data or provide the research. There should be one in every state, and they should be giving reports to the magistrates or the judicial councils, and there are civil justice councils now, and saying, "Here are the trends," and then that council should be looking at it and then providing a report back to government.

DR MUNDY: One of the issues we do raise, although I don't think anyone has said it's a bad idea, the whole question of better data collection and evaluation and analysis, but it does beg the question, who?

MS WALLACE (TMS): Well, you need a separate organisation.

DR MUNDY: So something around the Institute for Justice - - -

MS WALLACE (TMS): Yes, or - what have we got in health? If you look at health and education, you've got standing organisations that look at this data all the time and provide information back to the participants in those sectors.

DR MUNDY: Yes, I think the Commonwealth one has just been absorbed into the Department of Health.

MS WALLACE (TMS): Even so, in this day and age, we have an opportunity, we

should be stepping into the breach, and as Michael said, setting the definitions, I think there's a real role for the Commonwealth to come in and say, "Here are the definitions. Go away, build your systems, and then we can release this analysis." Just on the private issue, though, commissioner, the courts and the tribunals have to have some sort of control over those private - we have a single list of external mediators in Victoria, you have to apply to the list and the chief magistrate has to be satisfied of the qualifications as such. So you have to have a quality control over that.

The private negotiations and outcomes, if they're within the court or within the tribunal, obviously the shadow of the court and the tribunal extends. What's going on in the professional or, dare I say, small business to small business is a completely different scenario, and possibly there should be some options for people to report some of that as well.

DR MUNDY: Yes, I suspect at the end of the day the best you could hope for is that which is done within the auspices of the courts and tribunals.

MS WALLACE (TMS): That's right.

MS MacRAE: Just in relation to that - you know, the Commonwealth should set the data labels, if you like, what should be collected - do you see the current project that's being undertaken by the Department of the Attorney-General effectively performing that function?

MS WALLACE (TMS): It will perform half of it. It won't get the IT side of it, and the IT side of it is what's going on in Silicon Valley right now, in what they call "big data". So some expertise from that side from the coin needs to come together.

MR HALL (TMS): There's a separate paper which addresses those particular issues. It's a little bit technical, but the data structures now that are being used by Google, Facebook, Amazon, are different to the old relational data structures that underpinned a lot of the systems, including court based systems and systems we built for police. Those systems are much more peer-to-peer, they are scalable, they're dynamic, you can have clusters of the same system in different places and allow a much freer access by users to add on components to those systems and build them for their specific purposes, and for a law firm to differentiate their product from someone else's, and also to grab metadata without compromising the day-to-day operations of the system and analyse it in great detail.

MS WALLACE (TMS): It's almost - we've gone past - in 2004 we assisted the Victorian Magistrates Court to get \$40 million to rebuild their IT system.

MR HALL (TMS): And they blew it.

MS WALLACE (TMS): Dare I say it, I think RedCrest is the outcome of that, and very few cases are actually going through that system in the Supreme Court. The day of building the Big Brother systems is over. We need to be making a gazump move forward and looking at this coming back from a Silicon Valley perspective, how do we do this? That's why I'm saying I think Commonwealth has a big role to play, because I think the states are still mired in these, "Let's build a super case management system. Let's have electronic lodgment of documents. That's all good." But there are better ways to do it now, and I think there's a leadership role to play.

MS MacRAE: So who will take that leadership role?

MS WALLACE (TMS): We're hoping you would make a recommendation, but the Commonwealth could.

MS MacRAE: But where in the Commonwealth, I suppose, specifically?
Because - - -

MS WALLACE (TMS): Yes, I know.

MS MacRAE: I mean, the state attorneys-general, I think, are struggling a bit. This is not their natural territory in terms of the data projects they've got on foot now. I think they would say it's sort of - - -

MR HALL (TMS): The attorneys-general have a component called the CERT program, of which I'm a business member, that looks at cybercrime and the security aspects of small business and large business in Australia and its defence against data attacks. They do have some expertise, but it is an environment that requires high levels of expertise, and because this is a new way of doing things, it's relatively new, the expertise would have to be borrowed from the private sector, such as Google or Amazon or where we can form - that's why I've put a PPP at the top of that - for the Commonwealth to actually encourage some of those large corporates with IT expertise to get involved and reset how we gather data.

MS WALLACE (TMS): Then you would have a whole lot of small IT businesses in Australia building systems for the local state court or the local - they're the cluster, so it's a bit - you come out and there's a cluster activity here, there's - but they're all using the same way of looking at the data, and that's your big advantage.

MR HALL (TMS): And they're currently pointing their faces at the game industry, or other areas that are not justice, because it's not fun.

MS WALLACE (TMS): We think there's a bit of economic activity in the IT industry in Australia you could generate here. But you'd need to get the right people around a table, set up an advisory group, and start the process. And, yes, that is why attorneys-general are struggling with this, because they haven't got the practical how-to, how do we do this on the other side. All they can do is probably discuss the finer details of the definitions. But there needs to be a new dimension brought into this.

DR MUNDY: Given your experience with IT systems in Victoria over the years, it's probably the \$60 million question - and I actually ask this question in all seriousness, and I'm happy for you to go away and come back to us - but without buying a Rolls-Royce and perhaps buying an expensive Holden, what sort of capital outlay would a jurisdiction like Victoria be looking at if it was to get its systems fit for purpose?

MR HALL (TMS): The proposal I put to you was an open-source proposal, which is how Google and YouTube get a lot of their innovative stuff done. If you open up a market but give an application program interface where everybody knows how that data structure works and how to interact with it, they will build the things. So you then run pilots. Instead of a huge system, you run pilots to do a little bit of that case management here, some core stuff here, and then make those available. Then the industry itself grows because there's demand. So rather than having to foot the \$100 million bills - in answer to your question, the data project itself, setting up the data, actually is probably a \$25 million project. It's not that big. It's a bit of consultation. After that, you've got to start setting up - - -

DR MUNDY: \$25 million is about the annual budget of this commission.

MR HALL (TMS): You know, the last copy of Word took \$400 million to build. But every major project over \$70 million in IT has failed in Australia.

MS WALLACE (TMS): We have eight out of 10 in Victoria that have failed, and it was \$60 million. So we could come back with maybe some thoughts on the approach we're describing, how it would work and what it might cost.

DR MUNDY: Because everyone tells us that IT is a core to the solution called efficiency.

MS WALLACE (TMS): That's right.

DR MUNDY: The difficulty that we have is it's very difficult for us to - and I think that's fairly obvious. The difficulty we have is we know how much that's going to cost, so are we making a recommendation that's worth a couple of hundred million or

are we making a recommendation worth billions? Then there's the small trick of proving benefits of said costs. But any advice you could give us - - -

MS WALLACE (TMS): We can come back. I think you're in an ideal position right now because the technologies in the field have been developing so quickly, and you were saying this morning, every industry has gone through this revolution, it's truly a disruptive technology. You're in an opportunity now to say, "If we step into this vacuum here and fill it, then it's going to be a lot cheaper across the board for all of the justice systems in Australia, and we will be stimulating some IT industry."

MR HALL (TMS): And you don't just have 60,000 legally trained people in Victoria versus 12,000 15 years ago. You have 60,000 - 50,000 of those are younger lawyers, and they are tech-savvy. They know how to work the stuff, and they will draw through the applications that you need to actually run these on your phone. "Do I need to be in court? Where do I need to be? Where are my clients? Can I get in touch with them? Where are those documents? Have they been submitted?"

All of the information will change the way it works, and in fact a lot of that work will go overseas, just as it did with the IT industry, the banking industry. We've trained a lot of lawyers here who actually started off overseas and have gone back, and they can provide services here in a global economy where - we haven't touched on this, but we've talked about this. This legal market will change. What you were alluding to before about lower costs, it will be driven by lower costs from overseas if the barriers to entry are lowered.

MS WALLACE (TMS): And they must be, because they have been everywhere else.

MS MacRAE: And that new disruptive technology, if I can call it that, would you say it's in adoption elsewhere, or is it so new that no-one else has yet sort of jumped on board, or is it partially - - -

MR HALL (TMS): Have a look at the other industries. The banking industry lost its complete middle section of managers and clerks to computers. The IT industry, the same. The componentry for development was moved offshore because it was cheaper.

MS MacRAE: But have courts - like is the legal system in another country sort of - are they there?

MS WALLACE (TMS): Well, I think they're rapidly going there in the UK, just reading what's going on there.

MR HALL (TMS): Partially. All of the stenographic work is done in Thailand overnight for legal firms, for the bigger ones. So part of the jobs have moved overseas. We're seeing it, we're just not dealing with it at the front-end interface of the court. But in tribunals, where a lot of it is on the papers, we will start to see that.

MS WALLACE (TMS): And we've seen 900 posties get sacked today, so what can I say? That is a direct result of this.

DR MUNDY: Thank you very much for taking the time. We'll now adjourn for a small cup of tea and resume at 11 am.

DR MUNDY: We'll reconvene these proceedings. Could you state your names and the capacity in which you appear and then make a brief, by which I mean less than 10 minute, opening statement please?

MR SLADE (MBL): Yes, my name is Ben Slade and I'm from Maurice Blackburn Lawyers. I'm the managing principal of the New South Wales practice and I work with my colleague here.

MR WATSON (MBL): I'm Andrew Watson and I'm also from Maurice Blackburn and I'm the head of the class actions department there.

DR MUNDY: Gentlemen, we're in your hands.

MR SLADE (MBL): Maurice Blackburn has a substantial practice. We have over 800 staff over each of the states and territories except for the Northern Territory and the ACT and Tasmania. We are particular concerned that LawAccess model in New South Wales maintains its presence in New South Wales. We think it's a very good model for Australia wide. Advice and minor assistance services really do need to be rationalised, as LawAccess is doing.

It's a collaborative approach, LawAccess was introduced and funded without stripping funding out of community legal centres or the law societies or the bar association. It provides a very good first point for people who really have no idea how to access the legal system and where to go within it and it enables a rational and clear referral and hopefully a referral service where people don't end up on the merry-go-round that they used to in the past.

The position in the past really was very confusing for people. I was in the community legal centre world and then at Legal Aid for years, and we knew of the frustration of people being bounced around from one referral option to another because they hadn't been properly thought through or rationalised. LawAccess greatly resolves that problem for those who get to LawAccess. The only problem with LawAccess is first that it's not in fact as well known as it should be and secondly that the public purpose fund, which is the key to its funding in New South Wales, has been diminished in its capital base and there's now a very serious threat that LawAccess will not be able to continue with its current funding and there are rumours that its funding won't be supplemented through other sources.

Another issue of significance for our law firm, but also of significance for the wider community, is the rather silly differential standards for advertising of legal services. To identify personal injury as an area for concern over and above other areas of legal service delivery is just not rational. It's meant that in New South Wales and Queensland there are restrictions that don't apply to my colleagues in Victoria,

they find it difficult to work out what to say, especially when they're running cases across jurisdictions as we do, and the regulations are regularly breached.

Firms are apparently allowed to use the term "compensation law", but if they say "asbestos" then that's in breach. If you say "medical negligence" then you're in breach, if you say "medical law" then you're not in breach. It's not rational and it's confusing for the consumer of legal services. Consumers really need greater transparency in the provision of legal services, which is a fundamental part of your report and we agree that consumers do need clear legal processes and clear information.

Which brings us to another concern that we have which is tribunals. We have a real concern about the recommendation in the Productivity Commission's draft report that tribunals - or at least a number of them - have "no lawyers" rules. That just doesn't help. It was a position that I held very strongly when I was in community legal centres now 30 years ago. The experience is, it doesn't work. To ban lawyers from tribunals merely gives the power to the opponent, the opponent being far more and often greatly sophisticated landlords, government department representatives, in-house counsel are appearing before unrepresented people who need the help of the tribunal, and the tribunals don't engage enough.

Another aspect of our concern is court processes. We are particularly impressed by the Federal Court's fast track system, by in the main the Federal Court's judicial intervention in cases that we run. Early case management conferences. Case management conferences deal with a whole range of issues, including how the evidence is going to be presented, what experts might be required, early and targeted discovery are all really, really useful and they make for the conduct of our complex cases so much simpler. The individual docket system is a key to that.

Other jurisdictions, such as the New South Wales Supreme Court and the Victorian Supreme Court do not have such simple systems, do not have such a level of judicial intervention, and the process of running both relatively ordinary cases but also complex cases is delayed as a result and the costs of course increase substantially. Discovery is an issue where in the more complex cases we depend very much on targeted and sensible discovery and that requires both cooperation of the plaintiffs and the defence, and the defence can, through processes such as affidavits identifying where the documents are and how they're held, through cooperation and through judicial intervention can improve the discovery process substantially on the somewhat tortuous process that some can get caught up in.

We're very concerned about targeted costs orders in discovery procedures, because we just see that as being yet another step in moving the goalposts back to the size of the moneyed defendant and the ability of moneyed defendants to complain

and scream about discovery when the reality is it could be targeted, it could be provided and it could be done sensibly, is there. We're also most concerned on actions that we take against both either the Commonwealth or one of the states that the model litigant guidelines are not complied with.

It's very rare that we see any compliance with the model litigant guidelines, every now and again we do. We've had some appalling examples where model litigant guidelines are routinely breached and we like the suggestions you've made in your draft report that there be some proposals for enforcement of those model litigant guidelines, whether it be by the courts or whether it be by the legal services commissioner or some other office isn't enormously important. What matters is that they are enforced when they're breached as they are routinely. Andrew is now going to talk about contingency fees and third party funding.

MR WATSON (MBL): I wanted to start by making three general remarks about class actions and litigation funding before I turn then to the specifics of the recommendations in relation to contingency fees and litigation funding. The first proposition I wanted to make was that class actions provide access to justice. They do so by providing an efficient mechanism whereby claims can be aggregated and legal costs spread across a claimant ground, thus reducing the overall level of those costs, albeit in a particular action the costs are often very, very high.

Examples of cases where I think genuine access has been provided, which would not have occurred without a functioning class action regime, are our bank fees cases where the individual amounts involved in litigation would simply have made any action on your own prohibitively expensive and a waste of time. Our current bushfires class actions, where a large number of victims of the Black Saturday bushfires have been assisted to take litigation which they couldn't have afforded themselves, and those which create most controversy are shareholder cases.

Again, very often, even though some of the large institutions who participate could theoretically run those actions on their own, what we know is that in practice prior to a functioning class action regime they did not. So in each instance of those examples but more generally, what the class action mechanism provides is a remedy in practice where previously none would have existed. The second proposition is that litigation funding itself can increase access to justice, and it does so because it provides access to capital for the claimants in order to run cases.

Absent litigation funding, third party litigation funding, the only mechanism for accessing that capital is either the claimants themselves, and there are usually very, very significant problems about that, or law firms, and law firms are limited in the access that they have to capital. So again, to go back to the sorts of examples I just gave, we had sufficient capital to run the bushfires cases. Those have been

inordinately expensive, but we had sufficient capital to run them.

We would not then have had sufficient access to capital to then take on bank fees. So litigation funding promotes access to justice in that way. It also promotes access to justice in that it provides for an equality of arms. It does provide a mechanism by which defendants are less likely to be able to in effect starve out claimants, and that is, like it or not, something that was a function of the way major litigation was conducted in this country beforehand, and it's less evident now.

The third proposition I want to make in a general sense is that much of the current debate regarding class actions and litigation funding involves recourse to rhetoric and unsubstantiated claims. The facts are very different to much of what is said. First, the average number of class actions in any given year is about 14. The average number of shareholder actions, those which as I say seem to excite the most comment and interest, is actually less than three, and in the years since they have been run there's never been more than six in any given year, and if you look now at the current total number of funded shareholder class actions on foot in Australia anywhere, there are five.

Notwithstanding those relatively small numbers, there have been approximately one billion in recoveries from those funded actions over the course of the last 10 years. So there is a significant contribution to access to justice in cases where access would otherwise not have occurred. But a number of things stand out, which is that there is simply no evidence of economy stifling activity on any rational basis, nor is there any evidence of widespread unmeritorious suits.

Of course, in any functioning litigation system there will be unmeritorious suits. The real question is how many and are they in greater proportion than any other form of litigation? Simply no evidence of it. That brings me then to contingency fees. More broadly and outside the field of class actions, we think contingency fees offer a real opportunity to promote proportionality of legal costs with outcomes. It seems perverse that in an environment where people are concerned about the proportionality of legal costs to outcomes, the one form of judging that you do not permit is permitting a charge of a proportion.

Secondly, legal costs charged on a contingency basis provide an alignment of interest generally between client and lawyer. There's much discussion about the alleged conflicts, but in fact we think many of the alleged conflicts are much more manifest under current charging regimes than they would be under the introduction of contingency fees. Specifically, turning to class actions, we've crossed in a sense two Rubicons. The first Rubicon we've crossed is that we allow lawyers to have a financial interest in the outcome of their cases.

People talk about it as though it's an evil thing, but in fact whilst we have conditional fee arrangements, lawyers have a financial interest in the outcome of their case, and indeed in an unfunded case like bushfires the quantum of that interest is actually of a greater magnitude than in almost any other piece of litigation that I could think of. So we've crossed that Rubicon a long while ago. We also crossed the Rubicon a long while ago of allowing people to take a percentage of a judgment outcome when we allowed third party litigation funding.

The only thing we don't allow is for lawyers to do that, and in our view that's an economically irrational outcome and one that is not to the benefit of consumers. At a theoretical level, it must increase transaction costs to have two parties, each of whom need to make a profit, involved in the transaction, and each of whom need to take some premium for risk in the way in which arrangements are structured. At a practical level what we do know is that in funded class actions the percentage commission paid to the litigation funder will be between 30 and 40 per cent and that legal fees will on average be about 12 per cent.

It is plain that a contingent fee of 35 or 30 or 25 would be a cheaper outcome for consumers. Finally, just about litigation funding, the first thing we'd discuss in relation to some of the commentary is that it's often characterised as being an unregulated industry. That is not so. There are the general consumer laws that already apply, there are conflict of interest regulations which were recently introduced and in a de facto way security for costs from courts often acts as a capital adequacy mechanism.

Our view about regulation of litigation funding is that like all lawful activity, any regulation which does occur should be kept to the absolute minimum to prevent abuse and it should not create barriers to entry or be a de facto excuse for destroying an industry which is in the nascent stages of development. In those circumstances, we don't necessarily perceive any need for a licensing regime. But if a licensing regime is to be introduced then it should be introduced in a way which ensures that competition is promoted and not stifled.

DR MUNDY: Okay, thanks for that. We might start on litigation funding and contingency fees, because they seem to us really to economically look an awful lot the same, it's just a question of who's doing what. I guess the reason - so what we see is an opportunity to deepen a fairly shallow litigation funding market by allowing contingency fees is a way to proceed. I guess we are minded that there is some community unease and therefore some sort of licence held from APRA might assuage that and achieve the policy outcome.

I guess the first question I'd like you to bring your mind to is on page 17 of your submission you argue that contingency fees should be capped at 35 per cent,

and then go on to question why as far as conditional fees are concerned there is no economic basis for a 25 per cent cap. It seems you want to have your cap and want to eat it too. But I guess the question again is, how did you arrive at 35 per cent and I guess - and I'm not wanting to put words in your mouth - is this really an attempt to assuage that community unease? I mean, we've heard it from all sorts of folk. Is that essentially a mechanism by which the introduction of this would be essentially more palatable and if so, given the competition issues which appear to be pretty apparent with respect to the third party funded litigation, there should be a 35 per cent cap there in the name of a level playing field.

MR WATSON (MBL): So I think in short you're right. I mean, one of the obvious economic consequences of having a cap is that you'll then have cases which might be meritorious where 36 per cent would have been the right number, or more likely because things are not that subtle, 40 per cent might have been the right number and they won't want to be - - -

DR MUNDY: They won't go.

MR WATSON (MBL): Won't go ahead. But there is community concern and one of the things obviously enough in the introduction of a regime like this you want to do is create a sense that there's a demonstrable benefit in what is being introduced. What we know is that currently where you have third party litigation funding, you're ending up with numbers that are north of 40. So if you introduce it at 35 you have that demonstrable benefit.

As to whether there needs to be, as it were, a level playing field as between litigation funders and law firms in relation to capping them at 35 per cent, I actually think one thing you could do is cap us at 35 and leave litigation funders, as it were, to charge whatever the market bore, and that would ensure that where cases could be run for cheaper there'd be competition obviously enough, but where for whatever reasons 35 wasn't the right number you would still have access to a more limited level of competition between litigation funders.

MR SLADE (MBL): If I might just add, if the ban on contingency fees was to be lifted in the minimalistic fashion with some constraints but not too much, then law firms would be in a competitive advantage, because litigation funders put up security for costs. Law firms shouldn't be, I wouldn't have thought, required to do that, and subject to the complications of a security for costs order being made and how that is met, which is a matter between lawyers and a client, then law firms would have some competitive advantage. So the 35 per cent cap wouldn't be quite as harsh as it might otherwise seem.

DR MUNDY: It was suggested to us in our hearings in Sydney, and I can't quite

remember who it was by, was that for particularly smaller matters where the outcomes are tens of thousands of dollars say, really the incentives on the law firm in those circumstances, whatever you think the incentives might be, really are no different to a traditional no win, no fee conditional fees type - with or without an uplift. Is that your general - - -

MR WATSON (MBL): I would have thought if you analyse the likelihood of outcome and the impact it will have on the firm, there can't be really any difference in incentive at that level much.

DR MUNDY: It's the big fish that - - -

MR WATSON (MBL): It's the bigger cases where it might impact.

DR MUNDY: I guess that brings us to the question of - you know, we say, and I think it is our view, that there needs to be some sort of prudential attention paid to litigation funders. Should a similar requirement be placed on law firms that want to run particularly large actions. So forget about the \$35,000 one which looks like a conditional fees arrangement in all likelihood. But if you were going to run on a contingency basis of a bushfire - - -

MS MacRAE: Well, the bank fees one or the bushfires.

DR MUNDY: The bank fees case or whatever. Given that you would be presumably undertaking to the members of the action to bear the adverse costs orders if unsuccessful and those sorts of things, they need to have some certainty that the firm will be able to bear those orders and a licence does that for the third party fund. How would you think we would give consumers of your services in those circumstances the same level of assurance that's provided by the funders other than your good name and reputation as members of the profession?

MR WATSON (MB): There's some interesting questions there. Plainly there's an open question about whether law firms ought to be required to provide adverse costs guarantees in the same way as litigation funders are not required to provide adverse cost guarantees. In Canada, for example, law firms can if they choose to, and if they choose not to they don't have to. That's one issue.

MS MacRAE: Can I ask just quickly on that, because it is a big issue to us: what's the experience in Canada? How often do they choose not to, I suppose is the question.

MR WATSON (MB): I don't know statistics. I do know that anecdotally there has been a very nascent growth of third party litigation funding in relation to Canadian

class actions, but you could literally list on the fingers of two hands the number of cases which have been funded by a third party litigation funder as to adverse costs.

DR MUNDY: Can I just interrupt? Is the character of those actions of a securities nature or are they just across the board?

MR WATSON (MB): Generally speaking, securities actions, but the first case in which it was attempted was actually a consumer class action, although the court for various reasons determined not to permit the funding arrangement. I'm just trying to think of whether there's an example of one that has been approved outside of the securities field. I'm not sure that there has.

DR MUNDY: Because this is obviously the nub of the issue. The attorney-general I think has indicated that he doesn't have a problem with what are called traditional class actions, which I presume covers things like the ANZ case, the bushfires case. The real concern seems to be around securities. That's where the heat is. Some might call it hype of hysteria, but that's where the heat is and that's where the debate is.

MR WATSON (MB): Yes. To be honest, it is difficult to understand the level of hysteria which accompanies that issue; as I say, given that on average there have been less than three a year. More fundamentally - - -

DR MUNDY: Is it possible for you to get back to us on what you consider those actions to have actually been because the evidence in this space as you identify is pretty scratchy so if you know what these actions are that might be relevant, and the other ones that don't fall in - if you could actually list those cases for us, that would really help us in getting a handle on the evidentiary basis.

MR WATSON (MB): Yes, we can certainly do that. What other things I was going to say is just, look, I mean, we have rules that prohibit misleading and deceptive conduct and which require continuous disclosure and those rules are about in the best way we can trying to ensure the efficient allocation of capital on markets.

If you don't have an effective mechanism of enforcing those rules, then you really don't have as efficient an allocation of capital as you might otherwise have and whilst ASIC can do certain things, the one thing we know from history is that it is constrained in a budgetary sense and that because of those constraints it tends to focus on enforcement activity rather than recompense. So without a functioning class action regime that deals with securities actions or shareholder actions, you are not ever going to have the optimal allocational efficiency that you ought to have in your share market.

One of the curiosities about this debate is that people like the Australian Institute of Company Directors seem to spend an inordinate amount of their time worrying about the .2 per cent of companies who get sued in any given year rather than worrying about the 99.8 per cent who are attempting to do the right thing and who should be protected.

MS MacRAE: Just one of the counter arguments, if I can be devil's advocate for a moment: I guess there's this concern around blackmail or free mail, whatever you want to call it, that there might be an action that's threatened and a big company might say, "We think there was something unfair going on here. We're going to call a case." The company thinks, "Well, this is going to take us years in the courts to settle this because the law is uncertain and we're going to argue it, they're going to argue it tooth and nail. It's going to cost us a fortune. In the meantime our reputation is going to be dragged through the mud. We're going to be stymied, effectively, for some years before we can clear our name, so while we think we're in the right, ultimately we're just going to cave in early because the reputational damage to us and the problems for us in having this hanging over for such an extended period is a big enough threat to our name and our resources that we think we're just going to settle." How would you respond to that sort of argument?

MR WATSON (MB): Firstly, there's not much empirical evidence of people caving in early. These cases on average take about three and a half to four years before they settle and they're often extremely hard-fought with tens of millions of dollars on both sides run up in legal costs, so there's not much evidence of people just falling away.

The second thing is that the quantum of the settlements, even in those which have settled early, suggests that the notion that you would pay those sorts of amounts running into - I mean, we have now settled I think four shareholder class actions for amounts north of 100 million. We have recently settled a class action against Leighton for an amount of 69 million. These are not amounts of money that you would pay if you just thought, "Gosh, it's a bit too much trouble to go through all the pain, anxiety and hurt. Why don't we just pay 69 million to make it go away."

There are shareholder cases which have settled for relatively small sums, but again the question is not do such actions exist, but rather do they exist with any greater frequency than any other form of litigation. Is there any evidence that this is a widespread phenomenon that needs to be regulated out of existence or is it, as I would contend, less likely that unmeritorious shareholder class actions get launched than just about any other form of litigation because whether it's the lawyer funding themselves or whether it's a third party litigation funder, you do have to be up for saying, "Are we prepared to stick up to 10 million, maybe 20 million, on the line and then risk paying adverse costs on an unmeritorious action?" The answer almost

universally is no.

MR SLADE (MB): It's difficult to give more specific evidence about that because these cases settle always on terms that we don't disparage the company, we don't go on about what they did except for the purposes of education, and we can't therefore give you detail of what we say Leighton Holdings did but we could, if we were allowed to, give you fairly good detail of why it was a good settlement for Leighton. The claim was not brought frivolously. It was not unmeritorious, and none of our cases are. Neither are cases funded by Bentham IMF.

If I could just give you a snapshot of the cases I have just written down here while Andrew was addressing you of the cases that we're running at the moment, we have got two bushfires cases, which is large numbers of group members. That falls into Senator Brandis' legitimate claim; Bonsoy milk, which is on behalf of a large number of people with a substantial claim; DePuy and Johnson and Johnson, defective hip implants that I'm running out of our Sydney office. There's about two and a half thousand compensable group members in that claim, four and a half thousand people all up.

There's the Leighton case which just settled; Cash Converters, which I'm sure would move into the legitimate claim. That's claiming that people were tricked by Cash Converters into paying 633 per cent interest when the maximum interest rate was 48 per cent in New South Wales over that three-year period. Another case on behalf of 50 people who are residents of a place called Grand Western Lodge who were, we claim, effectively tortured and deprived of their liberty over a 10-year period while the state of New South Wales sat by and watched, unable to do anything for fear that they might be breaching their own regulations, and actually on behalf of young people - who were called Konneh in the State of New South Wales - who are routinely arrested by the police in breach of bail conditions when in fact they are not on bail at all and we have had the State of New South Wales run two strike-out applications.

We have had a separate determination of that issue which means that they are 100 per cent liable for at least half of the class issue, still not handing over the money, appealing one of the strike-out decisions and losing a case against the Commonwealth government in relation to equine influenza which has been run out of the Queensland office and we are about to start a case on the floods that happened in Queensland in the New South Wales Supreme Court because of jurisdictional issues. We have in relation to the shareholder class action just sent a demand off to Treasury Wine Estates' lawyers concerning an issue there and there's - - -

MR SLADE (MB): A few others, yes.

MR WATSON (MB): A couple of others; one other - - -

MR SLADE (MB): RiverCity, which is a case involving the securities which we issued in relation to RiverCity tunnel.

DR MUNDY: Yes, I think we have looked at the RiverCity tunnel recently on another matter. What you are basically outlining here is that securities class actions are a significant but not dominant part of business. That's essentially the - - -

MR WATSON (MB): That's absolutely right and as I say, is borne out by the statistics which is that on average, there are 14 class actions a year and on an average, there are somewhere between two and three shareholder class actions a year and the shareholder class action average comes from a publication by Allens Linklaters, who are a defence firm, so it's not an invention of ours. The 14 class actions per year comes from the research of Associate Prof Vince Morabito, so - - -

MR SLADE (MB): Professor now.

MR WATSON (MB): Professor, sorry, so these are not things we have made up.

MS MacRAE: Can I just ask one other thing and again, I am just interested in dealing with the advocates here, because we did hear from Jones Day last week, which is where we got some of the numbers that are in that area.

DR MUNDY: Angela is much better with this than I am.

MS MacRAE: If we just come back to this, and you have suggested that a 35 per cent cap might be appropriate, but in the absence of that, there might be an argument put that the only people that get rich out of these schemes are the lawyers, that you have got these thousands of people and it looks like a great benefit but it's only a tiny little bit of it for each of these people, that if it's no cap and there's a great damages amount here and you can take 90 per cent of it, you would only have to have one of these in your career and you would be on easy street for the rest of your days if you were one of these lawyers running the case. I think they gave the example in America where they talked about some cases where effectively the benefit to the people in the class was worth virtually nothing, less than a per cent. Can you just respond to that as well?

MR WATSON (MB): Yes. Well, the first thing to note is that if you do believe in the way competitive markets work and, you know, broadly we do, then your expectation is that over time, with competition, you won't have people being able to charge very large commissions for cases which don't warrant it and the key to ensuring that is ensuring transparency in terms of understanding about the

arrangements and also advice about the merits of a case, so that's the first thing. The second thing is we are for these purposes arguing that there should be a cap and if the cap is 35 per cent, that guarantees that 65 per cent will go to claimants.

DR MUNDY: Yes.

MR WATSON (MB): The individual amounts for each claimant might be relatively small but it does guarantee that the majority of the funds goes to claimants. The third thing is that just as winning one might provide some financial recompense, losing one where you guarantee adverse costs I can assure you is something which will in many instances guarantee financial ruin. Even losing a very large conditional fee case where you have got large amounts in disbursements, maybe tens of millions in disbursements and tens of millions in WIP, will have a very, very significant adverse effect on most law firms, so there is necessarily a calculus that will occur at an economic level for firms in making sure that they weight the risk appropriately and ensure that they aren't taking on cases that are too risky for very little benefit.

The final point I would make is that the courts have the capacity to regulate abuses and where it is plain that a case is really being brought just for the sake of the lawyers, then there is nothing clearer than that the defendant will raise that with the court and if that is the case, that the courts will deal with it appropriately.

DR MUNDY: I am just mindful of the time.

MR WATSON (MB): Yes.

DR MUNDY: But in trying to establish a series of recommendations or a framework of a recommendation which may ultimately be acceptable across the board, the fact that something along the lines, following on your last point, that agreements, be they in relation to contingency fees or litigation funding, you would see no objection to those being lodged with the court.

MR WATSON (MB): No.

DR MUNDY: The second question is would you see or could you conceive of a framework - and I'm particularly mindful of the protection of small people who could get stung with an adverse costs order - that to enter into arrangements - and I have got in mind an exclusion for what you might call in securities law the sophisticated investor, so I'm not talking about contingency arrangements for the corporations. I'm talking about punters and small businesses and stuff; an arrangement whereby those sorts of agreement should involve the funder, be they the law firm or the third party, they must accept the adverse costs order, because it's the adverse costs order that gives some teeth to the incentive characteristics in this in our mind.

MR WATSON (MB): I think there is no doubt that in most instances where you got litigation funding, it will be appropriate for adverse costs funding to be part of the provision but I wouldn't necessarily support adopting an inflexible rule or something like that.

DR MUNDY: We might leave it open to the court to be able to determine that exemption. Would that be okay?

MR SLADE (MB): It's either that or the court making a security of costs order which can't be met. Then either the law firm has to give that indemnity or the case will be stifled if the plaintiff can't pay.

MR WATSON (MB): I think there is a real - as a plaintiff lawyer now, one of the things that you inevitably have to do if you're talking about a piece of unfunded litigation where we don't give an indemnity for adverse costs is have the conversation with the client about the fact that you are effectively asking them to stick the entirety of their life savings on the line.

DR MUNDY: I understand that but we have had significant evidence that a lot of clients don't quite understand what that means. A lot of them don't but that's okay. I think that answers that question.

MR WATSON (MB): Yes.

DR MUNDY: The third is a more general issue and it goes to the funding of substantial litigation where the outcomes are not of a compensatory nature, so it may well be a large planning - I mean something like - I don't know whether you were involved at all with the Cole matter that went to the Court of Appeal but these very large planning and environmental matters which ultimately read in administrative law outcomes or interlocutory outcomes. How do you see those being funded? I guess I'm particularly mindful of this, given the apparent reduction in funding to the environmental defenders officers who typically brought or at least provided the solicitor services for these actions and the bar has generally stumped up for free. How do you see those matters being funded in the broad? Are they just something which has got to be funded on a public interest basis or through some other mechanism?

MR WATSON (MB): I think in the end, you are never going to get a system where everything can be funded on the basis of contingency fees or third party litigation or you do just have to accept that there will be some matters still which will only obtain legal redress if people are prepared to do them on a pro bono basis or they are funded in a traditional way.

DR MUNDY: Or we think up some other public framework that deals with it.

MR WATSON (MB): Precisely.

DR MUNDY: Do you want to add to that? Thank you for that, that has been very helpful. If you just want to reflect on the completeness of that. The other thing I would just like to ask you is you mentioned you might just want to ask us about the experiences that we had about matters that didn't proceed prior to class actions at some point. If you could identify a couple of those matters, that would be very helpful.

MR WATSON: It was more in the broad, but yes.

DR MUNDY: A couple would be very helpful indeed. Okay, thank you very much.

MR WATSON: Thank you.

MS MacRAE: Thank you.

DR MUNDY: Could we now please have Helen McGowan. Good morning. If you could state your name and your affiliation for the record, and then make a brief, about five-minute or so statement. Thank you.

MS McGOWAN: My name is Helen McGowan. I'm a country lawyer based in Albury Wodonga. I have my own legal practice, but I also work as a consultant to the National Association of Community Legal Centres, and from time to time with the Legal Aid Commissions.

DR MUNDY: Thank you.

MS McGOWAN: Essentially, I have submitted a written submission for this hearing and I'm happy to talk to that. It addresses four proposals that, in response to reading the draft report, which had not sort of been reflected in the current draft, so those four are the idea of a public-private partnership leveraging off our pro bono commitment as a profession to do justice to Australian communities. I can talk a bit more about that. The idea of an exemption for limited legal assistance services when they're provided in a way that does not breach the conflict of interest rules, but that actually gain some protection for those people providing those services. The third thing is a suggestion that we, in the data collection review that has been going on, we actually note the geographic or remoteness areas, because that will be useful for policy and service delivery. The final proposal is the development of national aspirational justice goals. The idea of goal setting has been reflected to some extent in the national partnership agreements, but also in the corroborative legal service delivery regional justice plans. From my observation, they seem to be quite motivational.

DR MUNDY: Angela, do you want to start?

MS MacRAE: Okay.

DR MUNDY: Thank you for being so brief.

MS MacRAE: Maybe I will take up one of the issues that you raised initially. Having the ABS identify the geographical location of services, do you see whether there would be any difficulties with doing that?

MS McGOWAN: No.

MS MacRAE: It seems to me it's an additional sort of data - - -

MS McGOWAN: The ABS released concurrent tables, it's post code identification. The data is already there, we just don't desegregate it and analyse it according to

remoteness areas. In the health and welfare professions, they use it regularly as a policy lever for government. The only time - I have been looking for it for a while - I have seen it happening was with the New South Wales Law and Justice Foundation in their current, subsequent analysis of the legal, law need. They went back and said, "Well, what exactly is happening in the more remote areas", then they found a concurrence between remoteness and access to justice, as if we needed to be told that it was there, but what they realised is that the people were not accessing the services that were there, so the question was do they know about the services and how were they promoted, but basically their comment in the subsequent reports for the New South Wales Law and Justice Foundation is perhaps the services aren't even there, perhaps they are more in the nature of the law access phone-in 1800 number. The posters aren't up in communities, so they don't know that they're there.

MS MacRAE: How would you account for that sort of factor that a lot of the bodies that we have heard from talk about doing a lot more outreach work, and doing more over-the-phone sort of things. How would you classify that geographically in terms of where the service - I suppose you would know where the need was.

MS McGOWAN: Yes.

MS MacRAE: You wouldn't necessarily, from a policy point of view, the need doesn't necessarily have to be matched to a service that's necessarily also located in that geographical area, so how would you account for those services, and how would that complicate, I guess, the policy questions you might be able to answer, having that sort of detail?

MS McGOWAN: The way I have seen it work in the health sector - and there has been a great audit done, where they actually looked at models of service delivery, so you may be thinking of the hub and spoke model, that works, and they looked at, well, if the hub is in, say Dubbo, where the spokes - how far remote are they going. So they were doing an analysis of those more remote communities and seeing to what extent they were serviced. On the one hand they were saying, "Well, we have a service that goes out to Wilcannia," then they would say, "Well, does it go out there, and is it just in the nature of a telephone number on a community notice board, or is there a fly-in fly-out supplementary?" From my observation, the New South Wales system seems to have been much more adventurous and evaluated than any other state that I've seen.

MS MacRAE: Is that because they do already collect some of this?

MS McGOWAN: I think so, and also my observation is the New South Wales Law and Justice Foundation is a leader in that area, and maybe they had good public purpose funding money that they were willing to invest.

MS MacRAE: Right, okay. You also talked about having some national justice goals.

MS McGOWAN: Yes.

MS MacRAE: Would you see them as something that you'd have separate for the private profession - - -

MS McGOWAN: No.

MS MacRAE: No? So you would want to have joint goals that would look at the totality of service?

MS McGOWAN: It just amazes me that, as a national profession, which I consider myself as an Australian lawyer, that we are so reactive and fragmented, yet when we sign on the for job, we undertake to (indistinct) administration of justice is our thing. In some jurisdictions, they are talking about, as well as swearing the oath of allegiance, we actually pledge to do more than that, and there's great work done by Kim Economides at Flinders Law School on a story that they use in Canada with the engineers. They have something called the iron ring ceremony. In the UK, they are trying to bring in this idea too. There has been a bit of resistance from the private profession, because they say, "Look, we are too busy doing what we are doing for clients, that dictates our agenda. We really can't go better and look at what it means to be in the society in this community."

My real interest is in, imagine having that conversation through the Australian Academy of Law or the Law Council, where we actually see, "What are the key issues for us in 2014 in Australia that resonate with justice?" To me, obviously, it has got to do with indigenous justice, particularly when there are children. You will hear later from Ashurst, when they come in and talk about their model for Katherine. There has been some wonderful initiatives on a case-by-case basis, but they are not being, I guess, harnessed to inspire the profession, and I think we have, already in the draft report it talks about the importance of the pro bono coordination. I think that's a really beautiful seat for the that idea to belong.

I see some law firms doing reconciliation action plans, including law societies, but there's so much individual effort that goes into pro bono in an ad hoc, fragmented way, I'm saying that's okay, but imagine if, once a year, we said, "This year we are going to focus on," or "This five years we are going to focus on this particular issue. We are going to measure our progress and see how we go with it." It's aspirational.

DR MUNDY: You mentioned, when we took evidence in Perth on Friday, the chief

justice of Western Australia drew our attention to the fact that there was no privately practising lawyers between Geraldton and Broome, that whole stretch of coast, so right through - so essentially, there are no private practising lawyers in the Pilbara. The Legal Aid Commission of WA talked about the program they have, which I think you reflect on in your submission which, unfortunately, now appears to have had some funding challenges. Would you just like to reflect a little bit on what you see the strengths of that program was and how sabbaticals and secondments might be used, particularly for places that are perhaps a bit less attractive than Margaret River.

MS McGOWAN: It has been evaluated and - I will talk about the benefits.

DR MUNDY: Yes.

MS McGOWAN: I was speaking to a remote lawyer on Friday. She had been recruited to a remote legal service because - she came from New Zealand, and she wasn't connecting with anyone. I said, "What about the country lawyer program?" So I put her in touch with them because their whole reason for being is to connect and they support. They offer remote supervision. They do the training track, continuing professional development remotely and they bring each other together and they do face-to-face time, so I think without something of that coordination at a state level, people will fall through the cracks and the country lawyers program again is exemplary but the down side is seeing this lateral recruit goes on.

The Legal Aid Commission is paid the best salary. You might start off with a community legal service. Maybe you have got an Aboriginal legal service but, you know, top dollar for profit is Legal Aid and the CLCs are unable to match that dollar because of the funding disparity between us. Not only is there a funding disparity. There is a governance issue, so the CLCs typically stand and fall with a governance committee and that depends on the calibre of the volunteers in that community and there can be great turnover. Lawyers can come but leave because they are not being looked after, whereas Legal Aid has got this model where they put them in Perth to start with, train them up, supervise them, get good relationships going with their cohort and then they keep those going for years, whereas when an independent service just employs, they just maybe get exhausted very quickly.

MS MacRAE: Is there a solution to that though, because it would seem a shame to say, well, there's this program that's working.

MS McGOWAN: Yes.

MS MacRAE: It's starving these other places, so that's a bias. It is in one sense but is the alternative to have no program working well?

MS McGOWAN: To me the fix which I have seen, which is again a declaration of interest - I'm involved with it - which is the - we call it the Fiverr, recruitment and retention of lawyers in regional rural Australia model, funded by the Australian Government. We had four regional coordinators. The only one at the moment is in western New South Wales. The fix is working for the regional law society, so the regional coordinator is employed three days a week. It depends which service they are based in.

In this case, she is based in the Legal Aid Commission. She works at all the legal services through the west of New South Wales but works very closely with the executive of the regional law society, in that case Orana, and all the legal services say, "Look, we've recruited someone. They're arriving next month," so Sharon will make contact with them and say, "How are your accommodation needs? Do you have schools?" She does all that, you know, pre-emptive strike, gets a reading of it, then when they come, they will introduce them to the estate agents, because it's very hard to get a home in the west. She will introduce them to the doctors because the doctors' books are closed. She will introduce them to the schools. She does a wonderful job. She's not a lawyer but she works very well with lawyers.

The other thing she does is coordinate the continuing professional development and she also organises with everyone else the social events, so they have set up a young professionals network and they were recognised this week. They have got a practitioner out in far western New South Wales who has been working the profession for 60 years and they have recognised a bit of an event, so I think that's the fix, someone working at a regional level who knows their community, who has got the respect of their profession and is doing that work. That's what we call the Fiverr project. That's due to finish, as most things are, at the end of this calendar year and it's a very cheap program.

DR MUNDY: Do you know how much it costs to fund? We can find out.

MS McGOWAN: Yes.

MS MacRAE: Where does run then? This is a Commonwealth thing or - - -

MS McGOWAN: It did run in north-north-west Queensland for that. It's run for the whole of the territory and for the whole of South Australia.

MS MacRAE: Right.

MS McGOWAN: But the unfortunate thing is that we only have regional law societies in Queensland, Victoria and New South Wales, so in the whole of Tasmania, South Australia, Northern Territory, WA, if you have a lawyer remotely,

they are not connected. Maybe they might go to the city twice a year for some CPD. We have got the country lawyers project which is like Hub and Spoke from Perth and then we have got the Fiverr which is based in the community doing a good job.

DR MUNDY: To some extent, you can see how it could work in northern Queensland or in central Queensland. The geography is in part determinative of where it may or may not work.

MS McGOWAN: Very much so.

MS MacRAE: Slightly odd but one is Commonwealth funding and one is state funded as well.

MS McGOWAN: I think the country lawyers program was Commonwealth to start with, so it still gets a bit of that. Basically, all it seems they are talking about is what is the case for it and that the idea is that no matter where you live in Australia, you should have the access, that people can a lawyer, yes.

DR MUNDY: You mentioned conflict of interest really in two contexts.

MS McGOWAN: Yes.

DR MUNDY: That's in small communities but also in unbundling of services.

MS McGOWAN: Yes.

DR MUNDY: The unbundling of services is something we are quite interested in.

MS McGOWAN: Have you been addressed on that already? Did John Boersig from the ACT talk about that?

DR MUNDY: Briefly.

MS McGOWAN: Okay.

DR MUNDY: Yes, we have had some discussion but I guess the issue that we are perhaps more interested in is the unbundling of services in private practice rather than by legal aid commissions per se.

MS McGOWAN: Yes.

DR MUNDY: You suggest a couple of solutions in relation to the conflict of interest and ethical issues around unbundling. Could you perhaps briefly take us

through that?

MS McGOWAN: In Australia, we have the Australian solicitors conduct rules which are being accepted by jurisdictions, currently under consideration in Victoria. They have gone from being, well, some people might say more prescriptive to more principle based. This means it devolves to each practitioner, as it always has, to what is the ethical thing to do. In this case, you must not act when there is a conflict of interest. It's pretty general but the case law, the common law, is very clear that there is imputed knowledge that flows within a legal practice, regardless of the size of the practice.

My home town is Albury Wodonga. We have a volunteer roster and we email the list through of the clients. First of all, we have to book everyone in. We don't have any drop in and we email the list of the clients through to the volunteer lawyers. They run it through their conflict system and then they say, "Look, I can't see X, Y and Z because I'm already involved." My system flags those conflicts. Then we make sure they go off and see someone. That's typically not an issue. They know who's coming. Lawyers work with that constraint but the problem arises when you have a larger law firm that has a very well developed database.

Matters have been going in a lot of country legal practices over a hundred years, so they have got lots of documents in safe storage. They have got a lot of names on their database and if they were thorough and conservative with their conflict mechanisms, they would say no to a lot of matters, so it really depends on the appetite for a very nuanced approach to the conflict rule. What I am observing, because it's through my PhD, is that there is a more robust attitude with the older practitioners than the younger practitioners, so for me it's an issue because when we introduce early career lawyers to an unsupported environment, they can be thinking they have learnt one thing at university and then they will be doing something else in practice and the reason why we need to shine a light on this particular issue is that it's a matter of being robust ethically without being compromised ethically.

In some of the North American jurisdictions they are making that a specific exception to allow for the unbundling, so when we raised it at the Law Council, the Law Council had a commentary paper on it and one of the things was - I think it's called a foreman's matter in Queensland - where they had a plan for \$20 between limits for legal advice and the discussion was, well, you're only paying for \$20 for 20 minutes. You can't expect a full scale legal service but the issue in that thing was whether the lawyer had under-served, whether the lawyer should have followed it up with a letter of advice and followed up about the expiring limitation period as well, but the court in that case found in the lawyer's favour because it is 20 minutes, \$20. You know, that's okay.

I guess what I am getting to there with the unbundling is if we can say this is a discrete legal service, we are clear with the client about the constraints and the limitations to that which can more mean that, "You are here now for a short time. Our fiduciary obligation to you, the relationship to trust and loyalty, is limited," but whether they will accept that in Victoria is another matter. It's a whole - - -

DR MUNDY: But it has been accepted in other jurisdictions.

MS McGOWAN: In other jurisdictions. Victoria differs a little bit on that.

DR MUNDY: This is probably a provocative question to end but I will ask it anyway. Some would suggest, as we have seen over a long period of time about profession reform, that sometimes competition and market sharing issues are dressed up as ethical concerns. Would your view be that this is a bona fide ethical issue, rather than simply trying to preserve work for lawyers?

MS McGOWAN: I am aware of the full spectrum of views and I can't say one without the other. I think they all are present there. On the one hand we have the large law firm group and then we have the stand-alone legal service struggling to give advice and it is the same issue but through a different lens.

DR MUNDY: Thank you very much for your time, Helen.

MS McGOWAN: Thank you for providing the opportunity and for the results that are going to come from the inquiry.

DR MUNDY: We can't guarantee results.

MS McGOWAN: At least you are in there talking.

DR MUNDY: Yes, we do a lot of that.

MS McGOWAN: Thank you.

DR MUNDY: Could we now have the Law Institute of Victoria, please?

MR BOWYER (LIV): You don't mind if I disrobe here.

DR MUNDY: I'm not quite sure why I even wear a tie myself but I do for these things. I'm not quite sure whether it is morning or afternoon, so welcome. Could you please state your name and the capacity in which you appear and make a brief opening statement, because there is a number of matters. If you could keep it to less than 10 minutes, we would be grateful because we have got a lot of matters we need to put to you.

MR BOWYER (LIV): Geoff Bowyer. I'm currently president of the Law Institute of Victoria. Obviously the Law Institute of Victoria is the professional association for just shy of 18,000 solicitors and students in this state and has had a long history of involvement in terms of law reform and in basically access to justice issues. I would hope that you have a copy of our submission which we provided to you. I know that you have got a range of issues that you want to talk about, so I thought we might just cover a number of issues broadly and then let you move wherever you want.

Firstly, if I could take you to page 55 which is reforming the legal assistance landscape, the first issue we want to say there is that clearly we see this as a shared responsibility between the federal government and the state government in terms of providing funding for the needy and people who are in most need of access to justice or who are restricted in their means to do that.

We just highlight the view that in our view the Commonwealth contribution to legal assistance has shrunk over the last two decades from 55 cents of cost to barely 35 cents of cost. This has had a significant impact in terms of the delivery of services to needy people within our state. You will note in the report that we put to you that we recorded that the \$9.3 million deficit in the last year by Victorian Legal Aid has significantly been caused by that lagging gap between the Commonwealth contribution and the state contribution. Overlaying that is our view that given the paucity of funds available, this has meant that in our view and in our submission this has resulted in a vastly inadequate payment being made to private practitioners doing legal aid matters which has flow-on effect.

I am the principal of a firm which used to do Legal Aid matters but it's an area we no longer do because we just cannot even from a break-even point of view make it a sustainable model. Victorian private practitioners play a vital role in the delivery of that service. What we want to see and we believe is the best form is to have private practitioners heavily engaged in that space, not only because it is good for our members but also in terms of accessibility of our members right across the state;

whereas Victorian Legal Aid offices are by necessity only in certain parts of the state and their reach is thus significantly limited.

They are some of the comments we make in regard to that. We say that the community legal centres form a very vital part of this arena and they play a different role to Victorian Legal Aid. They provide broader public benefits to society. As an example, the Loddon Campaspe Community Legal Centre is well known throughout the state and probably federally for some of the reform it has done in elder law and a raft of services which it provides to people in hospital who wouldn't in any form or fashion qualify for legal aid, and yet they have the ability to harness private practitioners to basically attend. Particularly a growing elderly population is just an example of the sort of work which community legal centres do, whilst at the same time doing a lot of policy development in that area. That particular community legal centre just is one example. It was the instigator of significant amendments to capacity issues in regards to the administration of basically powers of attorney.

I would probably take you to page 13, the unbundling of legal services. Certainly our view in regards to that is that the Law Institute supports the unbundling of legal services and should allow for limited scope representation. We say that in Victoria under the Legal Profession Act 2004 and conduct and practice rules, they do not explicitly prevent a lawyer from doing that but there would be some need to amend court rules allowing the flexibility of a law firm to indicate that they are only acting in a limited scope.

One of the challenges to that - because we are not talking about obstacles - will be that in terms of professional indemnity insurance, there will certainly have to be a significant level of dialogue with our professional indemnity insurer where firms are in and out or in a limited scope retainer issue, but we see that that area is going to be of increasing importance. We think that lay advocacy is an area that should be encouraged and is actually very active in a number of jurisdictions already.

In our VCAT jurisdiction, whether it is town planning or whether it is residential tenancy or retail tenancy disputes, there is a plethora of lay advocates involved; but we say from our perspective that at a court level there are two issues which are that there is an impairment to access to justice where the now represented party is unable to engage a lay advocate of similar training and experience - we support the idea of a lay advocate, provided they have got similar training and experience - and, secondly, one of the challenges I think we will have to look at as a nation is that lawyers are part of a professional association which is bound by ethical obligations which hitherto at this point in time do not present themselves to lay advocates. That is why our recommendations suggest that if a lay advocate was an employee of a law practice, then he would then be subject to those regulations. If that position is not adopted, there has to be at least a similar level of regulation of lay

advocates to make sure that the ethical rules and standards apply to ensure fair access to justice.

Just moving on if I can to page 23 which talks about the recommendations relating to tribunals and draft recommendation 10.1, our views are mixed about this. We support the use of lay advocacy but we strongly reject any restriction on the use of legal representation in courts. As an example, we point to the Fair Work Commission where for some time now basically leave has had to be obtained before a legal practitioner is allowed to present.

Whilst we see that as part of the status quo, we sometimes consider that when legal practitioners are involved, matters are dealt with more efficiently because they are more aware of how such matters are to be done and it would seem to be that often in many cases it is accepted practice, for example, in union positions, an employee advocate doesn't have to put his hand up to represent - and yet effectively he is in the role of a paid advocate. Our view in regards to all of that is that we believe that legal representation does not necessarily formalise hearings but can have the positive effect of focusing a tribunal on the legal issues of dispute and denying a party legal representation can paradoxically have adverse consequences in regards to access to justice.

I am conscious of the time. I would like to take you, if I can, to page 52 which is in regards to bridging the gap. In regards to that, we say two things just briefly: the whole idea of information requests, 19.1, of legal insurance is something which the Law Institute of Victoria has been more recently investigating in depth, along with the Law Council of Australia, and our paper goes to say that whereas the earlier model was probably not as well cooked as it could have been, the European experience, particularly in jurisdictions such as Germany and Denmark and the United Kingdom, the advent of legal insurance in today's world, where most people understand that litigation sadly or court appearance is something which is just as likely to happen as tripping over in a person's driveway, is something where that can certainly add to the availability to access to justice, particularly as legal aid space seems to be diminishing.

I would also just like to take you, if I could, to page 27, tribunal consolidation, which is a matter which is really important to the Law Institute of Victoria and particularly which is germane to myself and information request 10.4, which talks about consolidations of tribunals as not feasible. I come from a regional environment, Bendigo, Victoria, one would call the heart of Victoria, but sincerely, we have our courthouse there. It's certainly dilapidated but we have VCAT appearing out of it, we have County Court appearing out of it and we have a number of tribunals appearing out of it. I just want to - whilst we certainly think that certainly there is greater scope for that and it was put to myself by the current person

in the County Court that roughly 25 per cent of his clients drive past Dandenong every day and not so many necessarily go back to Dandenong after they have presented in front of him but sincerely speaking, there is obviously a need in vastly growing city suburban areas for multipurpose court space.

I'm happy to leave a copy with you of a report which was released in February 2014, headline "Out of Sight out of Justice," which is a report by the Wyndham Legal Services Incorporated about having a facility purpose built in Wyndham which would include not only Magistrates Court and VCAT but would also include a community justice centre, a Victorian legal aid office, a police station and a plethora of resources such as for family violence, would have counselling facilities available, would have for residential tenancy matters in which people are evicted housing accommodation services right in the courtroom, which would mean instead of just the traditional court being a place where you go to either receive a sentence or a fine, there will be immediate availability of services which can solve basically people's needs rather than just being a distant step in that process.

Just for your purposes, Wyndham original courthouse emerged from being a former schoolhouse, had 40,000, now has 200,000 people and by 2030 will have 1.7 million people and the Law Institute of Victoria is very much about effective justice rather than sometimes the justice which exists at the moment, so I will leave that there for you. They are some opening remarks.

DR MUNDY: Thanks very much for that. We are particularly grateful for what was a very thoughtful and balanced submission to this inquiry. There are a number of issues you raise which we want to go to but you raise the role of community legal centres particularly in policy reform and law reform advocacy. We understand that the intention now of Commonwealth funding of CLCs is to move to a more service oriented model and out of that advocacy role. Can you see any adverse consequences from that decision if CLCs are no longer funded to provide such services?

MR BOWYER (LIV): Certainly we can because I think the evidence demonstrates that community legal centres have come up - and it's great to have yourself present here today, Helen - have come up with policy positions based on an evident and ever present need in front of them and sometimes the policy deliberations of people in Melbourne, for example, or Sydney or Canberra are very remote and to a certain extent academic. They don't have to face the plight of actual issues about elderly people in front of them which you and I would say, well, gosh, we need to change the law but the process of changing the law, when it gets referred through body after body after body, gets in itself very muted. I can understand without appreciating certain governments want to have a situation where they want to restrict community legal centres from advocating positions which may or may not suit the flavour of a

government of today but I put to you that the very robustness of our legal system and democracy is best based where we have organisations who advocate for what they see as a need in the field and I think community legal centres are far better placed for doing that than any other organisation.

DR MUNDY: One suggestion that's been made to us has been that those activities could be picked up by organisations such as yourselves or the bar councils. Is that a likely outcome in your mind?

MR BOWYER (LIV): It is an outcome but I think it's a sterile outcome because the reality will be this. Let's say, for example - and I will just use Helen as an example. If Helen as a member of our Law Institute of Victoria saw an issue, she would have to hopefully - well, not hopefully, would have to make a representation to our relevant committee. It would then be the subject of deliberation by the committee in Melbourne and Melbourne would then form a view that if there were recommendations, it would make a recommendation to the Victorian Law Reform Commission and then slowly but surely, it would make its way up the tree, whereas the reality is that organisations like Helen or the Loddon Campaspe Community Legal centre are in a position where they have quality lawyers who not only have become proficient at dispensing justice but equally have the great opportunity and motivation to be able to develop law reform in the field and I think that's something which is a more effective justice provision than simply going through a sure but steady but unfortunately slow process of going through centric member organisations.

DR MUNDY: Angela.

MS MacRAE: Would you just have an example? You mentioned in particular the elder care area and some of the reforms that CLCs in that particular field seem to be involved in. Could you just give us an example or two of reforms that might have - - -

MR BOWYER (LIV): So in regards to the capacity at the Loddon Campaspe Community Legal Centre, through the result of having an elder law program where they have a funded lawyer, an aged lawyer, involved in the program, he was increasingly being called to hospitals in regard to the question of capacity and there were certain elements of how capacity was determined which were hitherto not best thought out. They were certain criteria not best thought out, so the Loddon Campaspe legal centre wrote a report about some of the shortcomings of the existing operation of powers of attorney and the instruments and set about suggesting legislative change in terms of some of the protocol required to make decisions about whether a person has capacity or not capacity, because the reality is at the moment that lawyers play a key role in determining capacity.

They may not have the medical knowledge but they certainly have the experience to determine whether a person has capacity and that resulted in Victorian legislation I think two years ago in 2011, where the Victorian Government adopted recommendations which were founded on the Loddon Campaspe Community Legal Centre policy.

MS MacRAE: Thank you.

DR MUNDY: If I could bring you back to the question of lay advocacy and unbundled services and I must say that your organisation's view of this is somewhat different to those of your colleagues in other jurisdictions but can I just bring you to perhaps the example of town planning. I do have some familiarity with planning matters in VCAT in a former life. Can you just outline for us what you think the benefits of actually lay advocates there are and I guess just reflecting on what you said, you wouldn't expect them to be employed by law firms per se, would you, because they are not at the moment and the fact that they are not doesn't seem to be a problem.

MR BOWYER (LIV): So I mean, certainly in VCAT there, I am most experienced with the lay advocates of planning. Again, because they spend all of their life in the practical field - I mean to say it's not just about being an advocate per se but most of the lay advocates I have known in the planning jurisdiction are actually involved in dialogue with councils, dialogue with state governments about developing - I was going to say pushing the boundaries but developing the boundaries in terms of planning protocols, so they live and breathe that experience and as a result of that, are just as knowledgeable about the legislation; you can argue about the interpretation but certainly just as knowledgeable about the legislation as any legal practitioner, whether he be a solicitor or junior counsel.

Certainly I believe that senior counsel - I don't mean senior counsel in terms of silk but experienced counsel - would have that level of knowledge, but because they are probably more accessible to a client -or in my case where we act for about 16 municipalities within the state including Melbourne, quite often you'll find that council officers will, for example, be trained up to do a range of appearances at VCAT where they either represent the council's interest or in certain instances taking a different view, but increasingly we see a role for that because I don't think there's any substitute for the fact that whether the law is a profession or an industry and there's always debate about that but we say a profession because of ethics, it's about service delivery and accessibility and often it's perceived by many developers and planners because they're in their space daily are better able to produce that service.

DR MUNDY: I understand the issue of council officers attending on behalf of

council. I used to be a senior executive at Melbourne Airport. We had certain planning powers years ago and I used to send my officers and occasionally go myself. But in the case of let's say a small property developer who has got a planning dispute with his local council and he has got a planner that has helped him work up the proposals and stuff and the planner is, let's assume for the sake of the argument, a suitably qualified and professionally recognised individual. Would you see any difficulty with that person then acting for that small property developer in VCAT up against the City of Maribyrnong?

MR BOWYER (LIV): My view about that would be, yes, I would see some difficulties, obviously from a potential conflict position. Note when I say "conflict", he has put forward proposals. Obviously he has to advocate those proposals where as a lawyer whilst he is always going to be in a sense a hired gun, an advocate, he'll generally base his position on his experience over a range of - you know, been acting on one side of the fence as opposed to acting on the other side of the fence.

DR MUNDY: Yes.

MR BOWYER (LIV): So sometimes from my experience, lay advocates tend to be a little bit diminished because they're generally always pro one position as opposed to changing positions. That's an issue for the client to determine. Often it relates to costs as well in a sense because, and we often find this, lay advocates where they're also engaged in the whole planning process are prepared to discount their appearance on the basis, well, it's part of a much bigger fee.

DR MUNDY: And in a funny way what, from a legal services perspective, you might think some unbundled service from a town planning perspective is actually - - -

MR BOWYER (LIV): Very much a bundled service, yes.

DR MUNDY: Okay.

MS MacRAE: You talked in your submission and your opening comments about some work you were doing on a legal expenses insurance policy. We just wonder if there's a level of detail that you might be able to share with us, not here but after the hearing, only because we've received very limited submissions on this, so our feeling was, and you might be able to comment on this today, that we couldn't find any barriers as such to that sort of scheme being run in Australia, so there's no sort of policy barriers but there seems nevertheless to be real difficulty in establishing such a scheme.

We did hear from the individual in Perth who had previously tried to establish

a scheme in Australia and had failed, although he runs a very successful scheme in South Africa, so I'd just be interested in your views about whether or not there were policy concerns and anything you've come across in the work you've done so far and I guess to the extent you have progressed the work, whether you think there is a realistic possibility of a scheme being developed that may be successful in the Australian context.

MR BOWYER (LIV): Certainly. In terms of the latter question, we are obviously a constitutional body of the Law Council of Australia. This idea or this concept was raised at one of our meetings of the various bodies of the Law Council of Australia, solicitor bodies, raised by South Australia interestingly enough, but we as a Victoria state body have looked at the idea and our legal policy and procedure division has been working on the idea and has started to sound out several insurance companies about it. We see it as an approach where it can't be a stand-alone policy. I don't think it will have any legs whatsoever.

The Australian mindset is, generally speaking, "I'll insure the house and I'll insure the contents" or as this poor unfortunate didn't do, I didn't insure my camera and my zoom lens which I lost about a month ago, but "I will put add-ons to policies if I see that there is some prospect of a need of the policy," so public liability is clearly one of those add-ons which increasingly goes on and we are in the early stages of discussion with a couple of major insurers about the prospects of it being an add-on to the policy. So it will go on to the normal home insurance policy and we'll have a legal insurance box side, a bit like public liability, a \$20 million public liability policy, which will have a small cost associated with it but to use your expression, it will be bundled into a larger policy. Provided we advocate it and provide the insurer advocates it, it will work.

It's just interesting today and it's related but not related, but pretty much directly diagonally opposite our Law Institute of Victoria is the RACV building and they make significantly more money out of their insurer association than they do out of roadside assistance and those other products. So they've bundled part of their service offering into insurance opportunities which have paid immeasurable benefits to them. So in regards to your earlier question about the policy, we certainly have developed policy on it and if I get the email details later, I will provide that dialogue back to you.

MS MacRAE: Thank you.

DR MUNDY: So really it's, and I should probably declare at this point, I'm a member of the RACV.

MR BOWYER (LIV): As I am.

DR MUNDY: Yes, I think most people, sensible people, are. So it's really an issue about, from an economist's perspective, some peculiar characteristics about demand.

MR BOWYER (LIV): Yes.

DR MUNDY: It's something about the consumers of these things. It's a bit like how many of us will take \$20 million of public liability insurance if it wasn't tacked on to the home and contents policy.

MR BOWYER (LIV): Absolutely. It has certainly been the experience in Germany. Our chief executive officer Mike Brett Young was over there last year with other CEOs from other law societies. There the legal insurance model has been successful because it goes beyond the normal insurance of - you know, litigation insurance. It even extends to divorce, for example. You might say, why should there be funding of a divorce? From an access to justice point of view, for a lot of people who have got limited reading ability or a limited knowledge base or cultural base, having ability to have a divorce policy may in fact be of significant assistance in terms of moving their life on in terms of many ways.

We formed a view about legal aid generally I suppose that front and foremost in people's minds are the obvious things which happen to them. Everyone is going to get sick. Everyone is going to need education, but we don't think we're going to need legal assistance in our lifetime. We don't think we're guilty of any crime or any misdemeanour. We don't think that it's likely someone is going to run into us or cause us harm or injury, but the statistics say otherwise. So we think provided it's bundled with events which are front and foremost in people's minds, it's more likely to be brought to their attention.

DR MUNDY: Have you given thought to how this insurance arrangement might work for those people who don't have home and contents insurance and these are people who are probably more disadvantaged but increasingly people choose not to be homeowners? Have you given any thought to see how those people may be covered?

MR BOWYER (LIV): In that regard certainly, I'd hate to think that home ownership is out of the reach of a significant minority of Australians but the reality is it probably is. Most people these days are considering having at least a level of contents policy or a life insurance, some level of personal accident or life insurance policies. Increasingly the people who often are, a hitherto unrecognised group of people, falling into this access to justice issue are people who are actually employed. They may be earning 50 or 60 or 70 thousand dollars but are never ever going to qualify for legal aid or assistance in any form or fashion. At least most of those

people will probably have a need for some level of insurance but to the extent that you've got people who are unemployed or people who are imprisoned or the like, clearly that's going to be a gap - you know, this sort of policy won't cover, but we think it's one of the tools which may improve access to justice.

DR MUNDY: You mentioned previously the issue about remuneration for private lawyers doing legal aid work and you provided some quite useful data on that front. I guess there's two things to start with. Is this a problem primarily for criminal matters, or is it to the extent that legal aid provided for civil matters in issue there as well, and then secondly, you know, how should this be fixed. To the extent that scales still exist, should it be 80 per cent of the scale or how could one systematise this so then presumably it would become a basis - so it then could become a basis for funding?

MR BOWYER (LIV): Well, in an ideal world, and I'll talk about scales in a moment, but in an ideal world it would be pegged to a recognised form of remuneration which is what scales are meant to be and in the earlier stage of legal aid - and I'm showing my age here, but when I first entered practice in 1979, the first four or five years of my life I was most certainly involved in legal aid matters and there was not a large gap between what the costs which were awarded by a court for an appearance was as opposed to what was awarded for legal aid.

Equally, the preparation costs of a brief or appearance fee were broadly in line with the scales which were awarded for private practitioners. Increasingly over time - and I'm not here to say anything which is unrealistic - as Victorian Legal Aid or legal aid bodies have felt the strictures of funding they have increasingly had to tighten those proposals. But talking about the scale of costs generally, one of the things which we have noticed is increasingly clients, whether they're sophisticated clients like corporate organisations or normal clients like mum and dad clients, are even concerned about scale costs because at one sense when they go and see a lawyer, if I said to you, "Yes. Well, I'll act for you in a part 4 application of the Administration Private Act and I'll charge you scale costs," what does it mean?

What does it mean? Does it give any sense of security to a client that he has an understanding of what those costs are? Equally, they don't want to be subject to a taxi meter which is what time billing offers most clients. They want to have a level of certainty. So at the Law Institute of Victoria we're looking at an alternative billing project where we start to educate lawyers, and cost complaints represent 40 per cent of all complaints against lawyers so it's a significant issue, about alternative means of billing.

The best example I can give you in that regard is we say to solicitors, "Look at a housing contract." A housing contract is made of staged charges. So you pay so

much for preparation, so much for foundation, so much for frame, so much for lock-up, practical completion and the like. Why can't we start to project manage, in a sense, how costs are. Now, you might argue, well, why don't we do that. One of the issues is that lawyers, and I think the universities have a role to play in this, have not in any way been involved in a conversation about the fact that lawyers actually do cost.

Naturally most of us want to have our graduates of good black letter law skills, but increasingly we're wanting to look at lawyers who have a greater level of understanding about real life practice. So in that regard we're looking at establishing a pilot scheme where there will be clinical, practical clinical education of undergraduate students aligned for a law firm from the very first day they enter into university, similar to a medical program or physiotherapy program, and we're currently in the stages of establishing a pilot with a well-known Victorian university to start that process.

So that the whole costing explanation or understanding will become understood to an undergraduate from the earliest days when a client comes in and says, "Yes, I've got to go court. I've been charged with such and such a matter. It's a pre-committal mention," and they will be present when that conversation is had, so as they work their way through law school and black letter law they will also at the same time have an understanding about the practice, the real-life practice of law and the need to treat your clients as consumers as opposed to separate clients.

DR MUNDY: The Chief Justice of Western Australia on Friday suggested to us that it's possible to build a 35-storey building on a fixed fee, so it should possibly be able to run some forms of litigation on a fixed fee as well. The other issue that his Honour raised with us when he very generously gave us some of his time was around the issue of information to consumers. We've made some proposals which I think have been slightly misunderstood, but what we have in mind is some notion of a web site that supports data which provides a range of costs that consumers could expect to encounter for quite typical matters. We're not talking about, you know, Fred Marr charges this and Harry Bloggs charges that, but just a range of quite common matters.

His Honour was of the view that this would not only facilitate access to justice and remove uncertainty, but would also, you know, I guess to some extent will give consumers at least some idea of whether they go to deal with a matter they're looking down the barrel of a couple of hundred dollars or tens of thousands of dollars. Is that something that your organisation is comfortable with, or would be comfortable subject to certain caveats?

MR BOWYER (LIV): I think our response at page 7 said that we considered a

centralised online resource on typical legal fees would be difficult to develop due to differing types of legal matters. So that's a challenge. Our view is not that it's not a good idea, it's a challenge trying to - if I could use the word, horses for courses approach to it all. But certainly, I mean, the more we can educate clients about indicative fees is the issue. What we want to get away from as a Law Institute position is a range of fees. Right. "Because we can do this between \$5000 and \$25,000, depending on a range of variables," and clearly clients generally from my experience always say, "\$5000 is what it's going to cost me," and then as those variables roll along, that's when the cost conversation becomes difficult.

So we would certainly support a centralised system but we think incumbent upon the lawyers has to be a much clearer and transparent conversation about how we charge and how it's likely this case may unfold, the various traverses along the way of litigation and how they do have a variation like a building case where if we hit hard rock instead of that soil report that said it was beautiful loamy soil, then, you know, if we have to bring in experts or join third party proceedings, et cetera, we can give indicative costs of what a third party proceeding might cost.

DR MUNDY: We make a number of propositions about disclosure and, I guess, moving off time based billing which a lot of people think is not a tremendous idea, so that discussion about alternative billing strategies and structures is something which the Law Institute of Victoria is already pursuing and tried to put in place educational frameworks and stuff to take the profession on the journey.

MR BOWYER (LIV): Yes, and we're looking at it from a point of view - obviously we're trying to get funding because we've got limited resources like everyone else. So we are in the process of trying to get funding and we've made applications to the Legal Services Board and we're about to consider other alternative sources, but our view is that as a member body of the Law Council of Australia, if we can get a pilot up - and it's got to be a measured scheme, so it's not just about information dissemination. We want to be able to do a project over say 50 law firms and go through that project and see from the Legal Services Board statistics a drop in the number of complaints about the types of fees charged so that there's empirical evidence that such a project would get results.

But we do believe that it's a bit like mental health. Mental health doesn't come about in our profession once they walk through the law firm, it comes back much earlier than that when they go through the whole journey of university and we're saying that if lawyers can understand that the service of law is just like another provision of a consumer service and that price is a necessary discussion early on in the discussion as opposed to, "Yes, I better bill," then it's more likely to have a positive result.

MS MacRAE: Would you like to comment generally on how the complaints mechanism works in Victoria? Do you think it's a good one, and are the checks and balances adequate?

MR BOWYER (LIV): The complaints mechanism in Victoria as it currently exists at the moment is a twofold process. The Legal Services Commissioner is the major forum for complaints, and speaking to the Legal Services Commissioner as recently as last Wednesday, there's been a significant drop in a number of complaints in Victoria. That's not a reflection necessarily of the fact that lawyers are doing a better job, although I'd like to think that was the case, but it's more about the Legal Services Commissioner engaging a number of employees, some former Law Institute of Victoria, who can broker a mediation approach to how the fees are structured and certainly from that mechanism there seems to be positive results, the Legal Services Commissioner.

Consumers also have got the ability to go to Victorian Civil Administrative Tribunal and 40 per cent of legal complaints actually go to VCAT because I think interestingly enough more and more of our clients see law as another consumer activity, which I'm trying to get - whilst we've got ethical obligation, I'm trying to see our body of lawyers to understand that we are providing just, in a sense, a consumer service. VCAT also has had through its mediation processes significant inroads in that. But really that's the delivery of the medicine. We want to try and get at the forefront and try and address the root causes which are, we think, better conversations and understanding between the consumer and the lawyer about how costs work in terms of any litigation or any activity.

MS MacRAE: So do the rules around disclosure of costs then, are they not working?

MR BOWYER (LIV): They certainly are working in the sense that if you don't give proper disclosure in Victoria you can suffer significant penalties, including professional misconduct. So that in Victoria we have a threshold where a cost disclosure statement has to be given which is - correct me - but I think it's in the order of \$700, and if any service under \$700 you don't. We recommended to our members, so for example preparation of simple wills, we believe every activity we do should have a cost disclosure statement. Right.

Because that way, at least, you're on the front foot, but if a lawyer doesn't have a cost disclosure statement and if that lawyer was using a time cost basis then he is going to automatically as a result of not having a cost disclosure statement find himself in a position where he's on a court scale level of costing which may in turn result in a lesser charge or a lesser assessment than what he's charged and leave him open to a misconduct claim.

DR MUNDY: These cost disclosure statements, it's been suggested in some jurisdictions that this is a bit of a con at the end of the day and they're described as the old product disclosure form for financial services or a mobile phone contract. Are they, in your mind, documents which are relatively simple for the average user to understand, or do you need at least two degrees, and preferably one of them in law?

MR BOWYER (LIV): Well, I think, you know, they're somewhere in between is true. Generally cost disclosure statements are one size fits all. So if it's a sophisticated client or an unsophisticated client, really from my experience as a practitioner I don't see a lot of degree of difference in them. So from my experience, and I think from the Law Institute of Victoria's experience, where we're trying to get lawyers to is saying, "That is the starting point of a conversation. That's a not negotiable. You've got to have that engagement letter and a cost disclosure statement." But, as they say, there's much more if you're going to have a client who's reasonably comfortable about where costs go.

DR MUNDY: Let's say, you know, I'm a business that employs 50 people in Bendigo, I've just built myself a new factory, I've got significant issues. The factory cost me 10 million bucks to build, I've got some significant issues with the builder. I come in, see you. Your cost disclosure statement is two pages or 50?

MR BOWYER (LIV): Firstly, I never give a cost disclosure statement as soon as they walk in the door.

DR MUNDY: Yes. But at some point.

MR BOWYER (LIV): Yes, at some point.

DR MUNDY: How big is it?

MR BOWYER (LIV): Yes. Well, our base cost disclosure statement is five pages, and you're right, but there are parts of that which talk about obligations to do this. There's parts about the rights of a client for the various complaint mechanisms he can go through. Then there's information about how - the range of fees and the basis of how those fees are charged. So, for example, if I've got a senior lawyer we'll either use - if we're going to use an hourly rate we'll put his hourly rates, if it's a PA, we'll put her hourly rates, or if we are going to go by scale we will refer them to the Supreme Court scale.

But in a sense, if that's all you do, then from a consumer point of view that's probably not enough because you're probably going to have a sort of quasi cost

lawyer's degree in understanding how that scale works, aren't you? So that's why we talk about from our perspective, and again it's our firm's perspective, about typical cases. So if it's a County Court case which is less than \$1 million we talk about the various stages so that, "If after this meeting, if you're inclined to engage us, there will be a cost for us to basically take instructions," and I always say to them, "Junk in. Junk out. If you can prepare proofs yourself and give it to us, if you can give us information in a digital medial form properly indexed, well, that's work we don't have to do," et cetera.

We give them a fee for what the initial instructions and advice will be. Then we say, "For your insurance purposes we recommend a counsel view on this. We think we have a reasonably sanguine view of where the law is, but we'll go to a barrister for an opinion on the merits of the claim which will be" - because he has a cost disclosure statement - "such and such," and then we take them through the various elements of preparing.

DR MUNDY: So you give them some sense of how much - - -

MR BOWYER (LIV): Yes.

DR MUNDY: - - - of these different bits you're going to consume.

MR BOWYER (LIV): Yes. Then we say, you know, "The only certainty of the proceedings is the uncertainty of the result. So that's why we suggest you enter into, you know, a process where you may be offered a sum which is less than you think you're entitled to, but there are significant costs," and we talk about the daily costs of engaging counsel and solicitors to attend, court fees and the like.

MS MacRAE: A lot of that level of detail is your own good practice and not a requirement of lawyers.

MR BOWYER (LIV): That's exactly right, but it's hard to get one size fits all, but I suppose the only thing is, and again, I think from our institute's position is the cost of a lawyer of a complaint to that firm is immense in terms of the time to basically reconstruct the file, hopefully he's got file notes, hopefully he's got, you know, good details of all conversations, et cetera. It's all energy going backwards. You've got a disenchanted client who will talk about his ongoing saga with the solicitor, it's not likely to get you any more work.

DR MUNDY: We are running out of time, but there was just one final issue I think we probably would like to bring you to and that's the issue of court fees which has attracted us some notoriety. The realities as we seem to think - see it are these, you know, Magistrates Court here in Victoria recovers about 50 per cent of its costs, the

Supreme Court gets about 20 per cent. So I guess putting that aside and again I think we may have perhaps not helped ourselves in our initial drafting, but I presume it is not the position of the Law Institute of Victoria the court should be free, so it therefore begs the question of who should pay for what.

Do you have any views about how we should think through that? I mean, our motivation in doing this was twofold, one was to present appropriate incentives to parties to behave in an efficient way, and the second was perhaps a slightly more vain hope which was perhaps we might be able to raise a few more bucks for the courts who seem a bit short of dough.

MR BOWYER (LIV): Well, certainly in regard to the last comment, speaking to the various heads of jurisdiction, their view is that they like to see any court fees charged going back into the system, so that not only does it pay the costs of operating a court but it may well - some part of that may be provided to assist people who are unrepresented and the like.

DR MUNDY: Yes. Improved technology for the benefit of everyone and all that stuff.

MR BOWYER (LIV): Yes. You've got the competing case of governments, and I can only talk about Commonwealth governments who, particularly at Federal Court level, and Law Council of Australia certainly have taken very strong views in this, have raised fees towards increasing cost recovery so that the cost of a government person is less. Our views are that really when we talk to clients, again from a third point of view, we talk about Medicare and private insurance, all right, that if you go to a GP and you've got private insurance you'll get maybe 60 per cent of the fee back and you'll be 40 per cent out of pocket.

But that's not going to help the underprivileged, absolutely unprivileged part of the community and we certainly strongly support - and in our submission we've made that case, there should be significant fee relief for people who are in need. The question always is, the \$64 question, who is in need, and that goes back to the eligibility criteria and we have listed on page 47 eligibility for fee waiver where we say legal aid for health care, pensioner concession card, seniors card, Department of Veteran Affairs, et cetera. I mean, I think every child under 18 years of age in receipt of Youth Allowance or Austudy or under Abstudy, we think those sorts of things are not negotiables. What we're absolutely opposed to is a HECS type system where effectively that gets added to your taxation bill.

DR MUNDY: I don't think we're particularly - the issues we're having are not with the needy.

MR BOWYER (LIV): Yes.

DR MUNDY: I guess the question, you know, the Bell case in the Supreme Court of Western Australia cost that court \$15 million and they didn't get a fifteenth of it back, and that was a dispute between a pile of banks and a couple of insurers. Now, it doesn't seem to me that there was over \$14 million of public benefit attached to that litigation which couldn't have been recovered from well resourced parties. So I guess what we're trying to think through - and I'm not meaning the poor and the dispossessed where the issues really lie, it's the half a million dollar dispute in the County Court between two companies.

How much of that - you know, and let's say it takes up five days of the court's time and, you know, judges come at three grand a day or whatever they do and the court, how much of that dispute should the tax payer be subsidising, or at least what should the principles in that be?

MR BOWYER (LIV): Well, there's very much competing principles and clearly I mean from a state or government perspective, their view is, whether it's Victoria, Western Australia or Commonwealth, we want a place where it's good to do business and if the costs of running litigation are far too high from a court perspective, then clearly having a jurisdiction in Malaysia or Hong Kong or the like are going to be significantly seen as beneficial. I think it's very dangerous from a perspective of saying, well, business should necessarily pay for it, because you're right on one hand they may have more capacity, but equally they have far more greater capacity as to where they source their business for the future.

I think that's a cost for the government of the day to accept that. The whole plethora of administration adjustments will touch various elements, but I think there's significant risk in loading a business model because - a case in point is, for example, mediation or arbitration. In Victoria we're trying to develop an arbitration model, an arbitration hub. We've recently had - basically launched a facility, Melbourne mediation and arbitration centre. We're trying to argue Victoria is a good place to have arbitrations because we can do it effectively, relatively efficiently, and the whole culture of an Australian based jurisdiction is something which should attract businesses.

But there's lots of competing countries who are light years ahead of us in that space, Singapore, Malaysia, to name two, who have really captured a large segment of a market and it's not only do they capture the litigation market, but they also then capture the hearts and minds of those corporations who are saying, "This is a good place to do business. Why are we not there," which in turn results in additional employment and the like. So I understand the noble aspirations of what you're trying to do, but I think it's got to be seen in the broader context of doing business in

Australia.

DR MUNDY: All right. Okay, thank you, Mr Bowyer for your time today.

MR BOWYER (LIV): Thank you.

DR MUNDY: We'll adjourn these proceedings until 1.35 so Commissioner MacRae and I can have some lunch. Thank you.

(Luncheon adjournment)

DR MUNDY: All right. We'll resume these proceedings. Could you please state your name and the capacity in which you appear, and then perhaps give us a brief five, but no more than 10-minute opening statement.

PROF NOONE: Thanks very much, Commissioners. My name is Mary Anne Noone, and I'm a professor at the law school of Latrobe University.

MR NOBLE: My name is Peter Noble. I'm the executive officer of the Bendigo based Advocacy and Rights Centre that operates the Loddon Campaspe and the Goulburn Valley Community Legal Centres.

DR MUNDY: Okay. We're in your hands.

PROF NOONE: Thanks very much for giving us the opportunity to speak to you today, Commissioners. My career, I guess, has been focused on access to justice and I've been involved in various parts of the legal assistance sector for a long time. I've certainly been involved in community legal centres for well over 30 years. I was on the board of Victoria Legal Aid for some 12 years and of interest also to you may be that I teach a subject called dispute resolution in the law school and the professional ethics subject. My research and teaching has been involved in access to justice and my passion, I guess, is how to improve access to justice, particularly for the poor and disadvantaged and different aspects of my research have addressed that at different stages.

I am also engaged in encouraging law students, usually through clinical legal education, and so I endorse my colleague Adrian Evans' submission in relation to that, but through clinical legal education, to be lawyers who actively engage in improved access to justice. Clearly the commission's terms of reference are wide and varied and these are issues that over decades have engaged numerous inquiries. The one first that I was probably involved in was way back in 1992 where the senate looked at the high cost of justice, and when I looked at your report, many of, you know, the chapter headings were not dissimilar from those in that inquiry. Of course, the more recent one is the Australian Law Reform Commission's managing justice.

These are perennial issues and as you've come to grasp, access to justice is a complex and a difficult concept to implement. I've addressed several issues in my submission and am happy to take any questions at length. I just would like to make a few specific comments. The first is in relation to, you know, in trying to respond to this question of how to improve access to justice I endorse the commission's approach which is an evidence based, you know, policy approach.

I think that the idea of trying to identify an issue, a problem, to then select the best solution to that problem, but then to canvass who is going to provide that

solution. So it's not thinking about the providers initially but to think about where and who might provide that solution best. So that's a concept I think, you know, plays out in your various recommendations and I endorse that.

Just to stress again, given my lengthy experience in the sector and involvement in the, you know, range of international endeavours in relation to legal aid, I certainly would like to stress that I think the Australian mixed model of legal assistance provision is basically a sound one and that it offers a way of having a variety of responses and appropriate responses to the various issues and needs of particularly the poor and the disadvantaged. I think that within recent times within the legal aid sector there's been a greater focus on the issue of identifying need and then setting clear priorities and again I would suggest that that's an approach that we need to endorse and encourage, but it needs to be done collectively across the legal assistance sector.

Two particular matters that I've raised in my individual submission and that is addressing the increased use of mediation or dispute resolution. I am currently involved in several research projects where we're trying to assess whether there are benefits in the increased use of mediation and again, particularly for those who are poor, illiterate, disadvantaged, and from that research it's coming through clearly that in order for mediation to be an appropriate dispute resolution method for those groups of people, there needs to be proper intake processes and there needs then to be available access to legal information, advice and support. So I guess in saying that, it seems to me it's important to recognise that mediation is not necessarily going to be a cheap option, particularly for the poor and the disadvantaged, but if they're going to be able to participate fully and for that to be successful then it needs to be adequately resourced.

Then the second aspect which I've referred to in the submission was the innovations that are occurring within the sector and, in particular, the innovation related to what in Australia we're calling advocacy health alliances, but you've mentioned in the draft report, you know, the idea of medico-legal partnerships. I guess this is how that evidence based approach that I mentioned before plays out, you know, the law survey shows clearly that people go to other people other than lawyers for assistance. So they go to doctors, they go to local government, etcetera.

So I think that we then need to say, well, if that's where people are going, how can we best provide services in those locations rather than trying to get individuals into lawyers' offices. So there's a group of us working on this idea of, in particular, the integrated legal and health services and Peter and I are here particularly to talk about that. Obviously any integrated services requires the support of many different levels and that includes government, so the idea that, you know, funding sources could be, you know, multiple funding sources, but government agencies obviously

need to work together.

The organisations who might be working together need to also engage staff. You know, it's not easy. You've got different disciplines working together and clearly clients need to want those services as well. So I might allow Peter to make a few comments.

MR NOBLE: So I have been associated with the community legal sector for the best part of 17 years, initially as a volunteer and then as a legal practitioner. In 2005 I joined the Loddon Campaspe Community Legal Centre, which is based in Bendigo, as its principal lawyer and carried on that role for approximately six years. More recently I've become the executive officer of the Advocacy and Rights Centre, and just to explain the relationship, which I think is an important part of the submission today; Advocacy and Rights Centre is a company limited by guarantee that operates over a large part of northern and central Victoria and operates not just the Bendigo based Loddon Campaspe Community Legal Centre but the fledgling service in the Goulburn Valley, the Goulburn Valley Community Legal Centre, which has three lawyers and an administrator.

It also operates a housing advocacy program. So through that corporate vehicle we're able to operate a number of different services of a similar nature but across different localities and therefore make substantial savings and so on, on the back end. One of the reasons why I'm attracted to that model is because I'm interested to see how we can do our work more effectively and efficiently, and that's another reason why integrated legal service delivery appeals to me and to our service and has been one that we have pursued.

The Clayton Utz Foundation have supported research into medical-legal partnerships, or as Prof Noone has now described them, advocacy-health alliances, and on the basis of some work done by myself and our service a number of years ago, we've been able to generate I think a not insignificant amount of interest in that integrated approach and seeing how we can deliver legal services in a health context to pick up the types of target groups that we should be really focussing on as community legal services but that we frequently miss, because as the law survey says only 16 per cent of those people end up coming to see a lawyer anyway.

On the basis of that we have more recently commenced a pilot again with the financial support of the Clayton Utz Foundation, in partnership with the Bendigo Community Health Services and targeting children who are serviced by their Child Health Invest team. So particularly young people with learning issues who might need some particular assistance either themselves or their family might need particular legal assistance.

To provide the Commission with some just brief background about the work of the service, I've prepared a supplementary submission that just describes some examples of the work that we provide, some basic statistics and then examples of the law reform work. If I might also say, one of the reasons why the medical-legal partnership or advocacy health alliance model appeals is because it recognises that some of the best preventative work that can be done is policy work, and no doubt you've received submissions to that effect from the community legal sector at length.

But I wanted to just pick up on a number of things, one was the research work done through the advocacy health alliance's report that demonstrates the value of integrated services, and I have copies of that for the commission. Another flows out of the 2006 parliamentary inquiry by the Federal Government into the legal needs of older people, and one of the particular findings of that inquiry was that the Australian Government work in cooperation with the banking and financial sector to develop national industry-wide protocols for reporting alleged financial abuse and develop a training program to assist banking staff to identify suspicious transactions.

On the back of that our service led ground-breaking policy research into the veracity of the legal barriers that affect banks and financial institutions responding more effectively to the financial abuse concerns of older people, and that has in many ways influenced the financial services sector to create voluntary educational materials for banks to respond to that. The last policy issue that I wanted to mention flowed out of our evening advice service, and that's how the best policy work done by our services arises is from direct case work experience, and that was through the experience of David and Julia Rosewall who were - David in fact was a financial planner in Bendigo and you would immediately think, "Well, that's not our target group, is it?"

Well, David and his wife had exhausted all avenues of assistance to try to be able to manage the affairs of their missing son, Daniel, who had bills to pay and rent to pay and mail to take care of and so on, and they were at their wits' end not having a power of attorney to be able to operate under or be able to apply to the VCAT for the appointment of an administrator. They'd been to their local member, they'd been to private lawyers, but they were hitting brick walls about what they could do.

When they came to our evening advice service we advised them of the law, which was that there was very little that could be done, but that we wanted to take it up as a law reform issue because there was a clear gap in the law in Victoria, whereas two other Australian states had specifically legislated to enable the families and friends of missing persons to apply to be able to manage their affairs in their absence, Victoria had no such provision. So with bipartisan support, within the matter of about four months, legislation was passed through the Victorian parliament enabling applications of this nature to be made in the VCAT. So they're just a

snapshot of some of the policy work that we've been able to do in the last number of years, and if I might provide these further materials to you.

DR MUNDY: Thank you. We will take them off you when you're finished.

MR NOBLE: Thank you.

MS MacRAE: Well, you'll be pleased to know that our previous participant from the Law Institute of Victoria spoke very highly of your particular CLC and gave us some other examples of work that you've done in the elder care space, so that's very useful. Could you just explain to me, and it might be that I just didn't pick up the detail, but was it necessary for you to set up the Advocacy and Rights Centre to have the legal structure to allow you to provide certain services in that integrated service setting or not?

MR NOBLE: No, I think is the brief answer.

MS MacRAE: No, okay. Sorry, I might have misunderstood - - -

MR NOBLE: No, so that was just the legal entity or legal shell. But what you often see with community legal centres is that they are either stand-alone organisations or they are part of very large multi-program centres, like an Anglicare or a - what's some other examples. Anyway, that's a classic example. Advocacy and Rights Centre is only a two million dollar organisation, it's a relatively small not for profit, but it's larger than a lot of stand-alone centres.

MS MacRAE: Right.

MR NOBLE: It is able to operate a number of different services through that corporate shell, but all of a similar nature. I suppose it could in its own right take on some sort of health service, but really the model that we were trying to pursue was for the legal centre that came under ARC's umbrella to partner with a local health service, just as West Heidelberg Community Legal Centre partnered with Banyule Community Health to improve accessibility to legal services in that health environment.

MS MacRAE: Right, okay. I just wondered because we're quite interested in the institutional structures, so I just wanted to make sure I had that right.

MR NOBLE: Yes.

MS MacRAE: Could we come back then to you, professor. You noted in your submission that the mandatory nature of ADR sometimes gave bad outcomes and I

wonder if you could just comment a bit more on what made those particular cases inappropriate for ADR and what were the features of those things that made it inappropriate and whether - you know, we make quite a - well, we say some pretty good things about the extension of ADR, but that there are concerns about it maybe going too far. So if you could comment on that.

PROF NOONE: Well, I agree that I think there's a lot of positive aspects of ADR. But as with many innovations, I guess I'm coming to this from the position of those who are least able. So whether they're poor, whether they're illiterate, whether they have some other issue about their capacity. It's how the innovation law addressed - because those people have been shown, and the data is clear, to suffer most if you like within our civil justice system and justice more generally.

So how do we make sure that any innovation is going to adequately address those people, and I first was alerted to this issue I guess by my involvement with some people from the Consumer Action Law Centre, and you have submissions from them and I think they're appearing as well. Because they've had this experience, and they'll talk in great more detail about it, whereby if somebody has - so somebody who has in a sense been pressured into signing a contract, whether it's a mobile phone, whether it's a car, whatever.

They default. There might actually be some legal grounds, maybe the contract wasn't valid. But even if that's not the issue, even if there's an issue about the repayment, getting those people back into the room with the same person that might have pressured them into signing the agreement seemed to me just to be flawed from the beginning. So what we have done, we've gone and talked to something like 21 experienced and expert mediators and we presented them with a range of scenarios, and a scenario not dissimilar to what I've just described.

All those mediators' responses were basically, "Well, this would never had got into the room, because we would have done a proper intake, we would have checked out whether this person was able, willing to be involved in this mediation, and if they were then we would also have asked them, did they have proper legal information. Had they had access to some legal advice." Because there are legal aspects often too in particular consumer disputes, that people may decide they don't want to pursue, but they need to know about them before they can make that informed decision. So it's those aspects I'd guess that I'm most concerned about.

MS MacRAE: Yes, okay. One of the other issues that has come up fairly - well, more regularly than we were anticipating, because we thought that wills and probate and those sorts of issues were sort of almost outside the terms of our inquiry, because we were regarding them more as transactional issues. But it seems that from a number of the participants that we've had for this inquiry that quite a lot of those

issues go immediately to the Supreme Court, when it would seem that there might be alternative mechanisms that might be more appropriate, and we were thinking about more use of ADR type arrangements there, and so I wonder if you would have a view about that?

PROF NOONE: Well, I agree again, I think ADR is generally a good alternative, and not necessarily an alternative but a primary dispute resolution. So if you take the model of family law where mediation is described as the primary dispute resolution. So it's not alternative, it is just the way that you do things. Again, I think the way that family law has dealt with a range of these concerning issues is that they have - you know, that's one area for instance where there is legal assistance available. So if you were going to set up a scheme of sort of dispute resolution that's different from the alternative, I think we just have to recognise that the same issues will apply there for illiterate disadvantaged. They need access to information, advice, support if needs be, before they go into those forums.

MS MacRAE: You also expressed strong support, and I think we'd have to say it's been near universal in our submissions about the mixed model of provision of services. One of the issues that comes up there is the increasing gap between what private lawyers actually charge and what they're actually paid for under Legal Aid. What would you see as the best way of setting up a relationship between those rates, that might be the commercial rates of lawyers and what the scales or the payment might be? What sort of reference should the Legal Aid Commissions be making in terms of what they would pay lawyers that they take on for particular cases?

PROF NOONE: I think there's a couple of preliminary issues in that question. The first might be, "Are the rates that lawyers are charging privately realistic? Are they fair, is that what we want to measure it by?"

MS MacRAE: Sure.

PROF NOONE: So that's the first question. The second aspect of it is that - and I do endorse the mixed model. But I think there is scope to look at the arrangements within the mixed model and I think there's - you know, you have one table in the draft report about how grants of Legal Aid are divided between private practitioners, in-house counsel, etcetera, and I can't remember off the top of my head but, you know, data that I've looked at that over the years shows that there's a great deal of variation between the Legal Aid Commissions about what percentage of the Legal Aid dollar goes to private practitioners and goes in-house, and I think that's been an issue of controversy in the legal assistance sector from sort of the 1970s onwards.

So it is one of tension, but I think it's one that needs constant review and reflection about what's (indistinct). Again, and I come back to that question, "Well, if

direct legal representation is the best way of addressing a particular issue" - so we've already jumped a couple of steps, but if that's the best way of - "Who is the best person to provide that? Who and where?"

DR MUNDY: I think the Chief Justice of WA suggested to us on Friday that if you happened to have a civil matter north of Geraldton, it will be no-one.

PROF NOONE: Absolutely. Exactly, and so there are - - -

DR MUNDY: Until you get to Broome.

PROF NOONE: Yes, that's right. So the market of legal services provision hasn't catered adequately for people in particular areas and groups of people. So to rely solely on that sort of - you know, we can't rely on the market, we have to rely on some sort of intervention. But we want to maintain private practitioners' involvement in the scheme, because they are critical for a whole range of things, for balance, for internal tension almost, because that actually, I think, is quite a healthy thing.

It's problematic at different times, but it's a healthy thing. In terms of the actual fee, that's got to be a matter of negotiation. But I do think you start by saying, "Well, maybe what the private practitioners charge now is not necessarily the fairest fee," and so - and remembering that when Legal Aid began the rate was 80 per cent of the standard rate.

DR MUNDY: How do these issues play out? I mean, the country between Geraldton and Broome is probably a little bit different to Bendigo, Shepparton, and that's perhaps - if you like - a bit more normal, and perhaps give us a better sense of things up the coast of New South Wales round Dubbo, those sorts of places, up the Queensland coast out to Toowoomba. So that you're probably in a more typical rural type area. Do you experience the same difficulties with the provision of Legal Aid by private practitioners in those areas?

MR NOBLE: Well, there are certainly some areas of Legal Aid work that certain practitioners choose not to do, either because it's not rewarding them enough or there are other, perhaps conflicts, that they don't want to embrace. So for example in a small rural community, it may be that a small practice doesn't want to take on a family law dispute, because they think it's more advantageous longer term to, for example, represent a man because he's going to remain on the land or keep working that land to the cost of representing a woman typically in a family law property dispute, and therefore there will be an unrepresented person there or that person might have to go further afield for assistance.

Our service provides a large amount of assistance in the family violence arena. I've provided some statistics about that. But it's a very large proportion of the court based work that we do that is not particularly attractive to the private profession, and so we now deliver that service at, I think, eight courts in regional Victoria. That's an example of where there's a service gap. You'll sometimes hear community legal centres say, and I agree with this as well, that they shouldn't be Legal Aid on the cheap.

So really, my only other comment is that while there might be a gap in work that could be filled or could partially be filled by community legal centres stepping up to the plate in that mixed model. I think you've also got to be mindful of remuneration rates for community legal centre lawyers, which again are below Legal Aid. So there would just be some parity issues there to be addressed.

DR MUNDY: They're below the rates paid to Legal Aid's own lawyers - - -

MR NOBLE: Lawyers, generally speaking.

DR MUNDY: Or the rates paid by Legal Aid to private practitioners or both?

MR NOBLE: No, well, I don't know about money paid to private practitioners by Legal Aid. But certainly Legal Aid's own lawyers. But then again, there are different expectations in terms of the amount of appearance work, for example. So by and large, Legal Aid's lawyers will be doing that acute, court based representation work and it's a different mix of work done by CLC lawyers.

DR MUNDY: And in a rural and regional setting where there is a conflict, and let's say it's the woman who would normally be Legal Aid funded, but for whatever reason a practitioner can't be found and the CLC lawyer steps up and does the job, do you receive the funding from Legal Aid to do that work?

MR NOBLE: No. We're already funded to provide a level of assistance, and we'll agree our targets in advance, and part of the objective of that mixed model is to provide greater coverage and so to avoid those conflicts of interest. It may be, for example, that there is a stage of litigation that we could apply for funding for, but the CLC itself won't receive that funding. We might use it to cover disbursements or to pay for a barrister, for example.

DR MUNDY: What would be the outcomes if Legal Aid was in a position where it was normally a matter it would deal with, but for a conflict issue it passed it on to yourself? What would be the consequences if they did fund you at their normal rate?

MR NOBLE: Well, one of the consequences is we would be able to recruit, I

guess, at a higher rate, perhaps more experienced practitioners, and that would have, I think, a whole leavening effect within the service itself to incorporate more expertise and capability.

PROF NOONE: I mean, I think they are really interesting questions. Again, questions that have been discussed at length over the years. Of course, there is one model of a service that does work like that, but there are also now newer models of - and I don't know whether - I can't remember whether - do Salvos Legal - - -

MS MacRAE: Yes.

PROF NOONE: So that idea of different legal practices developing priorities and how they're going to fund their service. So as I understand it, it's sort of a third legal aid work, a third for free, and then a third fee-paying. So I think it's important that we think broadly about how these things can be delivered and encourage innovation in that way.

DR MUNDY: I think, though, with respect to Salvos Legal, I think where we have got to, that space is probably - we should make sure there are no barriers, but we're not quite sure how you cause such organisations to come, but for the edifice of an organisation which has a lot of inherent property needs of its own. I mean, I think Salvos Legal is very interesting and it's absolutely something that shouldn't be obstructed as a question of policy, and indeed we see similar organisations like Anglicare, auspicing - I'm not sure it's a way to - a primary policy lever for government to pull, I guess is what we're thinking, unless you've got a different view.

PROF NOONE: Not necessarily government-directed, but I think we need to ensure that those initiatives can flourish. So I've actually - and I wish I could remember the name of the woman, but I sat next to a young lawyer a few years ago, and their firm was doing - so it was a private firm, but they were sort of taking this approach, they were reducing the profit that they were aiming for in order that they could do this mix of service. So I think there are some lawyers out there for whom the profit is not necessarily the endgame.

MS MacRAE: We've heard a fair bit about the problems that conflicts of interest present, and we've discussed it a little bit. I'm just wondering, given that you teach ethics, whether you have a view about how the regulations work. So there seems to be a bit of variation between jurisdictions, but are there some jurisdictions that do it better than others, and are there instances where the conflict of interest rules could reasonably be somewhat relaxed? Because, in the absence of that relaxing of the rules, it seems to be that in some cases people just have no option but not to be represented.

PROF NOONE: This is the classic problem that you present students with during the exam, of course. I don't think there's an easy solution, and I know that my colleagues, like Adrian Evans, for instance, who I think again is appearing - you know, I'm not sure whether he's going to talk about it, he probably won't talk about it tomorrow, but you could ask him, because in relation to the current promulgation of a new set of rules relating to - there's a lot of controversy within the legal ethics sector teachers about those rules not being strong enough on conflict of interest. However, I think there is a real issue about access to justice and how the conflict of interest rules play out, and particularly because you have - when you have an institution like the Legal Aid Commission, that are one firm but they have multiple offices, that rule to me doesn't seem to be as effective as it could be.

We need to, in certain circumstances, I think, have exceptions to enable, in particular, greater access. When there's a limited number of legal services available, then you have to take that into account in the mix. You know, this problem has got more acute because of technology, so once upon a time if somebody was given a duty lawyer service out in Sunshine, the other party went to the Frankston Legal Aid office, it would be a long, long time before the organisation actually realised that that was - and so, as I said, technology has changed all that. So we have to take into account how we work the technology as well in that regard to ensure that there is no transfer of confidential information, obviously. I don't think it's something where we can just say, "It's a conflict, we can't do this." I think we need to work towards it. Victoria Legal Aid has certainly produced several discussion papers on this.

DR MUNDY: So there's more we can do with achieving what the intent is, but perhaps we've lost the forest for the trees?

PROF NOONE: And there would be some who say, "The rules in relation to confidentiality were developed for other purposes. They weren't developed with servicing this group of people in mind."

MR NOBLE: I formally chaired the Victorian and the national professional indemnity insurance working groups within the community legal centre sector, and one of the tasks of that group was to review the risk management guide that all community legal centres follow, so 200-plus services, and in the course of that we had to grapple with these issues, and I can assure you that, at least when comparing it to Victoria, there is a higher standard applied in community legal centres, perhaps to the detriment of CLCs and their clients, that is applied at Victoria Legal Aid. So, for example, we would conflict-check every person that we give advice to, because we think that in the course of providing that advice, we receive information that could be used to the detriment of that person if it's later disclosed to another party.

A different approach is taken within Legal Aid. It's considered a discrete piece

of work. There are further examples - so, for example, when duty lawyer services are provided, and Mary Anne has already described where duty services might be provided at multiple places simultaneously across Victoria, and how do you practically resolve those problems - and the way some of the rules are presently constructed is a hindrance, and I think that some practices are choosing to push the envelope on those things because they feel that they can persuasively argue that they are still preserving the best interests of the client, notwithstanding that there might be some perceived breach or technical breach of the rules. So, for example, the principle that knowledge of one is knowledge of all is a real problem where, like Legal Aid, you've got all the solicitors across different practices, you might have a criminal division, a family law division, in multiple locations.

To bring it back to the Advocacy and Rights Centre, we have an information barrier, sometimes described as Chinese walls, which, imperfect as they may be, provide a level of division between our housing advocacy program and the community legal centre sector service within our organisation, so that we can offer a level of service in both of those places. But for some people that would make their hair curl, seeing that. But in my time at the service, which is nine years, I don't think there has been a significant conflict issue that has arisen.

DR MUNDY: I am mindful of time. So thanks very much for your time, and thanks very much for the materials you've provided.

PROF NOONE: Thank you.

DR MUNDY: Right. Could we have Flemington Kensington Legal Centre.

MR WILSON (FKCLC): Unfortunately, Sophie couldn't be with us today. My name is Matt Wilson, this is Julian McDonald.

DR MUNDY: Thank you. Just take a pew and, for the record, state your names and the capacity in which you appear.

MR WILSON (FKCLC): Matt Wilson. I'm a solicitor with Flemington Kensington Legal Service, and I appear on that basis.

MR McDONALD (FKCLC): Julian McDonald. I'm a volunteer at Flemington Kensington Community Legal Centre.

DR MUNDY: Could we invite you to make a brief - that means somewhere between five and 10 minutes at the most - statement, please.

MR McDONALD (FKCLC): Yes. I have one prepared. Good afternoon. Our submission comes from Flemington Kensington Community Legal Centre. We provide a hands-on perspective dealing with clients from disadvantaged and often foreign backgrounds. We have notably been involved in civil litigation with the establishment of the Police Accountability Project in 2007. It has highlighted some systemic roadblocks for clients with limited financial resources who pursue civil litigation as an avenue for address.

Our full recommendations are in our submission we've provided, but at this time I'll overview our positions. We support the use of alternative dispute resolution as an appropriate way to reduce the workload of courts and a swifter way to resolve disputes, however, a significant obstacle for litigants who are ineligible for aid and do not have a means to pay for a mediator is the often prohibitively high cost of mediation fees. Our experience is that mediator rates can range from approximately \$165 per hour up to \$480 per hour. In addition to these costs, venue hire must also be paid for by the parties.

In some jurisdictions including the County Court of Victoria, parties must reach an agreement in which a private mediator will carry out compulsory pre-trial mediation as a mediator is not appointed by the court. A solution to this problem would be to establish a pool of court appointed mediators who can do pro bono work. An alternative is for the parties to be able to apply for a fee waiver for mediation fees. The purpose of fee waivers is to provide access to justice for clients who cannot afford to pursue litigation. This principle should logically extend to mediation as well, as mediation is often compulsory.

We submit that not funding this compulsory process is sending a message that access to justice is only for those who can afford it. On the topic of costs arrangements and pro bono cases, we strongly support the recommendation provided by the Commission. Due to the decision in *King v King* which put into doubt the validity of pro bono parties to receive costs if they otherwise be successful in a court in a costs order, although the more recent case of *LM Investment Management Ltd* distinguished *King v King*, there still remains uncertainty in this area.

It is also in the interests of clients, many of whom come from non-English speaking backgrounds to be told that the work is for free rather than signing a complex cost disclosure statement for the sole purpose of enabling lawyers to apply for a costs order in the event they are successful. It would also be better if pro bono lawyers could carry out their work without having to negotiate complex fee agreements with disadvantaged clients safe in the knowledge that they will be entitled to seek an award for costs in the event they are successful. Without this protection, there is a disincentive for lawyers to act pro bono and more clients will have to rely on their lawyers waiving their fees or acting under a no win, no fee basis.

On the topic of protective costs orders, we support the introduction based on the English model jurisdiction from *Corner House* with the following quibble, we don't support the provision that requires that the litigant not have a private interest in the case. The reason we don't support this is the purpose of a protective costs order is to provide access to justice that is in the public interest. Whether the litigant who is moving the initial case has a private interest in the matter is irrelevant. The point is that public interest litigation should be able to proceed.

This provision that was introduced in *Corner House* is just a disincentive, particularly for young people because if the costs order is found against them, they may spend years paying back such an order, and this provision may discourage them from pursuing public interest litigation which would benefit the community at large. So we don't see any reason to include such a provision.

Lastly on fee waivers, currently the fee waiver process is costly and time consuming. We would heavily support the automatic granting of fee relief to parties represented by a state or territory Legal Aid Commission or clients of approved community legal centres or pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief. Another mechanism that would aid the streamlining of fee waiver processing would be implementing a single fee waiver application process which would be made and processed at the start of litigation.

Currently clients must continually apply for fee waiver for the many steps of

fees they need to pay in a case. We believe there should be just one fee waiver process that would be at the start of the litigation and no more. Fee waivers should also be much more comprehensive. We have mentioned mediation earlier but it should also include viewing and photocopying documents under subpoena as well as reviewing court transcripts. Currently we have to pay a third party to do this for us. Streamlining is important as there are time limits on filing appeals, interlocutory matters and other court related processes. Clients need to know that they have been approved for fee waiver before they can pursue these avenues. If they aren't notified in time, then this avenue is closed to them.

On the use of technology, we believe that fee waivers should be able to be filed electronically through Sitetech. Currently this is not an option. Lastly, we support a full fee waiver rather than a postponement on the basis that the purpose of compensation and tort law in general is to put the plaintiff in a situation he or she would have been if not for the tort. If court fees are taken out of compensation payments which are calculated for the aforementioned purposes, then victims will still be at a disadvantage after receiving a judgment in their favour.

Conversely, if the fees are to be paid back out of an award for costs in their favour, it is possible that the complete costs award may not ultimately be recovered or only partially recovered from the defendants. In that scenario the court should keep the fee as a waiver rather than a postponement as a plaintiff would not have recovered the money to pay the fees. That concludes my remarks.

DR MUNDY: Can you tell me this question about protective costs awards, it seems that in very many cases parties that would bring this sort of litigation may well benefit from it, for example, a matter that clarifies law around bank fees, for example, where the parties have a clear beneficial interest in the outcome of the case, but clearly there's some public interest in the establishment of the law but also in testing the law and then others can access the decision. So an economist parliament says public and private goods going on here.

I mean, the challenge for us is in a normal economic analysis would be, well, you shouldn't actually provide any assistance in this circumstance unless you think the public good will not be produced. So you can conceive of circumstances, for example, in litigation funding matters, where - and the ANZ fees case is a classic one - where there are significant private benefits to the parties but there is also a substantial clarification of the law which benefits other parties, whether it actually clarifies the law is a different question, I guess. So in those circumstances should - I mean, I take your point about there being no interest, you know, and I think that's what the UK has tried to get at.

MR McDONALD (FKCLC): Yes.

DR MUNDY: In the UK structure you would not get a protective costs order to run something like the ANZ fees case.

MR McDONALD (FKCLC): That's correct.

DR MUNDY: Should there be a test perhaps that says that - maybe it's covered in the notion that the public interest should be resolved, maybe the test should actually be - and I'm not - I'm just floating something - that the public interest would not otherwise be resolved. So that would still allow there to be a benefit in it for the litigants but not perhaps - so it would distinguish it from the circumstances of say the ANZ fees case. Because what we're trying to do is make sure the public interest cases get run, that wouldn't otherwise be run.

MR McDONALD (FKCLC): Yes. That's exactly our purpose as well. So the measure you suggested does go further than the English case, and I suppose we would support it. We would be worried that the test would have to be set up in such a way that the purpose we wanted actually came, like, making sure that if there was no other way the case would be run, then there could be a protective costs order.

DR MUNDY: So we've both got the same intent, it's just a question of thinking through the economic incentives and how it might work.

MR McDONALD (FKCLC): Correct.

DR MUNDY: Okay.

MS MacRAE: On something that's a little bit more mundane. How is the CLC funded? So where's your sources of income?

MR McDONALD (FKCLC): There's a number of funding sources. We have funding through state and federal government, grants to Community Legal Centres, and that's definitely over 50 per cent of funding for our centre. We have projects at Flemington Kensington that run litigation around specific issues. The Police Accountability Project where I'm a solicitor is an example of that. There's a level of philanthropic support that comes through for specific projects like police accountability, so that's one of our avenues as fundraising obviously but we're obviously still heavily dependent upon government funding for the service.

MS MacRAE: So how is the quantum of money that you get from the Commonwealth and the state determined? What sort of formula applies or is it a formula? Is it historical?

MR WILSON (FKCLC): I must admit that I'm fairly new to the centre. I've been there for three months but my understanding and I have experience working in the community sector is that there is a process of evaluation that takes a number of factors into account, including the case load experienced by the centre. The statistics are provided to Victoria Legal Aid certainly and I think that applies for all legal centres.

Also the demographics are taken into account in terms of the areas, how the make-up of the community legal supporting is changing. Those issues are taken into account and I would assume that the projects beyond general casework, how they're impacting the community and growing, they're also factors relevant to those determinations.

DR MUNDY: Can we just ask about those matters beyond general casework because we understand that the government has had a change of view as to where the priorities of particularly Commonwealth funding should lie and to what you should obviously call frontline services and has adjusted CLC funding over the next couple of years to reflect that change in priorities. Are you able to outline first of all what are the impacts on your organisation of those funding cuts and, secondly, the extent to which it will affect frontline services or rather will it affect advocacy law reform activities?

MR WILSON (FKCLC): I think it would be fair to say that the impacts are currently being considered. We're in the process of preparing budgets for the coming year and there's obviously an amount of belt tightening that I think will be going on across the sector. We're looking at methods of maintaining the services being provided. It's difficult to determine at this stage though just how significant the impact will be on our projects, although I think that it will be frontline services that will be ultimately struggling. There are concerns around the conditions that have been proposed in relation to specific projects, advocacy and public interest areas. Once again I think those concerns are felt across the sector.

DR MUNDY: How do you see those concerns?

MR WILSON (FKCLC): Not knowing the details but having seen some of the impact that there has been in other project areas, such as the Environmental Defender's Office, obviously significant concerns about advocacy work, these target around specific issues affecting government or certain organisations. The free reign that the centres have to explore those matters that impact upon public policy, especially where the work is being conducted around advocacy for particular campaigns, will have concerns, I would say, for people - - -

DR MUNDY: Is the character of this advocacy one of attempting to get individual

government decisions altered or is more of an addressing systemic reforms that are required to improve justice or indeed might just be there's a whole pile of people having a problem like this and everyone would be better off if you did that?

MR WILSON (FKCLC): I think, speaking from the perspective of police accountability, we have a broad number of intentions or goals in the advocacy work. We do seek to address systemic issues. The work that is being done around the race discrimination case is a clear example of that. We've worked closely with Victoria Police in establishing a commission into issues of race discrimination and discriminatory policing.

There is also an interest (and it's an aim of our project) to see a greater level of independence established in the bodies that regulate and handle police complaints, so they're certainly goals that we'd see in terms of affecting government policy. So yes, look, there are a number of different aims for our centre but mainly around state government activities.

MR McDONALD (FKCLC): It's mainly around the state government, yes. Also, the federation which is appearing tomorrow will be more able to speak on those budgetary issues I think.

DR MUNDY: Yes. We're just trying to gauge across participants what the broad scope of the consequences is worth in people's own words who are faced with these issues.

MS MacRAE: Can I just ask: we've talked a bit about advocacy. Assuming you're also very much involved in community legal education, I'm just wondering if you can talk about the way that you try and measure the success of your education programs, if you're able to do that. Also we're aware that NACLC has developed this database which is called CLEAR which probably stands for something and I can't remember what, to share their community legal education resources. I'm wondering if you use that and how useful that has been to you.

MR WILSON (FKCLC): No, I haven't used it myself but it may be being used at the centre. In terms of legal education, the activities that I've been involved in - we certainly seek feedback from participants and I guess a measure of success is also shown by the number of people who are coming along and the way the message is being spread but those monitoring and evaluation steps are very central to those legal education projects, in the sense that we need the statistics to maintain funding and to establish that they're showing progress.

MS MacRAE: Do you find being very locally based that you're able to better target that education because you're more aware of the issues that are of particular concern

to the people that live in your area? Do you do outreach work and education beyond your borders as well?

MR WILSON (FKCLC): Not so far beyond our borders. We are in the process at the moment of establishing a new project connected to the co-health centres or Dootta Galla as it was formerly known. That's just outside our catchment area but it's being initiated with a view to see whether legal support for those who are dealing with health issues can show positive results and also show results in improving people's health outcomes in connection with the public health system.

So it will be interesting to see how that evaluation assessment plays out and what sort of benefits are shown, but all of those projects tie you closer into the community and we also see the benefits in terms of knowledge and awareness of the centre and the services offered, spreading out not only through picking up people through specific projects but also bringing people in, for instance, the police accountability project. We've definitely seen an increase in the number of people who are aware of that through the public forums that we've held. They have been held outside the area. You may be aware there was one in Melbourne at the Town Hall before I started but that has certainly brought a number of clients to us from across Victoria.

DR MUNDY: I should know this because I did once work for the federal member for Melbourne but can you remind me what your area is or your catchment or your jurisdiction, however you want to describe it?

MR WILSON (FKCLC): That's a very good question. I was just about to get an answer before I came along today but I think - - -

DR MUNDY: Broadly.

MR WILSON (FKCLC): Yes, look, we're bounded by other legal centres that are in position such as Moonee Valley, North Melbourne. Effectively I would say to the east would be around about where the City Link toll road runs over.

DR MUNDY: Yes.

MR WILSON (FKCLC): And we head out across to - - -

DR MUNDY: Kensington Flemington.

MS MacRAE: Flemington Kensington.

DR MUNDY: That's where you bump into Footscray or something.

MR WILSON (FKCLC): Yes, Footscray to the south, the showgrounds to the west.

DR MUNDY: So it's quite a compact area compared to a lot of CLCs that we're aware of.

MR WILSON (FKCLC): It's a high density population area. It's also quite a mixed area and we have a large number of high rise estates in there, so I guess it is changing in terms of the affluence of those who live in the older established - - -

DR MUNDY: But there is still that very hardcore of relatively economically disadvantaged people in the high rises in North Melbourne and Flemington.

MR WILSON (FKCLC): Absolutely.

DR MUNDY: I guess the question then is, and I understand the issues around racism and racism in policing - my understanding largely arises from emerging numbers of people from African backgrounds, by and large. Do you share those learnings with, say, similar - from a former life, I am familiar that there are similar perhaps, not greater, concentrations of people of that ethnic background around Richmond, the Housing Commission in Richmond. Do you liaise with - it is probably Fitzroy, if there is not a Richmond one.

MR WILSON (FKCLC): I would say probably our closest relationship outside our direct neighbours would be with the Fitzroy Legal Service. We do have a lot to do with them and share a lot of information.

DR MUNDY: I guess one of the things that has been of interest to us is that whole question of how some legal centres seem to be quite small and the question that begs is: should there be, for want of a better word, amalgamations? Is there anything you can sort of share with us about the way that cooperation works, as opposed to an alternative - some sort of mercantilist amalgamation process, perhaps in the police project?

MR WILSON (FKCLC): There is a level of cooperation in the provision of information about the projects and legal education information that is on offer. There is obviously a level of cooperation whenever we are contacted and we are often contacted by other legal centres, by solicitors who have come up with issues of police abuse or information about cases where they are seeking to make complaints. We build up a body of knowledge and are able to access the specific material and resources that those people need on a case by case basis.

I guess in a broader sense we work collaboratively with different centres around specific projects as well. It is different. We pick up matters in a sporadic sense outside our boundaries and we take them on the basis that they are of strategic interest to the projects that we are running but we would also, and have found ourselves doing so increasingly lately, be referring matters that we are picking up, for instance, in the aftermath of the Horvath decision by the United Nations. There has been a lot of interest in the centre from outside our area. We are obviously sending those cases out to the legal centres and services closer to them.

DR MUNDY: There is just one other question. I mean, a lot of the material you have given us has been around the police project. Our terms of reference are primarily the resolution of civil problems, rather than criminal matters but are you able, on the basis of your experience, to give us any reflection on how the two are related? We are particularly concerned with people who seem to be quite intensive users of the system. They have criminal issues - and particularly if they suffer some form of disadvantage. They might be recent migrants. They may have been refugees. Do you have any insights into I guess complexity and how we need to support the civil system and help people who may turn up to you with a criminal problem, which then goes to the question: how do you attend to all their needs, rather than the fact that the coppers have pulled me over and done me?

MR McDONALD (FKCLC): We certainly do have a number of criminal matters that we help with. The whole reason the police accountability project formed was the shootings, I believe. Matt may be able to fill you in more details of that. We realise obviously the two are interlinked. The reason that we are pursuing litigation against the police originally started with a criminal dispute so obviously the two are linked. I would just say that we sort of handle them separately. Sophie Ellis who also wrote the report is just in charge of civil matters, similar to Matt, I believe.

MR WILSON (FKCLC): There is a bit of crossover. I think, as Julian has pointed out, often people's encounters with the police are kicked off or sparked by a criminal investigation and what we are doing is trying to find out what has happened down the track there but we obviously do defence work as well. In terms of reform in the areas of litigation there is a lot of doubling up I think which really places a huge strain on the points that Julian has raised about fee waivers. We have got clients going through so many hurdles as they work their way through the justice system.

DR MUNDY: You should almost prove it once and get a pass.

MR WILSON (FKCLC): It would seem to make sense and I think it would certainly save money. These hurdles - I think there is an expectation that sooner or later your client might trip over one of them. Those potentials obviously are a problem for getting to the resolution of a matter, as it should be resolved, but also

they may create incentives for matters to take longer than they should as they offer benefits to the opposition. We deal with people with great disadvantage. The process is very stressful. We have found a lot of benefit from setting up a welfare support project that runs out of our centre for the people dealing with police abuse cases because they do feel quite vulnerable. I think streamlining the process, the sooner people are out of the process, the better for them.

DR MUNDY: So having a single waiver would reduce your time in having to deal with it and presumably the court's time in having to process it multiple times.

MR WILSON (FKCLC): Yes.

DR MUNDY: And would reduce stress on someone who is probably pretty stressed anyway.

MR WILSON (FKCLC): Yes.

DR MUNDY: Thank you very much for your time.

MR WILSON (FKCLC): Thank you.

MS MacRAE: Thank you.

DR MUNDY: Could we now have Justice Connect please. When you are settled, could you please for the record state your name and the capacity in which you are both appearing and perhaps then give us a brief opening statement? That means no more than 10 minutes. You get a prize if you can get it under five.

MS McLEAY (JC): I will do my best.

DR MUNDY: Thank you. We appreciate it.

MS McLEAY (JC): I'm Fiona McLeay. I am the CEO of Justice Connect.

MS LYONS (JC): And I'm Anna Lyons, manager of pro bono relationships at Justice Connect.

DR MUNDY: Off you go.

MS McLEAY (JC): Thank you for the opportunity to attend and to speak. It's a really important process that the commission is undertaking and we are very pleased to have the opportunity to be part of it. We have made two submissions, as you would know. I wanted to give a brief overview of our work, highlight a few areas that we think are particularly important, present a couple of very short stories of clients we have assisted and then have a discussion.

Justice Connect formed on a merger of PILCH Victoria and PILCH New South Wales. That took place about a year ago. For about 20 years before that both PILCHs played a really key role in the development of what is a very strong pro bono culture among lawyers in both Victoria and New South Wales and indeed now nationally. I travel overseas in relation to this work and I think it is fair to say that the pro bono culture in Australia is viewed as being one of the strongest in the common law world.

The PILCHs and now Justice Connect have played a role in developing this strong culture and in the establishment and expansion of pro bono programs in law firms, at the Victorian Bar and at the Law Institute of Victoria. Our focus really is partnering with pro bono lawyers to develop and strengthen this pro bono capacity and to strategically match this with unmet legal need that we see in the community.

Our strategy highlights this approach. There are three components to it. Each one logically flows from the other and the three things wouldn't work as effectively if they were not in place, so the first thing is to build support and engage a strong commitment to lawyers' pro bono responsibility; then obviously to deliver access to justice programs using pro bono lawyers as the primary resource to people experiencing disadvantage and to the community organisations that support those

people; and then to improve laws and policies which cause or perpetuate disadvantage using evidence from our case work and the stories of our clients. We see those three things as being inextricably linked.

We have got a range of current programs. We have a generalist referral service which accepts requests for assistance from individuals in the community who have been otherwise unable to get legal assistance. We have three outreach services which target three specific client groups. One is Homeless Law, which obviously works with people experiencing risk of homelessness and its primary focus is on trying to sustain the tenancies of those people by addressing legal problems which can cause them to become homeless.

We have Seniors Law, again an outreach service for older people looking particularly at elder abuse but considering a whole range of civil law issues that arise in older people; and a service called Mosaic in Inner Western Sydney which supports newly arrived migrants, refugees and asylum seekers. It helps to address their civil legal problems, the sorts of things that can cause them difficulties in establishing themselves in the community and again things like credit and debt, housing, those sorts of issues.

We run Not-for-profit Law, which is a specialist legal service for not-for-profit community organisations, again targeting very much the smaller volunteer grass roots community organisations that really form the backbone of the not-for-profit sector in Australia. That's a service that looks at legal, regulatory and compliance issues for those organisations and ranges from a web site, a training program, a telephone advice service, through to referral.

Shortly we will commence running a self-representation service in the Federal Court and the Federal Circuit Court, a newly funded program by the Federal Attorney-General's Department which will provide short advice to unrepresented people in those jurisdictions. We will be providing that service in Victoria, New South Wales, Tasmania and the ACT, and sister organisations in Queensland and South Australia will cover Queensland, SA and the Northern Territory.

Our primary focus in our work is civil law, although in Victoria we do make some referrals in family and criminal law as part of our management of the Law Institute of Victoria's pro bono program and the Victorian Bar pro bono programs. That partnership with both of those professional bodies is a longstanding one and an extremely productive and effective one. They effectively have asked us to manage those programs for them and it means in Victoria we operate as a sort of one-stop central hub for pro bono.

The kinds of cases where we would perhaps be able to make a family law

referral are where the client's circumstances are unusually compelling and I wanted to share one particular case study with you. It also illustrates the way that we partner with other actors in the legal assistance sector, Community Legal Centres in particular in this case.

A client that we will call Lucy approached the Women's Legal Service for assistance a week before a final hearing of her application for a sole parental responsibility before the Family Court. The father of her child had perpetuated serious family violence against her on more than one occasion in breach of existing intervention orders. At the time of the final hearing the father had supervised contact with the children. Lucy was seeking consent orders to graduate up to unsupervised contact for the father on the condition that she obtain sole parental responsibility.

Unfortunately Lucy's former solicitor had ceased to act as a result of changes to funding that was available through Victoria Legal Aid and so she found herself unrepresented. Women's Legal Service sought assistance from Justice Connect to try and obtain counsel to appear at the hearing. Women's Legal Service were prepared to be the solicitors on the record but needed counsel to actually appear in court. On very short notice we were able to find a barrister who was able to appear. The hearing was adjourned and then relisted for later in the year.

Women's Legal Service agreed to continue on to represent the client and we then sought to attain further assistance from the bar. For a range of reasons it took 20 phone calls to 20 different barristers before we finally found one who was able to take up the case. The hearing was likely to be longer than a couple of days and it was towards the end of the year, so very busy, but this was a matter where our referral lawyer persevered and we did find a barrister who was willing to act and the client was successful in her application.

She talked a bit about the stress really that she was under facing the thought of being unrepresented, potentially having the perpetrator of violence opposite her in the court, so a good example of the kind of work that we can do: quite specific, quite detailed, quite time-intensive, but very impactful for the client concerned.

In all of our programs we make an intake assessment which asks the following questions: is the client or the client group unable to afford to pay for legal representation or does their legal problem otherwise raise a public interest question? Is there another agency that's better placed to assist the client or the client group? Do pro bono lawyers have the skills and the willingness to assist the client or can we help to develop these skills and willingness or to facilitate it?

Those questions are really crucial to us in our model because we want to ensure that pro bono doesn't displace other forms of legal assistance, whether government

funded through Legal Aid Commissions or Community Legal Centres, or other ways that legal problems can be resolved: no win, no fee, for example. We have a number of firms that do that work that we will refer clients to if we think that their cases meet that criteria. We also want to obviously avoid overlap and duplication. Secondly, we want to make sure the pro bono resources are devoted to where they can have the most strategic impact having regard to the skills of the pro bono lawyers and the support needed to ensure that they're well directed and managed.

As that case study illustrated, partners are really critical in our work. Most of our clients come to us on referral from another agency or we are working in partnership with the host agencies of our outreach services and they all help to ensure that clients that are likely to meet our criteria come to us. Non-legal agencies such as drug and alcohol case workers, social workers, financial counsellors, et cetera, also refer clients to us, as do law firms and barristers who get what you might call cold calls from clients.

We see ourselves very much as part of the access to justice sector and we really rely on these referrals to be efficient. We're not set up or funded to be an open access inquiry line to the general public, so any reduction in the effectiveness and the funding of these other services directly impacts on us. The family law example is a good one. We saw a 25 per cent increase in inquiries for legal assistance in family law matters when Legal Aid was forced to change its guidelines due to funding restrictions. So we get an increase in demand and a reduction in our capacity to respond. Our service levels and funding gets reduced from time to time as well and we certainly don't get additional funding when other areas of the sector are defunded, so we can't work absent the rest of the sector working effectively.

In our submission we stated that while relatively small, in our view the work undertaken by pro bono lawyers is critically important and strategically significant because by definition it's work that would not otherwise be done, if you think back to our criteria for accepting a client. Good pro bono in our view is often done for clients whose matters or personal circumstances are particularly complex, are outside areas for which Community Legal Centres and Legal Aid are funded, or where they have insignificant resources.

Another example is a client we will call Suzie who came to our Homeless Law outreach service for assistance with infringements; a very common situation for disadvantaged people. Due to her life circumstances she had been unable to address a series of fines which had resulted in her being arrested and then she was facing imprisonment. She had been struggling following the breakdown of a close personal relationship a number of years ago and her children had been exposed to significant trauma. Suzie's housing, finance, health and mental health had been affected by the ongoing impacts of the family violence that she had endured.

By the time she came to Homeless Law, she had found transitional accommodation and was starting to address some of the issues that she had put on the backburner while she was in transient accommodation. She initially appeared in the Magistrates Court in relation to the unpaid fines and the matter was adjourned because the magistrate wanted to see more evidence of her circumstances, so the pro bono lawyers that were assisting her came back to Homeless Law and asked if our social worker could give them some support to collect the relevant information from the various agencies that had been working with Suzie.

Over a period of time conversations were had and the material was gathered and our social worker was also able to contact housing agencies, Centrelink, Department of Human Services, general practitioners, to gather the information together. The result of all of this was that the magistrate was satisfied of Suzie's exceptional circumstances as the legislation requires and her fines were discharged. She avoided gaol and was able to return to reconstructing her life.

The overall amount of the fines in that case, relatively small, but a high cost to Suzie and her children, had she not been able to pay them. It took time to resolve, work for the homeless with a lawyer, the social worker and the pro bono lawyers, but critically important work to ensure that Suzie remained housed. The work that happened as part of that case fed into a broader law reform program that we're undertaking in Victoria to push for reform of the infringement system. We've been working very closely with the Victorian Department of Justice and the Attorney-General's Office on that work.

I just wanted also to make a slight correction to our submission, our second submission, on page 3. We state that pro bono work from larger Australian firms at around 7 per cent capacity to free legal services. I should just clarify that that includes work done for not for profit community organisations as well as individuals. So the 3 per cent figure quoted by the commission in your draft report we think is a reasonable estimate based on incomplete data of work that's done for individual clients. So that's my five minutes. Anna just wants to add a couple of things and then we'd like to have questions.

MS LYONS (JC): Just a very quick comment regarding the efficiency or the need for coordinated law firm pro bono. Our membership which we refer to in our submission has around 50 members and it ranges from very small firms with one lawyer through to all of the large commercial practices in the country. Some of those have very well established and well-coordinated and well-resourced programs and others really don't and often come to us at the really early stages of developing their practices.

So over the years we've seen a number of firms joining Justice Connect or previously the PILCHs with a view to establishing programs and some of those who started off very small or began their work with us have gone into really self-sustained, very well run programs but we want to make the point that there are still firms who don't have existing links to community legal centres and also to community organisations who are able to connect them with disadvantaged clients. In our written submissions we've talked about the benefits of coordinated pro bono which means that we can really facilitate the meeting of the disadvantaged clients with the law firms who are willing and able to do the work. So if you have any questions about how that works in practice, we'd be really happy to discuss these with you.

MS McLEAY (JC): I'm not sure if we get the prize but I think we were under 10 minutes.

DR MUNDY: You were just. I think it was raised with us by Legal Aid WA or it might have been the Chief Justice that there is no public interest clearing house in Western Australia. I note that you cover both New South Wales and Victoria. What benefits come from being able to deal with both and do your national activities suffer from either there being these other ones which by their very nature must be smaller and the fact that there is none on the other side of the Nullarbor?

MS McLEAY (JC): In relation to the first part of your question, I think there have been definite benefits from the merger between New South Wales and Victoria. There were many reasons why we embarked on that enterprise. One of them was because many of the law firms that were members in Victoria were also members in New South Wales and it just didn't really make any sense, particularly as the legal profession itself in Australia is really a national profession and in fact for some of the large firms an international profession.

DR MUNDY: Not according to Western Australia.

MS McLEAY (JC): Yes. They are in theory at least joined up partnerships. So we've certainly found that the ability to scale across states, to take something that works well in one state and develop it in another, to learn across the different places, to share back-end, back-office functions, PILCH Victoria had reasonably good capacity to raise funds from philanthropics and others which we've been able to bring into the way the New South Wales PILCH was working. It's early days but from our point of view we feel very positive about the benefits that have come from that.

In terms of Western Australia, there is a Law Society pro bono program in WA. We've had some discussions with them and with our member firms that have offices in WA through the course of last year and indeed earlier this year. There's

interest from our member firms for us to have a presence in Western Australia. It's really just a question of how we would resource that. Our model, as we've described, is very much to work in partnership and collaboration. We certainly wouldn't be wanting to impose ourselves on the Western Australian legal community.

We've had some discussions, as I said, with the Law Society, with the Bar over there and with law firms, so we're looking for opportunity but also I guess resources to be able to set something up.

DR MUNDY: To what extent, and it might be entirely irrelevant, was the New South Wales/Victoria merger a function of uniform national legal practitioners and also I guess the fact that many of your larger members I presume are on the Commonwealth panel? Does your amalgamation facilitate their obligations under the panel as well I guess is what I'm asking.

MS McLEAY (JC): You probably need to direct that question specifically to one of our members. I'm not sure that the amalgamation per se facilitates the work they do under the national panel arrangements, but we did know that - we refer a matter to a firm. It's up to them how they want to resource that internally. We know anecdotally that if it was appropriate it may be that although the referral had come out of PILCH Victoria, it may have been managed by a lawyer in New South Wales or indeed Western Australia, so firms are already making those resource allocations internally.

The first half of your question about the national profession, that certainly was in our mind when we first conceived of the merger. It was more like it might be a truly national profession but it was certainly one of the things that made us think about the change, but not by no means the main one. I think it was recognising that there would be benefits that would come from a larger footprint, the ability to share resources and the express preference of our member firms that we consider this.

MS MacRAE: Are you able to say a little bit more about how you choose the service? I'd just be interested - you talked obviously some individuals that get help and not for profits. Do you see there's a bit of a gap there for small business or can they adequately - no-one I guess can adequately access services in this whole space but we know they can go to their small business commissioners for information and advice at least. Is there a gap there at all that's not filled and is it something that could be looked at in any other way if it's not appropriate for you to - or something like your organisation to deal with?

MS McLEAY (JC): Yes, I think there's definitely a gap there but I'm not sure that it's one that pro bono would necessarily be able to respond to with any great degree of significance. There is some emerging interest in assisting social enterprises but

different firms have different views about whether or not that's appropriate for pro bono. Some take the view that any profit involved will put it outside of pro bono. Others look more at the mission, the social mission of the organisation, so I think that's probably a watch this space. In relation to the first half of your question, how do we choose? We go back to those questions that I asked. Who else is in the space?

MS MacRAE: Sure.

MS McLEAY (JC): And do we think that pro bono lawyers have the capacity? Do we have the ability as well to be able to support a response? So we're looking for areas of unmet legal need for client groups that are not otherwise accessing services. We're looking for areas where we might be able to partner with others who were running a complementary program.

In terms of our general referral work, we haven't identified a target group like we have with homelessness or older people or whatever. We're actually there quite flexible, so we've got the general principles that we apply but the detail that sits behind them can change from week to week, month to month as we hear of changes in Legal Aid guidelines or a community legal centre might call us and say, "Look, we had capacity to assist or to support these kind of people with these problems but we currently don't. Can we send them to you?" We might say, "Yes, we think we can place some more of those, so send some more." Then if our ability to place people with firms changes then we'll adjust our guidelines and be stricter on what we can accept. So there's a lot of finetuning that happens on a weekly basis really.

MS MacRAE: Would you say you do much advocacy work?

MS McLEAY (JC): Yes. We do a lot of law on policy reform work. Advocacy has become a word I think that doesn't have - it means so many things. It's open for context, so all of the clients we refer to lawyers, the lawyers advocate on their behalf but the law reform on policy work has been an integral part of the way we've operated our whole history and continues to be. It's for a number of reasons, one, because we genuinely think that that's the most effective way to use the pro bono resource. The infringements work that we do in the homeless law service is a really good example. There are large numbers of people experiencing homelessness who have infringements. They get fines because they're in public, living their lives in public, and so things you and I would do at home become visible, they are fined for that behaviour often, and also because they don't have enough money to access public transport and so on. So there's far more of those kinds of cases than any amount of resource pro bono otherwise could meet.

For quite a long time we did our very best to address as many of those kinds of

cases as came to us, but after a while we started to feel it was a bit like Sisyphus pushing the rock up the hill, and also our pro bono lawyers started to say, "Look, this was all very interesting when we started doing it seven or eight years ago, but really there's a limit to how many of these cases you can do before you start to have enough of them."

That really reinforced our thinking also that really there had to be a smarter way, a more efficient way, a more effective way, and so that encouraged us to continue to be more active in that space and to go to government and say, "Look, it's not in your interest either to have all of these people in the system who are never going to be able to pay a fine," at the risk, like the client I mentioned, of being locked up for not paying a fine with three children who will then become in the care of the state.

It just doesn't make any sense and we find that government wants to hear that information about how their policies are actually playing out on the frontline. They're trying to bring about good in the community as are we, and so our approach is always to go to policy makers with evidence and with suggestions and to say, "Can we work together on something that's going to be more effective." So it's very important to our work.

DR MUNDY: I think in your submission you mentioned legal health checks are useful and that's something that you guys are supporting and sponsoring. I guess the issue, one of the questions for us that was raised - I can't remember who raised it, but - is that it's one thing to develop a nice form, but it's another thing to train non legal workers to properly use the instrument, in the parlance, and I guess it's a wider question of something we've raised about the - particularly for community sector workers.

How do we get this legal education to them so they can identify people with needs so they can use the sorts of instruments you're trying to develop. We know in South Australia there's actually a Cert IV course in the TAFE system for legal training for community workers, just not more lawyers, it's for community workers. Do you have any thoughts about how that whole legal health check space and the interaction with people who work with people who are likely to suffer entrenched legal issues and how pro bono supports that and what other levers need to be pulled to get that going better?

MS McLEAY (JC): I think we would say that the best model of that is what you see and what we have called with others the Advocacy Health Alliance model, and I think Mary Anne Noone and Peter Noble probably mentioned that before. So over the last 12 years we've been running Homeless Law, which is an outreach service based in agencies that support the client group. The logic behind that is that

obviously that's where the clients are but also that the case workers can help to identify legal problems.

What we've found is that it's not enough to just co-locate a service, and it's not even enough to just have, you know, posters up and to do the odd sort of CLE. What you really need is that close, integrated partnership among all of the people that are supporting a particular person, and so the best model that you see of that is the Medical Legal Partnership, Advocacy Health Alliance partnership, and so from our point of view as we develop legal health check tools, they're very much to be used in that partner in context.

I don't think our view is that we're training health workers to be able to - in kind of law for non lawyers. They've got enough things that they're trying to juggle without an extra overlay of trying to work out - what we really want is to have a tool that can trigger for them a couple of simple questions that they can ask that they may then think, "Okay, it's time to go down the hall and see the lawyer, or make sure that the nurse books a person in for an appointment with a lawyer." So that you're just part of the general treatment or intervention that's happening, rather than a whole kind of overlay that goes over the top.

DR MUNDY: Okay. I think that's probably about it.

MS MacRAE: I think so.

DR MUNDY: I think one of your submissions mentioned - or we might have made it up - but online volunteering. Do you have many observations?

MS LYONS (JC): I think we very briefly mentioned that in our reference to Michael McKittrick's report on volunteering at community legal centres. I think he explained that as one of the things that CLC should consider if they wanted to tap into a new generation potentially of younger volunteers. So our thoughts on that?

DR MUNDY: Yes. I mean, I guess it's more in the context of - and a number of CLCs have suggested to us, who have quite big pro bono programs like Redfern Legal Service - and it's in part about the discussion about where CLCs are located, but one of the points they make is that if you're going to be located in a capital city and you want to procure pro bono assistance, best you be close to the CBD because that's either where the pro bono lawyers are going to be working in their day jobs or they'll probably live closer to the city than otherwise.

I guess the issue with that is the extent to which - and Martin J in Western Australia attentioned the fact on Friday - that there are no private lawyers between Geraldton and Broome, yet there are places like Port Hedland, Karratha, Mount Tom

Price, those sorts of regions where we probably would expect the odd civil problem to come along, and I'm just wondering whether that sort of online environment is something which people could be provided advice online in some way on a pro bono basis, and it wouldn't - for example, you wouldn't need to service the Pilbara from Perth.

MS McLEAY (JC): I think the question of regional, rural and remote service provision and the role of pro bono in that is a really important one. I think that you could have some kind of, you know, Internet based response that could be part of that. But I think there's more to it than that. There's some very interesting small models of what's possible in triple R work in NSW and indeed in WA, and they require again partnering between CLCs and law firms primarily, or law firms and Legal Aid Commissions.

Our view is that there's more capacity in law firms to do stuff in the regions. What's missing is the coordinating capacity that a Justice Connect can bring if resourced to do it. So identifying the right community partners in the community doing the brokering that is our sort of daily work between the clients and the community organisations and the law firms. So I think there's a lot of potential there. I think that, you know, the Skype type of idea, there are some interesting models of that both here and overseas. It does require people on both ends of the Internet line, if you like, it's not as simple as just putting a client in a room with a computer. But yes, as I say, my view and our view at Justice Connect is that there's a lot of potential there. We're very keen to explore that. But, you know, it's a big country so we need some resource to do that.

DR MUNDY: Just one other question; obviously, particularly with respect to what you might call the distribution mechanism, so appropriate IT services, that sort of thing which could be bought in rather than provided.

MS McLEAY (JC): Yes.

DR MUNDY: Do you ever get any interest from non legal firms, like for example, big mining companies or something might come along and say, "Look, as part of our community development program" - obligations, whatever you want to describe it as - "we'd like to support the provision of legal services into this mining town which we're effectively the dominant employer in." Is that something you see very often?

MS McLEAY (JC): I haven't. That's not to say it couldn't happen, but it's not something that I've particularly seen.

DR MUNDY: Not something that would bother you if they came along and said, "We're involved" - I mean, one of the big coal miners might come along and say,

"We've got an issue in the Hunter. We'd like to work with you to develop better employment outcomes or legal access outcomes for those communities."

MS McLEAY (JC): Yes, so again, our primary criteria is whether or not people can afford to pay for legal assistance, not just that there's a gap, but even if there were services there would these people be able to purchase them. So there would definitely be groups in those communities that would meet our criteria, whether they would necessarily be the focus of a mining company's attention, I'm not sure. In principal we'd be happy to have a conversation.

DR MUNDY: Yes, it's probably an indigenous community in a remote area probably, is more likely to spring to mind.

MS McLEAY (JC): Yes.

DR MUNDY: All right, that's all I've got. Okay, thank you very much for your time.

MS McLEAY (JC): Thank you.

DR MUNDY: We now plan to have a small break.

DR MUNDY: We will resume. For the record, could you please state your names and the capacity in which you appear.

MR CURRY (ASA): Ian Curry, Chairman, Australian Shareholders Association.

MR MAYNE (ASA): Stephen Mayne. I'm Policy and Engagement Coordinator, Australian Shareholders Association.

DR MUNDY: Would either of you like to make a brief opening statement?

MR CURRY (ASA): Yes, thank you. The Australian Shareholders Association supports the litigation funding system and the class actions which generally drive that. In our view, that has been brought about by the failure of the continuous disclosure system and directors and management advising shareholders appropriately of events which are affecting their share price and their company's future. We have noted that no class action at this stage has gone to court for a final decision. Companies are settling out of court, clearly recognising in doing so that they have a liability, which of course is not admitted, which would be the proper step a company would take. In all probability those actions being settled out of court are being settled for less than probably would be incurred in court.

We do support litigation funding. We believe those funders need to be properly resourced. We don't support being licensed because we think that would diminish competition and that in effect it would be a way in which these funders were muzzled or made it hard for them to take action. We have noted that in nearly all cases no directors have ever been personally liable, which we believe is wrong, and that insurers are carrying the risk which means higher premiums for everyone, and indeed that auditors and other professionals have had to pay out and in turn have been covered by their insurers. So that we believe the system as it stands today is appropriate but we would think that directors and management should be more aware of their liabilities. Thank you. I will ask my colleague to add a few comments.

MR MAYNE (ASA): We disagree with the argument run by our very well-resourced friends at the Institute of Company Directors with their 190 staff and 25 million a year in revenue that there's a safe harbour problem or there's a paucity of directors willing to serve because of the risks that they're taking. The fact that not one director that we're aware of has paid \$1 towards settling any class action brought by litigation funders or the Slaters and Maurie Bs of the world we think disproves that argument about the paucity of available directors, so we don't believe there needs to be any strengthening in so-called safe harbour.

We feel that the action of the litigation funders is effectively working like a privatised ASIC where they are going around and driving improvements in

disclosure because directors know that if they sit on bad news and they overprice their shares, they will be sued and this will threaten their reputations and potentially lead to a substantial settlement.

Overall, as far as we can tell, close to a majority of all settlement funds come from insurers, many of them offshore, so there has been, you can argue, an offshore capital contribution to the system in Australia and the system has helped contribute to IMF, which is the world's largest listed litigation funder, an entrepreneurial Australian company which has grown to be capped at north of 200 million, and equally Slater and Gordon is the world's biggest listed law firm. It's quite unusual for a jurisdiction like Australia to produce two world-scale outfits. In Slaters it's only a minority of their profits, but in part from this system, where in many of the companies that have settled - and if you go through the list, there are the GIOs, the Transpacifics, the Nufarms and the AWBs, they were sitting on bad news. They should have disclosed it earlier. They did mislead shareholders and that is why they settled, because they hid bad news. Sunlight is the best disinfectant. A culture of transparency - get the bad news out early. That is a system we should encourage and no-one would get sued if they could show that they weren't sitting on bad news.

All these settlements suggest that discovery would be very embarrassing for the directors in terms of hiding bad news, effectively leading to a misinformed market and shareholders who buy into that misinformed market losing money and in the end being rightly compensated. I guess for those reasons we think that there isn't a need for a heavy-handed regulatory intervention; that small shareholders are getting access to justice that they wouldn't get without litigation funders supporting them.

Our biggest issue in terms of any regulation is the capital adequacy question where you don't want a fly-by-nighter coming along, suing a top 50 company and then getting an adverse cost judgment against them and not having the ready to fund that. I think the capital adequacy of those approaching small shareholders seeking money from them is probably the most important area in terms of any regulatory intervention to ensure that they have got the ready to back up their initiation of a class action. Clearly with the likes of a Slaters or a Maurice Blackburn or an IMF, it is clear that they do have the capital adequacy to follow through.

DR MUNDY: Thank you for that. Mr Curry, you indicated that perhaps those who were recommending regulation of litigation funders were trying to muzzle them. In fact we have made that recommendation precisely for the reasons that Mr Mayne outlines, to provide appropriate prudential supervision of these organisations. I think that is an unfair representation of the views of the commission and indeed of IMF Bentham who also support regulation in this area, just to correct those facts.

Maurice Blackburn when they gave us evidence earlier today suggested to us, and I think this may be right - I mean, essentially what we hear is ASIC-light, but the point is that these settlements are occurring in private. Directors aren't being held accountable. Whether or not they should be held accountable and whether they would meet the test more generally, they are not being flushed out. They may well be repeat offenders. Is it your view, bearing in mind that our concern is not only securities' based class actions but things like the ANZ fees case and things like claims for dodgy hip implants - so we are obliged to consider this matter more broadly than just this case. Is it your view that this is an inferior solution to proper regulation of directors by ASIC or is it a preferred outcome, perhaps in a range of circumstances?

MR CURRY (ASA): In an ideal world of course there would be no need for anyone to take action. We think that there are steps in this position where companies through their directors and management need to disclose better. We think ASIC has a role there but ASIC has its own challenges in terms of resources and probably in the future would find it more difficult to cover all the situations it needs to. If you like, the privatisation of ASIC's role is a next step because that is the only next step probably available to the people who don't have the capacity to do something on their own.

MR MAYNE (ASA): I would probably add that over ASIC's 24-year history, I don't think they have had a stellar track record of going after directors. I have published previously lists of everyone who has gone to jail and it is the proverbial financial planner from Tootgarook who wasn't meant to manage a super fund who has been prosecuted and it is not top 200 company directors, so no-one from Babcock and Brown. 10 million disappeared. No-one prosecuted anything. I think the record has been sort of a tardiness to take action and when they do take action, they get a massive response so Fortescue, 15 million later; James Hardie; Centro - a huge cost to the taxpayers to get modest slaps on the wrists and modest fines in court; whereas this system is more market-driven. It is more professional and they go where there are precise issues.

A scoreboard question here: scoreboard ASIC; scoreboard class actions. A billion dollars plus in settlements; not one gone to trial. Directors cave in all the time; whereas ASIC when they take on the big ones - fight, expensive, lots of money and then a mixed record. I think the private model is working quite well.

DR MUNDY: It was put to us on Tuesday - and this is by people who are concerned with an Americanisation of the Australian legal system. You will be familiar with the rhetoric, I am sure. One point they do make is that because these actions take a significant period to settle, they create significant distraction in the company; they may suppress share prices. Evidence from the US is cited in this

regard.

The subtext is that these claims aren't meritorious and if they had run to court, then they would get knocked off but because of just the cost and the distraction of this lengthy pending litigation, companies settle them even if they were of the view that if they went to court, they would be successful. Do you have a view on either the statistical factual basis of those claims or even the behavioural basis for those claims?

MR MAYNE (ASA): I think that the directors are very concerned about their reputations. I think that is a driver in part as to why they are settling. The distraction issue is legitimate. You do hear it all the time but a lot of people have litigation going on all the time. I mean, litigation is just a part of life. Why you have to settle this sort of litigation as opposed to other forms of litigation, I struggle to see why it is, except that it goes to the heart - discovery goes to the heart of communications between management and boards on bad news.

As I said earlier, I think they are settling to avoid public ventilation of that discovered material in part and I just think the cases that have settled with the big dollars - you can see why. I have been a shareholder in all those companies. I hold 6 million stocks just to experience being a shareholder. All those ones that have settled have had a pretty strong case and it hasn't surprised me that they have settled, because they have done a shock downgrade which should have been announced earlier.

MR CURRY (ASA): There hasn't been a huge number of these when we look at the number of class actions that have been run over the last decade, let's say, or going back further to GIO which was probably more than a decade ago. Even the ones that are being talked about - some are talked about but never proceed of course. They have been so few compared to the American experience that I think to try to compare the two jurisdictions is not a fair comparison.

DR MUNDY: Mr Mayne, you mentioned management and directors. Is the agency problem in this the relationship between the directors and the management or between the directors and the shareholders or both?

MR MAYNE (ASA): It's definitely both. Every situation is different. I mean, I am in a sense management; Ian is on the board. Sometimes I won't tell him bad news. That is human nature. At the City of Melbourne, I am on the council and the management there sometimes won't tell us bad news for fear of how we will respond to them. My best guess on that is that the problem is more on the management side, not wanting to tell the board their bad news because they will get fired and they have got a lot riding on it with big incentive schemes. I think they sit on things, but the

board needs to be creating information flows, mandated information flows that give them line of sight into any form of deterioration so that the risk framework - boards should be responding to it but my guess is that on history, it is more management hiding stuff from the board, rather than the board deliberately hiding stuff from shareholders.

MS MacRAE: Just in relation to our recommendations or draft recommendations specifically, how do you see lawyers themselves entering this space? Would you recommend that they should be able to fund cases or should there always be a litigation funder involved, so should lawyers be able to charge contingency fees and if they can, should they necessarily have to bear or have the ability to bear an adverse cost order as a litigation funder would? Then the final part of the question is, should there be caps on those sorts of fees to ensure that not too much of the damages goes to the funder, be it the lawyer or the litigation funder rather than to the participants in the class action? Sorry, that's a lot of questions all rolled into one.

MR CURRY (ASA): Yes. On the fees side, typically the fees might be around 30 per cent but they will be taken on a judgment or however it's arrived at, that'll be around that figure. We think there are some issues around the way in which class actions are presented to shareholders inasmuch that's it's no win, no fee but there's no, generally, up-front when you talk about fees or costs if you lose and that does need to be dealt with better.

As to whether a law firm itself should, if you like, be the funder and the representative of the shareholders, I think there's a case for separation because there are two significant pieces of activity involved in looking at the class action value, if you like, and then taking it through the court. There's two stages there. Again, if a law firm was to be the one party involved then it would need to be the same financial capacity, the same capital requirements in their case.

MS MacRAE: Yes.

MR CURRY (ASA): In most cases they're not listed. They're companies generally these days or they're set up in a form which tries to limit their liability but they wouldn't be, I think, as strong as having a separate funder.

DR MUNDY: That's one of the reasons why we would expect someone to hold a licence from ASIC so that an assessment by a competent regulator could be made of their prudential position. I think Maurie Blacks gave us some evidence earlier today where they suggested they could - they're running a class action in respect to bushfires which they're able to pull on their own balance sheet, it appears, and that's on a no win, no fee, conditional basis, I suspect but they could not have brought the ANZ fee action as well, so our interest in contingency fees is ultimately to provide

competition for the litigation funders.

Our expectation would be that they would all be regulated in a consistent way and we were assured by the Chief Justice of Western Australia on Friday that the superior courts where these actions would be heard could happily regulate the ethical issues that are raised. Is that something that would fit comfortably with you?

MR CURRY (ASA): Yes, that's a reasonable position. Certainly the IMF's margins in Australia are getting up around the 40 per cent mark. That \$42 million cheque they got out of Centro was an eye-popping big cheque, and I was at a Maurie B conference on class actions a few months ago and I heard the comment made that in the US the margins are more around the 18 to 20 per cent mark, so if you are interested in competition, I guess barriers to entry from no win, no fee being prohibited may leave the field to a smaller number of players.

I guess from a small shareholder point of view you just don't want six different small law firms bombarding shareholders and soliciting because I think the risk would be on the multitude of actions, confusing shareholders and everyone competing. Centro was a bit unseemly when you had Maurie B and Slaters running separate actions and each trying to attract more shareholders. It's best if they came together. There should only be one class action and so a system that doesn't have five competing is probably better so I would have thought - - -

DR MUNDY: But that was the funding issue. That's what we have now and the problem is we have very little competition for funders and the likely entrants, because they've told us they will, are the plaintiff law firms properly regulated. Just on the question of - and we had this discussion with Maurice Blackburn earlier today. It has been suggested to us that if you were to allow contingency fees you might put a cap on them, and they suggested 35 per cent but let's not worry about what the - but it's going to be a number like that with probably a three in front of it. I think they made the observation that funded outcomes are in the 35 to 40 per cent range or 30 to 40 per cent range plus about another 12 per cent for the lawyers, so that's where the resources are going.

Their suggestion was that a cap on the percentage take in a contingency fee arrangement might actually serve to cause the funders to sharpen their pencils a little bit because otherwise now there's a question of what the capital capacity of the plaintiff firms to bring these actions really is, but that's a regulatory question that will result over time. I'm also mindful there are a lot of concerns which are expressed by thoughtful people, particularly on the bench, about funding and contingency fees. Would you see a problem with the imposition of a cap at least for an initial period if we were to allow a contingency fee as almost a way of giving the community some assurance that the lawyers weren't just going to go gouging?

MR CURRY (ASA): I'm not married to a lawyer. I know - - -

DR MUNDY: Some of my best friends are lawyers.

MR CURRY (ASA): Yes, I know and I've been sued a few times over the years. We haven't conferred on this but my view would be yes because there's always lawyers who know how to charge and charge like wounded bulls, so anything that protects, because often people are first time litigants, don't know what they're doing. There's an information asymmetry between the person promoting the class action and the free ride. If you can get something for not much, so something that protects the voiceless and the first timers - at ASA we spend quite a bit of time thinking about the non-participating ignorant shareholder, how the system protects them. They are the biggest losers in our system in Australia, so something that protects them, not something that's too low where it's uneconomic, so with a three in front of it probably sounds reasonable.

DR MUNDY: Yes. If you want to think about this and particularly that whole question and come back to us, we'd be more than happy to get a short note from you just if you want to think about it and talk about it a bit more because I know it's an issue you obviously haven't thought about. We'd be more than happy to - because we are interested in the consumer. For us, the big issue here is the consumer protection angle, both from the active willing participants in the contingency fee arrangement or the funded arrangement as opposed to the inactive one to whom someone must have a duty.

MR CURRY (ASA): Yes. We don't want to see an ambulance chasing the system in the investigative arena or the employment arena, as in both employment and accidents.

DR MUNDY: I think that's an arguable proposition but the other issue I guess is the question - it has been put to us and it's our own analysis that the presence of adverse costs orders is a significant break and on the sort of conduct that is alleged to occur in the United States in particular. We note that there are other similar jurisdictions where adverse costs orders exist where this behaviour doesn't appear to have occurred. Would you see it as an unreasonable fettering on the trade of lawyers and funders if the regulatory framework required them in most circumstances, particularly in relation to where there are small participants in the class, to accept the consequences of an adverse costs order rather than allow that to flow through to the members of the class as a way of putting a break on unmeritorious litigation? We understand at the moment typically that's what happens and whether we should insist upon it in all cases.

MR CURRY (ASA): Typically it's passed on to the class or typically - - -

DR MUNDY: No, typically the funder will wear the adverse costs and I think that's one of the attractive incentive characteristics of the regime.

MR CURRY (ASA): I agree, so I think that you pay 500 bucks and that's it. You're in.

DR MUNDY: Yes.

MR CURRY (ASA): That's one of the good things about it. It has had 28,000 GIO shareholders signed up and, yes, because the system is working like that now in practice. If that was codified and locked in, ie, to protect the class members, it may reduce activity a little bit but I don't think, given the track record in Australia, that it would kill the industry or - - -

DR MUNDY: Maurie B was telling us today there's probably only three or four a year, so it's not a big thing to kill.

MS MacRAE: I think we have asked most of the questions around this particular matter.

DR MUNDY: We do I think in the report acknowledge that we do think litigation funding in the broad - I mean, one of the concerns I guess that we have is that all the heat in this debate is around securities-based class actions. It's not for, as I said, dodgy hips or no-one has raised concerns about the ANZ fees matter.

Perhaps the last question, and you alluded to it before, is that this is effectively, if you like, a supporting tool on the policy armoury to enforcement by ASIC. Is the most efficient way of dealing with these sorts of concerns about directors these frameworks or are other forms of law reform preferable or needed? Are there supplementary or complementary public policy initiatives that could be pursued to address the issues that are of primary concern to you and your members?

MR MAYNE (ASA): About director accountability?

DR MUNDY: Yes.

MR MAYNE (ASA): Yes. I mean, it's amazing that a privately owned company, the ASX Ltd, has been able to come up with a set of rules that have led to a billion dollars of settlements, so ideally it would be in the Corps Act as opposed to just in the listing rules because the ASX can change the listing rules whenever they like. They can say, "We don't like continuous disclosure because it's costing our directors.

Therefore, we all vote to take it out." I think that Australian listing rules have a surprisingly large amount of power and clout relative to the legislation compared with other jurisdictions. That might be one change.

I guess one other little comment I was going to throw in is I have noticed in The Australian newspaper they seem to be running the line quite aggressively, coming ultimately I think out of the American Chamber of Commerce into the Australian market, and it has been quite a vociferous campaign they have run which the attorney seems to be quite interested in. I just note that there have been a number of class actions against the owner of that newspaper who personally doesn't like class actions and I get a sense there's a little bit of, "We wouldn't want that happening in Australia," so I would simply say read those comments with a grain of salt and think about the interests of the proprietor in pushing that particular line because it has been a very aggressive one-sided argument they have been running over a few months now.

DR MUNDY: All right. Thank you for those observations. We might draw this to a close. Thank you very much for taking the time on what I know was relatively short notice, so thank you very much.

MR MAYNE (ASA): Thank you.

MR CURRY (ASA): We will hand these forms to someone.

DR MUNDY: We have now the Office of the Public Advocate. Thank you. Apologies if bringing you on a little earlier is inconvenient. Could you please state your names and the capacities in which you appear.

MR GRANO (OPA): Yes, my name is Philip Grano and I'm the principal legal officer of the Office of the Public Advocate in Victoria.

DR FEIGAN (OPA): Mark Feigan. I am senior policy and research officer with the Office of the Public Advocate.

DR MUNDY: Thank you. Would either, or both of you for that matter, like to make a brief opening statement of no more than 10 and preferably no more than five minutes?

MR GRANO (OPA): Certainly. If I could just outline what we thought we might cover, which would be helpful to you, where we thought we might be most helpful to you. One would be the legal health checks in relation to people with a disability. The second area where we thought it would be useful for discussion is a single entry point for legal assistance; a little bit about supported decision-making for people with a disability and how that impacts upon being a participant in the legal system; and then a couple of issues that are specific to people with a disability in the legal system: litigation and guardianship. I don't know whether you have had much opportunity to consider that.

MS MacRAE: No.

MR GRANO (OPA): It's a role that the Office of the Public Advocate is being asked to undertake for people with disabilities, with cognitive impairment, and that creates complications for the legal system and for us because we're not resourced to do it. Then I would like to talk a little bit or perhaps field questions in relation to the court's alternative dispute resolution and inquisitorial jurisdictions.

DR MUNDY: Off you go.

MR GRANO (OPA): That's my introduction. I thought you may have questions about that. In relation to the legal health checks, disability advocacy services don't figure in your report at this point and I'm not sure whether you have heard much about disability advocacy services.

DR MUNDY: We had DANA before us on Monday of last week.

MR GRANO (OPA): Okay, great, because they are I suppose a body where people with disability get an opportunity to raise issues there. Whilst some of them are legal

advocacy services, most aren't and most provide a way of getting justice or getting some resolution of issues that arise for people without resort necessarily to legal processes, but using things like policies, procedures, to say you are not approaching this personally in a way that they are meant - receive services. So that provides, I think, an important avenue for people with disabilities to have a voice that they would otherwise not have without going to litigation.

I think that's particularly important because most of the issues that people with disabilities usually have to deal with are service issues and getting litigation in relation to services is particularly difficult and how services are funded - they're usually funded through government. I think that one thing, though, that has happened over recent years has been the diminution in the value of those advocacy services and the role that they play in the lives of people with a disability and it would seem to the office that their augmentation would assist people with disabilities to resolve a lot of disputes without the costs of litigation and so forth.

DR MUNDY: You hit on something which we are very keen to continue to explore but, sadly, this inquiry keeps getting dragged back into the courtroom. Would it be fair to say that these disputes arise because of a lack of training on behalf of the staff of service providers, an absence of appropriate dispute resolution mechanisms when the problem first emerges and a lack of adequate resolution processes?

MR GRANO (OPA): It's hard to identify those specific things. Perhaps I would identify that because the service system itself is under-resourced, it tends to cut corners and when it cuts corners, people fall out of getting the service that they expect and would have enriched their lives. Having mechanisms such as the Disability Services Commission, which we have in Victoria, we now are getting under the new Mental Health Act a mental health complaints commissioner. We have a health services commissioner but that's in relation to health matters.

Whilst they do a particular role, there has to be strong processes within organisations themselves to deal with complaints so that advocates, or even family advocates, can pick up on those policies and run with them and make the running there. When these things often get reduced to litigation you run into all the complexities of a person lacking capacity and then who is going to litigate and where do you get instructions and how will it proceed? All those become impediments to the effective resolution of the matter. I think services could be better informed but I do think it is in part due to the fact that people are trying to cut corners somewhat in the way they deliver services too.

DR MUNDY: Does that mean that these disputes - and accepting the budgetary constraints as what they are, part of the problem here is a failure on the part of service delivery agencies when they are trying to cut corners is a failure to properly

manage expectations of service users, because service agencies don't want to go through the heartbreak of turning up and saying, "What you used to get you're not going to get now"?

MR GRANO (OPA): I don't think it is just that. I do think there is a problem in the field of the squeaky wheel gets the services and therefore those who don't have an advocate can really miss out and get the raw end of the stick. You have got to be careful about managing expectations. A lot of the expectations are legislative. They are also in policy documents which have given people expectations of having lives that will be lives in the community and having expectations about that as a reasonable thing within Australian community. I don't want to diminish those things for those people and say that they shouldn't have them because of a lack of resources.

DR MUNDY: I guess what I am trying to get at is ways - I mean, one of the ways of reducing unmet legal need or unmet need in relation to dispute resolution is to better manage the processes that themselves lead to dispute. I guess that is what I am trying to do, trying to understand what the cause of these disputes is and can they be dealt with in a systematic way, as opposed to them having to end up in even the best - even the best dispute system in the world is a worse place than a dispute - well, not quite but in many cases it is a better outcome and I suspect a cheaper outcome than a dispute avoided.

MR GRANO (OPA): Perhaps if I gave you an example of the sorts of disputes, a person lives in a group home, a person with an intellectual disability, and they are in dispute with another person in the home and they are not completely compatible. The service is not really dealing with that in an effective way, either by bringing in further resources or some behaviour management or attending to the conflict between them and so that escalates. There is then an incident. The incident then gets drawn to the attention of a family member or a community visitor or someone of that ilk. Then it gets a report. Then it becomes a matter that gets reported to the department. Then you might have a process where that matter is investigated and why weren't steps taken earlier and what can be learned from it?

It is true that perhaps if the people at the coal face in the first place had identified the incompatibility and the issues and tried to have something done it about quickly, the whole thing would have been prevented from happening. I think that can be a problem, that sort of issue. It takes a number of layers before it actually gets revealed and dealt with.

MS MacRAE: Just coming to mind about what causes some of these disputes, we heard from the Public Transport Ombudsman this morning. She was very frank with us about, since she has been in the position, how much work she has had to do coming into that position to understand the needs of people with disability and how

much work she is putting in, trying to make connections with a whole range of service providers for those people so that she can better understand the needs of people and what is a large segment of the population that she would be interested in hearing from.

I would be interested in your views about how much of this lack of service provision - some of it is funding. I just wonder how much of it might be pure ignorance. When you get in touch with some of these service providers, for example, if you were the advocate and you say, "This person was finding it extremely difficult" - for example, she was saying for someone who is hearing and sight impaired, just working on which train to get on or where you need to go for the bus can be very challenging. Is there an element of ignorance here and is that something that will need to be addressed to try and meet some of this unmet need?

MR GRANO (OPA): I think in mainstream services that would certainly be true. Even though there are disability standards under the Disability Discrimination Act, people's awareness of those or their implementation of them if they are aware can often be poor. I think in relation to transport - but I know originally there were problems with myki, for instance. If you were in a wheelchair, you sometimes couldn't reach up to actually touch on and touch off, and practical things like that. Also impediments around transport can be just simple things, barriers that are put up by workmen who forget that the pathway needs to be available to someone in a wheelchair. These are simple things. If you had to push a person around in a wheelchair, you would not make that mistake.

MS MacRAE: Yes.

MR GRANO (OPA): It is true that one does at times despair that people do not have a mindset because they perhaps haven't had the experience of being a person with a disability or helping a person with a disability. These things do matter. I am glad that the commissioner is taking on board those things. On the way here we were remarking that issues that we raised in the 1990s about access to trams - and we came here using super stops. There is progress.

MS MacRAE: Yes, slow as it might be if it was 1993.

DR MUNDY: Just in relation to adversarial as opposed to inquisitorial matters, I think you raised these in your opening remarks. Our understanding is that the guardianship list in VCAT has a more inquisitorial character to it, whilst the Children's Court which I think you occasionally appear in has a more adversarial character. Can you give us a sense of the pros and cons of both, particularly from the perspective of the disadvantaged person involved getting access to a decent and just outcome?

MR GRANO (OPA): The guardianship list at VCAT - the supervising legislation requires the tribunal to act in the best interests of the person so it is not simply a contest between the parties and the information the parties put before the tribunal. The tribunal has its own legislated onus to act in the best interests, so if it considers that there is insufficient information before it upon which to adjudicate, then it is possible that it can then seek from the public advocate an investigation that goes to the issues that are unknown and seek a report. In fact if it does that, it cannot adjudicate on the matter until it has received the report.

That provides a way of checking that goes beyond the evidence that is put to the tribunal by the parties. I think that is particularly important where one of the parties, it is alleged, will have a cognitive impairment and therefore will be at a disadvantage compared to someone who does not have a cognitive impairment involved in the same litigation.

I think that generally works very well because it gives the tribunal an opportunity to collect all the information it needs. It also depends somewhat upon the ability of the Office of Public Advocate to do the investigation. Those investigations are rarely done by lawyers. They are done by people from a variety of backgrounds, a variety of skill sets, who then put a report to the tribunal. The tribunal looks at the report. The report is made available to the parties if they want it and they can interrogate the author of the report as to the information they have found.

It also has the advantage of bringing forward players in this matter who otherwise wouldn't know even about the litigation. I think that is particularly important, that there are other perhaps protective people, other family members, who don't know anything about it. That's the pros of it.

The cons I guess are a little bit about - is it as robust as the adversarial method? I think I'm unsure about that. At times it can be very robust. People will be represented. The lawyers will cross-examine the witnesses in great detail, so they can be robust. At times, though, I think there can be an over-reliance on the information that perhaps is provided by the public advocate because we don't always get all the information, so I think that can be a bit of a down side at times.

I compare that, though, to the litigation we have had in the Children's Court where the person has been found - this is the parent, often the mother - it has been I think almost exclusively the mother, and there is a protective application in relation to the child, so someone has determined that the mother doesn't have capacity to pursue that litigation, "Let's appoint the public advocate to stand in her shoes and make the decisions that she would make if she were a competent person in the

litigation."

When we have been involved in those initially we approached, and I think we still do, that everyone there is really trying to do what's best for the child, but we did find that the adversarial nature of it meant that people became defensive about positions rather than open about positions. They would be protecting their patch rather than exploring solutions.

We found this particularly diminished resolution of issues in a way which was constructive, particularly for the parent, so we might promote, "Okay, we cannot adduce evidence that means that there could be reunification of the mother and child. However, we think there needs to be greater effort in terms of access, keeping the relationships alive and so forth." That won't be permitted because these particular orders don't even give you ability to have access orders. Access will be determined by the guardian and it's hard to negotiate, so particular orders really put you on the back foot of being able to negotiate solutions for people.

DR MUNDY: Whereas if it was a matter in the Family Court about access of one parent to the child and one parent has custody, the court can make such orders.

MR GRANO (OPA): Indeed.

DR MUNDY: What you're saying is, for example, if the child ends up being a ward of the state, the guardian gets all the rights, whereas if there's a custodial parent, the courts are actually able to make orders that facilitate access in a different way.

MR GRANO (OPA): That's true, and I have got one of those at the moment and the other dilemma that is coming up in that case is the costs associated with the litigation. Where I'm standing in that, I am running up costs on behalf of a person who really doesn't have much in the way of funds and so my dilemma is trying to settle the matter in such a way that I do not exhaust the funds to do it. In that jurisdiction I'm not likely to get a costs order against me, but in some jurisdictions as litigation guardian if I lose the litigation I will get a costs order against me. We have had to say to the Supreme Court on two occasions at least, "We don't have the resources to run that risk of a costs order against the office," so the litigation just stalled.

DR MUNDY: We talk in relation to public interest litigation about protective cost orders. This is probably not quite the circumstance we had in mind but there is no capacity or a lack of willingness on the part of the Supreme Court to provide a protective costs order?

MR GRANO (OPA): I haven't been in a situation where that has been sought. We

have approached the other side and said, "If a litigation guardian is appointed, will you forego a claim against the litigation guardian?" There have been some occasions where the other side has decided to do that because they wanted the matter resolved, but there have been occasions where that would - - -

DR MUNDY: But there's no capacity for the Supreme Court to provide a protective costs order?

MR GRANO (OPA): I don't know. I don't know about that. We usually act by lawyers in these things, often pro bono lawyers. They haven't raised that particular issue as a protective costs order could be made.

DR MUNDY: The other party to the litigation is typically Children Protective Services?

MR GRANO (OPA): In the Children's Court that is so. We don't have an issue of costs there. It's more where you went to the Family Court and then went from there to other courts where there has been civil litigation perhaps more over money. That's where we have run into the costs issue more particularly.

DR MUNDY: Okay. Not so much over children.

MR GRANO (OPA): No. Costs is not an issue over children.

MS MacRAE: You mentioned in your opening statements about legal health checks. I'm just wondering if you could give us a little bit more information about who you think is best placed to do those legal health checks for people that have cognitive impairments and mental illness.

MR GRANO (OPA): We were thinking about this in terms of those disability advocacy services and what Mark found today was an interesting publication put out by the Disability Advocacy Resource Unit which has some figures in here around the sorts of complaints made to disability advocacy services in the last financial year, which I thought you might find interesting. I haven't had a chance to look at it fully, but I suppose it shows you a variety of matters that they have been asked to look at.

Education was the number one issue, disability services, accommodation, other, then health, family, legal, abuse and neglect, leisure and recreation, transport, employment, built environment, gender. That gives you a variety. Because disability has unique issues to it, I would think that a generalised legal service wouldn't know or wouldn't be able to identify the specific issues for people with disabilities.

MS MacRAE: So education is the number one issue?

MR GRANO (OPA): Yes. I'm surprised about that.

MS MacRAE: Would that be children being excluded from mainstream schools?

MR GRANO (OPA): I haven't got to the detail of that but I assume that that may be one of the issues, yes.

DR MUNDY: If you're able to share that document with us, if you could leave it with Mr Irwin on the way out, that would be most helpful. When we discussed this whole question of legal health checks with DANA a week ago now, they suggested that what needed to be done is much more than just the promulgation of a form which advocates or whoever could fill it in, but that some training would be required so that advocates could in fact properly administer whatever the instrument was. Would that be your sense?

MR GRANO (OPA): Yes. We were discussing this and one of the things we noted was that just having information in and of itself doesn't help people. You need to be able to apply the information to the particular circumstances you're in. I think with anyone in advocacy it's being able to identify what is the legal issue, the advocacy issue, and then saying, "This is where you might go for this particular expertise," or, "I could ring them and find out a bit more and get back to you on that." I think it does need to be a bit more than just filling out a form. There needs to be - - -

MS MacRAE: You need to be able to action it.

DR MUNDY: Some training, which then involves issues around people in regional areas and how do you get the training to them and all that sort of stuff.

MR GRANO (OPA): Yes.

DR MUNDY: Yes, okay.

MS MacRAE: Do you have any feel for the sort of scale of funding that might be required to make that operational?

MR GRANO (OPA): I don't, and I wouldn't - as a lawyer it's not my field, I'm afraid.

DR MUNDY: DANA would be the best people to ask, I suspect.

MR GRANO (OPA): Yes, I think that would be the better idea because - - -

MS MacRAE: And we did ask them that question.

MR GRANO (OPA): - - - I don't want to - I was in a Community Legal Centre at one stage that was funded by the advocacy program. It was Villamanta in Geelong. It was for people mainly with an intellectual disability but for people with disability generally. We had an advice service as well as case work as well as community education. So it was a traditional CLC model and it was statewide for that particular group of people, but I think, as I was there it was increasingly difficult to provide the statewide side.

DR MUNDY: So it was a specialist CLC?

MR GRANO (OPA): Yes, it was.

DR MUNDY: How did it - I mean, this is just a more general question because it's been put to us that for lots of good reasons specialist CLCs seem to be clustered around central business districts and, if not, in suburbs perhaps like Fitzroy or universities close to or whatever. Geelong is a reasonable journey from the centre of Melbourne.

MR GRANO (OPA): Villamanta is in Geelong.

DR MUNDY: Did that present any - did you ever think - did people ever think about moving to Melbourne or is that where it had grown up and the volunteer and support network was there so to move it would have ripped that sort of thing apart.

MR GRANO (OPA): It was considered at one stage, moving it to Melbourne. I don't think we really had the resources to - rents were cheaper and things like that, were cheaper, so we gained some level in moving to the city we would lose in other ways. Also Melbourne and Geelong aren't that far apart, so it did prevent more access to the north-east of the state but, you know, a lot of the work was done on the telephone system too.

DR MUNDY: Okay. Thank you very much for taking the time to come in and see us today.

MR GRANO (OPA): My pleasure.

DR MUNDY: Could we have Jemal Abdelrehem, please. Could you for the record please state your name and the capacity in which you appear.

MR ABDELREHEM: My name is Jemal. I'm not a lawyer or representing any company but I think the last 12 years I have been full time doing this issue so I think it will put me in a position where I have the knowledge required to be addressing you on very good points.

DR MUNDY: Could you perhaps make a brief opening statement of about five minutes and then Commissioner MacRae and I will have some questions for you.

MR ABDELREHEM: One point I'd like to mention is the overcrowding of the court system and overcrowding of the services and I would think not individual incidents have to be looked at here, but the main cause for this overcrowding. When, for example, as my experience, when there is a legal issue between a very weak person and very strong individuals or groups, that creates, just triggers more cases, unnecessary case, and then the courts are full of small issues and the person, the victim, cannot deal with all this at the time. To a degree, one legal issue can trigger 100 legal issues in some occasions because the victim is under siege and sanction.

I myself, I left my job of 20 years without even asking for redundancy because of stress which was a result of dissenting and still the problem is not solved. All those who are coming and speaking here have passed through them one by one, and it looks like they are looking at the new one coming issue and then the next one and then the next one, it goes on and on. So my conclusion is I come from cost control background and I am an engineer. I am very good at fault finding in other areas and the cost comes with it and I have a background of political economy and all this combined, it gives me the chance to be able to address a point which is central to many points.

As I read across the draft report I found out that there is no word called "corruption" mentioned there, but I feel it, whenever I am reading I feel that it is there. Everybody wants to increase their income. Some factory workers might try to work overtime to profit more. Some organisations they are trying to do anything to increase without seeing the consequences to others, and so the costs, sometimes they don't want it to end and sometimes they don't want the queue to end, because that is their justification for asking for more funds or asking for more money, and I saw this myself, I went through it, and I can tell you that I survive it, but maybe there is a lot of people that are not surviving incidents like this.

I have to be proud of what I did and up to now I have written like over 20,000 pages, most of them handwritten, on trains, on trams, to government departments and legal bodies, but I was dealing with any problem which comes now

and forgetting the main core of the problem because you are stuck in there. So corruption plays the main role in here, and where you can - judgment is jagged by comparison, with the case at issue, issue or whatever, and comparison is about measurement. When we say equal, being treated equally in front of the law, for example, it means fifty-fifty, being treated equally means fifty-fifty which is equal. The equal sign is mathematical, it is not legal issue.

Then when you say again equal opportunity, it is equal, but where do you measure corruption. When you're trying to go to a case which is very clear and easy, you find breakage, you're hitting a brick wall every time, and then this is where you measure the corruption, how much it's widespread. Corruption is not done openly, it is in secret and then also it is investigated in secret, then also talking about it is secret, because not many people will address it as a main core reason, but I say it is just there, everybody feel it.

So what happens is, after long time, the people who keep the secret and have been a secret society, because they have to compromise each other, and that is the history, the world has been always like that. Now, sometimes also, because the disadvantage, like me, is that with person nobody wants to bother. Maybe a judge or maybe someone very important have done mistake to this little boy, they will try to cover it up, so the mistake brings another mistake, and so on and so on it goes.

So my measurement is for this - it is - when we say "double standard" it also means times two, which is mathematical again. But there is triple, there is quadruple, there is whatever. So the words cannot be put into figures and be calculated. But the decisions which come from the judge, the words which are said, the steps you have taken, all this, are like mathematics, you can't calculate them and find out, and the legal system didn't come up with this here. We call it half-full, half-empty measurement, which looks like equal, but full and empty is two opposite things, and the system seems to work the same way.

Where can improvements be made is starting to follow the one goal and where it ends up, before just finding or whatever. Because sometimes, when you go - for example, I give an example where three or four people, who came together because everybody have a legal issue - so we've got legal service, we've got the Law Institute of Victoria, we've got all this and that. We're spending our time, we're wasting - somebody stand with us, that's all public money. They are paying rent, they are paying telephone or whatever, but then if you ask what did the victim get, sometimes you get nothing. So that is public money. Sometimes it's used to break you instead of giving you access.

But in all the ways, they have the information, they collect the information. I don't know where that information goes at them. An example is the Law Institute

of Victoria, in one instance, which was the advice to go and see a lawyer, and that advice was, the legal system is not always perfect. Just understand that this is a big problem, and you are right, but the legal system is not perfect. So to get that answer, the government or whoever is paying for that. The legal service is sometimes similar, but it is not in every incident. When it's against - a very strong person against a very small and very weak person, and I am talking about what I experienced, not what I read or what I heard or whatever. So this has to be addressed, and that corruption, existence of corruption, has to be clearly shown in any draft report or any decision made, because it is reality.

MS MacRAE: I understand the point you make about power imbalances and how you can have a very small party and you can have a very strong and powerful and well-resourced party, and our justice system does try and take those things into account in many respects, and I'm wondering if you've got any suggestions about how the mechanisms that are used in courts and in other mediation and conciliation and in tribunals, whether there are ways that you might suggest that that power imbalance could be better accounted for than they are under the existing processes.

MR ABDELREHEM: I have to say, there is a lot of improvement without just - maybe I am talking about the past. I saw the difference. There is a lot of improvement. But that damage has happened to some. But at one stage there was a network. A network means everywhere you go there is someone there blocking your access. So they would have done things, should have been - all right, it is a matter of investigation. The investigation bodies are the same. I don't know how, but I'm a hundred per cent sure, I have kept record of every step that I did, because people underestimate you sometimes, they do wrong in front of you and you catch them, and I lost count of how many times, because they judge you poorly and they do a mistake in front of you.

Then when it gets too much, you go to the investigator, or to who - whatever, they see too many good people who have got in trouble. Nobody will stand with you because he is confronting others beside you. So everybody is scared. Sometimes they openly tell you. This is the reality. Now, if somebody have the proof, a clear proof, and too much proof, he is still going to be blocked. What they're waiting for is, at once the victim will collapse. It will be his fault for not being on time to report or to go to the court or whatever, but the victim is sick.

For example, at one stage, my letters piled up like this, and the social workers, they are telling me to send me somebody to read for me my letters, somebody which is less capable than me to read. It is not that I haven't got English language, or I can't read, but it is - because there is too much stress, even if somebody is reading for me, I'm not going to understand anything. It piles up, and then a deliberate sanction and siege comes to you, because they want you to relive that issue, and they suggest

small things to help you, and this to help you, and that. It doesn't work. You're asking for a particular thing. This is not new. It's been there for a long time. Many victims have died. Many victims have got sick, mental hospital. Many victims, they stopped doing that. Some people, they don't want to know you if you want to remind them of how they were victimised.

So I saw this by my own eyes, and I became instead - I learned from this, and every day I'm going with someone to the court, helping someone to fill their form, helping someone to understand something, and there was a lot of result as a result of that. Still, the problem is not solved. I came to this country, in a few weeks I already had a job. For 20 years I worked and then stopped, a job which will last forever to retire from. Too much stress. I cannot even ask for claims that I had, or I cannot even tell what eligible to, just too much stress led from that. Then you go to Centrelink or whatever, they don't understand, you left a job. They want to kick you to make you look for job and go to job network. A hundred times you tell them, as if there is some network in there too. Then you become homeless, then you are cleaning houses or whatever.

This happens to many people. There are people dying, you never know who killed them. There are people - happening a lot of things. The potential of the case I have has put me in a position where I have faced this all in just the very few - lucky I kept surviving. I only want to highlight that there is corruption, and it is improving, but still people didn't get through their minds and understood that there is change going on. They're doing the same thing what they always did, and this has to be - the government have to know this, and they have to also follow the people, who I have met, to check corruption, and they have to be strict.

DR MUNDY: Thank you very much for coming. Your story is really interesting, because one of the things that we are trying to impress upon the government is that not dealing with legal issues properly and quickly and effectively ends up creating all sorts of social consequences, and real damage to people in the way that you describe. So thanks very much for your time today. Thank you. We'll adjourn until quarter to 5.

DR MUNDY: We will resume these hearings. Could you please state your name and the capacity in which you appear?

MS KINGSTON: My name is Madeline Kingston. I'm a member of the community and I am not associated with any organisation.

DR MUNDY: Would you like to make a brief five-minute or so opening statement and then we will move on to questions?

MS KINGSTON: I have a massive submission and I won't be speaking to all of it. It stands at 3000 pages and I have brought 1500 of those in support. I am very concerned about the state of affairs with the statutory system, with the complaint system and general access for the community. I do understand that there are many worthy advocacy organisations who do policy advocacy and who are involved in advocating for the 12 and a half per cent of the community who are labelled as disadvantaged.

What isn't available at all are the needs of those who don't fit that category. I see the work that is being done as extremely worthy and I have addressed many of those issues - 17 categories of people who are disadvantaged. I would also like to make a plea for those who can't access those services at all. There are absolutely no available funds for civil action through Legal Aid, so I very strongly support the Law Council of Australia in their recommendations for more funding.

The issues that ordinary members of the community who don't fit that category face are different in many ways. I will be addressing what I see as the policy contribution towards unmet legal need. I believe that there is a significant degree of policy corruption. This is meant very broadly of course. The regulators are particularly slack.

My area of interest is in the utility area particularly. That is where certain categories just don't get a response. I spent 18 months as a third party representative trying to lodge a complaint with the Melbourne industry complaints scheme, EWOV. It was 18 months before they admitted that they didn't have jurisdiction. I was placed under enormous pressure with the legal stance. This was third party. I was doing this for someone else. It was still a very stressful situation. They had legal advice. They threatened to close the file if legal advice were to be sought for the client. There was a lot of posturing and there was a lot of pressure.

The impression I gained was that they were gatekeepers; that there was a significant level of prejudice and bias in favour of the industry and that their main goal was to have a turnover. This was a lucrative matter because not only do they charge membership fees but they also charge a daily rate. At the end of the day,

although most of these complaint schemes advertise their services as free, they are far from free because we do pay for them in our bills.

There are a number of corruptions that I would like to address. I became involved with a community association who asked me to go through their files and help with a referral that was to be made. It was a major dispute involving 300 people in a Melbourne property, a strata title property. They weren't able to get any form of redress, none at all. They became embroiled in a Supreme Court matter. The regulators are so slack about everything that it just isn't possible to get any kind of attention, so I have many case studies that I am going to bring forward. Some of them reflect what has already been said to the commission. I won't labour it now because it is very, very lengthy submission, so I hope you will take those matters into account.

My view is that by merely advertising for schemes that are seen by the general community as being biased, coming from the industry - their ombudsmen are nearly always chosen from the industry. I haven't found them to be responsive, particularly where you are dealing with fungible goods, essential services. I have never felt that that should have been privatised in the first place but given that it is and given that we have a very slack environment from a regulator's point of view, I would like to see something different done. I support the recommendation of the Victorian Ombudsman to rationalise things, to streamline them, to nationalise them, to have some sort of control - people who are more objectively assessing what is being delivered - before you rush off and before you make recommendations to improve the image of these.

Many of us feel that calling them ombudsman is a misleading way to label them. I resent that. I will be addressing that. I think that it drives down the image of the state ombudsmen who have an entirely different range of powers. They are not on parity with them. They are not the same. They want to call themselves officers. What they are delivering, what the community sees, is a very unsatisfactory service. 18 months, legal stancing, high pressure - that is not what I call a friendly complaints scheme that is objective.

DR MUNDY: Thank you for that. You will appreciate that we are not in a position to investigate individual matters.

MS KINGSTON: Of course you are not.

DR MUNDY: It is difficult for us to engage with you without having seen this material, for our staff to have considered it, and you will appreciate that there are much more concise submissions that have been put to us in a timely fashion that we need to consider right around the country.

MS KINGSTON: Right.

DR MUNDY: Can I ask you whether you have had any dealings with or have any views about the financial services ombudsman?

MS KINGSTON: I know that they collapsed three or four of them and they are now called the financial services ombudsman but there were several of them. Four of them came from different areas in Victoria and are members of ANZOA. ANZOA is a publicity organisation who only gives personal memberships. They don't give memberships to organisations, so it all depends on what I see as being a peer review, peer support outlet. They are there to promote their members.

DR MUNDY: My question was - - -

MS KINGSTON: I'm sorry.

DR MUNDY: - - - specifically about any views that you have about the financial services ombudsman.

MS KINGSTON: I have had no direct dealings with them but I have heard that there are difficulties. Lots of people have complained. Peter Nair's submission addresses some of those issues. There are plenty of them around but the level of service - I can't answer in a personal capacity.

DR MUNDY: It is just that we have had evidence from the financial and insurance CLC. I can't quite remember their precise title. They operate a national service in respect of insurance. They speak very highly of the financial services ombudsman so I am wondering whether - I mean, that is why I asked you the question, because you seem to have a fairly dim view of ombudsmen. I think that is a fair summation of what you have said; but yet we have an organisation set up to advocate for the needs of financial services consumers which is entirely separate from the financial services ombudsman which is speaking positively of them. I was just wondering whether it might be a problem with ombudsmen in Victoria or utilities ombudsmen.

MS KINGSTON: Utilities in particular. In the statutory area, I think there is a certain line drawn. If it comes to building and construction, certain industries are better served than others. There were reasons why they collapsed the financial services but there were two services in the building industry that were closed down. One of them was a statutory authority. There is a lot of evidence that there are variable responses. I have been looking at all your responses and all the things that I hear from the community. I can't answer the financial - I don't know. I can't make a criticism, but if it comes to utilities I will stand up and be counted for that because

that was my personal experience and I am not happy.

MS MacRAE: I think it might be best if we wait and see your submission. We will be hearing from the telecommunications ombudsman tomorrow I think. We did hear from someone who previously had been an energy and water ombudsman.

DR MUNDY: You reflected on the Victorian Ombudsman who is of course an officer of the parliament.

MS KINGSTON: Yes.

DR MUNDY: Would your view be that - and certainly in Western Australia the equivalent officer I think performs the function for the water and energy sectors in Western Australia, essentially because they are still government-owned. Do you have any reflections on - - -

MS KINGSTON: I have, and I have addressed that. I certainly don't mean any offence, but as a member of the community I find that a conflict of interest. The particular post-holder had numerous positions, at least three statutory positions. He has also been associated with (indistinct) here and has had - - -

DR MUNDY: Just be aware there is no protection of defamation for what you say here, so if you are reflecting on an individual, I counsel you not to.

MS KINGSTON: No. I am simply saying that I view the office of a statutory ombudsman as being something quite separate. I view it potentially as a conflict of interest.

DR MUNDY: So if these were separate statutory officers, rather than creatures of the industry, if you like - so if the industry ombudsman arose out of a statutory scheme and they were appointed presumably by the governor-in-council or some other traditional method, that would allay some of your concerns.

MS KINGSTON: In principle, I would not be happy with someone wearing an industry hat called an ombudsman. It doesn't matter who it is, whoever holds that office. I see that as a potential conflict. If they also are running a private business advising schemes - you know, there is just the potential. It is not about pointing fingers at persons.

DR MUNDY: I will bring you back to the question I asked you. If the ombudsman - say, the Energy and Water Ombudsman in Victoria - was a statutory scheme with its own act, with the ombudsman accountable to the parliament, appointed by the governor-in-council, that would deal with a lot of the conflicts that you identify, and

did nothing else and could do nothing else?

MS KINGSTON: I think that the whole ombudsman service should be in a statutory setting where there is a juristic basis for it. At the moment there isn't and there are conflicts. The kind of things I will be addressing are to show that public submissions made by some of the ombudsmen, and I am thinking of utilities in particular, suggest a certain bias. They are reluctant to extend their jurisdictional powers. They have their synergies. They have been established in the industry, and where you have that exposure, it is very, very difficult to change public perception.

You can say whatever you like and you can call it whatever you like but public perception is a very subtle thing and once you have an entrenched view that this is a conflict, I would find it very difficult to shed my prejudices on that. I still wouldn't accept it. I think it needs to be a separate body that will coordinate the services. I personally think that all the small ombudsmen should be shut down altogether. You have a brand new slate and you have something that is accountable. You have something that can be accredited. The present benchmarks are 17 years old. They are ancient. There are better standards than that. They have no quality criteria to go with them. They have no basis on which any exterior assessment can be made of their efficacy.

I just think the whole thing is run in a very insular way and I wouldn't be happy using them and some of them I wouldn't recommend to anyone. It doesn't matter how you advertise them. There is an unshakeable perception. It needs to be a statutory set-up.

DR MUNDY: So you would support the recommendations we make about publishing of outcomes and so on for the industry ombudsmen.

MS KINGSTON: Yes, I do. I think the suggestion that has been made by the newest Victorian ombudsman is very sound. They want to separate themselves from being homogenised with groups that are associations offering personal memberships. They would like to see themselves on par with the attorneys-general. They would like to see some sort of stature and status and some demarcation and I strongly recommend that.

I think it is not a service to the statutory parliamentary ombudsman for them to belong to the same industry association. I don't see them as being of the same calibre, the same training and the same juristic basis. There is no juristic basis.

DR MUNDY: They belong to ANZOA by choice of the individual ombudsman.

MS KINGSTON: Yes, some of them do. I know there are seven of them and one

from New Zealand and one statutory and the rest of them, and there are 10, are industry but they are in my opinion not doing themselves a service doing that.

DR MUNDY: I guess that is a matter for them.

MS KINGSTON: Of course it is.

DR MUNDY: You just made the observation that they want to be on the same standing as the attorney-general. I think you meant the auditor-general, just for the record.

MS KINGSTON: Pardon me. I did.

DR MUNDY: I think my colleague made a very good point. It is very difficult for us to have a meaningful discussion around a submission which - - -

MS KINGSTON: I have it here.

DR MUNDY: - - - will take us some time to obviously digest. We are on the road ourselves for the next couple of weeks to ensure that citizens have the sort of access that I think you think they probably should. Perhaps the best way to proceed is that once our staff have had a chance to look at this, maybe someone will get in contact to clarify any further points you wish to make.

MS KINGSTON: Thank you. I appreciate it.

DR MUNDY: These hearings are adjourned until 9 o'clock tomorrow.

AT 5.11 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 11 JUNE 2014



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 MELBOURNE ON WEDNESDAY, 11 JUNE 2014, AT 9 AM

Continued from 10/6/14

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DR MUNDY: All right. We might make a start. Good morning, ladies and gentlemen, and welcome to these public hearings for the Commission's Access to Justice Inquiry. My name's Dr Warren Mundy and I'm the Presiding Commissioner and with me is Commissioner Angela MacRae and together we exercise the authority of the Commission in this matter.

Before proceeding any further, we'd like to acknowledge the traditional owners of the land on which we meet, the Wurundjeri people of the Kulin nation and pay our respects to their elders past and present, and the elders past and present of all other indigenous nations who have continuously occupied this continent for over 40,000 years.

The purpose of this inquiry is to facilitate public scrutiny of the Commission's draft report that was issued in April. We are looking to gather comments and feedback on that report, particularly from people who wish to make comments on the record, from which we may draw upon in a final report. We intend after today to hold hearings in Hobart, Darwin, and Brisbane, having already held hearings in Canberra, Sydney, Adelaide, and Perth.

Following those hearings and the completion of our work and consideration of any more written material we will provide a copy of the final report to government in September and they will have 25 parliamentary sitting days to make it public by way of tabling in both houses of the federal parliament. The Commission will then publish the report on its web site.

We do like to conduct these hearings in an informal manner, but I do remind participants that under part 7 of the Commission's Act we have certain powers to act in the case of false information or refusal to provide information. Since the Act was promulgated, the Commission has not had occasion to use these powers.

As I said, we like to conduct these proceedings in an informal manner, however in order to facilitate transparency we will be taking a full transcript of these proceedings and that transcript will be made publicly available on our web site. As such, it's quite difficult for us to facilitate the taking of comments and questions from the floor, but we will provide an opportunity for people to do so at the end of these proceedings this afternoon, which I suspect will be around about 5 o'clock.

Participants are not required to take an oath but are required to be truthful. I'm obliged to advise you under commonwealth health and safety legislation that in the unlikely event of an emergency requiring evacuation of this building you should follow the green exit signs to the nearest stairwell, don't use the lifts, follow the instructions of the floor wardens. The assembly

area is Enterprize Park situated at the end of William Street on the bank of the Yarra, which is out there, turn left. That's the preliminaries dealt with. We now have our first witness, Victoria Legal Aid. Could you please state your names and the capacity in which you are appearing today.

MR WARNER (VLA): Yes. Thank you. My name's Bevan Warner. I'm the managing director of Victoria Legal Aid. It might help if I introduce my colleagues.

DR MUNDY: It would be helpful if they'd introduce themselves.

MR WARNER (VLA): Okay. Sure.

DR MUNDY: It helps the person doing the transcription.

MR HUME (VLA): Cameron Hume, director of research and communications.

MR NICHOLSON (VLA): Dan Nicholson, the director of civil justice access and equity.

DR MUNDY: Thank you. Mr Warner, if you could make a brief statement - by brief I mean less than five minutes.

MR WARNER (VLA): Sure.

DR MUNDY: As we have a large number of questions we wish to put to you and we have had the opportunity to read your submission and see your commentary in the newspaper this morning.

MR WARNER (VLA): Thank you. So just three key points that we'll make in addition to the two submissions we've contributed in our own right and, of course, the national Legal Aid submission which we endorse, we think the Commission's work is very important. We stand ready to help you in whichever way we can to quantify a fairer means test.

We've acknowledged that the OECD as a starting point, it's not an end point, and we recognise that there would be different ways to approach the question of financial eligibility or someone's lack of capacity to meet the full cost of their own legal representation for very severe life-affecting issues. We would simply say that if the OECD estimate of households that were experiencing poverty was a base for financial eligibility that on our rough calculation some 60,000 people would be eligible on financial grounds for legal aid that don't currently receive it. At the moment we can explain some

of the thinking about that.

We also - our second key point is to caution against the demarcation of legal problems into hard segments. We've included in our second submission some ABS research on factors associated with high crime rates, for instance, which identify unemployment, low levels of education and, importantly, family relationship issues as drivers for people's contact with the criminal justice system, and we've also included some research on child maltreatment and adolescent offending which gives you a sense of offender trajectories because of the circumstances perhaps in which they're born into or the circumstances they experience in their formative stages of life.

There's also research that we've referenced around the social determinatives of health which suggest that segmenting people's legal needs or life problems into crime only or family only or civil only don't reflect the actual experience of the way in which we respond to people with particular issues, and our third point is that Victoria is progressively adopting and adapting the mixed model in dialogue with the players in Victoria.

We agree with the subsidiary principle that the lowest level of government should be doing the doing and we think that the independent statutory board model works particularly well and that we would see that as the - an enlivened independent statutory board model as a way of dealing with some of the fragmentation issues that you report otherwise addresses, and beyond those three key points I think I'm happy to open up for questions.

DR MUNDY: Okay. Thank you, Mr Warner, and we do appreciate the assistance you've provided us through the course of this inquiry. We do note your comments about criminal matters, but you'll understand that our terms of reference don't bring us to criminal matters.

MR WARNER (VLA): Yes.

DR MUNDY: And that, really, this is about civil disputes. We seem to end up in civil legal action more readily than disputes because that's where the weight of the participants seem to want to take us, but we are mindful that there's more than that.

Just before we come more directly to your points, are you able to advise the Commission of the direct impacts that recent cuts - or recent funding reallocations we might describe them as - within the commonwealth's legal assistance budget have had directly on the provision of the services and activities of your organisation?

MR WARNER (VLA): The reduction in the second year of - well, we had a two-year funding approved of seven million dollars over two years. We will receive the first three and a half million in full and we won't receive the second three and a half million dollars. The impact of that on the ground will be that we won't expand our services in the direction we were planning to, but we won't be reducing any existing services.

DR MUNDY: What direction was that expansion intended to take?

MR WARNER (VLA): We were intending to move into - address problems in the family law and family violence field.

DR MUNDY: So they were, essentially, commonwealth matters or commonwealth-related matters?

MR WARNER (VLA): That's right, and the money was always time limited, so we were always cautious about building it into a recurrent sort of service profile.

DR MUNDY: Okay. You mention that - and I don't think we need to go into the details of the calculations - but you mention that using the OECDs test of disadvantage - something which the Commission is, I can assure you, very familiar with - some 60,000 people would qualify for legal aid that wouldn't under the current tests. Do you have any sense of how much it would cost to meet the legal aid needs of those 60,000 - I presume that's Victorians.

MR WARNER (VLA): No, that would be 60,000 people nationally.

DR MUNDY: National. Okay. How much - do you have a rough guess on how much it would cost to meet those needs?

MR WARNER (VLA): Well, working backwards from the calculation, it's suggesting that if there were 44 per cent more households qualifying for grants of aid only, which are not all that we deliver but our most expensive and intensive service, then the starting point would be - it would be at least an extra 44 per cent on the total legal aid budget across the country, but we've also made the point that we don't think the task stops at relaxing the means test.

It's also about recognising that there are other categories of law for which we're not currently responding and that there are places in which legal aid is hard to access and that there are existing services that we'd be concerned about because the current limitations on service design, which is principally the amount of time that lawyers and professionals can spend with people to address the underlying issues, or perhaps follow through in a more meaningful way

with a client, the time-poor nature of some of our services we would want to address as well.

So we think there's at least four tasks in responding to unmet need. It's getting the right - a fairer test of financial eligibility. Then there's looking at areas of law in which we're not adequately meeting unmet need. Particularly in the civil law space we accept that we will never be able to cover the field, but in running effective niche civil law practices which can spotlight systemic problems and tackle issues at their source that we can contribute to the avoidance of legal problems for other people who will never actually be a client. I have mentioned then geography and the service intensity of some existing services that we think are falling short of what would be an ideal service, and I can give some examples of those.

MS MacRAE: I am particularly interested in the time factor because we have had quite a lot of evidence from people who are representing people with a disability, and they are saying that one of the main problems is that often, if you have got someone with a severe impairment of some sort, that the time required to obviously get the message across to these people and have it understood, including if you are going through an interpreter, but also for people with other physical and mental disabilities, that time can be a real issue. Would that be a group that you would be particularly concerned about under the current arrangements because of that?

MR WARNER (VLA): Yes and no. I mean, I think our greatest concern at the moment, both in terms of volume, projected increases in volume, the severity of the legal issues people face, and the time poor nature of the service we are currently able to offer, would be in the family violence space and the time that is required to do more than band-aid people who are coming to the state courts for an initial band-aid solution, or holding pattern, in terms of the incidents of violence and the safety notices that need to take place.

If we could spend more time both with the applicants or the victims of family violence, the people who are experiencing family violence, the respondents or the people who are committing these offences than we currently are able to, then we think we could provide a better service and actually tackle some of the underlying issues and the consequences and flow-on consequences into the Commonwealth Family Law system, where the heart of these disputes is often the resolution of children's contact issues, or the way in which children are going to be move between the care of both sets of parents if that's appropriate.

But that's something that's going to be occurring in the aftermath of an incident which has brought somebody to a state magistrates court, often at the

request of police, for an interim family violence order. If we are not assisting those people properly, which is often a function of time, then we're part of a system that's actually not doing as good a job as it could and the volume of increase through the positive policing of family violence in Victoria over the last few years has been quite staggering and it's projected to continue to increase.

MS MacRAE: Just while we are on that, we understand that your guidelines have changed fairly recently so that if one party to family law proceedings is unrepresented at trial, then the other party is not eligible for legal aid. Does that restriction apply in cases involving family violence?

MR WARNER (VLA): Yes, so that there are some limited exceptions. The police choice there is really a neat example of the moral quandaries around designing legal aid services because we've got people in an existing service stream and we've got people who aren't getting a service at all. The question is: how much do you invest in one party's legal problem to the exclusion of somebody else entirely? Whilst we're not happy with the way we've currently got that service operating, the philosophy behind ensuring that there's equal representation or no representation recognises that people have been assisted through the family law grant of aid through successive court stages, where the court itself has had dispute resolution phases associated with their case management right up to the point of trial and that the legal aid fund has invested in the complete preparation of papers for the conduct of that trial by the judicial officer.

It's a question of saying, do you continue to assist a lucky group who are in that legally-aided space, all the way through, or do you spread your funds more broadly at the bottom to extend the coverage you're able to provide to people who wouldn't otherwise be getting a service?

MS MacRAE: As far as you know, is that kind of rule applied in any other jurisdiction?

MR WARNER (VLA): The restrictions on family law trial funding are not replicated in other states, but the philosophy of putting downward pressure, or merits tests, on the reasonableness of continuing to fund somebody where the issues may not be substantial, for instance, has been a long-standing philosophy on the design of the family law, legal aid service.

MS MacRAE: Do you get problems - and one of the things that we have heard is that there could be problems requiring victims of family violence to be cross-examined by the alleged perpetrators and that can be particularly distressing. Are there measures in place to try and - is that a problem, I guess,

and are there ways you can alleviate it?

MR WARNER (VLA): It certainly is a problem. It is also a problem for the Court, who has a duty to conduct a fair hearing and to take measures to deal with the manner in which parties engage with each other and also engage with the Court, but it's not a desirable situation in the state sphere in relation to violence restraining orders provides a legislative prohibition on people cross-examining victims of violence in that situation. In fact, there is a provision there for the Court to order that legal aid must be provided to a person who has committed acts of violence to prevent them cross-examining that person, irrespective of their means.

There is a situation in Victoria in the state sphere, where the parliament has seen fit to set up a framework to effectively have the Court order legal aid to provide something that we would not provide on the basis of someone's financial circumstances to prevent the vicarious trauma to the person from experiencing that cross-examination. That is a very different situation that is occurring in mainstream Commonwealth Family Law courts around the country.

DR MUNDY: Mr Warner, how long has that legislation been in place?

MR WARNER (VLA): The legislation would have been in place for at least five years.

DR MUNDY: Is it possible for you - and I appreciate you will not have this off the top of your head - but to come back to us with how many such orders the courts have made and that you have had to respond to, and can you also come back to us with the number of persons who, because of the policy you just described - and I presume they are predominantly women - who have had legal aid denied them under that policy since it was implemented.

MR WARNER (VLA): You mean in the mainstream Commonwealth?

DR MUNDY: Yes, in the policy that my colleague was referring to and you outlined for us.

MR WARNER (VLA): Sure.

DR MUNDY: Could I just bring you back to funding. Could you give us an idea of how the government of Victoria allocated funding to the Legal Aid Commission; how it determines how much money is required and what restrictions it puts on you about where it must be deployed?

MR WARNER (VLA): There are not any restrictions on how it must be deployed.

DR MUNDY: So it just X million dollars and off you go and it is left to you?

MR WARNER (VLA): Essentially, yes.

DR MUNDY: How do they arrive at that quantum of money?

MR WARNER (VLA): I think it has evolved historically, and then it gets supplemented in relation to, I guess, the quality and the contestability of our annual budget submissions through the state's budget process about where we would say we need additional funds to address increases in demand or problems that we are experiencing in other parts of the justice system.

DR MUNDY: Would it be fair to say that it already is not essentially based on an assessment of legal need within the state?

MR WARNER (VLA): I think it is a combination of where history has led us and a patchwork of subsequent decisions in response to pressure points.

DR MUNDY: So in other words, "to some extent"?

MR WARNER (VLA): Yes.

DR MUNDY: Thanks. You mentioned before the 60,000-odd who would qualify for legal aid, nationally, under the OECD's recognised measure of disadvantage, but can we bring you back to how you construct your eligibility criteria and how fundable are they - I mean, how impacted are they on the availability of funds. Are they criteria that are essentially demand driven, or are they based on an objective assessment of need and circumstance?

MR WARNER (VLA): There's more than one test, so financial eligibility and the assessment of someone's capacity to contribute.

DR MUNDY: Let's talk about the financial bit.

MR WARNER (VLA): There are some exceptions. So children, for instance, are exempt. There are certain categories of criminal offending that are exempt from the means test in the interests of - so legislative encouragement in the interests of justice to ensure that trials proceed, for instance.

DR MUNDY: This is recognition of Dietrich, amongst other things?

MR WARNER (VLA): More crimes, mental impairment, other sorts of categories that we can supply you some information about that. But, in essence, there's an assessment about income, there's an assessment about household expenditure or dependents, there's an assessment of assets, there's an assessment about the likely cost of the legal representation they're applying for and then all of those factors together produce a decision about whether someone's financially eligible or not.

MR NICHOLSON (VLA): Financial eligibility applies to grants. There's a range of other services. One is that advice for minor issues can be provided which aren't means tested in the same way.

DR MUNDY: We understand that. It had been suggested to us by some that there is a perverse - and may well be unavoidable - but there is a perverse interaction, particularly with the assets test, and people have their assets assessed, but the disposal of the asset to realise effectively the economic character of the means test would involve denying them livelihood say they lived in a regional area and if they had to sell their car they would not be able to get to work or that they cannot access the asset. Perhaps it is tied up in a family law matter and it is jointly owned with a non-co-operative partner. Is this a common occurrence or is it an outlier which people are concerned with?

MR WARNER (VLA): I think people would be - people who have no need for legal aid would be shocked and surprised at the circumstances in which we seek to recover the costs of the legal aid that we're providing from people and the circumstance that that creates for people.

DR MUNDY: Do you want to expand on that?

MR WARNER (VLA): Well, you've mentioned the vehicle situation. We've had to - and in terms of recovering the substantial cost for the expensive cases and this includes in the criminal sphere, but in other spheres as well, caveats on property and then reverse mortgages and eating into people's equity at the later stages of their life. People would be surprised to think that that was a sort of a fair way of providing a government service, but that's the way the service is currently provided.

DR MUNDY: I think it might have been Mr Grant from New South Wales was able to give us some idea of the revenues that they - I think it was New South Wales but it may have been someone else, but certainly one of your sibling organisations in another jurisdiction was able to give us an estimate of how much money you recover annually from those sorts of - we'll call them - charges for want of a better word. Are you able to provide us with that

information on those?

MR WARNER (VLA): It would be within the three to four million dollar range.

DR MUNDY: That is great, that is all we need.

MR WARNER (VLA): What's important to understand about financial eligibility is that it's so varied across the country that it can't be said that there's uniform access to justice in Australia and the best example I could give you would be Albury Wodonga. The allowable assets threshold in Victoria is \$300,000, so if you're honest enough to submit an application for aid indicating that you've got home equity worth \$301,000 you'll be denied legal aid. If you live on the other side of the river the allowable assets threshold is \$525,000 in New South Wales, so someone who lives on the other side of the river could be getting a commonwealth-funded legal aid service to deal with a family law matter who has substantially more material wealth behind them than someone on the other side of the river who would be denied a service and that is a, I think, a problem that needs to be addressed in the way in which financial eligibility is designed.

DR MUNDY: Particularly with respect to commonwealth money.

MR WARNER (VLA): Yes.

DR MUNDY: Good thing it is not a tax.

MS MacRAE: Just in relation to the way the income and assets test, if that is what I can call them, work, do you have an assessment that says, "Well, you've passed the income test, now we'll look at your assets and if you pass the assets test and so you're in" or do you combine those things and say your combined - is it a combined test or more like the aged pension arrangement where you test under one or the other and if you meet one you're in?

MR WARNER (VLA): If you're out on either you're out.

MS MacRAE: Okay. Which of your tests do you think would rule people out more often? Would it be the income test or your assets test?

MR WARNER (VLA): It depends on the area of law that they're applying for.

MS MacRAE: Okay.

MR WARNER (VLA): A lot of our duty lawyers who are operating at sort of the front line at courts would say that the income test is too harsh and that there are people who are working in spasmodic employment and insecure employment who have a got a pay slip or have admitted to earning a bit of money last month which exceeds the income test and that where our rules are a bit too blunt or strict and they're being excluded from a service where, in fact, they are more deserving than somebody who has, you know, not passed our other tests.

MS MacRAE: The OECD benchmark that you referred to would be solely an income test. Is that right? If we were to adopt that.

MR WARNER (VLA): I think it's mainly the income test, yes.

DR MUNDY: I mean given there is - I mean the Commission has published a staff paper on the measurement of disadvantage. Why did you land on the OECD and not any other?

MR WARNER (VLA): Well, we're not recommending it as the solution. We're simply saying if we use that as the marker that's what it would produce, but we recognise nothing. We referred to that deep and persistent disadvantage report that the Productivity Commission has authored itself.

DR MUNDY: Okay. So it is just really a benchmark. Is a reasonable benchmark. At the end of the day someone has to make an arbitrary decision about this. Can I just while we are on it - and it is coming back to me the comments you made about application of an income test - how do you deal with someone who is recently unemployed? So they may have had an income, they may have lost their job six weeks ago and now they have no income prospectively, but they may have earned a reasonable income previously. They have relatively little savings. Does the fact that they might have earned a hundred grand last year and now they've got no savings - how does that work?

MR WARNER (VLA): It's income at the time they applied but they'd have to declare their savings, the value of their vehicle - - -

DR MUNDY: So a person recently unemployed would probably be more likely to be caught by the assets test than the income test?

MR WARNER (VLA): That's correct.

MS MacRAE: Just coming back to that issue of the asset test difference between New South Wales and Victoria, it brings us back again to how do you determine the levels that you put them at and how does New South Wales

determine theirs and what's the cause of that disparity?

MR WARNER (VLA): Well, the history has been to look at, effectively, someone's capacity to pay and to even out the assets test to recognise the greater cost of servicing mortgages but also equity and particularly capital city pricing, so if you go back into the origins there's some clear thinking but what's happened over time is that as our demand and the costs of letting demand through additional complexity in the law has ratcheted it up but our revenue hasn't or we've experience deficiency dividends that other government agencies have experienced. We've had to leave assets tests where they are and not move them over time, so in Victoria, for instance, one of the last big - like other legal aid commission has experienced a bit of boom and bust cycle with legal aid funding and demand.

Early in 2008 the then board reacted to a very significant deficit or financial crisis not by interfering with service design but by slashing the assets test, so it reduced financial eligibility by - in order to limit the number of people who would qualify and who would have to - funds would have to be paid to meet the life of their case by halving the allowable assets threshold from 300,000 to 150,000. Now, it was a very crude way of reducing demand on the legal aid fund but it didn't interfere with any of the service design that practitioners or courts were experiencing.

When funds became available four years later the board reversed that decision and returned the allowable assets threshold to \$300,000, but if you go back in time the \$300,000 allowable assets threshold was probably set in the early 2000s. It's now 2014. The allowable assets threshold hasn't moved with the times and what we have had is a policy response that's seen the means test become progressively meaner.

MS MacRAE: Has New South Wales been able to keep their assets test somewhat higher? Obviously, from what you're saying, it started at a higher base because of the difference in servicing equity in homes and such, but is that as a result of the New South Wales government potentially putting more in or keeping their levels more stable than you've had in Victoria?

MR WARNER (VLA): Look, I think there's different policy responses about how you control entrance into the scheme, but the total funding pool in New South Wales, if you just took it per capita, look at it with all source income, commonwealth, state, statutory interest would greatly exceed the total funding pool in Victoria.

MS MacRAE: Per capita.

MR WARNER (VLA): Yes.

MS MacRAE: Yes. Okay.

DR MUNDY: So we presume you receive revenues from some sort of public purpose fund.

MR WARNER (VLA): That's right.

DR MUNDY: What percentage, roughly, of your total income do they constitute?

MR WARNER (VLA): It's about 26 million dollars per year.

DR MUNDY: Yes.

MR WARNER (VLA): And it's about 15 to 18 per cent.

DR MUNDY: Okay. Are the purposes for which you can put that money prescribed or it is essentially general revenue?

MR WARNER (VLA): No, there's no conditions attached.

DR MUNDY: No conditions. How is that amount set? Who determines that and what's that amount based on?

MR WARNER (VLA): The attorney has the final approval. There's - the legislation provides for a maximum of 35 per cent of the residue in the fund, if you like, or the free money that's left in the fund.

DR MUNDY: Yes.

MR WARNER (VLA): And he can approve up to 35 per cent of that amount annually. Some years ago there was a decision to try to stabilise Legal Aid's funding in relation to some state government supplementation and it's been capped at 26 million dollars for the last few years.

DR MUNDY: Okay.

MS MacRAE: So in relation - you mentioned before that, you know, altering the - especially halving the assets tests threshold was a bit of a shock to the system, what other means would you have - because you said there are other ways that you might be able to adjust some of your parameters to meet a budget that might be blowing out. You talked about not changing any of the

way the services are delivered. Would you see that as a baseline essential, that you not touch those things, or - - -

MR WARNER (VLA): No, I think we need to constantly review our services to make sure they continue to be relevant and appropriate and meeting and targeting the most acute need. So on a sort of a different example, yes, we made some fairly contentious changes to eligibility guidelines about 18 months ago, but one of the ways we made a positive decision to preference an area of law ahead of an existing area of law and to do it more economically was to limit grants of aid for some minor summary criminal offences.

So best example would be to say we raised the bar for seriousness in summary offences, took traffic matters out of the remit of a grant of aid, left it with the duty lawyer if there were certain characteristics that meant that traffic matter carried a real risk of imprisonment, and took the savings and invested in an expansion of our mental health services, and the philosophy behind that was that, you know, that there's two key bits of thinking in services and one is the legal response ought to be proportionate to the problem that someone's experiencing.

MS MacRAE: Yes.

MR WARNER (VLA): And the impact of providing the service or not. It should be high impact rather than low impact, so when we looked at minor traffic matters with the sentencing restrictions that are placed on magistrates by parliaments and the facts speaking for themselves, providing a grant of aid or a thousand dollars for somebody to argue a traffic matter before a magistrate where the case disposition's unlikely to significantly be impacted by having a lawyer or not seemed to be not only wasteful but a poor targeting of resources to need, whereas people in involuntary psychiatric settings subjected to unwanted medical treatment who have rights of review before mental health review tribunals - what we know is that - what we knew was that we were only covering 7 per cent of people who were going before tribunals in those settings, and we also knew that the impact of having a lawyer was quite profound because people who had a lawyer to speak for them in those settings were four times more likely to get an outcome that they were happy with.

So from a public policy point of view, as a legal aid provider, we thought we had our priorities wrong. But once you make a decision to limit or withdraw a service from one area and to positively preference it in another our experience has been that neither the magistrate nor the lawyers who are doing that work move to the new jurisdiction, so they experience a loss and predictably complain about it, and we understand that. They don't experience the gain because they're not the same judicial officer and they're not the same

legal provider doing that new work.

MS MacRAE: Yes.

MR WARNER (VLA): And it's our job as a legal aid provider representing the community's interest to balance that competing need and to explain why we've made that positive choice to preference one area of activity over another.

MS MacRAE: And I guess, ultimately, you'd say you'd rather not have to make that choice but your budget constraints require you to do that.

MR WARNER (VLA): Well, somebody has to make the choice and we would agree with the - both, I think, your comment in your draft report and I think the New South Wales Legal Aid Commission's submission that the lowest level of government closest to the coal face should be empowered to make these difficult choices because it's informed by the real life practice wisdom of staff who are delivering the service.

MS MacRAE: I understand.

DR MUNDY: Can we bring you to those - a broader question, and we've had this discussion both with your colleagues in New South Wales and in Western Australia, and this is around - I mean, I guess part of our concern is, if not the reality, certainly potential overlap between CLCs and Legal Aid Commissions, and perhaps not a - probably a sub-optimal prioritisation of expenditure that's at play, and I guess where we're going and the proposition we've tested in New South Wales and Western Australia was this notion that the commonwealth would provide its money on block and essentially get out of the business of program management, would allocate that money on some basis.

And you'll understand that the Western Australians - being Western Australians have a different view about the allocation of commonwealth money to any others - I suspect Tasmanians have a similar challenge - but to allocate this money to a body to then work collaboratively across the legal system sector to lead to optimal priorities that reflect the priorities of the jurisdiction - again bearing in mind that issues in Tasmania may be different to issues in Western Australia - is that a model that sort of exists in a form in Victoria already and, if not, is it a model that you would encourage?

MR WARNER (VLA): I will get Dan to answer my comments, but the first point I'd say it's a model that is present in Victoria in a more enlivened way than in any other state, and whilst I promised to my interstate colleagues that I

wouldn't get parochial, I think your reference to Western Australia is that they are relatively a low-funded state. On a per capita basis, of course, Victoria is the lowest, so I'll leave it at that, but in relation to your - the question about whether the commonwealth should get out of the business of program managing the commonwealth component of the community legal services program I think that would be a good thing.

I don't think that despite the good intentions and the calibre of the individuals involved in Canberra performing that function, I don't think, with respect, that they're adding a lot of value, and in fact, they're the outlier because in relation to state funding for CLCs - and Victoria's the only state where state funding for CLCs exceeds that of the commonwealth, so the commonwealth is the junior partner in Victoria - that money is not managed by the state department equivalent, it's managed by the board and the board makes decisions to add or subtract money from the Legal Aid fund positively to grow new CLCs or to encourage CLCs to move in other directions and it equally takes up its responsibility of holding CLCs to account where services aren't being provided well, so we have a history of defunding CLCs but we equally have a history of making positive decisions to inject new money into the CLC program and the government department or the attorneys are making those decisions where our board is and that's one of the functions that Dan oversees in his role in the department - - -

DR MUNDY: And just before we hear from Dan - I'm sure Ms Buchanan will have a view on this - but is there - it's been suggested, and I can't remember by who and I suspect it's by more than one participant - that the model you describe leads to a fundamental conflict of interest because in some sense there's a competition between CLCs and Legal Aid Commissions.

MR WARNER (VLA): Yes. Well, we've set out a response to that in our submission. What we would simply say is that no conflict exists because for a conflict to exist it would presume that the independent statutory board has an in-built preference in its DNA to preference its staff practice ahead of its statutory obligations to administer the mixed model which includes grants of aid through the private profession, a staff practice to give it some exposure to the coal face and a CLC program and the facts aren't borne out in the way in which the funds are currently distributed, so in Victoria we have the best funded, most vibrant CLC sector of all of the states, we have private practitioner involvement in Legal Aid in a proportion that's pretty consistent with other states, so the evidence isn't in that somehow the staff practice is better bettered or preferenced ahead of the other two supply types.

The key thing here is I think the greater conflict lies with those funding decisions being made by public servants who are bound to follow the policy

priorities of the government of the day because the independent statutory model equips Legal Aid with a legislative protection to sue and be sued and we must do things under section 25 notwithstanding that they're adverse to the interests of the government of the day. Most of the legal disputes that citizens have in the poverty law space or many of them involve government or government agencies on the other side.

To have a situation where well intentioned public servants are administering funds to CLCs and perhaps putting conditions on what they can and can't do to reflect the policy priorities of the government of the day, there's a greater conflict there than actually interfering with the basic *raison d'être* of having CLCs holding governments to account by the actions in which they are supporting ordinary citizens in their disputes with government. So it seems to me that this whole conflict scenario is just sort of misconceived.

DR MUNDY: I take your point and I think the commission has recently opined on the benefits of such models for the funding of roads. I take your point it may well be. I would say though, that an explanation could be that these conflicts haven't emerged because you are relatively well resourced, as you point out. But is there anything that could be done which would not be substantially disruptive that might allay - I mean part of the business of public policy is accept it is a policy change and sometimes you do things that are not necessary to allay concerns which may be important, held by important stakeholder groups even if you do not think the problem is real.

Is there anything that could be done without significantly disrupting the operation of your organisation that could allay the concerns that those people might have, perhaps putting a separate governance framework around your own group provision or something like that, because it does seem that the governance model is slightly - there are independent governance arrangements with CLCs but there is a much more direct relationship with the board and your own provision?

MR WARNER (VLA): Well, of course, the board's accountable under its enabling legislation but all of this sort of usual rigmarole that goes with statutory bodies. So annual reports and - - -

DR MUNDY: I've been a director of a number of statutory authorities.

MR WARNER (VLA): - - - auditors. So the accountability on Legal Aid in terms of public disclosure is far more acute than it is on CLCs. The proportions of money make that entirely appropriate. One of the things that's unique about Victoria from other legal aid commissions is that other legal aid commissions still carry the governance framework from inception which

provides for independent boards of varying size. I think New South Wales is a commission of 12 where the attorneys typically appoint commissioners but there is provision in most other states for a list of names or nominees from the stakeholder fraternity, so nominees from the Law Institute and of two of those four the attorney will select. So you end up with a governance board that is inclusive of stakeholder interests, although once appointed your obligation is to the entity not to where you come from.

That's quite different in Victoria because in Victoria in the 1990s there was a big review and the board was restructured. They deliberately set apart that representative model and created a small skills based board, so what's unique about Victoria Legal Aid is its four independent directors and myself as the fifth full-time managing director and there is a community consultative committee which is a feature of the act which was designed to compensate for the absence of representatives on the commission to make sure that the board's independence was complemented by a mechanism for community input into its decisions.

It's community input, it's not just stakeholder input and the composition of that community consultative committee which we're committed to ensuring works effectively is broader than simply supplier interests who have an interest in either looking after their constituency and certainly looking after the interests of clients, but have a focus on what their constituent - - -

DR MUNDY: Surely you're not suggesting that the Law Institute of Victoria has a pecuniary interest of its members sometimes in mind?

MR WARNER (VLA): I'm sure that it does and I think that is entirely appropriate.

MS MacRAE: Just in relation then to how the CLC - and this might be more appropriate for people that are appearing next - but it would seem from your submission that through the board structure you keep quite an eye on the functioning of CLCs and you talk about high functioning CLCs and others and the movement of resources within CLCs. One of the issues that we struck in our report is the difficulty where you have a CLC that is well connected in its particular location and as a result of that location it has access to pro bono services and volunteers that it may not have if you moved it to another location of greater need and so there is this sort of tension between keeping a CLC in a location where it is very well connected and might have access to resources but maybe not in such a high need area any more because the nature of, you know, changing suburbs over time.

How does your model sort of deal with those sorts of challenges and

would you say it is more effective at providing services in areas of greatest need compared to maybe CLC structures elsewhere?

MR WARNER (VLA): I'll get Dan to give you some examples but I think in a word it's about having an honest conversation.

MR NICHOLSON (VLA): Yes, I mean so I think some of the key elements are - I mean our board is actively involved in choices about CLC funding, so we've set out guiding principles for where we're going to prioritise additional funding. We're working collaboratively on some joint projects with CLCs and Legal Aid officers to look at where need is, where the most need in certain regions is and to try and meet it together, but also where we've got nothing, the example given in our submission and the federation one is about the western CLC project, so that's a classic case. There's four CLCs in an area in the western suburbs that demographics of that area are changing, there's enormous growth out further and rather than disrupting the model or tendering or things like we're doing is working with the four centres to work out we can together best allocate resources and change the governance and management model of those CLCs to better reflect where the need is now.

What that is, the direction that is moving in is that three of those centres have agreed to, in principle, to amalgamate and that would enable them to, without losing the connection that those centres have for their local communities, also shift resources much more easily to the areas of really high population growth further out but also it continued to a service to the areas of disadvantage even in the relatively kind of gentrifying inner city areas where there does remain some legal - - -

MS MacRAE: Yes, pockets of disadvantage.

DR MUNDY: I lived in Footscray for a decade so I have some idea of the demographics there. Which three are amalgamating?

MR NICHOLSON (VLA): So the in principle agreement that three of the centres have passed through the committees are Wyndham in Werribee, western suburbs in Newport and Footscray.

DR MUNDY: What are the benefits that are going to flow from the survey, essentially administrative in character or - - -

MR NICHOLSON (VLA): Yes, I mean it's a number of things. Firstly, there are administrative benefits, so more efficiency but also a more even management of risks around the organisations.

DR MUNDY: It would be easier to cover annual leave and stuff as well - - -

MR NICHOLSON (VLA): Exactly.

DR MUNDY: - - - given that people could move between them.

MR NICHOLSON (VLA): Yes, the research tend to show that people don't easily just go to their nearest service so the idea of a specific kind of suburb or LGA catchment is not really borne out in that data so people tend to move around to where there are particular specialisations amongst the CLCs so, again, you can move those specialisations around more easily. It also creates a much better career path for the lawyers coming through those organisations and addresses the problem of retention. But perhaps the most important one is, you know, we have two of the five fastest growing LGAs in Australia in the west and the ability to move resources to service those areas without disrupting or shutting CLCs, and disrupting their connection to their community and their ability to community is also - - -

DR MUNDY: So essentially what you are doing is effectively developing a model of a larger CLC for essentially the Western suburbs of Melbourne, which is more adaptive and flexible and, as you say, a better place for - I mean, an issue about attraction and retention of lawyers plus CLCs has been an issue and the scale of the organisation presumably means it is more attractive.

MR NICHOLSON (VLA): So you will end up with two larger CLCs that cooperate a lot more rather than four that perhaps don't.

DR MUNDY: We are running out of time, but there is just one issue we have not touched on we would like your view on, and that is this issue of juniorisation within the part of the profession you retain to do work for you. I guess the question is: do you have a view on how remuneration for lawyers retained by legal aid commissions should be set? The myth is 80 per cent of scale. Do you have a view of where an appropriate benchmark could be struck, other than full commercial fees?

MR WARNER (VLA): I don't think - I think the greatest problem with juniorisation lies in family law rather than criminal law. I think that criminal law firms, legal aid is the market and the fact that there's no shortage of criminal lawyers willing to undertake legal aid work and involvement that we have in terms of the way the work's structured and designed, I think they - I don't say that it's easy being in business, but I think they are surviving. It's what they do.

DR MUNDY: It's what they do and what they get paid.

MR WARNER (VLA): I think in family law it's quite different. I think the family law firms who do legal aid work are doing a very - sorry, the criminal law firms, our private, fee-paying clients, have got the same problems as a legally-aided client. In family law, the private, fee-paying client is subsidising the legally-aided client because I think that family law firms would be loss leading on the time taking to do the work for the legally-aided client. The legally-aided client would have, in comparison to the private fee-paying client, more vexed issues. The presentation of violence or dysfunction, or alcohol or mental health issues in the client cohort would make for a more difficult client cohort, and family lawyers don't need legal aid clients to run a practice and turn a profit whereas criminal laws do.

So I think you've got all the ingredients for the family law firm, as well intentioned as they are, to stay delivering family law services for legal aid, to juniorise the work, and to not spend sufficient time doing the work well because they're not getting paid for it. So I think the way the lump sum fee structure works is that there is a comprehension of an allowance for hours, about how many hours you would need to do a reasonable job for that particular stage of a matter, with an underlying hourly rate of about \$150 an hour. So I don't think it's the import hourly rate that's the problem - - -

DR MUNDY: It is a recognition of the task?

MR WARNER (VLA): It is the allowance for hours is undercooked, and I think what that means is that our pressure to keep volume of services up means that we will end up under providing for the true amount of time that is required to do the job well. I think that is a problem in the way in which the family law service is currently being delivered.

DR MUNDY: Putting aside the issue of availability of funding, would it be - how significant would the administrative burden be for yourselves if you had a system whereby you know you had A through D, being a severity or a complexity-type measure, for someone in your office to say, "Look, it is probably a C and therefore it needs this lump sum, whereas an A might be a much" - would that be a particularly onerous administrative burden for you.

MR WARNER (VLA): It's all in the design, so - - -

DR MUNDY: But it would not be beyond the wit of your organisation to design something that was not particularly administratively onerous?

MR WARNER (VLA): No, we do that at the moment. We think we run pretty lean. So we spend less than \$10 for every \$100 of legal representation

we supply. We spend less than \$10 arranging or administering it. If you added staff overhead a gatekeeper, or as a more - making better decisions about exactly what that client needed, then you would be spending more money to get more nuanced decisions, but if we are already designing services that are very skinny in nature, it is not going to be any positive effect unless there is actually a total increase in resources.

DR MUNDY: We have run out of time, thank you very much.

MS MacRAE Thank you.

DR MUNDY: Could we have the Federation of Victorian CLCs, please. Could you please state your names and the capacity in which you appear?

MS BUCHANAN (FCLCV): Liana Buchanan, Executive Officer from the Federation of Community Legal Centres.

DR ATMORE (FCLCV): Dr Chris Atmore, senior policy adviser, also for the federation.

DR MUNDY: Would one of you, or both of you, like to make a brief statement totalling no more than five minutes, as we have some questions.

MS BUCHANAN (FCLCV): Certainly, look, I will keep it very brief, and I will really seek to reiterate three of the main points from the written submission that we provided. Firstly is to restate our encouragement to the commission that you undertake as part of this inquiry the work that you are looking at already, in terms of quantifying the extent of under resourcing of the legal assistance sector. We very much welcomed this inquiry when it was announced last year. As you will well know, there have been many inquiries over the years into access to justice, including in the civil justice space, but none of those inquiries to date, although they have repeatedly reached findings about under resourcing in the system, have been able to make firm recommendations about what the modelling for that resourcing should look for.

So we were very hopeful, and remain very hopeful, that the commission will be able to apply its expertise to that effort. To be frank, within community legal centres, whilst we very much believe that work is important, we simply don't have the resources to do it and we are very firmly of the view that the commission is well placed to do it, as you have done in relation to some very significant areas of social service. The second point that I would make really relates to the role and the particularly important role, we think, of community legal centres as part of the mixed model of legal service delivery. I will not detail what we describe as some of the defining features of the CLC service delivery model other than to say it very much aligns with what the research now tells us is effective good practice, legal service responses to people who are disadvantaged and who are vulnerable.

We caution the commission against any recommendations, ultimately, that would reduce the community legal centre contribution to the legal assistance system, or that would remove it entirely, because we think the impact of that would be incredibly damaging, in terms of access to justice in Australia. The final point that I would make is in relation to law reform and systemic advocacy. We welcomed the commission's draft finding that law reform and systemic work is core activity for community legal centres.

Certainly from the first community legal centres, when they opened over 40 years ago, we have always seen that on some issues it's far more effective, far more efficient, will manage to help far more people, if we work to change laws and policies and practices that impact negatively or unfairly on our client groups. We continue to see that as critical and, of course, are very concerned about some proposals by the commonwealth government to restrict the use of commonwealth funds for those purposes, and so we really make an offer to the Commission that if there's anything further that would be useful from us to support any further consideration that you plan to give to that issue we very much would be keen to assist you in that way.

DR MUNDY: Thank you. We might start on the last point. What would be helpful for us is evidence of - and it's probably by way of case study, but of where - particularly where active advocacy and law reform has led to policy change which was efficient in the sense that it just stopped a whole pile of problems from happening, and the other area in which we're quite interested is - and we see a challenge is understanding the extent to which in the event that CLCs were to somehow - and I'm not saying this should be - because I think the draft recommendation indicates the contrary - but in the event that CLCs were to cease undertaking this sort of activity, how would the information that they capture through their day-to-day client interaction be captured and then turned into meaningful information for policymakers?

It's been suggested to us that that could happen, that the Law Institute of Victoria might do that, or some other body. I won't reflect my view on that proposition, merely to say it's been put to us by someone who's got some exposure to these issues. So if you can bring information to us that would be very helpful. Is it possible for you to give us a brief outline of the impacts of the recently announced re-prioritisation of commonwealth expenditure to frontline services and how that's impacted on your members?

MS BUCHANAN (FCLCV): There's a few things that I would say. Firstly, what's important to understand about the re-prioritisation which is, in effect, cuts to community legal centres is that, whilst all of the public commentary by the government about those cuts has indicated that those cuts are intended not to impact frontline services but to reduce the policy work that's happening in community legal centres, the opposite is true.

So in the budget week, although separate to the federal budget being handed down, there were some decisions communicated about those cuts to a number of centres across the country - 14 in Victoria - those centres learned what portion of their funding would be reduced and in every case that funding is being used for direct service delivery. It's not being used in any centre

primarily for policy or advocacy purposes. So that's one thing that's important to clarify.

DR MUNDY: Without delaying the discussion today, could you take on notice and perhaps document what the impacts on those 14 centres are?

MS BUCHANAN (FCLCV): Indeed.

DR MUNDY: And we'd also be interested in the extent to which an analysis was undertaken of the consequences of those funding reductions. I guess what I'm interested in ascertaining is whether there was an efficient decision-making process. Much as I'm interested in efficient decision-making processes for the allocation of new money I'm interested in efficient decision-making processes for the removal of it.

MS BUCHANAN (FCLCV): Indeed.

DR MUNDY: And just on one other issue, we heard evidence in Canberra from the ACT EDO - I presume the Victorian EDO is a member of yours.

MS BUCHANAN (FCLCV): Yes. Indeed.

DR MUNDY: The ACT EDO indicated that as a result of the re-prioritisation decisions of the commonwealth government they would in all likelihood close. Are you able to give the Commission any idea of what the state of the Victorian EDO would be post the re-prioritisation of funding?

MS BUCHANAN (FCLCV): The Victorian EDO, I think, based on the information I have, is relatively well-placed compared to some other EDOs around the country. They had already prior to the decisions sought to diversify their funding sources with some foresight, I think, and so have been able to do some quick work and some fairly strategic work to try and shift their approach and move to a situation where they are less reliant on government funding. So they are going to be relying heavily on private donations which, of course, is a very unreliable or uncertain source.

DR MUNDY: Yes.

MS BUCHANAN (FCLCV): So for them, I think it is a bold and brave experiment, but one that I think they're fairly well-placed to embark upon because they have very good reputation and value in the - - -

DR MUNDY: And, presumably, they were in a slightly better position given their relative size and also the more generous funding from the Victorian

government, I would presume some of which does end up with them.

MS BUCHANAN (FCLCV): Indeed. They do receive a portion and, as I understand, there's no indication that the portion of funding they'll receive from the state will cease, so they will be able to continue to provide some legal services using that funding.

DR MUNDY: And just on this re-prioritisation notion, is that a policy proposition that's being, to your knowledge, advanced by the Victorian government as well as the commonwealth, or do they seem less concerned about your members doing - you know, we'll call it law reform work broadly.

MS BUCHANAN (FCLCV): To my knowledge, the state government continues to be supportive that community legal centres have a role not only in providing direct services to clients but also communicating issues and having a role to play in effecting good public policy.

DR MUNDY: And they're relaxed about some of the funding they provide being used for those purposes.

MS BUCHANAN (FCLCV): To my knowledge, yes, and certainly the indications that we've heard from the state attorney-general is that he sees some value in some of the law reform work that is done by community legal centres. For example, he has fairly recently introduced some infringements reform, some fairly significant reforms, and was certainly very keen to make sure that community legal centres who of course have contact with lots of clients on infringements matters, that we fed into that process. So that's just one example.

DR MUNDY: Yes, I think it's fair to say that - fair to the commonwealth - their view is that CLCs shouldn't - it's not that they shouldn't be doing this work, it's just that within the commonwealth's budgetary framework and stringency it's not a priority for the commonwealth to fund.

MS BUCHANAN (FCLCV): And we would say we think that's misguided because systemic work can be some of the most efficient use of very, very scant resources in community legal centres and we're very, very well accustomed to working within scant resources.

DR ATMORE (FCLCV): If I could give a very brief example. The federal actually led a coalition of family violence organisations to make a very extensive submission to the Australian Law Reform Commission and New South Wales Law Reform Commission inquiry into family violence and reading the final report it's clear that that submission had quite an impact on the

Commission, so that's just one example.

DR MUNDY: Okay. Angela.

MS MacRAE: Could we then turn to the other issues of funding. I just wonder if you'd like to comment - we've just heard from the Legal Aid Commission about how funds are distributed to CLCs, and would you like to comment on how you see those current arrangements, so under this sort of board structure, whether you see a conflict there and whether that's problematic for you, and if it is whether you'd have a preferred model.

MS BUCHANAN (FCLCV): So you may have noted this from our submission. Our submission is silent on this particular issue in part because as a federation we represent 51 member centres. We haven't reached a definite or agreed view, so certainly some member centres who would share the view that others have clearly expressed to you that there's some conflict inherent in the different roles that Victoria Legal Aid play. There are other members who feel fairly strongly that the decisions about funding allocation to community legal centres are going to be better made by a body that has more direct understanding of legal assistance and legal assistance services and the communities with whom we work.

So I think that it's fair to say we would see there is a theoretical conflict, but in practice in the main that does not bear out. There have been certainly some situations where the issues have been more apparent, but we, as I say, we don't have an agreed position on what would be the preferable option.

DR MUNDY: But there's no - without wanting to put words in your mouth - there's no screaming angst coming from your membership that the current arrangement is fundamentally broken and must be changed.

MS BUCHANAN (FCLCV): At the moment, no. I think there would be a view that there's scope for improvement and so what I would say is regardless of whether the funding decisions are made by the state government and a state government department, or by the Board of Victoria Legal Aid, there's scope to strengthen the input that all parts of the legal assistance sector have into those decision. So I think the draft report of the Commission referenced the Peter Shergold work that's been done in Victoria. That hasn't been extensively discussed in relation to the legal assistance sector, but certainly in terms of strengthening what collaboration and co-design looks like in respect of community legal services, there's scope to strengthen that, and our members would say that that's the case regardless of whether the current arrangements stay in place or whether there's a move and funding were administered by the state department.

DR MUNDY: Okay. So but a model where the needs and the funding of all legal assistance providers are considered at a state level is something which isn't problematic. It's a question of what's the governance arrangements?

MS BUCHANAN (FCLCV): Correct. Correct.

MS MacRAE: So are you familiar with the West Australian review, because this is - there's some reviews that have happened in WA and the way that they've collaborated each - when they've looked - areas of need and how resources are allocated in Western Australia between the legal service providers seems to us as being set up as a good model that might be replicated elsewhere. Are you familiar with that model and do you see that it might suit Victorian conditions?

MS BUCHANAN (FCLCV): I'm probably not familiar enough to make a well-informed comment, I'm afraid.

MS MacRAE: Sure. Okay.

MS BUCHANAN (FCLCV): I'm happy to that on notice.

MS MacRAE: Yes, that would be helpful if you could.

MS BUCHANAN (FCLCV): And give it some consideration.

MS MacRAE: Okay. Thank you.

MS BUCHANAN (FCLCV): And then come back to you.

MS MacRAE: They had reports in 2003 and 2009.

MS BUCHANAN (FCLCV): I'm aware of the different reviews.

MS MacRAE: Yes.

MS BUCHANAN (FCLCV): But in terms of the way that model's operating in practice, no. I know from my contact with my former counterpart in WA that there have been some really positive aspects to that and some more troubling aspects, and I'm certainly happy to come back to you.

MS MacRAE: Sure. Okay. Thank you. That'd be helpful.

DR MUNDY: Excuse me. Just bear with us.

MS MacRAE: I just - the other questions that we were putting to Legal Aid was in relation to means tests and income tests and how you ration resources. Can you tell us about how CLCs decide what sort of work they do and how do you allocate what sort of rationing - because obviously you're going to have to ration - - -

MS BUCHANAN (FCLCV): Yes. Indeed.

MS MacRAE: - - - the resources that are available to you?

MS BUCHANAN (FCLCV): So there's a few points that are important to make. One is, of course - and I think the commission appreciates this when you were trying to understand what eligibility criteria and means tests look like across the community legal sector - but of course because each community legal centre is independent and focuses on a particular client group, be that within a geographic location or a particular demographic, each centre applies their own process currently to those decisions.

So I'd say within Victoria, 51 community legal centres, there will be a whole range of approaches that are taken, but in the main community legal centres will assess the evidence. So that might include very rigorous data analysis and certainly community legal centres over time I would say are increasingly engaging in data analysis and, you know, a review of what the data tells them about legal need, as well as combining that with the information and the evidence they get from their connection to community.

So one of the defining features of community legal centres is that connection to community, so the fact that community legal centres, the workers in the centre, often the boards of the centre are very much engaged in the community and different community organisations and have a very good mechanism to stay connected to and on top of emerging issues and changing legal needs.

So that combination of the quantitative data analysis and the information and evidence that the centres get from their connection to community together go to an assessment about where the centre should be directing its resources. Now, we in our submission included several examples of casework guidelines and, again, every centre will have their own. They have their own procedures and protocols and guidelines that set out where they're going to direct their resources and how they'll make the decisions about what cases they take on, in what kinds of matters, and to what kinds of clients. So it's not a simple answer in that there's no one answer for all community legal centres, and the process might look a bit different and does look a bit different for different centres, but

that's the general approach across the community legal centre.

DR MUNDY: I think our concern in raising this was not a mindless Orwellian quest for uniformity, but rather some mechanism by which governments could be assured that funding was being allocated, scarce resources were being allocated broadly for the purposes for which they were meant, and I think your colleagues in New South Wales - if I can cast my mind back to the past week - suggested that the notion of broad overarching principles by which these decisions might be made would be something that would not only be acceptable but in some cases may actually prove to be helpful.

MS BUCHANAN (FCLCV): Yes.

DR MUNDY: And that would then help align governance frameworks back to performance and so that governments - and one of the concerns that our commission always has is how do we ascertain the purpose for which money and scarce resources being provided is meeting the purposes? So that sort of general principles framework would not be something that would cause you difficulty?

MS BUCHANAN (FCLCV): No, indeed. And so we support that and certainly our response to the relevant draft recommendation in the report is that we support that. So the idea that government has a role appropriately informed by the other players in setting some of the priority groups and setting in place some of the frameworks to guide those decisions is entirely - is one that we're entirely comfortable with.

The point that we want to emphasise is that we think the notion of that resulting in standard eligibility criteria, for example, across all community legal centres, or across community legal centres and Legal Aid, would be incredibly problematic, and there needs to be some capacity for community legal centres to identify what the local community needs are. So whilst there may be some high level identification by government of here are the priority target groups for legal assistance services, what that looks like on a local basis may vary slightly and there needs to be some capacity for centres to make some flexible decisions based on the needs that are apparent to them as well.

DR MUNDY: And, you know, a community legal centre servicing the general community in Geelong will have very different issues with, for example, the national CLC that looks after issues around insurance.

MS BUCHANAN (FCLCV): Indeed. Indeed. And the - - -

DR MUNDY: And their delivery methods are different.

MS BUCHANAN (FCLCV): Exactly, and that diversity and that capacity to tailor the services to the local need and the - you know, identify and really keep on top of the emerging needs as they present and as they shift, as they do when communities change and the environment changes, that's absolutely one of the strengths of the community legal sector. So losing that would be incredibly detrimental.

DR MUNDY: Can I ask just briefly - I just mentioned the insurance CLC that operates nationally out of Sydney - did - and this is probably a question that is more easily asked in Victoria than anywhere else - but is there more scope for national - for something like an insurance - something like insurance, which is national in its character, and probably financial services are national in their character more broadly - is there scope for more national based services or - it's just an open question because there does - you know, consumer credit would seem to be another one, particularly where they're increasingly delivered not face-to-face over a desk.

MS BUCHANAN (FCLCV): I think - I mean, that's not a proposition that we've considered a great deal in part, I think, because the community legal centre model has such strength - - -

DR MUNDY: And it's got that community word - - -

MS BUCHANAN (FCLCV): - - - in responding to community on the ground.

DR MUNDY: It's got that community word in it.

MS BUCHANAN (FCLCV): The community word in it but also the community aspects to the service delivery and service direction.

DR MUNDY: Yes.

MS BUCHANAN (FCLCV): The service planning aspect of the services. So I mean, and you know, you mentioned the consumer credit and the consumer areas of law, as you would know, Consumer Action Law Centre is a Victorian Centre. They work very closely with their counterparts in other states, and that's the same for lots of specialist legal centres. So there is absolutely already networks of legal services that work on a particular area or with a particular demographic and they join forces fairly effectively at a national level to tackle national issues whilst retaining that local state-based focus and some of the strengths that come with that.

DR MUNDY: Yes. I was just curious because we were quite taken by the fact that very limited resources are supporting a national service for insurance.

MS BUCHANAN (FCLCV): Yes.

MS MacRAE: Just in relation to the scale of CLCs, are you able to give us an idea of the sort of size of them here, and we heard previously from - again, from your colleagues at Legal Aid - about some amalgamation that's happening. Do you see that as a positive, and is there scope, or would there be benefits, in increasing the scale of some of the CLCs because we have had some evidence from various people that scale can be a bit of an issue, especially if you are looking at centres of only two or three people perhaps.

MS BUCHANAN (FCLCV): We certainly think that there would be benefit in increased scale to community legal centres. In the submission that was submitted by the National Association of Community Legal Centres and jointly with ourselves and our other state counterparts, I think we referred in that submission to the National Association funding principles for community legal centres, and the modelling that is done there to suggest the minimum level of funding for a sustainable community legal centre is in the order of \$626,000 per annum. If you look at Victorian centres and the government funding that Victorian centres attract, there would be more than 20 centres in Victoria who would not meet that criteria, who are currently operating, in some cases, significantly under what we say is the sustainable level. There is no question that, for small centres, there are a number of extra challenges over and above the challenges for larger centres.

You asked whether, in our view, the amalgamations or what is happening in the Western Community Legal Centres Reform Project is positive. From our point of view, one of the most positive elements of that project is that the community legal centres are, themselves, around the table. They have formed the view that there might be better ways to work. They've formed the view that perhaps not all of the services they're providing in the western region in the Western region are being provided in the optimal area, or at least, looking at what's likely to happen in the future, they will face some real challenges in meeting changing need in their current form.

They've seen that there might be some efficiencies that can be gained from working together in different ways. They didn't set out in that project necessarily to look at amalgamation. They left the door open to look at whether they might share some back office or corporate functions and a whole raft of other kinds of changes, certainly in terms of where it seems to be heading. The centres involved seem to have agreed that amalgamation for

them, and shared governance, is a good option. For me, certainly, that project seems that it will be delivering very good outcomes, good outcomes for the centres, good outcomes ultimately for the communities the centres provide services to. The fact that community legal centres have been around the table with Victoria Legal Aid, working through that together, really is a strength of that approach.

DR MUNDY: To the extent that efficiencies are realised from this, will they be held within that group of CLCs?

MS BUCHANAN (FCLCV): Absolutely.

DR MUNDY: Legal Aid is not going to harvest - - -

MS BUCHANAN (FCLCV): That's exactly right, so any inefficiencies - - -

DR MUNDY: So what they generate - - -

MS BUCHANAN (FCLCV): - - - can be used for more client service and to generate ultimate benefit to the community.

DR MUNDY: You mentioned, I think, that about 20 CLCs in Victoria fell below this.

MS BUCHANAN (FCLCV): I believe slightly more than 20, but yes.

DR MUNDY: Whatever the number is. Whilst these sorts of benefits are probably relatively easily realised in metropolitan areas, or more readily realised, it is probably not the case in regional areas. To what extent are those sub-scale things in regional centres rather than in a metropolitan area?

MS BUCHANAN (FCLCV): Certainly, some of the regional centres are very close to what the national association has set as the minimum. Some would be slightly under, but there's - - -

DR MUNDY: What sort of communities are at risk? Are we talking about Bendigos and Ballarats, or are we talking about Sales? You know, what sort of places are talking about?

MS BUCHANAN (FCLCV): The Central Highlands area, Gippsland area, would be some examples.

DR MUNDY: The opportunities to, through some sort of institutional reform to support that, is, in your view, less available than would be in the western

suburbs?

MS BUCHANAN (FCLCV): It's virtually non-existent, I would suggest. I think the reality is, if you look at regional Victoria, then what you will see is very limited community legal services. So the notion there simply are no, in most areas, legal services with whom a CLC can work to find efficiencies and, already, those services are vastly inadequate in terms of the resourcing they have to meet the legal needs of the communities in which they are based. So the notion that there is any genuine efficiencies to be found and that there is any other answer beyond, to be frank, additional resourcing would be a flawed one.

DR MUNDY: There is no fat and they are starving, basically?

MS BUCHANAN (FCLCV): Indeed. We say this fairly clearly in the response and it was implicit in the very first point that I made, but even within metropolitan Melbourne, whilst there are a large number of centres and whilst there are certainly some small centres that we say their current level carries some challenges in terms of sustainability, we caution very strongly against assuming that any of those centres are based in areas where there's no need. If you look at the service data of most of those centres, or all of those centres, we would say they are all meeting very serious legal need, usually amongst very disadvantaged client groups.

Even - and I go into this in some detail in the submission - the centres that are placed in inner Melbourne in areas that seem to be in more advantage, better-off areas, when you look at the data and you look at those centres' own analysis of who they're servicing, then you can see fairly readily that they are still meeting the needs of highly vulnerable client groups and there are enormous risks with removing the services from those areas.

DR MUNDY: From personal experience, I understand that. Specialist CLCs, we came across one the other day that - granted it was in the ACT - had one employee. The specialist CLCs in Victoria, are they well - well, relatively - none of them are of that ilk, I presume?

MS BUCHANAN (FCLCV): I can't think of any centres that have just one staff member.

DR MUNDY: No, but - - -

MS BUCHANAN (FCLCV): Again, there is a variety, so there are some specialist centres that are large centres, that are relatively - compared to other community legal centres - well resourced and have been successful in

maintaining funding and attracting funding, and there are some specialist centres that are fairly small. Overall, I would say - I mean, we have some very strong and effective specialist community legal centres.

DR MUNDY: Specialist centres are largely CBD, inner suburbs based?

MS BUCHANAN (FCLCV): Yes.

DR MUNDY: Redfern Legal Service pointed out to us - and I think there is some interesting data that has been drawn to our attention by Clayton Utz and Ashurst - that there is this preponderance of CLCs, including the specialist ones, and the point was made: the specialist ones need to be somewhere and the CBD seems to be not an unsensible place for them to be.

MS BUCHANAN (FCLCV): Indeed.

DR MUNDY: Another point that was made to us is the advantage of a location close to the CBD, and the larger, more successful ones, certainly in New South Wales and Victoria, to be a significant - of that ilk - is access to pro bono assistance rather than having to trip it out to Sunshine to provide your pro bono, it's easier to hop up to Fitzroy, particularly if you live in Fitzroy. Is that your experience?

MS BUCHANAN (FCLCV): That certainly bears out, based on the information that we get from members. We haven't done the analysis of pro bono and volunteer contributions, so I can't say that based on data analysis, but certainly the information that we get from centres is that the centres that are further out in different parts of suburban Melbourne, they absolutely can still attract volunteers. They can still attract pro bono, but there are some extra challenges in doing that. Having said that, most of those centres are still very effective in attracting volunteers, so I don't know that that's - - -

DR MUNDY: I guess it was more on the point of particularly large firms with large pro bono programs. I think the suggestion basically was they're more likely to deploy their resources close to the office than they are three-quarters of an hour on public transport away.

MS BUCHANAN (FCLCV): I think there's some truth in that. What that means for centres that are based closer to the city is that they have an advantage in terms of developing pro bono partnerships, and I think in the main centres close to the city in Melbourne make the most of that and have incredibly strong pro bono partnerships.

DR MUNDY: The Redfern Legal Service has developed an overseas students

service and I think their ability to leverage pro bono into that is locational.

MS MacRAE: We did make some suggestions around trying to make the pool of volunteers more readily available for CLCs through things like practising certificates for recently retired people and I note that that's something that you didn't support. Are you able to discuss a little bit the problems that you would see with that and whether there's other mechanisms, or whether in fact you think that you're already accessing the volunteers in really the best ways you can and there's not barriers that we need to address there.

MS BUCHANAN (FCLCV): I will answer the second part of that question first. The feedback that we receive from member centres is that in the main they have no challenges attracting volunteers. That's one of the strengths of the Community Legal Centres, as you found in the draft report, but volunteers are generally very willing to contribute their time and their expertise into the Community Legal Centre. In the main the challenges that we hear about from centres is about how centres can be best equipped and best resourced to kind of make the most of those volunteer contributions.

We said in our initial joint submission I think with the national association - we made the point that Community Legal Centres need very zoned infrastructure to attract and manage and supervise volunteers well and really those questions are the questions that we hear more about from centres rather than challenges in attracting volunteers. There's certainly some centres I know that have long waiting lists for people who are keen to be volunteers and that simply reflects their staffing levels and the resources that they get from government and other sources don't enable them to provide the staff supervision to meet the demand, if you like, of the volunteers who would be prepared to come and work there.

In terms of the concerns around relaxing the capacity for volunteers to come in and assist, our main point, our main premise, is that the level of quality that Community Legal Centre clients get from a volunteer practitioner should not in any way be compromised and so the rigour that applies to volunteers requiring a practising certificate and a current practising certificate is an important part of that. It means that the supervision needs to be in place and needs to be of good quality, but the supervising staff of the centre can assume a level of knowledge and a level of currency of that knowledge. The points that we made in the submission were really to caution against anything that would affect those kinds of principles.

DR MUNDY: I don't think it was our intention to produce a sort of "grey lawyer light" or something. Your views about availability are different to other

jurisdictions and I guess what our intention was really was to reduce the financial barriers to people properly qualified, so our intention was that they would still need to do CPD, they would need to have appropriate insurance and we suspect indemnity insurance could perhaps provide assistance in that regard, but it wasn't in any sense to provide a lesser quality of - and it is essentially around recently retired practitioners and also practitioners, predominantly women, who want to do a bit of volunteer work while they might be taking career breaks. That was really what we were getting at. It wasn't a second string - - -

MS BUCHANAN (FCLCV): To clarify the point we were making in our submission, certainly provided there could be some provisions and mechanisms put in place to make sure that volunteers had the kind of requisite level of current practising knowledge and the kind of elements that come with a current practising certificate, then we would be open to that.

DR MUNDY: They should look like all other lawyers.

MS BUCHANAN (FCLCV): Indeed. I should say, going back to our previous point, whilst many centres find it easy to attract volunteers, there certainly are some issues for some and particularly in regional centres, so I think that's an important point for me to make as well. It's not that all centres have volunteers clamouring to join the waiting list. There are some centres that find it easier than others and of course centres in regional areas and some areas further out from the CBD find it harder than others.

DR MUNDY: Thank you very much.

MS BUCHANAN (FCLCV): Thank you.

DR MUNDY: We will now take a break for 15 minutes and recommence at 10 to 11.

DR MUNDY: We will recommence these hearings. Could you please state your names and the capacity in which you appear for the benefit of the transcript.

MR LIVESEY (ABA): Certainly. My name is Mark Livesey. I'm the current president of the Australian Bar Association. With me is Jacqueline Stone who is the executive officer for the Australian Bar Association.

DR MUNDY: Could I ask you to make a brief opening statement. By "brief" - I know it's a challenge for barristers - no more than five minutes.

MR LIVESEY (ABA): I would be delighted to, and I would also be delighted to break the mould. One of the key concerns that the Australian Bar Association has with the current draft is the idea that the courts should be recognised as a form of profit centre which should be determined according to whether they are or are not profitable. With respect, we see there is a serious misunderstanding of the role of the courts and the public role that the courts provide which is pervasive and influential across Australian society.

The courts aren't there simply just to resolve disputes as between particular litigants, although that's an important part of the function of the courts. The courts are there as an essential mechanism which ensures that our society continues as it does. The fact that the courts are there has an influence on commerce and on the conduct of people in our society and it's something which the ABA believes governments should continue to provide and not put the cost of that on the shoulders of the individual litigants.

The second thing that I would like to emphasise is that whilst alternative dispute resolution and the use of these kinds of ombudsmen is very important, these should be seen as filters to the courts rather than ways of diverting matters from the courts. The courts have, certainly in the time I have been in practice for around 25 years, embraced alternative dispute resolution, but the challenge is to ensure that cases don't get to the courts. Once cases get to the courts, they should be dealt with quickly and expeditiously and getting a result, getting a case heard and determined, is an important part of the process.

Finally, in relation to legal training, we agree that the Priestley 11 should be reviewed. It is timely to look at the way in which legal training is proceeding around the country. That really occurs against a backdrop of two things. One is the failure of the national profession to proceed. That was a regrettable thing but it's really something which is probably beyond the scope of reference of the commission, but it's because of that that there is still scope for individual variations across the jurisdictions.

Finally, in relation to legal education, it's a mistake, with respect, to think that alternative dispute resolution isn't part of legal training. It was part of the legal training when I was being trained as a lawyer and it continues to be an important part of legal training, and indeed it's an important part of a lawyer's ethical responsibilities to look to resolving disputes rather than litigating them. I think those matters have been lost sight of in the draft report.

DR MUNDY: Three minutes. Well done. I don't think the word "profit" is actually used in the report. I'm a classically trained economist. I know a lot about profit and its sources. I don't think we suggested the courts should be run for profit. I think what we suggest - and we acknowledge readily and frequently that the courts provide a number of roles, including clarification of the law and the resolution of disputes.

I think to say that the commission's view is that they should be treated as profit centres is an inadvertent misreading of the document, but it does come to the point - His Honour Chief Justice Martin graced us with his presence in Western Australia on Friday and he pointed out to us that in the Bell matter that court spent somewhere in the order of \$15 million of public money and recovered somewhere around about 700, 750 thousand, so somewhere north of \$14 million of public money was devoted to the resolution of a dispute which clarified virtually no points of law and was essentially a fight between a pile of banks and a couple of insurers.

What the commission is concerned about is that public benefits are paid for by the public; private benefits are paid for by private citizens. We can have a debate where they start and end and that's an interesting debate, but I guess the question is this: if full cost recovery is not something that's appropriate, and we don't think it is and perhaps our language was a bit defective in that regard, and accepting that people do pay court fees, they have paid court fees for a long time, the question is how do we strike those fees, what should be the relevant considerations and who should pay them?

We have indicated that certain classes of matters should be carved out, but thinking about those larger commercial matters, what would be the view of the Bar Association as an appropriate basis for - let's take the Bell case, for example. Without trying to put numbers on it, how should we think about the setting of fees because if those fees in those matters could be set - one of our interests is of course to perhaps influence the behaviour of litigants and therefore not have the courts clogged up with matters which could perhaps be dealt with privately. We're invited to say something about the setting of court fees. What is your view?

MR LIVESEY (ABA): Can I, rather than commence positively, commence negatively. The court fees currently set in the Federal Court are generally regarded as prohibitively high and it's a matter of concern - - -

DR MUNDY: Can I stop you there and say prohibitively high for whom?

MR LIVESEY (ABA): For ordinary litigants.

DR MUNDY: Could you give me a definition of "ordinary"? Are we talking about you and me or are we talking about the Commonwealth Bank?

MR LIVESEY (ABA): We can talk about you and me and we can talk about companies, ordinary companies; businesses.

DR MUNDY: Yes.

MR LIVESEY (ABA): That's an example of something which I think is too high.

DR MUNDY: Yes.

MR LIVESEY (ABA): You have raised the Bell litigation and I think it's dangerous to raise a very unique piece of litigation and try and draw general - - -

DR MUNDY: I can find others.

MR LIVESEY (ABA): I know there are others. I have been involved in some myself over the years, particularly audit cases, but it's a mistake to think that those cases don't resolve any points of law or don't have any impact on the broader community, and by that I mean the legal and business commercial corporate communities. The fact that these cases are being litigated has an effect, and so I think it's not just about what that case cost that court in that situation. It's about the effect of having a court there. That's the first thing.

DR MUNDY: I'm also concerned about what the \$14 million of Western Australian taxpayers' money could otherwise have been devoted to.

MR LIVESEY (ABA): Perhaps. I haven't spoken to the chief justice about this but I think if there was a question as to which court would get the choice to hear that case, I would be surprised if Western Australia wasn't keen to put its hat in the ring if it was open to a selection as to who would get that case because it's an important piece of litigation that nearly went to a full hearing in the High Court and was widely followed. I understand it was expensive. I

understand that there is a question about the extent to which that money might have been spent elsewhere but I think it's an extreme example. There are many, many other cases which might run for a few weeks, perhaps a few months and down to a few days which are expensive and prohibitively expensive because of court fees both to commence the case and to continue the case on a daily basis. A full user pays system, which I think was the terminology that the commission was looking at - - -

DR MUNDY: I think we used the language "moved towards" full cost recovery. It was a direction on the statement and the words were carefully chosen.

MR LIVESEY (ABA): I accept that. I would speak against that for the reasons I've already articulated. I think in an extreme example such as the Bell case. For example, I was involved in the Arthur Andersen audit case involving the Southern Equities Group and that case was scheduled to run for two years. It ran for six months and what happened is that the parties themselves funded the computer equipment used for transcription, used for the paperless court room - the publication of documents in the court room and so forth. That's an example of something where I can see there is a genuine role for parties to fund the expense associated with running litigation. I don't know to what extent that happened in the Bell case, I wasn't that closely involved with it.

DR MUNDY: Given its time, I suspect there wasn't much IT support going on at that time.

MR LIVESEY (ABA): Yes, but it should be and that's something that the parties can shoulder themselves, and in that sense I think what courts need to do is provide the service, that there is a judge highly skilled, a trained individual, a court room and its infrastructure and the parties, to the extent that they are able to, can add on things like computer support.

DR MUNDY: Can I ask you this question; our research indicates - and no-one's disputed this - that court fees in Australia constitute around about 10 per cent of litigation costs and it's probably higher for smaller matters

MR LIVESEY (ABA): Yes.

DR MUNDY: Smaller matters in higher courts. Is it your experience, obviously as a commercial litigator, that the parties bring their mind when deciding to proceed with litigation or not as to the total cost that they're likely to encounter rather than the bits? That, to me, would be a reasonable economic assumption.

MR LIVESEY (ABA): Yes, and that's backed up by a number of things. First, the professional ethical responsibility traditionally reposed in solicitors to advise about all of those matters and secondly, particularly in commercial cases, you're dealing with people who are making commercial decisions whether to litigate or not.

DR MUNDY: So there's experts and there's solicitor's time, and all that sort of stuff, and their own time in attending court, and the disruption at litigation invariably has on the business.

MR LIVESEY (ABA): That's so.

DR MUNDY: So it's no real different to you and I going to buy a plane ticket and it's going to cost us \$500 to fly to Sydney, and whether Qantas gets a bit and the airport gets a bit, and air traffic, we don't actually care. It's how much it costs us to get there, that's the real point of the decision.

MR LIVESEY (ABA): I would disagree with you about the product but as to the commercial decision of the litigant - - -

DR MUNDY: As far as we look at the cost.

MR LIVESEY (ABA): Sure.

DR MUNDY: So if that's the issue, an increase in court fees - let's say, a modest increase of 10 per cent and given they constitute let's say 1 per cent of 10 per cent of the total costs, so that would leave 1 per cent increase in the cost of the litigation. So the marginal litigant would proceed or not proceed, but there may be a tendency in which the litigation would still proceed and the 1 per cent would actually compress the fees. It would either lead to increase the efficiency on the part of those running the litigation or perhaps lead to a reduction in, let's say, the returns to the equity providers of the litigation which let's just say are the law firms and the private barristers.

So in a sense, a relatively modest increase in court fees across the board may actually just lead to a redistribution of rent within the litigation process between the state - who everyone thinks should provide more resources for the legal system, I think we're all agreed on that and mainly to a marginal reduction returns to the providers of legal services.

MR LIVESEY (ABA): Respectfully, I don't see there's a contest between whether the lawyers would do better out of no increase as distinct from an increase. I don't see it in that way at all.

DR MUNDY: I'm trying to work out who's going to bear the cost of an increase and it seems to me that the marginal litigant won't pursue the matter or the litigant will pay, or the service providers will take a reduction in rent.

MR LIVESEY (ABA): I think it's more complicated than that. I think what's happening is that by and large the litigants are wearing the increased cost. I can't think of law firms that would wear that sort of expenditure, apart from perhaps the truly contingent arrangement cases and I don't think that sort of - the context is they are already high and so the disincentive to litigate is already there, and so you're dealing with people who are prepared to litigate in any event, by and large. You're just making it more difficult to get access to the court.

DR MUNDY: That argument all makes sense to me, providing you assume that the market for the legal service which constitute the bulk of the cost is competitive?

MR LIVESEY (ABA): That's true and I think what we're dealing with is to take a case which - let's say it's a standard business acquisition and there's been a concern that there's misrepresentation about the turnover of that business and allegations of misleading conduct under the old Trade Practices, now Consumer Law. Fairly stock standard piece of litigation for the Federal Court. The disgruntled purchaser will seek legal advice and go to a law firm, and presumably that decision is made on the basis of cost, reputation, skill set, et cetera.

DR MUNDY: Assuming they have that knowledge, which the literature generally suggests unless they're a regular litigant, they don't.

MR LIVESEY (ABA): Yes. Can I come back to that?

DR MUNDY: Sure.

MR LIVESEY (ABA): Because for the purposes of my illustration we can assume that person's made a genuinely - - -

DR MUNDY: It's more likely if it's a business transaction than a punter.

MR LIVESEY (ABA): Yes. So what happens is that person will be considering an array of options, probably advised, as to how to claim redress for a business that is not as profitable as promised. So those range of options will include court action. What's happening at the moment is that the Federal Court is missing out on those cases because the Federal Court is a more expensive place to litigate. So those cases will go to other fora such as a

Supreme Court or a District Court. That's the most obvious impact of the problem with filing fees and court fees.

If, properly advised, the litigant decides that even the Supreme Court or the District Court are prohibitively expensive there is often an attempt to try alternative dispute resolution and in many cases that's done before action. The fact is that the defendant, the seller of the business, may be reluctant to accept any responsibility. So again, the importance of the court being there looms large in any negotiation and so in those processes as you track it through - it's not about whether the solicitor's advising the litigants are going to miss out on anything, they're often assisting the client to a resolution, to an end point. The question is how to get to that end point effectively, quickly and efficiently, and having a court that's available to hear their cases quickly, efficiently and so forth is critical.

DR MUNDY: I won't labour the point, but I think what the issue I'm trying to get at is that litigants make a decision about where to bring matters on the total cost for the matter and marginal variations or even substantial variations, whilst court fees are a relatively small proportion of total litigation costs, are unlikely to determine fora. I suspect - and I think you allude to this - what actually might be driving this, might be driving the decision about the selection of fora may actually be how quickly they get on.

MR LIVESEY (ABA): That's true, for example in my - - -

DR MUNDY: If I can get on in the Federal Court in three weeks or a month, or three months and I've got to wait 12 months on a commercial matter, there is real economic value in delay.

MR LIVESEY (ABA): As you'll have heard from many people who have come before you, the Federal Court generally speaking is a quicker venue than the state courts, but it's getting harder for the Federal Court to attract that traditional business, notwithstanding speed of service, because of the fees.

DR MUNDY: Because there's a trade off between time and costs.

MR LIVESEY (ABA): There is.

DR MUNDY: So effectively people are valuing that additional cost against how quickly they get off within the total context of their litigation costs, including the cost of delay for them to gaining access to their settlement.

MR LIVESEY (ABA): That's true. But it would be a mistake to think that any person properly advised is simply thinking about going to court and about

getting a judgment. It's always a multifactorial process, multifaceted process, where dispute resolution is considered at every stage.

DR MUNDY: No, we understand that.

MS MacRAE: Just to get to the absolute - take you back to the heart of the matter though, just to be clear so we're on the record that you agree, that you're not suggesting that we shouldn't have court fees.

MR LIVESEY: I'm not suggesting that at all.

MS MacRAE: Okay. So we agree then that we're looking to try and find a mechanism that better reflects we might say the private benefit and not necessarily the total private benefit, but the benefit that's received directly by the individual, and in that instance, I guess, to give the example of the Federal Court, we might say, "Well, what factors determined how that rate was struck and how it's moved over time," and why aren't those same principles, or should they be, if we can identify principles that were used there, should those principles be used elsewhere, and if the principles were fairly applied then, you know, is there a case to say that in some instances these fees are too high. So that's the sort of - I guess that's the sort of issue we're trying to get to.

MR LIVESEY (ABA): Could I address two points at the outset. First, I'm not sure that fees were ever set in a principled way. I think they were set historically in ways which are no longer understood. Second, I'm not sure that they're now being set in a principled way or that to search for a principle is going to yield any beneficial outcome as to how to set them in the future. The problem that's emerged, certainly in my time in practice, is the retreat from funding by state and federal governments of court infrastructure. It's more pronounced in the states than it is federally, but it's apparent across the board.

It's been that retreat in funding which has caused these cost pressures to be addressed amongst other ways by increasing court fees and my point is that that's a mistake. That's to misunderstand the public role of the courts as a piece of our society's infrastructure, just in the same way that roads are and bridges and so forth.

DR MUNDY: I think this is probably the wrong fora and the wrong Commissioner to talk about efficient pricing of economic infrastructure with the greatest of respect, Mr Livesey. We might move on. The debate around contingency fees and litigation funding has drawn some discussion while we've been discussing this inquiry and I guess we had an interesting discussion with the New South Wales bar association on these issues, and I guess barristers are probably in a good position to make some observations on this because you see

this stuff up close and personal without necessarily being the ones doing the funding or charging the contingency fees, and you probably therefore have a degree of objectivity about these matters.

So before I ask you some specific questions, do you have any general reflections, and particularly it seems to us that the nub of the concern is about securities actions more than anything else. That seems to be where all the expression of angst is, it's not coming, for example, around - I think Maurice Blackburn told us yesterday they're running a class action for a defective hip replacement and the ANZ fees case which is a more - bushfires is another. There doesn't seem to be a big concern about those matters, but I'm interested in your broad view, particularly on contingency fees and the behavioural and ethical aspects, but also the funding question.

MR LIVESEY (ABA): The Bar support greater access to justice and getting really better outcomes more quickly. Contingency fees can be a way of ensuring that litigation which would otherwise not be pursued, rights which would otherwise be lost, can be pursued and rights defended.

DR MUNDY: I think we are coming at this issue from the same place.

MR LIVESEY (ABA): So the Bar's view is that there is a role for contingency fees. The concerns arise when there is - I'm sorry, I should have emphasised also that there are stringent ethical responsibilities on solicitors as well as on barristers about the maintenance of unmeritorious litigation and about advising clients about risks and returns and so forth. The problem comes in some areas of litigation, not most, in my experience, where the profit element in pursuing litigation is at the fore. Many other bar leaders have spoken about this in the past and whilst it's true that most of the criticism have been of some firms, I'm sure there's room for criticism of some barristers as well.

So I think that's a minor part of the problem, but it's something that needs to be looked at in any rules established regarding contingencies. The balance in Australia has always been the loser pays costs. The system has been thought to be a good disincentive for a meritorious litigation combined with some limited relaxation of contingency arrangements. Certain percentage uplifts, for example, on fees that can be recovered and in a carefully regulated way I think that's worked relatively well. It's probably been disproportionate concern about it, because by and large in the personal injury areas or some of the examples that you gave, it's really about a true contingency to be paid or not paid rather than any uplift, and that's the way most litigation is run with people who can't otherwise afford representation.

The new phenomena in the last 10 years, maybe a bit longer, has been the rise of litigation funding, and I think in general terms it's regarded as a good thing, but it does provide another avenue for representation that would not otherwise be there, but it's starting to develop to a point where some consideration of oversight and control would be a desirable thing, which is not to say that there are particular problems or examples of misconduct, I'm not aware of that, I think it's simply getting to a stage where it's a sufficiently mature aspect of the litigation landscape that looking at its regulation is an appropriate thing to consider.

DR MUNDY: I think you make a good point in as much as what a lot of what we here is about concerns about the future rather than abuse of the past. Starting with the ethical questions, we had similar discussion with Chief Justice Martin on Friday and I think his strong view was when it comes to the ethical behaviour of solicitors and barristers you can leave that to him. By "him" I think he was speaking with the royal - - -

MR LIVESEY (ABA): Generically.

DR MUNDY: Yes. That's the business of the courts and the courts can, along with the other fora for the regulation of the behaviour of lawyers, do their job. Would that be the bar's view?

MR LIVESEY (ABA): Yes.

DR MUNDY: Or do we need to do something more?

MR LIVESEY (ABA): No. To deal with it in context, there are very robust arrangements at the moment for oversight of the legal profession in all of the states and territory jurisdictions. By and large they work effectively. A slight criticism of the interim report is that it tends to lose sight of just how robust those powers are and how they're exercised, but they're there. There are always of improving that, for example, the interim report suggests a five-day rule. That's something that could certainly be considered, although that might have an impact on cost. Another thing is ensuring that the examples of unethical conduct are well publicised. That's another way of ensuring that the market is able to know who is providing ethical services or not.

I'm not sure that your commission would add very much to that. I think there are already a number of ways of dealing with that. The advantages or improvements would come, I think, with an increase nationalisation of the rules that apply, and I've already mentioned the float of the national profession, by and large a federated arrangement whereby there is a relatively small oversight body funded by each of the jurisdictions but ensuring consistency in

terminology, rules and so forth would be the best way to do that. There are always examples of idiosyncratic differences amongst the jurisdictions which don't appear to make sense. They should all be removed.

DR MUNDY: I don't want to get too, because of time, in the area of professional regulation. I think our concerns are more about the commercial conduct of lawyers rather than their ethical conduct, and the concerns which we reflect in the court have been put to us by Legal Services Commission and I, with respect, don't think the confidence in the community about these arrangements is as strong perhaps as they are in other areas of commerce where people acquire services from service providers. We've tried to understand some of the arrangements and we might be slightly better at understanding regulatory arrangements than the ordinary citizen. Some of them strike us as being profoundly opaque.

But can I just bring you back to this question of litigation funding. You seem to suggest that there's not much evidence of systematic problems. One of the things that's been suggested to us - and you did bring our attention to the existence of adverse costs orders which makes this sort of scare about American outcomes I think significantly out of play, but you talk about regulation. So the idea that a funder would have to hold a financial services licence, say from ASIC - we're not wanting to create a new regulatory agency just for the purpose, and our concern is primarily about the prudential, you know, people are essentially taking these people on, they're providing some sort of financial service which may be claimed upon in the event the action is unsuccessful, so the notion of a financial services licence would not be something the bar would object to, or some form of prudential regulation.

MR LIVESEY (ABA): I think careful consideration of that would be timely. Whether it's ultimately implemented, that depends on a range of factors. For example, insurers have been in the business of funding litigation for a very long time indeed.

DR MUNDY: Typically on their own.

MR LIVESEY (ABA): Certainly, but also subrogated rights actions and so forth. There are many examples of mums and dads or friends of families providing funding. Casting the net so wide as to encompass all of those things would not necessarily be a good thing.

DR MUNDY: I don't think that's what we had in mind. But what we do have in mind is the area where we see that contingency fees and litigation funding economically look quite similar and the only difference is really in the character of the funder, being the independent funder on one hand or the law

firm on the other, and it's the law firm issue that gives rise to certain ethical consideration, which I think a number of people have suggested to us might be a bit overblown.

MR LIVESEY (ABA): Yes, because ultimately there's a commercial self interest in the funder, and the funder - however keen the lawyer might be to run litigation, even if one ignores the ethical responsibilities, which you can't, but even if one did, the funder is not going to throw money at something that doesn't like bringing a return.

DR MUNDY: If the law firms are funded, they're not going to throw money at something.

MR LIVESEY (ABA): It makes no sense.

DR MUNDY: Yes. It stills leaves the prudential issue.

MR LIVESEY (ABA): Yes.

DR MUNDY: Would you see a problem if a law firm wanted to act as a funder - that's not to say law firms have to, and I suspect the vast majority of them, because we know the vast majority of them are actually small, if the law firm wished to act as a funder, that it should be exposed to the same prudential considerations as say IMF Bentham?

MR LIVESEY (ABA): I think it depends, because again, depending on how wide you cast the net, you may pick up, for example, the time honoured small personal interest firm.

DR MUNDY: I'm thinking about the Maurice Blackburns, the Slater and Gordons of the world who would enter this market, I think, if they were allowed and would effectively compete with the known funders that we have.

MR LIVESEY (ABA): If it's on a true basis of large scale commercial competition, it would be difficult to suggest that there shouldn't be some similar oversight, however, that's something that it's a very complex issue and there are a number of sub-issues to it and I haven't - I can't pretend that I've thought through all of those.

DR MUNDY: No, that's okay.

MS MacRAE: Could we perhaps just talk a little bit about you mentioned in your opening comments and I think in your submission about your support for the idea that the structure of the law degree should be reviewed. Could you

just say a little bit more about what elements you think are potentially problematic or need looking at in the current structure and what - - -

MR LIVESEY (ABA): It's not so much a complaint about what's happening at the moment, but a recognition of the proliferation of law schools over the last 10, 15 years, and the attempts made to try and bring in court elements which have failed over time, and the fact that there doesn't appear to have been a major review of the law degree for some considerable period. I think the last one was - - -

MS STONE (ABA): In Victoria in 2006 there was one, but that was all legal education from the law degree all the way to CPD.

MR LIVESEY (ABA): So it's timely to have a review of that and again, as in all of these matters dealing with an Australian legal profession, there are good reasons why there should be similarities rather than differences across the board, which is not to say that there shouldn't be unique opportunities provided by law schools, I think that's a good thing, innovation is a good thing, but there are going to be some certain elements that need to be in law degrees and there shouldn't be too many differences amongst them.

MS STONE (ABA): I just say, the model we have now in our law schools is really just in case learning, so there's a lot that you learn that we know because of the structure of the profession will probably be irrelevant to your day-to-day work, and there's an enormous amount of stuff that you don't actually learn, and unfortunately that is a very expensive process and it also puts the emphasis on actually training people to be fit for practice on the profession itself which is a cost absorbed by the profession and ultimately passed on to consumers and also in many ways can distort the actual character of the profession itself.

So by actually structuring a profession where you're required a mentor, the importance of a mentor to a legal degree is often referred to, can act as a subtle disadvantage to women, for example. So if your progression through the law in your career depends on you forming a close working relationship with usually an older man, I think it's probably self-evident what the problems inherent in that may well be. So there's certainly scope to actually perhaps tailor the law more to practice. I think a lot of law deans make claims that it's a very good general degree, and I'm not actually sure that that's tested and even true.

We may actually be better putting people through an engineering style degree where actually all of the stem courses, the science technology, engineering and mathematics, which actually generate productivity in the economy may actually be a better diversion in general degrees than a law

degree, so I think, as Mark has said, there's certainly scope to revisit it and actually consider - well, there's distortions in the way universities are funded.

DR MUNDY: You're speaking to the converted. I have a mathematics degree, a couple of economics degree and a law degree.

MS STONE (ABA): Yes. There are distortions in university funding traditionally too, which has made the law degree a very attractive proposition for the universities and there's reasons why they claim it's got a very good general - it's cheap to run and they can charge people. But I think that it has led to distortions in the legal profession and I think that we can actually consider that the just in case model may well be outdated, and this is a review that's happening extensively in the UK at the moment, the Canadians are doing it, and the Americans are doing it, so I think that there's certainly scope for Australia to perhaps be a little bit more open minded, because I think some of the submissions about legal education were particularly forceful and probably should - - -

MS MacRAE: That's a good word.

DR MUNDY: Some of them could be described as defensive as well. Can we perhaps bring you to - I mean, it's an issue that personally interests me because I've done a lot of legal-related work over my career, and we heard evidence yesterday from the Law Institute of Victoria and they were making some unusual observations for an organisation of their ilk in respect to lay advocates and particularly in jurisdictions like VCAT in areas such as town planning, I think, was the one that they focused on, whereby it's not uncommon for people to appear in VCAT on behalf of either their employer, typically the council, or their clients to whom they provide - and argue out matters about town planning and those sorts of issues. There's a tradition of it in the industrial jurisdiction as well. Is that - - -

MR LIVESEY (ABA): And in the police courts.

DR MUNDY: Yes, and the police. Thank you, we hadn't thought of that one. Is this something that - and it comes back to the just in case nature of legal training and whether there is some capacity to increase the training of people who - the legal skills of people who know that's what they want to do, you know. Back in the days when we had industrial relations degrees, there was a whole pile of law courses in IR degrees. Is that something that - well, within appropriately structured jurisdictions with people who are recognised in some way - what drew our interest to this in the first place were some reforms in Washington state in the family law jurisdiction. But is there a place in the world for lay advocates but with legal training in certain fora?

MR LIVESEY (ABA): Historically before degrees became commonplace, it was done on the job as it were, and someone would move through to full qualification or not. I think there's always a role for - - -

DR MUNDY: I think Mr Justice McHugh might be an example of that.

MR LIVESEY (ABA): Precisely, and I don't see any difficulty with lay advocates in those specialised areas. Whether there's a need, a pressing need for some form of formal qualification, a certificate or a diploma or something beyond that, I'm not sure about. But the question you raise has another element to it, and that is the impact of that type of person on litigation where the person is self-represented, particularly in the plethora of tribunals that we have at the moment, and what often happens is that because of dint of experience and informal training that lay advocate is much better placed to deal with what are sometimes very arcane rules, particularly in planning and industrial law, that the first time litigant, and the suggestion in the draft that there should be greater emphasis on keeping lawyers out of disputes carries with it the risk that that simply creates an imbalance in power and effectiveness.

One of the other problems that emerges is that when you've got the true dispute with an unrepresented litigant what often happens is that unless that person quickly acquires legal skills, like the lay advocate, or gets a lawyer, then the whole system has to change around that person, and so the tribunal or the court changes what it does. So for the price of saving legal representation, some thousands of dollars, tens of thousands of dollars can be wasted in changing the structure of the dispute to cater for something that isn't working.

DR MUNDY: I think our observations about creeping legalism was actually a reflection of those fora where leave is granted and perhaps where the fora has been designed for self-represented litigants and leave perhaps - but I think you make a good point. I mean the average citizen coming up against the chief planner of a large metropolitan council is clearly disadvantaged. I suspect the average suburban solicitor might be equally disadvantaged.

MR LIVESEY (ABA): I have the same experience.

DR MUNDY: Yes, but I think you make a very good point about the fact that sometimes legal representation is needed and that's - - -

MR LIVESEY (ABA): Well, it's there to balance the - - -

DR MUNDY: I think it's equality of arms.

MR LIVESEY (ABA): Precisely. But also it's quicker and cheaper to have a skilled lawyer deal with a problem with another skilled lawyer by and large, because contrary to public belief most skilled advocates want to get a dispute resolved relatively quickly. They don't like the grief they get from the bench or from the tribunal if they're wasting everyone's time.

DR MUNDY: True. Anything else?

MS MacRAE: I don't think so.

DR MUNDY: We're probably done. We are pressed for time.

MR LIVESEY (ABA): Can I just raise two final matters - - -

DR MUNDY: Yes.

MR LIVESEY (ABA): - - - with your permission. The first is we accept that there was a need for greater research and collection of data about the cost of the current system, and that a number of the decisions that are taken need to be costed properly, and I think court fees is an example of how that hasn't happened to date.

DR MUNDY: I think we're in violent agreement on that point.

MR LIVESEY (ABA): Root cause analysis, for example, is another thing that could be undertaken profitably to better understand the cost of each stage of a dispute because the bar's strong view is that the cost of legal representation in proper context is not as great a burden as is sometimes thought. It's often far and away the cheaper way to resolve disputes to have skilled advocates arguing only the relevant points relatively efficiently, and if you just pardon me one moment. That's all I wish to say.

DR MUNDY: All right. Well, thank you very much for your submissions and taking the time to come in and see us.

MR LIVESEY (ABA): Pleasure.

DR MUNDY: Thank you.

DR MUNDY: Could we have the Women's Legal Services of Victoria, please? Sorry for the slight delay.

MS FLETCHER (WLSV): That's all right.

DR MUNDY: But when you're settled, could you please state your names and the capacities in which you appear?

MS FLETCHER (WLSV): Joanna Fletcher, chief executive officer, Women's Legal Service Victoria.

MS MUTHA-MERENNEGE (WLSV): Pasanna Mutha-Merennege, policy and projects manager, Women's Legal Service Victoria.

DR MUNDY: Thank you. Would one of you like to make a brief opening statement? If you could keep it to five minutes or thereabouts, that would be helpful.

MS FLETCHER (WLSV): Thank you. We're both going to say a very small amount, if that's all right. I wanted to start just by talking about two things: Women's Legal Service's role in the legal assistance sector in Victoria; and also how we innovate and adapt to address legal need. We're a statewide legal centre with 20 staff. We specialise in issues arising from relationship breakdown and violence against women. We really complement Victoria Legal Aid in terms of the services we provide. We work opposite them in duty lawyer services in the Magistrates Court and through our related organisation in the family law courts, and we also provide assistance at Legal Aid's mediation service round table dispute management. The final way we see our role in complementing Legal Aid is our flexibility in relation to ongoing case work, and I'll talk about that a little bit more in a minute.

The final aspect of our role in the legal assistance sector in Victoria that I wanted to emphasis is that we play an important role building the capacity of generalist legal centres to respond to violence against women because it's the biggest issue facing our colleagues in generalist centres as well. We've found probably even more so in recent times that the need to innovate and adapt so that we can actually manage the increasing demand is more and more pressing. In that context we've developed a service called the link virtual outreach program where we're providing legal assistance via Skype to women supported by their family violence worker or community health worker in agencies around Victoria, and so that attempts to overcome some of the barriers of being in regional, rural and remote areas, and also barriers such as economic and cultural barriers.

We really make sure that we target our intensive services, so our ongoing casework. There's often a misperception about legal centres that we don't do a great deal of ongoing casework. Women's Legal Service runs four or 500 cases a year, and we focus in our casework guidelines on ensuring that the people we assist in those cases are the women facing the most significant disadvantage and whose cases will have the most significant impact.

It probably goes without saying that working in violence against women issues, we already feel that we're addressing legal need in Victoria. It's an increasing issue, but we're also on top of that, undertaking at the moment a statewide legal needs analysis of the needs of women in Victoria experiencing relationship breakdown and violence, and who face particular barriers to access to justice. So we've learnt a little in that context about sometimes the bluntness of the CIFA index, which I'm happy to take questions on.

Finally the thing I wanted to emphasise because it will continue to inform our innovation and adaptation is that we've developed a really robust monitoring and evaluation framework which is outcomes based, so that we'll be able to tell people not just, "This is the services we provide with your money" but, "This is actually what we're achieving for the women in Victoria."

MS MUTHA-MERENNEGE (WLSV): I wanted to speak very briefly too about key recommendations in our submission. The first is around complexity, and the commission has highlighted in its report how complexity in the court system is a barrier to accessing justice, and rather than leaving it to individual jurisdictions and individual courts to develop their own initiatives, we've recommended that there be a comprehensive audit of the federal court system to map where the gaps are and to identify areas of complexity, and we think that an audit is an opportunity to bring in expertise from outside of the legal profession, for example experts in plain English drafting, to develop solutions that are systemic and that are evidence based as well. An audit is actually an opportunity to consult with users of the court system to understand what their experience has been and to understand what would be a meaningful intervention for them in terms of assisting them to navigate the system.

Very quickly I wanted to draw the commissioners' attention to pages 6 and 7 of our supplementary submission, and I put in an example of the steps required to attain an order for a division of superannuation. Now, that's an ordinary order that our lawyers often seek in the Family Court system, and it's an incredibly complex process, and I think we counted at least eight different applications and affidavits that needed to be filed, and 12 different steps that needed to be completed before you could get a final court order, and that just illustrates one aspect of the Family Court system and its complexity.

The other recommendation we had was around addressing unmet legal need for women who have small property claims, and it's linked to the issue of complexity, but it's one of the key gaps in the system that we see. So regardless of the level of disadvantage that you experience, you actually can't access Legal Aid in Victoria if your family law case only relates to a property dispute, and we often step into that gap to assist women where there are property disputes. Given the complexity in the system you'd understand why women don't pursue an equitable property claim. It's far too complex for them. It's too expensive, and often their claims are quite small. They're often under \$100,000.

It's for this reason that the recommendation we have in our submission is the creation of a family law tribunal to deal exclusively with small property claims, and we see that a tribunal provides a pathway to resolve disputes without lengthy and costly processes of going through court litigation, and that's something that we've referred to in page 26 of our original submission, and I'm happy to take questions on that as well.

DR MUNDY: I'm asking these questions of all CLCs. The commonwealth recently indicated it's reprioritising its expenditure towards frontline services. Can you advise us as to whether your CLC funding has been affected by that reprioritisation, or did you escape?

MS FLETCHER (WLSV): We haven't had a reduction in our actual funding in dollar terms, but the provision that will be put in our service agreement that refers to the core services now excludes reference to policy and law reform activities.

DR MUNDY: Okay.

MS FLETCHER (WLSV): So we're a little uncertain how that's going to be interpreted.

DR MUNDY: Is your current interpretation that would extend to not participating in the inquiries of this commission?

MS FLETCHER (WLSV): I think our approach is likely to be not to seek permission, but to ask forgiveness afterwards because we believe it's a pretty fundamental part of civil society that you have public commissions and they need information from the people at the frontline and, you know, that's what we do. We see 3000 women every year, and that's what informs - - -

DR MUNDY: To be fair, I think the commonwealth's intent is that their funding is not to be used for that purpose, rather than your organisation - - -

MS FLETCHER (WLSV): Exactly.

DR MUNDY: - - - isn't to pursue those activities. You touched on this small claims tribunal and I must there are some other matters that we wonder why need to go to courts too, and we might touch on those just in a moment. Obviously this would need to be a federal tribunal where - I think we are with the Commonwealth on attempting to reduce the bureaucracy around its own tribunals, whether what occurs, how success or not is a matter for others.

But would you envisage this tribunal - I guess there are essentially three options: it can stand alone; it can sit within the AAT's broader Commonwealth tribunals infrastructure; or it could effectively hang off either the circuit court or the Family Court. Now, given it's a small claims sort of jurisdiction, you're not expecting there's any complex issues of law, that would sort of lead you to the view that it should hang off the circuit court, if it's going to hang off either of them. Do you have a view on where that might be and why that would be appropriate?

MS MUTHA-MERENNEGE (WLSV): My first response would be that it would sit most appropriately with the AAT where there's already an existing tribunal structure and existing processes and procedures. What would be important is that people would understand that that is the process that they need to go through. So currently there's an understanding that if you are looking to pursue a family law case, it sits under the federal circuit court or the Family Court, and so it's really about making sure that there's an understanding amongst users of the court system that there's a different process that they need to access.

DR MUNDY: The difficulty I see with that proposition is that the AAT has no judicial function. It deals solely with matters of dispute between - well, matters in dispute with the Commonwealth. It's an administrative tribunal. It's not a judicial tribunal, so therefore it would need to be given jurisdiction to deal with matters between contesting parties which it doesn't have at the moment, and that raises questions under chapter III of the constitution as to its character. An easier problem for states to resolve with respect to tribunals and determinative tribunals between competing parties.

The circuit court doesn't suffer from that jurisdictional issue, and I think it's fair to say that - I mean my concern would be, and this is no disrespect to the president of the AAT who I have known for a long time and who has assisted us in this inquiry, is they're not set up to deal with family law. They don't deal with it now, and I'm just wondering whether the registrars and the edifice, the processes of the circuit court where the vast bulk of family matters

are dealt with and they're skilled with that in both a legal sense because they know, but also in a dealing with the people sense, might it be a better place? I mean I'd really invite you - if you'd like to come back to us with a short submission on where because I actually think it's an attractive idea, but if we're going to make a recommendation in this regard, I don't want to get knocked off on a jurisdictional question at the first hurdle. So if you'd like to think about that, we'd be really grateful.

MS FLETCHER (WLSV): Yes.

DR MUNDY: The other area I wanted - and I think we'd like to get a sense of, we've had a number of quite moving stories come to us about the resolution of people's estates and family disputes when someone dies, not particularly in relation to issues faced by women, but I suspect women are often - do you see many of these sorts of matters?

MS FLETCHER (WLSV): We'll sometimes get calls for advice, but because we have specialised, now 14 years ago, most of our referrers are quite - - -

DR MUNDY: Yes.

MS FLETCHER (WLSV): So because we work in violence against women in a relationship breakdown, we tend not to get those inquiries.

DR MUNDY: Well, let me put it to you in another way. Would your sense be that this is a problem for - I guess where we're going is we think the Supreme Courts are a pretty blunt device for dealing with what are essentially family disputes. Would that be your stance?

MS FLETCHER (WLSV): Well, it certainly would be, you know, from past history of dealing with property matters obviously that happened until recently with de facto property matters. It is complex and blunt, but obviously I'm not familiar with the particular areas of - - -

DR MUNDY: No. I mean if you want to go away and - I mean I guess what we're interested in - it's similar to the problem that - what brought me to this is this proposition about the resolution of small matrimonial disputes around property, whether a similar mechanism might lead to - because it's very traumatic for people. We've heard some shocking stories and we all know about them. Whether the sort of notion that you've prescribed suggesting for small matrimonial property disputes broadly defined might actually not be a device jurisdictionally founded properly that might actually assist in the resolution of what are other property disputes of a family nature.

MS FLETCHER (WLSV): Are you suggesting that that would happen in a commonwealth court?

DR MUNDY: No, it would happen in a state tribunal, I suspect.

MS FLETCHER (WLSV): In a state tribunal. Yes.

DR MUNDY: To be fair, the chief justice of Western Australia says it's not a problem. Other people tell us it's a problem. It may just be the conduct of the Supreme Court of Western Australia that's the difference here. I'd just be interested in your views.

MS MacRAE: The other main area that you talked about was the complexity of the law, and I think we absolutely agree with you there. One of the things you mentioned was possibly looking at some plain English drafting, and I guess I have some experience of that in the tax area, where we now have two Tax Acts, because we started out trying to do a plain English and it turned out so hard, and the benefits turned out to be so minimal that people decided it wasn't worth doing any more.

So I guess I just caution a little bit, and some of the experiences from there - and I'd be interested in your views on them - but one of the things was, if you're worried about the layman going to the Tax Act and not understanding it, the layman never looks at the Tax Act. The accountants might occasionally, but even they don't look at the act very often. The lawyers do, and most other people rely on someone else simplifying it for them anyway, if they even are ever going to touch that area of law, because if they've got a problem, it's very rare that someone is going to go to the legislation. So I guess the benefits of that plain English, who are we doing it for and why would we put resources into it? So asking that question initially.

Then I think the other problem that you run into early is that the people that do use the law say, "But we know now what that word means and we'll lose all the precedent around that. So if you just want to change that word" - I mean, the arguments became very entrenched. But things that looked to me, as a non-lawyer, absolutely commonsense, "Why wouldn't you put a simple word in here," "But we've got precedent around this word, and if we change this word in this legislation, there are implications over here." All those arguments sort of ran, and it just became very bogged down, hugely resource-intensive, and I think in the end everyone agreed, "Did we really gain much out of that process?"

So I guess I'd just be interested in how wedded you are to the plain English drafting and whether you could see an upside that I might be missing,

because I have to say that initially when that project was first mooted, I thought, "Good idea," and in practice it just didn't turn out to be such a good idea.

MS MUTHA-MERENNEGE (WLSV): I think that it's not just legislation that we consider there needs to be plain English drafting. I think it's looking at what are the court applications that people need to fill out, what's the legal information that's available to users of the court system when they actually go to court, so that they understand court process. I think that's probably the contact that users of the court system have, is through when they attend - - -

MS MacRAE: Sure. Okay. So you're not looking so much at the legislation but more at the periphery of - - -

MS MUTHA-MERENNEGE (WLSV): I think the legislation could do with a redraft.

MS MacRAE: Yes, there are certainly segments of it I know that we've had some submissions on, where basically lawyers work around what the law says, with workarounds, but they have to work around because the law itself is a dog, basically.

MS MUTHA-MERENNEGE (WLSV): But I do think - I mean, when you look at where the users actually come into contact with the court system, it is going to the registry and being given a bunch of forms that they don't understand. It's, you know, the access to legal information on the Family Court's web site. I read that and I don't understand it.

MS MacRAE: I have to admit, I did watch their video on just filing for a very straightforward divorce, and I thought, "If this is as easy as you can make it, you haven't done a very good job, to be honest." I mean, even the forms had 15-letter-word titles that they kept repeating, and I thought, "If my first language wasn't English, I would really be struggling. You keep repeating all this nomenclature of words, and why do we need to have something that complex?"

MS MUTHA-MERENNEGE (WLSV): Mostly I think that the external expertise does assist as well, because I think as lawyers it's just our second language to use all of these words, and an external expert can actually bring a different perspective to that.

MS MacRAE: Just in relation to your casework, you do have quite a heavy load there. Even though you are able to see that four to five hundred a year, how do you ration those things? Because I'm assuming you do get a very -

even though that looks like quite a big number, I'm sure it's the tip of the iceberg of people that come to you.

MS MUTHA-MERENNEGE (WLSV): It is, yes.

MS FLETCHER (WLSV): Before we made this recent change to our casework guidelines to be more targeted, we probably - 50 per cent of the clients who were actually taken to our casework meeting for consideration couldn't get taken on because we just didn't have capacity. What we're trying to do, therefore, with the new casework guidelines is to be much more targeted, and we basically developed sort of a simple sliding scale that really says, "What barriers to access to justice does this client face, and what will be the impact of this case for her as an individual, and ideally a bigger impact that might then have a flow-on effect to other cases?" So we're only three months into using the new guidelines, but it is changing the demographics of the clients we're taking on from going matters, which is exactly what we want to see.

DR MUNDY: How is it changing the demographic?

MS FLETCHER (WLSV): There are fewer clients - you might have been told about the income brackets in our (indistinct) reporting, which are a bit silly. So under 26,000 is low, between 26 and 52 is medium. We had more between the 26 and 52, and 52 and above even, under the old guidelines, because, as you've probably also been told, one of the key roles legal centres play, particularly centres like ours, is that gap between legal aid and really can't afford to pay, or, as our submission explained, excluded for some slightly strange reason, like having a financially associated person, or unfortunately having had to leave the matrimonial home, so now it's considered an investment property, and you might only have \$10,000 in equity, but bang, you've got no access to legal aid. So we'd really try to make sure we're reaching those women, and those women who face other particular aspects of disadvantage.

DR MUNDY: Those examples which are highlighted there, which seem to be a triumph of form over substance, are they issues that you bring to the attention of Legal Aid?

MS FLETCHER (WLSV): Yes.

DR MUNDY: How do they respond?

MS FLETCHER (WLSV): I think with some of them they're aware they're an issue. I think it's a challenge, you know, they're a big organisation, they have a \$156 million turnover, we have a \$1 million approximately turnover.

We can be a bit more flexible. I think probably the issue would be that if they introduced more discretion in their grant offices, it would become too cumbersome a process to manage. The response has generally been - you can challenge those decisions on occasions, but again, as we've included in our submissions, the process of appealing is quite complex.

DR MUNDY: And time-consuming.

MS FLETCHER (WLSV): And time-consuming, yes. So often private firms who do legally aided work, it's really not worth their while from a financial point of view, because they would already see themselves as making a loss, to actually appeal, and even seek external review, which we have on occasions.

DR MUNDY: If they're doing underfunded, legally assisted work, they're going to do a certain amount of it, and if they don't provide it here, they'll provide it somewhere else.

MS FLETCHER (WLSV): Yes, and that's exactly the experience in family law, where even firms that do legally aided work, they will maintain only a small proportion of their overall work as legally aided, and sometimes view it as a community service as opposed to a moneymaking exercise.

DR MUNDY: We heard from Victoria Legal Aid earlier today, and they were suggesting - we've had issues about what has been referred to as "juniorisation" of private providers, and they've suggested from their perspective it's much more a problem for them in family law work than it is, say, in criminal work, because basically, if you're a criminal lawyer, you're doing a lot of - that's the business, that's the customers.

MS FLETCHER (WLSV): That's right. The same in child protection as well.

DR MUNDY: So I think where they said their real problem was, with private work they provided grant and aid for, is in the family law space. Is that - - -

MS FLETCHER (WLSV): That would certainly be our experience, and certainly when we're trying to find lawyers in regional areas who do legally aided work at all, in some areas it can be quite difficult.

DR MUNDY: Is that because of the money, or because they might act - because we've heard a lot about conflict issues in legal aid. Is it a conflict issue, or - - -

MS FLETCHER (WLSV): In this context that I was just mentioning then, no, it's about just money, it's not economically viable.

DR MUNDY: I mean, if you accept the old notion that you do legal aid at less than commercial rates but you still - the argument isn't that it's not being charged commercially, it's that it's so far below, is essentially the argument. How would we think through about some sort of mechanism by which those rates could be struck? Because if an understanding could become about the mechanism of how the rate should be struck, and an expectation - there then becomes a capacity to work out how much more money should be provided for legal aid and family law matters. So do you have any ideas about how 80 per cent of something - - -

MS FLETCHER (WLSV): I don't in a percentage term. I think it would be a bigger inquiry, including how the legal aid guidelines sometimes actually contribute to a lack of early resolution of matters because of how they're structured. So although there's legal aid for RDM in Victoria, roundtable dispute management, other sort of negotiated outcomes, and not really supported by the guidelines. So if you were doing a privately funded matter, you would spend a lot of time on the phone, writing letters, emails, talking to your client, trying to resolve the matter by negotiation. That's not well-funded under the guidelines, it's funded by stage of court proceeding. So those things actually structurally disincentivise settling, because you're not funded to do those negotiations. So I think that that's probably a bigger issue than the - - -

DR MUNDY: So you'd get paid to go to court?

MS FLETCHER (WLSV): Yes. You see it in other jurisdictions as well, but because they've come to operate in a bit of a churn sort of way, like summary crime and child protection. It's a problem, but it's just so inherent in the whole system, which is funded by Legal Aid, whereas the family law system, you see it done well when people have the resources to throw at it.

DR MUNDY: The other observation that Legal Aid made to us was that they thought - and Legal Aid rate is about 150 bucks an hour, they think. That seems to be a number that we've been told around the country, so let's assume that's the number. Their view wasn't the hourly rate, it was the amount of hours the rate was being applied to. So there was no recognition of complexity.

Now, whilst we have a view about time based billing and the desirability of fixed fees, I mean, I guess one question - and I'd be interested in your views about how this would assist in the problem you've just described - was that if the rate became a function not of necessarily going to stages of the court

proceeding but rather an assessment of the complexity of the matter, and payment was on resolution, whether it be through a court process - and there may be some issue around supplementation for court appearance - but the funding of these matters was to get the family law matter resolved and an assessment up front was made of, "Well, some of them" - I think I used A through D, and you wouldn't get as much for A as you would for D on an assessment. Do you think that sort of approach might - and I accept there's all sorts of hooks through that.

MS FLETCHER (WLSV): Yes. I think that that's probably something that we'd like to sort of think about and then come back to you on.

DR MUNDY: I'm just trying to think about how - because really, as far as Commonwealth Legal Aid is concerned, for the vast bulk of matters, it's family law. There's a bit of drug crime money and there's virtually nothing else. So it is, I think, within the Commonwealth to drive behaviour in this space, with an alternative model for - and it comes to, I guess, our view about, should we quarantine civil legal assistance? The reality is that Commonwealth quarantines its own money pretty much anyway. So if you could have a think about an alternative funding model for legal assistance, particularly reflecting upon the perverse incentive you identified about, "Let's get to court," that would be really helpful. If you wanted to talk to your colleagues interstate, a national view would be even more helpful.

MS MacRAE: You talked about doing a statewide analysis, and I'm just wondering what's the timing on that. In some respects - well, is that, who, the national body, or is that - - -

MS FLETCHER (WLSV): We've used this - the national association has developed a framework for undertaking legal needs analyses, which is really good. It's generally geared towards centres in local areas, so general centres in local areas rather than specialist centres that have a statewide catchment. So we've had to sort of tailor it for that, and we're really kind of looking at geographic areas where our priority clients, for want of a better word, are in greater numbers or greater concentrations, and also particular groups who may be underutilising our service. We're hoping to have that finished by the end of July.

DR MUNDY: Could we trouble you to forward us a copy when it's publicly available?

MS FLETCHER (WLSV): Certainly. Yes.

DR MUNDY: That's still within our time frame, just.

MS MacRAE: I guess the other sort of question around that is, is that data that you think, "I'm sure it would be useful to other people," and is it somewhat of a surprise to you that it's fallen to you to do that sort of analysis when you think that something like the Legal Aid Commission or elsewhere might be tasked with doing that sort of collection and have that sort of data readily available.

MS FLETCHER (WLSV): Yes. I think that question actually points to something that's quite important about the distinction between legal centres and Legal Aid. I guess because we have our specialist area, it would be very difficult to do a statewide legal needs analysis of all the legal needs of Victorian women, but because we're a specialist centre working in relationship breakdown and violence against women, we are targeting those issues, that makes it more feasible to do a statewide analysis. Certainly we will be accessing data from Legal Aid to help us look at some of the geographic areas that are coming up as areas that we should be paying more attention to.

MS MacRAE: I'll just ask you, on the specifics, and it is a very specific matter, but the Victorian law in relation to where there's an unrepresented party, so that legal aid can't be provided to the other side - if one side is unrepresented, the other side can't - I mean, we understand completely, that was - well, it was one way of rationing funds, and we had the rationale given to us this morning from Legal Aid - but does that present particular issues to you? Do you find that that's been - well, I guess, has it increased your caseload? Has it reduced the extent to which you can help women who you think need it? Do you have a general comment to - - -

MS FLETCHER (WLSV): Yes. It's a really significant issue, and that change came in early last year. We saw almost immediately a real impact in terms of women seeking our help. They were women who were at the very end stage of their proceeding and they had lost legal aid at the trial. So they were faced with either trying to negotiate a settlement or attending the trial by themselves and arguing their case, and for most of them it wasn't really a choice. You're talking about cases that are high conflict, they've got really complex issues, like drug and alcohol, mental health issues, and it wasn't really a choice for them to attend trial.

So we have duty lawyers at the Melbourne Family Court who were negotiating settlements at the door of the court, spending five hours doing that, because we had women who didn't want to go into court to argue their case. So, you see, we've been seeing a lot of quite poor outcomes for women at that stage, and it's certainly an issue. We've been collecting case studies around it, but it seems like quite a perverse outcome that you have both parties who are

legally aided, and they're both legally aided because they're disadvantaged parties losing their legal representation at trial.

DR MUNDY: So they're legally aided up to the point of trial, and then it falls away? It doesn't seem like a sound investment of public money.

MS FLETCHER (WLSV): No, we would agree.

DR MUNDY: Legal Aid did make the point that in certain circumstances, I think where violence had been perpetrated by one party on the other, I think there was a capacity for the judge to order Legal Aid to provide assistance.

MS FLETCHER (WLSV): The exceptions are very narrow. They're much, much narrower than that.

MS MUTHA-MERENNEGE (WLSV): So my understanding around the actual guideline exception is for a party that has an acquired brain injury, a party that has a diagnosis of a mental illness through a public mental health service. I know there's another one, but it's not related to family violence.

DR MUNDY: So it's more about capacity, in your mind, than anything.

MS MUTHA-MERENNEGE (WLSV): The exceptions.

MS FLETCHER (WLSV): Yes, and they're about exceptions that can be objectively proven by another agency having done some work. You have to be, under the Mental Health Act, recognised as having a mental illness, and Legal Aid's reluctance to change the guideline is that very significant proportions of matters that go to trial do involve allegations of family violence. Estimates range between 60 and 80 per cent of matters that go to trial. So effectively they would say, "Well, if we change that, then we're giving it to everyone, and we can't afford it."

DR MUNDY: We did ask them for data on the number of people who are actually having legal aid removed in the circumstances and also these other orders that apparently have been available for five years or so. That was - - -

MS MUTHA-MERENNEGE (WLSV): We've not heard of - I mean, we've heard of cases where judges have asked Legal Aid to appear to explain their guideline to the court, but not that they have been able to actually order that Legal Aid represent the party.

DR MUNDY: You might like the transcript of Legal Aid will be available - what's today, Wednesday - so by Friday or maybe Monday or Tuesday next

week, so you might want to have a look at it and if there's anything you want to comment on we'd be interested.

MS MUTHA-MERENNEGE (WLSV): Just very quickly on that point. Those guidelines are non-reviewable. So the decision to restore legal aid at that point in trial is not a reviewable decision, so our lawyers have written to Legal Aid to go through the review process and at each stage they say that the guideline can't be reversed, the decision can't be reversed.

DR MUNDY: Can they be directed by the judge to review it, or can the judge stay the matter until Legal Aid has thought about it again?

MS FLETCHER (WLSV): They haven't tried that in the Family Court, have they yet? I mean, that's obviously happened in criminal matters as you know in Victoria, but I'm not aware that that's - - -

DR MUNDY: But that's essentially because of Dietrich and those sorts of issues.

MS FLETCHER (WLSV): Yes, that's right.

DR MUNDY: You mentioned that you specialise in family violence and essentially family broadly defined.

MS MUTHA-MERENNEGE (WLSV): Yes.

DR MUNDY: Do you have any observations or comments you would like to make on other areas of civil law where women may suffer from disadvantage and how those issues get addressed and what might be done to improve outcomes?

MS MUTHA-MERENNEGE (WLSV): I would say - and it is very interesting, I think, looking at Victoria Legal Aid's reports. I think that users of the criminal justice system are marginally men and for women they're more affected by child protection issues, child support, discrimination, family law and family violence, and that's where from our point of view more funding needs to be directed to address the gender inequity around legal aid funding.

DR MUNDY: Okay.

MS MUTHA-MERENNEGE (WLSV): I just wonder if I could very quickly on that, on the point around the trial funding, if the Commissioners are interested, we do have clients who are very happy to speak of their experiences in losing legal aid, in not being represented, in having to represent themselves

at hearings. So please let me know if you would like to speak to any of the clients.

DR MUNDY: We will, and any of the case studies which you could provide us with. It's just we're - well, I haven't seen my own home since Monday of last week and we are having to draw an awful lot of material to a close.

MS MacRAE: It's a small matter which we haven't talked a lot about in our report, but there is a vexatious proceedings bill currently before the Victorian parliament, as I understand it, and I'm just wondering whether you see that that's got any particular relevance for the particular groups you're involved with and whether that will be helpful or not.

MS MUTHA-MERENNEGE (WLSV): Not in the federal jurisdiction because it is a Victorian bill, and we would like to see something similar at a federal level and I think that would be helpful, and I do think the bill is quite useful in terms of the way it grades vexatious litigants, and we've mentioned that in the submission as well, that there are a few different strategies that would assist in addressing vexatious litigants and it's certainly something that we see in high conflict family law cases as well.

DR MUNDY: I think the chief justice of Western Australia drew our attention to the fact on Friday that men are more inclined to be querulous litigants than women now, and his Honour probably does see matters on appeal on family law matters in Western Australia. Is your sense that within the family law jurisdiction that where parties tend to go querulous, they tend to be men rather than women?

MS MUTHA-MERENNEGE (WLSV): I have to tell you I'm quite biased about this.

DR MUNDY: It's a special question of fact.

MS FLETCHER (WLSV): Yes.

MS MacRAE: So those gradings would give the court more latitude, I guess, to impose some sanctions, where at the moment the bar seems to be set generally so high that the court understandably is concerned about imposing those kind of sanctions given that it's a pretty heavy sanction. So the Victorian arrangements look quite attractive from that point of view?

MS MUTHA-MERENNEGE (WLSV): They were. They were graded in terms of the particular court that you could apply to, and it also allowed the particular person who was the subject of the litigation to apply themselves in

some circumstances and I think that's really useful and at the moment for a lot of parties, for the women that we see, that they're not able to do that, they're quite powerless in that sense and so actually giving them the avenue to do that is useful.

DR MUNDY: Putting aside the obvious emotional impacts, if there is - let's assume it is a querulous litigant which the federal jurisdiction can't deal with at the moment, and obviously the woman who is on the other side of this matter needs to go to court because she has probably got a property settlement she wishes to defend and there's probably some custody issues that she is keen to preserve, will she get legal aid assistance if she - how does she - other than coming to yourselves, will legal aid support what may, in effect, be, you know, a victim - she is a victim of this querulous litigant and probably the primary victim as opposed to the judges get paid enough to put up with this.

MS MUTHA-MERENNEGE (WLSV): She would probably have to meet the means test.

MS FLETCHER (WLSV): Yes, that's right. I mean, she would have to fall within the means test and so on, but I guess she may also face another issue around whether there's a substantial issue in dispute because if the vexatious litigant is litigating over something that really isn't an issue, which often happens, or is something really minor about, you know, changeover being at this McDonalds rather than the one in the next-door town, you know, Legal Aid aren't going to fund that, and she's still going to have to front up to court. I mean, they may fund it under a public interest exception but because that's normally more about actually, you know, public interest litigation that's going to achieve something big - - -

DR MUNDY: So she might get struck out because of some sort of means test.

MS FLETCHER (WLSV): Means, yes.

DR MUNDY: But it may also be struck out on a matter basis.

MS FLETCHER (WLSV): Yes, because it is not a substantial issue in dispute.

DR MUNDY: She would then have to bear those costs, and because it's a family matter she couldn't get restitution from the claimant.

MS FLETCHER (WLSV): That's right. We've had - I'm not sure that we've had them in family law jurisdiction in fairness, but in intervention order

matters we've assisted a client, we've been able to have a barrister assist her pro bono who has had over 200 applications brought against her, and even the applicant, the vexatious litigant was declared vexatious, but even then, you know, he can apply for leave to issue an application even though he's been declared vexatious. She comes back to court, you know - - -

DR MUNDY: She has to respond.

MS FLETCHER (WLSV): The balance is quite off in those sort of cases.

DR MUNDY: I mean, any more information you can provide us on that, because vexatious and querulous litigants come up a lot. People have very different views about what vexatious litigation is. Sometimes it seems to be just the normal assertion of rights contrary to the interests of the person claiming the litigation is vexatious, but circumstances like this, I think any more we could - - -

MS FLETCHER (WLSV): And I think it's a big burden on the court system, leaving aside the impact on the individual on the other side of those applications.

DR MUNDY: Your experience would be it's a bigger problem in the superior courts because they tend to be matters on appeal because the facts have been - - -

MS FLETCHER (WLSV): I wouldn't say that necessarily, no. There are a quite a lot in the Magistrates Court around intervention order matters, you know. It will be an appeal and then it will be a variation application the next week, and then it will be a revocation application two weeks later, and - - -

DR MUNDY: So they just keep bringing - they're not necessarily abusing the appellant process, they're just abusing the process per se.

MS MUTHA-MERRENEGE (WLSV): It's the same at the federal circuit court level that they will bring an application because there has been a change in circumstances in relation to the children which is really no change in the circumstances but it has to go to a hearing and the other party has to appear as well. So there's no sort of bar high enough that they have to jump over.

DR MUNDY: That's interesting, and I think the sense that we've largely got is just progressive appeals and then it just circles around in the appellant jurisdiction. All right. Well, thank you very much for that. That's been very helpful.

DR MUNDY: Could we have Dr Elizabeth Curran, please. Could you please state your name and the capacity in which you appear.

DR CURRAN: My name is Dr Liz Curran. I am a senior lecturer at Australian National University.

DR MUNDY: A very august institution. Dr Curran, could you give us a brief five-minute opening statement?

DR CURRAN: Yes, thank you.

DR MUNDY: Then we'll put some questions to you.

DR CURRAN: Thank you. Firstly thank you very much for the opportunity to appear today. My last written submission was the third one and I found that in each submission I was sort of around a range of different areas, so apologies for that. I think that reflects the fact that I've been working as a lawyer for over three decades. The majority of that has been in Legal Aid, community legal centres, private practice, and also as an academic whose research for nearly two decades has been in relation to access to justice and human rights issues. So apologies for the three.

But there are, I guess, four main points, just picking up across the submissions that I'd like to cover on in a very short, hopefully, opening. The first I wanted to start with I guess was when I did the research evaluation of Legal Aid ACT I interviewed a range of clients, and I just wanted to note that overwhelmingly they had explained to me how but for the intervention of Legal Aid ACT their lives, which were often filled with trauma and stress, would have been very different, and that the interventions were pivotal often in positive, more often overwhelmingly in positive ways. For example, reunification with children, protection from violence.

Key elements seem to be good triage, good connection with other non-legal agencies, and I guess an unknown quantity that they said was persistence by their lawyer, persistence with them because of their complex needs, but also persistence with horrible other sides and a complex, difficult to navigate legal system that they felt was often very unsympathetic to their personal circumstances. So I thought that starting with that was an example of what access to justice arrangements should really be about.

The second point that I wanted to note in opening is I've been very encouraged by the Productivity Commission report itself, the draft report, which picks up the findings of Coumarelos and Cunneen particularly around holistic joined up integrated service delivery and the complexity of many

human beings in the justice system, which they often find hard to navigate. So I sort of wanted to reiterate that because it would be awful to see that part of the report lost in a final report.

But one area which struck me that seemed to run counter, and I said this in my final submission and that's why I spent a bit of time on it, to the general thrust of the report was that around the funding, and I know that that's a very difficult and fraught area for you anyway. But I raised in my final submission the concern around the proposal for tendering. That process can be very competitive, secretive which in itself will create barriers to the needed and necessary collaborations to help people who are accessing different services.

The other thing that I would like to talk about just very briefly is funding can be too political and ideological when done by governments, and that concerns me particularly given we've had two significant empirical studies on what is effective innovation and strategic methods that are needed in order to be effective.

One example of that sort of concern about government and ideology, and that runs across all political parties, is that in the budget announcements recently it appears that a lot of the what I would call innovative services that were funded - one I'd like to highlight is Inner City Community Legal Centre which is running a service at the Royal Women's Hospital for victims of domestic violence, and the idea is that rather than waiting for them with fear and the experience of trauma, to actually situate a legal service there and then at the hospital to pick up those people, and I note that that particular service has lost its funding as of the end of this year, this financial year, sorry - sorry, next financial year. They've been funded til end - sorry, June 2015.

The reason that I raise that as an ideological concern is nationwide we have a national commitment to prevention of family violence and doing something about it. We see a lot of rhetoric about it. The concern is that the reason for the defunding of that service was pretty much it was among a number of initiatives that were announced by the former Attorney-General Mark Dreyfus that were dropped and decided not to be funded because they were initiated by the former federal government. What I would argue is that in fact it was about the nature of the project and the nature of the program and situating a legal service at a point or juncture when people most need help, particularly groups that really we're seeing are more and more disadvantaged by fear and violence.

So my concern is it's not being - a lot of funding decisions need to be or should be better informed by policy information. We have two pivotal pieces of research now by Cunneen in relation to indigenous legal need and

Coumarelos in relation to the law-wide survey. So I guess what I'm saying is it would be really good if somehow or other the funding of legal assistance services across Australia could actually be based on empirical research about what is needed and what is effective about a service through service evaluation that actually is done in partnership and cooperation with those delivering the services.

You just heard from the Women Legal Service Victoria, and I think that is an example of how the vantage point of those who see things on the ground can actually assist in explaining why services are delivered in particular ways to particular groups. So I guess the argument is really to try as much as possible to take the funding of these essential services out of the political fray as much as is possible. That would be something that I would ask. Not an easy task, but something that I think would be worthy because I think it's a problem in the way in which, you know - and I know that the Commonwealth has to prioritise a range of services, but this is a human service and is at really the cutting edge of people's human rights. So that's pretty much the opening.

DR MUNDY: Okay. Can we start back on the funding question? I think it is a misrepresentation of our report that we have a proposal for competitive tendering. I think we said it was an option.

DR CURRAN: Yes. Fair enough.

DR MUNDY: The attraction that competitive tendering has is that it provides a mechanism of accountability that governments, possibly at some distance from the service provider, have and we are aware of this collaborative model that gets discussed, and we understand clearly the merits of it. I guess the question is that in providing funding that will be scarce funding for services, how can governments be assured that the funding goes to the areas of greatest need because it seems to me that the collaborative model works on assumption of incumbency, that there is a body or a group of organisations there who are able to collaborate, and therefore it doesn't have a mechanism to draw out necessarily the provision of new services in new areas and that's, you know, the community nature of the CLC system is of that character.

So I guess the question is just how would you see the identification of new services in new areas, not new services or add-ons to existing arrangements, working? I mean that's our concern, and the other is, quite frankly, how can the taxpayer be assured that - and I'm not saying they're not getting value for money, but how can they be assured, other than us saying they're getting value for money, that they're going to in the long run?

DR CURRAN: Yes, and I agree, I think it's a very important point in terms of

transparency, accountability, and also value for taxpayers' money, and what I would say is I've now, for a number of years, been evaluating legal services and, you know, some services are good at some things and some services say they're good at some things but when you actually go and have a look they're actually not doing it. So it's about matching the rhetoric with the actual reality as well.

DR MUNDY: Yes.

DR CURRAN: Also, in terms of the challenge with a large country like Australia and a federal system and remote and rural communities it is really challenging to get some services into areas remote - for instance, Aboriginal communities would be one key example that I would give, so I completely agree and understand the challenge that you're talking about, and I think my view is that the creation of an environment in which services that by and large deliver services to the most vulnerable and the most disadvantaged, which the studies are showing have the highest rates of legal need, multiple legal problems, often really complex and are least likely to get the help of a lawyer is a real challenge.

I think that, firstly, with existing services I think that they - I used to be a director of a community legal centre here in Victoria and we estimated that - and we actually ran ourselves a quick trial with a range of other legal services in the north eastern region of Victoria and we came up with a figure that we spent 36 per cent of our time on compliances. Reporting to Legal Aid, reporting to the CLSIS data system and we could not actually extract or use any of the information that we put in and that they weren't asking the questions that were relevant to inform us about how to improve or what and where our services need to be delivered.

So I guess my argument would be that I think that there needs to be a more collaborative - using that word again - a collaborative model whereby an existing service actually is supported in actually properly evaluating their service. One of the reasons that when Legal Aid ACT commissioned me to do the research in the ACT was to develop a model along the lines of Hazel Genn's work in the United Kingdom which is capable of using local understanding and knowledge and developing a model for evaluation of legal services that could be adapted and replicated and that's why we've put the methodology on the web site, and the idea of that was it was an action research model where you actually worked with the services concerned, led by the most recent and informed research in the specific area.

It may be that, say, it's an indigenous service led by the most recent indigenous - information about indigenous services and how to deliver them

effectively, international and domestic, and the idea of that was a low burdensome low cost snapshot approach to research that was done on a regular basis and can build up comparisons to demonstrate impact, and then the idea of that was to actually measure whether or not the service was effective or not and if it wasn't effective - because you worked with the service and the people delivering service and the clients of the service - and that's an important factor, so it's a 360 degree angle, the stakeholders, the clients themselves were part of the research, and you actually worked out what was working, what wasn't working, why it wasn't working, and how to proceed.

Now, on that basis I think that would provide a very, very useful - that sort of research useful platform for forming funding decisions, going back to the point that I initially made about funding decisions often being made divorced from or not taking into account evaluations. I know of a number of Aboriginal services which had just recently been evaluated and have been de-funded over many years and the local community has said, "I don't understand why we didn't continue the funding. It didn't cost them much and yet we were really making inroads" and so I do need to flag that some achievements or impacts do take time because of entrenched in the disadvantaged.

So I think if we could create a patchwork across the country of effective evaluations and then in that process, particularly if you involve legal and non-legal agencies, which is what I've been doing my more recent research with Consumer Action Law Centre here in Victoria who are appearing this afternoon, but bringing in line the discussions between legal and non-legal services. Then you can actually often identify partnerships in different areas where community groups or community organisations - like I'm doing some work currently with Loddon Campaspe Legal Centre in Bendigo.

What you can actually do is identify other areas which need support and assistance to set up a service in a remote rural area and they can just take the - it's very simple to do a legal needs analysis. The first step is to not call something a legal problem and then you're on your way because most people don't know how to identify a legal problem.

So I think that then that informs funding decisions and I think that there needs to be a link between the Commonwealth Attorney-General's Department and a respect for the expertise and the experience on the ground and a genuine partnership between those two and then that informs the funding arrangements and I think if you have that consistent model - and I'm not saying just my evaluation technique; there are a number of different organisations that are doing it differently - and the irony of all this is they're doing it differently because they've had these - some of them have been doing this innovative stuff for a while but some of them are actually listening to the results of the LAW

Survey and they're actually saying, "All right, we need to be doing things differently. We now know about advice-seeking behaviour." A lot of it used to be intuitive. Now they've got empirical studies, and they have been changing the services and just starting to be more innovative.

The problem is there are some community legal centres and Legal Aid Commissions that are slow to respond to that and to shift, but I think that there's - they're actually going to be left behind and I think that there's an issue of leadership now in the sector. They've got the material that they need. There are leaders out there who are demonstrating it. I wrote a report for - on behalf of Footscray Community Legal Service and Consumer Action Law Centre, strategic approaches to problem solving. It's now had significant hits and downloads and a lot of centres around the country and internationally - I've done some work in Canada as well - are now saying to me, "We want to be more effective. We want to learn how to communicate more effectively with communities on the outer edge", and some of them aren't being led by legal centres, they're being led by community health centres in remote communities.

The difficulty, I guess, the more remote rural that you are and the less services you have you don't have that groundswell of people, even in non-legal service, to initiate the action and that is an issue, and I don't necessarily have the problem to that other than having something that's replicable, available, cheap, and allows for adaptability according to the local communities. Sorry it's such a long-winded answer, but I do think that issue of partnership and recognising expertise so to actually deliver the service delivery and having it processed by the very clients that we claim to be assisting are heard and have a voice and we can learn as to whether or not they think the service is effective is absolutely pivotal, and often they get lost in any funding model. The voice of the communities who often don't have a voice, so that's what I would advocate there.

MS MacRAE: So when did you do your evaluation of Legal Aid ACT?

DR CURRAN: 2011.

MS MacRAE: Okay.

DR CURRAN: Second half of 2011 and we produced the report in March 2012.

MS MacRAE: Okay. And is that - you said that you were looking at something that was ideally would be replicable. Is it the sort of - could you do a similar evaluation for other Legal Aids around the country using that same model?

DR CURRAN: Yes. Yes. You could use it to do an evaluation of a family violence service. You could use it to do an evaluation of an Aboriginal health service. You could use it to do - the idea was to get something that was able to measure impact on client outcome and quality service. So it has 11 outcomes - the work that I've been doing with Consumer Action because it's consumer we've developed some different, slightly tweaked outcomes, some additional ones, so it can be adapted for a range of different services. It doesn't have to be legal but it could be community legal centre, family violence, health services, allied health services, youth work, and that was the idea. It was based - its starting point was humanitarian organisations and some of the evaluation work that was being done internationally and a lot of it was based on the United Nations development work that had been done there.

MS MacRAE: And simple enough for someone from an existing organisation to be able to say, "I can look at this tool and apply it myself."

DR CURRAN: Absolutely.

MS MacRAE: And I don't need to have any expert skills or - - -

DR CURRAN: Absolutely.

MS MacRAE: Yes.

DR CURRAN: Yes.

MS MacRAE: Okay.

DR CURRAN: And that was the idea. I mean, we did a lot of the work around the literature of around the experience of vulnerable and disadvantaged and how it affects behaviours and stuff, so that's all there, and then they probably had their own understanding. But the idea of it is that it could actually - and what I did with Legal Aid is I trained up internally people within Legal Aid ACT who now run the snapshots on a regular basis, and so it can actually be done internal to an organisation or external if they're looking for that independent sort of - it could be done by a volunteer, so yes, it's quite replicable and low burdensome.

MS MacRAE: And do you know - I mean, I guess some of this might happen without anybody knowing about it because someone might see the web site, do their own little evaluation and you might never know - but do you know to what extent it might have been picked up?

DR CURRAN: Well, I know certainly Canada picked it up because I did some work with Law Clinics Ontario and Legal Aid Ontario around how to measure effectiveness and evaluate their own services. They've now put stuff on their web sites. I certainly know that Consumer Action certainly picked up on it and brought me to do some of the work with them and now, of course, Loddon Campaspe, the Advocacy Rights Centre has asked me to do some evaluation work with their family violence and their medico-legal health alliance to do a baseline evaluation and build on that. So, yes, it's being picked up. Victoria Legal Aid asked me to attend their strategic planning day, but unfortunately I can't go because I'm teaching the legal workshop intensive for ANU that week so - yes.

MS MacRAE: Okay. The other question, I guess, that comes to mind in relation to using this sort of evaluation work, if we were to link it more directly to funding whether there'd be an issue then about people not wanting to reveal that there are problems with what they're currently doing, and also then a concern that you might end up with a bit of a lead table that, well, we've got a finite budget here. We've evaluated these 50 programs. These five at the bottom here look like they're not performing so well. Because we've got a limited budget we'll chop the bottom five, but as you said, it's a snapshot in time and so maybe that's not the best way to look at it, that you'd be, you know, and obviously if you've got a bit of a longitudinal base, like Legal Aid ACT might have now that might help you with that. But I guess just coming back to this central issue about funding and how you link these things in, how do you - I mean, that's just some of the issues that have come immediately to mind about possibly making that link.

DR CURRAN: Yes, and I would very much urge against lead tables and all the rest of us can see where that's headed, unfortunately, but I guess the thing that I would be sort of saying is it's that recognition of the expertise, so the agencies do the evaluation and that then feeds up and there is, I think, a fraughtness about linking that to funding and I agree with you. One of the things that really made it work and made that continuous learning and development - like there were particular parts of Legal Aid that were very resistant to the evaluation and the reason that they bought into it and participated was that they felt a sense of ownership of it and an ownership of the outcomes and there is a danger that - and so they were prepared to change and some of these were people who'd been practising for like 40 years.

MS MacRAE: Yes.

DR CURRAN: And said, "It's my way or the highway," and then they were like, "No, actually, I can hear - this is safe. I feel safe in this. It's challenging but I feel like you're acknowledging the issues and I'm prepared to change." So

it was a good model for bringing about cultural change as well, and linking it to funding, I think, you're right. I mean, it is dangerous and, as I said at the outset, I see the struggle with how do you fund legal assistance services with competing government priorities but I guess what I would say is that funding decisions should be better made on empirical data and that these sorts of evaluations would provide empirical data and currently there seems to be a misfit, if you like, between a funding decision that is based on not an empirical reason for cutting the funding, and that would be, really, that, I think, is the point that I was trying to make.

MS MacRAE: Yes.

DR CURRAN: Is that I think there should be - we now have something that we've never had before, which is pivotal, qualitative, and quantitative, and I really want to stress the importance of qualitative work as I think I did in my second submission because I am aware of a number of studies that go to the Commonwealth Attorney-General's Department and other Commonwealth departments where they just look at the quantitative. So, for example, just to take a random example, kids are not in school for two weeks at the snapshot and tut tut, naughty naughty school in an indigenous community. The reason those kids aren't in school, if you actually do the qualitative study, is they're not in school because there's been a number of suicides and deaths in the families and it's perfectly human those kids were out of school attending to family business, and as a human being we would all expect kids who've lost a close family relative to take time out.

So it's really important that we not just get - and it goes back to the lead tables - convinced or hung up with just quantitative research, we need to have the quantitative and the qualitative, but my argument will be that funding decisions should be made not in a vacuum from empirical data, empirical information, and that the funding decisions we're seeing recently around de-funding some services seem to fly in the face of what this fairly pivotal and unique and never been done before Australia-wide research is telling us is the way to go.

So that would be my key thing is let's listen to the evaluations. Let's listen to the Cunneens and the Coumarelos' of this world and find out what is actually going on and then adapt our services to meet what the behaviours are of the people we claim to be helping. If we're not doing that we're not being effective. So if we're not being effective, then we're wasting taxpayers' money. So that would go back to my point, Dr Mundy, about taxpayers' money. It's all very well to fund something but if it's not effective and it's not having an impact and it's not making a difference, then you've got to ask questions is how could we fund it better or how can we make it better?

DR MUNDY: I think we might call it waste, and we are almost out of time. Just briefly - and it's a question I've put to a number of participants around the re-prioritisation of Commonwealth funding away from all reform matters. How does this framework for assessment deal with those questions because it is one of the three pillars of what CLCs do.

DR CURRAN: Yes.

DR MUNDY: The Commonwealth is withdrawing assistance - funding for those activities.

DR CURRAN: Yes.

DR MUNDY: We're not quite sure the basis upon which that assessment was made. So how would this tool that you describe assist people in saying, well, actually, hang on, there is value coming from this and here's why.

DR CURRAN: Yes. What this tool recognises is that community agencies do advocacy because no matter what the service, but let's look at legal services - that's what the inquiry's about - we have a problem with trends and revolving doors. We can do individual casework over and over again. We can waste court time over and over again. There are some cases which need to go to court. It's not an issue. Sometimes the state drags individuals to court. So that's a necessary.

But there are some times when we can identify trends and we can say, okay, let's be innovative, let's do something different. Let's look at this particular issue. What's a strategic approach to solving this problem? In my final submission, and in my second submission I refer to the bulk negotiation project which is still ongoing but has saved 15 million dollars of individual's money. It's led to reforms of various industries; the banking industry, the telecommunications industry. It is an amazing - it was an idea - an idea that worked.

I think it's actually inefficient of the Commonwealth to be looking at deleting clause 5 of the funding and service agreements. I think it stifles legitimate debate. I think it's absolutely fundamental that those who are doing work on the ground can actually say this is the law, this is - it's not working as the government would - it intended. It's wasting a lot of money. It's harming community. It's causing undue stress which is causing ramifications for the health service system. We think this needs to change and going back to the submission of Women's Legal Service, it's not just that community organisations be able to talk to the Productivity Commission or the various other Commonwealth body advisories that they're on, it's that they also are able

to - sometimes - I wrote a report on this in 2007.

Sometimes legal centres have been the only voice and the sole voice in a need for change to the law and it's taken time for the momentum to build and others to see, yes, there is a problem, and the reasoning for that is that their workers connected to the case work that they see on the ground. So again, it goes back to efficiency. I think if you take away their role as advocates and you take away their capacity to have input to policymaking and law reform then you take away the voice of the people that they help and you actually take away the potentiality of solving the problems at their source, which is early intervention and prevention in its purest form.

DR MUNDY: Okay. Well, thank you very much. We are out of time. These hearings are adjourned until half-past 1.

DR CURRAN: Thank you very much.

MS MacRAE: Thank you.

(Luncheon adjournment)

DR MUNDY: Could you please state your name and the capacity in which you appear for the benefit of the transcript?

MR WATKINS: Andrew Watkins, appearing in person.

DR MUNDY: Could you make a brief opening statement, if you like, Mr Watkins?

MR WATKINS: Yes, thank you. Thanks to the commissioners for their time today. Today, I also thank the participants here who have brought a strong community founded on principles of equity and equality, fairness and a fair go, merit and perhaps some merriment. I think that description probably covers everyone except for lawyers. I'm an Australian citizen, I'm a father of three children, married for 10 years, my wedding cost about \$25,000. I'm now separated and divorced, but the divorce cost about \$250,000. This scenario might be typical for a separating couple with some assets and some children, so I speak on behalf of people in that category.

This cost is before adding the cost of losses of personal income, losses of business prospects, loss of employee productivity, and loss of momentum and personal energy associated with multiple mandated Court events post separation. At best, the Productivity Commission already has some idea of the costs of legal events like divorce and marital separation, but perhaps not the full cost of the injustices of that process. My desire is to address this forum today because legal events, legal suspense, and legal expense have all had a drastic effect on the effectiveness of my immediate community.

Divorce, we already know, affects some 40 per cent of marriages. The link I put today is that a system which drives productivity and ethical behaviour is one which comes with it the need for a complaints system, because we all know that not only must justice be done, it must be seen to be done, and so come the rules of evidence. To reframe, not only must justice be seen to be done; it must actually be done, and so come the courts with their justices followed by the lawyers with their injustices. The complaints system we've now created is one where not only must injustice be done before it gets seen, it must be obscene before it gets undone, and so come the legal professional legislation and the legal services commissioners.

I was attracted to this inquiry because of its main aim, or one of its aims: to study the cost of accessing and securing legal representation for effecting effective access to the justice system, i.e., it shouldn't be dependent on the capacity to pay. It should be timely and affordable. It should produce fair and equitable outcomes, and it should resolve disputes early and expeditiously at

the most appropriate level. Alternatively, we end up with a system which effectively excludes a sizeable proportion of society from adequate redress and risks considerable social and economic costs. Now, I've borrowed that wording from the issues statement.

My intention is to produce a written submission. My apologies to the commissioners for not having done so yet, but you at least have in draft some synopsis of that. A number of items which I may raise in the written form would speak to items 1.1, what is access to justice; 3.1, how much does it cost to resolve a dispute; 6.3, some reforms required; 10.4, how to improve tribunal performance; 11.5, discovery; 11.6, experts; 13.4, costs awards; 14.4, on the impacts of self-represented litigants; and perhaps something on unbundling. However, two main issue I would like to treat today are at 6.4 in relation to the complaints system. I do so with a series of examples, so we don't run foul of the Family Law Act in relation to specific cases.

Sections 6 and 7 of the inquiry welcoming further comments in relation to the powers, structure and execution of the complaints handling in all jurisdictions. As at last week, there were about 200-something submissions, but nothing in relation to this issue. I understand you've received some things verbally in the last week or so, whereas the LCA claims to speak on behalf of 60,000 lawyers, I suggest perhaps their views ought to be well tempered against the public's views. Recently, in The Age newspaper, there was an article which raised the issue of dealing with the LSC, so I know that I'm not alone in the difficulties that presents.

Of some 20,000 respondents surveyed about their lawyer experiences, some 30 per cent who had an issue did not pursue their gripe. 17 per cent did what the lawyer wanted, 6 per cent pursued resolution through another body, and only 4 per cent through a complaint body such as LSC. I'm introducing a series of examples. The first one is a complaint made to the LSC, the LSC spends four weeks looking at this issue then writes to the complainant advising, "We note that you have decided to withdraw your complaint." The complainant itself said otherwise and the complainant, therefore, had to say the same thing twice.

The second example is a conduct matter. The client has terminated their solicitor's services then asked for the client's files. There's no money outstanding, so the solicitor gives the client some, but not all of the documents. The LSC dismisses the matter on the basis that the solicitor said all files had been provided. The third example is a conduct matter where a solicitor who was sacked retained the client's personal items. The LSC said this was not a disciplinary matter and dismissed it. Common law and commonsense says otherwise.

The fourth example is a conduct matter. A solicitor refused to bill the client. The LSC said they could not force the practitioner to provide bills. The LSC then classified it as a cost matter only, did not consider this to be a disciplinary matter, and dismissed it. The LPA says otherwise. The fifth example is a billing matter for work not completed. The LSC requires the client to pay money in, but then negotiates a middle position which includes a gag order, or gag agreement. Surprise, surprise, no further details available on this one.

The sixth example is a practitioner commencing legal action while the LSC was still investigating, reasonably well-covered by the LPA, but the LSC took no interest. We heard from the LIV yesterday and they reported various statistics in relation to Australia wide, 1 to 3 complaints per 1000 and, in relation to Victoria, .8 to 2.2 complaints per thousand. That came from the LSC Vic's reports, which are included, I think, in the final version of the draft final report. What the LSC reports between the lines of the fine print is that it discourages complainants from maintaining their complaints, or aids the solicitors to disguise their unprofessional behaviours without recording complaint statistics against them.

I put a couple of rhetorical questions to the examples I've given. To the example where the LSC had written to the complainant saying, "We note you've decided to withdraw your complaint," does this identify the capacity that the LSC has to deal with a complaint by not even categorising it as one and by saying something to what the complainant's actually put? What does it say for the ability to investigate a more substantial complaint? For the second example, where a client terminated their services, has received some documents but not all, if your investigation consisted of reading the complainant's statement that they had not received all their documents and then reading a reply from the solicitor that the client "has received all files that they are entitled to", then writing to the client to say "we believe the practitioner", how appropriate is that? If you're going to sweep it under someone else's carpet, why not give the client the right to let VCAT sort it out?

The third example, where the solicitor has retained the client's personal items: is this or is this not unprofessional conduct? If it's not covered by the rules, then the rules need some amendment because certainly the man on the street would suggest that was unprofessional not to receive back from the solicitor their stuff at the end of a matter.

To the fourth example where the LSC said they could not force the practitioner to produce bills that may, in fact, be technically, in the eyes of the current regulations, correct. Very strange, but perhaps correct. There was a

case in 1999 in the Victorian Supreme Court, I think, where the magistrate noted that there was no definition in the Act of the word "bill". That's in the 1996 Act. We've since had a 2004 Act and now a 2014 Act, and we still have no definition of the word "bill". So why do we need to go to VCAT to litigate the question of whether there's been a bill provided or not at the client's expense.

The sixth example was VCAT heard a matter in relation to moneys owing in the middle of the LSC conducting an investigation. The LSC being made aware of this -it is prohibited by the Act - the LSC took no action. So, in summary, if our families and our communities are putting their trust in the legal profession to act professionally in our best interests then we ought to have a level of confidence in the upholding of these professional standards. If the above examples are occurring - and they are - then we have a potent combination of the incompetence, bias and dare I say it - it was mentioned yesterday - corruption within the office of the LSC. None of those ingredients gives us the confidence that community demands.

I've got further examples in relation to the new Legal Profession Act and the powers of the LSC, also comments on that in relation to billing issues, a further example in relation to family law on court delays costing the client some \$50,000 potentially where the matter wasn't even heard and some minor comments which, depending on whether time permits today, in relation to unrepresented litigants in a family law sense, and unbundling of services for professions such as accountants and engineers. So any questions?

MS MacRAE: I guess at first instance are there some things, obvious or not, that you think need to happen in relation to the powers that the Victorian Legal Services Commissioner has and are there particular characteristics of regular legal professionals that you think that the LSC doesn't have?

MR WATKINS: In relation to the powers of the LSC, not much of this is new for the 2014 version of the Legal Profession Uniform Law Act, however if we were to name some of the relevant powers that the LSC has in relation to complaints, section 277 suggests it may close the complaint without further consideration of its merits and that is a discretionary provision. It may also - within that provision, if it forms the view that the complaint requires no further investigation, also discretionary. At sub-section 3 a complaint may be closed under this section without any investigation or without completing an investigation, also discretionary.

At section 282 the power to investigate complaints is written as follows: "The designated local regulatory authority may investigate the whole or part of a complaint." It doesn't say it must. Similarly, at 299, "The designated

regulatory authority may in relation to a disciplinary matter find that the respondent lawyer or legal practitioner has engaged in unsatisfactory professional conduct." It may, or it may not. "If it determines a disciplinary matter under this section no further action is to be taken under this chapter in relation to disciplinary complaints," therefore that is also a discretionary element and the buck stops with the LSC. Perhaps in that case, no longer being transferred to VCAT.

So I think all of those issues summed up, whilst the provisions might on the face of it be for good reason, to prevent some of the vexatious and unfounded complaints, if the examples I've described are sufficient to suggest otherwise then this is potentially behaviour that's occurring within the LSC environment and I understand there was a report written in 2009 by the Victorian ombudsman and that there were significant behaviours and cultural elements which the incoming Legal Services Commissioner for Victoria had to deal with. To the extent that he has been able to deal with that, I commend him however it seems there's more work to be done if these examples can be used as appropriate.

MS MacRAE: Was there something particular that prompted that ombudsman's report in 2009?

MR WATKINS: Yes, it was the fact that - and I don't have all the details in front of me on that one - but it was the fact that there were some 90 something complaints to the ombudsman about the Office of Legal Services Commissioner's activity in - must have been - 2008.

MS MacRAE: Are you aware of any or the extent of complaints since that time to the ombudsman?

MR WATKINS: I'm not. At the ombudsman's level, you mean?

MS MacRAE: Mm.

MR WATKINS: No, I'm not. However, this statistic that I mentioned before where we've got less complaints being carried through to resolution in Victoria and more withdrawals of complaint, does suggest to me that complainants are actually being encouraged to withdraw their complaints, some which may be meritorious and such as my example where they've written to the complainant saying "we note that you withdrew your complaint" without even having a discussion as to whether they wanted to withdraw it or not, and I think that's problematic.

DR MUNDY: With the greatest respect to that example, that could be

nothing more than an administrative error. These things happen.

MR WATKINS: I appreciate your comment and - - -

DR MUNDY: Can I just finish my question, if you may?

MR WATKINS: Yes.

DR MUNDY: What evidence is it that you have that sort of behaviour is systematic with exception to - is this an example of similar types of letters or is it just a one off?

MR WATKINS: In that particular case it's a one off, however it is a process whereby the case officer has referred it to a second person and it is the second person who's then issued the letter. So that means it's gone through two hands. If a complaint, you assume - the complainer's made the effort to make a complaint - you assume that the very least the LSC would do would be to identify the merit of it and if it is intending on dismissing it or asking a complainant to withdraw it, that there'd be an actual proper basis for that request.

DR MUNDY: That doesn't alter the fact that it may have been an administrative error. But I guess I'm more interested in the - I mean, I guess part of the story is - and you've obviously looked at a lot of this correspondence; when the Commissioner dismissed a complaint, decides not to proceed or whatever, are reasons given for that decision?

MR WATKINS: In not all cases.

DR MUNDY: Does the statute require them to give reasons for - - -

MR WATKINS: My understanding is it does, yes.

DR MUNDY: What - - -

MR WATKINS: Sorry, if I can just add to that, of the matters that have been dismissed in my examples, the reason given is that it is not - I'll just see if I can find the actual provision. Here we go. Yes, so in those cases, the LSCs dismissed them under section 4210(1)(f)(ii), which is that there's no further need for investigation.

DR MUNDY: So it is not a jurisdictional question, it is not, "I cannot look at this." It is, "There is no basis upon which" - that is the provision that enables the Commissioner to form a view that the Commissioner does not, as a matter

of habit or policy or practice, say, "There is no need to consider this matter because" - he just cites the provision and - so there is no reasons given other than citing the provision?

MR WATKINS: It seems to be the common practice that the LSC will restate the position of the complainant, then state the position of the practitioner. It may not be in that same correspondence, and it then will form a view, which I would suggest is a biased view, in favour of the practitioner that, given that there is a difference opinion, "We'll take the opinion of the practitioner." It sort of begs the question: what is this complaints process for? If we have identified a dispute based on two ends of the same stick, we have got to get something that is on the same stick. If we are saying, "He said, she said, they said. We're not interested in what the complainant's got to say," what benefit is that to the community?

DR MUNDY: I am interested in sound administrative and just processes and, certainly, within Commonwealth law, a decision maker who makes a decision of an administrative character, which this may or may not be - but let us assume it is for the time being - there is a general obligation in the Commonwealth jurisdiction that a person unhappy about that decision may seek a statement as to why the decision was made.

MR WATKINS: Without knowing the provision, I think that exists within it.

DR MUNDY: I am just coming from your evidence. If that provision was - I do not want to put words in your mouth, but let me put it this way because I am mindful of the time. Your expectation would be that, if asked to provide an explanation of the decision, the likely outcome in your view would be restating of the complaint, a restating of the service provider's response, and the Commissioner basically then saying, "There is no need to proceed," without providing what might be seen as an explanation of the reasons?

MR WATKINS: That is right. Further to that, I will note that the Commissioner does have powers to refer the matter to a mediation and in the examples given, as I've said before, if we've identified a dispute that consists of two parties being some distance apart - - -

DR MUNDY: The facts are not clear.

MR WATKINS: The facts can be clarified by that mediation process and, in any case, if it's outcome focussed, we could still get to the same point. If it's the fact that - in the example where the client's file wasn't provided, well, "You say it's not provided. You say you provided it. What did you provide?" Has any of that discussion occurred?

DR MUNDY: And presumably the remedy is "hand the file over now".

MR WATKINS: Exactly.

DR MUNDY: Do you have any sense, given, as you suggest, the Act contains provisions for mediation, are those provisions - do they empower the Commissioner to order mediation, or is it - - -

MR WATKINS: I believe they do.

DR MUNDY: It is not simply at the consent of the parties?

MR WATKINS: I am not sure on that. It may be with the consent of the parties, but if one party were to say, "How about mediation?" if the practitioner were then to say, "We're not interested," the expectation, I guess, would be that the LSC would then form a view that it would have been appropriate and there is a reason why the practitioner is not interested.

DR MUNDY: The sense I get from what you are saying is that, despite this mediation route being available to the Commissioner, there is not a lot of evidence to suggest that it is used.

MR WATKINS: It is not being suggested up front, that's for sure, and when it's being suggested by the complainant, who's obviously got to go and do the research and work out, well, what are the avenues if we're hitting brick wall after brick wall, to suggest to the LSC, "How about mediation, seeings how we've got a dispute," by definition. The LSC wouldn't then follow that through.

DR MUNDY: When I go to make a complaint at the LSC, do I get any sense from the LSC - and I know that other complaint resolution systems and, indeed, ombudsman - and I notice there is one in the room - will often say, "Here are the avenues in which this complaint - here is how it may proceed. These are the sort of steps that may be taken." That is not something you get from the LSC?

MR WATKINS: No.

DR MUNDY: It is essentially a black box?

MR WATKINS: Yes, it's a black box. You give us your complaint. We will stir it around in the black box and then, after a period of time, we will form the view that it is not a matter for further investigation and we will dismiss it under

4210(1)(f)(ii).

MS MacRAE: One of the other people we have seen in earlier proceedings - I think it was in South Australia - talked to us about the complaint handling there and was concerned that, at every turn, he had to put things in writing and there was no attempt to contact him in any other way and if he tried to contact the complaint body, he was told to put his concerns in writing and was not able to contact the complaint handling body directly. As far as you know - - -

MR WATKINS: I don't see that as an issue here in Victoria, however, I see the opposite side of that, which is, if you allow the LSC to engage you by telephone, you will then have words put into your mouth as what you said or didn't say. In the light of these experiences, it's actually preferable to deal only in writing with the LSC. However, even with the examples where that's been the case and the full paper trail exists, we're still getting, "We note that you've decided to withdraw your complaint." That's taking the facts and totally ignoring them.

MS MacRAE: Are the provisions that you are speaking to now - have they basically been picked up and will be re-produced in the uniform law, or is there - - -

MR WATKINS: Most of them. There is some re-wording, but most of the provisions are very similar to the current Victorian scheme. My understanding is Victoria actually put most of the work into that in writing of it. That is as much as I know on that fact.

DR MUNDY: Mr Watkins, cutting to the chase: where are the policy remedies in this? Is it that the underlying statutory framework is defective? Is it that the institutional - and we more than most people understand that regulation is both about the law and those who administer it. I, for one, have done a lot of work in this space. Is it your view that the real problem here is the conduct provisions under the uniform professions legislation? Is it that there are - reflecting on the ombudsman - institutional - the Commission has an institutional character which is such that it is not meeting the expectation of aggrieved consumers of legal services, or is it a third option, in that the appellate processes against decisions of the LSC are, in some sense, defective, or expensive, or not well enough known so that people who have a grievance - and let us accept that even with the best will in the world, mistakes do get made - that people do not have an adequate course to get those grievances addressed?

MR WATKINS: If I can respond to the third one first, in relation to the appellate process. It would have to be said that it's quite hazy as to what that

process is. Having been through a complaints process with the LSC, a complainant might expect to see at the end of it, "If you don't like our decision, you can go to the Vic Ombudsman." That's lovely advice and I'm sure that's where those other 90 complainants went to in 2009. Let's assume something is working there, but it's a slow process and it's certainly difficult for your average complainant to want to navigate that.

DR MUNDY: And it's not a determinative process.

MR WATKINS: Exactly, yes.

DR MUNDY: The ombudsman won't typically be able to make orders in regard to that.

MR WATKINS: And I can attest to the example where the LSC has suggested to the complainant, "Well, you can talk to the Vic Ombudsman, but we actually don't listen to them because they don't outrank us," effectively. Okay. Our determination is final and, yes, sure, we might let them whisper in our ear occasionally, but it's certainly not the case that it is an appeal process. As for the regulations, well, we mentioned before that most of these regulations are, you could assume, reasonably well drafted in the public interest, however, with all of the discretionary provisions at the LSC level, it does certainly provide a considerable power base in the office of the LSC.

So the concern then is to your second point, which is, who is policing the policemen. That was the nature of the article in The Age newspaper last month was, "We don't have anyone policing that policeman." So if we're expecting as a community that the legal services industry is a profession, then we are expecting it to have in a similar way to the accounting conduct rules, engineering rules, medical practitioner's rules, we are expecting it to have some form of code of ethics and some form of compliance and measurement against that code of ethics. If the best example we have in the legal profession is the office of the LSC, then there is definitely more work to be done.

DR MUNDY: All right. Look, we're probably out of time, but thank you very much. We look forward to receiving your submission and thanks for taking the time to be with us today.

MR WATKINS: Thank you. Have a safe journey.

DR MUNDY: Could I have the Telecommunication Industry Ombudsman, please. Can I please ask you to state your name and the capacity in which you appear.

MR COHEN (TIO): My name is Simon Cohen. I appear as the Telecommunications Industry Ombudsman and as an executive committee member of the Australian and New Zealand Ombudsman Association. I have with me my colleague, Shobini Mahendra, and I'll ask her to introduce herself as well, Commissioner.

MS MAHENDRA (TIO): Commissioner, I'm Shobini Mahendra, I'm the policy manager at the Telecommunications Industry Ombudsman's office.

DR MUNDY: Mr Cohen, would you like to make a brief opening statement, noting that I think by the end of this inquiry we'll have heard from all the executive of ANZOA at this rate.

MR COHEN (TIO): Commissioner, thank you. Firstly, can I congratulate the Commission on the draft report and the thoughtful review of access to justice that you have undertaken in its broader sense. Today I'd like to speak about four matters, the role of the ombudsman in addressing legal need, promoting awareness of justice mechanisms, the normative impact of ombudsmen and developing expertise of dispute resolution practitioners.

But before that, could I briefly outline a little information about my office, the TIO. We're Australia's busiest ombudsman and in each year we deal with in excess of 150,000 new complaints. Our dispute resolution approach is scaled to circumstance, from referrals to expert complaint handlers within telcos for a final chance at resolution, to conciliation, investigation and determination. Surveys of consumers and members involved in disputes dealt with by my office demonstrate high levels of satisfaction with outcomes and process. A combination of scale, streamlined process and a focus on efficiency means our dispute resolution service is of comparatively low cost.

ANZOA is an organisation that represents most industry and parliamentary ombudsman. ANZOA promotes excellence in external dispute resolution and provides a skilled community of practice sharing expertise, experiences and resources to the benefit of all its members. So to my four points. First, can I endorse the key point in the draft report that ombudsman potentially provide an appropriate mechanism to meet significant unmet legal need. The TIO, for example, provides a dispute resolution service that ranges from disputes about non-functioning \$10 phone cards and disputed 50 cent mobile premium service charges through to business loss and excess

international mobile roaming charge complaints in the tens of thousands of dollars.

We deal with complaints other than consumer issues including about the use by telco carriers of their statutory powers of entry onto land, and about interferences with privacy by telcos. You can access the TIO by phone, by web site, by email, you can even still write to us in a letter and we will deal with your complaint.

DR MUNDY: Not if Mr Fahour has his way.

MR COHEN (TIO): We focus our service on what we understand from our research matters to consumers and telcos, that we are timely, that we are informal and that we are expert. In the past 20 years we have received more than 1.8 million consumer complaints which is access to justice on a very substantial scale. It is access at no cost to individuals across all Australian states and territories, in cities and country, to personal customers and small businesses. The ombudsman model has proved to work across government and industry as an access to justice mechanism.

My second point, I agree that work needs to be done to promote ombudsman services. For the TIO, our aided awareness is at 57 per cent, and that means that 43 per cent of Australians don't know there is a telco ombudsman. Closing the gap for us and every ombudsman is key to increasing our effectiveness as an access to justice mechanism. I don't think that the best approach is to create a single access point. There is a real risk with this approach of increasing consumer run around and resulting in a poor service experience and possibly poor centralised decision-making. Instead, my view is that a focus on increasing the profile of existing services and strengthening cross referral processes is to be preferred. This is likely to be effective both from an access to justice and from a costs perspective.

My third point is to the normative impact of ombudsman as a critical value add to the justice system, reducing the need to access justice for many thousands of individuals and small business. Ombudsmen's systemic work is informed by a unique data set and enhanced by increasingly sophisticated systems and processes within ombudsman offices. For example, all too regularly consumers complain to the TIO about misleading telemarketing practices which result in their phone services being transferred to a new provider without their proper consent.

We can solve the individual complaint. We can work with the company to improve its telemarketing practices to reduce new complaints, and we can refer repeat offenders or serious cases to the regulators for enforcement and

compliance activities. This trifecta of responses is a unique tool set that ombudsmen hold. Ombudsmen also have a strong track record of reporting to organisations, to government and to the community important issues impacting upon the vulnerable or impacting on individuals in a substantial and detrimental way.

TIO's highlighting of poor customer service in our Connect.Resolve campaign prompted a whole of telco industry review and reform of customer service. Our follow-up resilient consumers report brought a clear focus on the telco customer 'run-around' experienced by consumers who complained, and informed a complaint handling standard that is now in the industry code. Our public reporting of unexpected and unaffordable consumer charges for international mobile roaming services has been one of the key reasons for a stronger regulatory response from government and industry to stamp out consumers incurring these sometimes astronomical charges. This normative impact is maximised when all relevant disputes are handled by the ombudsman, improving the visibility of new dispute trends and maximising the response to them.

My final point is to the importance of competent and expert dispute resolution practitioners. I agree in this respect with the Productivity Commission draft report note that the calibre of ADR practitioners is fundamental to good dispute resolution. Ombudsmen have long recognised this. Our people are at the centre of our service and its ability to meet the community's justice needs. We wrap around dispute resolution staff extensive inductions and training, coaching and quality assurance. In addition, all industry ombudsmen are the subject of regular independent external reviews which provide ongoing opportunities to consider and improve ombudsman services in a public and accountable way.

The TIO has had an emerging realisation that retaining and recruiting the right staff in 2014 requires an increased focus on training in the vocation of industry dispute resolution. We have accredited with Box Hill Institute a graduate certificate course which we are now delivering in a pilot program to our dispute resolution officers with a focus on general skills of communication and dispute resolution methods and specific skills on applying consumer and other laws and learning about technologies and rules that are specific to telecommunications. I thank you for the opportunity to address you today and look forward to any questions you might have of us.

DR MUNDY: Thank you. On the centralised access point issue, I think the issue that we were trying to bring some focus to there was not so much in relation to organisations such as yourselves but the plethora of legal assistance providers that permeate jurisdictions. I think perhaps we needed to be a bit

more nuanced in our language. Can I start with - and this may not be a relevant question to you but I'm interested - if you don't have a view and it's not relevant, that's fine. We heard from a CLC in Sydney last week who specialises in financial services issues and in the broad, so banking but also insurance as well. Do you have much engagement with the CLC sector in this sort of systemic identification - I guess, probably the specialist consumer CLCs would be the most likely candidates.

MR COHEN (TIO): We certainly have ongoing engagement with financially focused Community Legal Centres. We also have extensive engagement with financial counsellors, some of which are actually attached to Community Legal Centres, and they are an excellent source of information about things that consumers, particularly vulnerable consumers, are seeing happening in the community. We find that a really good way to work with specialist Community Legal Centres is to look for the opportunities for them to provide direct input into how we provide our services, so to provide a couple of examples, we recently ran a series of round tables with consumer representatives across Australia, and at every one of those Community Legal Centres, including appropriate financial legal centres, were represented and gave us feedback on our service.

As a second example, we've recently facilitated the development of financial hardship guidelines for telcos through sponsoring a dialogue between telcos and consumer advocates and financial counsellors and the appropriate Community Legal Centre was one of the advocates who was present in the engagement around that, and I think they bring that richness of experience from the consumers that they're dealing with to inform the way that we provide our services and inform some of the priorities we make in our discretionary work.

DR MUNDY: So if consumer legal centres were unable to continue this sort of engagement with you, it would be likely to impact on both your development of your own dispute resolution process but also the systemic work that you do in, for example, the hardship provisions.

MR COHEN (TIO): That's absolutely my view, and can I say not just for Community Legal Centres but also for other key intermediaries who act for and represent consumers. So I, for example, point particularly to financial counsellors who are a key source of dealing with issues for consumers who do have, in essence, unmet legal needs. They often arrive at a financial counsellor with a dozen bills that they can't afford and they need to figure out some way forward in relation to them. A high awareness of our service through those intermediaries and an opportunity for them to critically evaluate the way we do our work is absolutely critical, I think, not just for the standard of the service

we provide them and their clients, but for the standards more generally that we provide to all consumers in a similar situation.

MS MacRAE: I was just interested in your - there's two questions, I'll ask the first one. In relation to the awareness of your office, I'm always a little bit - I don't know if "sceptical" is the right word - to say that 43 per cent don't know about you. I wonder if they had a problem with their phone, how easy would it be for them to find you? I mean, isn't that more the issue that you might say - you did say, I think, a prompted awareness.

MR COHEN (TIO): Yes.

MS MacRAE: Have you tried to get at that issue, so you put it to people you've got a telecommunications problem or a problem with your phone bill, where do you go? Is that sort of - - -

MR COHEN (TIO): That's the way that those questions are first asked. If you had a problem and you couldn't solve it to your provider, where would you go? That's your unprompted awareness, and then your prompted awareness is, have you heard of the Telecommunications Industry Ombudsman. I think the point you raise is a really good one, because I think there's two aspects to it that I think are relevant in terms of promoting access to justice, particularly in the ombudsman space. The first is that whether people in the community are aware that there's somewhere they can go at no cost to make a complaint if they have got a problem with a service, be it a government service, an energy service, a telco service.

Many in the community know that, quite a number don't though, and one of the frequent things that I hear when I go out and speak to community members is that they think that the problems that they've got aren't big enough for an ombudsman or that they shouldn't bother an ombudsman with them or so on and so forth. So I think that's one element to it, but I think the other element is that it's really when people have the problem that they need to know that the ombudsman is there and how to access them.

I actually have a view that if people know the basic tenet that there is likely to be someone who can help them and they land with one of us, be it me or any of my colleagues, we're going to direct them to the right place. That hand-off has got to be really easy for the consumer because otherwise they may just get tired and let it go, but it's the awareness more generally that I think is really key and critical to it.

Just a third point, because trying to make the entire community aware of you is, I think, an unrealistic expectation of an office like ours. We certainly

focus our initiatives on those key intermediaries who are dealing with vulnerable consumers, so disability advocates, migrant resource centres, financial counsellors, Community Legal Centres and the like, because we think that that's likely to maximise the impact that somebody will go to someone who might be able to help them and if they know that we're there, then that will increase the ability for us to be able to provide our service in those circumstances.

MS MacRAE: The other number that you mentioned in your opening statement was 150,000 complaints this year.

MR COHEN (TIO): Yes.

MS MacRAE: That still seems like a pretty big number to me.

MR COHEN (TIO): It is.

MS MacRAE: I guess one of the things that you would know from our report that we're interested in is how the way that you're financed might impact on the behaviour of your members, and so how much do you think the fact that you've got a per complaint basis part of your fees helps keep that number in check? How do you see that number moving over time? I mean, obviously it's unreasonable to think you would ever get it to zero. I'm thinking 150,000 is large in ignorance really of what the potential might be, perhaps it is a tiny little percentage. So I guess just particularly about the funding and the fee per complaint.

MR COHEN (TIO): Can I perhaps start one step back and note that the motivators for driving down complaints within telecommunications I think have changed very much over the past several years and by way of comparison, if I'd appeared before you three years ago I would have said almost 200,000 complaints each year. So the trend is a positive trend. The reason for that is, I think, threefold, none of which relate to our fees. But I'll come to those in a moment if I could. The first is that there is a real battle for telcos in customer service, and a key metric that they have been using is the number of consumers who approach the TIO in relation to complaints. So it's a very healthy sign, I think, that industries actually recognise, in an environment where there might not be the opportunities to get new customers because that growth phase in the industry cycles is less than it used to be, that the actual competition is now occurring in customer service, and that's resulting therefore in an increased investment in that area and a reduced need for those customers to come to the TIO at all.

I think the second thing is that everybody - industry, consumer groups,

and the community more generally, and telcos - realise that the number of complaints going to the EDR body, the telco ombudsman, was simply out of proportion with what was happening in other industries. So the regulator and the industry association Communications Alliance made conscious decisions to try and tighten up the codes to address the causes of complaint. So if a key cause of complaint is high bills, sending consumers alerts is one way to reduce the prospect of those high bills. Getting rid of misleading advertising, like unlimited that's limited, and caps that are floors, those sort of things result in fewer complaints coming to the TIO from a misunderstanding of the product that's being purchased by the consumer. So I think that's a second element.

I would put our hand up as being a third element in that. I think we've upped our game in how we intervene on systemic issues. We really try to get in on the ground floor and raise those matters immediately with service providers before we've got a big case load to say, "Hey, look at this," but when we're seeing those early indicators, and we are seeing service providers acting quickly to try and respond to some of those causes that we're seeing. So I think that those three elements are better protections, a real reputational issue, and a greater identification of systemic issues that are having an impact. Our cost structure is distinct from many of our colleagues, in that our only charge is a charge per complaint. So many of our colleagues have a baseline charge, kind of like an opening-the-door annual charge or membership charge.

DR MUNDY: A bit like a taxi.

MR COHEN (TIO): Yes, exactly like that. And then the fare charge. Whereas for us it's all fare, if we can continue the taxi analogy, and no flag fall.

DR MUNDY: I'd encourage as a future career option, to consider regulation of the taxi industry.

MR COHEN (TIO): I've been there once before, Dr Mundy, and I'll stay well away. But what I do think is that the process whereby complaints escalate through the process - so the initial fee is quite low, but if it can't be resolved quickly, the dispute resolution charge increases - does always bring to the mind of the telco a quick resolution of the complaint as an option because of the cost factor in relation to it. So I think it does have an impact in particularly the escalated levels, if I can call it, or the progress levels of our complaint process.

DR MUNDY: So if it goes on and on, what sort of money are we talking about?

MR COHEN (TIO): So for a referral complaint, a referred complaint, it's around \$100. For a conciliation it's around \$1000. For a matter that needs to

be determined, the charge is in the vicinity of seven to eight thousand dollars.

DR MUNDY: Is that down the big end of the scale? That seven or eight thousand dollars, is that an accurate reflection of your cost in dealing with the matter?

MR COHEN (TIO): More or less. It depends on the complexity of the matter. There are some quite simple matters where the determination simply results because the service provider isn't cooperating with our process. So the facts are simple.

DR MUNDY: But across the class of matters that end up at the \$7000 level, the charges you collect will basically fund at least the avoidable cost of the dispute resolution?

MR COHEN (TIO): By and large, our cost structure reflects the cost at each point of doing our work.

DR MUNDY: So there's essentially no subsidy from the rest of the organisation, at least in an avoidable cost sense, from the other lower-level activity.

MR COHEN (TIO): Yes. So the lower-level activity funds some of the leadership costs in our dispute resolution area, but by and large, our dispute resolution costs are funded through our dispute resolution charge directly.

MS MacRAE: And then you get a separate funding amount to cover things like your staff training and - - -

MR COHEN (TIO): So then on top of that, we divide by the number of complaints and the proportion of complaints we receive each month our operating charges, and they get added on top of that in a proportionate way across all the complaints that we receive. So they get spread equally to the proportion of cost that each member incurs in that month.

DR MUNDY: So, if you like, the fixed costs of the operation are funded irrespective of complexity, and then the real expensive services fund themselves?

MR COHEN (TIO): That's right.

DR MUNDY: Okay. Can I just bring you back to complainants. Is it your sense that they come to you - this is a sort of general observation - in an already fatigued state, or do they come to you earlier in the process?

MR COHEN (TIO): Our experience, and we reported on this in a report called Resilient Consumers that, if it assists the commission, we'll make available after today - - -

DR MUNDY: If you could email it to Mr Irwin, that would be helpful.

MR COHEN (TIO): - - - is that consumers spend many hours over a significant period of time talking to a number of people to try and resolve their complaints before they come to the TIO, and often not reaching a resolution, but as often as that reaching one that then isn't kept, a broken promise. We called that report Resilient Consumers because it reflected the experience that we saw of these consumers who came to us. I would note, though, that our threshold for allowing consumers to make a complaint to the TIO is quite low. We say that the service provider has to be given an opportunity to consider the complaint.

There are a number of schemes, particularly in overseas jurisdictions, where there are deadlock provisions that prohibit consumers from approaching an external dispute office, be it an ombudsman or commissioner, for up to 60 days from the date of originally raising the dispute, and I think in the context of an essential service, where businesses and consumers are relying on it, those provisions exclude access to dispute resolution - - -

DR MUNDY: Your rules basically do require people to have at least had a go.

MR COHEN (TIO): That's right.

DR MUNDY: Is your sense - I mean, given that lots of people experience some form of disadvantage in resolving matters, be it language issues or they may have some form of disability or whatever - is your experience that those groups predominate the people who come to you, and within the group of people who seem to have some sort of disability - disadvantage, let's say, broadly defined - is it your sense that that is a reflection of the inability of the telco provider to actually have a dispute resolution system that's resilient with respect to people who may have some challenges communicating?

MR COHEN (TIO): Firstly, and unfortunately, our office doesn't at this time collect detailed demographic information on consumers who approach us, and it's a key information need that we've identified through our disability action plan, and that we propose to remedy in the next short period of time. My assessment, based on what we know from some of our survey, and particularly of migrant communities and indigenous communities, is that awareness of the

ombudsman and access to our services from those communities is less than it is from the general community. If you have a look at the TIO complaint rates in smaller states as against larger states, and in metro as against regional, you'll find that predominantly metro areas in the big states are where we most commonly get our complaints from. So that says to me that the accessibility of our services to many of the vulnerable in the community is something that's a piece of work that we have to do.

DR MUNDY: And we know from the Law Foundation survey that the big area of unmet legal needs are 'consumer', we understand that telco issues are prominent within that, particularly in remote and indigenous communities.

MR COHEN (TIO): Exactly right. So I'm under no misapprehension that our service has an incredible accessibility or awareness within those communities. I think that's a challenge not just for us, although I think one of the things that's distinctive about the TIO as against, for example, the energy ombudsman or the public transport ombudsman in Victoria, is that we're a national office with a single physical presence in Melbourne, and I think it does assist in outreaching many of those communities to have a physical presence or an ability to be physically seen in some of those communities.

DR MUNDY: I'm not sure which ones this applies to, but certainly some of the water and energy ombudsmen, there is a requirement on providers to say, "If you have a complaint about this bill, call the ombudsman on this 1300 number." Is that something - I mean, (a) is that a requirement of the members of your scheme, and (b) if not, do you think it would help? Would it get over this problem about people coming to you late in the game?

MR COHEN (TIO): Well, firstly, there's a number of requirements on Telcos to tell consumers about the TIO. A key one is in the critical information statement that telcos are required to give consumers every time they sign up for a new service. It's a double A4 side, at maximum, information - - -

DR MUNDY: I remember it well.

MR COHEN (TIO): If you have a look at the bottom right-hand corner on the second page, there's some information about our office. There's also a requirement, when a complaint can't be resolved, for that information to be provided to consumers. And I acknowledge that those efforts don't result in all consumers being aware of us if they can't resolve a complaint. I do have a view that putting the ombudsman's number on an account is problematic, because I think the consumer should be encouraged in the first instance to try and resolve the complaint, and rather than dealing with 300,000 contacts, of which 50 per cent are new contacts, you could see yourself in the position

where you would be dealing with a million contacts, because everybody is ringing you about their disputed bill, rather than ringing the telco. That's not just an unrealistic scenario, I'm actually aware of other similar schemes where in fact that information is required on bills, and the proportion of contacts that can't be acted on as against those that can is very, very significantly bigger, and I don't see how that's in any consumer's interest.

DR MUNDY: So the balance that you have at the moment you think is probably - you're not going to get significantly better outcomes by changing it?

MR COHEN (TIO): Well, there are some areas where telcos are required to tell consumers in a written format; for example, if they're going to disconnect a standard telephone service. I think the continually refining those points where consumers need to know - - -

DR MUNDY: So the obligation is where the essentiality of the service becomes the real issue, rather than, "The bill should be 400 bucks, not 800 bucks."

MR COHEN (TIO): Spot on. That first one, and then secondly, hopefully, that telcos, or any service provider, have the right systems and processes in place, that when a consumer generally can't resolve their problem with them, that they do get told, and that they are given the information they need to go to the external dispute resolution.

DR MUNDY: And you're satisfied that in the broad, the framework in place is adequate for those purposes?

MR COHEN (TIO): I think that there's a framework in place, a code framework in place, that requires that to occur. How well it actually happens on the ground I'm less certain of. I certainly know most telcos have information about us on their web sites, I think that's a very positive thing, and I think increasingly, as consumers are using online means to make complaints, to make inquiries, that is going to be an increasingly important repository.

DR MUNDY: Does the industry have in place ex ante frameworks for in fact monitoring - I mean, because one of the big challenges that we regularly face is we get to the point of being put on the job, and the data is not there, and if someone had have thought five years ago that we would make this inquiry and undertake these inquiries in five years' time, they would have collected the data and our staff would have a much easier life. So you've got these frameworks in place. Are you monitoring and making sure the telcos collect data through time, so that at some point an objective evidence based assessment can be made?

MR COHEN (TIO): There's two mechanisms that are in place in the telco system. The first is a self-regulatory mechanism through a body called Communications Compliance, which has been set up under the Telecommunications Consumer Protection Code. It's early days for that body, it's only been in place since 2012, but it is a significant advance on the situation before where there was no compliance mechanism at all. I think importantly that body has a governance framework that includes consumer as well as service provider representation, but at the moment I think it would be fair to say it's a work in progress.

The regulator, the Australian Communications and Media Authority, also has extensive powers to be able to audit compliance with the TCP Code, including audit functions that it has exercised in relation to new requirements under the code. So there is a framework there, and we're aware of information being collected to demonstrate compliance with the framework that has been put in place.

DR MUNDY: Compliance with the framework is one thing. I suggest effectiveness with respect to intent of the framework is another. Are you satisfied that those frameworks will lead to sensible public policy bodies being able to form a view about effectiveness of these frameworks in the fullness of time?

MR COHEN (TIO): My view in relation to industry self-regulation of compliance is that firstly it's a positive step to see the industry taking responsibility for it. I just think at this point it's a bit early for me to have an assessment about that. The body has only really been up and running for a short period of time, and I think it really needs some further time to see how effective it is.

DR MUNDY: Okay. Fair enough.

MS MacRAE: Just coming back to that issue about how you collect your funds, you might see in our report that we're interested in just seeing if we can find a mechanism that might give the same sort of impetus to government departments that also may have a level of complaint. Would you have any advice for us in terms of the sort of mechanisms that might help give an incentive to government departments or agencies that might be the subject of complaint? Having a cost per complaint seems to have some problems with it. We've certainly had some submissions to that effect. Are there other things that you think we should be considering that might help in that space?

MR COHEN (TIO): Firstly, and I imagine this point has been made to you

by some of my colleagues, there are a number of government organisations that are members of industry ombudsman schemes who already pay fees for dispute resolution services. For example, in respect of my office, when we were originally set up, Telstra was government-owned, and it paid fees in respect of dispute resolution services. National Broadband Network is a member of TIO, and we can deal with complaints in relation, for example, to its exercise of statutory powers to enter land. So there are precedents for that already in the industry ombudsman space. In terms of a broader application of that, I think there may be no single answer to it, it may require a really close consideration of the nature of the disputes that are being dealt with and the appropriateness of a funding model that is cost based on the service that is complained about.

DR MUNDY: I don't think we intended this as a mechanism by which to fund ombudsmen, but rather - because it just becomes a money-go-round within the consolidated revenue. I think what we were hoping, or what we had in mind perhaps, was that if departmental secretaries had to undertake a multi tens of thousands of dollars disbursement out of their budgets, particularly if they were repeat participants in the ombudsman - I won't use the word "offenders" - but this may focus the minds of secretaries and other agency - it would certainly focus the mind of our agency head - that perhaps better complaint and dispute resolution processes within government were a less bureaucratically painful way of dealing with these matters, rather than them turning up at the ombudsman's office.

MR COHEN (TIO): Look, perhaps if I can completely dodge it in this way - - -

DR MUNDY: We're looking for the behaviour, we're not looking for the funding.

MR COHEN (TIO): No. But I see very much the funding model for industry ombudsmen as being about a cost-for-service model. It's not designed per se to have an incentive to resolve costs, it's designed to recognise the cost of the service and to get the funding for that from the bodies that are best placed to fund it, while ensuring access to the service at no cost to consumers. So while it may have an incidental effect of incentivising a particular outcome, my view has always very strongly been that the primary objective is to fund the service, not to incentivise - - -

DR MUNDY: And to fund it in an equitable way.

MR COHEN (TIO): Exactly right.

DR MUNDY: Reflect that some participants may be very large and others

might be quite small.

MR COHEN (TIO): Exactly right.

DR MUNDY: Look, thank you, Mr Cohen. We're particularly grateful that you haven't brought to our attention the question of the use of the word "ombudsman".

MR COHEN: Thank you for your time, commissioners. It is much appreciated.

MS MacRAE: Thank you.

DR MUNDY: Can we have the Consumer Action Law Centre, please. Could each of you please state your name and the capacity in which you appear?

MR HUSPER (CALC): Hi, I'm Gregor Husper, the Director of Legal Practice at Consumer Action.

MR BRODY (CALC): I'm Gerard Brody, I'm the CEO of Consumer Action.

MR LEERMAKERS (CALC): David Leermakers, Senior Policy Officer.

DR MUNDY: Would one of you like to make a brief opening statement, and if you could limit it to five minutes, which the bar was able to manage, we would be very grateful.

MR BRODY (CALC): We'll definitely do that. I'll open the statement. I'll just ask Greg to make a few additional comments about costs issues. Firstly, thank you for the opportunity to participate in this hearing. I'm sure you've read our submission, but I'd just like to take a few minutes to draw a few issues out which we think is useful to reiterate. The first one is on consumer protection in the legal services market. As a specialist consumer law service, we really welcomed the consumer protection focus in the draft report in chapter 6. We did want to draw attention to the way the draft report seemed to conflate the two different concepts, the concept of independent regulation, including enforcement, of a market, as well as consumer complaint handling or dispute resolution. We see those as separate functions and usually - not always - handled by separate bodies.

In particular, a dispute resolution needs to be focused on providing fast, fair, accessible relief to complaints for their individual dispute and the previous presentation from the TIO is an example of that, but it is also important that professional conduct or systemic issues arising from disputes receive a response, but it's undesirable for these processes to get in the way of handling the individual's dispute.

My second point is on alternative dispute resolution. The Commission's draft report spoke very highly of alternative dispute resolution and we agree that ADR is an important part of the mix, but we do urge some caution. It's really important to properly evaluate existing ADR processes before we expand its use any wider, and make sure safeguards are in place to ensure that processes and personnel are up to the task. We included two case studies in our submission which explain why we have legitimate concerns that existing compulsory mediation are creating unjust outcomes in some circumstances. In both cases, the mediators made errors of law and we only know about these cases because our solicitors were able to attend, which is unusual for many

consumer complaints.

Without proper evaluation of existing processes, we can't be confident that extending the reach of compulsory ADR will improve access to justice. Before handing over to Gregor, who will mention costs awards. I will just make some of the comments we made in response to chapter 21 of the draft report on the application of eligibility criteria for legal assistance services. I'll just start by saying that our services, and we would suggest most other community legal services, have documented and thought out the eligibility criteria and that those criteria are applied consistently, but strict application of uniform means criteria across legal aid commissions and CLCs, as the Commission seems to suggest in its draft report, will likely limit community legal centre's ability to do work that they should do best: respond to issues arising from their community and engage in public interest work.

For example, strict application of means tests would prevent CLCs from taking on public interest litigation on behalf of clients with means. One example is when we acted for a higher income earner in a dispute over a \$20,000 home loan exit fee. We knew that many vulnerable consumers were charged the same fee and the willingness of this client to take the matter to Court and engage in media contributed to systemic advocacy, including action by the regulator to obtain \$3 million in refunds for consumers and ultimately a ban on home loan exit fees.

It may also rule out providing legal assistance on matters which have public interest implications, but where the detriment to the individual clients is minor. For example, the losses to an individual in a case of irresponsible lending with a pay day lender may be relatively small because the amounts in dispute are small, but much like the bank fees class actions, the total loss by many consumers across the economy may be very large. Moreover, litigating and winning that individual case will have real public interest impact if it addresses a systemic issue in advocacy. The Commission did recognise the importance of systemic advocacy by community legal centres and others in its draft report, and we welcomed that. It's important to see the links between how community legal centres assess eligibility and the capacity to do that systemic work. I'll just pass to Gregor.

MR HUSPER (CALC): I'm addressing what is essentially within chapter 21 on costs awards and protective costs orders. The Commission's draft findings support cost recovery in pro bono matters and the codification of protective costs orders, and we commend that. Both those propositions are aligned with the improvements of the rule of law and access to justice. The Commission cites a number of reasons for costs recovery in pro bono matters, which we endorse, including levelling the playing field and establishing the usual checks

and balances as to costs. The Commission, however, sought guidance as to who should recover those costs and we believe that it's the lawyers acting pro bono who should recover those costs awards.

The reasons lawyers act pro bono are, by definition, for reasons other than costs recovery, and we don't consider that philosophical base for undertaking pro bono is likely to be compromised because a small amount of costs may be available after payment of disbursements. It's all the case that pro bono matters are typically about restorative justice and injunctive relief; they are very rarely, if ever, about compensation because you can go to no win, no fee for that. On the other hand, the opportunity to recover costs is a welcome vindication of the lawyer's time and returns some capacity to those lawyers willing to undertake the work.

In the case of protective costs orders, our main point there is that we consider this should be equally available against private persons as well as government. Much of public life is now controlled by private parties and many of those private parties have a capitalisation that exceeds government departments and, indeed, some sovereign states. We can anticipate only two arguments against protective costs orders in the case of private litigation, which is the exposure to costs and the so-called flood gates of litigation that might take place. But the reality is that - and experience overseas and in other jurisdictions where they do have protective costs orders - either codified or in the common law, is that neither of those two concerns have ever materialised. There are no flood gates and, in fact, there are not many protective costs orders issued. The reason is because all protective costs order regimes, including those that have been advocated in Australia, talk about a balanced and proportionate scheme and that's what we would also advocate.

DR MUNDY: Thanks for that. Can I start on pro bono. I hate to disappoint you, but I intention with respect to pro bono fees was not about the recognition of lawyers' time; it was rather about equating incentives for people facing pro bono litigants not to over-egg the cake. I guess, as an organisation who presumably attracts pro bono lawyers from time to time, the systemic issue in our mind and what has been put to us is the complexity around pro bono work not being construed as a no win, no fee arrangement, or a contingency - probably a no win, no fee arrangement - and what has been put to us, for people acting pro bono, often for people who are experiencing some form of disadvantage, the hoops that people have to go through in their costs agreements could be avoided perhaps with a little bit of assistance from the legislature. Would that be something you would support?

MR HUSPER (CALC): That's right, for the reason that, as you well understand, the indemnity principle potentially undermines the costs recovery

and I was previously director at Public Interest Law Clearing House, Justice Connect, for four years, and we prepared - there's some case law which throws into doubt the opportunity to recover costs if represented pro bono because of the indemnity principle. We sought to craft and protect a costs agreement that would get around that. It was extraordinarily complex and, in my experience, most of the firms and most barristers failed to actually have a compliant costs agreement in place, and we are talking top-tier law firms which would come to us for guidance on that point.

DR MUNDY: So the legislature helping us out here would all in all just avoid a whole pile of transactions

MR HUSPER (CALC): It's low-hanging fruit and it exists, for example, for Victoria Legal Aid, the Act states for the avoidance of doubt they can recover costs and explain how it happens.

DR MUNDY: On protective costs orders - and we're grateful of your assistance. There seems to be more floods threatened against access to justice than you're average ark. I guess in relation to protective costs orders, you make the point that there is no evidence of a flood of litigation and to some extent there is already existing precedent in Australia particularly in relation to environmental matters in Oshlack - and it's been suggested to us by some participants that the existing - and I think it was the South Australian Law Society citing the Blue Wedges cases in Victoria, they weren't quite sure which one. But is it your view that the existing case law precedent - I guess it comes again to this question I guess, is enough, is Oshlack good enough and the other judgments that hang off it, or would this be facilitated by some legislative intervention?

MR HUSPER (CALC): My very strong view is that you need some codification of it and in comparison to other Commonwealth jurisdictions, notably South Africa, Canada and the UK, the courts in Australia have been very reluctant to engage in I suppose what you might regard as judicial law making, and so there has been a great reluctance to introduce that and for the courts to do it here, and Oshlack provides some guidance. It's very conservative. It's not nearly as advanced as it has become in, for example, the UK, and so for us codification, you would look at all those cases and it's pretty common ground what those cases suggest is the best practice, what are the sorts of elements that you might look for.

But that would provide greater certainty to the litigants and to the courts and I guess would give the courts a permission to make a PCO under known terms and under known considerations, because we've really only had one. In Victoria we've only ever had one contested protective costs order made, and

that was because of changes to the Civil Procedure Act which actually unwillingly, you might say, facilitated it. It was a section that was passed for other purposes, for case management purposes, which dropped the word "public interest" in and, without going into the details of that, there has only been one case.

DR MUNDY: Could you perhaps send us that case so we could have a look at it? It's an issue that we're quite - - -

MR HUSPER (CALC): Yes, and that's the Nassir Bare case, and I can provide that one to you.

DR MUNDY: Yes, that would be helpful.

MR HUSPER (CALC): I don't want to take away the rest of the time, but just very briefly in terms of private corporations, to give you three examples of cases against private corporations, the Coball case, which I think is now going to the High Court, which was the example of a children's youth advocacy group hiring camping facilities for same self attracted children, and the people who ran that camp, it was a Christian camp organisation, when they found out who the users were going to be, they cancelled their use of it. So that was a case in which a protective costs order would determine very important rights in terms of a private organisation's right to discriminate on the grounds of sexual orientation. Another one in Victoria was the water case where, I don't know if you're aware, there's a desalination plant in Victoria costing a number of billions of dollars.

DR MUNDY: I probably - the record should state I'm a director of the Sydney Desalination Plant.

MR HUSPER (CALC): Okay. So Thiessen, who are one of the constructors, had an MOU with the Victoria Government that they would share information about protesters, private information that the police were gathering, and so a couple of individuals took an action under the charter, the Victorian charter, raising important privacy issues. The organisation that they represented couldn't take the action because you had to be a private individual, and in the end a failure to get a protective costs order in that case, and it was applied for, but the risk of actually even applying for the protective costs order, that risk killed that case and we never got the jurisprudence on whether that was a breach of privacy. Think I had one final example. The Andrew Bolt case was another case where a protective costs order could have determined important issues. In the end they were represented pro bono and those clients were willing to take the hit had they lost that case.

MR BRODY (CALC): I think we find that every day in our casework in fact where we're acting on behalf of low income consumers that might have had a dispute that started in a tribunal, they feel that the tribunal had an unjust outcome, and they are looking to appeal the decision, and their risk of cost awards at a higher court deters them from what otherwise would be a meritorious case, and having some access to a protective costs order in those circumstances - and many of those cases might be on public interest grounds when it's, you know, perhaps got a business model that is affecting many other people in the same vein.

DR MUNDY: So your view would be that the issue around the flood and what constitutes the dam is effectively the judiciary.

MR BRODY (CALC): That's right.

DR MUNDY: That unmeritorious cases are brought on the public interest, particularly if the judiciary is left with the business of determining the protective cost order rather than it be some administrative process would be appropriate.

MR BRODY (CALC): Yes.

MR HUSPER (CALC): But even if it was codified, I think there would still not be that many.

DR MUNDY: Yes, okay.

MS MacRAE: You've made some comment in your submission about the billable hours and a preference not to use that billing method. I'd be interested if you could elaborate a little bit more on where you see that, and also then what might happen if there's a complaint about fees from a lawyer and how you see that system working in Victoria.

MR BRODY (CALC): Sure. Well, we do receive complaints from consumers about lawyers' bills, and it's often at a later stage as you can imagine where a bill has remained unpaid and they have sought to recover it through the courts or through bankruptcy even, and by that stage it's often too late for us to do much about, rather than, you know, perhaps assist that person with financial counselling. One of the key drivers of that problem I think is that people don't have a good understanding of how much legal services cost up-front, and that the very nature of billable hours is something that, you know, most - I'm talking about legal service users as individuals, have real lack of knowledge about, and we would say that, you know, that sort of billable hours for an individual matter is probably contributing to costs elsewhere down the system

when these disputes arise.

Look, there is the Legal Services Commission and our centre where that dispute resolution jurisdiction is available. We would refer to that Legal Services Commission. We don't have unfortunately a lot of evidence or data about the outcomes of there. We merely refer people to that. I guess we could say that, you know, people aren't obviously coming back to us saying they've had bad experiences through that body. We've been supporting of - - -

DR MUNDY: Are they coming back and saying they've had good ones?

MR BRODY (CALC): Well, they haven't said that either, no. We would say that it's been positive that the new uniform legal profession law operating in New South Wales and Victoria I think is going to improve the Legal Services Commission ability by making binding determinations. We think that that will, like in the Industry Ombudsman environment, reduce costs overall and reduce the likelihood that matters will get appealed further up to the - in Victoria to the Victorian Civil and Administrative Tribunal.

One issue that we did raise in our submission was there can be problems with jurisdiction if you end up at VCAT. For example you might have a complaint about a bill or costs, but if you end up in VCAT under the legal practice lists, you don't have - you can't bring claims around the Australian consumer law under that list about being misled in some way. So that might lead to sort of unjust outcomes. So having one dispute resolution body that has a binding determination that can consider the range of consumer protections that are available is a good step in the - a right step in the direction.

DR MUNDY: We have made some recommendations about these legal services commissioners being able to administer the Australian consumer law in the way of fair trading - - -

MR BRODY (CALC): Yes.

DR MUNDY: - - - commissioners' authorities, whatever they are depending on where you are. But what you're saying is that VCAT has no jurisdiction in relation to the ACL. That jurisdiction presumably has to be exercised by the Magistrates Court.

MR BRODY (CALC): That's not true. The VCAT does have a jurisdiction, but on a particular list. So if you go to the civil claims list, they will be able to - - -

DR MUNDY: So this is something which is within the capacity of either

VCAT itself or the Parliament of Victoria to remedy promptly - - -

MR BRODY (CALC): Indeed.

DR MUNDY: - - - and effectively. One of the concerns that's been put to us generally, and certainly historically, has been a matter of concern not only with the legal profession but certainly a lot of medical professions which exhibited guild-like characteristics, is the notion that dispute resolution bodies in these professions are not truly independent of the professions themselves, and the commission has - I guess myself in particular have been active in the policy space of how important is the conduct of regulators as opposed to the law under which they regulate. Do you have any views about the governance of legal services commissions and the desirability or necessity or otherwise of having people who are not of the profession there to provide some sort of governance, oversight of what could otherwise be seen to be outsourcing, the old closed shop?

MR BRODY (CALC): I actually agree that that would need to be viewed other than in the governance of those independent bodies and we are very supportive of the model, at least the industry dispute resolution area, where there is, you know, representation from industry but there's also representation of consumer or user interests with an independent chair and we think that that leads to a more balanced governance framework and more likely to have decision making that benefits, you know, not only the profession but users of the profession as well.

DR MUNDY: From your initial comments, am I right that what you were trying to say, or you were saying and I was just being addled, that your view is that we should separate the ethical regulation of the profession from what we might call its character, so how it bills people?

MR BRODY (CALC): I think it's more about, you know, having compliance and enforcement on one hand, about compliance with the rules, and that would mean a regulator that can take audits or take particular compliance action for breach of the rules, disciplinary action, if you like.

DR MUNDY: Yes.

MR BRODY (CALC): As separate from dispute resolution, so a consumer's complaint, that might be resolved quite easily without any recourse to - - -

DR MUNDY: It might be a misunderstanding.

MR BRODY (CALC): Could be.

DR MUNDY: Could be a simple clerical error.

MR BRODY (CALC): I agree that there would have to be good links between those two functions, so that the information that is obtained from dispute resolution, particularly systemic issues, are identified, are shared back with the regulator, who can take action, but we do see those roles as separate.

DR MUNDY: Do you receive funding from the commonwealth?

MR BRODY (CALC): We do, yes.

DR MUNDY: You will no doubt be aware - - -

MS MacRAE: A standard question.

MR BRODY (CALC): Pardon? Is that correct, a standard question?

DR MUNDY: Yes, I usually ask at the start.

MS MacRAE: I was expecting it.

DR MUNDY: Are you expecting a reduction in funding given the re-prioritisation of commonwealth expenditure?

MR BRODY (CALC): At this stage - our centre was fortunate enough to receive some additional funding over a period of four years, as many community legal centres received. We have been informed that we will receive that for two years rather than four and we will receive it on 30 June next year.

DR MUNDY: What will be impact on your activities of the loss of that funding?

MR BRODY (CALC): Look, we primarily used that funding to do a couple of things. One was actually improve our capacity to run our legal advice service, our telephone legal advice service, and we have undertaken some evaluations of that service over recent years, which I think we referred to in our submission, to really understand, well, what are the outcomes of the advice we provide? Do people use it to resolve their disputes without further recourse to our services or did they find challenges in that and the evaluation showed - so we didn't do call backs. Our evaluation showed - it's probably pretty obvious really - that people who have a significant degree of capacity were able to resolve a dispute. Those that are more vulnerable or easily persuaded

otherwise by the trader, you know, were less likely to be able to use the advice to achieve the just outcome that they sought, so what we wanted to do was improve the capacity of our legal advice service in a number of ways, about better identifying vulnerable people, that we should provide more assistance up front or other measures to ensure that those people are able to use the advice that we provide them.

DR MUNDY: Would you characterise the consequences of this loss of funding as impacting upon your front line service delivery or upon advocacy and law reform?

MR BRODY (CALC): I would characterise as impacting on front line service delivery.

DR MUNDY: Thank you. In relation to advocacy, how important is it that your organisation undertakes advocacy, given the systemic identification of issues to ensuring access to justice and development of the law, and do you have any views on whether it is a relatively efficient way of achieving outcomes for the community rather than waiting for large numbers of matters to be hashed out through the courts at a cost to the court system and for the individuals involved?

MR BRODY (CALC): Sure. It's hard to overstate how important undertaking systemic advocacy is to our service. Indeed, it's a central purpose. We would say that we are never going to be able to provide individual legal services to all those that have consumer issues and debt issues in Victoria and as such, it is incumbent on us to in fact undertake policy and systemic advocacy to hopefully prevent problems occurring that would need that sort of legal assistance and that's very central to our purpose of our organisation and indeed to the way in which we run the direct legal services, so our lawyers are trained and are able to identify systemic issues and then have ongoing discussions with our other staff in the centre who are more responsible for policy work or our campaigns work and work out what's the best way to respond to this issue and sometimes it will be "Let's get some more information or test it through the tribunal or the court" to really ask these things but what else can we do in terms of resolving these.

DR MUNDY: I would suspect that sometimes these are just inadvertent things and with a bit of advocacy to the appropriate government authority, the problem is fixed and what you are doing is identifying the problem.

MR BRODY (CALC): Indeed. I will give you an example, one in which we have had. It's a systemic problem actually, but we are hopefully going to solve it, around private carparks. Private carparks are operated in most capital cities

but they have been operating in Victoria around food markets and train stations and the like and their business model has really relied on people not understanding the way in which the parking works and often, you know, you get free hours and then you have to get a ticket or you might pay up front but it's just not clear about the terms and conditions of the parking at the carpark and then they use the court system.

They use the Magistrates Court to obtain your personal details to then send debt collectors and lawyers over to you to recover damages amounts, often \$66, \$88, for people who either forgot to pay a \$2 fee or forgot to pay what was free parking, so people find this is a very unfair practice and we would say that there is a lot of evidence to say that the amount demanded doesn't actually equate to the loss that the carpark has incurred and therefore it's not actually credible in law but because of the difficulties in challenging them individually - in fact, actually when people do challenge them individually, it's often forgotten about, but they will make their money because most people pay and so we see it as very important to take that as a systemic issue. There are a mixture of activities. One is to talk to government about better protections in those circumstances, better enforced that our current protections under unfair contract terms, but also directly with industry about if you just used a boom gate, it would solve all these problems to begin with.

MR HUSPER (CALC): I would suggest, if I can, why is it we do the advocacy. It's virtually impossible to achieve a systemic outcome through the legal practice and it's very frustrating to us, because we take our cases on principally two eligibility criteria. One is that it's a systemic issue and we want to bring about change or secondly, the client is just ultimately very vulnerable and ought to be supported. On those cases which we take on for systemic purposes, we rarely actually achieve the outcome that we want to by taking on the case, because we go to EDR and there's a confidential settlement and you can do nothing with it or you litigate and the other party offers you a confidential settlement and you can do nothing with it or you seek to go to litigation.

Well, you can't find anyone who is willing to take the costs risk of going to litigation and this is quite separate to protective costs orders because often these clients wouldn't get a protective costs order anyhow but for those reasons, we actually struggle to get a change because of the cases. What the cases do is they inform our advocacy work. Because of the cases, we are able to speak to our client. We are able to evidence our client's experiences in the advocacy and policy work we do and so it's an evidence based practice that we have but the change typically comes about with the policy team, from David's team rather than directly from the legal practice.

DR MUNDY: So the litigation is as much about getting the court to clarify the inadequacy in the law.

MR HUSPER (CALC): Well, the failure to get the outcome - I shouldn't say exclusively. Every now and then we'd get a gratifyingly good outcome in a case, but those cases are actually quite rare and they're the celebrated cases.

MR BRODY: I mean, we make in our initial submission up to the Commission - I think we talked a bit about confidentiality clauses in disputes between consumers and traders, and the risk they are to actually harm public interest outcomes, because we're failing to get that broader outcome that might be possible.

DR MUNDY: I guess ADR in a form like an ombudsman gets around that sort of problem, but your ombudsman need homogeneity in that as to - so they can work, I guess.

MR HUSPER: I think, you know, a recommendation out of this would be that EDR schemes and EDR, and the like should report better to the regulators because they have an obligation to report matters, but in truth we will notify the regulator of a matter that we're taking to EDR but once it goes there it becomes confidential, and they'll often ask us what happened. We're unable to tell them, they're not getting the message from the scheme and those schemes - so there's a loss of information that the regulators could gain from those schemes.

MS MacRAE: So you can at least advise them of the nature of the problem. If you were seeing the same problem over and over, you'd be able to relay that but not the outcomes?

MR HUSPER: Yes, and I don't see why we can't, but I don't see why the traders should be quarantined from the scheme being able to notify the regulator. Why should they be quarantined from that?

DR MUNDY: And the information would be sufficient to say "the matter was of this character and this is how it ended". It wouldn't need to identify the individuals concerned?

MR HUSPER: No.

MR LEERMAKERS: That's right and, I mean, we'll have an enormous bank of cases that we've given advice on that may never get anywhere near a court, that may never even get anywhere near EDR and, I mean, what we see is probably the tip of the iceberg and what gets to court or a dispute resolution is

the tip of the tip of the iceberg. We're quite often doing advocacy or policy work based on a collection of maybe - if we get say six cases over the course of three months, that's usually indicating quite a huge problem and we'll go to the industry player and we'll say "there's a problem", or start talking to government. You couldn't do that kind of work based on the small amounts that would ultimately get to the courts.

DR MUNDY: But given these matters are small amounts reporting in the Magistrates Court and then the Tribunal's are patchy, I'm just wondering how these low level disputes, if they were conducted in a public forum as they traditionally have been, the value in that information that's going to be revealed as someone who's a statistician by trade. How am I going to collect it and analyse it in a systematic way, and weighing up against that whatever benefits there are in the EDR process. I'm not sure that the public benefits might outweigh the private costs of - I guess what we're trying to identify is a mechanism.

MR BRODY: Yes, and I think there probably are mechanisms there, so there is a lot of court appointed ADR or ADR through the Tribunals that ends up in confidential settlements, so I think in those processes or those programs, there is opportunities, evaluation techniques. So you might look at a sample of matters that have gone through there in a particular year. Maybe you're right, that it will be costly to try and report on outcomes of all of them, that using sampling to encourage evaluation and to publicly report on that. So, you know, parties can make judgements about whether the outcomes - those evaluations indicate good outcomes overall.

MS MacRAE: I don't think we've got very much time but I was just interested also in your comments around ADR and the compulsory use of ADR, and it's interesting because we've had a range of participant say it's great and there should be more compulsory ADR, and other people that have some reservations, as you do. Are there things that we can do to better address power imbalances when ADR is compulsory?

MR BRODY: I think exactly what I was just talking about, around having evaluations of ADR processes. So there is some public assessment of outcomes. When it's a court appointed or a Tribunal appointed ADR scheme, it's a black box, we've got no idea about outcomes. If you compare that to the industry dispute resolution schemes they're generally mandated to have a public review at least every five years and, you know, they're always appointed more often than that, and that is an opportunity for stakeholders to give input into review, the independent reviewer comes and looks at files, and comes to some public judgment about whether there should be some changes to how dispute resolution is undertaken to improve justice outcomes. I think there's a

lot to be learnt from those sort of things that can be applied to other ADR.

MS MacRAE: We did have a suggestion or we asked for comment about having a threshold for small claims, if you like, and consumer matters. We did suggest a number of 50,000 and I think, you know, we note now that VCAT's got a \$10,000 limit. Is a \$10,000 figure - is that sort of acceptable to you? Do you think that's a good number? Or should there not be a threshold?

MR BRODY: Look, I think that when it comes to power and balance we would encourage - a power balance situation, we would encourage it to be the election of the weaker party. If they see there's not much point going through a mediation process, they're probably in all cases - and this is true to our complaints - have been in dispute with this trader for one to two years. They know they're in very false positions that, you know, a mediation that's going to go for two hours now, you know, is that going to achieve an outcome? It might be - and our concern has often been - that yes, it will achieve an outcome. It will achieve an outcome that's, you know, somewhere in the middle that's not a fair outcome to the consumer. So we would say that having, you know, things like an election of the weaker party, evaluation could all contribute to having a better system where ADR is part of the mix but it's compulsory in every circumstance.

DR MUNDY: You mentioned a couple of case studies and my sense of those case studies was that was as much a reflection upon the mediators as anything else. Is your concern that in the rush to get matters through Tribunals, we're effectively dumbing them down?

MR BRODY: I probably agree that is a risk. I mean, we also talk about in our submissions - - -

DR MUNDY: We get odd decisions from High Court judges.

MR BRODY: We do, I agree. But I think it is another factor that indicates the same concern. We're seeing, at least in our experience with the VCAT, that there have been a number of procedures put in place that's making it more like a court and less like an accessible Tribunal. So one of those was a recent threefold increase to application fees. A lot of the change around application for hardship waivers, making that a much more complex and timely process for individuals to go through and most recently there's been changes on - at least in the civil claims list - around extra steps that a consumer has to undertake to have their matter heard, for example providing - or there are documents directly to the other side rather than to the Tribunal.

They call it serving, you know, the documents on the other side. Now, serving

and legal things like that aren't well known to consumers. They're legal constructs so it leads us to the view that they're becoming more like a court and less like a Tribunal, potentially because they're wanting to limit the number of people going to the Tribunal because it's costing them a lot of money.

DR MUNDY: So the issues around creeping legalism are not solely about presence of lawyers, which tends to be the focus of the discussion, but it's the procedural aspects of the Tribunals that - they're procedurally looking more and more like courts?

MR BRODY: Indeed, and I would say again, our experience is in the civil claims list at VCAT, that only a very small proportion of those claims are represented by lawyers.

DR MUNDY: My sense from your previous comments was that this was largely a response to resourcing constraints?

MR BRODY: Indeed. Well, again it appears to us to be.

DR MUNDY: Thank you very much for your submissions and your time to be with us today.

MS MacRAE: Thank you.

MR BRODY: Thank you.

DR MUNDY: We'll adjourn these proceedings until half past 3.

DR MUNDY: We might recommence. To assist the transcript, could you each state your names and the capacities in which you appear?

MS BAIN (SCVFIC): My name is Miranda Bain. I'm Director of Strategy, Community and Government Relations for Funds in Court.

MS MAY: I'm Susan May. I'm a solicitor to the senior master.

MR WALTON (SCVFIC): Roger Walton, senior legal officer for Funds in Court.

DR MUNDY: Would one or more of you like to make a brief opening statement, by which we mean about five minutes?

MS BAIN (SCVFIC): Yes, I'll do a very brief one and then we'll be open to your questions. I thought it might be useful to give an historical context to Funds in Court of which you may not be aware. So the origins is the Master in Lunacy was an officer of the Supreme Court created under the Lunacy Act of 1867. The officer was responsible for registering the general care, protection and management or supervision of the affairs and estates of those mentally ill or disabled. They maintained registries and recorded everything to do with the patient, their names, where they went to, associated costs and they managed the general disbursement of funds for those people, and those judged incapable of managing their affairs.

The Master in Equity and Lunacy was responsible until 1940, with the transfer of that function to the Office of the Public Trustee for the general care, protection and management or supervision of the management of the estates of all lunatics, persons of unsound mind and those incapable of managing their own affairs. The Master in Equity and Lunacy became the Public Trustee but Funds in Courts estates remained with the court and eventually became the Office of the Senior Master in 1986. The Senior Master is an Associate Justice of the Supreme Court.

In our earlier submission you'll be aware of how the Funds in Court office manages itself. So I don't want to go through that again. I just want to draw your attention to the funds that are paid into the Court and that we administer those funds on behalf of those people who are deemed to be unable to manage their own affairs. We call them beneficiaries. The Productivity Commission calls them consumers. Our population group have various degrees of cognitive impairment borne out of either trauma, car accident or from a medical illness or negligence mostly.

I think we gave you information on how we managed the funds through

the senior master and the judicial registrar and I wanted to say quickly that our emphasis really is on the rights of our beneficiaries to be protected and we take that responsibility quite seriously. It has been historically sound and we think we are pretty good at what we do. The role of this section that's represented by Susan and Roger today is really to have a look at how legal bills are presented to our beneficiaries and to question those bills when we sense that there's been perhaps - well, our beneficiaries have been overcharged. Overcharging is a common practice in some law firms, not in all.

But I wanted to give you finally some sort of context about the protection. A beneficiary with an ABI may have spent over a year in hospital relearning common skills such as eating, walking, reading and writing. Post hospital, they may have to wait years to have their case go to trial and tests that were done previously have to be performed again if there is any kind of delay in that trial. We ask you to consider such a consumer has capacity to provide informed consent when signing an agreement pre trial and ask whether or not they can seriously question or have capacity to question their legal bills post trial.

How would they do that? Over time they develop a close relationship with a lawyer who will represent them in court and analysing a legal bill takes a particular skill and we have that skill with us today. If not, it would go to the Supreme Court's cost court, but to have a matter heard in the cost court means the consumer or our beneficiary would have to appoint yet another lawyer of whom they would know nothing about, having developed a relationship with a lawyer who represented them and won the case over a long period of time, and that questioning of their legal bill is going to cost them more money.

The funds that they get is a one time, once only sum, lump sum, which has to assist them in their life until the day that they die. They don't return to employment, for example. I think it would be an exceptional person who would have that skill to question the bill given the context of how that comes to be. There are other processes which we've acquainted you of, the appointment of a litigation guardian and other processes, but our experience is a litigation guardian is often appointed to a beneficiary from within the family construct and our beneficiaries are already disadvantaged, they often come from low socioeconomic areas, they're poorly resourced, they have very, very little knowledge of the legal system as such.

What we observe is that personal injuries is a growth industry for legal firms. There are other reasons for that but it's certainly a growth industry and we say that the establishment of other sorts of funding models like the central access funding credit facility for these consumers with an ABI or disability where they can pay for their own legal costs if their case wins or disbursements

may not protect the consumer from unwarranted and excessive legal bills.

Finally we thought we might come with some suggestions rather than a complaint. Since the client consumer beneficiary has to pay eventually one way or another for a battery of medical and psychological tests, we thought perhaps it might be useful if they were to have a neuropsychological assessment to deem capacity supported by their local GP or specialist before they sign an agreement and before the bills begin.

Another thought was that perhaps the role of the Senior Master's Office that we exercise in relation to costs could be duplicated somehow by perhaps an independent review panel or a tribunal who are made up of lawyers who are experts in costs, legal costs, who don't have an interest in the outcome and they might be appointed on a rotating basis to review a consumer's legal bill and make appropriate adjustments. So we're here now to answer your questions.

DR MUNDY: Thank you very much.

MS MacRAE: I guess the role that you play raises a whole range of issues for the system more generally in our view and I know there's a couple of things you said in your opening which were of interest. One is that you said that you thought that analysing a legal bill required a great deal of skill. I think we probably agree with you in that regard. But while you've got disadvantaged people that you are providing that service for, would you say that the average consumer who doesn't have those difficulties are also going to be struggling to analyse whether their bill is reasonable or not?

MS BAIN (SCVFIC): I'll answer and say yes, from experience, but you don't have a comparison so if your case takes 14 hours for legal research and another case takes 14 hours for research, the general punter won't know value for money around that or was the research warranted and, you know, there's some reflections that one could make about that, you know, how do you - unless you are a lawyer and skilled in the area, how could you know that something was appropriate for your particular case. What do you think?

MR WALTON (SCVFIC): I think you're right to the extent it's difficult for anyone, apart from, well, what are defined under the act as sophisticated users of legal services or people that are - - -

MS MacRAE: Obviously for large repeat users, that's not the problem.

MR WALTON (SCVFIC): Absolutely, but even for your - for want of a better word - average one-off user of legal services, it can be very hard to determine whether costs are reasonable or not, particularly when, as you

pointed out in your report, with the use of time-base costing, how do you determine whether the time that has been devoted to a particular case is appropriate, especially when there's no way really to make a meaningful comparison of the time that's been taken in your case with another case. So I think it is difficult.

The Legal Practice Act is not an easy act, I wouldn't think, for consumers of legal services to digest. I mean, you see enough mistakes in costs agreements disclosure by solicitors, let alone by lay people. So, yes, look, I think as a general statement it is difficult for people who are not regularly users of legal services to determine whether costs in all the circumstances of their case are reasonable or not. I mean, there are avenues, of course, the Legal Services Commissioner, but currently the jurisdiction is fairly limited, although that will be going, I understand, up to \$100,000, there's still a substantial number of cases that would go beyond, that cost more than \$100,000. So certainly the increase in the Legal Services Commissioner's jurisdiction is going to be a help but for those bigger cases there really is only the cost court as an avenue for consumers wanting to challenge their legal bills.

MS MacRAE: You also said in your opening statement that overcharging is common practice among some law firms. Are you in a position or would you be breaching your responsibilities to address that? I mean, I guess you're in a unique position to have seen enough bills across a whole range of clients, that you would pick up on that when no individual consumer could possibly be in that position, so how would that overcharging - is there a way of dealing with that information that would be helpful? Obviously if it's a systemic problem with particular practitioners, it would be great from a consumer point of view to have that somehow divulged and addressed. Is there any mechanism that that can be brought to anybody's attention in the current system that would allow that to happen?

MS BAIN (SCVFIC): That's four questions all rolled into one.

MS MacRAE: I'm good at that and they're all unanswerable.

MS BAIN (SCVFIC): I will give it a good shot. The only time we have provided costs information to anyone outside our office was to this Commission in relation to the NDIS inquiry. That was the first time it had been compiled. In our office we are very concerned about the privacy of our beneficiaries and when we did provide that information, the Commission and the Transport Accident Commission actually got together and paid for someone's time to do that. The Senior Master wasn't convinced that our existing beneficiaries should bear the cost of gathering that information. So I think if the confidentiality concerns could be addressed, then we could provide

that kind of information but we probably need funding to do it because we work on a cost recovery model and - - -

MS MacRAE: Sure. I can appreciate you wouldn't want the - it's a public benefit that you're looking for, not a private one for the individuals involved.

MS BAIN (SCVFIC): Yes.

MS MacRAE: In a hypothetical world, if the money was provided for you to be able to collate that information or for someone to collate it, where would that complaint then go? Would it go to the legal services commissioner?

MS BAIN (SCVFIC): Probably not. I mean, his role is to argue on an individual basis costs which he deems to be inappropriate. He responds to complaints rather than looking at it.

DR MUNDY: This is one of the concerns that we have with the resolution of what are essentially commercial issues between lawyers and their clients. We weren't here before but this is in stark contrast to situations with people who have a complaint with their telecommunications provider.

MS BAIN (SCVFIC): That's exactly right.

DR MUNDY: There is no systemic way in which - and in fact our view is that the failure to do so actually means that more people probably end up in your hands than actually need to be if there are systemic issues about conduct which can't be captured.

MS BAIN (SCVFIC): I think that's a reasonable summary.

DR MUNDY: That's the reason why repeat behaviour is in the public interest to be captured. Obviously not to the immediate beneficiaries because they have already been stuck, so the funding question is a relevant one because there probably is (indistinct) unreasonable to expect those who have been burned to pay for the prevention of others being burned.

MS BAIN (SCVFIC): I think the Senior Master's position on that would be that because these funds are beneficiaries, one of our custodial, I guess, obligations and responsibilities is to protect the funds from any depletion other than basically keeping the office running because they need these funds to get them through the rest of their life.

MS MacRAE: Just think if you were - would you be comfortable about explaining this one case study, because that might address the second question?

MS BAIN (SCVFIC): I had occasion to go through this list of special damages for one of the beneficiaries for whom we received about \$6.5 million. They were injured as an infant as a result of medical negligence. The initial claim for costs was solicitor-client costs and disbursement was \$295,000. Eventually it was settled at \$280,000. So the actual costs in this case was about 4.3 per cent of the total award.

I was breaking down, in the list of special damages and then later in counsel's advice when the matter settled, how much was for future attendant care and future costs, how much was for funds administration, how much was for - because this beneficiary is never going to work. She is cashing in her earning capacity for her entire life. Because it's a medical negligence case, she has got to pay for all her future medical costs, whereas people who are injured in work or transport accidents have that ongoing entitlement to medical costs.

So although \$6.5 million seems like a lot, it has got to last her all her life. One of the complexities of this case was they couldn't agree on how long she was going to live and eventually they decided on looking at about 40 years, so that's another - she is about eight at the moment. I suppose one of my concerns with contingency or damage-based assessment of fees, for instance, is that that will reduce the amount that's available for her future care if costs were on that basis.

MS MacRAE: And she doesn't qualify for NDIS.

MS BAIN (SCVFIC): And Centrelink either. She will never get Centrelink.

DR MUNDY: Because she fails an assets test presumably.

MS BAIN (SCVFIC): Yes. She will - - -

DR MUNDY: If an assets test is relevant to her, she has failed it.

MS BAIN (SCVFIC): Yes.

DR MUNDY: Yes. I think we have been quite careful, particularly in those sorts of matters. I don't think we would think contingency for these matters were appropriate in those sorts of circumstances. Conditional billing I guess is a different question. I mean, it has been observed to us by a plaintiff lawyer in Sydney that whether you allow an uplift or not is probably neither here nor there because if you don't allow an uplift on a no-win - in New South Wales there's no win, no fee, no uplift. They just smear the uplift over everyone anyway, so it probably doesn't distort behaviour outcomes. I think

contingency fees in those sorts of matters are probably not what we had in mind. Our concern about not allowing conditional fees in those circumstances would be that the matter might never get brought, because a person in those circumstances is probably going to struggle to find means to fund the action. How they might actually give instructions is probably - - -

MS BAIN (SCVFIC): A moot point.

DR MUNDY: Yes. It's a difficult issue but yes, I don't think conditional fees - - -

MS BAIN (SCVFIC): That's a relief from our point of view.

DR MUNDY: Yes. They're the fees. The fees could have been 25 per cent higher on a zero uplift and you would have got the same outcome but just on that, I mean, where there are limits on - my understanding is from the way I have read your submission to us was that they are invariably charged at the limit anyway, so I guess it begs the question: why have the limit? Is that a reasonable observation?

MR WALTON (SCVFIC): Perhaps the question might be: why is the maximum amount almost invariably charged? I mean, the idea obviously is to take account of the risk the solicitors face and the disbursement that they might have to fund, but often cases proceed as an assessment of damages effectively and there's little risk that the solicitors won't recover in the end one way or the other. So I did recently see a costs agreement where the uplift was only 10 per cent but that's very, very rare that you see less than the 25 being charged.

DR MUNDY: I guess you probably didn't bother to have a look to see what the starting fee rate looked like anyway.

MR WALTON (SCVFIC): Yes. I think it was actually, from memory, on a Supreme Court scale, so it wasn't on the basis of hourly rates. Under those circumstances it's probably not an unreasonable costs agreement. I think with the issue of overcharging - I mean, certainly from what I have seen it's not in any respect conscious sort of overcharging. I mean, I think you pointed out the issues associated with time billing, the generation of activity, you know, sometimes and it may be inappropriate - it may be appropriate in a number of cases for two or three solicitors within the firm to discuss the matter but I think, as you have pointed out, time-based billing - there is obviously an in-built - not incentive but there is a tendency for costs to sometimes get out of control on a time - - -

DR MUNDY: It's a bit like when you're pricing infrastructure assets, is it the capital base that's having the cost put on it or is it the cost that really matters? My experience is it's easier to pad the asset base than it is easier to pad the rate. We had the benefit of Martin CJ appearing before us in Perth last week and he made the observation that if you can build a 35-storey building for a fixed price surely it's not beyond the wit of people to at least cost some forms of litigation on a fixed-price basis. What do you think the ups and downs of that - because that's clearly a reflection, it's an alternative to time-based billing. Perhaps a more useful question is what matters that come before you are more amenable to fixed-cost billing, or at least events-based billing, and which perhaps aren't?

MR WALTON (SCVFIC): Well, the things that we see, I would have thought that perhaps personal injury is one of the areas where, you know, there can be an element of stage costing or fixed costing. I mean, it can be - look, I don't think that anyone is suggesting that it's easy to work out how much the cost should be at a stage or at a beginning of a matter how much the costs should be, but I would have thought if you have enough cases, you would be able to draw out some kind of conclusions, averages, from those cases. I mean, the estimates that you often see now in costs agreements, as you are no doubt aware, solicitors are obliged to give an estimate of the costs, but the estimates are sometimes so broad that they are effectively meaningless; so I would have thought, as I said, in cases where there is a volume of cases that you can draw some conclusion, some dollar amounts from those cases, they might be amenable to fixed pricing or staged pricing.

MS BAIN (SCVFIC): Any categories - - -?

DR MUNDY: Those which could be dangerous or shouldn't be pursued.

MS BAIN (SCVFIC): Sorry?

DR MUNDY: Those where you might think there would be risks about going down that path.

MS BAIN (SCVFIC): We talked a lot about perceived risk and real - there's an observation, I guess, that what's presented as being a risk to the beneficiary or the client actually isn't a risk. You pretty well know that the legal firm that takes on the case, even though they may present the idea that it's risky, they have already kind of done their sums and know whether or not it's going to win, and then what is the risk of winning. So you would think that, in the overall scheme of everything, you know, you have X amount of cars, X amount of interventions, X amount of traffic lights that are shot, the amount of injuries, in terms of being able to assess the risk, it doesn't feel like that's a risky assessment once the case is taken on; so when we have talked about that we

thought that there is sort of some categories within personal injuries that you would pretty well be able to predict how long is it going to do this, how long is the research for, how long do you think we are going - everyone knows basically how long the trial will take. We certainly do from the Supreme Court's point of view. We have to run the business based on estimates and length of trial.

DR MUNDY: Even if those estimates are perfect, the distribution of them is such that it's manageable and outliers are particularly rare and - I mean, I presume, you can have a look at these matters and say, "That one's going to - - -

MS BAIN (SCVFIC): That's a curly one.

DR MUNDY: Yes. I mean, just following on, one of the things we have suggested, which I think has been misunderstood by some representatives of the profession, the solicitors' professions primarily, is this notion that it would be helpful to consumers that if matters could be identified by type, that a range of likely costs, and we don't mean nought to a million dollars, but some sort of sensible range that could be provided, give people some idea about the costs of litigation before they actually go and start to have a look at them, that could be properly statistically constructed so you get rid of the outliers and you probably wouldn't ask major Colin Street firms to provide data on how much it costs to run a small claim in the magistrates - so you would have a sensible statistical process. Is that something that, in your experience of looking at how costs play out, that would not be an imponderable as far as the development is concerned?

MR WALTON (SCVFIC): I wouldn't have thought that it's impossible to do, no. You would think, given enough information, that you could draw some sensible conclusions from, some observations from that information; so yes, I certainly don't see it as being something that cannot under any circumstances be achieved.

DR MUNDY: I'm glad you say that, because that was the view of Martin CJ.

MS BAIN (SCVFIC): I thought so. It might be the view of our Chief Justice, but I can't speak on her behalf.

DR MUNDY: I mean, it is the nature of professional service, you know, there is a distribution of outcomes and practitioners usually know how much it is going to cost, otherwise how do they run their businesses?

MS BAIN (SCVFIC): We have talked again, we have asked some questions, because you are going to have workload and throughput, and you are going to

have to designate resources against that. We have to do that in the court when we are trying to work out how many trials we are going to be able to run. You know, even if you've got complex trials, you basically know that it is going to take x amount of time, it's going to take x amount of resources, so you would hope, wouldn't you, that a legal firm would have the same capacity. What we did think, though, was that we wondered whether or not someone who has an acquired brain injury has got - how would that information be able to be translated to such a level that they would be able to appreciate it and apply it to themselves, and we don't actually have a view of that today.

DR MUNDY: You made the observation about the Civil Procedure Act, and we are interested more broadly, I guess, in measures in - the Civil Procedures Act sits within a whole range of case management tools and efficiency tools for the courts. Is your court doing anything to try and monitor the effectiveness of these innovations in terms of costs, both to the court and to clients?

MS BAIN (SCVFIC): From the point of view of the Supreme Court, it's always monitored and reviewed, primarily because we have through the Chief Justice a commitment to reduce delays at all times. It has been a major focus of her leadership for the last 10 years. There are examples of that preoccupation which have been recorded in, I think, the Court of Appeal case.

DR MUNDY: We were at a timeliness conference at Monash University a few weeks ago, and one of the justices from the Supreme Court came and spoke. I want to say his surname is Martin, but that's not right.

MS BAIN (SCVFIC): No, it's not.

DR MUNDY: But I can't remember, he came and talked on the Civil Procedure Act and - - -

MS BAIN (SCVFIC): - - - remembered his name.

DR MUNDY: I forgot, but you weren't there, so you've got an excuse.

MS BAIN (SCVFIC): I'll get back to you on that.

DR MUNDY: No, I can look my own notes up.

MS MacRAE: We are interested in as much data as we get on professional fees, and we note in your submission that there's an increasing trend in average professional costs claims by plaintiff's solicitors over the last five years of 34 per cent, or an average of nine per cent per year. I'm just wondering if you have any idea of what's underlying that growth, and whether there's particular

factors in the personal injury area that explains that growth. I'm hoping you are not going to ask me to point to the page where I got that number. I might have to point to the man at the back of the room.

MS BAIN (SCVFIC): The 43 per cent, or nine per cent per annum is a statistic that came from the Transport Accident Commission. That was their observation, so they had trended it over that period of time. I think I would feel more comfortable if I was to go back to them and, say, provide a little bit more information and put it back to you in writing, because it's - - -

DR MUNDY: It's their number.

MS BAIN (SCVFIC): It's their number.

DR MUNDY: I mean, I guess what I would be interested as to whether they think it's a reflection of wage growth or more lawyers being - it is a volume thing, is it a price thing, those sorts of - basically what they think underlies it.

MS BAIN (SCVFIC): Well, from discussions, it was suggested that the trend was growth in the personal injuries, there might be some mitigating circumstances of which - - -

DR MUNDY: So it just might be growth of claims.

MS BAIN (SCVFIC): Yes, but I will qualify that.

DR MUNDY: That would be useful because they may have some data on unit claim costs as well which would be helpful.

MS BAIN (SCVFIC): In the general conversation with TAC, they were worried that there had been such an increase on a per annum basis and that it was trending up and they, you know, questioned how that came to be and I don't think it was a whine about how much they were paying out from the commission. I think there was a genuine concern that it seemed to be just continuously rising and it was unclear about what as - you know, what did they get out of it, was a comment.

DR MUNDY: I guess ultimately they are the ones who have to justify the premium increases if it can't be stemmed.

MS BAIN (SCVFIC): Yes.

MS MacRAE: Do you want to make any observations about the increase?

MR WALTON (SCVFIC): No, look, I would be guessing.

DR MUNDY: So it's an aggregate level growth, so it could reflect complexity of matters; it could reflect remuneration. It could reflect the number of matters brought, or it could be anything - costs of witnesses.

MR WALTON (SCVFC): Yes, I was going to say medical reports, expert reports.

DR MUNDY: It could be experts, so it could be process driven. It could be any number of things. If they had a view as to what the cause of that would be, I guess the other thing we would be interested in is whether they think it's a reflection of speculative cases. We have heard from a number of folk concerns about speculative cases being brought, run by plaintiff lawyers who ultimately don't run, whether that has been built into their cost base which is driving it, because they have got fund those matters to the extent they exist.

MS BAIN (SCVFIC): That's an interesting reflection.

DR MUNDY: It's particularly in the context of funded litigation and issues around securities class actions.

MS BAIN (SCVFIC): Okay, that makes sense.

DR MUNDY: Probably not matters that are directly relevant to you.

MS MacRAE: Just coming back more directly to your work, if you find that there is excessive billing, so you regard a bill as excessive, what process do you go through then to determine what happens next, I guess.

MR WALTON (SCVFIC): In brief terms, the solicitors make an application. They usually - well, they have always recovered party-party costs and have usually effectively paid that to themselves, retained that and make any claim from Funds in Court for effectively the unrecovered component of their solicitor-client costs, so often it's made on very scant information. Sometimes we're provided with an itemised bill of costs, sometimes it's an assessment with details or sometimes it's little more than, you know, a one line - effectively an assessment of those costs with an explanation of what happened in the case.

There's issues of proportionality. Obviously, we're not going to pay out a huge proportion of the funds that we're holding for the beneficiary. We look at the party-party costs that have been recovered and the gap, if you like, in professional charges. We're looking at the disbursements to make sure that they are reasonably incurred and we are also looking at anything that the

solicitors put to us which they say has increased the component, if you like, of unrecovered solicitor-client costs, so, if you like, the standard of the applications, there's a huge variability. Some of them are very well made out, some of them are less so. It's generally a process of looking at all those different components and the information that we have at hand.

If necessary, we put the onus back on the solicitors, "Explain to us how unrecovered costs equal x dollars. What were you unable to claim on a party-party basis which you are now seeking from Funds in Court?" Then subject to the Senior Master's instructions or the judicial registrar's instructions, we will make an offer to the solicitors in settlement of their claim and then usually there's a bit of a negotiation process going to and forth and we arrive at a figure. That's typically the process that we go through. The onus is obviously on the solicitors to make out their entitlement and we're pretty cautious about paying out solicitor-client costs. We won't pay them out unless we feel, the court feels that the claim has been properly made but that's basically the process that we go through in trying to quantify those or determine the reasonableness or otherwise of the solicitor-client costs being claimed.

MS MacRAE: What proportion of the cases that you look at would there be a dispute about the level of costs claimed?

MR WALTON (SCVFIC): When you say dispute - - -

MS MacRAE: Discussion.

MR WALTON (SCVFIC): There is probably very few, not many cases where we will pay the amount that has been requested by the solicitors, although in a lot of cases there might be a very small reduction but in more substantial cases, it can be quite a convoluted process of negotiating the resolution.

MS MacRAE: Just roughly, are you able to give me a feel for what sort of proportion it might be where you get a substantial adjustment, because I can appreciate at the margin you might be arguing "I want this or that," but is there - - -

MR WALTON (SCVFIC): Just going on the last two months, because I have those figures sort of off the top of my head, the reduction on the amount claimed was an average of about 22 to 25 per cent.

MS MacRAE: Okay.

MR WALTON (SCVFIC): On average, so some of the claims were reduced

by a very small amount. Some more substantial claims are obviously reduced by a greater amount in terms of percentage but on average in these last two months, and I certainly haven't done figures going much further back but, yes, an average reduction that - - -

DR MUNDY: Your sense is that there is nothing abnormal about those figures.

MR WALTON (SCVFIC): I don't think so, no.

DR MUNDY: Thank you very much and we do appreciate the assistance the Supreme Court has provided in this inquiry and the past. Thank you very much.

MS BAIN (SCVFIC): Thank you, our pleasure.

DR MUNDY: Could we please have the representative of the pro bono practices of Clayton Utz.

MR HILLARD (CU): Our three firms put in a joint submission. Two of us are here today.

DR MUNDY: Could you please for the record state your names and the capacity in which you appear.

MS FRIEDMAN (A): I'm Nicky Friedman and I'm the head of pro bono and community programs from Allens.

MR HILLARD (CU): And I'm David Hillard. I'm the pro bono partner at Clayton Utz.

DR MUNDY: Thanks. Would one or both of you like to make a brief opening statement and brief means less than five minutes.

MR HILLARD (CU): Certainly. Australia has a uniquely collaborative pro bono culture and that occurs both between large law firms, and I think Nicky and my presence today is a not subtle example of that, but also between pro bono providers at law firms and the legal assistance sector, and I think we are in a very good position to be able to comment on the way that we perceive the sector as a whole. We have got a breadth of exposure to all parts of the legal assistance community. I think it's true to say that from our point of view, we were very heartened to read that the commission acknowledge that pro bono was a small part of the solution to access to justice in the civil space. We are really a very tiny pool in terms of what's available out there to be able to assist low income and disadvantaged people to get access to civil legal assistance, and it always causes us some concern whenever politicians of either stripe turn to pro bono as perhaps a solution to how civil legal assistance might be offered in Australia. Our capacity is really very limited in the scheme of things. The (indistinct) that our three firms have, is really in how we create a stronger system for ensuring that low income and disadvantaged people have access to the legal system in relation to their civil rights. I think it's probably fair to say that if we started today from scratch to build a legal assistance sector we wouldn't end up with the one that we have today, and that's absolutely no criticism of the very competent, very dedicated people who are across the legal assistance sector, but it's a very ad hoc approach that we have in Australia, and particularly in the civil space. It's very interesting to contrast how we treat access to criminal law assistance and family law assistance in comparison to how we treat the access to civil law for exactly the same community of clients.

For low income and disadvantaged people, they are at capacity, and the

system to accessing legal assistance in a criminal space is very different to how you might get assistance in the civil space. These are all truisms, but they are the sort of things that keep us interested in how pro bono can work effectively and, as you will see from our submissions, our three firms are very supportive of the idea of a civil law one-stop shop of some form, at the very least a more collaborative and cohesive approach to how people might get access to civil legal assistance.

I think it is also important to acknowledge that one of the reasons Australia has such a strong pro bono sector within its private law firms is leadership the government has shown, both here in Victoria and at a Commonwealth level, particularly the Commonwealth with the adoption of a single national aspirational pro bono target and the incorporation of that into the system for how government purchases legal services has really transformed the way in which the capacity to do the pro bono and the willingness to do it from within some firms.

I have been in this role now, this is my 18th year, heading the pro bono practice. When I first started, Gilbert and Tobin and myself could meet in a phone booth to talk about corporate law firm pro bono. There has been a really collaborative approach over the last 18 years to develop a much broader and stronger landscape, and certainly the target, I know the target gets a mention throughout the report, has been a significant factor in the last six or seven years in really dramatically increasing the breadth of what's provided by law firms in the pro bono space. Thank you.

DR MUNDY: Could we start on target. It has been suggested to us that, whilst the target might be all well and good for the Commonwealth list and perhaps in larger jurisdictions, particularly the south-east corner of the country, that this approach of a target is quite problematic, for example, for trying to draw forward pro bono services in, say, South Australia, where there is - one of the benefits of New South Wales and Victoria, obviously, is the Commonwealth does most of its own legal procurement here, or perhaps in the other sector. Do you have any views about whether there is merit in that observation and, if so, how might pro bono services, and perhaps reflecting on your own firm's activities, say in South Australia or Tasmania or Western Australia, how that might be drawn forward?

MR HILLARD (CU): I think that one of really strong benefits of the creation of the target was it was aspirational in nature, and there's still absolutely no compulsion on anybody to meet the target. What it has done, I think, is to provide a very clear statement that this is what good lawyers are expected to do, and this is sort of the quantity of work that meets the benchmark. One of the issues with the delivery of pro bono work is that any lawyer and any law

firm who does some work for free thinks that's a significant contribution that I've made.

When the target was created in 2007, none of the firms who are now signatories to it were at that 35-hour number, and I'm sure that all of us thought we were doing a fabulous job. We probably were, but we weren't doing as much as we could, and by setting a 35-hour number, it gave all firms something to aspire to, and this sense that, well in reality, a week's worth of work is a reasonable benchmark to set. Now, firms like Allens and Clayton Utz and Ashursts see ourselves as really being leaders in this area, so we have moved well beyond that target, but putting that 35-hour number there helped to give us a platform for which to move to, and it also helps, I hope, for those firms who might have previously done one or two matters a year to think, "Well, hang on, if there's a 35-hour professional benchmark, then maybe there's more that we can do." I think it provides that sort of incentive.

I would certainly not support any arrangement that had a compulsory and punitive nature to doing pro bono, but I think the aspirational and encouraging way that we have gone about it is useful, so that even in some of those other smaller jurisdictions, I don't think that it is more difficult, or that the lawyers in those jurisdictions are more different, that the concept of providing 35 hours is an unrealistic one for them to aspire to.

DR MUNDY: I guess it's more the mechanism. I mean, you say that the target has drawn forces, and the Commonwealth purchasing of legal services probably in South Australia is minimal, and I suspect that some submarine work is probably done from here. They don't - their crown solicitor's office tends to in-source most of the work rather than outsource it. I'm not being critical - - -

MR HILLARD (CU): No.

DR MUNDY: You say that the target has been effective in drawing out this stuff, so I guess my issue - - -

MR HILLARD (CU): What else can be done?

DR MUNDY: If there is no leverage by virtue of government procurement because of the character of the legal services market in the jurisdiction concerned, then what else can be done by governments? What recommendations could we make to achieve similar outcomes?

MS FRIEDMAN (A): The state government would still be procuring legal service, or are you saying that they - - -

DR MUNDY: We were advised by the people who manage the pro bono scheme in South Australia that the crown solicitor has an unusually high, I was about say "peculiarly high" but that would be probably - certainly, that they seem to outsource less than would be, certainly in New South Wales.

MR HILLARD (CU): The target came first before the Commonwealth system was adopted, and I think there's a real benefit from the target having been used as a statement by the profession, and by firms which saw themselves and being leaders in the profession, to say, "This is what we think should happen", and I think there is still that opportunity within a smaller jurisdiction, like South Australia, for the firms which see themselves as leaders to be able to say, "We are nailing our colours to the mast. We are committed to this." I think that there has been, as one of our great colleagues in the United States, Esther Lardent, has often said to us, "Law firms are competitive and collaborative creatures. We all want to do exactly the same as everybody else, just a little bit better," and that by creating a level of sort of professional, across the profession, responsibility, the profession itself can do it. One of the interesting things about the target was that it was established almost in the absence of similar leadership provided by our professional associations. It wasn't something that individual state law societies or bar associations or the Law Council was interested in doing, and it's something which the private profession itself has really created. I think those opportunities exist in each of the jurisdictions.

DR MUNDY: There has been some issues, and we have made some observations about the nature of the work that is being performed pro bono, and it seems to us that a relatively small proportion of it is going to dealing with increasing access to civil justice, whereas a large amount of it seems to be – what I'd call transactional in nature and I think, to be fair to the major firms, I certainly know on a personal level, country solicitors working on minor extensions to the golf course lease and all that sort of stuff, it's fine, but I guess the question is, I mean, have we got our estimates around how much of this is really going to access civil justice issues around about (indistinct) is there a view within the profession, within your sort of cohort, that perhaps over time we need to refocus it away from major artistic institutions who are in receipt of a substantial amount of Commonwealth money, certainly more Commonwealth money than any CLC would get, and back towards real areas of need?

MS FRIEDMAN (A): Absolutely.

DR MUNDY: Am I preaching - - -

MR HILLARD (CU): You are.

MS FRIEDMAN (A): I think on both counts, I think the estimates sounded fairly reasonable to us, and - I mean, I just looked at some numbers today, 80 per cent of the matters we have opened in our firm this year, the new pro bono matters, are for organisations and 20 per cent for individuals. There's also work we do through clinics, through our homeless clinic and so on, but actually individuals who we act for directly through the firm, it's an 80-20 spread.

DR MUNDY: Those matters that you have opened for organisations, I guess I draw a distinction between a homeless women's shelter and MSOs.

MS FRIEDMAN (A): Yes, absolutely.

DR MUNDY: So are we more in the homeless women's shelter or - - -

MS FRIEDMAN (A): We are moving much more towards the homeless women's shelter. We do a lot of work for Aboriginal corporations. It's also numbers of matters is only one measure and the time and complexity of those matters is a different measure, but one of the challenges we have had as managers of pro bono practices within the firms, and I think it's something that we would say is pretty universal, has been that when we came into - law firms have always done pro bono work. It's not a new thing. Corporatised professionalised pro bono is a relatively new thing but doing work for free is something that's as old as (indistinct), so there was a lot of work going on for scouts and private schools and golf clubs and so on before people came in from the access to justice sector to run professional pro bono practices, and part of challenge for all of us has been slowly redirecting our practices, which not everyone has chosen to do, not everyone aspires to do but certainly we do, those of us who have made this submission, and quite successfully, but any support I think that could come from government and from the legal profession and from the establishment for an idea that pro bono really should mean access to justice and it should be about disadvantage, whether for organisations that work with disadvantaged people or directly for those people, I think would further that.

MR HILLARD (CU): Just as an example, the policy at Clayton Utz and I know the policy at Ashursts says we act for low income and disadvantaged people and the not for profits which support low income and disadvantaged people.

DR MUNDY: Yes.

MR HILLARD (CU): I had the pleasure or discomfort yesterday of

knocking back a request for work from the state symphony orchestra. We had a partner who said could I do this and the answer was, "Absolutely, yes, if we do it as a business development file but it's not our pro bono work and it won't be counted as our pro bono time." One of the beauties of the target and the statement that underpin that is it really does focus again that idea that pro bono is something about disadvantage and I think all three of our firms are very conscious of - - -

DR MUNDY: So you actively distinguish between what you consider to be - - -

MR HILLARD (CU): We absolutely do.

DR MUNDY: - - - that and what we might for the better – say call work done for marketing type stuff, brand development.

MS MacRAE: And just then in coordinating the work that you do and what the legal assistance sector does generally, the more that you move towards what we can think of as help for the disadvantaged or the otherwise groups that would miss out, your submission is, if I'm reading it correctly, somewhat critical of the CLC sector saying that they tend to lack scale and that they are not always placed in areas where there is the greatest need, and I have to say we have had quite some push back on that from the CLC themselves, and I am just wondering if you would like to reflect a little bit, if you were in our shoes, I guess, if you were looking to find better coordination and better use of the total resources available in that sector, so that pro bono contribution alongside that legal assistance - the more general legal assistance sector - what changes or where you think reforms might be worthwhile.

MR HILLARD (CU): A lot of the work that we do comes on referral from CLCs. A lot of the work that we do is in partnership with CLCs. We are certainly not critical of the people involved in the community legal centres and the way in which they are conducted but there is, I think, a fundamental challenge that's created by having 200 independent small organisations, each of which is funded from a multitude of sources to deliver some form of comprehensive approach to access to civil legal assistance, and as I think the commission notes in its report, whereas with Legal Aid, representation court work is core business, that's often not the case for many CLCs. Those that do representation well tend to be larger places that have more than one and a half lawyers. They have got the capacity to be able to do that.

In my mind, there is a challenge with the fact that we have here in Victoria I think 51 community legal centres. I am not sure if we started again why we wouldn't look to have one community legal centre of Victoria with 51

branch offices, or some other way of doing it. The difficulty – not with just having a large number of small centres, is that it slices up the amount of work that's done but it also means that there needs to be 200 separate volunteer management committees that there lacks sort the back of house operations in terms of having HR policies and recruitment policies and funding programs and arrangements that are in place. There's a lot of duplication and a lot of time that's spent again and again and again, so that incredibly well intentioned and well meaning lawyers are often distracted by some of those sorts of issues. That I think is a criticism of how the sector has evolved but it's not a criticism of why the sector has evolved that way. CLCs started very much from an independent position, from some really pioneering lawyers responding to needs in their community. Nicky, did you want to - - -

MS FRIEDMAN (A): I would agree. Each of us works with numbers of community legal centres and we see up close the inconsistencies in resources and accordingly, inconsistency in procedures and so forth; again, not because anybody is not completely dedicated. They have to be dedicated to work in that environment but they are small and accordingly there's inefficiencies.

MR HILLARD (CU): So there is an example that's in our paper of a program run with Redfern Legal Centre. Redfern is of a sufficient size that it can employ a specific employment lawyer, someone who can specialise in that area, and so its capacity to therefore expand assistance is much, much greater in employment law than anybody who's at a general CLC that may have one or two legal staff. It's really a question of the size and the scale and so if there was a way to make CLCs larger, to have a greater capacity or to make a civil legal service larger with greater capacity, I think that naturally - - -

DR MUNDY: So the policies being pursued, and you may not be aware of it, with respect to western suburbs of Melbourne who would agree to amalgamate, that is the sort of issue open. I think in your submission, you made an observation about the concentration of CLCs particularly around the metropolitan, around the CBD of Sydney and I guess suffering from the occasional Marxist tendency, I historically determine - - -

MR HILLARD (CU): You are talking to pro bono lawyers.

DR MUNDY: Historical determination would suggest that these community centres have grown up in suburbs in the inner cities characterised to proximity to universities, with Fitzroy. The point that Redfern makes in relation to that point, and I think you also draw attention to the number of specialists, is, well, if they are not going to be located in the CBD, where would you expect the specialists to be located, and the second observation that Redfern made was it's much easier to attract pro bono lawyers from major firms to come to Redfern

than it is perhaps - and I don't know whether they used this example but certainly, the outer western suburbs of Sydney.

I guess the question is really about the view and about the capacity of outreach and we saw in the case of Redfern, they have got a state-wide overseas students program, and I just wonder whether the CRC has national reach in relation to insurance matters. We are just wondering whether the deployment of resources, perhaps the nature of the position would change over time with technology, because what we are very concerned about and what the CLC sector has come with an option or proposal about, competitive tendering that would fundamentally undermine its community nature and they would just be legal centres in communities perhaps but "C" comes first. I am just wondering, do you have a view about how we can get this efficiency encouraged and without undermining that fundamental community perspective?

MR HILLARD (CU): Can I say that I think the community question is an important one but I would suggest that service delivery of legal assistance is the primary issue and from my point of view, if the choice is between do we have a community feel or do we have the capacity to provide people with the ability to defend or enforce their legal rights, the notion of community should come second to that.

DR MUNDY: Yes.

MR HILLARD (CU): There are, as we have said in our response, there are certainly ways that community involvement can continue through any sort of structure, through having advisory committees or local invitations to the community to be involved but legal aid services, for example, service low income and disadvantaged people in the criminal space. There is no suggestion that they do a poorer job because they aren't established with a community person sitting on their board or whatever. It's an interesting argument but I would certainly suggest that it's also important to look at what capacity is involved, so community of itself is an admirable thing but if it comes at the cost of a greater delivery of service, that's a challenging question but we would certainly advocate the idea of a - I think we have referred to it, and we have stolen it unashamedly from previous reports, but the idea of a no wrong door approach, so that if I walk into a community legal centre at Fitzroy and the employment law specialist within the community legal sector is based in Bendigo, I should still be able to find a way to get access to that service, and that I think is the real challenge.

DR MUNDY: Yes. This is just an out of left field question, but a lot of your major clients, your major commercial clients, have very substantial community

obligation programs, and many of them, particularly in the mining resources sector, but not exclusively in the resources sector, are often directed at people suffering disadvantage. The mines are particularly interested in indigenous communities, for all the obvious reasons. Has it ever been the case that major clients, the firm, will come along and say, "Look, we see there's this problem of legal need in indigenous communities in Western Australia. We are not quite set up to work in that sort of space. Is there something we can do to partner with you, or can you facilitate a discussion with an appropriate body so that we could put some money into that, and can you provide us with some guidance and assistance in making sure the money is well spent"?

MS FRIEDMAN (A): Not that specific example in my experience, I don't know about David, but we have certainly worked closely with some of our resources clients.

DR MUNDY: I'm not picking on the resources - it just seems to be - - -

MS FRIEDMAN (A): Yes. Well, with the Aboriginal and Torres Strait Islander population base, which they do have – through our reconciliation action plan, so we have reconciliation action plans, they have reconciliation action plans, they fund micro-finance ventures. For example, we facilitate some of that legal work through micro finance providers, so it's really the micro finance providers who are our clients, it doesn't come through the resource companies, but we are aware of the triangular interest. If the client were to come and help us to identify a community with legal need and in some way wanted to provide the resources for us to service that need to the extent that we could, and didn't present other problems and we thought it was the best use of our resources to provide access to justice, we would be happy to do so. It's the kind of thing we would also be very likely to take a referral body like Justice Connect, if it were in Queensland to QPILCH, or the WA equivalent. They are probably best placed to facilitate that sort of thing.

MR HILLARD (CU): There aren't a lot of examples, but all three of our firms, and others, will have examples of working with in-house legal teams at commercial clients. We have got projects at the moment with Brookfield Multiplex in relation to an Aboriginal adult literacy foundation, and work in north-western New South Wales, which was a project that came to us from the client. There are other examples that we will have. I think it's increasingly part of the way in which law firms speak with their commercial clients through the language of their pro bono programs and their broader community engagement, but I don't want to overstate the size of that. Certainly, there would be absolutely a willingness for us to be engaged in those sorts of discussions.

MS MacRAE: Just in relation to costs awards, I note in particular that you're opposed to the sort of scheme that operates in the UK, and I'm wondering if you could just outline a little bit why that would be the case, and what your preference would be.

MR HILLARD (CU): Yes. It hasn't operated well in the UK. It's a scheme which exists, but I'm not actually aware of any substantial grants or payments that have been made into that scheme or paid out. It's not supported by most of the firms, and I think the reason for it is fairly understandable. As we put in our submissions, I think that we sat and crunched our numbers. We provided more than 500,000 hours worth of assistance between us over the last three years, and in total costs paid from all potential sources, between us there was about \$485,000 or something of that nature that we had received.

I think we all took the view that that was - any money which we do recover, we would much rather put back into our own, we think well-functioning, pro bono commitments, rather than to have it go out to something else. The funds are relatively small anyway. I think one of the things that conceptually differs pro bono representation from, if I was running just simply a no win-no pay arrangement, is quite often matters which we run, we don't want to run to a final determination, we don't want to keep going until we get a judgment, we don't want to keep going for a costs order. Many of our matters, sometimes frustratingly for the lawyers involved, but not for the clients, are matters that get settled much earlier in the process, because our fees aren't in question; so there are very few matters, and in fact between the three of us we might have had four substantial matters in the last three years where we had any sort of significant costs awarded, it's not a large scheme anyway, and most firms, I think, are very comfortable in saying, "Our program costs a lot more to run than we ever recover and, if we ever recover anything, heaven forbid, we would like to be able put that into our own programs."

DR MUNDY: I think it has been, I mean our real interest in costs awards was not actually about funding pro bono lawyers, our real interest in costs awards is the behaviour of the litigants, and particularly the circumstance where a well-resourced litigant faces a pro bono or self-represented litigant and, in the absence of a costs order would seem to have an incentive to drag the matter out, and to ultimately frustrate the matter financially until stalemate, and then the matter falls over and parties go away. That's - so justice isn't achieved.

I guess, following on from your question, you don't expect to get paid, and there has been a relatively small number of matters which you have received substantial awards in. Would it follow therefore from those observations or generally, are we conceiving of a problem that is more theoretical in nature on behalf of practising economists, than perhaps in the

reality of practising lawyers?

MR HILLARD (CU): I think so. I think it's a situation where, as we said in our submissions, we're not aware of a situation that anybody has not taken on a pro bono matter because they didn't think they were going to get paid at the end of it, so it's not stopping the – it's not the issue for representation.

DR MUNDY: I'm not worried about the refusal, I'm worried about - - -

MR HILLARD (CU): Just between us, certainly when we act, we don't often disclose to the other side that we're acting on a pro bono basis, or we don't disclose to them that we think that acting on a pro bono basis might mean that we're disentitled to a costs order so it's remarkable what happens in matters, understandably perhaps, when Allens hoves into view, suddenly a party on the other side does start to think about those things, and I'm sure they're not just thinking about the quality of the representation or the size of the representation on the other side, but they're thinking about the costs risks.

DR MUNDY: So when the Clayton Utz pro bono partner turns up, he just turns up, or she turns up, "Hello, I'm the Clayton Utz partner, and I'm acting for them." That's all they know?

MR HILLARD (CU): That's right.

MS FRIEDMAN (A): Probably, our major cases, and certainly the ones where we have had significant recovered costs, have all been matters on behalf of people who everybody in the room would know are represented pro bono, they have been asylum seekers or prisoners. It's pretty clear that there's pro bono representation.

DR MUNDY: Are they typically matters against the state?

MS FRIEDMAN (A): I was going to say, it's pretty much always the Commonwealth or occasionally the state government on the other side.

DR MUNDY: So you could rely upon the Commonwealth model litigant laws to - - -

MS FRIEDMAN (A): Exactly right.

DR MUNDY: - - - any sort of adverse behaviour.

MS FRIEDMAN (A): Yes, in theory that's right, so yes, it's not another, it's not a party on the other side who is going to push the matter harder because

they think won't have to pay costs.

DR MUNDY: Okay, so it's not a tier 1 issue?

MS FRIEDMAN (A): It's a bit of a red herring though.

MR HILLARD (CU): As an example of the matter that resolved with us this week, a client who was referred to us, we wrote to the other side. We asked effectively, "What's the basis of this claim that you have commenced in the District Court against our client?" We signed it off "Clayton Utz". There's nothing on it about pro bono. Within 28 days the proceedings had been discontinued by the plaintiff, and we never said we were acting on a pro bono basis. I assume that they didn't think we were, and they were worried about, "Gosh, there really is a problem here. We better make sure we really have a claim to run."

DR MUNDY: Or if you were, it doesn't matter. We've already sucked up all the costs, so they are not going to be able to exhaust you; so the issue probably, if it exists, exists with Mary Smith, the suburban solicitor, who might be trying to help someone out, and then faced a major firm of insurance, or some such, particularly in a money matter I think is - - -

MR HILLARD (CU): Yes.

DR MUNDY: - - - rather than matters which lead to a, you know - - -

MS FRIEDMAN (A): A constitutional question, yes.

DR MUNDY: Okay.

MR HILLARD (CU): As we have put in our submission, we would certainly welcome any clarification about making sure that costs, if push comes to shove, that costs would be available, but in reality I think it's actually not a huge issue for any of our practices.

DR MUNDY: I think the issue really may be here that the legislature might be able to remove a large amount of transactions costs that are irritating people providing services pro bono, rather than people having to do hoops and things with costs.

MR HILLARD (CU): We're acting at the moment for a client who was trafficked here from India and has been working locked inside a restaurant for two years. We're happy to provide - to run the case, but the interpreter costs are killing us. You know, it's those sorts of things. The absence of access to

interpreter costs to pay the disbursements are really the challenge for us.

DR MUNDY: Yes. That's not - and you may have done this already, but are you able to give us any data on the nature of the matters that you've - I mean you've indicated migration matters and matters in the High Court and constitutional questions and administrative law matters, so just be - I guess part of our thinking has largely been brought forward on the basis of matters involving monetary settlement where the incentives are probably very different to the sort of proceedings you might have with respect to the Department of Immigration.

MR HILLARD (CU): I think it's fair to - we can certainly try and crunch those numbers, but it's fair to say that for all of our practices the bulk of what we do is not ending up in the High Court, you know. There are - and Allens more than any firm is probably to be credited with the leadership it's shown in that, but the vast bulk of what we do are matters which perhaps ordinarily would look like they should be at Legal Aid. They're matters for low-income people who have got an employment problem, they're the victim of discrimination, they've got a dispute over, yes, their housing, those sorts of - they're everyday legal matters.

MS FRIEDMAN (A): Minor credit and debt matters, yes.

MR HILLARD (CU): Yes.

MS MacRAE: What sort of evaluations do you undertake of the pro bono work that you do?

MR HILLARD (CU): We probably measure what we do simply by way of volume and a sense of outcome, but we're not - it's an almost impossible task and we struggle with this all the time. A number of years ago we ran a High Court matter which saw a man released from prison after 12 years who had been wrongfully convicted of murder. That took up two and a half million dollars worth of our time. I don't know whether that is a better way of using our resources than acting for two and a half thousand people who have been unfairly dismissed and can't get access to a lawyer to pursue their employment rights, and it's very difficult to draw that sort of thing.

What we do, I guess, is each of our matters is opened under terms of engagement. All of our work is supervised by partners, clients are treated in precisely the same way that we would treat any of our other clients, and that I guess builds in some sense for us of integrity and proper service. It's certainly not a - I mean the fact that both of us are here as full-time people leading these practices and in reality our pro bono practices are probably our largest

commercial client at either firm, this work is done with integrity and it's done properly, but we're probably not sitting down with a sort of a systematised way of saying, "We need to do 27 of these type of cases and 106 of these," and that sort of thing. So we're probably guilty of not having a lot of internal - - -

MS FRIEDMAN (A): We don't survey past - we don't anyway. We don't survey past clients to ask how satisfied they were or otherwise. I mean we've had discussions. I don't have key performance indicators for example attached to my employment because every couple of years it comes up someone from HR wants to know what Nicky's KPIs are. We say, "Well, what would it be? More pro bono matters, or less pro bono matters, or bigger ones, or smaller ones, you know? How do you measure those things?"

MS MacRAE: Yes.

MS FRIEDMAN (A): So, yes, we just - I mean we get a sense of things, but it's (indistinct) enough for an economist.

DR MUNDY: No. Well, look, we don't - Angela and I don't have KPIs. The Governor-General doesn't expect them obviously. Is there anything else?

MS MacRAE: I don't think so.

DR MUNDY: Okay. Look, we might draw it to a close there. Thanks very much for the material you've put to us and the time.

MR HILLARD (CU): Thank you.

MS FRIEDMAN (A): Thanks very much.

MR HILLARD (CU): Very pleased to have been here. Thank you.

DR MUNDY: Could we have Mr Hannigan, please. When you're settled, could I ask you to state your name and the capacity in which you appear.

MR HANNIGAN: Just have to find my glasses.

DR MUNDY: I usually have to take mine off to read.

MR HANNIGAN: That's a good question. I come from Collingwood by the way at the moment.

DR MUNDY: As long as you don't barrack for them - - -

MR HANNIGAN: I don't.

DR MUNDY: - - - we'll listen to you with respect.

MR HANNIGAN (FLAC): Thank you. My name is Diarmuid Hannigan, and I'm on the executive committee of an organisation called For Legally Abused Citizens, so that's the capacity in which I appear.

DR MUNDY: Could we ask you to make a brief opening statement, Mr Hannigan, and then we'll ask you some questions?

MR HANNIGAN (FLAC): Right. I'll read this. Thank you for giving me the opportunity to address the Commission on behalf of the legally abused citizens of Australia. It is all too apparent that we have formed a legal culture that has excluded family and community as a participant. Lawyers make, administer and interpret out laws. During law reform process the committee members are nearly always drawn from members of the legal industry. Concerns raised by the community are often ignored or become so diluted by the lawyer-run reform committees in their recommendations that they become ineffective when they are shrouded in legal speak that is designed to create a series of indeterminate outcomes which will require engaging the services of the legal industry.

So sophisticated is this manipulation of our laws by the legal profession that when the Trade Practices Act of 1974 was introduced to Australia, the legal industry promptly decided that the learned profession was above reproach and maintained their own separate state-sanctioned Legal Professional Acts where consumers of legal services are clients. Clients do not have consumer rights. The Legal Professional Act was passed in Victoria in 1946.

The example of the Brookland Greens Estate fiasco, which has cost the Victorian taxpayer about \$150 million, is a case in point. The details are

outlined in the Victorian Ombudsman's report on this matter. The ombudsman discovered that Colin Taylor of Russell Kennedy failed to honour his duty to the court by not informing the hearing at VCAT that the expert witness had raised concerns regarding an explosion of gas. Considering the purpose of the forum and implications of the knowledge, having consideration for the fact that young families would start a community in this area, and there was even a possibility of there being an explosion in a house full of children, one has to ask the question why has the legal regulator in Victoria not prosecuted the lawyer?

Another example: example of lawyers who become executors. 175,000 people die each year in Victoria leaving an average estate worth half a million dollars, a total of \$80 billion per year. The legal industry manages the majority of this money, and many lawyers and law firms offer their services as executors. Since executors have access to the estate, it is essential that their behaviour is accountable to the beneficiaries. Currently these lawyers, executors, can engage in misleading and deceptive conduct in order to generate disputes which will permit them to pay themselves more fees from these estates, particularly if they have helped to draw the will and ensure the terms of the will have some ambiguities. These lawyers, as was the case of Russell Kennedy when managing my own mother's estate, can also hide documents they have in their possession from the deceased.

DR MUNDY: Mr Hannigan, can I just interrupt you there, please? I need to advise you that these proceedings provide you with no privilege and anything - - -

MR HANNIGAN (FLAC): Fine.

DR MUNDY: - - - anything - - -

MR HANNIGAN (FLAC): Fine, fine.

DR MUNDY: Can I just finish? I am obliged to warn you - - -

MR HANNIGAN (FLAC): Yes.

DR MUNDY: - - - of this. These are not parliamentary proceedings and anything you say is available for people to bring action against you.

MR HANNIGAN (FLAC): Fine.

DR MUNDY: I'm not going to stop you, but I want you to be aware.

MR HANNIGAN (FLAC): No. I'm speaking the truth from Collingwood.

DR MUNDY: Please continue.

MR HANNIGAN (FLAC): These lawyers, as was the case of Russell Kennedy when managing my own mother's estate, can also hide documents they have in their possession from the deceased, and even lie about the contents of those documents without fear of prosecution by the regulators. Lawyers who become executors of deceased estates are not deemed as lawyers and are not bound by the Legal Professional Act of 2004 in Victoria. But lawyers who are executors were appointed by people who are now dead who thought they were lawyers. Clearly a case of misleading and deceptive advertising.

Unfortunately the impacts of this culture when left unrestrained extend well beyond the dismemberment of a few grieving families, or even a community of 1000 people living on a methane mine, and into our aged care and retirement living community, the sick, the ageing, and one of our society's most vulnerable groups. One only has to follow the growth of the law firm Russell Kennedy who now advises the Victorian Government on five special legal panels and has now opened an office in Canberra so as to market its expertise in the aged care and retirement living industry to the Federal Government.

In conclusion our laws are not founded on the basis of family or community. Our laws are created, administered and interpreted by the legal industry for its own financial benefit. Despite the fact that Australia has embraced consumer rights since 1974 through the Trade Practices Act and now Australian consumer law, the legal industry has been able to subvert its responsibilities under that Act to Australian consumers of its services by maintaining Legal Professional Acts that regulate lawyer behaviour in each separate state.

These acts turn consumers of legal services into clients who do not have consumer rights. I suggest that the Commission address this anomaly within the law and ensure that Australian consumers of legal services are ensured of their consumer rights. I also suggest that during the law-making process members of our communities who represent Australian families play a dominant role and are well resourced and funded to ensure the best outcomes for our nation. Thank you very much. Hopefully it's waking up.

DR MUNDY: It's been a long - this is the seventh working - no, yes, because we had a day off on Monday. I'd make the observation about the Trade Practices Act 1974 that there were constitutional issues which were there around the regulation of partnerships which at the time were thought to be

beyond the scope of the Commonwealth, but that's just a point which has subsequently been clarified with the Australian consumer law, and in fact we are trying to advocate stronger application of the Australia consumer law. I think some of the issues with the executors probably go into the very murky area of the law of trusts and when people are trustees or they're something else, and that's not a matter which we're probably competent to resolve.

But one of the things we are interested in is consumer protection and fraud. You've raised a number of matters, and I get the sense that you're probably not particularly satisfied with the processes around the Victorian Legal Services Commissioner and legal services complaints more generally. We heard from someone earlier on and others who have made the observation of the legal system designed by lawyers for the benefit of lawyers and administered by lawyers. Do you think there would be any merit in us making recommendations as to the governance of these complaint bodies to require their membership to consists of at least a number of people who were not lawyers, much in the same way as some of the medical registration bodies require there be persons who are not medical practitioners to sit upon them?

MR HANNIGAN (FLAC): It would help a little bit, but I would suggest that they would automatically feel intimidated, not being a lawyer. That's my suggestion.

DR MUNDY: I'd be available, and I'm not a legal practitioner.

MR HANNIGAN (FLAC): No, no. A person of your calibre, or somebody who has got an education and is a tough nut, could well be very, very useful in those areas. I also feel though that it would be better if the consumer affairs bodies were well resourced and in many instances were capable of dealing with issues regarding the provision of legal services to consumers.

DR MUNDY: Well, given that the Australian consumer law does extend now to the provision of legal - - -

MR HANNIGAN (FLAC): You've worked that out.

DR MUNDY: - - - services, do you think there's a problem inasmuch as that because there are these legal services commissions there, and all agencies are scarcely resourced at some point, that there's a risk that the consumer law isn't vigorously brought to bear by the fair trading commissions or the ACCC or whoever because there is this other body there and they say, "Well, given there's someone over there to deal with those sorts of disputes, and given there's no-one over here to deal with these, we'll focus our resources on that"? It's not a criticism of the people involved. I think it's a logical bureaucratic

response. But I'm wondering whether that's part of the cause of the lack of an enforcement of the consumer law.

MR HANNIGAN (FLAC): No. I'm going to hand you over more information, but from my own experience they're loathe to tip their toe in the water. That's from my experience. I'm trying to get Consumer Affairs Victoria to organise a voluntary mediation between the firm I'm dealing with, and they write back to me and say, "We can't do that because we think that the voluntary mediation wouldn't resolve your issues." So they're loathe to even go to stage 1 and formalise it. My point is that if they arranged the voluntary mediation, then the law firm, if they decline to attend, will have to give reasons for why they don't want to attend. So I can't even get to that base, which is why I'm running down the consumer - - -

DR MUNDY: It's interesting that you've actually tried to go to Consumer Affairs - - -

MR HANNIGAN (FLAC): I've done all that, yes.

DR MUNDY: - - - and deal with the matter under the ACL rather than through the legal services option.

MR HANNIGAN (FLAC): Yes, I've been there, and the other point I'll make whilst we've got a bit of time, I've been trying to get the Victorian Ombudsman's report on the Legal Services Commission that was done in 2009 through FOI, and I would suggest to the Commission that you obtain that report, but it's a very, very difficult report to get. They're loathe to hand it out. That report contains 29 recommendations on how the Office of the Legal Services Commissioner could improve its performance, but we don't know what the recommendations are, so we don't know if the recommendations have been implemented or how it's progressing or - - -

DR MUNDY: Is the ombudsman in this jurisdiction required to table their reports in parliament, or not?

MR HANNIGAN (FLAC): The ombudsman mentioned the report in his 2009 annual report, and in that report he gave a copy to the Attorney-General for his information. The Attorney-General, I gather, has not tabled that in parliament, and therefore the report has not become public.

DR MUNDY: That's a few Attorneys-General ago I would suspect.

MR HANNIGAN (FLAC): Two: Hulls and then Robert Clarke.

DR MUNDY: So Hulls received it.

MR HANNIGAN (FLAC): Yes.

MS MacRAE: Are you aware of any jurisdiction where you think this works better? I guess because you've got issues with the complaints system, but you've got issues about how, if I read your - - -

MR HANNIGAN (FLAC): Well, from communicating with Peter Andrew - I've never met him actually. He's up in Sydney and he's helped me a lot over the years - they continue to talk about the European system and the inquisitorial system as a far more appropriate system, and Annette Marfording did a report on that through the University of New South Wales and they found that to be cheaper, quicker and more accurate, but it was also very, very difficult to get that report. Took two years to dig that one out. Was funded by a federal body, and then it went through - I can't remember the name of thing, some federal legal agency that funded the New South Wales people. She wrote the report, but the report then was stashed for a while, disappeared, and I've only come into this, as I said, as a result of a will.

DR MUNDY: Yes. No, and that's the issue I perhaps - - -

MR HANNIGAN (FLAC): I'm a businessman and an engineer by trade.

DR MUNDY: Yes. I'd like to bring you to that question of wills because we've had some quite moving evidence from a number of people around a whole pile of issues about the finalisation of estates and where people are to be buried, and a whole pile of issues which seem to us to be primarily disputes within families. They're - a case on the record we had in South Australia, a dispute within an indigenous family about where someone was to be buried, and ultimately a judge of the Supreme Court had to try and sort it out, and another dispute whereby a man was - a medical practitioner was highly traumatised by the conduct of his siblings and their legal counsel, and arguably on the basis of his evidence the conduct of the Supreme Court of New South Wales.

It seems to us that these are matters which are quite rife or the normal sort - you know, we have very well developed processes for resolving disputes within families when a marriage breaks down, and they seem on evidence to do a better job than trying them in front of a judge, at least in many cases, and you raise the issue of a small - a low-cost tribunal for dealing with these very much in the way that the Women's Legal Service earlier said, "Well, look, do we really need to resolve disputes over matrimonial property say up to the value of \$100,000 or whatever?"

How would you see such a tribunal working, because it seems to us that these are circumstances where quite often, not always, the parties are grieving for a lost one, there's the realisation of a lot of unspoken angst built up over times, and perhaps a mediated arrangement rather than probate which just as you - has a capacity to chew through the resources of the estate either because of the conduct of the executor or the conduct of any of the beneficiaries for that matter, might actually get better outcomes more quickly?

MR HANNIGAN (FLAC): If you have a trained commissioner and you paid him a grand a day, that's 5000 a week, he could sit there and sort out all the rubbish, and it's not rocket science.

DR MUNDY: It's about people, isn't it?

MR HANNIGAN (FLAC): It's just about people. It's not - we're not trying to reinvent the wheel or fly to the moon, we're just trying to sort out, "It's my Dinky toy, it's not yours."

DR MUNDY: "Auntie Molly was going to leave me that and - - -"

MR HANNIGAN (FLAC): That's it, yes. It's really simple stuff, and you don't need a guy in there on 10 grand a day sitting there with a wig and a - you know, and all that.

DR MUNDY: I guess if you would do it in a way which was successful, it would be a lot quicker and people would get in and out and get on with their lives.

MR HANNIGAN (FLAC): Lot less psychological angst. I mean it split my family. I don't talk to my sister - two sisters, and that's been 10 years.

DR MUNDY: Okay.

MR HANNIGAN (FLAC): So it creates - and then it creates a lot of rifts with the children too, and the whole - it's very bad stuff.

DR MUNDY: Yes. So it's a bit - and it's funny, it's a family breaking up in a different way.

MR HANNIGAN (FLAC): Yes. It's really bad stuff and it's not good for Australia. All right.

DR MUNDY: All right. Well, look, thank you very much for your

submission.

MR HANNIGAN (FLAC): Thanks for listening to me, and it was good to meet you and thank you for doing your work too.

DR MUNDY: They pay us reasonably. Unless there are any observations or comments that anyone else wishes to make, these proceedings are adjourned until 8.45 on Friday morning in Hobart.

AT 5.04 PM THE INQUIRY WAS ADJOURNED UNTIL
FRIDAY, 13 JUNE 2014



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 HOBART ON FRIDAY, 13 JUNE 2014, AT 8.45 AM

Continued from 11/6/14 in Melbourne

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DR MUNDY: Good morning, ladies and gentlemen, and welcome to these Hobart hearings for the commission's access to justice inquiry. My name is Dr Warren Mundy, and I'm the presiding commissioner on this study which is being conducted along with me by Commissioner Angela MacRae. Before we go any further, I'd like to pay my respects to traditional aboriginal owners of the land, the Muwinina people, and their elders past and present. I'd also like to pay my respects to the elders past and present of all indigenous nations who have continuously occupied Australia for over 40,000 years.

As you know, the commission released its draft report in April, and the purpose of these hearings is to facilitate public scrutiny of that report to gain feedback and information which we may subsequently draw upon for the final report. Following these hearings today there will be hearings in Darwin and Brisbane. Hearings have already been completed in every other capital city in Australia. I'm not going to list them. The list is getting too long. Once we finish - conclude those hearings next week, we'll proceed to finalise the reports which will be provided to the Commonwealth government in September, and that report will be published within 25 sitting days by tabling in both houses of the federal parliament.

Whilst we like to conduct these hearings in a reasonably informal manner, we would like to note that under Part 7 of the Productivity Commission Act, the commission has certain powers to act in the case of false information or refusal to provide information. As far as we're aware, the commission has not had occasion to use these powers as yet. We do keep a transcript of these proceedings to facilitate our work, transparency of our processes, and as such it's not possible for us to take comments from the floor, but we will allow a brief period at the end of today's formal hearings for any person to make any further comments they wish to make. That said, whilst participants aren't required to take an oath, they must be truthful in their remarks, and we do welcome people commenting on the views that have been expressed to us by others.

Under Commonwealth health and safety legislation, I must inform you that in the unlikely event of an emergency requiring evacuation of this building, please listen to the instructions given over the PA regarding the safest exit to use, which will either be at the city end of the building, left upon the corridor and exit through the rear of the building - it's actually just out there - or the lift at the end - the lift end of the building, which is down there. I'll be going that way. We're then to assemble in the assembly area, which is in the diagram below, just out the back in Terminus Row. That concludes the formal opening.

Could we please have the Women's Legal Service of Tasmania? All three of you can come up if you want to huddle around the table. It's up to you. You're okay? Cool.

MS FAHEY (WLST): I'll drag them up if there's something.

DR MUNDY: Great. Could you please, for the benefit of the transcript and those poor souls who have to transcribe it state your name and the capacity in which you appear today.

MS FAHEY (WLST): My name is Susan Fahey, and I'm the CEO and Principal Solicitor of the Women's Legal Service.

DR MUNDY: Susan, would you like to make a brief opening statement? By that we mean not more than five minutes or thereabouts, and then we can ask you some questions.

MS FAHEY (WLST): Yes. Look, actually what I thought I'd do is just give you a really quick "this is what we do and this is why we're here," and then thought that given how many hearings you've already had and how many people you've already talked to, you might just want to ask me some questions.

So on a personal basis I've actually been with the Women's Legal Service since 2002, so I've actually been in and around and active within the sector for quite a period of time now. The Women's Legal Service is a statewide service which caters, obviously, to the women of Tasmania, more specifically those in low socioeconomic or disadvantaged situation.

We deal with several thousand women every year in our capacity in delivering information, advice, referral, community, legal education. We also have a support worker. So our interest in making a submission to the Productivity Commission both through input to the national association submission as well as the Women's Legal Services Australia submission for which Pauline, who is sitting here, is the convenor of that network at the moment is actually because we feel that women - women's legal services were ultimately all funded where there weren't any women's legal services in any state or territories in around 1996, 1995 through the access to justice statement which found that women were finding it much harder to access legal services and faced significant barriers to accessing justice.

We still find that today despite having all these services and things improving within the community. Particularly in Tasmania women are within the more disadvantaged part of the community, and they have a high representation. So our interest obviously is in any study into how services can be delivered or funded is obviously of great interest to us. So we're a service that likes to work with the Legal Aid Commission. We see ourselves as complementary to, not in competition with that service. We do work with the other community legal services. We work well with private practice and we have some very good networks and other partnerships going.

We don't look to replicate what someone else is doing, and if there's funding or assistance available somewhere else, we'll direct people to that and assist them to obtain it, as do, I think, pretty much all the Women's Legal Services. So if you've got any questions, I'm quite happy to talk on pretty much anything because obviously there's a lot of issues that are touched on in there, and anything from the - you know, obviously I think you've heard a bit about people's views on things like competitive tendering, [indistinct] unbundling of services. Anything like that.

DR MUNDY: I think our views on competitive tendering were slightly misunderstood. But anyway.

MS FAHEY (WLST): It's the kind of thing that scares this sort of sector.

DR MUNDY: It's the sort of thing people expect us to ask, and we know that it scares people. But we have to ask the question. Look, one question that we've asked a lot of - well, in fact I think we've managed to ask all CLCs that have appeared before us is that we understand that the Commonwealth is seeking to reprioritise its funding for CLCs to frontline services. We understand that there have been funding reductions to some CLCs.

MS FAHEY (WLST): Ours would be one of those.

DR MUNDY: So we understand. Could you outline to us what the nature and extent of your funding reduction is, what will be the impact of that funding reduction, and would you identify those impacts as being to frontline services or to what I think is referred to as advocacy in law reform?

MS FAHEY (WLST): Sure. Well, the funding reduction that we face is \$100,000 a year, and that's as at the end of June 2015. So our core funding from the Commonwealth is only \$210,000, which if you compare us to, say, Women's Legal Service in ACT, they receive about \$180,000 more. They've got a smaller population and our female population is far more disadvantaged than theirs.

DR MUNDY: Yours is not located in one city.

MS FAHEY (WLST): No. We have to travel all around the state, and technically too we cater to King and Flinders Island, Furneaux Group and all of that as well. So basically I would view us, as anyone in an NGO does, we're already disadvantaged when it comes to funding. We don't receive any state funding. So last year as what I think everyone is calling the Dreyfus money, we did receive for a four-year period an extra \$100,000 a year. That funding was provided to deliver an online app that we developed called Girls Gotta Know. That provided very comprehensive legal information, referrals, links and all sorts of things for - aimed at women, young

women, 14 to 24.

We rolled that out in Tasmania for about \$30,000 on a grant, and the Commonwealth gave us the extra \$100,000 a year to roll that out nationally, which it is actually in the process of just going live. So it's been made larger and has the same information of every state and territory in Australia. So we are half-way - by the end of June 2015, we'd be halfway through that additional one-off funding, and that's been cut. So fortunately we've already got most of the app done and paid for, but again the funding came into us in \$25,000 quarterly increments, so we had to take other money to pay for it. Fortunately we won't come out behind on that, but that money was also to provide services for family violence which effectively was for one - within our budget, one solicitor. So if we don't find that funding, it's effectively a solicitor's position or a couple of - we only have one admin person. It could be that. It could be - whatever it is, it translates to jobs. If we can't find - - -

DR MUNDY: How many staff do you have in total?

MS FAHEY (WLST): We have seven staff. So we have four solicitors including myself, we have one full-time admin person, and we've only had an admin person for about four years now. We have a part-time office manager who does all of the financial stuff and he's there to take some of the work off my desk, and we also have a three-day a week - actually, she works four days, but it's equivalent to three days a week position which is a community and support liaison person who basically she helps people out. So she takes work off the solicitors' desks to do sort of not quite paralegal work, but if we have someone who has literacy and numeracy issues she can help them change phone bills or go to appointments with someone if they need - - -

DR MUNDY: So to help people out who have an issue, but don't necessarily require a solicitor.

MS FAHEY (WLST): Yes.

DR MUNDY: But it's rather than send them down the street and round the corner.

MS FAHEY (WLST): And sometimes it is someone that - it will be one of our clients that we're working with, but it might be that we need them to fill out forms. My time is better spent seeing a client than sitting there filling out a form, so we'll kick it off and we'll introduce her into the process right from the beginning so they feel comfortable going back and forth. So I think all up, the full-time equivalent is around about six people, five and a half, six people. So the immediate impact of that loss of \$100,000 is actually front-line services. It is advice, it is all of that.

The law reform work that we do, we've done some fairly significant law reform

work down here in the past couple of years because we're involved in the reproductive health Bill, but realistically the law reform work that we do is usually through somewhere like Women's Legal Services Australia networks and things like that, making submissions to things like this. We have initiated some stuff in the past where we've talked to the Attorney-General, for example, in Tasmania.

It used to be, you know - still is, illegal for two women to be in a relationship together, two women to access IVF, only one could be on the birth certificate, and we were actually getting a lot of people coming in going, "I've been denied access to my child in the ER because I'm not on her birth certificate. I don't have the Family Court order." So we spent time doing things through the Family Court and working with them to make that process faster, but as we got more and more people coming to us because there were more and more people having children, we ended up talking to the state's attorney-general and said can we just not change the Status of Children Act and alleviate my work, - I actually said, "Alleviate my workload, please."

Apparently that wasn't the reason to do it, but Parliament changed the Status of Children Act and both parents can now be on the birth certificate. It wasn't a lot of work but it's taken a lot of time away from people going to the Family Court, it's alleviated stuff - - -

DR MUNDY: So that - I mean, obviously plus what you're saying, that piece of law reform has probably saved the Family Court time - - -

MS FAHEY (WLST): A lot.

DR MUNDY: - - - and money.

MS FAHEY (WLST): Yes.

DR MUNDY: It's probably made the people involved less aggrieved at a time when they don't really want to be hassled, and it's probably made life better for the staff in the maternity wards because they're not having to say, "Actually I do know who you are, but you're not allowed."

MS FAHEY (WLST): Yes, absolutely, and it basically made life a lot easier for children because they have two legally recognised parents. So it was something that really didn't take a lot of work. Fortunately, actually parliament made it retrospective back to when the Relationships Act commenced, so they backdated it for six years and a whole heap of people could have new birth certificates reissued and it made a lot of things a lot easier for people. So it was something that didn't take a lot of work. At one point there were a lot of sort of meetings and briefings and helping politicians understand how the law worked and what happened, but that's something that I think community legal services have a unique ability to do.

Private practice, I mean, you're sitting there - you're there to make money for your partners. You don't necessarily deal with that side of things and so you're not going to have the time to actually appear at a lot of briefings - I mean, certainly when I was in private practice I didn't have people emailing me questions from parliament. I do now, I have politicians who email me questions all the time because our service has got a reputation for being able to explain complicated law in a really easy to understand way. So I think removing the ability for community legal centres to do that is - I think that's fairly misinformed.

I understand that in the past there have been centres who might have done something that can be embarrassing or upsetting to a government or somebody because it's not going the way they want it to go, but really the only reason to stop that is if you don't like where things are going. I would look at any of the law reform work that we've done has only ever benefited the women of Tasmania.

DR MUNDY: Before we move on, do you assist women with issues other than around family law, violence, so you would help them with a full range of civil law matters?

MS FAHEY (WLST): Yes. Because we're a women's legal service, we get branded as being a specialist centre because we only deal with, you know, just over half of Tasmania's population, but I would actually really regard us as a specialist general centre because we answer questions on everything. So we have a 1800 line which was put in place - when Women's Legal first started they had basically a full-time coordinator and a couple of part-time solicitors. So even when I started - when I first started managing Women's we had three solicitors and that was it, no admin, nothing. So we've kind of built up from there.

We've always operated a 1800 line because that makes us accessible all across the state and we use other technologies to get face to face with people but Tasmania is a big country area, sometimes you really do need to go and see people and have a presence but basically, yes, for us we can answer questions on everything. We don't have access to say like the Legal Aid Commission has a really big database and they have someone part-time that keeps it up for their phone advice people. We don't cap how long someone can talk to us on that and we don't put any limitations on what law they can ask about.

DR MUNDY: So it seems a bit like some other women's legal centres round the country who really do - and I think they articulate their role to be family violence and family law matters.

MS FAHEY (WLST): Yes.

DR MUNDY: You see your role as much wider than that.

MS FAHEY (WLST): Ours is much wider because it's needed. If you look at say Victoria, Women's Legal in Victoria have a very specific defined role and I think that was a strategic move quite a long time ago because - their ex CEO is a good friend of mine actually and I was talking to her about that. Because one of the things you have to do in any NGO I think, but particularly in our sector, is you need to look at it and have that question, if you get defunded tomorrow, who is going to miss you. So you need to evolve and go, "What do we do?" That was one of the questions they asked themselves and they said, "Well, we need to be specific. What can we specialise in that at this point no-one else is specialising in? What's our niche market?"

That works in somewhere like Victoria because you have a lot of other community legal centres. Legal Aid does a slightly broader amount of stuff. In Tasmania, Legal Aid is funded to provide - they have got the criminal law band, and even that can be quite tight. Sometimes they can only fund stuff where you are actually really specifically facing a gaol sentence, depending on what funding is available, and in their family law part it's down to pretty much children's matters. So you can go in for the 15-minute advice thing during the day in their clinic and you can call their advice line and I think they have about a 10-minute sort of conversation with you.

If you want anything more specific and you're in that disadvantaged scenario, what's left for you is a community legal centre or private practice. So if you have some fairly general questions, and some of the questions we get is, "This has kind of happened. Do I even have a legal problem?" So we might get questions say - occasionally get women with say that have got mental health issues and they have had a problem with the council and their dog and it will take a letter or two to fix it. It doesn't take any time for us to basically - we know how to communicate with people so we effectively have a lot of early intervention and a lot of triage kind of sorting legal problems out that are small that could become really big.

That applies to the family law stuff that we deal with and the family violence that we deal with, but we've always resisted honing down to only doing family violence and only doing family law because in Tasmania there is nowhere else to go for a lot of those other questions that people have, whether it be having been fired at work for, you know, being pregnant, or if someone has - we get the odd wills and estates questions. We don't do wills, but we get questions about, you know, "Someone has died and this has happened. What do I do?" So we do direct a little bit of traffic but we do have a lot of people who can ring us, we can answer it and we can move it along and I would resist just going purely to family law and family violence because with that come a lot of other issues anyway.

DR MUNDY: Seeing you have raised wills and estates, and it's particularly the

resolution of people's estates, we've heard some pretty terrible stories about the winding up of people's affairs once they're deceased ranging from indigenous families fighting over burial sites and all sorts of other things, and it seems to us that Supreme Courts are a pretty big sledgehammer to resolve these issues. I guess our observation will be is that when families are in dispute and it's about the breakdown of the primary relationship or marriage within the family, our first course of action is to bundle people off to mediation and try and get them to resolve it that way.

We don't seem to do that when families are equally traumatised at the passing of someone who is significant within the family and the resolution of their estates. Given you deal with these issues, would you see that a more mediated approach like we see for matrimonial family disputes might be worth exploring in what you might call intestate family disputes?

MS FAHEY (WLST): Yes. Look, it's not my area of speciality, but I don't think that a mediated approach hurts anywhere to be honest. Thinking about those kind of disputes where as you said a lot of the time it's actually about hurt because someone has been in the will more or someone has been, you know - - -

DR MUNDY: Auntie Agnes didn't give me my favourite teapot or something.

MS FAHEY (WLST): Yes. And some of the things that I would have seen both in private practice and at Women's where there have been disputes, it is sometimes about the hurt or about a misunderstanding or a miscommunication, and so sometimes, yes - and there's all the grief and people just go completely crazy. So I don't think it ever hurts to try and sit people down in a situation like that. The Supreme Court here generally in a lot of matters does have a fairly good emphasis on trying to conciliate early on and they have some very good staff members that do that.

So I think - I mean, it's always good if you can do that without having to initiate proceedings and, you know, certainly although we wouldn't generally take on a matter like that, if we were handling something like that under our sort of philosophies and things we'd certainly try and mediate that anyway and try and have a far less aggressive approach in the litigation thing. Sometimes I think the outcomes can be a product of the system, ie people see Supreme Court jurisdictions as an adversarial system and sometimes, you know, it's that whole thing, if your only tool is a hammer, you'll treat everything like a nail, and that can be the attitude occasionally, whereas certainly in the community legal sectors there's a very wide variety of tools and you're encouraged to use all of them.

DR MUNDY: So that behavioural issue about the hammer and the nail, if the place for resolving intestate family disputes might be some sort of tribunal, you might actually see a bit of a change in conduct.

MS FAHEY (WLST): Could be, yes, I think so. I don't think it hurts to ever - I mean, whenever you have something that specialises in a specific area of law, then if you have a tribunal that matches that, it's a little bit like drug diversion programs or specialist family law lists, if you have someone in there who knows what the issues are, what the emotions are behind it, because a lot of law is about emotion and actually getting people to either curb that or take a bit of a check on that, if you can actually have someone who is handling it that has a really clear understanding of what the beast is before them, then they probably know how to navigate through that.

DR MUNDY: Okay.

MS MacRAE: Just in relation to the issue of mediation, we've heard that some concerns - well, generally I think people are very supportive of the family dispute resolution process, but there have been concerns raised about whether there's adequate acknowledgment where there's violence or other problems involved and the power imbalance that might be in those situations, whether that's adequately sort of streamed and catered for. Would you have views about that?

MS FAHEY (WLST): Fairly strong ones. Look, I think in principle family dispute resolution is really good and we were actually involved in the coordinated family dispute resolution pilot down here that was something that the Attorney-General's Office funded Women's Legal Service in Queensland to devise, and they rolled out a few pilots cross the country and I think AIFS did an evaluation of it, and that pilot put a mediator - sorry, had the dispute resolution practitioners along with a lawyer and a counsellor for each party and there had been violence and it was actually getting the parties in a room together sort of thing.

So we're always open to trialing things like that. The issue that you do get is when you get a family dispute resolution practitioner who doesn't properly acknowledge the family violence that's there and doesn't actually listen to what they're being told - because people won't necessarily come in and say, "There's violence. This is what happened." A lot of the issues what we're seeing now, I had a conversation with a really senior family law practitioner down here recently and I actually said to him, "Question for you. The family violence that you're seeing these days, how is it manifesting," and he said, "Fair less actual violence. It's controlled pattern behaviour. It's financial abuse. People are getting much more clever about how they abuse their partner."

I said, "Yes, that's kind of been my experience." I said, "Obviously I've only been dealing with women for a really long time." So you can have a really good dispute resolution practitioner who knows how to broker a negotiation and do all that sort of stuff but if they don't get - for example, in a session that I had, the guy that was twiddling with the glasses on his head, was twiddling a set of sunglasses that he

had actually taken off her when he had flattened her and kicked her and beaten her up, and then he was just reminding her what would happen if she didn't agree in that mediation.

If the people in the room don't know what those glasses are or they're not tuned into that, then a whole lot of stuff can happen right in front of you that you don't even know what's going on. I didn't know what those sunglasses were until I could see my client was starting to show a [indistinct] distress response that shouldn't be happening and said, "I just need a minute," and said to her, "What's the go?" and she just said, "This is what happened," and I was, like, "Yes, okay, we're done. We can't do this in the same room if this stuff is going to happen. So if you have someone who can't pick that up, and sometimes the lawyers don't pick that up because people don't necessarily tell you, but if you're not tuned into that stuff then some really bad things can happen right in front of a bunch of otherwise intelligent people who know their jobs.

The other issue that we find down here with the family dispute resolution, some of the practices, is that there is definitely a lawyer aversion. We recently had one FDR practitioner give contrary legal advice and they're not a legal practitioner and they shouldn't have been giving legal advice anyway to our client, that basically undermined our client's faith momentarily in their lawyer because we had said, "No, this is the violence. This is what's happened. This is how the Family Court or the Federal Circuit Court would treat this matter," it was very clear cut how they would handle it, and the FDRP basically told them something completely different and said, "No, no, you need to do this."

You could see what they're doing, which is they were trying to get people to manage expectations and get people to move off certain marks and do things like that, but they then told her ex this, so he was feeling really bullied and rang her and gloated and said, "Well, they told me this is what would happen and this is what I could expect," and then she was like, "Well, why am I doing this and what's going to happen, and I don't want that," and we had said, "That's not what the court would order and you don't have to accept that. This is what they will probably try and do."

So when you have an FDRP that really oversteps and tries to push people into an outcome, because for them outcomes are important, whereas I guess with a lot of lawyers, even if they don't get an outcome, for me, if you can get two people in a room and actually start to talk and have a civil, or at least semi-civil conversation, and if nothing else, narrow down the actual issues - I mean, that's probably an overly lawyerly way of looking at it, but it's the same thing the registrar does down here in the Federal Circuit Court and Family Court, even if he can't get an agreement in his conferences, if he can narrow down the issues and there's less to argue about before the court or at a later date, then that's a good thing.

So I think sometimes the FDRPs can be very, "Well, you know, we need to come out of this with an agreement," and it's human nature to go, "Well, if we're in here, we need to come out with an agreement," and people don't understand sometimes, including FDRPs, it's okay not to have a full agreement but if you can actually find some points of agreement or you can narrow it down at least.

MS MacRAE: Would you say that that's a systemic problem, or is it an occasional one-off - - -

MS FAHEY (WLST): Down here it's systemic, but that example is something we run into a lot. There's definitely a lot of them and us, lawyer and FDRP stuff, and it's just something that I don't even know how people - how we overcome that sometimes. I think sometimes, to be honest, sometimes government policy sort of says, "Well, we'll fund FRCs really heavily," and, you know, at one point I think it was something like your average FRC a few years back was getting one point something million dollars and your average community legal centre was getting like 250, 300 hundred thousand dollars - it was 330 actually.

It was like there's a heavy emphasis that you must go to the mediators and this is the way to go, stay away from the lawyers, whereas you should be having the two kind of working together, you don't have to put them in the same building, but they should be complementary and I think while ever your funding policy says, "Lawyers bad, or less preferable," then I think if you can have a situation where they're each, you know, referring - like, we will refer to them and we always have but, you know, I know, for example, down here it's a lot of the time you send people to the FRC because you know you have to do that, but you have to give them fairly careful sort of - you know, set where you're going to go, put in a time to go away and think about it. Don't just agree to something on the day, otherwise people get bulldozed into a parenting plan that they really don't want. If that happens and then they were to back out of it then you have even more ill feeling, so sometimes I think in that part of the system the drive to get an agreement can actually cause more problems than actually just getting in and seeing if you can get people to start talking in the first instance and see if we can get them to agree at least one or two things.

DR MUNDY: I guess telling from all that, particularly in the family law space, you'd see that lawyer assisted mediation is preferable to non-lawyer assisted mediation?

MS FAHEY (WLST): Some people can go off and, like, I can talk to them and say, "These are the sort of things that will come out," and I will say to someone, "Look, this is probably what he is going to want. How are you going to respond to that?" I will help them prepare for that. They'll go along and they'll be fine.

DR MUNDY: Yes.

MS FAHEY (WLST): If you have someone who has been through family violence then, yes, lawyer assisted mediation is a lot better because they've got someone they can talk to. You always get practitioners who don't necessarily practice in the way you would like them to, which is in their client's best interests and getting things resolved. Some people will just sort of coast along a little bit. For me personally, if I'm sitting in a session like that with someone, I always keep giving them reality checks and try and be that voice of reason to say, "What he is raising isn't actually unfair. How could you make that work?" or something like that, or I might say, "No, that's absolute rubbish and that's not workable for you because of this, this and this reason and just effectively doing what I'm meant to do which is give them advice and help them come to an outcome there and some people need that. There are some people.

That's when the CFDR Pilot was really good, horribly expensive framework to run but it also meant that you had people who had absolutely really no other option but to go to court and have that decision made for them because they can't communicate; they can't agree and they are just so opposed to even talking to each other for various reasons that, yes, having a couple of lawyers in the room with them is a really good way to go and to a certain extent having a lawyer in a room with someone, it provides a buffer zone.

To be honest, in Hobart any of the really good family law practitioners having them in a room is actually only going to help the situation. It's not actually going to make it worse. They're not there to make the situation worse. You do get the odd bad one that does prolong it but that's a rarity down here,

MS MacRAE: Those pilots had a counsellor in the room as well, did you say?

MS FAHEY (WLST): Yes.

MS MacRAE: Yes, okay.

MS FAHEY (WLST): So basically how that worked was initially it was paired with us and an organisation called SHE which was Support Help and Empowerment who've been counselling women in family violence for 25 years and the guys had someone at Hobart Community Legal Service and they had someone from TassieMale which was a program from Relationships Australia. If nothing else, that program was really good because it was guys who really needed counselling and assistance being asked to access at least in the first instance counsellors who knew their stuff and who could actually open a communication and knew how to do that without making them feel judged or without putting the guys on trial, because usually they were the perpetrator, so the good thing about that was that they at least had access to something they might not have otherwise had the thought to go and see

or in some cases might not have been able to just take that deep breath and go, "Actually I need to see someone." You could see with some of them they're actually relieved that they were starting to talk to someone. So in that respect it was good.

DR MUNDY: I'm just mindful of the time. On page 8 of your most recent submission to us, in the third complete paragraph you say, "As funding from the LACT became - - -"

MS FAHEY (WLST): Legal Aid Commission, yes.

DR MUNDY: Yes - "more restricted, there were significant numbers of women seeking assistance from our service whilst eligible for aid, were unable to obtain it due to lack of funds." What were the consequences for those women? Were you able to - we've heard stories, because of Legal Aid policy, in Victoria where women have had to appear in court unrepresented and be cross-examined by those who have brought violence against them.

MS FAHEY (WLST): Yes. That can happen here too.

DR MUNDY: Is that what's happening here?

MS FAHEY (WLST): Yes.

DR MUNDY: How often does it happen?

MS FAHEY (WLST): We see it happen fairly often. The thing with the Commission is that they do make a small amount of money go a long way and they've modified things so that they can do that which is really good but, yes, basically for us what happened was we were getting calls from lawyers, both private practice and Commission lawyers, going, "Our client has been defunded." We actually had one private practitioner, from memory, who rang in. His client had been defunded two days before a full trial which obviously we couldn't do but what we were doing with any of those women was we would try and do something for them but our fairly strong policy is that, particularly with family law stuff, we try and make sure (a) people get off the referral roundabout, so once they get to us, if they've been to 10 other places then we don't try and just flip them on to someone else and we'll follow up and make sure that wherever we've got them going, they get help.

So for women described in that paragraph, basically it might mean that we were drafting affidavits for them. In one case Pauline drafted a number of affidavits and a number of court documents and then actually assisted a woman prepare to conduct a trial herself. That was actually a relocation matter. Part of the reason she lost her funding was because she had had to change - because of the family violence and everything, she did end up changing the orders sought to be able to relocate, so

that was why she couldn't then continue with aid. So we actually then assisted her with that and Pauline didn't appear at the trial but basically prepared her and helped her with the questions and ultimately she was actually successful in her application.

DR MUNDY: So in that, effectively, what we call in the report unbundling, did you appear as the solicitors on the court documents?

MS FAHEY (WLST): No. We prepared all the documents for her. We do that for a lot of people. We'll actually prepare the documents for them. Because of resourcing effectively we can't appear for everybody that we act for, so sometimes if we have a client that we go "Yes, you're actually quite capable of doing this or having a" - you don't want to see anyone doing a relocation application on their own. Even lawyers don't like doing those because they can go any way. They're complicated but basically we talked about the unbundling and some of the issues that had arisen from people in other states and frankly CLC is unbundled stuff all the time. I don't think much is bundled. We prepare documents for people. We'll do affidavits for someone if they're coming in really all they need is - it might be that they seem like they've got it nailed but they need a trial affidavit or they need the case summary or something like that and we'll help them with that or we might write a few letters for them.

Sometimes we will actually write letters for clients who are trying to negotiate something themselves. The introduction of a lawyer or legal letterhead is actually - for example, I was helping someone with a property division the other day. On merits I could have sent a letter to the other party but they were really feisty, quite unstable and in a not good place at the moment, and the introduction of the piece of legal letterhead would have been a really big red rag to that bull, so I wrote the letter from my client to them and I wrote it in language that wouldn't look like a lawyer had written it for her, so that they could keep negotiating and actually have a bit of control over it without actually escalating it.

DR MUNDY: It does appear that the legal assistance sector broadly defined quite happily unbundles [indistinct] every day of the week. It's put to us that the contrary argument is, and you still have to have legal indemnity insurance and you're still liable to being hauled up before a judge and then asked - - -

MS FAHEY (WLST): Absolutely.

DR MUNDY: Is it your experience (a) that you suffered from insurance problems or (b) that you get hauled in by judges saying, "What's all this about?"

MS FAHEY (WLST): No. Look, the thing for us is that in the community legal centre sector we have a pooled scheme. I'm not sure if anyone has told you about that but basically we would pay less for our four solicitors than we would for one

person.

DR MUNDY: Yes.

MS FAHEY (WLST): And because of that, we have to go through constant cross-checking and audits and do training and all sorts of things that private practice just doesn't have to go - - -

DR MUNDY: Yes, and the insurers when pulling all the risk of a community legal centre knows they do this and, "This is the risk I'm pulling on, so - - -"

MS FAHEY (WLST): Yes. Probably realistically, with the rigorous stuff that we have to go through, including all the accreditation that we are now having to jump through, we constantly have people checking what we are doing which you just don't even have in private practice. Basically we are actually a much lower risk, even though we probably at times do higher risk work. We are a much lower risk on an insurance basis. Basically we are because of our scheme.

The other thing that I think is important to look at though with unbundling is that it is not a matter of someone just coming in to me saying, "I need an affidavit for this. Can you fill it out?" I will talk to them about their whole matter and then I will identify what other issues might arise from that because most lawyers get into trouble for the advice they don't give, rather than the advice they do give.

DR MUNDY: I suspect most people don't know what an affidavit is when they walk in the door.

MS FAHEY (WLST): Exactly, yes. Basically I won't just sit down. You know, if someone comes in and says, "I need this", I won't just do that. I have to look at the matter, what is going on, where does that sit, is that the most appropriate course of action? While you're unbundling it because you might just do one part of their action for them, you still have to give full legal advice. You still have to be apprised of everything that is going on in there and you have to be confident that what you are doing is the appropriate course of action. We are not just scribes or someone there - you know, we are not overly qualified secretaries basically.

Provided people adhere to what they are ethically required to do and they follow their legal professional responsibilities, doing bits and pieces for people is okay and certainly in our service we have a requirement that we run obviously not only to the requirements of a lower insurance scheme but we run like a law firm in how we do that. Part of that is because a lot of the practitioners who start with us, it might be their first job so they have to get that grounding from the very beginning. "This is what you must do. This is what you must not do. There are lines that you don't cross." That comes with the unbundling stuff as well.

We hold everyone in our service to an exceeding high standard because (a) just because a client can't afford a lawyer doesn't mean that they should have a substandard experience with a lawyer and (b) frankly the community legal sector pay is awful so there comes a time when people want to move on. I don't want our service to have a reputation of turning out dud lawyers, not that I want people poaching our lawyers but we want lawyers who people would quite willingly say, "Actually, we have got a spot. Let's pick her." Unbundling is fine and doing bits and pieces for people is fun but you still have to give them the absolute full amount of advice and you have to be sure that it is the right thing. I don't have time to be someone's secretary quite frankly.

DR MUNDY: I am afraid we have run out of time.

MS FAHEY (WLST): That is all right. No worries.

DR MUNDY: Thank you very much for your submissions and taking the time to come and speak to us.

MS FAHEY (WLST): Thank you for hearing me.

MS MacRAE: Thank you.

DR MUNDY: Could we please have the Legal Aid Commission of Tasmania? For the record, could you state your name and the capacity in which you appear please?

DR HILL (LACT): My name is Graham Hill and I am the Director of the Legal Aid Commission of Tasmania.

DR MUNDY: Thank you, Dr Hill. Could you perhaps make a brief - and by that we mean no more than five minutes - opening statement? Then we will take you through some questions.

DR HILL (LACT): Certainly. Thank you for the invitation to come today and speak to you. First of all, I would like to congratulate you on the draft report that you have produced. As far as legal aid commissions go, which is the only thing I would comment on, I thought it was very fair, accurate and thorough and I wouldn't seek to change a word of it in respect to legal aid commissions.

I have been in this role since 28 January this year so I am relatively new and don't bring a huge corporate memory to the hearing today, although being new has its advantages because I have obviously done an audit of the place and had a look around it.

The hearings being in Hobart today, I did want to make the point to you when talking about the legal assistance sector in Tasmania that Tasmania, as it is often said, has lower than average socioeconomic status. That is I think a profoundly important point - that Tasmania has the lowest income, the highest unemployment, the lowest literacy and the least education. I am told that the mean household income in Tasmania is 26 per cent below the national average; that 31 per cent of people in Tasmania are [indistinct] living on government pensions and allowances; that unemployment is frequently around 8.4 per cent which is one-third higher than on the mainland. That has a flow-on effect in terms of the need for the legal assistance services in this state and it has an effect on some other issues too, so juniorisation of the profession which has been raised in other states is not a problem down here. Getting private lawyers to act is not a problem down here.

The Legal Aid Commission of Tasmania has six staff spread over four offices: Hobart, Launceston, Burnie and Devonport. Like all legal aid commissions, we give advice and information, and we do representation. On information - - -

DR MUNDY: Did you say six staff?

DR HILL (LACT): No - 65 staff.

DR MUNDY: Sorry. I thought you said six. I thought: you need to talk to the CLC.

MS MacRAE: It did sound like six.

DR MUNDY: I have a bit of a hearing impairment, so forgive me, but I just wanted to make sure.

DR HILL (LACT): It was probably my desire to squeeze into the five minutes. We give information, advice and representation, like all legal aid commissions. In terms of information, 340,000 people look at our web site and get a push in the right direction. We do about 150 community legal education events a year that reach 3000 people. In terms of advice, we take 22,000 calls or our lawyers take 22,000 calls for advice. They see 4600 people a year face to face. We do 2400 duty lawyer services at the courts and in terms of representation, somewhere between 6000 and 7000 grants to new clients each year.

The Legal Aid Commission of Tasmania has some islands of absolute excellence and I can't take the credit for them because I am too new but in terms of grants, National Legal Aid says that where somebody applies for legal aid, the application should be determined by the commission within five days. No state in Australia meets that five-day benchmark. Tasmania does it in about two hours.

National Legal Aid says where private lawyers render a bill, it should be paid within 14 days. Again no state meets that benchmark. Tasmania does it the next working day. The National Legal Aid benchmark is that the administrative of grants shouldn't absorb more than 5 per cent of the total value of grants. Again no state meets that benchmark. I think the best state is at 9 per cent and the others are in double digits. Tasmania is under 4 per cent. That is done because of fantastic IT that the Legal Aid Commission has.

Our family dispute resolution is also another island of excellence. We do about 500 cases a year. These are high conflict disputes over children's issues in family law. We do about 500 a year with a 93 per cent settlement rate which is very, very high by National Legal Aid standards. Family Court judges in Hobart have told me that their court would fall over without all of those cases being settled.

In terms of civil matters, our lawyers will give telephone or face-to-face advice to people on any civil matter. We have a minor civil assistance scheme where we will act for people, do an occasional appearance, write letters - all of those sorts of things for contractual disputes or motor vehicle property damage, those kinds of things. We have a small consumer credit service that helps people who have difficulties with loans and mortgages and of course we have a civil disbursement fund. Where private practitioners want to run a personal injury case for people but can't afford to pay the out-of-pocket expenses for medical reports out of their overdraft, they can apply to the Legal Aid Commission and we have a scheme for

paying those out-of-pocket expenses and recovering them when the case is successful. We have done 700 of those over the last few years. I think that's probably enough for the five minutes.

DR MUNDY: Thank you for that. Can I just ask you; you mentioned a civil advice service. Does that extend only to individuals? Would it extend to small businesses?

DR HILL (LACT): It would be to individuals in the guise of small business.

DR MUNDY: So if I am a small business person, I come in and I have got a problem with someone else, you are not going to inquire whether I'm a sole trader or whether I'm incorporated necessarily and turn me away on that basis.

DR HILL (LACT): No, so in terms of telephone advice, there would be no means test at all. They would give it anybody who phoned up. In terms of acting for someone and writing letters and helping with documents, those sorts of things, there is no strict means test. It's left to the discretion of the lawyer but - - -

DR MUNDY: I haven't thought about this, commissioner, as an entirely reasonable answer to this question. Would you think because there is no small business commissioner in Tasmania, the place that people turn for the advice that might have been provided by such a body in every other state other than Queensland, some of that work might come to you?

DR HILL (LACT): I don't know but I would imagine that is correct.

DR MUNDY: The Commonwealth is re-prioritising the focusing of its expenditure on legal assistance matters. We have heard about how it has impacted on Women's Legal Services Tasmania. Have these recent decisions over I guess the last nine months or so had any impact on your organisation?

DR HILL (LACT): You are referring to the announcement in the federal budget.

DR MUNDY: They would be them.

DR HILL (LACT): For the Legal Aid Commission of Tasmania, I think it's \$444,000 that we were promised and anticipating that we were getting we now won't be getting and that money was earmarked to fund independent children's lawyers in more complex cases. It was earmarked for family dispute resolution which, as I said in my opening, is a very successful program. It was earmarked to expand that and it was also funding the consumer credit service that we provide, so in the absence of that money, our starting money would be to scale back those three things to the extent that it was funded by the Commonwealth for the next financial year.

DR MUNDY: Doctor, would you describe those as frontline services?

DR HILL (LACT): Yes, absolutely.

DR MUNDY: Were you consulted by the Commonwealth about the impact of these proposed funding cuts before they were announced?

DR HILL (LACT): I have been in the seat since 18 January and, no, I wasn't and I don't believe my predecessor was.

DR MUNDY: I want to think about this for a moment. Commissioner MacRae.

MS MacRAE: I would just be interested, given the difficulties that are present in Tasmania, and I assume you have got a lot of pressure on your resources on the criminal side of things, how you manage your budget in terms of what goes into civil law and from the introduction, it sounds like you do a little more civil law than some of the other legal aid commissions. Internally with your budgeting, how do you sort of work out what resources you have available for civil law and what does that mean for your means test and your eligibility criteria?

DR HILL (LACT): Well, I suppose our starting point is that we don't do a little of civil and our starting point is that we want to maintain the profile that we have and not go backwards in that, so as we create our budget each year, we would try and build around that. You know, our advice and community education team, who take the phone calls and do the face-to-face advice, we want them to keep operating without a means test and do civil matters and we will maintain that for as long as we can possibly afford to and consumer credit will take a hit and contract - - -

MS MacRAE: We heard quite a lot, just some of the case studies we have had, how some of those consumer and credit issues can look small at the beginning but then can escalate into matters that might even turn criminal, where people find that they can't pay bills and then they're actually sort of imprisoned down the track or they might be driving unlicensed, those sorts of problems. Are you aware of that sort of escalation happening in - - -

DR HILL (LACT): The anecdotal evidence is that there's huge flow-on effects from not addressing them, that they impact on other government services and that someone losing their home, it can have a flow-in effect in terms of mental health, in terms of proper care for children, domestic violence, in all sorts of areas, so I think there is a lot to be said that's addressing these issues before they escalate, while they are still small cracks rather than a complete disaster.

MS MacRAE: Would that be one of the driving factors where you do get extra resources, trying to focus them in that area?

DR HILL (LACT): Yes, definitely. I think there is a high return on the dollar. It's a most worthwhile area.

MS MacRAE: Just in relation to the funding, we heard a little previously from the Tasmanian share of the money. How do you see the allocation of funding between the states and would there be reforms there that you think are necessary? We had a little bit of a discussion about that with the West Australian Legal Aid Commission, who felt that they're being duded under the current formula.

DR HILL (LACT): It's relatively easy for Western Australia. Yes, they have been known to batter the Commonwealth, haven't they? When I go to National Legal Aid meetings with all the directors from other states, it's already pointed out to me how the smaller states like Tasmania get a larger per capita share than New South Wales and Victoria and so, you know, I don't think I would have anything more to add on that. Obviously, Tasmania has its unique problems and in terms of addressing need, it's quite appropriate for the Commonwealth to fund Tasmania heavily. As to whether the carve up should be done differently, I don't think I know enough about that to address you.

MS MacRAE: Does the CLC money come through you in Tasmania? Pardon my ignorance on that as well.

DR HILL (LACT): As I understand it, it does in terms of being the bank account. It comes to us. It goes to the CLC and then we are collecting data to report to the Commonwealth as to how it's acquitted. I think that's a fair way of describing it.

MS MacRAE: But you would regard yourself more as a post box than as a decider about how that money is distributed.

DR HILL (LACT): That's right, yes.

DR MUNDY: So do you sit down with the CLC sector and have a discussion about where the unmet need is, where the priorities are, make sure you are not overlapping? We heard some interesting models from the Victorians and Western Australians, who seem to be in a desperate tussle to prove who has got the better institutional arrangements, but is that something you do?

DR HILL (LACT): Yes, it is. You know, I have had a coffee with Susan and I think this month I attended the annual general meeting of the CLCs and had a talk to them. We value the relationship with CLCs and think they provide a complementary service to the Legal Aid Commission and we certainly have been talking quite recently about coordinating in community legal education, to make sure that what our people are presenting on works in with what the CLCs are doing in those areas.

DR MUNDY: So there is no sense in which institutional reform is required to prevent unnecessarily duplicational overlap, in your view.

DR HILL (LACT): I don't think there is any real duplication with CLCs. I think they do things differently, have a different client base to the legal aid commissions. From my vantage point it seems they provide an important safety valve out there in dealing with people who would fail our means test, but yet are still under the poverty line; so I think they play an important role there. I think the development of legal aid commissions and CLCs developed side by side in the early 1970s, I'm old enough to remember the movements behind each, there's just different historical reasons for them and they are different creatures.

DR MUNDY: We had a discussion with the previous witness about their submission, and I don't know whether you were here when we discussed it, but I will just read you the paragraph that's relevant, it's on page 8 of their submission.

As funding from LACT became more restricted there were significant numbers of women seeking assistance from our service -

that's the Tasmanian Women's Legal Service -

who, whilst eligible for grants of aid were unable to obtain them due to a lack of funds at the time of their application.

I guess that the question that that begs is that during the course of the year do you have to modify your criteria in the event of availability of funds. Is that a regular occurrence and, if so, how many people does it affect?

DR HILL (LACT): You are asking me how frequently we would change our - - -

DR MUNDY: Yes, and I guess my next question is on 1 July in the subsequent year did your eligibility criteria return to where it was?

DR HILL (LACT): Yes. We track our budget daily, weekly and monthly as to how we are going, you have to in grants to keep track of it, and where we were exceeding budget usually the Board of the Commission will impose a guideline. Last year they said we would no longer, for example because we were overspending, they said we would no longer represent people who were charged with breach of suspended sentences. When the budget corrected itself a couple of months ago, I think in February, they reinstated, they removed that restriction; so they do change from time to time.

DR MUNDY: I guess my interest is particularly in relation to family law matters,

because essentially that's all we had spent Commonwealth money on, because I don't imagine you have much customs-related crime and stuff in Tasmania, so I guess the concern, and we have heard issues in relation to Victoria, where women have to represent themselves in court and be cross examined by those who allegedly have perpetrated violence against them, is that a regular occurrence in Tasmania?

DR HILL (LACT): I don't think I could answer that.

DR MUNDY: I guess a better question is, is your need to restrict access to aid typically not in relation to Commonwealth matters?

DR HILL (LACT): I put it this way, in Commonwealth matters we always fund independent children's lawyers where the court requires there to be one; so we have got complete coverage there.

DR MUNDY: They are first cab off the rank?

DR HILL (LACT): That's right, and then where there is an urgent need to recover children or a child, or a parent has urgent need, I think we cover that all of the time, and then I think when you have one parent who is unrepresented and the other parent has representation and is seeking to change the orders that are in place, we cover that as well. After that it starts getting patchy, so opposing a relocation to another state, we might or we might not - - -

DR MUNDY: So if a man appears unrepresented in a matter which the - the fact that the male might be unrepresented would be a contributing factor to the decision to ration legal aid not in favour of that woman?

DR HILL (LACT): That's right, yes.

DR MUNDY: Okay, thank you.

MS MacRAE: Can I just ask, we have heard various evidence on how self-represented litigants impact on court processes. You have some duty lawyer services that you fund, and I'm wondering if you could just talk about how effective you feel they are in helping self-represented litigants and whether you see the extent of self-represented litigants in the courts in Tasmania as a problem or otherwise.

DR HILL (LACT): Yes, I think self-represented litigants have certainly been a growth industry over recent years, and I think it's now up to about 30 to 40 per cent of all matters involve self-represented litigants. We regard them as the norm, if you like. They are here to stay. It's not a passing fashion, and it's quite clear the evidence from the courts is that it's a major drain on court time. The courts are trying to appear impartial in a dispute before it but yet the judge has to go to extraordinary

lengths to assist a self-represented litigant and get them through, so it's an uncomfortable situation in an adversary system, so we do have duty lawyers in state matters. Certainly, at the Magistrates Courts we have duty lawyers, and in the Family and Federal Courts, Launceston and Hobart, we have coverage with duty lawyers. They are in an office at the court and they will see and help a dozen or so people on a sitting day, and I'm sure it makes a big difference in telling people what to say, how to frame things and what's relevant and what's not.

MS MacRAE: Do you think that's a service that's under stress in terms of - are they able to service the client, given that there's an increasing number of these?

DR HILL (LACT): It's something that we spend a lot of time talking about. First of all, I think that the duty lawyer service should be expanded, and I'm dearly searching for ways that we can do that, to reallocate resources. I think within our existing resources we probably should tip more into that area. I think the returns in terms of public value are very high, and we need to look at that. Self-represented litigants generally is something that we are talking about all the time. I think that they have, as we say, they have come about, crept up on us and they are [indistinct] at 30 to 40 per cent; they're here to stay, and I'm not sure that legal aid commissions around Australia are necessarily configured to meet the challenge, and I think in terms of do-it-yourself kits and duty lawyer services and YouTube style things on our web site to tell people what they can expect at court and where they might have to go and those sorts of things. There is tremendous opportunities for us to meet that challenge, and that's something we really are intending to do in the next year or so.

MS MacRAE: In terms of how the courts are set up, we have heard it from at least one magistrate, that he felt that the court itself should be set up to cater for self-represented litigants and that, ideally, that court should be accessible for someone who does have to self-represent. Would you see that in Tasmania as a sort of a reasonable expectation, that in the lower-level courts self-representation should be regarded as something that should be able to be accommodated?

DR HILL (LACT): I think there is little choice but to move in that direction.

MS MacRAE: Are we getting there, or do you feel like it's getting - I guess we have heard various evidence about how even some of the tribunals have become more legalistic and that it is becoming harder for a self-represented person to appear in some of those venues when, really, the founding of some of those tribunals was that they should be easy and accessible to people on a self-represented basis. Do you see those sorts of problems of what we have described as creeping legalism as a problem anywhere in Tasmania?

DR HILL (LACT): I'm probably not the best vantage point to judge that, so no I don't. I hate to admit it, but I think the courts have actually led the way on

reconfiguring for self-represented litigants. They do have a coordinator and they have committees of magistrates and judges that look at the forms and work through them in changing forms and rules, so that they are easier for people, they don't have to draft pleadings and things like that. So I think they're down the path - - -

MS MacRAE: Right, okay.

DR HILL (LACT): - - - for that way.

MS MacRAE: Thank you.

DR MUNDY: In respect to unbundling of services, how do you deal with the particular challenges of people suffering some form of disadvantage, or some sort of disability? Do you provide training for your duty solicitors in dealing with people who have special needs?

DR HILL (LACT): No, we don't. Certainly our guidelines for granting of legal aid requires grants officers to take that into account, and so although we talked about, you know, cabs off the rank and priorities before, it's common for people to leapfrog up that if someone has special needs and - - -

DR MUNDY: So your criteria are about matters, but there are also - - -

DR HILL (LACT): yes.

DR MUNDY: - - - characteristics of the individual, and then we might call them economic criteria as well.

DR HILL (LACT): Yes. So, you know, if a grants officer forms a view that someone has special needs and they really can't go to court unrepresented, then they will - - -

DR MUNDY: Move up the list.

DR HILL (LACT): - - - certainly meet that, yes.

MS MacRAE: One of the things we heard, I think in Victoria, was that it wasn't so much the hourly rate that was a problem in funding private lawyers to do legal aid work, although there is an increasing gap between, you know, private fees and what's paid under the legal aid fee rates, but time taken for particular cases was a particular issue. So, as I say, they weren't so much concerned about the hourly rates, but more about the time that it was assumed a case would take, and that they felt that there was an undercutting there of the time that was really required to adequately service a case.

We heard from the disability advocacy services that part of the problem for them in legal aid funding is that often if a person has a disability of some form, that it will necessarily take a longer time to be able to service that client effectively because you might have an interpreter, or someone is having to really translate what the lawyer is saying into language that someone with, say, a mental impairment can understand. Is that also an issue that you would have here?

DR HILL (LACT): I don't think so. I think, you know, private practitioners apply for legal aid and would say what they feel they need for a particular matter, and the grants officer would assess that and make the grant accordingly. Clearly nobody is getting rich out of doing legal aid work.

MS MacRAE: No.

DR HILL (LACT): There's plenty of evidence that it's very low remuneration for private practitioners compared to other work. Having said that, we don't have any difficulty in getting private practitioners to do work. The profession has just been excellent in that regard, and the juniorisation in family law that's often talked about in mainland states, that's not been our experience here. Some of the most senior practitioners will do hearings, legal aid hearings in family law, and the independent children's lawyers are all - all of them are very experienced and capable practitioners.

DR MUNDY: You indicated that, unless I misunderstand you, was that if a matter comes up, the private lawyer will actually have a discussion with one of your officers as to presumably the length of time, the complexity, and then there will be an understanding reached about what the appropriate remuneration for that work is.

DR HILL (LACT): That might happen. I don't think that happens as a routine though.

DR MUNDY: Because what we understand and what was put to us by Legal Aid Victoria was the problem is not the rate, the problem is what the rate is applied to, and they didn't give any sense that that was a negotiable sort of issue, that you were remunerated on stages of proceedings essentially. But what you're saying is your arrangements might in some cases be more flexible.

DR HILL (LACT): Yes, and the application for legal aid might say if the practitioner is to do a plea, it's to allow this many hours for it, and that the grants officer will assess that and say yes or less.

DR MUNDY: All right. I think we're probably just about out of time. Thank you very much for - - -

MS MacRAE: Thank you.

DR HILL (LACT): Thank you.

DR MUNDY: - - - coming along today. Our next witness is Mr David Barclay, but I'm wondering if we could perhaps take morning tea just now to facilitate the comfort of the commission? We'll adjourn for 15 minutes.

DR MUNDY: Could you, for the record, please state your name and the capacity in which you appear?

MR BARCLAY (LST): David Barclay, I'm the Vice-President of the Law Society of Tasmania.

DR MUNDY: Mr Barclay, would you like to make a brief five minute or so opening statement?

MR BARCLAY (LST): Thank you. I've been given by my Executive Director some notes touching the matters of most relevance and concern to the Tasmanian Society. Just as a preliminary, though, the Society is a small society. There's only 500 lawyers in private practice in this state who are members of the Society. The Society employs only an Executive Director and an Assistant Executive Director and some support staff, so given the breadth and size of the report, we have only touched those matters of direct concern. The first matter I did want to raise, however, is the issue of the definition of access to justice. I'm not sure whether oral hearings have taken place in South Australia yet, but - - -

DR MUNDY: Yes, they have.

MR BARCLAY (LST): You'll recall then, and I won't stay too long on the point, that the South Australian Law Society referred to the definition of access to justice. The Commission has defined that as making it easier for people to resolve their disputes. Now, obviously if one focuses entirely on the economic aspect of access to justice then that would be an appropriate definition, however it's not a sufficient definition to recognise the role of the justice system to the fabric of our society. Access to justice means more than making it easy for people to resolve their disputes. The court's an independent third arm of government, and the definition does not include that aspect of justice, and South Australia and Tasmania regard that as a substantial omission.

DR MUNDY: Mr Barclay, if I could just pause you there, our terms of reference bring us to the resolution of disputes. Those are the terms of reference which were given to us by the Assistant Treasurer, and I say with respect that if you read our definition in the light of our terms of reference, you will find it entirely consistent. There was certainly no intention expressed or implied to read down the role of the courts. So if you would like to continue, I just wanted to clarify that point because we are concerned with more than court-based resolution.

MR BARCLAY (LST): Certainly. I understand that. Thank you. The next thing I wanted to touch on is a matter that directly relates to Tasmania, and this was regarding information and advice at chapter 5.2. It's not true to say that Tasmania

doesn't provide a law firm referral service to the public. It does so in two ways. The Society's web site provides a referral service searchable by firm name and/or region and/or area of practice, and the Society regularly receives telephone calls seeking referrals. When it does, it provides three alternative names. So in that way there is a referral service provided by the Society.

DR MUNDY: That may have been an oversight on our part.

MR BARCLAY (LST): Thank you. Following that, chapter 5.3, the draft report dealt with the appropriateness of sources of advice and considered the issue of a one stop shop. The Society strongly supports a one stop referral service, so long as, of course, as it is properly resourced. One of the issues that arises, of course, is that the family law particularly, being federal, there's a risk of duplication there, there's a risk of duplication for AAT matters and the like. So the one stop shop I hear of course, properly resourced, will result in savings as its costs increase, in our view, with access by members of the public to that assistance, and of particular note of course is the comment in the draft report that people rarely go to more than one service.

Chapter 6, costs and in particular disclosure, the Society would like to point out that our Legal Profession Act Part 3.3 contains 59 provisions dealing with cost disclosure. We're obliged to disclose costs at the start which includes the obligation in litigious matters to provide advice as to consequences of costs if the client was to lose and what the likely quantum of those costs would be. We're obliged to update our clients continually during the course of a matter when anything arises which may affect the initial costs estimate. We are obliged to provide written advice as to costs prior to mediation, and we are obliged to provide cost estimates and consequences prior to trial. In Tasmania we submit that that is sufficient to enable our clients to be fully informed in respect to costs. There are significant sanctions for failure to comply, not least of which is that you will not be allowed to rely on any costs agreement and you will only be allowed to have costs taxed at the Supreme Court rate which as a general rule is somewhere between half and two-thirds of what a costs agreement hourly rate would be.

DR MUNDY: That sounds much more comprehensive than other jurisdictions.

MR BARCLAY (LST): Yes. The answer to that I think is being a small jurisdiction people are more prepared to complain and a huge area of complaints - the Law Society used to deal with complaints - was the issue of costs and so I was determined that - "Let's fix it," and we think we have. There are still complaints of legal professional indemnity costs but - - -

DR MUNDY: If there are any materials that you could provide us which set out that other than direct reference to the Act, that would be most helpful to us.

MR BARCLAY (LST): I will just make a note of that and I will cause that to happen. Moving on perhaps to more important matters, the Society supports the recommendation insofar as it relates to dispute resolution. In Tasmania for many years there has been alternative dispute resolution. Initially it was informal. I have been around long enough to know that there was a huge backlog of cases for our compulsory third party insurer for personal injuries and it determined that it would mediate all actions over a certain age. I think it was three years.

The effect of that was that it settled a whole lot of matters and at that time there were no ADR rules, there was no ADR Act. It's just that they did it. It worked so well that it became the norm rather than the exception and then of course the ADR Act [indistinct] 2001 came in. Our Supreme Court won't allow a matter to go to trial until there has been an attempt to resolve the matter by way of mediation. In Tasmania the society submits that ADR is simply part of the legal landscape. In respect of the tribunals, the society has a concern obviously, being a union for lawyers, with the proposition that - - -

DR MUNDY: We will quote you on that but your honesty is both refreshing and welcome.

MR BARCLAY (LST): Thank you. I don't know where to go with that. The point is that - it was touched on slightly by the previous speaker - in Tasmania we find that those who appear in tribunals have special knowledge of the tribunal in which they appear.

DR MUNDY: Yes.

MR BARCLAY (LST): Tribunals that require leave - and I'm thinking particularly of the Fair Work Commission - will only grant leave where the practitioner in this state is going to be of assistance. Because the practitioners as a general rule have specialised knowledge of the tribunal, they appear and the Society's position is that it in fact aids resolution rather than is a barrier to resolution. We identify the issues, the actual issues in dispute and very often the matters are resolved in a much shorter and therefore cheaper way for the clients.

DR MUNDY: Given we are having a bit of a chat as we go along, our principal concern in that regard is there are a number of tribunals; I'm not familiar with the Tasmanian ones particularly but I suspect - they're not here but there are lists within places like VCAT where the procedures and the matters have been specifically structured so that citizens can appear and represent themselves and the idea is that leave is provided if one - leave will be provided to a party if they're disadvantaged in some way.

MR BARCLAY (LST): Yes.

DR MUNDY: That may well be because one of the participants has some sort of impairment or disability. It may also occur because an ordinary citizen appears up against a real estate agent who appears in the tribunal four times a month.

MR BARCLAY (LST): Yes.

DR MUNDY: So that was more our concern and what's being put to us is that in those - that's what leave has been provided for. The concern that's being expressed to us by tribunal members and presiding judicial officers in tribunals is that there does appear to be leave being granted more regularly and in perhaps less meritorious circumstances.

So that's what we were actually trying to get at because the concern was it was leading in some cases to lawyers talking it out and frustrating the purposes of the tribunal to seek a speedy resolution, although no lawyers were named and no cases were mentioned, but also it was leading to an imbalance in as much as that the represented party was perceived in some cases to have an advantage where the point was actually to address the disadvantaged.

MR BARCLAY (LST): Yes.

DR MUNDY: That was what leave was meant - so that's what we were - we weren't trying to suggest that no-one should ever be represented.

MR BARCLAY (LST): No.

DR MUNDY: But we do appreciate the point that you make.

MR BARCLAY (LST): It seems to me at least that there are leave provisions and it may well be that the tribunal is not having regard to the threshold that has to be got over.

DR MUNDY: I suspect that might be the problem.

MR BARCLAY (LST): Certainly that's not the case in the Fair Work Commission.

DR MUNDY: Yes.

MR BARCLAY (LST): Regularly you get knocked back there. In other tribunals in this state, if only one party is represented, that representation won't be allowed as being unfair.

DR MUNDY: Yes.

MR BARCLAY (LST): Coming from the legal profession, we turn up, we apply. If we get leave, we're in.

DR MUNDY: Yes.

MR BARCLAY (LST): If we don't, well, so be it.

DR MUNDY: Yes.

MR BARCLAY (LST): So really it may well be that the error stems from the way in which the tribunal have been exercising their discretion. I did want to say something about the costs recovery for court fees. That's the very next area, because it seems to me that it has got to be a barrier to entry. If a litigant or the losing litigant has the prospect of being responsible for paying substantial court fees, that of itself might be a barrier to a claimant making an otherwise meritorious claim. We regard the suggestion that higher fees are charged or that there's a real cost recovery as being flawed. The Society doesn't know of any other essential public service where the costs of providing such service are fully recovered; the government cost of providing health care services isn't, neither is education, neither is the cost of registration in respect to the costs of roads and road-building and no doubt there are other examples.

DR MUNDY: But there are contra examples, aren't there, Mr Barclay; for example, water, sewerage and drainage, the Therapeutic Goods Agency, the Civil Aviation Safety Administration, the provision of air traffic management services to make sure that people are safe when they fly. So I can list any number of full cost recovery essential public services.

MR BARCLAY (LST): Yes.

DR MUNDY: This Commission would be of the view that it is a failure of public policy that roads aren't better cost-recovered and we have recently produced a report. So I don't think the fact - I think it is simply not a statement of truth that no public services that are essential are fully cost-recovered.

MR BARCLAY (LST): Yes. You have to look at the type of area in which you're dealing. I would suggest that the legal schemes are more like the health case scheme because you may have very disadvantaged people and you often do. It's not the case that somebody is jumping in an aeroplane, paying a whole lot of money for an air ticket. It's a matter of choice.

DR MUNDY: I'm sure that the people who are resident on King Island don't think getting on an aeroplane to access their essential hospital services is a matter of

choice.

MR BARCLAY (LST): That's true but there's not full cost recovery for them in respect to health services.

DR MUNDY: The cost of the provision of the oversight of the Civil Aviation Safety Authority with respect to the safety of that aircraft is fully cost recovered. I think the real point is this: as you do note, matters such as the Bell Group litigation in the Supreme Court of Western Australia - which His Honour Chief Justice Martin told us last Friday cost that court \$15 million. He advises us the court might have recovered \$700,000, so let's call it a million.

MR BARCLAY (LST): Yes.

DR MUNDY: So \$14 million of the taxpayers' money of Western Australia was provided essentially for a dispute between banks and insurers.

MR BARCLAY (LST): Yes.

DR MUNDY: The more relevant fee, rather than having a debate around fact and the classification of essential public services and issues around chapter 3 of the Constitution - I think the better question is to say this: we charge court fees for some matters; we waive people for others. Our motivation for going down this path was actually to try and identify sources of revenues which could be put to work in improving the services and facilities provided by the courts.

I guess the more useful basis of discussion is in what circumstances should court fees be set, and in those circumstances how. To be fair to yourself and others, none of you I think are claiming that the Bell litigation, C7 or any other of those matters should have been free.

MR BARCLAY (LST): No.

DR MUNDY: So if the answer is they shouldn't be free, how do we go about that, because particularly in a lot of monetary-based disputes - let's think about commercial disputes - there is an alternative available in the vast bulk of matters for these to be resolved without the courts. They can be resolved by mediation, for which mediation fees must be paid.

MR BARCLAY (LST): Yes.

DR MUNDY: Part of what we're concerned about is that we have a fee for service dispute resolution system that's provided privately and when I worked for major corporations, every contract that I advised clients on for aviation service provision

had three pages at the back about binding dispute resolution, so it happens, so how do we set fees for those sorts of matters so that the matters that really do need to go to court which involve the establishment of precedent and all those things which we acknowledge in the report - how do we ensure that we get the ones going there? That's what we're trying to get at.

MR BARCLAY (LST): Yes.

MS MacRAE: Just as importantly, I guess, the ones that don't need to go there - - -

DR MUNDY: Keep them away.

MR BARCLAY (LST): Yes.

DR MUNDY: Because we're not talking about people's fundamental rights.

MR BARCLAY (LST): No. As you note, arbitration is becoming more and more and more prevalent and that certainly is user pays.

DR MUNDY: Yes.

MR BARCLAY (LST): The difficulty is, you're quite right, how do you set the criteria? I expect that those who would be entitled to a grant of Legal Aid would have fees exempt, perhaps subject to assessment at the end.

DR MUNDY: Yes, but these aren't the big money matters - - -

MR BARCLAY (LST): No. The Federal Court charges more for a corporation than it does for an individual. Perhaps prima facie one starts with that proposition that if you are a corporation litigant, particularly listed - - -

DR MUNDY: Yes, it raises some little issues. I mean little issues at the bottom between sole traders and small - - -

MR BARCLAY (LST): Quite.

DR MUNDY: But you can fix that.

MR BARCLAY (LST): I guess what we'd be concerned to ensure is that capacity to pay and barrier to entry is taken into account in whatever scheme is come up, but certainly, as you point out, we are more than comfortable with the fact that large publicly listed corporations should pay. Whether they pay the \$15 million is another thing.

DR MUNDY: But certainly more than \$700,000.

MR BARCLAY (LST): Absolutely; and that the individual who has a genuine grievance who needs access isn't excluded.

DR MUNDY: Can we just explore that a bit more because, I mean, we're not going to be able to set scales in every court in the land, but I guess what we would like to be able to try and do is make some recommendations about the sort of issues or things that people sort of think about. Obviously there are certain matters which we simply - the fee might be nominal.

MR BARCLAY (LST): Yes.

DR MUNDY: Let's forget about immigration appeals and all that sort of stuff, but in what we might call commercial matters would a reasonable set of criteria be the characteristics of the litigants, whether they're large corporations, individuals, small businesses?

MR BARCLAY (LST): Yes.

DR MUNDY: The size of the matter in dispute, because we obviously don't want trifling matters being brought to court. The fee should reflect what's on the table.

MR BARCLAY (LST): Yes, in commercial matters, absolutely. Yes.

DR MUNDY: Yes, and whether there is any particular public interest in the litigation. Are there really points of law that need to be resolved here for the benefit of others or is it just about the application of the existing - that would be a matter I suspect that only a judge could form a view about.

MR BARCLAY (LST): Yes. You might even need to have some sort of system whereby a registrar or somebody looks at the pleadings once they're closed and says, "Righto, this is going to be - - -"

DR MUNDY: And give the parties some forewarning rather than find out at the end.

MR BARCLAY (LST): This will be your first filing fee.

DR MUNDY: Yes.

MR BARCLAY (LST): We're back in the dark ages in our Supreme Court; \$650 and that's it for filing of a writ. There's no hearing fees, there's no nothing, just a simple filing fee.

DR MUNDY: So a typical commercial matter within the Supreme Court of Tasmania, bearing in mind it doesn't attract the very large commercial cases that perhaps the courts in Sydney or Melbourne, and to a lesser extent Perth and Brisbane - what do you think would be reasonable?

MR BARCLAY (LST): The first question is are we really going for full cost recovery or are we going for a reasonable contribution towards the cost of access to justice, because if you go for full cost recovery do you divide the judge's salary by the number of sitting days and say, "Right, there's \$5000 a day, \$2000 for the court, that's seven a day."

DR MUNDY: There are lots of statutory utilities regulators who perform an almost identical exercise. If we're talking about the resolution of commercial disputes only - - -

MR BARCLAY (LST): We would have a problem, I think, in this state because of the size of the litigation in a full costs recovery.

DR MUNDY: Yes. In a commercial matter that goes to the Supreme Court of Tasmania, are we talking about hundreds of thousands of dollars?

MR BARCLAY (LST): Yes.

DR MUNDY: Or a couple of million?

MR BARCLAY (LST): They tap out at probably two or three million, otherwise they go to the Federal Court or they're - in fact they usually go to the Federal Court if they're - - -

DR MUNDY: If they're corporations matters.

MR BARCLAY (LST): Yes.

DR MUNDY: But if they're a normal contractual dispute, they won't go to the Federal Court.

MR BARCLAY (LST): No, but speaking for where I work, we do a lot of construction work and of course that's arbitration. We do it because it's quick. I suppose there would be no reason that one ought not have regard to the fact that they could have gone to arbitration.

DR MUNDY: I was hoping you would get there.

MR BARCLAY (LST): And that this did get allowed, obviously, and that, "Well, that would have cost them X. Arbitration would have cost them \$70,000, \$35,000 each. Well, that might be a starting position."

DR MUNDY: Yes, because that has that characteristic of, "Well, you have made a choice to be here, not there, so don't expect it to be any cheaper."

MR BARCLAY (LST): That's right. Issues will arise if they have gone to arbitration first, of course.

DR MUNDY: Of course.

MR BARCLAY (LST): Yes, it's not without its difficulties, but I guess if we're having to look at guidelines and principles, we would say that you couldn't have full cost recovery in this state because of the kind of claims, and indeed the large corporations in this state are really state enterprise businesses or wholly owned statutory corporations.

DR MUNDY: Okay. We have probably belaboured that point enough.

MS MacRAE: One of the things you note in your submission is that there's no overarching obligations on the parties in this state and other states have that. Do you find that that's a problem here?

MR BARCLAY (LST): No. It's one of the consequences of being a small practice that we all know each other really well and you don't get away with it. Unmeritorious claims are soon weeded out. I would like to see - this is me, not the Society, but I would like to see the requirement to certify pleadings. We don't even have that requirement in this state. What I mean by that is to certify that the factual basis in the pleading is sufficient to raise a cause of action or a justifiable defence. Other than that, I don't see any difficulty arising in this state. As I say, we have 500 legal practitioners of which 100 probably do litigation. Of those, 30 would actually appear over the Bar.

DR MUNDY: How many people are at the Bar?

MR BARCLAY (LST): About 50, of which about 20 are active. So really it's a very small pool. We all know each other. We'll call each other if somebody is being silly. So at this stage it's not a problem.

MS MacRAE: But in relation to the sort of behaviours, if I can call it that, of government organisations, I note that you'd like to see the model litigation guidelines enshrined in legislation. Is that because you see that there's a problem with how they're working now and that's a frustration?

MR BARCLAY (LST): Yes. I think it arises from time to time with the Office of the Director of Public Prosecutions and/or Crown Solicitor. Unlike the Commonwealth, [indistinct] model litigants, they don't have an obligation to be, and we take the view that because they represent the state, that they ought.

MS MacRAE: Would you see that as extending to local government as well?

MR BARCLAY (LST): I think I'd better talk about that. I think yes. Yes. But I suspect they would take a different view because they've only got finite resources as well. At this stage, some of the councils are very small. 3000 rate payers, so they're tiny.

DR MUNDY: There's one in Western Australia with 42.

MR BARCLAY (LST): Well, I don't know how they have a good rate.

DR MUNDY: It has a land mass bigger than Tasmania.

MR BARCLAY (LST): Yes. I don't feel like I'm really able to talk about - - -

DR MUNDY: What about - I mean, the whole notion of the model litigant rules which effectively have legal force from the Commonwealth perspective, because they're in the legal services direction, the notion between a lot of rules is in part because of the power and the position of the state or the Crown, but also it's a reflection of the economic power of the state or the Crown. Obviously there are many pieces of litigation where say a person who has been denied an insurance claim comes up against a litigant which, for all intents and purposes, the relative economic positions of the parties is no different if they were facing the Crown as to whether they were facing a very large international insurer. Do you think that there's a case therefore to extend the expectations of model litigant behaviour to such private sector bodies, or is it in fact the peculiarity of the Crown that creates the obligation for model litigants?

MR BARCLAY (LST): I think it's the Crown. You've got to remember at the end of the day that corporations have shareholders to respond to and to ensure that they can attempt to make a profit. So they're big, but they're essentially not in the same position in my view, as the state. But what I can say though is I think the common law is going to catch up. I think it's only a short step until the common law says that corporations, particularly insurers have a duty of care to an insured when they refuse a policy. It was many years ago there was a case called Dixon which almost got there, but didn't.

DR MUNDY: Are you able to provide us with a reference to that?

MR BARCLAY (LST): Yes. It was a strike-out case, but I think it's *Dixon v CGU*, but I'll find that for you. So I think it won't be very long until the common law catches up and says - particularly with insurance companies, "You can't refuse a claim." I'll start again. "You've got a duty of care when you exercise your rights of refusing a claim." That might also extend to making available, if they accept part of a claim, that they've got to pay the money within a certain time, those sorts of things.

DR MUNDY: We note you don't support unbundling of legal services. We know that - in fact we've had evidence here today that in fact this is almost the *modus operandi* of legal aid commissions and community legal centres. Given that these folk are - they're admitted in the same way as private practising solicitors are, they've got the same duties to the courts, they may have slightly different indemnity insurance arrangements because they may be self-insured by the state or they're part of the pool scheme that was described to us earlier. Why is this? It clearly isn't an ethical question because otherwise people like the Tasmania Women's Legal Service wouldn't do it, because they're highly ethical practising solicitors. So what is - is it just the insurance question?

MR BARCLAY (LST): I think that's right. There's also the issue of protecting, as much as a private practitioner can, your client's interests. We take the view that it's easier to do that if you have a hold of the matter. Very often matters are really - sorry, some matters aren't - don't go in steps as often - so for example, where we have grant of legal aid - we don't have civil grants in this state, so as - we accept the disbursement fund as I understand it. So you get a grant of aid to investigate and report. Well, that's really a discrete issue. Then you might get a grant of aid to do a plea of guilty, or you might get a grant of aid to do a hearing.

They're separate steps, but often in commercial matters and personal injury cases, there's - you don't have those steps so much. So the practicality of doing it is also difficult, and there'd be the position on the lawyer to make sure that the retainer is properly expressed, because of course at common law your retainer is the entire retainer to produce the end result.

DR MUNDY: Let's just consider this hypothetical situation: I come along to you. I hold any number of degrees, I hold statutory Commonwealth office, I'm clearly, at least in my view, a competent person. But I've got a problem with my builder. I've got to lodge these documents in the court, I've got - you know, I'm happy to run it myself, I reckon I can argue the law around the track. I'm confident about that, but I just need you to help me with this thing called pleadings because they didn't teach me that in my economics doctorate. So these things called pleadings, I'm happy to pay you for your time, more than happy to do that. At the moment that would be something you wouldn't think was reasonable?

Because what we're concerned about in very many matters is that, as we know, civil legal assistance is not available, and the only thing I might need to access the courts and get justice is a bit of help which I'm happy to pay for which I can't get from Legal Aid and frankly I probably don't want to tie their people up on the helpline, but at the moment that's very difficult for me to get unless I've got a mate who is a lawyer, which sadly I do.

MR BARCLAY (LST): In those circumstances I don't think the difficulty arises.

DR MUNDY: But we're concerned about your duty to me in that circumstance.

MR BARCLAY (LST): Yes, and our other duty, because it's a big question. It's not really just settling some pleadings to make sure they read properly.

DR MUNDY: No, I understand that. Yes.

MR BARCLAY (LST): I need the evidence, I need all of this stuff, so it's going to cost you \$15,000 just to do that. It's another not very much to go and do the rest or whatever it is, but it does present those sorts of problems because to protect ourselves, it's quite a big task.

DR MUNDY: If the parliament was to help - I mean, I accept this is essentially largely common law issues and people get hauled up by the Bench which we have on evidence now doesn't seem to be an issue for legal assistance lawyers, but we have heard stories about private practitioners being pulled up in all sorts of matters to explain dodgy pleadings and things. If the parliament was to provide some clarification around these issues rather than wait for the common law around lawyers' duties to develop, which I don't imagine is a particularly speedy process, even slower than the parliament perhaps, would that be something that you would object to fundamentally, subject to it being properly structured?

MR BARCLAY (LST): Sure. I don't think so.

DR MUNDY: Okay.

MR BARCLAY (LST): If we were talking about, firstly those sorts of things, it doesn't happen, but it's happening more and more and more in commercial matters, where you have event-based costing, so rarely with the other side.

DR MUNDY: My issue really there is we have this concern, it's not a proposition that has been challenged to date that the ordinary person in the street on a decent-sized claim about a normal event in life, dodgy builder, dodgy tradesperson-type thing, can't afford a lawyer, but might be able to afford maybe \$1000 for a bit of advice that they feel they need, but might not be able to afford the

15 grand that you talk of. That's what we are concerned about in this whole - - -

MR BARCLAY (LST): Yes, you're right. That would require there to be an alteration of the common law obligation that we have so that we can say, when we get hauled over the coals, "This is what we got, and that's from what we gave the advice - - -"

DR MUNDY: So we need the parliament to help us out.

MR BARCLAY (LST): Yes.

DR MUNDY: Okay. Angela?

MS MacRAE: I think one of the last things I just wanted to ask you about comes up in our submission is in relation to costs awards for self-represented litigants. We are attracted to that proposition, partly because of the disparity that otherwise arises for the opposing party that would have no costs awarded to it so that incentives are different, and that seems to be an unattractive imbalance there. So on those grounds, I guess, that's the prime reason why we have gone for it, rather than a reimbursement for the costs that might have been incurred by the self-represented litigant, but nevertheless you might see that as some advantage, given that there is time and effort involved for those people. Can you just outline for us a bit what your concerns are around that draft recommendation and how you see that playing out.

MR BARCLAY (LST): It's a fundamental thing. Costs are the penalty, costs are compensatory. That's why we get party-party costs and simply primary indemnity costs, unless you can demonstrate some default on the opposing party; so if costs are compensatory, an unrepresented litigant has nothing to be compensated about, hasn't incurred the expense. If you want to change it and make all costs a penalty, which it seems to me that would be, then that requires a complete about-face, the whole reason we have orders for costs.

The other thing is, on what basis are the costs to be calculated? Do we say, "You were a builder and you would have earned this much money that day." That's going to leave it wide open for being arguments about whether that's right or not, so there's also a real risk when it comes to qualification of an unrepresented litigant's costs, that you end up having another litigious dispute about the quantum of those costs. As it presently is, we say the present system really needs to stay, unless there is going to be an about-face about why we have costs orders.

DR MUNDY: So the situation that we're concerned of, and we will put aside the querulous self-represented litigant, let's come back to my dispute with my builder, and let's say my builder is a large building company and is better-resourced than the poorly paid statutory officer of Commonwealth. I am there representing myself and

the situation is, well, if I'm there representing myself and there is no risk of a costs order, then the incentive to pursue this litigation unreasonably, you would concede, is greater than if they were exposed to an adverse costs order, simply by virtue of I had retained your firm to represent me in court. Because the consequences of loss and the effect of adverse costs orders, which are cited for many reasons as reasons why we shouldn't worry so much about contingency-based fees in Australia, but the effect of adverse costs orders, which constitute the bulk of the litigation costs, not court fees, are not there. So why would that not change the behaviour of the well-resourced litigant when the other side is represented as opposed to not?

MR BARCLAY (LST): It presupposes the highly-resourced litigant is going to act improperly.

DR MUNDY: It does, and there are examples of that, I'd suggest.

MR BARCLAY (LST): But it's rare.

DR MUNDY: Okay. So it's a theoretical possibility but not something that is in practice encountered so regularly as to upset the traditional balance?

MR BARCLAY (LST): I think that's right, but further, the proper way to tackle that is by judicial intervention. It says to the defendant, "You can't win. The other representative doesn't know that he can apply for summary judgment, and I'm about to tell him, and you lose." Now, you're not going to have a trial, so I think proper judicial intervention in proceedings such as that, where a party is acting improperly, is the way to resolve it.

DR MUNDY: Your view would be, by the sound of it, that in the vast bulk of these relatively small number of cases, the judicial officer would be onto it?

MR BARCLAY (LST): In this state, which is all I can really talk about, is yes.

DR MUNDY: If you could provide us with any cases where in fact the self-represented litigant has been in the circumstance you have just described, that would be most helpful. I don't expect you to know them off the top of your head. I presume you don't participate in such litigations, apparently.

Thank you very much for your time, and I do apologise for the slight late start and keeping you here a bit longer than you may have expected to be, but we do appreciate, and particularly we do appreciate the circumstances your organisation finds itself with resourcing, as compared perhaps to the resourcing availability of some organisations you may be a member of.

MR BARCLAY (LST): Thank you so much.

DR MUNDY: Could we have National Legal Aid please? Could you please state your names and the capacities in which you appear.

MR TURNBULL (NLA): I'm George Turnbull, and I'm the current Chair of National Legal Aid.

MS SMITH (NLA): Louise Smith, and I'm the Executive Officer for National Legal Aid.

DR MUNDY: Thank you.

MR TURNBULL (NLA): Just by way of explanation, National Legal Aid is a - it represents all of the directors of each of the legal aid commissions around Australia. It's a forum for engaging at a national level with governments and with other key stakeholders about the practice of legal aid and related issues. We meet three times a year, or as needed, and the chair is rotated on an annual basis. For my sins, I happen to be in the Chair at this time. We have got a permanent secretary, as I think Louise has mentioned, which is also supported by an administrative assistant.

Just in response to the draft recommendations, we concentrated really on chapter 21, reforming the legal assistance landscape, and to a lesser extent on chapter 24, which deals with data and evidence gathering. I am happy to hand it over for questions or I can perhaps make a few key points.

DR MUNDY: Whichever you would prefer.

MR TURNBULL (NLA): Yes, okay. I will just make a few points about chapter 21. From a Legal Aid Commission perspective, the question of whether the right mix of services are being provided or if we have got the balance right doesn't in reality arise because of the size of the funding envelope, so the reality is that we are overwhelmingly concerned with criminal law services and with also family law. We would have the support of a proportion of any new funds or any new moneys being set aside for civil law services, civil law assistance, and I guess also on the question of whether we are targeting the right people, again putting comment to one side, where we really have little choice, we of course are bound by the priorities set out in I think it's schedule A of the National Partnership Agreement and we also, in addition to that, take account of competing priorities and in an environment of limited funding in order to meet our budgets.

The question of whether eligibility criteria for the legal aid commissions and clearly community legal centres should be aligned, it really depends on the nature of the services being provided and the context in which it's being delivered. On Legal Aid rates and I add also, if you like, the allowances that are made for lump sum

payments which has also I think been raised by Victoria, the growing gap of course is an emerging problem and it's particularly acute in family law with the costs of services increasing significantly. We have made some suggestions in our submission about possible models for better aligning Legal Aid rates to the market. In relation to the distribution of funding, NLA supports accountability and transparent processes for the allocation of public money and we consider that there should be further investigation into the applicability of the current model but we would generally agree with the Dietrich principle.

We appreciate that not all CLCs, community legal centres, are ideally placed but we believe that this can be remedied over time with a collaborative approach such as that that was adopted in WA in 2003. No commission considers that competitive tendering would be appropriate. Questions about the extent of civil law needs, we think the best evidence we have got is the law survey that was undertaken and in relation to the National Partnership Agreement, we agree that there are significant deficiencies in the current agreement. In one sense, it's not a sort of real national partnership agreement. It only deals with the Commonwealth's obligations or the Commonwealth's funds and there are no state moneys involved. We would support a renegotiation which resulted in a genuine buy-in by all governments, provided that the service providers were consulted. That's very important and I think there are some real issues. We are aware of that and cost is a factor. I think that's probably all I can say at the moment.

DR MUNDY: Thank you for that. Can I perhaps bring you back, and it obviously relates primarily to the distribution of state money, but we heard from the Victorian Legal Aid Commission on Wednesday, I think it was or it might have been Tuesday, that they had taken a decision that they were no longer going to provide legal assistance for low grade traffic offences which were of themselves criminal but led to substantial risk of imprisonment, so they might be criminal in character but as far Dietrich was concerned, it wasn't really applicable, at least at that point in the game.

MR TURNBULL (NLA): Yes.

DR MUNDY: Is it the case that most legal aid commissions are funding those sorts of matters which Victoria has - and it may have only been temporary; I can't quite remember - but are funding those sorts of matters?

MR TURNBULL (NLA): Many are not. I don't know whether it's most.

DR MUNDY: I guess the question - and I'm happy for you to take this on notice - is this one: to what extent are resources being deployed for providing criminal legal aid for matters that don't have a realistic prospect of incarceration for the individual? In other words, how much money is being spent on criminal matters where Dietrich is not immediately in play? I would be interested to know because I think, to be

frank, that money could be devoted to other purposes.

MR TURNBULL (NLA): My sense is - I would need to check this - very little, very little, but can I just mention that it does depend a bit on the service that you're talking about.

DR MUNDY: Yes.

MR TURNBULL (NLA): If you're talking about the traditional grant of aid where the person has legal representation in the way we understand it, it would be very little but if you're talking about the duty lawyer service - - -

DR MUNDY: So if they are having a chat on the way in, that's a different story.

MR TURNBULL (NLA): It is, yes, but I would be surprised if - - -

DR MUNDY: It just struck me that if Victoria thought a solution to their funding challenges was - there must have been more than two-and-six in it.

MR TURNBULL (NLA): For example, in Western Australia, we would never grant aid for anything in the criminal sphere unless either there was almost a serious risk of imprisonment or alternatively, there were some really special circumstances.

DR MUNDY: Yes, a person that is particularly disadvantaged or there is a risk of them losing a livelihood, presumably.

MR TURNBULL (NLA): Now, I don't know if Louise could add anything.

MS SMITH (NLA): I would agree with the suggestion that it's very little. That's certainly my understanding and I am happy to take the question and make sure that it - - -

DR MUNDY: I guess what I want to clarify is that there isn't criminal work being done that isn't going to trigger Dietrich, because then I think there is a legitimate funding choice to be made available and I think at that point, there is a legitimate question for governments to say, "No, we want that money spent on civil work."

MR TURNBULL (NLA): At the risk of creating difficulties, I just want to mention one thing. Even though we would ordinarily grant aid where there is a risk of imprisonment, that is still contingent upon an assessment of merit.

DR MUNDY: Yes.

MR TURNBULL (NLA): That doesn't save you from Dietrich, because the facts

of Dietrich actually were precisely that. It was a County Court case in which aid was refused on the basis that there was no reasonable prospect of acquittal, so in a sense, we are currently exposed.

DR MUNDY: Yes, you can't apply the latter test as you would normally do.

MR TURNBULL (NLA): Yes.

DR MUNDY: No, I appreciate that.

MS MacRAE: Just in relation to the distribution of funding, can you just advise, or do you feel it's appropriate that the funding for the CLCs comes through the LACs and then on to CLCs and there seem to be some competing models about how that's done in various jurisdictions. Can you comment on the pros and cons of those things?

MR TURNBULL (NLA): I might ask for these two to comment but, for example, in my own experience it would certainly work quite well and there wouldn't be much adjustment that would need to be made, for example in Western Australia, because the program manager is employed within the Legal Aid Commission and the program manager is really the key person in relation to the funding distribution of CLC. Certainly that's the case in Western Australia.

DR MUNDY: But that's money from the state or from the Commonwealth?

MR TURNBULL (NLA): Both.

DR MUNDY: From both.

MS MacRAE: As compared to Victoria that has a statutory board that determines those things. I'd just be interested in whether you've got a view about whether one or other of those institutional frameworks works better?

MR TURNBULL (NLA): No.

MS MacRAE: Or whether you think it's a bit immaterial to - but in practice there's not that much difference. The Victorians seem to think pretty strongly it did have a big difference when we saw them last week - this week.

MR TURNBULL (NLA): When you talk about the statutory board, are you talking about the Legal Aid Commission?

DR MUNDY: Yes.

MS MacRAE: Yes.

MR TURNBULL (NLA): We all have a statutory board, so when I talk about decisions being made within the legal aid commissions, I'm talking about being made by the statutory board and we in effect being authorised by that board.

MS MacRAE: So in practice it's the same institutional structure there?

MR TURNBULL (NLA): Yes.

MS MacRAE: Because they seemed to have been implying it was somewhat different.

DR MUNDY: Yes, it may be the case, I'm not sure, but my recollection is that in some jurisdictions the Attorney-General's Department distributes the resources. They might take advice from the LACs and the CLCs but in Victoria the money goes to the Commission and the Commission doles it out. The issue that's raised there is the conflict of preference between the work of the CLCs and the work of the Legal Aid Commission's own lawyers, although, no, to be fair, no such prejudice has been able to be evidenced to us.

MS MacRAE: A couple of CLCs have given us evidence they'd prefer it not to come through LACs.

MR TURNBULL (NLA): Yes.

MS MacRAE: So to the extent I'm sure they can't prove anything but they feel I think that they - - -

DR MUNDY: There is on its face a governance conflict. The question is how real it is.

MR TURNBULL (NLA): It's not real; it's not a conflict. We've been working with the CLC community for many, many years. It's not a conflict. Just in relation to the point about where the funds should be channelled to, whether it go through a commission, the point I was making earlier about the example in Western Australia, it actually comes from governments but it's directed in the sense though the program manager who's - in fact the program manager in consultation with both governments will in effect be part of the determination of where those funds are going.

DR MUNDY: Given the uniform opposition to competitive tendering, and I guess I'm thinking of this as someone who was a treasury official in Western Australia once upon a time, if we're going to allow the sector to divvy up this money, be it the state government or be it the Commonwealth government, how are we going to be

assured that the services are being provided in the most efficient way and there being applied in the most effective way?

MR TURNBULL (NLA): Yes.

DR MUNDY: This is not to say that I think there's lots of fat, lazy CLCs sitting around the country. I've got no evidence of that but I guess this is why people propose competitive tendering - to drive economic efficiency. We identified some reasons why you might not want to go that path in the report, particularly around the volunteer nature and source of the volunteers for CLCs, but the fact remains particularly if we were to recommend increases in public funding, we would need to suggest to government how they can be satisfied that the money will go to the areas of greatest need. So how are we going to advise them of the framework to ensure that?

MR TURNBULL (NLA): First of all we're not talking about a lot of money.

DR MUNDY: I don't know how much money I'm talking.

MR TURNBULL (NLA): No. They really are the poor relations in so many respects, the Community Legal Centres, and operating on a very low cost basis with, as you say, volunteers coming in. Certainly in the case of the review that was undertaken in Western Australia which I know a little bit about, there was some extensive research undertaken into areas of need along with the costs of delivering services. That was an approach which [indistinct] included officials from both the Commonwealth and the state, along with the CLC association, and the Legal Aid Commission were involved as well. Certainly as a result of that review there was an acceptance on the part of both governments that the placement of Community Legal Centres in Western Australia - they were appropriately placed and it also identified some gaps which provided the opportunity for the State Government to actually inject some additional funds into the program and new Community Legal Centres were put in place in some of the areas of high need. That was a process that satisfied governments and which I think produced a good outcome.

DR MUNDY: Have similar studies been undertaken in other jurisdictions that you are aware of? If you want to take it on notice - - -

MR TURNBULL (NLA): I think it - - -

DR MUNDY: Either who has or who hasn't.

MR TURNBULL (NLA): I'm aware that, yes, an exercise was commenced in Victoria but I'll take that on notice if I may.

DR MUNDY: Would it be your view then that it would not be unreasonable perhaps as part of the national partnership agreement, a new one which was truly a partnership, that that sort of study should be a key element and that its repetition periodically, because needs obviously change, but a study like that should be something that should underpin and then that study may give rise to the Commonwealth being able to identify where areas of need are - they might be in rural New South Wales; they might be in downtown Hobart - where its money would best go on a needs basis because I think you reflected to us in Perth a week ago that the study was statewide, and Commissioner MacRae and I both have a degree of familiarity with Western Australia, that there are some areas of profound disadvantage, particularly in remote Western Australia, and that your study picked up that regional characteristic as well and enabled a statewide - and if that was done on a regional basis, that would enable the Commonwealth to underpin its assessment and probably might help but thinking about its indigenous legal program as well. So it would give a nationwide basis for funding.

MR TURNBULL (NLA): We'd certainly support that.

DR MUNDY: Okay.

MS MacRAE: Maybe if we can talk about some other matters that are completely separate. We've suggested that there should be - and we've probably used the wrong word for calling it a single entry point because people have thought that means only one door that people would access services, and that's not what we mean.

MR TURNBULL (NLA): Yes.

MS MacRAE: But we have put out there that the Law Access New South Wales seems to be quite a good model that others could follow. Would you see value in that and is that a reasonable model, given the size of some of the jurisdictions. Obviously they couldn't have something quite as grand but do you support that sort of idea?

MR TURNBULL (NLA): I think it's a really good idea. It would vary a little bit around the country. For example, in some commissions we all have very well-developed telephone information and referral and in some cases initial advice services, and of course people walk in and we provide a similar service to people walking in off the street. That exists already. In most commissions that would be one possibility. Certainly in the case of Western Australia that's what we would be looking at and in fact the Law Society - we have been having discussions with the Law Society about their law access program being combined with our service. So I think that's - and I'm pleased to hear you say that it wasn't intended that it should be the only point of entry.

DR MUNDY: I mean, there was some concern expressed to us at various points about multiple information providers, there being overlap between the information being provided by CLCs and legal aid commissions. Naturally, you know, because of the efflux of time some material was more out of date than other material and that was what I think originally drove this but also quite frankly there may be some savings available in reducing particularly, if you like, the infrastructure overhead cost which could then be redirected back into making the service better. I mean, when we're talking about efficiencies in this study, it's not about reducing money, it's actually just making better use of the bulk of the money that's there. It was raised with us very early on in this inquiry, that that was an issue in another jurisdiction.

MR TURNBULL (NLA): I don't know how much of an issue it is, to be honest, but it no doubt is.

DR MUNDY: I suspect it becomes less of an issue over time as these things become more IT based rather than traditional bits of paper.

MS MacRAE: Just looking at family law, we talked a little bit with the Women's Legal Service this morning about the problems that can sometimes present where you will have a power imbalance where there's a requirement for mediation.

MR TURNBULL (NLA): Yes.

MS MacRAE: You have suggested that there be a national duty mediation service at all family law courts.

MR TURNBULL (NLA): Yes.

MS MacRAE: Is that partly trying to address that issue or are there other things that you or the reasons - if you could elaborate a bit more on the reasons for that.

MS SMITH (NLA): That was a proposition that was raised a while ago following a meeting of the national Legal Aid dispute resolution working group, basically comprising a representative from each state and territory and the managers of those programs. It was perceived that there was perhaps a need to be picking up those matters that had got as far as court but then appeared to be capable of resolution once they were through the door. So it seemed that there were numbers and some of the legal aid commissions now receive referrals from the courts.

I think New South Wales actually has a program at the court and those referrals do seem to be producing some success. So it was that sort of idea that we were looking at, picking up those matters that had actually for one reason or another got to court but there was still the capacity for them to settle without needing to proceed to a hearing. So that was the hope, that that service at the court would pick those

matters up.

MS MacRAE: So it was really just from your on-the-ground experience that there seemed an opportunity here basically to reduce stress and cost and all those things.

MS SMITH (NLA): Yes.

MS MacRAE: So it was potentially another layer, one that might be very helpful.

MS SMITH (NLA): Yes. I think the approach of the resolution people has always been to be constantly screening all the family law matters that they see to try and - you know, they might not have settled early but they could settle a bit further down the track given what has happened since.

MS MacRAE: Okay.

DR MUNDY: Did you make an attempt to cost this service?

MS SMITH (NLA): No. It was a very early proposal. It was made a while back in general terms, very much along the lines of what you see in the submission there. That was very much the extent of the proposal that was put and the basis was that we would hope to have sort of further discussions, have additional discussions around it and we would still hope to do that.

MS MacRAE: So coming then to the question of that power imbalance of that earlier stage in the family dispute resolution centre sort of stage, do you see - is having more lawyer involvement at that stage maybe beneficial for counsellors, and we heard a bit about some trials that are run in Queensland? Do you see that as a big issue and something that we do need to look at in terms of what might work?

MS SMITH (NLA): The power imbalance issue is a significant issue. I think all of our dispute resolution practitioners are alert to those power imbalances. The models that the legal aid commissions operate are legally assisted models, so the parties have their legal representatives there and the chairperson, the dispute resolution practitioner, is somebody with legal or social science qualifications and I think that model is a model that helps to address that imbalance and further to that, conferences may be undertaken over the phone, separate rooms. They can be run as shuttle conferences. That's quite common. So yes, I think certainly this model is a good way of addressing that issue.

MS MacRAE: Another issue that was raised this morning was in relation to the qualifications of those FDR practitioners. You mentioned some of them do have legal training but at least in Tasmania we heard that there might be a bit of a systemic issue where they don't have legal training, that occasionally they will overstep the

mark and give legal advice that can then be conflicting with a lawyer giving advice from a CLC or elsewhere. Is that a problem that you would say has been a problem elsewhere?

MS SMITH (NLA): I don't know that I could - certainly from the Legal Aid Commission perspective the chairpeople are all either legally trained or social science trained. The majority are legally trained.

MS MacRAE: Right.

MS SMITH (NLA): That's the in-house practitioners. We also have external practitioners on the Legal Aid Commission panels, the same qualifications. Those qualifications are pursuant to the family law regulations. I would imagine if things are being mediated by people who aren't legally qualified, there would be some significant issues in terms of the advice that people were receiving. I think it's quite a serious situation if that's occurring.

MS MacRAE: Yes.

DR MUNDY: Would it be possible - I mean, we have heard of a program in Washington State where people with limited - we will call them limited practising licenses. They are properly and fully trained in areas of family law within that jurisdiction but they are limited to practise within the family law space. They're professionals, they're trained, they're supervised until a point in their careers. Is that a model that you think might be usefully deployed to assist in increasing the availability of appropriately skilled people to handle these matters?

There's a whole pile of the Priestly 11 they probably get to avoid. I'm just wondering as mediation is essentially the preferred mode of dispute resolution in family law, whether people with limited but appropriate academic tertiary qualification in the relevant parts of the law, plus a pile of social sciences skills - would be something where we could actually in the course of time permit those people to do the work and be confident they could do it?

MS SMITH (NLA): I would like to know more about it I think and I would like to refer perhaps the question to the people who are the experts in the area.

DR MUNDY: Yes. I'm more than happy for you to do that.

MS SMITH (NLA): But on the face of it, it seems - - -

DR MUNDY: It's a bit like - you know, they're fully trained in family law. They're just not trained in contract - - -

MS SMITH (NLA): The other areas of the law.

DR MUNDY: - - - lots of stuff that they don't need.

MS MacRAE: Maybe just one last question in the family law area. We heard in Victoria - and we appreciate that like everyone else they have got strictures on their funding - that one of the guidelines that they have changed which has been quite controversial in that state is that family law, where one party is not represented, then the other party cannot be successful in getting a grant of Legal Aid even where there may be domestic violence involved. So there could be a situation where an unrepresented, usually a woman, would have to appear unrepresented and possibly be cross-examined by a partner that has perpetrated violence and that this can happen - so they can be supported up to the point where they go to trial and then at the point they go to trial, they lose that funding because of the guideline, and I am wondering if you could tell me if you're aware whether that happens in other states and the extent to which that may happen in any case, without the guideline as such but you might find that through means tests and other things, people fail that and you have got people unrepresented in a situation that has involved family violence.

MR TURNBULL (NLA): I mean, it could certainly happen. You would hope that in circumstances that you have described involving safety issues and family violence that there would be an independent children's lawyer appointed. That may not always be the case but if that were so, then I think the risks, it wouldn't necessarily mean that the person would not be subjected to some traumatic examination but it might give you a better - "guarantee" is the wrong word but a better - - -

MS MacRAE: Mitigate the risk of - - -

MR TURNBULL (NLA): - - - likelihood of an appropriate outcome.

DR MUNDY: This circumstance Commissioner MacRae has described has developed some notoriety, particularly in The Age.

MR TURNBULL (NLA): Yes.

DR MUNDY: We would be grateful if National Legal Aid could ask its members the extent and the cost of alleviating such an outcome. In closing, because we are running out of time, Commonwealth Legal Aid only extends to family law matters now where there are children involved. It doesn't extend to property matters. Is that the case?

MR TURNBULL (NLA): Property isn't included.

MS SMITH (NLA): Property is not excluded.

DR MUNDY: Let me rephrase it.

MR TURNBULL (NLA): It's not excluded but in practical terms - - -

DR MUNDY: Let me recast the question. In a situation where a woman has experienced substantial violence from her partner and goes to the Family Court to seek a resolution of the property of the marriage and it's beyond question that she has experienced significant violence from the man, let's say, is that a circumstance in which she would be provided Legal Aid?

MR TURNBULL (NLA): If it involves children - - -

DR MUNDY: No, there's no children involved.

MR TURNBULL (NLA): No children at all.

DR MUNDY: There's no children involved. Let's say there were never any children. It's before or after children. There are no children involved but violence is clear and palpable and well known. He has been convicted, for instance. Would she get legal aid or could you take it on notice and let us know which jurisdictions in which she might get legal aid?

MS SMITH (NLA): Yes, we would have to take it on notice.

MR TURNBULL (NLA): Yes.

DR MUNDY: We are out of time. Thank you for coming all this way, Mr Turnbull.

MS MacRAE: Thank you.

DR MUNDY: Can we please have our next witness which is the Launceston CLC. When you are comfortable and ready, could you please both state your names and the capacities in which you appear.

MS HOUSE (LCLC): I am Sarah House. I am the General Civil Solicitor and Clinic Coordinator at the Launceston Community Legal Centre.

MS DOWNIE (LCLC): And I'm Jessamy Downie and I'm the Principal Solicitor at the Launceston Community Legal Centre.

DR MUNDY: Thank you. Could we ask you to perhaps make a brief - by that we mean five minutes - opening statement and then we will ask you some questions.

MS HOUSE (LCLC): So in our report to the Commission, we were very specific in what we wanted to talk about, because we think CLC Tasmania, our state based body, and also the national association have touched on other matters that we didn't need to, so the main focus of our submission was on merit testing, assets testing, which we think could be a potential problem for our centre should it be implemented in the future, so that's what we focused on.

But just as a brief rundown, so the Launceston CLC, we are a general civil centre. The rule of thumb is we will see anybody about anything apart from criminal law, although we are starting to dabble a little bit in that, but we don't means test. We will see anyone and usually it's for a 45-minute appointment and that's it, so we do a bit of representation but mostly it's just one-off advice sessions and our concern is should the same merit testing and assets testing that Legal Aid use be applied to our centre, a significant number of people would not be able to get access to our service and that's not just an implication for them personally but the other parties.

Our centre provides a very holistic approach, or we try to, so a lot of our clients have complex issues, so lots of different legal issues, clear morbidities that aren't necessarily legal problems, so social issues, financial issues, and we provide a referral service, so it wouldn't just be the legal impact of them being able to access our service but potentially a lot of other impacts on their personal lives as well and also the courts and tribunals and the other parties involved, so those are main concerns, and I have outlined in my submission a few case studies that we thought the Commission might be interested to read.

Another impact that we see, especially in Tasmania, which is an aging population, is that potentially older members of the community would be excluded from our service, so they might be on the age pension but a lot of them might own their own homes or significant assets that again would exclude them from our service, which is a concern for us.

DR MUNDY: Particularly if they are self-funded retirees.

MS HOUSE (LCLC): Yes, absolutely.

DR MUNDY: Thank you for that.

MS MacRAE: I think probably just to make sure that we are on the same page, in our report when we were talking about means testing, we were talking about case work, so we weren't proposing in that instance that things like your advice line and your general information would be subject to those tests.

MS HOUSE (LCLC): Yes.

MS MacRAE: So I think probably that goes a long way to allaying your main area of concern, and I apologise if we were not clear enough about that, but I don't think we have any problem with having services made generally available that are at first information or an advice sort of stage. It's more case work that we were concerned about. We are really thinking how we would look at the means test for those as well but we certainly weren't thinking about means testing something like initial advice that people might come to you for, that sort of nature of a 45-minute chat about legal issues and the other things that you might need to refer on. We won't be proposing that that would be subject to a means test.

MS HOUSE (LCLC): Okay, yes.

DR MUNDY: You could spend the first 15 minutes administering the means test.

MS HOUSE (LCLC): Yes, and a significant amount of - - -

DR MUNDY: One of the issues that was raised with us was this whole question of inconsistency and the potential for forum shopping and I think we have probably got to the stage where we don't think that's an issue. Just before we come to the specifics you have raised with us, the Commonwealth has recently reprioritised its expenditures for community legal services and legal assistance more generally. As a result of the budget and other recent announcements, has your centre suffered any funding losses?

MS HOUSE (LCLC): Not from the federal budget that's been handed down. In the immediate future, we haven't been affected. Our CLSP agreement for the next 12 months is just the same as it has been. The only change that I know that's been made to that is that we are no longer allowed to be active in law reform. We have been stopped from doing that for the next 12 months.

DR MUNDY: So you won't be able to come and see us again.

MS HOUSE (LCLC): Maybe, potentially not, but for the next 12 months, we're going along much the same as we used to. July next year, there could be changes but what they are or could be, at this stage, we are not sure.

DR MUNDY: My next three questions are redundant.

MS MacRAE: Can I ask just in relation to that how much of the work that you do would you say does fall into that advocacy sort of law reform?

MS HOUSE (LCLC): In reality, very little. Most of our time is taken up with - most solicitors will see five clients a day, so we don't have much time left over for that. It's mostly when, mostly the State Government will send us a letter requesting, "What's your opinion on this potential legislation change," or there's something that we notice from a news article or something that a client has raised with us that we think, yes, we actually need to target and do something with that but in reality, it's not too much at all that we do.

DR MUNDY: So it's perhaps not of the character of the activities that would have been of concern to some people?

MS HOUSE (LCLC): I can only speak for the Launceston CLC, so for us it isn't a major change but potentially for other CLCs it could be. Some CLCs have a dedicated policy officer and law reform officer, so that would obviously be a big problem for them. But for us, not so much.

DR MUNDY: Is it fair to say from what your opening statement was that it doesn't matter - that the characteristics of the individual that walked through the door is not of concern to you. You don't bother to means test them. So any person could wander in. The local bank manager could wander in and get 45 minutes of free legal advice?

MS HOUSE (LCLC): Absolutely, yes.

MS DOWNIE (LCLC): Certainly anything proceeding from that, where it fits into one of our programs, that is merit tested.

DR MUNDY: Yes.

MS DOWNIE (LCLC): So fits strictly, so that - - -

DR MUNDY: How much of your work or budget is this 45-minute service as opposed to the subsequent programs that you just mentioned?

MS HOUSE (LCLC): We have a number of different services within our Centre, so general legal, family, employment, discrimination, welfare rights, so Centrelink issues. Most people who walk through the door will get 45 minutes in each of those services, so each of those areas. Depending on how much merit they have and what kind of a situation they're from, can they write a letter for themselves, do they need extra help, that's when we'll decide, "Can you pay for it? Can Legal Aid help you or is really us that need to do something more?"

DR MUNDY: Let's say I'm a small business person and I've had some work down on my shop and I've run into a dispute with the builder and I come in, is that something you'll help me with?

MS HOUSE (LCLC): Absolutely. Absolutely. Depending on how much money you earn, if you can afford to go and see a private solicitor, we'll give you that initial advice. So, "Do you need to take it further? Should you drop it? What things do you need to do before you go and see someone else and do you need to see someone else?"

DR MUNDY: If you formed the view that they did need to see a private solicitor - - -

MS HOUSE (LCLC): A private firm, yes.

DR MUNDY: - - - you'd say, "Here's Mr Smith, Mr Jones and Ms Brown," down the street?

MS HOUSE (LCLC): Yes, free referrals.

MS DOWNIE (LCLC): And we might provide guidance on what to do to prepare for that, to minimise costs going forward.

DR MUNDY: Yes.

MS DOWNIE (LCLC): And how to really make the most of that private service.

DR MUNDY: You have presumably got a reasonable idea of which private firms in Launceston do what sort of work and that sort of thing.

MS DOWNIE (LCLC): Yes.

DR MUNDY: So you send them on a - I was about to say a targeted goose chase as opposed to a wild one but that's probably not a good use of language but that's okay.

MS DOWNIE (LCLC): That's right. So the most appropriate firm for them,

absolutely.

DR MUNDY: Because we're an organisation obsessed by assessment, do you follow up these clients to see what the outcomes of the matters were to, in a sense, to quality assure the services you're providing. Once you've sent the small business operator down the road to launch his litigation against the dodgy builder, is that the point at which you cease to engage with them?

MS DOWNIE (LCLC): It depends, doesn't it, Sarah, so it depends on how much assistance has been provided at the outset, so if it requires follow up and you get a sense that that person might need a bit more support in following up, absolutely. Often they come back to us and tell us what has happened. So you know, we have an ongoing relationship in that sense.

DR MUNDY: But I guess I'm more thinking of it in some sort of performance measurement.

MS HOUSE (LCLC): No. As a matter of course, we wouldn't follow every single client that we see up, only the ones that we think might need a phone call to say, "Have you done this? Have you gone and seen someone? Have you gone?" Then even though it's supposed to be a one-off 45-minute appointment, if they need to come back, if what we've suggested hasn't worked or there has been an issue, they will come back.

MS DOWNIE (LCLC): And we do have a survey system, so we do survey clients to assess outcome.

DR MUNDY: So Mr Smith who was the small shopkeeper, if he happens to get pulled out at random, he'll get surveyed?

MS DOWNIE (LCLC): Exactly.

DR MUNDY: Was he happy with what he got?

MS DOWNIE (LCLC): Yes.

MS HOUSE (LCLC): Yes.

DR MUNDY: Okay, that's good.

MS HOUSE (LCLC): Also on the survey we ask, "What would you have done if we hadn't been around, so if you hadn't been able to access our service, what would you have done?"

MS MacRAE: What sort of response do you get to that?

MS HOUSE (LCLC): Nothing.

MS DOWNIE (LCLC): No, that's not true. They've improved as we've adjusted the way we're approaching the client. We found that sending them out in the post even with a reply paid envelope doesn't get a good response, so we're now targeting people as they leave the office, whether the solicitor flags it and then the receptionist says, "Would you like to take the survey with you? We'd really appreciate some feedback on how you found our service." We're getting a much higher rate of return. So it's just a matter of tweaking that, how to engage them in the feedback and in applications for funding we like to see how our service is meeting your needs and it's that trigger.

MS HOUSE (LCLC): And proving our worth I guess as well. When we ask people, "What would you have done if we hadn't been around?" their response is, "Nothing. I would have sat at home and buried my head in the sand" or "I wouldn't have known what to have done" or "I would have paid \$500 to go and get some advice from a private solicitor," so it's very validating for us to get those responses to know that people really do appreciate the service - - -

DR MUNDY: Could you remember if you asked them, "How did you know about us?"

MS HOUSE (LCLC): Yes.

MS DOWNIE (LCLC): Yes.

MS MacRAE: Would you say that there's a higher level of appreciation that you are there and that you were available?

MS HOUSE (LCLC): Absolutely, yes, and we do CLEs as well, so community legal education. We go around regional areas of Tasmania giving talks on different areas of law. That's a good way for people to find out about us because still a lot of people in our community don't know we're there and just the fact that we've gone out to them, we've tailored a talk for them, incredibly appreciative. Yes, it's great.

MS MacRAE: I'm assuming that although anyone can come in your door, you would say on average that you probably see more disadvantaged people in whatever form that takes. You talked before about how the client base is changing a bit, so you're getting more older people coming in now. How do you sort of adjust your resourcing as those needs change over time? What sort of budgeting arrangements and things do you have in your service? I suppose it's very much demand driven, so given that I'm assuming demand is always going to be higher than the resources

you've got available, how do you ration what's available?

MS DOWNIE (LCLC): In terms of access to the service in general?

MS MacRAE: Yes.

MS DOWNIE (LCLC): It's merit based, so we have an assessment of an individual matter. There's a limit. There comes a time - we're limited. We have guidelines of how many hours to spend on particular things according to what they are. People can always come back and see us on a separate matter but it's generally maintaining that access. We always have the repeat clients who want to come back and ask a lot about every issue and it's about empowering them and directing them to other appropriate services, but we do have strict policies, strict guidelines about access to the service and they are monitored closely, so we try to maintain an equal access to it.

DR MUNDY: We're happy for you to go away and think about this but could you provide us with a copy of those guidelines. We're happy to treat them confidentially as much as we'd love to use them publicly but if you're not comfortable about that, that's fine but it is particularly helpful for our research team back in Canberra to have a look at something like that, to see a real operational version of a very general CLC.

MS HOUSE (LCLC): And just adding on to what Jess says, speaking from a personal point of view with the general legal service that I service at the centre, my rule of thumb is I see people once for 45 minutes and then if they want to come back and see me again, depending on their disadvantage, their level of literacy, "Do they need to?" that's what I make the decision about, shall I spend an extra hour of my time with them, or do I need to say, "I've told you all I can. You need to go to the Legal Aid hotline" or, you know, "There's nothing else that we can do for you." So on a case by case basis we do do that as well.

MS MacRAE: How difficult do you find it with your resources as you're a generalist centre and you're covering such a wide array of civil matters? How difficult is it for you to get staff that can cover that wide array of matters or do you find that you tend to - you talked about the specialist centres that you have. Is that adequate for the sorts of services that you're called on to provide I guess is what I'm asking?

MS HOUSE (LCLC): We don't really have trouble getting staff or retaining staff but the issue is training, so you're being thrown in the deep end with a huge amount of knowledge that you need to acquire quite quickly. I find once or twice a week I will still need to say to a client, "I'm sorry. I need to do some research for you and I'll get back to you," because what we deal with it's basically everything apart from criminal law.

MS MacRAE: So vast, yes, that's what I'm imagining, that you've got such a wide area of law you're covering.

MS DOWNIE (LCLC): That's a good point. Resources for training come in. We're very lucky in our centre that that is a priority and it's managed very carefully but the needs of the staff are met. Also, we work collaboratively with Legal Aid. I mean, our office in particular, I can only speak for our office, works very closely with Launceston Legal Aid office. We can access their lawyers for support as well, information. The Legal Aid advice line is very good for referring clients with other issues but we've gone to great lengths to identify areas of need that they are not meeting and try and meet them, so, for example, we have started an after-hours clinic, drop-in, where there is no other service available. Legal Aid runs clinics in the day. There's a Legal Aid advice line. We have appointments during the day but we saw a need for an after-hours drop-in service. The private practitioners have come on board on a roster basis, on a volunteer basis. I think we are attempting and we are meeting that, you know, taking a proactive approach to finding out what we can do to be most efficient within the constraints that we're facing.

DR MUNDY: So you are working collaboratively to address need and - - -

MS DOWNIE (LCLC): That's right, so, for example, at family dispute resolution conferencing for an unrepresented party, in some circumstances we can provide a lawyer for that purpose, to create equality in terms of bargaining power. It's just being aware of what is needed and trying to provide that service, so we did a collaborative community legal education program with Legal Aid as well, just to outline the difference in the services and what the public can access, the community can access and how to make the most of those free services for their particular problems, so we have found that to work really well.

MS HOUSE (LCLC): Just adding on to what Jess said, we work really closely with Legal Aid but also with private services, so with our clinic, we have private practitioners on a roster who come and give up their time to see clients for us and, you know, we get, say, stuck with some research, some legal research that we are doing, I would have no hesitation to call someone up in a private service who specialises in that area and to ask them to help me or point me in what direction I need to go in. We try to use our funding as best we can by outsourcing and collaborating, yes.

DR MUNDY: Do you have that informal sense with professional advice? I know in my profession I do too. Do you have a sense of how much of that you would actually access? I am just trying to think, because one of the issues we were asked to look at are issues around pro bono support and the debate starts with pro bono appearances in court supported by major law firms down through the sort of clinic

stuff you're talking about, but also this informal private network which is private in the sense of between practising lawyers. How much value do you ascribe to that? Do you do something like that weekly or monthly or daily? I am just trying to get a sense of it and how much value do you put upon it.

MS HOUSE (LCLC): Probably monthly I would say, personally, is how often I would contact someone for assistance but it's invaluable, you know, because with the CLC that we work at, all our practitioners, I think they are five years practising or under, so it's a very young scope of lawyer that we have working for us, so to be able to call someone with 10 or 15 years' experience, it's priceless to be able to do that.

DR MUNDY: It's almost professional mentoring.

MS HOUSE (LCLC): Yes.

MS DOWNIE (LCLC): I mean, I would say I would talk to someone at least once a week about an issue, a practice issue, particularly as we have started a domestic criminal service picking up matters where there is merit but they wouldn't attract Legal Aid funding, so where there might be literacy issues or, you know, something else that's contributing to their inability to represent themselves.

DR MUNDY: What sort of criminal matters would they be?

MS DOWNIE (LCLC): We have started off small with very distinct guidelines, so minor traffic, minor drugs and anything else - I mean, if there are special circumstances - I know we just had one that was stealing but there were particular circumstances where she had mental health issues and couldn't represent herself. We wouldn't normally do that and in fact we have relied very heavily on private sector mentors to guide practitioners in training and support and it has been invaluable and we are very grateful.

MS HOUSE (LCLC): Yes, absolutely.

MS DOWNIE (LCLC): We have had nothing but support. We have got the volunteer private practitioners. We have got, you know, being able to call them up or ask them questions that hasn't yet evolved to them giving up their time in a courtroom situation to help us with a client that maybe we can't take any further. It hasn't yet got to that stage but that's something that we definitely want to think about in the future.

DR MUNDY: Just remind me. I remember being concerned about this in a former life but are there any federal judicial officers in Launceston? Is there a circuit court there?

MS DOWNIE (LCLC): Yes.

MS HOUSE (LCLC): Yes, they have circuit court dinners, I know, so I assume that, yes, but because we don't attend court, we are not - - -

DR MUNDY: I am sure the President of the AAT attends regularly.

MS HOUSE (LCLC): Yes.

DR MUNDY: I am just wondering, because it was an issue many years ago when I used to do a different thing, so is there an issue about access to the courts for the citizens of Launceston?

MS DOWNIE (LCLC): On the whole, no, I don't believe so, in my experience.

DR MUNDY: Because there is no District Court in Tasmania, is there?

MS DOWNIE (LCLC): No, so we have - I mean, there are things like - I know there is a Family Court workshop that we refer to that's run by Legal Aid for access weekly.

DR MUNDY: Yes.

MS DOWNIE (LCLC): Look, I think that's always an issue for parties trying to navigate it themselves. I mean, the duty lawyer scheme - - -

DR MUNDY: There are registered magistrates in Launceston.

MS DOWNIE (LCLC): Yes.

MS HOUSE (LCLC): Yes.

DR MUNDY: The Supreme Court comes on circuit, does it?

MS HOUSE (LCLC): Yes.

DR MUNDY: The Family Court, it comes as well.

MS HOUSE (LCLC): Yes.

DR MUNDY: So presumably the circuit court comes on circuit as well.

MS HOUSE (LCLC): Yes. Do you mean access in terms of financial access or access in navigating the system, physical access?

DR MUNDY: No, I meant how do the citizens of Launceston go to the courthouse and get their matters dealt with?

MS HOUSE (LCLC): Physical access, yes.

DR MUNDY: So the Family Court comes on circuit to Launceston, so therefore the circuit court must come.

MS HOUSE (LCLC): Yes.

MS MacRAE: That's fine.

DR MUNDY: Thank you very much your time and coming down from Launceston. We really do appreciate it. Sadly, we haven't been able to conduct hearings in anywhere other than capital cities.

MS HOUSE (LCLC): Thank you.

DR MUNDY: Could we now have Environmental Defenders Office (Tasmania), please. Could I ask you state your name and the capacity in which you appear, please.

MS FEEHELY (EDOT): Sure. My name is Jess Feehely. I am the Principal Lawyer with the Environmental Defenders Office in Tasmania. I am here in that capacity but also as a representative of the Australian Network of Environmental Defenders Offices.

DR MUNDY: Thanks. Could you perhaps make a brief, which means no more than five minutes, opening statement.

MS FEEHELY (EDOT): Sure. I wasn't expecting to make a statement, so I will make it very brief indeed.

DR MUNDY: If you don't want to make one, you don't have to.

MS FEEHELY (EDOT): I guess the main purpose of our submission and of my appearance here today is really to articulate the role of Environmental Defenders Offices and the importance of recognising that access to justice needs to include access to environmental justice. I guess the significant change between our initial submission on the draft issues paper and on the draft report is that our funding was cut. Our Commonwealth funding was cut in December, so the issue of access to justice has become particularly acute for Environmental Defenders Offices around Australia. I guess it's our view that Environmental Defenders Offices provide a cost effective mechanism for providing that access to environmental justice but there are also a number of other issues around costs, standing, access to merits review and the things that we have listed in our submission that would also go a long way towards improving access to environmental justice around Australia.

DR MUNDY: Can I just make one brief observation - and this is not meaning to dismiss the issues and we did make a deliberate decision on this. The Commission last year finalised a report on major project assessment where we looked at, and I think it was chapter 9, at length, and I was one of the commissioners on this piece of work, at length around the issues of standing and all - - -

MS FEEHELY (EDOT): Yes, [indistinct] and we appreciate that.

DR MUNDY: And I think we probably weren't at vast variance and we did certainly find the assistance of a number of mediators and the national organisation particularly helpful in that matter, so we haven't come back there because, as you would be aware, the report is already too big and I know books can be written on standing and merit appeal, so we haven't gone to those issues but we are very interested in the funding question. We have certainly had evidence from your

colleagues in the ACT as to the effect of these funding cuts and their evidence to us was that the ACT EDO was likely to close. I guess more broadly, and I think we have asked this question of others around the place, are you able to, I guess, give us a sense of what is the funding cut for yourselves? If you are able to take it on notice, it would be helpful to get feedback on the funding cut for each of the EDOs, if you are able to do that.

MS FEEHELY (EDOT): Sure. I will - - -

DR MUNDY: What are the consequences for these? What is not going to get done that used to be done?

MS FEEHELY (EDOT): Sure, so I can definitely speak to the Environmental Defenders Office of Tasmania's position. I have been attempting to gather some facts from around the country and we will take that on notice and provide that in due course. For the Environmental Defenders Office in Tassie, the Commonwealth funding is the bulk of our funding. We do currently have a one-off grant from the Solicitors Guarantee Fund in Tasmania that does provide a bit of a buffer but as of 1 July this year, we won't receive Commonwealth funding and that's 90 per cent of our funding, essentially, so for us, that's a significant issue in terms of our long-term sustainability.

We are looking into various other options around philanthropic donations and being a donor driven model and those things, so the most immediate issue is that it's really changing the way we have to think about how we can provide our service long term. There is a significant risk that we won't be able to provide that beyond the expiration of the Solicitors Guarantee Fund money which at this stage looks like around March next year, March 2015. I guess in the absence of an EDO, there really isn't another service that provides advice on environmental law in Tasmania. We would frequently have people referred to us by government agencies and Legal Aid, simply because Legal Aid doesn't provide that information and the EDO has that expertise, so I think there is a significant service that will be lost if the EDO wasn't available in Tasmania.

I think one of the things that's often misunderstood or ignored is the role that EDOs play in actually discouraging litigation without prospects, so while I guess negative commentary around EDOs tends to focus on the litigations that we are involved in, it ignores the vast majority of cases where we are actually discouraging people from engaging in litigation that we don't see as having merits or prospects of success, so I think it's likely that the tribunal might see an increase in appeals that are taken because people haven't been able to access advice to say that that's probably not the best use of their time or resources to pursue that, because certainly taking away the Environmental Defenders Office doesn't make the community happier with environmental outcomes. It just means that they are not able to access expert advice

about what they can do about it and in some cases what they can't do.

DR MUNDY: I think there may well be a perception at large that EDOs really just bring very large high profile test case sort of matters. I know that other jurisdictions often, particularly where the planning law and the environmental law are one and the same thing or they bump up against each other, that quite often they are helping citizens with what might be relatively ordinary matters. Are you able to give us a sense of the extent to which the work of either your EDO or the EDOs more broadly are in those - I don't want to call them mundane, but community/individual/citizen type matters as opposed to bringing action to stop the pollution of Gladstone Harbour?

MS FEEHELY (EDOT): Sure. We have also tried to find a better word than "mundane" because we find ourselves using that occasionally too.

DR MUNDY: "Ordinary" doesn't work either.

MS FEEHELY (EDOT): No, so, look, I think certainly from EDO Tasmania's perspective, the vast majority of what I will call litigation work - and it often involves representation and often it's just the advice leading up to that or discouraging people from doing that but the vast majority of what we do is those smaller matters in the Resource Management and Planning Appeal Tribunal; yes, matters which matter very much to a particular community but don't really make waves at that broader level. It's the amount of media attention that the bigger cases get that kind of skew the perspective in terms of the amount of our time that gets spent on stopping development at that larger scale. I think that would be consistent across all of the EDOs in terms of the percentage of time that they are involved in the ordinary - - -

DR MUNDY: If we could get some evidence of stuff like that, that would be helpful.

MS FEEHELY (EDOT): Yes.

DR MUNDY: And perhaps just some case studies on the sort of - - -

MS FEEHELY (EDOT): Yes.

DR MUNDY: Because we have got lots of case studies about CLCs helping to pick up people with Legal Aid. We don't have any in this space, particularly those that relate to people who are disadvantaged on some sense.

MS FEEHELY (EDOT): Sure, and I think that's certainly one of our concerns around the justification for the cuts in funding being around EDOs not providing

frontline services, which from our perspective is a misunderstanding of what environmental law and access to environmental justice is all about, because it's not just a middle class indulgence. There are actually people who are affected. Their health is affected. Their access to a community pathway is affected.

DR MUNDY: Presumably even cases of small agricultural producers.

MS FEEHELY (EDOT): Absolutely, and particularly - well, across the country, but it's become an issue over the last year in Tasmania too; unconventional mining and people's concerns about the impacts that might have on rural property is increasingly an issue that we are contacted about.

DR MUNDY: Any information around that; I think there's a lack of information in the public domain for us to form a definitive view about these things.

MS FEEHELY (EDOT): Mm'hm.

MS MacRAE: To what extent do you have means tests when you are looking at matters with significant interest? How does the sort of rationing of your resources take place and I appreciate you will have fewer resources to worry about rationing soon.

MS FEEHELY (EDOT): Similar to Launceston, we don't have a means test for advice generally, so we would never ask the question when someone contacts us initially. In the instance where there is an application for us to represent - this is EDO Tasmania; I will speak more broadly about EDOs around the country in a minute - that needs to go to our committee for approval and there's a test that we apply which is around a number of things but our primary concern is public interest, so means or the capacity to pay is an issue but our primary concern is whether or not the issue that's being raised is a public interest environmental issue. There's obviously a bit self-selection that goes on.

People that come to EDOs are generally not people that can afford to go elsewhere, so it's not that often that we would have someone who is incredibly wealthy come and try and get free legal advice from us but that being the case, their capacity to pay would not be the primary issue that would dictate whether we did get involved. It would be the public interest nature of it, so whether it was a significant test of a legal issue and there is some uncertainty around the application of the law, whether the area that was in question was of significant public value and, really, it's about whether or not the person who is bringing the action will get some private interest from it or whether they are actually just trying to protect the public benefit and we would see that as our role, to assist them in that situation.

DR MUNDY: What about in circumstances - and the Warkworth Coal case might

be an example of this - where there is actually a community that's got a substantial private interest in preventing what appears to have been in the Court of Appeal in New South Wales an invalid ministerial decision?

MS FEEHELY (EDOT): And it is often difficult to separate that private and public interest.

DR MUNDY: Because essentially, it is that no individual in this matter was going to be able to bring this case and it's not the sort of thing that litigation funders turn up to assist with in the way they might with a case against - they see it as against their interest.

Even if there isn't a particular issue you ought to try, it's just - here's a bunch of citizens who individually can't bring this. They are not going to get this done any other way. Is that also the sort of matter that the EDOs would [indistinct] on, or does there really need to be this fundamental question of law involved?

MS FEEHELY (EDOT): Obviously EDO New South Wales was involved in the Warkworth case. For us, I guess it's about the deterrent value that that could provide, so even though there might be some private interests, you know, the law itself was reasonably clear, but it's the enforcement and compliance with the law that we would see as being a public benefit.

DR MUNDY: And the fact that it may well provide benefits to other groups of citizens down the track where they wouldn't need to - - -

MS FEEHELY (EDOT): That's right, so that's for the precedent value, would be kind of what we would consider as well.

MS MacRAE: So in this difficult situation that you find yourself, what are the other possible sources of funding for you? You mentioned philanthropy and I guess that's one of the obvious ones. Do you get funding from the public purpose funds now? You mentioned you do get something from the State Government at this time.

MS FEEHELY (EDOT): So the Solicitors Guarantee Fund is the equivalent of the public purpose funds in other states, but only over the last couple of years has it been available to community legal centres and we have been lucky enough to get grants from that fund previously. We would be hopeful of getting one in the next round. We will certainly be applying for it but there isn't really any consistent application of that, so we are unsure.

MS MacRAE: Are you just using a year on those things then? Do you get - - -

MS FEEHELY (EDOT): It varies. They are just one-off funds. Occasionally,

they will provide enough money in that one-off grant to carry through for several years but it's only a one-off grant. It's not a recurrent fund.

DR MUNDY: Is it money to do something? Is it project-based money or is it just general revenue?

MS FEEHELY (EDOT): Well, the two grants that we have received from the Solicitors Guarantee Fund have been projects, I suppose. One of them was to engage a litigation lawyer, so recognising that prior to that, there was only myself in the office and it's incredibly difficult to undertake litigation with only one person in the office. So the pitch that we made to the Solicitors Guarantee Fund was around engaging someone to take on and improve our litigation capacity. So it was a project in one sense but it was to fund a position without any particular detail as to how that would be rolled out. The second one was specifically the production of two publications, so that was very project related and so we have engaged someone to do those two publications.

DR MUNDY: This is probably a question with your national hat on but, roughly, what percentage of matters, I guess - this is probably me wanting too much data - both in terms of advice and litigation, fall within the Commonwealth's jurisdiction and fall within state jurisdiction? I suspect it differs from state to state. I imagine Queensland has more issues because of the reef and the - - -

MS FEEHELY (EDOT): To some extent, and I have looked at this because Camilla flagged that this was something that had been asked. Over the last two years there have only been four litigations that EDOs have involved in which have really dealt with federal matters, so principally the Environment Protection and Biodiversity Conservation Act. So the vast majority of the work that we all do in our various states is state-based, but then there will be years where the bulk of litigation is actually more on a Commonwealth issue. So it's largely demand-driven, if you like.

DR MUNDY: So four Commonwealth matters. Are you able to tell me what they were?

MS FEEHELY (EDOT): I don't actually have a list with me. I will just have to try and remember. So there was an application by EDO New South Wales in relation to Ashton Coal, so essentially looking at decision-making under the EPBC Act, and EDO South Australia took a matter in relation to Olympic Dam, so Buzzacott, and then the two EDO Queensland matters in relation to dredging in the reef this year, the Gladstone, yes. So there's a very small percentage which would actually be a Federal Court matter essentially. The rest of them are largely in the general state jurisdiction and the planning tribunals - - -

MS MacRAE: Is any of the nature of your work in the form of community legal education?

MS FEEHELY (EDOT): Yes, very much so.

MS MacRAE: What sort of work do you do in that space?

MS FEEHELY (EDOT): So we would do a number of things. There's publications; so the two that we're working on at the moment are a community guide to mining laws that are responding to the number of requests that we're getting for information about what landowners' rights are around, you know, proposals for mining on their property, and a farmers' guide to environmental laws. So there has been a bit of misunderstanding or lack of information available to farmers about exactly what their rights and their responsibilities are in terms of environmental issues.

So there have been similar publications in Queensland and New South Wales which have been very well received by rural communities. So we're producing one of those. We do workshops in communities, both at our own initiative and at the request of groups who want to know about a particular thing. It may be because something has been proposed in their area and they would like more information about the process to respond to that or it might just be apropos of not very much; they need someone to speak at their AGM and they have heard that we could talk on coastal issues or what have you.

Every roughly two years we also hold a conference and they have a community legal education role. They also have a kind of law reform and advocacy role and they're usually around a particular resource management issue and the laws around that and we would have speakers from government, academics, practising lawyers and community members, basically a forum for discussion around whether the laws are working and, if not, what could be done to change them.

DR MUNDY: These publications you're developing essentially for the - - -

MS FEEHELY (EDOT): Rural land - - -

DR MUNDY: Yes, rural landowners.

MS FEEHELY (EDOT): These two, yes. We have done ones previously.

DR MUNDY: Are you working with farmers organisations and your colleagues elsewhere presumably worked with farmers federations or whatever they're called in Queensland these days.

MS FEEHELY (EDOT): Yes. Certainly EDO New South Wales and EDO Queensland worked in close collaboration with their farmers federations. Our rural guide for farmers is being done in collaboration with the Tasmanian Farmers and Graziers Association. The mining guide isn't sponsored in the same way that the rural land holders guide will be but our education officer is doing a lot of liaison with the Minerals Council, with people who are land holders, farmers and graziers associations and community groups in rural area, conservation groups, the broad spectrum of people with concerns about these issues.

DR MUNDY: So you're cooperating with - - -

MS FEEHELY (EDOT): Very collaborative.

DR MUNDY: You're cooperating with the Minerals Council of Tasmania?

MS FEEHELY (EDOT): We're in conversation with them and certainly the workshop series that will follow the release of the publication will be done in collaboration with various groups, NRM groups and the TFGA to provide both forums and to spread the word through their networks about the availability of those. We also do have a range of more general publications. We have got an online environmental law handbook which is basically the easy practical guide to environmental law in Tasmania.

DR MUNDY: I know. I've used it.

MS MacRAE: I guess just to clarify the point but it's probably an obvious one, that educational sort of type service and material would I guess with your funding cuts be potentially the first to go unless you can find sponsorship or something for it.

MS FEEHELY (EDOT): Yes. I think this is an ongoing discussion with our Board in terms of how we will spend diminishing resources and in some ways the education resources are the legacy product and so if we were to close the office, it's more important to actually make sure that at least that information is available in some way. So we would certainly not be looking to just cut that as a way of savings because we see that as a very important role that we play but when it's that or someone who has an urgent environmental issue and we need to down tools and get into, you know, a court action to represent them, then education would come second in that situation. It's certainly something that we see as a cost-effective way of using limited resources to actually improve environmental outcomes.

DR MUNDY: Perhaps just moving on to some other issues; we made a recommendation that protective cost orders should be available in public interest litigation where the government is involved and we were interested to explore the question about where the defendant essentially is a private party. Some have

suggested to us that Oshlack is enough and that may well be the case, and Oshlack works occasionally but not very often, as we saw in Victoria.

I guess the question is, why should a private party bear the cost of a protective costs order where it may ultimately be, to use their own language, an innocent victim of unmeritorious litigation? Putting aside the point that it's pass the judge test about being meritorious or not, why should the public interest be funded by the private party is, I guess, the question in our mind and, in such circumstances, should the state actually pay for the public interest, hence the idea of a public interest fund?

MS FEEHELY (EDOT): Sure. Yes, certainly. As you say, the protective cost order would only be issued in a situation where there was some satisfaction on the merits.

DR MUNDY: Yes.

MS FEEHELY (EDOT): I think from an environmental litigation perspective generally the private interest will be turning a healthy profit off the use of public resources, so the development is in some way already benefitting from the public interest and so there's some balancing out that goes with just bearing some of the cost of litigation in that respect. We are very supportive of the idea of a public interest fund to recognise that, you know, there are some situations where it might be appropriate that the state pay.

One of the difficulties for environmental litigants is often access to scientific expertise and so having a fund that was available to not just address adverse cost orders but also to assist with providing access to funds so that a scientific expert could be presented and the courts would be able to make more informed decisions.

DR MUNDY: Just on the public interest - I mean, there are funds available administered by Attorneys-General to allow cases of public interest where there's a general - - -

MS FEEHELY (EDOT): A test case, yes.

DR MUNDY: - - - legal issue to be resolved but I think it's fair to say that perhaps the Attorney-General's view of such public interest may be coloured by the nature of litigation given that the Attorney is a politician. Do you have a view about how such a fund should be - I guess, who should be determining the public interest, particularly in cases where the government is the potential defendant, and how such a fund might be funded?

MS FEEHELY (EDOT): EDO Tas doesn't do a lot of litigation as compared to the others, so I'm probably not in the best position to discuss this but certainly it's our

view that it would be appropriate for the Legal Aid Commission to potentially administer a public interest litigation fund. It would be important to have an independent panel to assess applications to that and obviously clear guidance as to what public interest actually meant and what the eligibility was.

DR MUNDY: So if a fund had statutory guidance which could then be applied by - we call them trustees or some people who are notionally independent in some sense.

MS FEEHELY (EDOT): It's embarrassing to admit but I did google this yesterday. I mean, I did notice that the ATO also has a public test case fund and I have no idea whether that operates well or not but certainly the panel that they have seems to be fairly broadly based in terms of effect - - -

DR MUNDY: Things around the ATO seem to actually operate much better than most people expect them to.

MS FEEHELY (EDOT): Just their recognition that there was value in cases that actually tested the law and created some jurisprudence around the application of that is noteworthy, I think. If I could just say, I didn't address your question previously about the other options other than philanthropy. Obviously, the Solicitors Guarantee Fund for us is - well, we would hope to be able to access some of those funds. Obviously, we will need to consider fee for service and I think Environmental Defenders Offices probably are in that position where some of our clients, albeit our position is that they are acting in the public interest and therefore shouldn't have to pay for services, potentially they are less financially disadvantaged than some of the other CLCs, so for large NGOs, environmental NGOs, we may need to look at some sort of fee for service. Unfortunately, it's a very tight market for everybody. Everybody is facing funding cuts across the board, so in the environmental space, it would be very unfortunate for the conservation groups to be suffering funding losses and then also having to be paying for advice that they haven't previously had to pay to get access to.

DR MUNDY: Yes, we are aware of the challenges of funding cuts. I am probably about done there. As I said, any information that you can provide us with reasonably promptly - - -

MS FEEHELY (EDOT): Sure. Yes, that's right. We have put the wheels in motion to get the stats together. We just haven't managed to get them together for today. I do just want to comment on the advocacy issue in terms of, I guess, the extent to which we are involved in advocacy. There is a little [indistinct]state by state but I would say probably about 25 per cent of the work that we do is around law reform, some of that proactive and a lot of it reactive to calls for submissions to particular proposed changes to legislation and often at the request of government departments seeking our input, so we would consider that to be a significant loss if

funding cuts meant that we weren't able to participate in that, because I think EDOs particularly feel that that's another cost effective use of our time, is to actually ensure that the laws that protect our environment are adequate.

DR MUNDY: I think our colleague Commissioner Coppel and I think it was a very good use of your time in the major projects inquiry. Just to finish on one question, just a factual one: is it possible for you to provide data nationally on, I guess the matters that you bring on a public interest basis, the number that get struck out as not meritorious and the success rate of those that go to trial?

MS FEEHELY (EDOT): Yes, sure. I can just speak briefly on that from a Tasmanian perspective. A scholar at UTAS actually did a study on this last year, a fairly clinical study of over the past five years, the number of cases taken to the tribunal not just by EDOs but taken generally and kind of sorted into what she saw as public interest versus private interest, and of the five that she recognised as having gone all the way through to hearing and were public interest, all five of them either succeeded in full or partially. They improved conditions.

DR MUNDY: It would just be useful, I think, to get this information.

MS FEEHELY (EDOT): Sure.

DR MUNDY: Because there does appear to be some view that matters brought by EDOs are frivolous, unmeritorious and - - -

MS FEEHELY (EDOT): I am sure we will be able to dispel that.

DR MUNDY: I am aware of a case which has been described as such which went to trial and was fully successful.

MS FEEHELY (EDOT): No worries. I can get that.

DR MUNDY: Thank you very much for your time. These hearings are adjourned until 1 o'clock.

(Luncheon adjournment)

DR MUNDY: We will reconvene these hearings and can we have Community Legal Centres Tasmania, please. For the record, could you please state your name and the capacity in which you appear.

MR BARTL (CLCT): My name is Benedict Bartl and I am a two day a week Policy Officer with Community Legal Centres Tasmania.

DR MUNDY: Thank you, Mr Bartl. Would you like to make a brief opening statement, and by that I mean no longer than five minutes.

MR BARTL (CLCT): Sure, so first of all, on behalf of CLCT, Community Legal Centres Tasmania, I would like to express our gratitude at being able to respond to the Productivity Commission's current inquiry on access to justice and, more specifically, your draft report. I should also note at this point, we would like to endorse the submission of our parent body, that is the National Association of Community Legal Centres, including their response to the draft report which we believe was provided in May of this year.

There is a lot that I could say but a lot of it has also been covered by the National Association, so I thought perhaps I could just focus on Tasmania. It's clear that there is significant disadvantage in Tasmania. Approximately one third of Tasmanians are in receipt of either government pensions or allowances. Up to half of the Tasmania population is illiterate and more than half are innumerate, so it's definitely the case in Tasmania that there is significant legal need and by legal need, we adopt the definition provided by the National Association, which is legal need that is unable to be dealt with by individuals.

Turning specifically to community legal centres in Tasmania, there are eight in total and if you have a copy of our report there, a complete list is provided at the end of our submission. There are three generalist centres and five specialist centres. CLCs in Tasmania do a variety of work. This can range from legal advice, legal information referrals, case work and law reform and the board of management of each of the CLCs determine what exactly will be engaged in by the centre.

In terms of the generalist CLCs, we have been able to provide some statistics for you on the disadvantaged in Tasmania and the work that our generalist CLCs do. A sort of broad point I would like to make about generalist CLCs is they are unable to meet demands. There is significant unmet need in the Tasmania community but they do do their best to meet unmet need and that applies equally to our specialist centres as well, so with our generalist centres, they are located in Hobart, Launceston in the north and Devonport in the north west and they also provide significant outreach to a number of towns in Tasmania and in Hobart, there are two satellite offices in Bridgewater and Sorell, which are approximately 20 kilometres sort of east

and north of Hobart.

Something that may be of interest to you is we were able to crunch some numbers and found that in Tasmania, for every lawyer working at a generalist centre, there is at least 9000 disadvantaged Tasmanians who may require the assistance of a lawyer and that, as the table shows, can range anywhere from one in 9000 to one in 16 and a half thousand in the north west. We were unable to find any similar figures from the mainland but I think it's fair to say that there is significant work for the lawyers at the generalist centres.

Turning specifically to the specialist centres, it is more difficult to provide statistics because they do provide state-wide services, so all of those centres will provide telephone advice, will visit people if required and will attend the court if they need to. I am, as I said, unable to provide any specific statistics but turning to levels of disadvantage in Tasmania, there's about 32 per cent of Tasmanians who are at risk of disadvantage or social exclusion.

The last point I probably want to make to you is about our funding. As our report shows, we receive approximately \$3 million across Tasmania; 64 per cent of that is from the Commonwealth and most of that is recurrent funding. It is of concern to all CLCs that of our state funding, most of it is provided for one-off, for project work and we would like to see the Tasmanian Government providing more funds and particularly more recurrent funds.

DR MUNDY: We should probably start on funding and thank you for that and thank you for the information you have provided to us. You say that just over \$3 million in funding is provided. Two thirds of that comes from the Commonwealth. I'm old enough to be able to do some mental arithmetic in my head still, so that's about \$2 million bucks a year from the Commonwealth, for the sake of the discussion.

MR BARTL (CLCT): That's correct.

DR MUNDY: That's the 2013-14 funding. What is your expectation about the 2014-15 funding levels or to put it another way, what are the effects on that \$2 million of the recent budgetary announcements?

MR BARTL (CLCT): Well, at the moment, it's unclear exactly how that is going to impact on Tasmanian CLCs. The federal budget recently passed - well, that was last year - no, earlier this year, showed that there will be a cut to all CLCs.

DR MUNDY: Yes.

MR BARTL (CLCT): Exactly how that applies to Tasmania we do not know at

the moment.

DR MUNDY: We have heard from the EDO. They know how much is going from there.

MR BARTL (CLCT): Yes. We are aware that the EDO will losing all funding and most of that - if you have a look at our funding, most of the cuts are to the EDO.

DR MUNDY: I might ask you to take this on notice but given you don't have a huge number of members, if you could just ask them individually what their expectations of their funding cuts are and perhaps let us know, because then we will be able to tally them up ourselves.

The Commissioner is well aware of the sorts of economic disadvantage that is faced by citizens of Tasmania. We may have a slightly different view about how it should be addressed but how do you think these levels of - you know, there are other regions in Australia which experience similar levels of disadvantage, particularly in relation to indigenous communities but also non-indigenous communities and often in the periphery of urban areas. Given that the Commonwealth must ultimately allocate money across states in some way, how do you think these levels of disadvantage should be reflected in the decisions that the Commonwealth makes?

The Commonwealth at the moment essentially funds nothing other than family law matters where there are dangers to children and so on. Should the Commonwealth funding I guess be directed at general measures of economic disadvantage or given the nature of the Commonwealth's funding, should it consider its distribution of funding around the matters that it actually funds? It's not clear to me because I don't know whether the general level of disadvantage expressed and the sort of economic indicators that you cite is directly correlated with the relative needs of Australian citizens, which is the Commonwealth's concern in relation to those matters that the Commonwealth is funding, or if you've got data that says it is, great.

MR BARTL (CLCT): Yes, look, that's a difficult question. Jane Hutchison who will be speaking after me is the head of CLC Tas and she may be able to provide some more information, particularly given that she has been working in this area for a lot longer than I. I suppose one point I would make is the finding of our national association, which was that we would like to see legal assistance funding provided equitably and consistently across Australia. I think at the moment the problem is that there's a hodgepodge funding arrangement, with some states being more generous than others. What we would like to see is all the states and territories coming together with the Commonwealth to ensure that funding is adequately and equitably provided across the board.

DR MUNDY: Page 5 I think reflects on some of the data you gave us. You pointed

out that in your view the advocate to demand ratios are essentially too low. I guess that begs the question of what's the right level, because if we were to establish the right, I would suspect I could probably find areas of western Sydney which probably have even higher and more densely populated areas, so the question is, it would help us understand how much money a rational Commonwealth government would, unconstrained, allocate money to the sector, if we had a sense of what is the optimal level.

The national NACLC has told us helpfully that you probably need five or six people to run a viable CLC and the cost of running that is probably in the order of I think 5 or 6 hundred thousand dollars a year, a number like that, but do you have a view? What would be a reasonable ratio if it wasn't resource constrained? Is it one in 5000 or is it one in a 100 or are we orders of magnitude away or where would the optimal level need to be to meet the unaddressed need in Tasmania?

MR BARTL (CLCT): Well, we know that at the moment there is significant unmet need but in terms of a precise figure, I wouldn't be able to give you that. As I said earlier, we're not aware of any similar research that has been done in this area. The national association may be able to assist but we do know that for a lot of general centres, they're not meeting need. There is significant unmet need that, in our view, needs to be met.

DR MUNDY: The challenge for us is how much need needs to be met. I hate to say this but it is efficient that some need not be met because the cost to the community in meeting the need is greater than the benefit to the individuals concerned. We'll leave it there.

MS MacRAE: Just finally perhaps on the funding, you've got your eight CLCs. How is the funding determined, the split between those eight? Does that mechanism work well in your view or does it need reform?

MR BARTL (CLCT): All the CLCs receive funding from a variety of sources. They'll have a community legal service who you'll hear from next. It does a lot of Commonwealth work, so a lot of their funding is from the Commonwealth Government. The Tenants Union., on the other hand, who I work for three days a week, receives a significant amount of their funding from the State Government because they're doing tenancy law, which is a state issue. Then some centres, the EDO, for example, has a bulletin that people can actually pay for, so that's in our other column. Some centres are receiving money. So I suppose to answer your question, it depends on the program and who is ultimately responsible for providing that program. If it's a state issue, the state will usually pay or should be paying and if it's a Commonwealth matter, the Commonwealth should be paying.

MS MacRAE: Given the whole system is under pressure, is the extent of unmet

need felt, if I can call it, evenly across that sector or are there quirks of the fact that some matters are state funded and some are Commonwealth means that some of the CLC are doing relatively better than others? I guess we're interested in the other sources of funding but particularly how the state and Commonwealth money is allocated is of interest. Would you say, "If I was a CLC in Tasmania, I'd much rather be doing Commonwealth related matters because, gee, they get better funding than the states ones," or is that an unreasonable kind of question to ask?

MR BARTL (CLCT): I think it's more with Commonwealth funding. The majority of it is recurrent funding which means that those centres can plan for the future whereas those CLCs that are receiving a significant amount of money from public purpose funds are not able to plan for the future because the funding is only there for a one-off project which may only run for, say, three years. So I don't think any CLC - Jane might think otherwise, but I don't think any CLC staff feel that they would rather be working for another CLC, but, yes, in terms of - - -

MS MacRAE: The certainty of funding you're saying is more substantial if you're Commonwealth funded than if you're state.

MR BARTL (CLCT): That's correct.

DR MUNDY: I may have misheard but you mentioned Commonwealth money being put to Commonwealth matters. I just wanted to check whether you were just stating what the situation is or that it's in fact desirable that the Commonwealth funds be only limited to Commonwealth matters. It's open to this Commission to recommend the Commonwealth should fund things for all citizens if it so chose, so I just want to make sure that you're not - well, I want to know whether you're saying that the Commonwealth should only fund Commonwealth matters or have an open mind?

MR BARTL (CLCT): No.

DR MUNDY: You merely stating what the current state of play is?

MR BARTL (CLCT): Yes. In my opinion, if the state weren't to provide funding and Commonwealth funds were made available to do state matters, for example, criminal law matters that Legal Aid are unable to do, then in our view those funds should be used to assist people with criminal matters.

DR MUNDY: So if the Commonwealth felt that it wanted to fund a stand-alone civil law program which wasn't necessarily related to family matters, even though that would largely touch upon the state jurisdiction in terms of a statutory sense, that wouldn't cause you any concern?

MR BARTL (CLCT): No, we would strongly support that. I'm sure that you are aware of this but the former Attorney-General introduced a small amount of funding for a civil justice program. It would be great if that could be extended across all states and territories, and the funding on a recurrent basis.

MS MacRAE: [indistinct] talked a little bit in the national submission about an optimal size or, I guess it may be a minimum size, what they regarded as a good minimum size for a CLC. Are you able to just elaborate in relation to the eight CLCs you have here, what would be the smallest one that you have in terms of staffing?

MR BARTL (CLCT): The Refugee Legal Service which has only just started. That's run 100 per cent by volunteers, so volunteer lawyers, social workers, people like that. So that's more in the sense of it has very little funding. It has received a couple of donations but other than that - - -

MS MacRAE: Does it get state and Commonwealth funding?

MR BARTL (CLCT): My understanding is it received a small amount of seed funding to start with, maybe in the vicinity of \$5000 but other than that it has received no funding from either the state or Commonwealth governments and, as I said, is run by volunteers. So in terms of funding, maybe that is the smallest but in terms of the more established CLCs, yes, again it's a little bit tricky because some CLCs work out of other organisations. Worker Assist, for example, has three staff but it works out of Unions Tasmania. It is a small CLC but it works - - -

MS MacRAE: It's with a much bigger - - -

MR BARTL (CLCT): Yes, and then probably the more established CLCs, the North West Community Legal Service I think has 2.6 lawyers and probably another couple of admin staff, so, yes, that's probably the smallest of the bigger ones.

MS MacRAE: Thank you.

DR MUNDY: Can you give us an overview of the way that pro bono services - or how CLCs in Tasmania utilise the services of pro bono services of private lawyers?

MR BARTL (CLCT): Well, Jane, who will be speaking after me, will be able to talk in great length about that. In general, I can't speak as a policy officer in relation to that. I can speak in my other role, which is a three day a week lawyer at the Tenants Union. If pro bono were required, and that's the sort of significant cases in the Supreme Court or going higher, then generally because Tasmania is such a small jurisdiction, it's probably about who you know, who you feel you can approach. It is difficult. It has been difficult to get pro bono assistance at times, yes, and because there are no big firms in Tasmania, the Mallesons of the world, because of that, there

is a small chance within the small firms that there are here of providing pro bono assistance.

DR MUNDY: We have heard similar concerns in South Australia. Thank you very much for your time in coming today and the effort you have made in putting your submission to us.

MR BARTL (CLCT): Thank you for hearing me.

DR MUNDY: Could we please have the Hobart Community Legal Centre. You can both come up if you want. I thought that would solve the problem. Who said the Commission isn't practical? When you are all settled and comfortable and stuff, could you each please state your names and the capacities in which you appear, for the record.

MS HUTCHISON (HCLS): My name is Jane Hutchison. I am the Director of the Hobart Community Legal Service and that's the capacity that I am appearing today.

MS MITCHELL (HCLS): My name is Meg Mitchell. I am a Lawyer at the Hobart Community Legal Service and I have come to support our Director.

DR MUNDY: Jane, would you like to make a brief five minute or so opening statement. It can be shorter.

MS HUTCHISON (HCLS): I was just going to address what we were supposed to be going to say, so we just want to talk about some specific areas in general that you were talking about that we felt we were qualified to talk about but maybe before I go into that, I might actually just address some of the things from Ben's previous - - -

MS MacRAE: That would be very helpful.

MS HUTCHISON (HCLS): The size of the community legal centres; I would actually go with the National Association of Community Legal Centres' recommendation. We have had very small centres here that have been funded by the north west. I think just in recent times, over maybe the last six years or so, we have gone from one lawyer and one admin staff to two and a half lawyers. It's very, very hard to do anything substantial with those sort of resources. We ourselves have found that we got a substantial amount more funding, probably about five or six years ago, and that has made a huge difference to the services that we have been able to provide, so it does make a difference. If you have just got one lawyer and one admin staff, you are very, very limited in what you can do. If you go to the court, then there is nobody else there to see folk, you have got a day out where nobody is being seen and you have to weigh up all those things.

I weigh those up where we have one part-time lawyer and one part admin person and particularly in our offices in Bridgewater, which is the northern suburbs of Hobart, a big broadacre estate with massive social disadvantage, probably equivalent to some of the worst parts of western Sydney and places like that. At one stage, I think it had the most single mothers in one area in Australia and we do a lot of criminal work out there because the nature of the work is we get a lot of criminal work out there and I do get grumpy because the lawyer then has to spend a morning in Hobart at the Magistrates Court and it means that there's five people not being

seen, so we have to weigh up all the time how to meet the need as best we can and how to make sure people are best looked after.

Therefore, it's not suitable really to have an office with one lawyer. It just doesn't really work. As far as administration, I think most CLCs, we try and keep admin down to an absolute minimum and all our lawyers are expected to do their own typing except for one very senior elderly one, who I am not going to bring into that.

DR MUNDY: Most Productivity Commissioners do their own typing too.

MS HUTCHISON (HCLS): We don't work like traditional law firms. That's the big difference, I suppose, where we try and get the client to share their problem with us, whereas if you go into a traditional law firm, the client just basically hands over the problem, the lawyer takes over and that's what happens. We don't work that way. We try to get the client to actually take ownership of their problems and actually we try and teach them as much as possible in how to manage the problem themselves, because we take a very educational approach to it, because we feel that we know how to do it. You know, we do it time and time again but it's very important that the client, if they ever find themselves in that position again, that they find learn how to do it and that way, it means hopefully there will be less need for them to access services in the future.

MS MacRAE: Could I just interrupt you.

MS HUTCHISON (HCLS): Yes.

MS MacRAE: Just in relation to that matter of the optimal size of CLCs, in some of the larger jurisdictions, it has been suggested that you might get scale by amalgamating some of your CLCs but, I guess in Tasmania, you would be saying that for those existing centres, given that you have got eight and a couple of them are so small that they barely register - - -

MS HUTCHISON (HCLS): Yes.

MS MacRAE: That you wouldn't be suggesting that amalgamation would be a solution here, would you, that you need the centres where they are now, given the spread of resources that you need in the - - -

MS HUTCHISON (HCLS): Most definitely. It's also knowing your environment.

MS MacRAE: So there are no two sitting close together or that do something near enough that you would say, "Well, let's get a better scale by bringing them together." You would be saying at a minimum, you would be needing to be adding to the

resources of each of the centres that you have got here.

MS HUTCHISON (HCLS): Yes.

MS MacRAE: I just wanted to clarify that.

MS HUTCHISON (HCLS): There is quite a few kilometres between them.

MS MacRAE: Yes.

MS HUTCHISON (HCLS): There is only one in each regional area.

DR MUNDY: Yes, but the specialist centres, would there be any capacity for them to, if not merge in terms of their decision making frameworks, at least perhaps say to co-locate?

MS HUTCHISON (HCLS): Well, I can actually say the Tenants Union co-locate with us and keep down their costs that way.

DR MUNDY: I can see there may be issues with the Women's Legal Service co-locating.

MS HUTCHISON (HCLS): They did co-locate for a little while for us but it didn't work and they do need to be on their own, yes, because - - -

MS MacRAE: Sorry, to interrupt you.

MS HUTCHISON (HCLS): That's all right. I was getting a bit off track anyway. Yes, I believe there needs to be a optimum size for things to work properly. I will just address pro bono.

DR MUNDY: Sorry - and the national body has got the number right at about five or six staff and an annual cost of whatever it is in the national submission.

MS HUTCHISON (HCLS): Yes, I would say so, looking at the best-case scenario.

DR MUNDY: Six, a number like that, would seem to be the minimum number to deal with the sort of concerns that you have.

MS HUTCHISON (HCLS): That's right.

DR MUNDY: How many staff do you have in - - -

MS HUTCHISON (HCLS): We have the equivalent of seven full-time solicitors

across three offices, and two full-time admin people, including myself, and we've got an office manager, and then we have three part-time admin assistants.

DR MUNDY: So three and a half?

MS HUTCHISON (HCLS): Yes.

DR MUNDY: Okay, thank you.

MS MITCHELL (HCLS): Pro bono.

MS HUTCHISON (HCLS): There is a fledgling pro bono existence in Tasmania. The Law Society in the last five years, I think it was, have started up a pro bono clearing house. It is a huge job and I'm changing the culture here for practitioners to understand pro bono. The other thing I need also - it has been said we don't the large, huge law firms, so the best we can do with the biggest law firm would only be - it wouldn't even come in as a medium-scale law firm; so resourcing is quite different here for those types of things. It is happening, the culture is starting to get there, but it's nowhere near what the big eastern board states, et cetera.

We actually did experience, the Hobart Community Legal Service, we did a project using the NBN out of our Sorell office, where we partnered with DLA Piper, getting them to provide legal advice to our clients over the NBN. It proved actually very clumsy and didn't really work; we were doubling up the whole time and our lawyer was actually having to sit in with the clients. Our lawyer, first of all, had to find out what the problem was and then our lawyer then had to get that problem to DLA Piper. Then when DLA Piper gave the advice to the client, the lawyer had to be there to then translate the advice that was given to the client; so it proved - we just thought, "No, we don't need to do this." So what we ended up doing is they don't provide that type of assistance to us, but what they do is provide mentoring to our more junior lawyers, and also all our lawyers can go over and join in with their in-house training, which has been a huge thing for us, particularly we do a lot of work in industrial relations and Fair Work, and it means that all our lawyers are kept completely up to speed, because we just wouldn't get that training down here.

DR MUNDY: So do you fund the getting them there, and they provide the training, or do they fund - - -

MS HUTCHISON (HCLS): No, we do it actually over the Web, over the NBN. Just I transport them out to Sorrel, and they will sit round a computer, and when it gets very fancy, we do Web hours at their actual desks, which is even better; so that has proved to be very good, but, as I said, pro bono is in its early days in Tasmania, but I hope that it will - - -

DR MUNDY: What about the Tasmanian Bar? I know there's one particularly notable person who regularly appears at the bar in Melbourne, Mr Barnes.

MS HUTCHISON (HCLS): Yes, Mr Barnes, yes.

DR MUNDY: Does the Bar support pro bono services?

MS HUTCHISON (HCLS): Yes, it does, and they have actually just - I'm actually on the pro bono committee of the Law Society and the Bar has actually just recently joined that and becoming more active in it.

MS MITCHELL (HCLC): May I make a comment in relation to pro bono? We have got a large number of volunteer lawyers, so they are all in practice in either the public or private sectors. They have been coming for years twice a week to give after hours advice and occasionally take a case or act as mentor to a solicitor in-house. I think that's an extremely successful and long-standing example of pro bono being fostered by Hobart Community Legal Service.

DR MUNDY: Yes, we heard about something vaguely similar in Launceston.

MS HUTCHISON (HCLS): Ours has actually been going for years.

DR MUNDY: Yes, I think it's much more informal, the Launceston one. Some issues have been raised with us about lawyers on career breaks or retired practitioners who might be prepared to work pro bono, but registration fees, insurance issues, fidelity fund issues in some jurisdictions seem to be a barrier for them to do so. Are they barriers in Tasmania?

MS HUTCHISON (HCLS): No.

DR MUNDY: So if I'm a retired lawyer and I want to pop down and do pro bono work for you in my professional capacity, not as some sort of unqualified, but in my professional capacity, do I still have to - - -

MS HUTCHISON (HCLS): You would have to have a practising certificate.

DR MUNDY: Would I pay the same for a practising certificate to work pro bono for you as I would if I was still the partner of my mid-sized - - -

MS HUTCHISON (HCLS): No. The Law Society allows us very heavily discounted practising certificates for our in-house lawyers, but they would be also suitable - - -

DR MUNDY: So CLC lawyers get a concessional arrangement in any event?

MS HUTCHISON (HCLS): Yes.

DR MUNDY: So if I'm a pro bono lawyer, I would just slip in under your arrangement?

MS HUTCHISON (HCLS): Yes, and also the Law Society have also said in certain situations they are willing to give some sort of, I'm not quite sure what they call it, it was just mentioned to me that they would have flexibility there - - -

DR MUNDY: And your insurance would cover them because they are working for you?

MS HUTCHISON (HCLS): Our actual indemnity insurance would cover them.

DR MUNDY: Would the expectation be, because one of the concerns that has been raised with us was they wouldn't keep up their professional development requirements.

MS HUTCHISON (HCLS): That wouldn't be the difficulty, it would be making sure they were up to speed with the latest laws, et cetera.

DR MUNDY: But you would expect them to be kept up to speed?

MS HUTCHISON (HCLS): We would expect them, and in fact it would actually cost us money, because we would actually then probably have to pay for them to have the education.

DR MUNDY: Okay, so they would be in effect like one of your staff?

MS HUTCHISON (HCLS): They would be, yes.

DR MUNDY: Okay.

MS MITCHELL (HCLC): On that note, may I make a comment please? Because I have observed, we have had lawyers who in a sense are in that position, they've come in, the resources demanded in the office has been an issue, because especially if they are senior practitioners, they just think they can take anything and run with it. So there is an administrative - - -

MS HUTCHISON (HCLS): That's a very good point, we have had to watch that very carefully, because we tend to employ quite junior lawyers a lot of time. These older ones come in and think they can ride roughshod over the younger ones. It's carefully managing it all.

DR MUNDY: I suspect that we would have some staff that say our commissioners a bit like that. It wouldn't apply to Commissioner MacRae.

MS MacRAE: Of course not. I would just be interested, would you have any comments at all about the funding arrangements and whether you feel you are getting an appropriate share of funds and how the allocations are made? Have you got any comments about that at all?

MS HUTCHISON (HCLS): The bulk of our funding comes from the Commonwealth. I think, from memory, we get something like just under \$700,000 a year from the Commonwealth, and we get \$100,000 a year from the state government. That is specifically to run our Sorell office out of the state money, and the Commonwealth money pays for our Hobart office, our Bridgewater office and our specialised services.

MS MacRAE: So are you impacted by the latest budget announcements?

MS HUTCHISON (HCLS): Not so far.

MS MacRAE: All right.

MS HUTCHISON (HCLS): From what I can gather, I believe our state funding is still okay, and from what I heard from our State Program Manager, it's the only thing I have to go on, I gather from the Commonwealth is that our funding will be rolled over for the next 12 months. I don't think there will be any increases, it will stay at the level it is, and then from the next financial year, 15-16, then we will take major cuts, is what I'm expecting.

MS MacRAE: Okay. Are you able to tell us what impact that's likely to have on the services that you will be providing, or is it too early?

MS HUTCHISON (HCLS): It depends how much they are or what they are, but I would expect that they will mean that I would have to do redundancies, which will mean that we will have less lawyers to provide direct service delivery, which will mean we can take on less cases.

DR MUNDY: I was under the understanding that, and I may have been naive, but the Commonwealth was waiting to see the outcome of this inquiry before it made decisions, but you have been advised - - -

MS HUTCHISON (HCLS): No, that's what I was meaning. So for 14-15 we should stay - they haven't let me know.

DR MUNDY: No. I think - no, the point of my question - - -

MS HUTCHISON (HCLS): That's what I'm expecting.

DR MUNDY: So you have interpreted that - I'm just wanting to be clear about this, because you may have heard something that I haven't and I'd be interested to know about. We understand that the Commonwealth is waiting for the outcome of this inquiry.

MS HUTCHISON (HCLC): This inquiry and the Allens Consulting.

DR MUNDY: That's what I understand. Now, I suspect Commissioner MacRae and I know more about this than most Commonwealth offices in relation to our inquiry.

MS HUTCHISON (HCLC): Yes.

DR MUNDY: But when you say you've been - you're expecting that, is that your expectation, have you been advised - - -

MS HUTCHISON (HCLC): That is my expectation.

DR MUNDY: You haven't been advised by any Commonwealth office that there will be cuts.

MS HUTCHISON (HCLC): No.

DR MUNDY: Okay.

MS HUTCHISON (HCLC): I'm just going on what was in the projected budgets and I think it's been informally - nothing formal has been said, but it has been implied, put it that way, and we are expecting cuts.

DR MUNDY: I just wanted to make sure there wasn't an expectation that we had signalled we were recommending the cuts. That's all. I was concerned that people weren't representing something we hadn't formed a view on yet. Okay.

MS HUTCHISON (HCLC): I suppose my only comment then also would be with cuts, et cetera, I just see that the need for our services is probably going to increase in the next few years.

DR MUNDY: I think that's probably reasonable. The state funding you get - - -

MS HUTCHISON (HCLC): Yes.

DR MUNDY: - - - is that general? Is it of the character of project funding out of the Solicitors Guarantee Fund, or is it more solid than that?

MS HUTCHISON (HCLC): No, it's more solid than that. It's seen as - it's paid to us through Legal Aid through the community legal services project. We get \$100,000 per annum for our Sorell office, and the North-West Community Legal Centre also gets \$100,000 per annum.

DR MUNDY: Cool. Okay.

MS HUTCHISON (HCLC): And we get a little bit of Solicitors Guarantee Fund, but you obviously have to put in applications for that, and we use that to fund our law handbook.

DR MUNDY: Okay. You note that many of your clients have poor literacy, lack of access to computers - - -

MS HUTCHISON (HCLC): Yes.

DR MUNDY: - - - despite the preference given to the NBN by the Commonwealth to be rolled out in Tasmania, and this is an issue that we've come across in the past, that people rush to technology as a device for spreading information, but then people aren't able - and I'm sure our colleagues from the Tax Office have some experience of this, and I know that a number of regulators think all they need to do is put information up on the Web and small business owners whose third language is English will immediately be able to understand it.

MS HUTCHISON (HCLC): It's one of my great frustrations, that.

DR MUNDY: Yes, I've heard it a lot. I guess the question then is how do we achieve the - without wanting to not use the technology when it's available - - -

MS HUTCHISON (HCLC): Yes.

DR MUNDY: - - - for people who have - an increasing number of people probably have an expectation of its availability and get frustrated when they can't. We have colleagues like that. But these people who probably are more likely to be in some sense disadvantaged, what strategies do we need to put in place I guess around the whole information provision thing to make sure that those who are disadvantaged - and typically they're probably also strongly correlated with the people who don't have access or ability to use technology. What do we do about that?

MS HUTCHISON (HCLC): Yes. It's a huge challenge and it's something we

grapple with all the time, you know. Word of mouth works with them. So it's really getting word out amongst their community and making sure that you are part of that community, and that's what we try and work hard at, and also making sure that all the community organisations also know about you and understand about you because it's the only way you're going to reach those people.

DR MUNDY: Because it's leveraging off other community organisations and services that does the trick.

MS HUTCHISON (HCLC): Yes, and once again I must say what's also what we think is very, very important for us is to actually work with the community and other community agencies, and that's what we do a lot of.

DR MUNDY: I guess people who are disadvantaged, I mean would it be your experience, are typically accessing other community based welfare and assistance services?

MS HUTCHISON (HCLC): Yes.

DR MUNDY: And will often be the people most likely to present with complex legal needs. Is that - - -

MS HUTCHISON (HCLC): Very, very much so. A lot of our clients have very complex needs, and that's half the problem is also, you know, working out what's the legal problem, what's the social problem, and that's why, you know, we do need to work closely with their caseworkers and whoever they're working with in the community.

DR MUNDY: So I guess one of the things that we've had raised with us and encouraged to look at and we have done so I think reasonably favourably is this question about legal health checks, and I guess there is sort of two models for this. There's one for when, you know, a person comes and presents in your offices with a problem, do you then scan them to see if there's any other legal problems that might be floating around with them, so that's one model. But the other model is for people who are dealing with disadvantaged people more broadly, so some sort of instrument that can be used by non-lawyers when they're dealing with someone, it might be a social worker or someone like that, and they're dealing with someone and training for people to - not to solve their problems, but just to say, "Look - - -"

MS HUTCHISON (HCLC): To recognise them.

DR MUNDY: "- - - that looks like a legal problem." We know the South Australians actually have a TAFE course for non-legal - for community workers to teach them non-legal skills, but that's probably down the heavy end of the spectrum.

But do you do any work with other welfare organisations so that they learn to spot a legal problem and send them off to you without you having to be physically present to find it yourselves?

MS HUTCHISON (HCLC): Well - - -

MS MITCHELL (HCLC): So if I say something to start with.

MS HUTCHISON (HCLC): Yes.

MS MITCHELL (HCLC): I address all the social worker students at the University of Tasmania, and we often do make available to them to come into the office to actually sit in because we often have, you know, a lay person or a person from another profession sitting in, so that's one - - -

DR MUNDY: Do they take that up?

MS MITCHELL (HCLC): They haven't actually.

MS HUTCHISON (HCLC): No.

MS MITCHELL (HCLC): No, they haven't.

MS HUTCHISON (HCLC): Which is sad. We've got all the law students who are doing the legal prac courses. They all come through us, so they all get to know what we do. But, yes, no, that's - so, you know, we do it that way, by going and talking to groups. We also - as I said, we have strong ties with the community and a lot of community agencies, and we also encourage them to phone us and ask. We do that all the time, "Just phone us and ask us," and we do the same, you know. We get clients in who have got multiple needs, and then we also then - - -

DR MUNDY: I guess in a somewhat smaller place, jurisdiction, community - pick whatever word you want, you're probably - - -

MS HUTCHISON (HCLC): It's probably easier to do.

DR MUNDY: You're probably a bit closer to a lot of these services than your counterparts in parts of Sydney or Melbourne or Brisbane.

MS HUTCHISON (HCLC): Well, yes, but I would be sad to think that they weren't working with their community.

DR MUNDY: But when you look at somewhere like Marrickville CLC, who has - I think there's a million people - - -

MS HUTCHISON (HCLC): That's true.

DR MUNDY: - - - live in the catchment and - - -

MS HUTCHISON (HCLC): That's a bit different to this.

DR MUNDY: - - - you know, they're 15 miles away.

MS MITCHELL (HCLC): Often other workers, you know, social workers, et cetera, are actually an intermediary though.

MS HUTCHISON (HCLC): Yes.

DR MUNDY: Yes.

MS MITCHELL (HCLC): Between the client and us. But I suppose on the other hand, our work is pretty much - our time is pretty much occupied with the cases we've got. But it is interesting that, you know, you can have someone with an individual problem - and I have this experience. Another lawyer in the office just asked me something about divorce, so in the family law context, and I said, "Well, make sure you tell that client that if she's going to apply for a divorce that the clock - she set the clock running for a spousal maintenance claim and property, financial settlement, and he says, "Oh, will you speak with her?" Because she came into the office and I saw her paperwork, I think we ended up with eight files for her. There was a fraud matter, there was child support - - -

MS HUTCHISON (HCLC): Huge. There was family issues, there were consumer credit issues, there - - -

MS MITCHELL (HCLC): Solicitor negligence, like a former - a practitioner who had effected the sale of the former matrimonial home hadn't divided the proceeds of sale properly, and I suppose it just reinforced for me the danger of advice by telephone, because I've worked in that capacity both at the Law Society and at Legal Aid. It's always quite a worry, I think, to be giving advice because you're relying on that individual to properly represent their issue, and they come in with the paperwork and it's usually quite a different story.

DR MUNDY: Yes.

MS MITCHELL (HCLC): So I suppose if we were talking about technology, perhaps, you know, it would need to be, say, like a television screen so that you've actually got face to face, you can see the person and some method of transmitting their documents to you if you're at a different location, so you really are dealing with

the actual issue rather than someone - - -

DR MUNDY: Because a trained legal eye will see more in a document than the person reading from it necessarily will.

MS MITCHELL (HCLC): Yes.

MS HUTCHISON (HCLC): The other difficulty is the literacy of a lot of our clients. They can't read and write, and so half the time they just come in with this wad of stuff and just pop it on, "We've got this," and then you have to go through it and work out what - work it out for them.

MS MITCHELL (HCLC): That's the other thing. Telephone advice, that's the point that the recommendation - was it section 7 recommendation 5.1, having the single contact point. Basic - and I think there's an issue there that's - what was the clause - phrase basic advice - - -

DR MUNDY: Don't worry about too much of the language because it needs to be worked on.

MS MITCHELL (HCLC): Okay. So then there the caller has got to have the capacity to properly describe their issue and then a capacity and the confidence to act on any advice that they are given, and we find that a lot of our clients can't do that.

DR MUNDY: Yes.

MS MITCHELL (HCLC): You know, it might just be gathering documents, attending court, writing a letter. They've most likely got barriers that would prevent them acting on that basic advice.

DR MUNDY: And the degree of embarrassment involved by saying on the phone, "Well, I can't actually write," is probably - - -

MS MITCHELL (HCLC): And then they - - -

DR MUNDY: - - - a very high hurdle, but if you - - -

MS HUTCHISON (HCLC): They never tell you they can't read or write, you just gather when they say, "Oh, I haven't got my glasses. I can't quite see," then you start - - -

DR MUNDY: Whereas if you - - -

MS MITCHELL (HCLC): "I've forgotten how to spell Australia."

DR MUNDY: Yes. But if you see them in the flesh, you're more likely to be able to identify that than if it was on the phone.

MS HUTCHISON (HCLC): Very much so.

DR MUNDY: And these obviously aren't the people who are going to use some sort of online service.

MS HUTCHISON (HCLC): We actually have a policy. We try to do as little telephone advice as possible. We like our clients face to face because of that fact. I think really the only area we do provide information really on a regular basis on the phone is we have a consumer credit hotline for the state, but apart from - and that's just basic information then referral to resources in their areas.

MS MITCHELL (HCLC): It is partly why we run an after-hours service - - -

MS HUTCHISON (HCLC): Yes.

MS MITCHELL (HCLC): - - - too for people who wouldn't be able to get in or even make a phone call during the daytime.

DR MUNDY: All right then. Well, thank you for taking the time to put your submission to us and coming in - - -

MS HUTCHISON (HCLC): I was just quickly going to address the civil areas as well.

DR MUNDY: Yes.

MS HUTCHISON (HCLC): I was just going to mention that, you know, we do a huge amount of civil work and, you know, a lot of that is Commonwealth work as well, and the other thing I need to point out is Legal Aid here do not do civil work, and they do not fund civil work. That includes, you know, bankruptcy, consumer credit, Centrelink matters, administrative law, Fair Work, and so it goes on, and that's where we pick up a lot.

DR MUNDY: Okay, and that's either funded effectively both by - and the Commonwealth doesn't fund that for legal aid purposes either, so the - - -

MS HUTCHISON (HCLC): No. So therefore that's where we pick up. CLCs do pick up a lot of that work.

DR MUNDY: All right. Well, thank you very much for that.

DR MUNDY: Given I know exactly who everyone in the audience is, I presume no-one wishes to make a statement from the floor, so these proceedings are adjourned until 8.30 on Tuesday morning in Darwin.

AT 1.53 PM THE INQUIRY WAS ADJOURNED UNTIL
TUESDAY, 17 JUNE 2014



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO ACCESS TO JUSTICE

DR W. MUNDY, Presiding Commissioner
MS A. MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON TUESDAY, 17 JUNE 2014, AT 9.25 AM

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DR MUNDY: Good morning, ladies and gentlemen. Welcome to the series of the Productivity Commission's Access to Justice Inquiry. Before we go any further, we would like to pay our respects to elders past and the present of the Larrakia people whose lands we meet on today and the elders past and present of other indigenous nations who have inhabited this continent continuously for over 40,000 years.

As you'd be aware, the Commission released a draft report in April of this year. My name is Dr Warren Mundy and I am the presiding Commissioner of this Inquiry. With me is Commissioner Angela MacRae. Together, we discharge the Commission's capacity in regards to this matter.

The purposes of these hearings is to facilitate public scrutiny and comment of the draft report, to collect further information and feedback and particularly to gather that information on the public record so we may subsequently rely upon it. It's our intention to provide a final report to the government in September. Then the government will have 25 parliamentary sitting days to publicly release that report by way of tabling it in both houses of federal parliament.

Whilst we like to conduct these hearings in a reasonably informal manner, we should remind you that under Part 7 of the Productivity Commission Act the Commission has certain powers to act in the case of false information or a refusal to provide information. To our knowledge, those powers haven't been used since the Act was passed in 1998. As I said, we want to conduct these hearings informally, but we do take full transcript of the hearings and that transcript will be placed on our website to facilitate both our research efforts but also for scrutiny and transparency of our processes.

As such, we do not take comments from the floor, but we will provide a brief period at the end of today's hearings for anyone who wishes to make comment. Participants are not required to take an oath but should, of course, be truthful. We welcome comments from participants on submissions from others to this Inquiry.

Normally at this stage I have a piece of paper which I read about occupational health and safety requirements. In the event of an alarm going off, I suggest we go out that door, turn right and go straight down to the car park and out into the street. But we'll take (indistinct) to advise us of that so I cannot commit an offence under the Act.

They're the formalities completed. Could I ask each of you who intend speaking stating your name, the capacity in which you appear and then someone make that brief in that sort of five minutes or so opening statement.

MS COX: Suzan Cox, Director of Legal Aid.

MS HUSSIN: Fiona Hussin, Deputy Director NT Legal Aid Commission.

MS PALARVA: Jacqui Palarva, Managing Solicitor of the Family Law Section.

5 **MS COX:** We also have other participants here who may speak.

DR MUNDY: They can introduce themselves if and when they need to. Suzan, would you like perhaps to make a brief opening statement?

10 **MS COX:** Yes. First of all, I'd like to thank the Commission for coming to Darwin and giving us the opportunity to appear today to give evidence. We made a submission in November last year and also commented on the draft report of the Commission in April this year. We've also contributed to the national Legal Aid submission and the further comments that were in relation to your draft report.

15
20 There are a few matters I'd like to highlight. Firstly, the NT demographics. We're the smallest commission of all the legal aid commissions in Australia and we operate in the most disadvantaged jurisdiction. A sizeable proportion of our population live in areas of very high disadvantage and we have a greater population of people who are young and indigenous. The legal Australia-wide survey on legal needs in the Northern Territory found that age was one of the strongest predictors of the prevalence of legal problems; that is, the older people are the less legal problems they have. In the Northern Territory in a sense 18 to 24 year olds have the highest level of legal problems.

25
30 Although survey results for the Territory showed that legal problems are widespread with some people experiencing multiple severe problems with substantial impacts on many life circumstances, disadvantaged groups were found to be particularly vulnerable to legal problems.

35 In our geographic context and demographic profile, many services have their own limitations in terms of providing accessible service. Here national services have limited presence, and this is even more so outside of the Darwin area. Clients with limited or no English – and I'm talking about those particularly in our remote communities – with disabilities and of course living remotely require assistance to access those services.

40 There are constant pressures specific to the Legal Aid Commission at the present time and have been for a number of years. The bulk of our criminal law work on the bush court circuits is serviced by the Aboriginal and Torres Strait Islander services here, NAAJA in Darwin, CAALAS in Alice Springs. We're continually finding and increasingly finding that the rules of conflict require the Aboriginal and Torres Strait Island Legal Services to refer matters to us where they determine there is a conflict of interest. As a result, the Legal Aid Commission is required to attend remote court

sittings where we may have one or two clients only and where it may very well only involve a brief appearance.

5 The cost associated with getting to and from those courts, often by plane, and taking moneys away from the otherwise busy metropolitan courts places additional pressures on both our funding and ability to meet our statutory obligations. One of those obligations is to ensure that legal assistance is provided in the most effective, efficient and economic manner.

10 Further, the federal government did have an expensive case fund for expensive criminal cases, which NAAJA and CAALAS were accessing. We're informed this is no longer available and that the expensive cases will be referred to the Legal Aid Commission to fund. We view this as both cost shifting and short-sighted as the
15 ATSILS are best positioned to represent their client base if adequately funded. Of course the pressure on us meeting this need means that we have an increased workload on our staff and it also means that we're limited in doing otherwise civil work which we could be possibly have done.

20 I just want to briefly say something in relation to our means test. In order to qualify for a grant of legal aid, a client must satisfy both merits and means of course. An under-investment in the legal assistance sector over the last decade has produced highly constrained eligibility guidelines for us to grant aid. Due to the constraints of funding, we've not been able to adjust our means test since 2008.

25 Accordingly, our means test is well out of step with the economy of the Northern Territory. This results in many people being refused aid and those people unable to afford their own legal representation. Here in the Northern Territory the working poor with significant expenses are not eligible for legal aid, whereas
30 Centrelink recipients do fall within our means test. We're very concerned about those people who are missing out. The reality is we can't adjust our means test unless we get more funding. So it all comes back to that.

35 The other pressure we are feeling which I want to highlight is the juniorisation of legal aid panel lawyers and quality assurance. We're very concerned that our legal aid rates are inadequate and we have continual feedback from the private profession in the Northern Territory that this is the case. And without the ability to appropriately remunerate suitably qualified professionals, there's a real risk that, for example, our family law panel will be reduced to inexperienced solicitors who are not able to provide the level of service which is required, particularly in relation to
40 complex matters which receive grants of aid.

 This poses a real threat to the sustainability of our operations under the mixed model service delivery. We depend on that in family law. Particularly, we have a very strong in-house practice. But of course in family law matters there's always a

conflict with half the money to be referred out. We haven't increased our rates of pay to private lawyers for a number of years due to funding constraints.

5 The other aspect in relation to that is that you're asking people to do this work for little money or less than market rate and our clients are very difficult often, due to severe disadvantage and often mental health issues. They take longer to service. So the hours just aren't enough to adequately compensate the work put in.

10 We found the mixed model of delivery to be the best around. We looked internationally, National Legal Aid have. But we feel that here in the Territory it's in danger of collapse because we've got fewer and fewer experienced lawyers who are willing to do our business for the amount that we're able to pay.

15 We have had to prioritise those matters and class of matters which we'll aid due to funding constraints. We continually review our guidelines to meet the growing demand and to ensure that our services are placed where they're most needed. Under our legislation section 8J requires we determine priorities in the provision of legal assistance as between different classes of people and also different classes of matters. For example, our guideline in relation to traffic cases was amended a few years ago.
20 I'll read it out:

25 *Legal aid is not normally granted in relation to prosecutions under the Traffic Act NT even where there is a likelihood of a penalty of imprisonment unless one or more of the following applies: (a) there are more serious charges pending on the same prosecution file; (b) the applicant is under 18 years of age and/or there are particular circumstances relating to the applicant and/or the matter.*

30 That was a hard decision to make, to deny legal aid to someone who's facing the likelihood of imprisonment. The sad truth is that we felt compelled to amend our guidelines to enable us to fund those cases where there is a likelihood of even a longer period of imprisonment. So they're the sort of choices we are making.

35 Similarly, our guideline in relation to family law property disputes states as follows:

40 *A grant of legal assistance for litigation for a dispute about property may only be made if the applicant for assistance is also seeking the resolution of another related family law matter by the Court or the Commission decides that it is appropriate to make a grant of legal assistance to the applicant for assistance because of his or her personal circumstances.*

So we're constantly reviewing our priorities to put the money where it's best placed and where we can do the most good.

Finally, I want to just highlight our civil law needs and the Legal Aid Commission and how we've dealt with it over the years. We've got a long history of seeking to address meeting the civil needs in the NT. But when the Commonwealth government reduced Legal Aid Commission's funding in '97/'98 by 15.6 per cent we, quite frankly, have been battling ever since.

Since this time we've not had an in-house civil practice other than family law. Instead, we provide small grants of aid to private firms on behalf of clients who satisfy our means test to investigate a potential claim. In this way, if the private firm forms the view that there is merit in pursuing the claim, they do the case on a professional cost speculative basis.

The Legal Aid Commission has further assisted the impecunious litigants by way of the continuous legal aid fund which was set up so that private practitioners doing these sorts of cases could apply the disbursement costs only. We set that up with a ceiling fund from the Legal Aid Commission which has since been repaid and also a contribution from the Law Society.

So now it's self-funding and self-sustaining. We do make funds available and an independent committee decides if they should be given to a particular party. At the conclusion of the matter, the client must repay the amount, plus interest. We've been running that for the last 20 years and it's been very successful.

We also provide several advice clinics which are not means tested. So the small business person can come in and get some free advice for about 40 minutes. We operate those clinics in all our offices across the Territory. We staff those clinics by both our in-house lawyers and private practitioners who are contracted to provide the service. For example, our Darwin office, we've two practitioners. One is a private in his own firm, the other is a practising barrister. And they provide to our clinics each week.

In this context, the provision by the federal government last year of the legal aid collaboration fund to establish a minor system civil service was most welcome and, let me say, not before time. The funding enabled us to set up the service to provide minor assistance to vulnerable people, to identify their civil legal issues, enable them to progress resolution of those issues and help them access other services and organisations that could help them.

Minor assistance is legal help from a lawyer to a person to help them take the steps to solve their own legal problem. It's not a grant of legal aid. It's limited to three hours per case and doesn't involve legal representation. To be eligible, the person must have two or more vulnerabilities, such as low income, mental illness, youth, elderly, domestic violence issues, disability, indigenous, non-English speaking

background, culturally and linguistically diverse, literacy issues, remote location.

5 It was determined that minor assistance would be provided in the following priority civil law areas: consumer issues, employment matters, discrimination and other civil matters if it's reasonably appropriate in the circumstances and there was no other service provider that could help. Examples of where we didn't go to assist were with wills and estate matters, welfare rights, immigration advice, immigration applications, those sorts of things.

10 We believe the service is extremely valuable in preventing problems from escalating. That strategy was supported by the law survey and the indigenous legal needs project research for the NT. Unfortunately, the funding for service was cut, finishing during this month, 30 June, and we're going to have to stop the service next month.

15 The cutting of the funding has been extremely difficult as a lot of time and energy was invested by our very small commission and the few people that we have determining the target service most needed and how best to provide it. Premises were leased until June next year and staff employed. If funding had not been cut we would have been in a very good position to be able to assess the success of such a service over the pilot period, which was two years.

20 As it is, time and resources have been largely wasted, although a significant number – and I believe it's a round figure of about 200-odd – people have been assisted during the operational period. I have the manager of that service here, Ms Alison Hanley, should the Commission wish to ask any questions in relation to that service. Those are the matters, thank you, that I wish to highlight.

25 **DR MUNDY:** Thank you for that. Can we perhaps start on the most recent funding reductions? So the principal impact of the budget announcement – so the announcements of late last year taken together as being the (indistinct) determination (indistinct) assistance.

30 **MS COX:** Yes. In fact, it was only last night that we met with our staff and told them that we've tried and tried, we just don't have the money. We have to stop the service.

DR MUNDY: Will there be other service reductions or is that it?

40 **MS COX:** That's it, yes.

DR MUNDY: Were you consulted by Attorney-General's Department Commonwealth or any other Commonwealth or Territory offices about the impacts of these cuts before?

MS COX: No.

DR MUNDY: How were you made aware of that?

5

MS COX: We were told that we would have no funding – after the budget came out we'd have no funding after 30 June this year. It was for two years. We'd just set up the service, it was operational. We'd leased till June next year. We don't know whether we can get out of that lease yet. We have given notice to the landlord that we will be vacating. And we're trying to relocate staff into positions that have become vacant and that sort of thing. But it's been very difficult.

10

MS MacRAE: How much money was involved?

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MS COX: Not a great deal, actually. It was only 400,000 each year. But we only got the 400,000 for the first year and of course the second year it was due at the end of this financial year.

20

MS MacRAE: For those people you said in your opening statement that you were careful to ensure these people were coming to you because there was nowhere else to go. So having to shut this down, those people will now have nowhere to go.

25

MS COX: Well, they can go to our civil advice clinics, which are much more restrictive and are only being delivered on a much limited basis. It was up and running and doing very well and it was obviously servicing a real need in the community, something that we haven't been able to do without extra funding since '97/'98.

30

DR MUNDY: And you said that what, about 200 people?

MS COX: Yes. If you'd like Ms Hanley to talk about that.

35

DR MUNDY: I'm just mindful of time. Perhaps if you could just let us know by way of email the nature of the matters that were dealt with and some sense of the characteristics of the client – the demographics of the client basis, that would be most helpful to us.

40

MS HANDLEY: At present it's approximately 200 matters. Some people often present with more than one civil matter.

DR MUNDY: That's fine. If you could just give us that data, we'll see if we can - -
-

MS COX: I stand corrected on that. Two hundred matters.

5 **DR MUNDY:** Whilst I just raise a funding question, we've heard from Legal Aid Tasmania, I think, or certainly one of the other Legal Aid Commissions, that in circumstances in a property matter in family law that goes to trial and there are no issues, there are no unresolved issues other than the property – so there are no children and no unreserved violence matters – in circumstances where the man has perpetrated violence against the woman, Legal Aid in that jurisdiction – I think it was Victoria also – Legal Aid would not provide assistance for the woman in that case unless the man was represented. So she's exposed to the circumstance of being cross-examined by someone who may have committed a violent act against her. In those circumstances in the Northern Territory, would she get representation from yourselves?

15 **MS HUSSIN:** I think the other thing to point out is we also have our family dispute resolution program and property law matters, which has a relaxed means test. So that actually enables a lot more people to access our service than in other jurisdictions. A lot of other jurisdictions don't have that. But in this situation that would be an exceptional circumstance that we would take into account and we would grant aid.

20 **DR MUNDY:** So that would be one of those circumstances the director outlined (indistinct). Okay, thank you. The mixed model, I think you made an observation that you've got some challenges with the mixed model because of your size.

25 **MS HUSSIN:** The juniorisation of our practitioners.

30 **DR MUNDY:** We put a similar question to your colleagues in Tasmania who also suffer from size challenges. They indicated to us it wasn't an issue for them. Is that because there may well just be relatively greater numbers (indistinct) for capturing particularly I suspect Hobart than would be the case here?

MS COX: I would suspect that is the case.

35 **MS HUSSIN:** We don't have a great deal of influx into the profession of family lawyers anyway in the NT. What tends to happen is practitioners come in as juniors, they get a certain level of experience and then they don't do legal aid work after that point or they're very selective in the legal aid work that they do. So in our submission Ms Eileen Terrill wrote a letter saying that she does legal aid work representing children in Independent Children Lawyer's matters, but she doesn't
40 represent parties on legal aid rates, for example. So they may be selective.

I mean, juniorisation is probably one way to categorise it. But really, it's about solicitors with a particular level of skill and experience where there's a market demand for their work saying, "Well, I actually don't need legal aid work any more.

So off I go and I can charge a much higher rate,” and those who may be more junior or may not have particular skills and experience at that level are left for legal aid.

DR MUNDY: Is there a resident Family Court judge here or is there a circuit?

MS HUSSIN: There’s a circuit court judge.

DR MUNDY: So most of this stuff gets done – does the Family Court come on circuit to Darwin?

MS PALARVA: It does. They circuit quarterly, but it really depends on what’s listed. The circuit court judge now only travels down to Alice Springs, for example, when necessary. She doesn’t travel down on regular circuits any more. So it’s really just depends on what matters there are to hear.

MS MacRAE: You talked about conflict of interest and effectively what a drain it becomes on your resources. Is there any solutions to that? I mean, it seems like it’s kind of a – it’s an intangible really, isn’t it?

MS HUSSIN: You mean in terms of us having the NAAJA and CAALAS referrals?

MS MacRAE: Yes.

MS COX: I don’t think there is an answer to it, other than people need to be represented and if you can’t do it with one organisation because they’re conflicted, someone has to do it. But it’s a cost shift.

MS HUSSIN: We’ve raised it with all of the agencies that we can think of, including the Law Society, looked at the complex rules, talked to our funders. But it is an incredibly inefficient way to represent a small number of people. But we recognise they need representation, so we provide that.

MS MacRAE: And there’s nothing you could do remotely as in using technology or something rather than find people - - -

MS HUSSIN: The courts are looking at a model where they are hearing matters remotely. The difficulty is with the client base that they really need face-to-face solicitors there. In terms of access to justice, they need physical access to a lawyer, usually an interpreter. It’s much more complex.

MS COX: Because of the clientele base.

DR MUNDY: Is the conflict real or is it perceived? Because it’s been put to us by others that with a bit of work people got realistic about – perhaps in large legal aid

commissions, that some sensible decisions could be made, whilst not eliminating the conflict (indistinct) to see and mitigate it. Is that your view or is it the family nature of a lot of these disputes that you see and the kinship ties between various parties that cause a greater problem here than elsewhere?

5

MS COX: I think there is a greater problem here than elsewhere because of the size of the communities and the closeness of the communities and family. But if NAAJA or CAALAS say they're conflicted, then it's not for us to look behind. We have questioned the conflicts on occasions and usually we end up doing the conflicted matter.

10

MS HUSSIN: So we have an MOU with NAAJA and CAALAS in relation to referrals where there's a conflict. There's an agreed process that we go through. It includes that if we believe after taking a client that the conflict has been alleviated – so, for example, if the parties decide to plead guilty who were essentially alleging that each other committed the offence – then they can take the client back. So, where possible, that will happen.

15

It's something that yes, we do continuously review and say, "Is this" – you know, but to an extent we don't question. It's their professional decision that they know.

20

DR MUNDY: And there's no funding travelling to the client.

MS COX: Absolutely not.

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DR MUNDY: You mentioned a law survey. It's been suggested to us that because of the manner in which it was conducted (indistinct) that it probably understates what
- - -

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MS COX: I think that's very true.

DR MUNDY: I can understand the difficulties they would have doing – tapping those people who don't have access – I get their statistical and survey problem. So your view would be that the law survey would understate people living in the Northern Territory and probably more so than it would perhaps in somewhere like Victoria.

35

MS COX: Yes, because of the access to telephones and various difficulties.

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DR MUNDY: What do you think they could do to correct that? Would it involve expensive firm work out in remote communities?

MS COX: We could probably tap into the Stronger Futures people.

5 **MS HUSSIN:** So the indigenous legal needs projects, we worked very closely with them in assisting them to gather data and also engage with people in terms of receiving input about the concerns. So we have a Stronger Futures funded program that goes to indigenous communities. So we were able to facilitate a lot of that contact and information being provided. So that's one way that we could assist.

10 **DR MUNDY:** Other than getting more information, which will presumably raise the estimate of legal aid, do you think much would come of it that would be useful for public policy purposes, whether you believe our number is 70 per cent or if you believe the number is 25 if it's done properly with some clusters? Would it actually give us information that could help us with public policy, given we're probably so far behind expenditure rate already? I'm just wondering (indistinct) recommendations to spend money to improve the quality of the survey or is the money better spent elsewhere?

15 **MS HUSSIN:** That's the interesting thing is even though we had our reservations about the survey, we agreed with the results of the survey.

20 **MS COX:** I think we put in funding to it too.

DR MUNDY: I wouldn't disagree. I don't think anyone doesn't think it's robust. But it's limited in obvious ways.

25 **MS HUSSIN:** So, yes, the findings, they resonated with us in terms of our understanding of the legal need.

30 **MS MacRAE:** Just in relation to there's the access to the courts question, but obviously we're interested in lower level dispute resolution mechanisms. I'm wondering if you could elaborate a bit on the sort of particular issues that you might find in terms of barriers. And perhaps it's not your particular field. But, for example, does it impact on the extent of demand on your service that you don't have a general civil and administrative tribunal here or are there particular difficulties with accessing ombudsmen if problems escalate and they come to you that you feel might be able to be addressed lower down? I'm just wondering if there's any way we could think about the spread of resources to do more to try and get issues addressed earlier and pre-court, whether you had views on that.

40 **MS HUSSIN:** I think that's something Alison might want to address. Essentially the experience that the (indistinct) has been drawing out.

MS HANLEY: As the manager of the minor assistance civil service, that was what a fair bit of our minor assistance was targeted towards is that low-level dispute resolution even before it needs to go anywhere formal in helping the person to think about what are existing dispute resolution options before this problem becomes

bigger than it is. Obviously a lot of the effective dispute resolution work in civil matters is someone who presents with the vulnerabilities that we were saying were eligible had more than one civil problem and it was all rolled up.

5 There were financial issues, there were health issues. So it was about finding out what is the true legal problem that's currently causing this person angst, distress, anxiety, and getting a resolution of that, either in the short term or putting them on a path of resolving it themselves. So that does include existing dispute resolution bodies, Ombudsman Northern Territory, also the Commonwealth Ombudsman,
10 Health Complaints Commission. So those structures that exist that have that dispute resolution process but assisting people to identify that that's where they needed to go or assist them to know what the primary civil problem was that was keeping them up at night.

15 **MS MacRAE:** So really, from your point of view, the best mechanism to address that would be to have the kind of service that you're now going to have cut.

MS HANLEY: Yes. Because it's certainly not a service that's provided by private lawyers in civil matters. It's usually people don't even get through the door,
20 necessarily, into a private law firm, although they may need to end up there, but they just haven't made it yet. But also where I guess people are not knowing where to go and it may be that they just don't know where to start in resolving a dispute themselves and helping them to take charge of that issue and work out where to go with it.

25 **UNIDENTIFIED SPEAKER:** Maybe that a private lawyer whose focus is on a particular area might not know that either. So a specialised service that's expertise is in knowing how to appropriately refer people adds to that even further.

30 **MS HANLEY:** And also particularly people who are in contact with government departments who are making decisions about the insurance companies, insurance offices, statutory schemes that cover personal injury and things in the Northern Territory where people just simply – the vulnerability, mental health disability, age, youth is just preventing them from being able to access the very services that are
35 funded or are supposed to be giving them the help that they need. So it's certainly – obviously the service was up and running. So I think the numbers don't fully reflect demand because it was about fitting the service within the existing services that do provide some assistance, making sure there was no double-up in service and making sure we caught those people that were falling through the cracks.

40 Particularly with civil matters, which has always been my passion, I think increasingly in the Darwin population there is the working poor that are suffering civil legal problems that are severely – although they're not sitting at the family law courts or at the Magistrates Court, it's definitely something that's impacting on their

whole lives and their families that they really need that - - -

DR MUNDY: Something like Melbourne or Sydney consumer action CLC they can go to.

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MS HANLEY: Yes, where there's more – I guess there's certainly more – normally it's not legal aid services but other community legal organisations that would perhaps catch them or be able to provide them with the minor assistance aspect of the assistance, not just the legal advice, but, "Okay, you now know what your legal problem is. But how are we just going to help you along to resolving it yourself?"

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There are certainly community legal services in the Northern Territory. Obviously Darwin has the highest concentration and so a lot of our service was targeting let's make sure that remote areas can access some of those services. Let's get the referral pathways happening like they should for civil law matters and then identifying those gaps where the service is simply just not provided. So it was all going really well. Put that on the record. Certainly those costs that have been expended, it's not very productive to have cut them because it's expensive to start that service, to begin with.

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DR MUNDY: So you start with a lot of capital which you probably won't be able to recover.

MS HANLEY: Even capital too.

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DR MUNDY: You mentioned briefly CLCs and part of what we're trying to explore are these more efficient models of organising community legal aid (indistinct) broadly. One model that's been – the model they have in Victoria is effectively your equivalent distributes the money to the CLCs. I guess my question is in two parts. What is the model in the Northern Territory with respect to the centre as a whole; and (b) would you see a particular conflict of interest if you became the body that distributed the money to the CLCs?

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MS HANLEY: So the model depends on the CLC. So like Darwin Community Legal Service – generally they are all directly funded by government; that's the starting point. Darwin Community Legal Service receive a combination because they have a (indistinct) service; so NT matters and then they have an Asian disability service. So it does vary. There's the Family Violence Prevention Legal Service, Women's Legal Services but generally directly government. I think our sense in the NT is that we work very well collaboratively with those services. I know that that's a difference to a lot of other jurisdictions. I think a big part of the reason is that we don't - - -

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DR MUNDY: No-one's told us that they're at each other's throats.

MS HANLEY: Yes. Well, we say we work especially collaboratively in the NT. Look, there's always that sense that who's getting the dollar and if you get that dollar over there, is that one less dollar for us? Everyone has that sense and that's something that you definitely have to develop and build relationships to combat that so that you can all work well together. But I would imagine, especially in a small jurisdiction, that us holding the purse strings would cause problems with our relationships and with making appropriate referrals and working collaboratively.

DR MUNDY: So at this point you'd also say is that we work hard to ensure that there's no duplication.

MS HANLEY: Absolutely, definitely, that's a big focus.

MS MacRAE: That does then come through Attorney-Generals? Is that how it works? When they get the money from the government, does it all come through - -

MS HANLEY: Both Attorney-General federal and Attorney-General state.

MS COX: And also now with indigenous funding there's Prime Minister and Cabinet as well.

DR MUNDY: Do you see any of that money from PM&C?

MS HANLEY: We have had funding through Stronger Futures and now we'll receive funding for the next year through the soon-to-be-announced Indigenous Advancement Strategy funding.

MS COX: Without any indexation from our last year's funding.

DR MUNDY: Just on the expensive cases fund, would you say that its evolution places a disproportionate burden on you relative to the other CLCs?

MS COX: Absolutely. CLCs?

DR MUNDY: Sorry, LACs.

MS COX: Well, the expensive case fund for the ATSILs was put forward by National Legal Aid to start with because of that very pressure that we were feeling, particularly in WA, particularly in South Australia and particularly in the Northern Territory. I believe it worked very well. It also means that there's a clear path for their lawyers. They're better at handling their client base. They've got the support of field officers and contacts in the communities and the staff relationships. It's a

completely different way of operating to the LACs. And they were able to access that expensive case fund.

5 Without that, we're now expecting those cases to come to us. That places an extraordinary burden on us. First of all, we don't know how many, if any, but we presume some. We don't know how complicated. I know there's a murder in Alice Springs which has got a number of co-accused. That means we would probably take one in-house and have to refer the others out at great expense to us.

10 We'll have to notify the NT Department Attorney-General and say that we've got these expensive cases and keep them on notice because we can't go into deficit. And we'll need to – what's happened last time, last year, was we got an advance from Treasury to cover our expensive cases. But that's all from year to year.

15 **MS HANLEY:** The other part of it is that proportionately that's all much bigger compared to legal aid commissions in the NT than in other jurisdictions. So there's going to be a - - -

20 **DR MUNDY:** You'd be relatively closer in size here - - -

MS HANLEY: Much so.

MS COX: And the ATSILS have greater funding than us.

25 **DR MUNDY:** Just before closing, this decision to be made with respect to traffic matters, which I think the Victorians have made a similar, has there been any pushback from the Bench as to why aren't these people being - - -

30 **MS COX:** We've had criticism from the Bench, yes.

DR MUNDY: But they've proceeded to hear the matters nevertheless?

MS COX: Yes, I understand so.

35 **DR MUNDY:** So Dietrich didn't - - -

MS COX: Dietrich only advised indictable matters. These are summary court matters.

40 **DR MUNDY:** Thanks very much for your time and your submissions.

MS COX: I understand we'll supply more detail about the sort of matters, was it?

DR MUNDY: Yes, sort of matters, the number of them, types of matters - - -

MS COX: (indistinct) service. Thank you again for coming to Darwin.

DR MUNDY: Our pleasure.

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5 **DR MUNDY:** Just before we commence, I'm advised that in the event of emergency we should proceed to the assembly area located across the road now, to leave by the main exit. I have now discharged my duty under the Occupational Health and Safety Laws. When you have settled already, could you please state your name, the capacity in which you appear and perhaps make a brief – and by that we mean less than five minute – introduction. The record is currently held by the Australian Bar Association at three minutes.

10 **MR WYVILL:** Three minutes as in the longest?

DR MUNDY: No, shortest.

15 **MR WYVILL:** That's impressive. My name is Alistair Wyvill. I'm the Vice-President of the Northern Territory Bar Association and their representative for the purpose of making submissions on behalf of that organisation to this Commission.

20 You should have our outline of submissions, I think. I wasn't going to talk at length about 1. It's because it seems that there's certainly a degree of common view between us and the Commission about that. It's certainly, we think, a good opportunity to take advantage of the quality and value of the junior Bar in providing those kinds of low-level services, particularly in the smaller cases; I think there's a real opportunity there.

25 It's got to be linked with 2 which is the better education. We would respectfully suggest that as access to justice is so critical for maintaining the rule of law, that legal studies really shouldn't be an elective at school, it should be something that's far closer to the curricula and, really, people need to understand how to use court services and to be able to exercise their rights far more effectively.

30 We would also encourage the courts taking on a far greater responsibility and recognising the reality of unrepresented litigants and facing up to it and embracing it and trying to make them better. Unbundling can coordinate with that. There's not much point unbundling if we don't help people how to use them.

35 Pre-action conduct is the one we would really like to talk about. Before I get to that, which really covers 3, 4, and 5, I did want to just briefly mention number 6, which arises out of the Priestley 11. I don't know whether you wanted us to deal with this at any great length. But there is an issue in the Territory about us getting the benefit of highly qualified, highly competent practitioners and experienced practitioners from other Commonwealth jurisdictions who, because of the current economic climate in the world, find it desirable to immigrate to Australia, particularly the Northern Territory, with a lot of opportunities. There's a real shortage of the supply of good-quality legal services in this town. They get here,

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they get the right to work and they don't get the right to practice.

DR MUNDY: (indistinct)

5 **MR WYVILL:** This is a big one.

DR MUNDY: (indistinct) one that we've torn down.

10 **MR WYVILL:** It would be great if you tear this one down. I've got a fabulous example I can just entertain you with at the moment.

DR MUNDY: Please do.

15 **MR WYVILL:** Felicity Gerry QC from the English Bar, she arrived – she sent me an email in the middle of 2012 to say that she was emigrating here with her husband who got a job with IMPEX. Thirteen years experience at the English Bar, over 300 jury trials. And this is a jurisdiction where, as you probably heard, crime is our developing area, with regret.

20 Great, we were delighted to have her. We're short of two things in my chambers and two things at the Bar generally; high-quality legal practitioners in crime and senior women. So she ticked both the boxes just superbly. That was mid-2012. She sent her application to various admission boards in early 2013 or late 2012. She got assessed on 14 March 2013 – it's a very poor copy, but I'll hand it to you – by – I
25 can't even really recognise their letterhead. But it's from the team leader professional services and it's the crowd in New South Wales who assess this.

It required her to undertake further study in professional responsibility, trust and office accounting, commercial and corporate practice, proper law practice and in one
30 of the following four: consumer law practice; impairment of industrial relations; planning on environmental law; or wills and estate. Perhaps if I can hand up a copy of that.

DR MUNDY: We're able to place this on the public record, I trust?

35 **MR WYVILL:** Absolutely.

DR MUNDY: Thank you.

40 **MR WYVILL:** She then spent the next year in Britain negotiating with them. She's finally got them down to just requiring her to study constitutional law. She's in the process of completing that at the moment. In the meantime, because she can't practice, she's now lecturing at the Charles Darwin University in evidence and criminal practice and procedure. We'd dearly love to have her in chambers, but we

can't.

DR MUNDY: You'd have no objection if I raise her case with the Law Council Australia tomorrow, would you?

MR WYVILL: No, not at all.

DR MUNDY: Thank you.

MR WYVILL: She is very grumpy about this, understandably. She has all the burdens – because in the meantime she's been made a QC in the UK. So she's here as an English QC. She has all the burdens of being senior counsel. So when the judges come to a conference up here to visit she has to entertain them as part of responsibilities as senior counsel but none of the benefits in court; she can't practice.

Anyway, there's no doubt as a person who has practised in the UK, who's qualified over there and come back and practised here, there is no doubt there's a need for people to undertake some sort of apprenticeship, some sort of training period. But the best thing in my experience is for them to get into legal practice and then to be supervised over a period of time, which I think enables them to - - -

DR MUNDY: But a barrister of her (indistinct) standing that period would presumably be measured in a few months or number of trials rather than years, surely.

MR WYVILL: Six months at the outside, absolutely. By six months she would be well and truly above the standard of what you're getting from people.

DR MUNDY: Some supervision could be provided by any senior counsel.

MR WYVILL: It'd be a normal pupillage, yes.

DR MUNDY: Perhaps even the director of Legal Aid.

MR WYVILL: I think she's offered, actually.

DR MUNDY: Sorry to divert you on that, but we are always on the watch for barriers.

MR WYVILL: She's not on her own. There are several other senior – not senior but sort of people in their mid-30s, established practitioners from the United Kingdom and Wales who have come here and have been put through an agonising process of getting the right to practice. I can get you those names as well, if it would help.

DR MUNDY: You mentioned that you've gone the other way. My general understanding is it's relatively easy for Australian qualified lawyers to practise in the United Kingdom.

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MR WYVILL: Absolutely. I had to spend a period of three months non-practising but after that I was allowed to practice, supervised for three months and then I had my full certificate after that. I had some significant further study requirements, which weren't a problem, I was happy to undertake.

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DR MUNDY: At what stage in your career were you?

MR WYVILL: I was 12 years as a barrister. So I moved across to the UK after 12 years experience.

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DR MUNDY: So you were relatively experienced.

MS MacRAE: Just to finish up on that, is there a timeline now for this?

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MR WYVILL: We hope to get her admitted as a legal practitioner so she can start that period of training that we're talking about early next year.

MS MacRAE: So it will have been more than two years since she - - -

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MR WYVILL: She made her application at the end of 2012 and yes, it will certainly be – it'll pass its second-year anniversary.

DR MUNDY: This body who's making this decision appears to be a functionary of the Attorney-General's Department New South Wales?

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MR WYVILL: I'm not sure. What I can do is I can track them down and get you better details.

DR MUNDY: That would be helpful. Mr Raine will give you an email address.

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MR WYVILL: Certainly if you want to speak to Felicity Gerry, you've got a spare hour, she'd be delighted to talk to you about it. Suzan reminds me she's doing a murder trial at the moment in the UK but will be back shortly.

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DR MUNDY: I'm unable to help with certain murder trials (indistinct)

MR WYVILL: And she'd rather be here with her family and children of course.

DR MUNDY: We'll investigate (indistinct)

MR WYVILL: Now, pre-action conduct, just to give you some of my background in that so you can see why it's a bit of a bugbear of mine. I, as I said, moved to practise in the UK at the end of 1998, which was just before the Woolf Reforms came into effect. They came into effect in 1999 in the UK. So I was able to see a little bit of a system prior to the Woolf Reforms coming into effect and then practised with them for about nine years.

I then came back here and it was like going back to the 1850s to be practising in the jurisdiction where you just went straight to court and you found out the issues the week before the trial. So I got myself with the support of the Bar Association under the rules committee and then drafted the PD6, which is that practice direction you may have seen, submitted that to the rules committee. The judges were very keen on it from the beginning and it's been put in place pretty well about a year after I got here.

Then it's been part of the legal landscape here now for five years. It's been in our view largely a great success. I'll come to the qualification shortly. It's a great success particularly in settling matters before they get to court for the obvious reasons; you would have heard about that. Having practised here for 10 years in the bad old days and then coming back here now, I would think the ratio has gone from less than 10 per cent that settled before proceedings were commenced to 80 per cent which are now settling before proceedings are commenced.

I can say that there's just no issue of any substance within the community, judicial and professional, about these principles staying in place in the Territory. They're supported across the board. You'll see them referred to in the most recent report from the Supreme Court at page 16, 2012/2013 report, and the proposals there about building on those reforms, enshrine them into the rules and then working on the area where there is an issue; that is, where the matter doesn't settle pre-action, making sure there's a real dividend from the procedures that have occurred pre-action so that the litigation is very focused and efficient when it gets to court.

That's the weak spot at the moment which we need to work on. That's what we're aiming to work on. So, as I said, it's going to be part of the landscape here forever. It's just a question of fine-tuning it to make it work more efficiently. The direct result of that is of course that you've probably over the last couple of years taken out – we've probably taken out well over a million dollars worth of fees out of the legal market.

That's fine in a jurisdiction where there's an excess of demand over supply for legal services and so lawyers can still survive. Indeed, they feel better about the practice because it's more efficient. Only the disputes that don't settle are litigated and everyone's happier. It's a very different kettle of fish where that isn't the case.

That's one of the reasons why we believe that there are some pretty powerful vested interests lined up against these kind of reforms down south. There is no equivalent experience to the Northern Territory's experience about pre-action conduct and it's really strongly supported here.

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DR MUNDY: Martin CJ in the Supreme Court of Western Australia when we saw him talked about the processes in his court. I think he said that only 6 per cent of matters that are filed ultimately go to trial in Western Australia. But again it may well be down south might be different.

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MR WYVILL: Our object here is to almost make that figure a hundred per cent. So if you actually commence – you got to the point where you've exhausted the options, you already know what the answer is and you go bang, bang, bang, and get an outcome.

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DR MUNDY: And you'd get some benefit out of what you invested in the pre-action activity.

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MR WYVILL: That's right. I'll come to an example of why the culture down south just hasn't got to grips with this shortly. But our aim here is to make sure there aren't any discovery issues outstanding when we commence proceedings. You've shown the documents to each other, that's it. So we don't need an order for discovery. The pleadings can be much more focused. We'd probably like to rename them statements of case, whatever you want to call them. Often we won't even need those because you'll say, "Look, there's just a point of law in issue here. It doesn't need a set of pleadings. That's the point of law. What's your decision?" So that's how the pre-action conduct ought to be used to focus litigation, so that it happens quickly and if it does happen, it does happen.

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The example I wanted to raise was this: when the Federal Court introduced this new set of practice rules in about 2011, I think, that was shortly after the pre-action reform was brought under the Commonwealth Civil Procedure Act I think. I listened to the video of one of the senior judges describing all the benefits of these new rules. He was talking about the case when at a first case management conference and he said, "Well, of course at the first case management conference the defendant is not going to know very much about the case."

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I'm going, "Hang on. Isn't the whole point of complying with that legislation to make sure the defendant does?" So when you come to that first case management conference you try and make it the last one and so you can say, "This is the case, it's set up, that's the issue, let's have a dispute on that, let's have an argument about that." That was, to me, a striking example of how the judge was in a completely different headspace to where he should have been if there was a proper embracing of the pre-action conduct requirements.

The issue I have, if I may say, with respect, about the way it's drafted in your report at the moment is the lack of the connection between the different ideas, all of which are good, with the central notion of cards on the table litigation before you start proceedings. So you talk about the early disclosure documents. But that of course is what pre-action conduct is all about. You talk about it being – and to use your expression, “targeted” I think was the expression you used in your draft findings – “targeted pre-action conduct”.

Looking at the (indistinct) and there are three there, these fundamental principles are basically about consent, about being informed sufficiently to express a judgement. These are fundamental rights before a citizen gets taken to court or chooses to go to court. That, we don't think, is something which you should target. That should be something which is inherent in the system to give litigants that choice.

DR MUNDY: Do you think there are any categories of matters – it's been suggested to us that these sorts of – well, some (indistinct) reasonably well qualified you would have thought, have suggested to us that these sorts of protocols aren't necessary or in fact may in cases be dangerous. Are there any sorts of matters which you could conceive of which you think they wouldn't be appropriate?

MR WYVILL: Once one accepts, as I believe one should, that running an efficient litigation system requires the cards to be on the table and that one should only litigate what one needs to litigate, it's difficult to see why those principles don't apply across the board. There is a risk with any system of incompetent lawyers or malicious lawyers taking advantage of whatever system you devise. One of the interesting things about the pre-action conduct that I saw in the UK was in Birmingham where the marketplace was not dissimilar to Darwin. There wasn't an oversupply of legal services.

DR MUNDY: (indistinct) or any similar (indistinct) in Darwin?

MR WYVILL: Look, it's surprising, I know. I think people in both places would be surprised. But the legal services market wasn't dissimilar because it was smallish because it was dominated by London, dominated by south, smallish and also that because of that and because of the massive industry in the area there tended to be an excess of demand over supply for good quality services.

The pre-action conduct system operated really efficiently. It reduced commencements extraordinarily and it meant that when they hit the court trial times went from four years down to less than a year. So you were getting trials heard and determined within a year. You go to London the marketplace is different and suddenly you see people taking forever to go through their pre-action conduct and taking all these (indistinct) about what further documents they need. Then you see

the cost going through the roof before – and of course then they can't agree on the day of the week. So the whole process has been wasted. That's a vulnerability which the system has across the board and pre-action conduct isn't on its own.

5 **DR MUNDY:** Is there any material – if you can give us the references of any analysis of what's been happening in the UK with pre-action conduct.

10 **MR WYVILL:** I have looked high and low. It's the same problem here. Nobody has got to the critical facts. No-one's got the market data. It would be great if you people could do that because this needs an economist to get the market data.

15 **DR MUNDY:** We've tried. The date (indistinct) I think ultimately rests in a systematic longitudinal study with the cooperation of both the judicial authorities and civil authorities. It has to be set up, then they capture the data as it goes into court and it comes out of court.

20 **MR WYVILL:** I know that the judge effectively look at – and I think you've got it in my – in Prof Sourdin's report on pre-action conduct she refers to a comment by the Chief Justice expressing some concern about a lack of cooperation from the Law Society forgetting logistics. That didn't get to the right place. If it had come to me I would have made sure that that would have happened. So that cooperation can happen up here. So if you're looking for a place to get the information, I'd be delighted to offer.

25 **DR MUNDY:** (indistinct) move on from this matter in the not-too-distant future. I suspect Prof Sourdin could assist.

MR WYVILL: I hope so.

30 **MS MacRAE:** Just on that issue about the success of the pre-action protocols in jurisdictions where there's basically said to be very strong support for them, but, as you mentioned, in London people can sort of pervert what's supposed to be a – what mechanisms are in place or what could be done to try and reduce the extent to which the rules can be gained? Is there anything there?

35 **MR WYVILL:** The English – the (indistinct) was onto this and he put it forward, but the forces against him never saw it prevail and not prevail successfully because judges are always resistant about dealing with money. They hate money. They'll put it in a judgment but they hate talking about legal cost or managing legal cost. You just need to deal with this like you would need to deal with any economic function; 40 with budgeting and then accounting to a budget.

So if you were in every case simply to say that, "Sorry, you might have an interest in the confidentiality of your solicitor's legal bills but the access to justice

principles override that confidentiality and we make it a requirement that if you come to court you have to disclose at the end of the day what your total legal bill was,” if you did that, it would enable the policing of the system so much more efficiently.

5 **DR MUNDY:** I guess following on from that, your view would be that the Woolf Reforms around litigation budgeting and those sorts of issues would not be an inappropriate reform (indistinct) certainly substantial cases, perhaps commercial cases.

10 **MR WYVILL:** In every case, because the – I mean, obviously not the small scale ones, but any case of significance because it’s required under the legal professional rules anyway; you’ve got to do that for your client. The difficulty is that when the court comes to policing practitioner behaviour it’s not given that information. And that’s the critical information, critical information for seeing how the behaviour of
15 the solicitor has impacted on the client, critical information for seeing how the court’s behaviour has impacted on the client.

So a judge who’s a bit case management conference happy can see the fact that he or she by their 10 case management conferences has seen the cost go from here to
20 here. Next time they’ll think long and hard about doing that. So that’s the critical information. How can we manage things like the success of whether the ultimate outcome of the litigation delivers a practical outcome without knowing and publishing the legal costs?

25 **DR MUNDY:** Some would have to believe it’s about justice, not cost.

MR WYVILL: I have never met a client who thought that. I’d like to meet him.

30 **DR MUNDY:** Talking about clients, how well informed do you think people are about the costs of litigation?

MR WYVILL: I think there – I do a lot of mediation work and one of the things as a mediator that I do is what every mediator normally does, is go through the alternative futures if you don’t settle. That means that I’ll go through and say,
35 “Right, what’s going to happen in court.” In fact my note that I send out to parties before a mediation suggests that they ask their solicitors to give a budget for what the litigation will be if the matter is not settled.

So from that point of view, people through that process can be – and when that
40 occurs – are much better informed about the future, the financial future. The difficulty is that when we have a court system which is operating without reference to budgets and financial impact you cannot be as precise as you’d like to be because you get into court, you get the judge who’s likely to take their time or do more case management conferences and suddenly your estimates blow out.

5 **DR MUNDY:** Perhaps just on costs of the courts, we've created a bit of notoriety for ourselves suggesting that perhaps more could be recovered from litigants from the use of the courts. Martin CJ mentioned the Bell case to us which cost his court \$15 million. He thinks they got back somewhere in the order of \$700,000, but in any event, 14 million-odd of the taxpayers' money in Western Australia has gone to facilitate a case between bankers and insurers which, from my reading of it, didn't resolve any particularly fundamental issues.

10 Do you have a view on what would be an appropriate policy for the establishment of court fees, particularly in matters which are primarily commercial?

15 **MR WYVILL:** I think the question has got to be put back to the court to say that, "If you're going to charge for the provision of a service," which, in effect, is what it's doing, "you need to give certain commitments in return for that." The commitments are the kind we've been talking about. So I think the principle of recovering those costs is fine if the court is doing its job properly and administering a system which sees parties come to court with only the real issues in dispute and then managed as efficiently as possible.

20 Once that theory is in place, the court's entitled, I think, to say, "Well, here are our outlays for that in an ordinary commercial case." You ought to recover them in the same way you'd have to pay them for an arbitrator.

25 **DR MUNDY:** That may actually be a useful point of reference for what a day in court should cost. It probably should cost you no less than an arbitrator.

30 **MR WYVILL:** I don't have any difficulty as a matter of principle – and I may be speaking purely personally here because the Bar Association could well have different views within them about this.

35 **DR MUNDY:** The Australian Bar has got an open mind. The Queensland Bar submission to us has indicated that (indistinct) are essentially wrong. I don't think many people share that view.

MR WYVILL: Yes. I just would connect them with the services provided. If you provide that service sufficiently, then – but if you don't, it's just a monopoly power.

40 **DR MUNDY:** Thank you very much for your time.

MR WYVILL: Not at all.

DR MUNDY: We'll adjourn until 10 to 11.

ADJOURNED

[10.35 am]

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5 **DR MUNDY:** Could you please state your name and the capacity in which you appear, for the transcript, please?

MS COLLINS: Priscilla Collins, CEO at NAAJA and also Deputy Chair of the National ATSILS.

10 **MR HUNYOR:** Jonathan Hunyor, Principal Legal Officer at NAAJA, the North Australian Aboriginal Justice Agency.

MR SHARP: Jared Sharp; I'm the Manager of Law & Justice Projects, also at NAAJA.

15 **DR MUNDY:** Would you like to make a brief - and by that we mean five minutes or so - opening statement? Then we can move on?

20 **MS COLLINS:** Yes. Thank you for giving us the opportunity to give evidence to this inquiry on behalf of the North Australian Aboriginal Justice Agency and thank you for coming to Darwin, Larrakia Country, to hear our evidence. NAAJA has over 40 years' collective experience in providing legal advice and representation for Aboriginal people in the Top End, in criminal law, civil and family law, advocacy, community legal education, tenancy, welfare rights and indigenous prisoner
25 Throughcare.

In our supplementary submission and our brief comments today, we'd like to touch on some of the particular features of the NT legal landscape and NAAJA's work to highlight the critical role we play in providing access to justice for
30 Aboriginal people in the Northern Territory. As we note in our submission, our work is much broader than many of our counterparts. Our legal practice comprises of approximately 40 per cent civil, and that also includes family law, and 60 per cent criminal law. This commitment to civil law has been a deliberate approach.

35 Unmet civil legal needs for Aboriginal people is vast. We know the impact that issues like housing, child protection and welfare rights have on people's daily lives. There are no other services that can meet this need for remote Aboriginal communities in the Top End. NAAJA is the only legal service that comes to their community and provides general civil law services. However, our civil law work is
40 significantly reliant on funding beyond our core operational contract.

Eleven positions in our civil law practice, including our entire family law and welfare rights practices, are reliant on additional funding. At this stage we are unsure of whether this funding will continue beyond June 2015 and expect that we

may have to cease all services in family law, as well as reduce civil law services, as a result of funding not continuing. This will be disastrous in terms of the ability of Aboriginal people in the Top End to access justice. There is nobody else who can fill this gap.

5

Our supplementary submission gives some examples of the way NAAJA's coverage of civil and criminal law, community legal education and advocacy allows us to deal with a person's cluster of legal needs. One of the concerns we have the proposed cuts to services like NAAJA's is that it will seriously undermine our ability to provide holistic services. This is one of the reasons we urge the Commission to engage directly with the question of funding.

10

MR HUNYOR: Commissioners, our submission also gives examples of the complexity of the social legislative and policy environment in which we work. Obviously, this is a challenge that faces a lot of legal services but particularly in the NT context, and, in the last 10 or so years, we've seen really big changes that are very challenging. For example, we set it out in our submission the 14 significant changes in law and policy over the last seven years that a team like our welfare rights team have had to grapple with. The demands of dealing with that sort of change really limit the ability of services to engage in proactive early intervention work to assist people to avoid and resolve their legal problems, which is something we recognise is best practice and we strive to do but only specific program funding or a serious boost to our core funding can give us the capacity to take on that sort of work, and we recognise the significant efficiencies that we could achieve if we were funded to do that.

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We also recognise that there is significant scope for improvement in the way government engages with service providers, and we very strongly support moves to bring greater consistency to data collection and to streamline reporting requirements but we stress that the chronic and structural underfunding of legal assistant services to Aboriginal people remains a pressing issue.

30

It's critical, in our view, that the Commission appreciates that, for an organisation like NAAJA, in a jurisdiction like the NT, where we are stretched simply to breaking point every day, significant improvements in providing access to justice will not be achieved through internally allocating resources more effectively or better coordinating with other service providers. Of course, we'll always strive to do these things and, frankly, we've been doing more with less for as long as we've been around but the best evidence available - and we recognise that there are problems with the quality and the depth of the evidence but the best evidence we've got supports a clear finding that Aboriginal and Torres Strait Islander legal services are not adequately funded. To meet the recognised widespread and serious unmet legal needs of Aboriginal in the Northern Territory, a significant increase in funding is required and, in our respectful submission, this is an issue that can't be dodged.

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The draft report suggests - just to pick up one specific point - that there's generally a problem with duplication and lack of coordination amongst legal information providers. This isn't an issue in the NT. The problem we face is a significant gap in the services provided, not any overlap. In our small but geographically vast jurisdiction, there's a high level of coordination and collaboration, we meet regularly with other service providers and we all know what each other is doing, and I think it's something we're very proud of that we do well.

The draft report proposes the law access model as a signal referral point for legal information services and we understand that that works well in New South Wales but our view is that it won't work in the Northern Territory. For a start, ATSILS aren't a minor player, ATSILS are the major legal service providers in the territory; NAAJA alone is bigger than the whole of the NT Legal Aid Commission, covering Alice as well as Darwin, but NAAJA just covers the Top End and we are a bigger service because of the demand for services by Aboriginal people. NAAJA and CAALAS also provide comprehensive services across civil and criminal law, and we're the first port of call for Aboriginal people, so it would be, with respect, inefficient and confusing for Aboriginal people to have to first call another service for assistance and referral, particularly where those other services won't be able to do the substantive work if it's required; they'll have to refer them to us anyway.

We also urge the Commission to be mindful of the limitations on telephone and Web-based information in meeting the legal needs of Aboriginal people. We still have many, many of our clients who don't have access to a reliable telephone, they don't have access to online, and the problems raised by language and communication, including high levels of deafness and hearing impairment amongst Aboriginal people, need to be taken into account.

We also touch in our submission on the role of the Ombudsman. I won't take you to that this morning but we note that one of our concerns is that their effectiveness depends on having real teeth. We have a case study in our supplementary submission of where the effectiveness of an ombudsman is limited by the extent to which government is prepared to listen to what they have to say and the extent to which the Ombudsman can actually engage with the community. In the Northern Territory, the Ombudsman doesn't travel, so, if you've got a problem in a remote community, you need to go to the Ombudsman, the Ombudsman won't come to you. Jared is going to have some things to say about community legal education.

MR SHARP: Thank you. We welcome the Commission's draft findings on the importance and effectiveness of advocacy and community legal education in meeting and responding to legal needs in a cost-effective way. Our submission sets out examples of the value of NAAJA's work in improving and developing legislation and policy. We also note the importance of our role as a regular contributor to public

debates on important issues that impact upon access to justice for Aboriginal people. In the NT, NAAJA is one of the few organisations that can provide a voice on these issues and ensure a balanced and informed debate.

5 Commissioners, I have brought with us today a visual representation - it's a shield which has been developed by some women's safe-house workers in the remote community of Nooka, which is some 300 kilometres southeast of Katherine. We brought this in really just to highlight some of the challenges that are faced in respect to community legal education and particularly the conceptual challenges for remote
10 Aboriginal people in understanding concepts like domestic violence orders. This is an example of - when intensive community legal education work is done, then it's empowered those women's safe-house workers to develop resources such as this shield to break down some of the misconceptions, such as, if you get a domestic violence order, your husband will go to gaol. It's to really make sure that something
15 like a domestic violence order is fully understood by remote Aboriginal people. We're really proud to be part of this project, which has just started in the community of Nooka but we're hopeful that it can expand to other communities and really empower Aboriginal people to understand the law.

20 **MS COLLINS:** Just following on, as the Deputy Chairperson of the National Aboriginal and Torres Strait Islander Legal Service, I'd like to just make a few comments on their behalf.

25 The NATSILS welcome the finding of significant unmet need. The exact level is difficult to quantify but, in ATSILS' experience, it is high amongst Aboriginal communities, particularly when you consider the amount of people who have a similar issue but don't have access to the service. The law survey had its weaknesses in capturing the need amongst Aboriginal communities, as it was largely phone-based and, as we know, Aboriginal people have limited access to telephones,
30 especially in the remote communities.

35 The NATSILS want to be able to provide more civil services to meet that level of need but would not be able to grow their civil law practices unless they are provided with specific additional funding. They cannot deliver the civil service under the current funding. The demand for criminal services is consistently high and we have no capacity to divert those resources from criminal services to the civil services. The draft report recognises the importance of CLE law reform and advocacy but it doesn't make it the subject of a specific recommendation.

40 I have a letter here that has been sent to you by the Commissioner of Correctional Services in the Northern Territory, which is a letter of support for the NAAJA advocacy and law reform activities, which we'll give to you. What we would like is a specific recommendation, especially in light of the funding cuts to this area for the NATSILS. We're also best placed to deliver these to Aboriginal

people, as we've built up the necessary relationships of trust and have the necessary communication skills. ATSILS also support an NPA on the condition that ATSILS are at a party to it at this time and are involved in the development and negotiation process. NATSILS support state and territory governments being required under the NPA to provide funding to ATSILS, and this (indistinct)10.58.57 to the reality that their policies and laws have an impact upon the level of demand of legal assistant services amongst Aboriginal people.

In regards to a role for state and territory governments in influencing service delivery and reporting requirements, it is our view that, given the historical relationship, knowledge and experience gained over time, the Commonwealth Attorney-General's Department remain the key agency with whom decisions regarding service delivery should rest - any transfer of funds as part of the new NPA on legal assistant services between the state and territory governments be tied, so that all the money goes to the services; so the ATSILS funding is not reduced as a result of new arrangements. We don't want the funding to be absorbed by the territory's treasury for the administration costs. Further, it is crucial that the Commonwealth does not take away their responsibilities to Aboriginal people under the Australian Constitution.

We would also not support any duplication of reporting requirements. The NATSILS supports robust reporting requirements for ATSILS and, indeed, the entire legal sector. Additional resources will be required to implement any significant change to data collection and reporting systems, both in terms of start-up costs and the ongoing collection and reporting requirements. These resources cannot be found in existing operational budgets. Thank you once again for the opportunity to provide evidence today.

DR MUNDY: I was going to ask about one question. How much money do you want? It's a serious question because we have spent a long time and considerable effort in trying to, first, understand how much services cost to produce, secondly, what's the nature and the need and how much it would cost to meet that need. We're reasonably good at this and we're really struggling, in part because, despite what people say about all the data that is collected, it's not fit for purpose or, at least, the purpose which your organisations and a whole pile of others are saying we must make specific recommendations about funding. How long is a piece of a string and how we will know that, if we were to recommend that amount, the benefits would exceed the costs?

MR HUNYOR: I think the difficulty in us telling you how much is that the extent of the need - all we know is that it is vast.

DR MUNDY: We can see that and we can see it in many, many areas of legal services.

5 **MR HUNYOR:** What we've never really done over the 40 years is say, "This is how much you're offering and this is what we can do for that." What we've always done, and one of reasons Aboriginal Legal Services do this is because they've got skin in the game because our board is Aboriginal, our staff is almost 50 per cent Aboriginal - so we get an amount of money and we try to do everything with it. It would be very tempting to say to the government, middle of June next year, when we get told how much is on the table, "Okay. Here's what you'll get for this" and actually make a realistic calculation of what they can expect. I'd be reasonably confident it would be about half what they're currently getting.

15 **DR MUNDY:** I'd really like to be in a position where we could say, "If you spend" - and this is in relation to ATSILS, it's in relation to CLCs, who I'm sure you understand are experiencing very similar fiscal conditions. We would dearly love to be in a position to say, "Spend X dollars and you can be reasonably assured" - certainly within a public-policy context, "you can be assured that you will get these outcomes" or, at least, "these outcomes are likely to flow". That's what we need to be in the position to do - right across the assistance - and whether it be ATSILS or legal assistance, legal aid commissions or CLCs, it's the problem, again, that we face.

25 **MR HUNYOR:** I think, within the - we could certainly come up with certain figures, for example, I think we could probably come up with a reasonably accurate estimation of how much more money we would need to pay our staff the same as what they would get at a mainstream legal aid service or at the DPP, our counterparts there. We could do that. I could also come up with an estimate of how much more money we would need to be able to have our staff within the criminal section having a similar caseload to that which we expect our counterparts, again, at a legal aid service to have because we can try to roughly work with the figures that we've got.

30 The difficulty within the civil sphere is, to some extent (indistinct) so we go out to what Wadeye, the biggest Aboriginal community in the territory, we go there once a month for one or two days, and we get a certain number of clients. One of the things that we've really worked on over the last four years, and it has been a great success, is making sure that we commit to being in communities on the times that we don't cancel trips and we don't - when we're short of staff, we don't stop servicing a community and, as a result, we've seen the demand in those communities increase, we've built up trust, we've built up reputation, we've built up awareness of what we do, and someone comes to us for their motor accident's matter and then they realise they've got a medical negligence claim and we go from there.

40 The trouble with the "How long is a piece of string?" question there is that it's the unknown unknown. If we went to Wadeye every week, we would be busy.

DR MUNDY: I guess the answer is that there is so little similar assistance provided that whatever you provide is almost guaranteed to be successful in some sense - - -

MR HUNYOR: Yes.

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DR MUNDY: - - - but nowhere near the margin. We heard about the (indistinct) service and we heard any number of great programs around the country, both indigenous and non-indigenous legal assistance based. And I guess that's the real challenge, that everything almost seems to work because there's virtually nothing there.

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MR HUNYOR: One of the challenges we've also got is establishing a critical mass. To provide an effective service, you need a critical mass be you need to make sure, when someone's - when you've got three people on leave, two people on circuit and four people sick because the flu's come to town, that you can still provide a credible service. You need to make sure that you've got enough of a corpus knowledge within your organisation. One of the reasons we stopped providing a family law service 18 months or two years ago, for a period of - for about a year, I think, we stopped providing it -was that we weren't able to attract, with the money we pay a sufficiently senior family lawyer, and we didn't think that we were able to do a competent-enough job, and we didn't have enough lawyers; we only had one or two. We just said, "If that's too great a risk, you should go to NT Legal Aid," where they have a great family service, albeit limitations of not having the access to the communities and all those other things.

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So, to some extent, there is a matter of getting a critical mass and we think we've sort of reached that but we've got these parts of our funding that we think are going to drop off, and we'll be back to try to sort of paper over the cracks, which is why, for us, funding is an issue. I think I once heard someone say "A library is an expensive thing to run but a cheap library is a complete waste of money because" - and I feel like that about a legal service; to have something that is just a fig leaf and we pretend we're providing a service is really just greasing the wheels and doing a disservice. I feel that we're approaching a critical mass but we are constantly trying to hang onto all these little bits of funding, to sticky-tape it together; it's deeply frustrating.

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DR MUNDY: Are you able to describe to us what the dollar amount of the recent budgetary decisions have been - on your organisation as yet?

MS COLLINS: What we know at the moment is that there's a \$30-million cut that's coming across the ATSILS. Six million of that will be cut in the 15-16 financial year and, based on previous calculations - I mean, we haven't been told this by the Attorney-General's Department, they're not in a position to do that, but, based on previous calculations, we're probably looking at \$1 million, and that's just in our

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operational contract. So, in addition to that, we'll get funding under the Stronger Futures for welfare rights and also to employ a number of civil solicitors and criminal solicitors under Stronger Futures, and we don't even know what's going to happen to that funding. That could possibly be another \$900,000 as well, on top of the one million that we're looking at.

That's looking at being cut. I know that you're saying "What sort of figure?" Our sort of thing at the moment is that we have to maintain the funding that we've currently got, we cannot lose any funding at all, and you need to at least have a minimum of a 3 per cent increase every year. At the moment we're getting, like, .5 or 1 per cent. I mean, we have to pay our staff a 3 per cent CPI and everything goes up 3 per cent, so we're already behind the eight ball every time, let alone the increase in workload.

DR MUNDY: (indistinct) nothing.

MS COLLINS: That's the thing, we can't even keep up with the basic CPIs, let alone the workload that comes our way; so, for us, we have to maintain that funding. We cannot lose that funding.

MS MacRAE: Does the expensive cases fund, does that impact on what you're doing?

MR HUNYOR: It's more of an impact for our criminal work than it is for our civil work but it is an impact there as well. It means that we will have to send a large number of very expensive significant cases to NT Legal Aid or we will need to withdraw from the record once matters are set for trial and assist people to apply for NT Legal Aid, and it will be a matter of time before they're not able to take on those cases as well. It's a game where we have to pass the costs on to Legal Aid and Legal Aid has to run out of money and pass - have people go to Court with no representation. The Court has to then make a big deal and, finally, government will do something about it. It's grossly inefficient.

DR MUNDY: Have you made representations to the Commonwealth Attorney about this?

MR HUNYOR: Yes, we have, over years.

MS MacRAE: Just on the family matters, you talked about not being able to provide family services for a period. Would you say that, for your client base, there's a tendency where potential clients are more comfortable in coming to you, given the aboriginality of your board and your staff, compared to, say, a legal aid commission, or is that not - - -

5 **MR HUNYOR:** Very strongly. There's a number of features behind it. One is that we're known. If you're from Wadeye, really, NAAJA is legal assistance; that's it. We're the organisation that goes there regularly, so there's a familiarity with the work that we do, there's a recognition that NAAJA provides its services in a qualitatively different way, so we have the role of client service officers, who will travel to remote communities and will go and find people and we're able to track people down. I have countless stories of the remarkable ways in which we've been able to actually find someone to get the piece of information because we've got those community networks. All of those things are very, very important. Obviously our lawyers are experienced with communicating with people in a cross-cultural environment, working with interpreters and all of those sorts of things. We think it's something that - we applaud the Commission for recognising the role of a distinct Aboriginal legal service but we think there's a qualitative difference that really matters.

15 **MS MacRAE:** And, I guess, in family law you've got all those emotional sort of connections on those issues that make it particularly difficult if you're dealing in an environment that's less sort of culturally accommodating.

20 **MR HUNYOR:** That's right, and often there are really complicated issues around family relationships and kinship, and those can make family matters particularly complicated.

25 **MS MacRAE:** We heard from the Legal Aid Commission about the problems that you have with conflict-of-interest issues and only representing one side, and it seems to be an uncrackable nut in terms of the problem. Is there anything there that you think could be done that hasn't been done, or is it just one of those issues that you've got accept - - -

30 **MR HUNYOR:** There was a proposal, and, I'm sorry, I'll struggle to remember the exact details - there was a proposal we actually - with the other ATSILS - looked at around making the conflict rules more flexible in circumstances where someone is remote, they don't have access to other legal services, and the only service they have access to is a legal aid agency, where the conflict relationship does work slightly different. I think people in Wadeye or Maningrida understand that we represent all Aboriginal people and that, if we represented someone three years ago, they wouldn't consider that there's an ongoing duty of loyalty such that we couldn't cross-examine them about their memory of an incident where they were a victim, whereas that might not be the same in a commercial setting in a city.

40 I think we did put something in - I can't remember the details but there are things that you could do around that, but, in the end, there will be conflicts that are just conflicts and we strongly support Legal Aid having the capacity to go to communities to pick up that load.

DR MUNDY: It's been suggested to us elsewhere in the country that some of these conflict issues are more informal than they are actually truly in substance and that a very narrow or expansive, depending on how you want to look at it, view of conflict is being drawn and, with suitable clarification, perhaps even by way of legislation of some of these issues, could be certainly dealt away with. Now, it hasn't been mentioned to us in an indigenous context, I must stress, where I suspect the conflict issues, culturally, may actually become realer than they may well be between people who are not indigenous. Is there anything that governments could do to assist in resolution of these conflicts to make it somewhat easier to - is there anything in the law that needs clarifying, which, if it was clarified, could deal with these - - -

MR HUNYOR: I think probably the notion of constructive knowledge creates a particular issue for us. The assumption is that, if you were represented by NAAJA five years ago, I have access, as the principal lawyer, to that file and, if I'm representing a new client, I should go and dig out the old file for someone else and have a look through it, which is, of course, not how it works, particularly for a legal aid agency, where there should be an assumption that we sort of have - there's a public interest in the sort of service we provide, and we provide a different type of service. I think, to have rules that make it quite clear that, when people come to us, they should know I am not going to go and dig out the victim's file to find out if she's got an alcohol problem, and I've got an ethical obligation not to do that, and that's a clear expectation. I think being able to draw a line under someone's matter and say, "Well, as long as - - -"

DR MUNDY: That's the sort of issue that - I mean, I think it's come up in family law matters where there's violence and - in indigenous - and Legal Aid might have represented the bloke on some other matter five years ago and, therefore, they feel they can't - or three years ago, a totally unrelated - I think what's being suggested to us is very much that perhaps if the same person did the representing - - -

MR HUNYOR: Precisely. That's right.

DR MUNDY: But it seems to us that - it's been suggested that a little bit of legislative clarification might actually help, and it's not a particular issue with indigenous parties.

MR HUNYOR: It's not especially an issue for us. One of the things we've done deliberately, in the way that NAAJA is structured, is to have a Chinese wall or an information barrier between our criminal and civil. That works, really, very well but we can't sort of erect those information barriers within our civil or criminal teams from time to time, in ways that would ordinarily be pretty sensible. I would have thought, if you've got - for example, dealing with co-offenders or dealing with mum and dad to a - if you deal with mum and dad in a child protection issue, where they

may not have the same interests or typically only represent one, I would be fairly comfortable with having two lawyers who don't speak to each other, who, you know, are professional and maintain contact, in those situations particularly, where there's not a real hammer-and-tongs dispute where they're going to be having to bark at each other at the Bar table.

DR MUNDY: In circumstances where the conflict may arise within a period of time, this probably could be, helpfully cleaned up?

MR HUNYOR: Absolutely. I mean, the approach we take, which is similar to - based on the sort of New South Wales legal aid guidelines, is - we consider that our duty of loyalty generally expires after about 12 months. So, if we represented someone, say, six months ago, we might think that that creates a bit of a bad flavour, if we're then there cross-examining them, for example, but if more than 12 months has passed, generally, we would consider that - provided the same lawyer's involved - so we've always taken a very, very robust approach to conflicts. We don't cease to act on the basis of potential conflict; we'll only cease to act if there's a real conflict. Co-offenders is a classic example, there's always a potential conflict if you take on co-offenders, but we do that because otherwise it would be unworkable.

MS MacRAE: Just coming to this issue about how much funding you might need, and one of the things that we're tasked with is trying to look at costs and benefits of providing additional assistance, and one of the things that we hear a lot anecdotally is that issues that start out as small civil matters can be escalated to bigger things and might even spiral into criminal matters. Would you have any sense of the scale to which that might occur here in the territory? Is that a relatively common thing? I know it's very hard here - it's one of those other imponderables that we're sort of trying to get a handle on and would you have any guidance for us on the extent that that occurs?

MR HUNYOR: No, I'm not sure that we can. I think my view would be that we - I don't think we could reasonably expect that the Commission is going to come up with a number and say, "This is how much more you need to give" but I think a clear recollection that there is not enough and that we can't do more with less and that there needs to be more - we're very much - we very much accept that the inconsistencies in data collection and those sorts of things make it very hard to quantify that but the concern for us is that government seems to be on the track to saying, "You're going to have to do more with less because everyone's going to have to do more with less." We want to make it really clear that not only are we not able to do that but, from an Aboriginal Legal Services perspective, if we pull out, the costs are going to be much greater than what the government cuts to replace because we do things way too cheaply, to our detriment. If we were to transfer any of our criminal work, for example, to mainstream legal aid, we know it would cost them much more to service because that's the nature of the models we work on.

5 **DR MUNDY:** Just on that, when these cuts come along, which they periodically seem to, is there any discussion between yourselves and the Attorney-General's Department of the Commonwealth of what are going to be the frontline service implications with these cuts, or you do find out about attendance after the treasurer has been on his feet on budget night?

10 **MS COLLINS:** It's a little bit of a last-minute thing. I mean, we always lobby leading up to that time and then we just get told, "This is what your figure is going to be" and you kind have to revise your budget to fit within that. What we're aiming to do, now that we know that there is a 13-million-dollar cut coming, is to sit down and - we don't know what the cut to our organisation is but we're just going to have an estimate so that - we want to actually backtrack and say, "Well, if this is the cut, this is what we're going to lose and this is what the impact is going to be". We're aiming to meet with the Attorney-General when he comes to Darwin in August.

20 **MR HUNYOR:** We'll try and do that work now but, again, it's not that the government has got to come to us and said, "We need to cut something. What would this look like?" They've said, "We're going to cut this much" and we're now going to be able to take it to them and say, "Well, these are the implications." It's very frustrating because, I think, certainly the way it's been communicated is that there are meant to be cuts to advocacy. The idea that we spend - - -

25 **MS COLLINS:** That much.

MR HUNYOR: It's not based on reality.

30 **DR MUNDY:** Given that you raise advocacy, and we've raised this with a large number of other community legal groups and we understand that probably some of the EDOs would simply close, particularly in smaller jurisdictions, do you have a sense of the extent to which advocacy actually leads to the avoidance of disputes, which are costly in themselves?

35 **MR HUNYOR:** Can I give you one example? Section 104A of the Sentencing Act up here used to contain particular provisions that related to the way evidence of Aboriginal custom and culture was to be led in a criminal proceeding. We took the view that they were racially discriminatory and we engaged in advocacy. I thought that we had a pretty good case, if we were going to take it as a case to the Federal Court and, probably, ultimately the High Court, to challenge the law a being contrary to the RDA but, instead, we lobbied the former Attorney and then the Attorney changed, we lobbied the new Attorney and I met with the Solicitor-General and we talked through the issues and ultimately they changed the law and they've made it
40 much better than I could have hoped to have done if I'd spent tens or hundreds of thousands of dollars litigating the matter; it would have been enormously expensive.

We got that done through advocacy. That's exactly the sort of work that we think is really important for us to do and that we could do really, really well.

5 The letter that the Department of Correctional Services has provided also speaks to the sort of relationships that we were able to build up. We're constantly being asked to be on consultative panels and steering groups and those sorts of things because, frankly, we're one of the few organisations that can and that really knows the issues around child protection or the issues around youth justice. They're issues where we have significant expertise and, for indigenous people, we are the only
10 organisation, with CAALAS, that can talk about that in the territory.

MR SHARP: The other aspect of that is, when we are involved in law reform initiatives, our role is often crucial to avoiding unintended consequences of legislation, where, with the best of intentions, policy officers will put in provisions
15 which will disproportionately impact Aboriginal people. We have that role of (a) providing the voice of Aboriginal people, our clients, and also to assist in avoiding those unintended consequences.

DR MUNDY: You act in effectively ensuring that the unavowed consequences are
20 avoided.

MR SHARP: That's right.

MR HUNYOR: And there are various pieces of legislation here where I've been to
25 the Court of Criminal Appeal and won appeals against changes to the law and, if they'd come and asked me in the first place, I could have told them "Those words mean this, not that". They didn't ask, so we litigate and we cost everyone a whole lot of money in doing it. That sort of work, we think, is just an obvious way to do things efficiently.
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DR MUNDY: Clearly, the people who don't have day-to-day contact with the clients involved in this space aren't going to have that knowledge.

MR HUNYOR: That's right.
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DR MUNDY: And that's no criticism; it's just a statement of the reality.

MR HUNYOR: That's the reality.

40 **MS MacRAE:** Is that true both for Commonwealth and territory matters, I'm assuming?

MR HUNYOR: Yes. We do much less in Commonwealth matters but, for example, around things like welfare rights and changes to social security and things

like that, our welfare rights lawyers are amongst the best in the country and they really know their marbles, so, when they're consulted, frequently the feedback we get is "Thank you. That was really helpful" and we see changes. In all sorts of legislation we see the changes that come about through our advocacy. Obviously,
5 the government is going to achieve what they want to achieve and isn't going to have us then litigating them down the track.

DR MUNDY: Saves time for everyone.

10 **MS MacRAE:** One of the things that is talked about in the national submission, that I think you support, is the possible development of a culturally-tailored ADR service for indigenous people. I'm assuming this isn't really on the wish list because it would cost money and you clearly don't have very much of it but what would you see as the benefits of that? It seems to be something kind of on the top of your list of
15 things you'd like to see. Can you just give us a bit more detail about what - - -

MR HUNYOR: I might throw to Jared. One of the things I would note is that, in a jurisdiction like the territory, that would look differently in almost every community because there are different groups of elders, with different law systems and different
20 capacities, some communities are very much ready for it, but it's actually work that we are already doing through our Northern Justice Project.

MR SHARP: Yes, that's right. A community like the Tiwi Islands is a good example, where Tiwi Island mediators are bridging that divide between traditional
25 Tiwi Islander conceptions of dispute resolution and mainstream mediation models, and a lot of work's been done by NAAJA, as well as the Community Justice Centre here, to develop the skills set of those mediators, and it's enabling them to resolve disputes at a very early stage but also at a later stage, so that they can be called upon by the Courts to support a particular process at that Court stage as well. That's a
30 good example of the type of model that could be developed more widely across the territory but, as Jonathon said, it is very much a community-by-community approach that would need to be had. I think a national model would have grave difficulties, unless it had that flexibility to adapt to be locally responsive.

35 Some of the other work that our community legal educators are doing is just phenomenal in terms of supporting elders in remote communities, to train them up in mediation and it was a fantastic example, where the elders in that community are also having an active role in the Court process to again help to resolve disputes and to provide information to the Courts about particular defendants. So, there are certainly
40 examples of where it's been happening really effectively; it's just the resources that are not there to support those types of initiatives because they are extremely resource-intensive, they require ongoing work with those elders, whose, often, level of knowledge of western concepts of mediation and the law are quite low. To bridge that gulf requires a huge amount of work but it can be done and there are successful

models in place.

MS MacRAE: Would you have any idea what sort of resources would be required if you wanted to roll it out across the territory?

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MR SHARP: It's a really difficult one. Again, just looking at case-by-case scenarios - we're doing some work in the community of Gunbalanya at the moment, which is really intensive between now and November, doing monthly visits. Just as an example there, I think you'd really - with a core group of, say, three workers, you could support maybe four or five or six communities to develop those types of initiatives from the ground up. I'm conscious of examples, like in the Mornington Island Restorative Justice Project, which seems to be a best-practice example, and that was extremely resource-intensive, to grow that service, and it's now starting to bear the fruits of that investment.

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MR HUNYOR: And I think you'd need to be really careful about trying to roll anything out in a big way. I think, the truth is, these things really need to work organically, community-by-community, with real leadership from those communities, and work up from there. I'd be concerned that, if you tried to say "This is the thing that's going to work for the whole of it, and you'd be much better to pick a couple of communities, pick a couple of organisations that you know can deliver that and then see what works in that community and see what you can learn. I think that's one of the things that we see is effective, that one particular community will find something that works for them. Unfortunately, often you're not going to know what that is until you're actually in there doing it. The paradox for me with a lot of indigenous initiatives is that, the bigger they are, the less likely they are actually to work, and it's the things that start small and build and that you're learning from and - - -

MS MacRAE: Start at the grass roots and build on that competency with the people that are there and then grow with the them.

MR HUNYOR: Exactly. That's right.

MS MacRAE: And, I guess, just to make the final point about that, although they're very resource-intensive, I'm assuming, in those places where you've got them operating, you would say that it's very cost-effective. Sure, resource-intensive but cost-effective in a good way in dealing with the problems that those communities are facing.

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MR SHARP: I think that's right. I think it's really the forward-thinking model because you can see, in some of those communities, tangible examples of dispute that could so easily have escalated and ended up in the criminal justice system which those elders are resolving at the earlier stage. The community legal education

example of that shield is a really good example, as well, of, when elders do have that knowledge of the legal system, they will then organically develop the ways in which they think they can transmit that knowledge and show their leadership to improve community safety in their communities.

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MR HUNYOR: Another hard to quantify is the spinoffs of supporting a community to, for example, engage in a law and justice project or in a mediation project, but the capacity that develops within that community for those individuals who then have the confidence to engage in the legal systems - and it leads on to all sorts of other things they can do but quantifying that - I can't.

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DR MUNDY: Did you get a sense, I guess, that, down the track, it's leading to less disputes? Presumably what you end up with is a realisation of rights, which leads to, probably, a recognition. It's a bit like, you know, we find a new way of diagnosing cancers and, therefore, the rates of cancer go up but, over time, we see them come back down again. Is that the sort of behaviour you tend to see - you see a bit of peaking and then, over time, disputes and offending rates - - -

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MR SHARP: It's hard; a lot of these projects are still quite new, so, to see those longer-term changes - but what you do see is examples of the opposite occurring, where you could have predicted that a conflict with the law would have occurred in the future but for that intervention, so that person would have reoffended in some kind of way but hasn't.

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DR MUNDY: These projects that you're involved with in these communities, have you actively got monitoring frameworks in place so that we can see how things are going 12, 18 months, two years down the track?

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MS COLLINS: Not that far down the track.

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MR SHARP: No, and, again, it's all funding-dependent. Some projects don't have external evaluation funding built into them. Internally, we're certainly doing that and - - -

DR MUNDY: To the extent you can.

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MR SHARP: To the extent we can. We have one project, a Throughcare project, and Prime Minister & Cabinet have been extremely forward in thinking to the longer-term evaluation of that project. That's a really exciting development because it's - - -

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DR MUNDY: Sorry, what project was that?

MR SHARP: That's a Throughcare project, which NAAJA has been running since

2009. Prime Minister & Cabinet have just commissioned external evaluators from Harvard University to do a long-term analysis of the effectiveness of that program. It's a really positive development, not just for Throughcare but around in evidence-based - to a lot of these initiatives.

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MR HUNYOR: Throughcare is working with prisons before and after their release, so we - intensive case management to try to stop people reoffending. The results we've got are fantastic but it's a matter of trying to get that longitudinal study.

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DR MUNDY: As part of that - I mean, prisoners often manifestly - have got what I call civil problems and minor debts, that sort of - are you monitoring for those sort of civil disputes as well as they come in?

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MR SHARP: Absolutely, and that's one of the key advantages of this service being located within NAAJA, that, as an integrated service, we can very quickly diagnose those particular issues and make those instant referrals, which, for our clients, frequently wouldn't happen otherwise.

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MR HUNYOR: I've got a client, for example, who is currently being detained on a custodial supervision order because he is someone who's got a mental impairment and isn't fit to be tried. I represented him in his criminal case. One part of that was that he didn't at the time have a guardian, so I didn't have, actually, anyone to instruct me, so I needed to get the civil team involved to assist him in relation to guardianship procedures. A guardian was appointed. He's now got issues within the prison about his classification, so I've got the Throughcare team involved, they're assisting him with those issues, and we're also looking to get welfare rights involved because, now that he's under this order, he should be entitled to get Centrelink payments. So, I've got all arms of the organisation working for this man's complex cluster of needs, and that's an absolute classic example, and I've had a number of clients in exactly that position. The next thing is, what happens with housing when they get out, what options are there available? I can again get Throughcare then to assist.

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DR MUNDY: We're probably about out of time. Again, thanks very much for your submission and time to come and speak to us today.

MR HUNYOR: Pleasure. Thank you.

DR MUNDY: Can we ask you to state your names and the capacity in which you appear here today, for the benefit of the poor souls known as the transcribers?

5 **MS LAWTON:** Megan Lawton; I'm the CEO of the Law Society Northern Territory. This is my colleague.

MS WILSON: Marion Wilson, and I'm senior policy officer.

10 **DR MUNDY:** Would you like to make a brief, and by that we mean no more than five minutes, opening statement?

15 **MS LAWTON:** Yes. I can read that brief opening statement. First of all, there's an apology for not filing with you a submission other than contributing to the Law Council of Australia submission. I guess I found the reporting, the concepts and everything hugely overwhelming and this is the entire team, apart from our voluntary members, who assist on committees.

20 **DR MUNDY:** We do appreciate the challenges of small under-resourced organisations.

25 **MS LAWTON:** I have taken the time to put some dot points together. The top priority, I guess, for me is the concept, which I think the Law Council does clarify - the focus on justice and what is justice. Unfortunately, there's a couple of focuses in the report that I don't think are heading in the right direction. There's a focus on alternative dispute resolution and I have some concerns about that. We've got some comments to make about the uniform law of the legal profession.

30 Currently in the Northern Territory, we are proudly self-funded and self-regulated; so the legal profession is regulated by the Law Society Northern Territory. Funding for that comes from the fidelity fund, which is the interests on solicitors' trust accounts, which the funds management committee invests, and, thankfully, it's well invested in the previous 12 months, and out of that fund is the regulatory functions of the Law Society, as well as - community legal centres get a
35 small payment; there is facility for other things to be paid from that.

40 My concern about the uniform law - the society is generally in favour of a national profession. Our concern about it is the cost, the cost for very, very little advantage to the majority of our members, which, as you'll see in the demographic, apart from the government firms, who would see very little benefit at all, the private profession would simply see an increase in cost. We say that in that it separates out - it invents a whole new genre, which - at the moment the Law Society covers that genre of complaints, which is consumer complaints, and we already track information about consumer complaints, we deal with consumer complaints, and we

do it with staff member, who's the manager of regulatory services, and a volunteer council, which is unpaid - the only position on that council that is paid is the president - and volunteer ethics committee, who volunteer their time to consider complaints. The majority of consumer complaints are handled by a staff member, to
5 separate that out from the society, as required under the (indistinct) it's kind of an overarching thing - would require an additional staff member, roughly \$100,000, which, in the scheme of our budget, is a significant cost.

The other thing that I'm concerned - that the society is concerned - about is the
10 loss of the ability to manage the functions locally to investigate complaints locally and to respond locally to local matters. The way most of our consumer complaints are dealt with at the moment are a phone call from (indistinct) regulatory services to the practitioner or the firm involved and, overwhelmingly - that was an attitude that's kind of modelled on Mr McGarvey's rapid-response approach to investigations but
15 it's about an experienced lawyer ringing a firm and saying, "We've got this person here who's not happy with your bill" and - or - often not that, a failure to communicate or you won't hand over the file - they're trying to brief someone else - and the response that we get overwhelmingly is "Thank you for the call. That now gives me a chance to repair my relationship with that client". I'm increasingly
20 getting that response and I'm very happy with that. I guess our concern is that anything national - I can't see - I understand Mr McGarvey needs 30 or 40 extra staff to handle the new uniform law and my concern would be that, if we had to add one more staff member, it's a significant increase in our budget - or someone else's budget, because we couldn't do it.

The other thing is, of course, trusts accounts - the interest in trust accounts are what fund the regulatory regime. Under the uniform law, that's all preserved, our fidelity fund is preserved, but the lack of local knowledge is a big concern, and the increased costs.

We're happy with the concept, we'll sit back, wait and see as it rolls out in this jurisdiction and, hopefully - my game plan is to adopt those parts of the uniform law that benefit the profession and the consumer, such as the short-form costs agreement. We can probably do that with very little regulatory change at all.

Here is, on my left-hand side, our Legal Profession Act and our regulations. It's based on the model law, which is now - I think, they've only just adopted in South Australia. We have a statutory supervisor who's also the Solicitor-General. Here's the uniform law that we would be required to administer - that doesn't include
40 the regulations; that's the New South Wales one - concerned about the size.

The other aspect that's in your report is that - you address proposing deregulating the PAI. At the moment, the society coordinates a scheme for professional indemnity insurance. We have recently been to the market. Myself and

the president and our broker travelled to Sydney and we spoke with a number of insurers, got their best offers, negotiated better deals, discussed what they would deliver back to the Northern Territory because frequently they don't have a presence here.

5

By offering that scheme, we are able to provide to our members some of the best terms in Australia, in comparison with other terms, and I know the specific aspects of that that are better, including one-off cover and including Defence costs - not only that, we insure on an individual-practitioner basis, which - whilst it ends up being expensive for the larger firms, such as the ATSILS, who are under the scheme - it has, until recently, been very expensive for them because they have the largest number of practitioners - it means, for the majority of the members, that it is reasonable. At the moment, say, worst-case scenario, it's about \$6000. If we were insuring on a per-firm basis, which is common in other jurisdictions, it would be \$30,000 now - for a local practitioner or a small firm, that would be a huge imposition, which, of course, as you know, would go on to the client.

We think that our scheme has significant exposure to the market forces constantly driving a better deal, particularly for those less-attractive insureds. We also have a fantastic claims history in this jurisdiction, which meant that we did get a significant discount this year, although we continued with the same insurer and - lucky with - after lengthy negotiations, most of that discount was passed on to the ATSILS, in the form of a special ATSIL rate for PIR insurance. They say they could get PIR insurance cheaper in the market. It would not be on the same terms as our scheme has offered. That was one proposal we considered.

The other aspect I wanted to cover was billing, complains, professional conduct, court-resourcing. A key concern, I think, that - I appreciate the work of the courts. I guess a concern that is emerging is the under-resourcing of courts, in courts infrastructure and the call for courts to gather more information. I think courts are best-placed to determine their procedures and to be flexible to the local jurisdictions. They're also best-placed to collect data on outcomes of matters and time, if that's one thing - or other issues. They're best-placed to - I don't think they are resourced to do so and I'm sure NAAJA spoke to you at length about bush courts, which don't even have running water or toilets, so I don't need to go into any length there.

I think there's a reason behind the under-resourcing of courts, which is basically that they are the poor third arm of government that has a role in keeping an eye on executive power, so there's a bit of a disincentive to adequately resource them. I think that there needs to be recognition of that in any of this work going forward, that courts are painfully under-resourced.

DR MUNDY: Thanks for that. Can we start on the - our inquiry is concerned with civil justice, not criminal justice, that the primary role of the courts in the civil-

justice system is not to act as a break or an executive power, really, is it? The vast bulk of matters in civil courts, in the civil jurisdiction, is, in fact, not the state versus a citizen; it's actually citizens resolving each other's disputes, isn't it?

5 **MS LAWTON:** That's some of the work. We would class, in civil, anything outside of criminal, so that would be the care and protection jurisdiction. That would also be - one of the areas that the legal need - identified as being the biggest area of legal need in the Northern Territory was housing, which is government - and I'm sure NAAJA went on at length about - I think it's fantastic - - -

10

DR MUNDY: I think my question more relates in the broad, which may be different in other jurisdictions to the Northern Territory, so we - - -

15 **MS LAWTON:** Yes. We've got two courts here and, yes, the government spends a bit of time in the court.

DR MUNDY: You were talking about professional indemnity insurance and - negotiated this arrangement.

20 **MS LAWTON:** Yes.

DR MUNDY: Why wouldn't you still be able to have negotiated that arrangement if other people could just provide services to solicitors?

25 **MS LAWTON:** Market share. At the moment - - -

DR MUNDY: If your product is the best product, then, presumably, you would dominate the market - - -

30 **MS LAWTON:** No. I don't think insurers would offer insurance to most of our members if it wasn't compulsory under a scheme. At the moment, we have a policy, we take that policy along to the insurers and say, "How much would you give us if we're insuring this many people on these terms?" and they give us their best rate. I think you would find that there would be a lot of people in this jurisdiction unable to
35 - particularly in the sort of small area, unable to obtain insurance if it wasn't compulsory under a scheme. My concern is that - when we have looked at - we have looked at shifting to the other policies in other jurisdictions, so joining, say, with LawCover or whatever, and the method of calculation there - whilst there might be a \$70,000 saving for a larger firm, the majority of members would have seen a
40 significant 30 to 40-thousand-dollar increase in their premiums, which, of course, would either blast them out of the market, they would be unable to continue to work, or it would be passed on to customers and be, again, not - - -

DR MUNDY: I'm at a disadvantage. I'm a micro economist and I understand

markets, it's a burden that I struggle with every day, but my general understanding is that, when you allow multiple providers in a market, there's innovation and prices go down. What you're identifying, essentially, is a market which is highly peculiar and it's highly peculiar not only in normal markets - it's highly peculiar in insurance markets. I've had a bit to do with (indistinct) insurance in the aviation industry over a very long period of time and I heard exactly the same arguments being advanced around about September 11, 2001, and I now see an active and vibrant insurance market, so I - - -

10 **MS LAWTON:** I think the experience, yes, in the UK is what we would have here, particularly in the territory. I just don't think that we're an attractive market for many things, particularly - and telecommunications is one that is an example where - there are some telecommunications providers that are available on the East Coast, cherry-picking, as we anticipated, and not available here. I cannot sign up for VOIP
15 in the same way my sister in Victoria can. I believe the same would occur here. We are not attractive. Most government agencies don't even want to provide services here, so why would insurers want to insure the peculiar risks of this jurisdiction, which - as we know, each jurisdiction has its own laws - and I just am a bit concerned that, in the grand scheme of things, the territory - and particularly our
20 small firms would be lost and no one would want to offer that - I mean, no, they may - insurance is there to protect the client as much as the legal practitioner.

DR MUNDY: That's our concern precisely. There is a very broad sweep of history where arguments such as the ones you have advanced have been to the detriment to
25 consumers.

MS LAWTON: But, if we're offering a \$6000 policy in comparison to a \$30,000 policy, that \$6000 is being passed on to consumers and they've got the benefit of some of the better terms in the country.

30 **DR MUNDY:** Why is it that that's happening?

MS LAWTON: Because we have interfered in - by pooling our resources, pooling the practitioners together, we say - - -

35 **DR MUNDY:** Insurance is about pooling. That's one of the fundamental natures of insurance. It's not quite clear to me why you would, with a smaller pool than, say, you would have if you were to pool with South Australia or New South Wales or Queensland, any of the other jurisdictions, any of them - why, absent - you've pooled
40 your resources. Yet, if you were to pool your resources with someone else - - -

MS LAWTON: Because of our risk-claims history at the present time. At the moment we have a really good claims history, which saw a 25 per cent reduction in the insurance rate this year. If that had not almost entirely been passed on to the

ATSILS, our firms would have seen a significant reduction in premiums, which we elected - the council determined to pass that on to the ATSILS, in the form of a reduced insurance - on a public-policy basis, really.

5 **DR MUNDY:** We'll do a bit more investigation on this because I just can't quite see how these sums work.

MS LAWTON: Yes. I agree with you but I - if you think you can do it cheaper and better, I'm happy to hand over - - -

10

DR MUNDY: As I say, there have been many arguments over a long period of time of this nature and very few of them have been borne out. We're short of time, so - can I ask you about your complaints in relation to this? Are there any people on your - you said you had a voluntary council?

15

MS LAWTON: Yes.

DR MUNDY: Are any of those people on that voluntary council not lawyers?

20

MS LAWTON: Not on our council. On our ethics committee, we have a layperson. On our council, because it forms all the functions - which has the determinative power, no, we don't have anyone other than lawyers on our council.

25

DR MUNDY: We've heard evidence from other jurisdictions where there are statutory schemes and the complaint about those statutory schemes is it's lawyers judging - even the statutory schemes, the complaint that is made is it's lawyers judging lawyers. A number of jurisdictions moved away from the model that you have, I understand, for scale reasons, because I'm a resident of the ACT and I think there's a similar challenge in the ACT because of its size - - -

30

MS LAWTON: But, more so - the problem is, I can't increase the regulation without increasing the expenses.

35

DR MUNDY: Yes, but, my question is, how can consumers be assured that it isn't just lawyers judging lawyers because complaints have been made to us on the record of precisely that with statutory schemes?

40

MS LAWTON: Yes. I would take into account the concern throughout the centuries, it's Caesar judging Caesar. I came to the Law Society a few years ago wondering about that, from a health professional regulation point of view. I am now happy to say proudly self-regulating. Part of that is looking complainants in the eye and being confident that the process is rigorous. Part of that is the cost of it and - it's very efficient. Part of that is that sometimes the lawyers get into trouble. I think our complaints statistics speak for themselves in that regard. Most people who have

complaints are dissatisfied with the outcome of the complaint, but, as long as lawyers and complainants are dissatisfied, as long as we're commencing own-motion complaints, I think that's suggesting that it's a system that's working and - I hear that comment, I have to face it, particularly in those jurisdictions, but I look at the
5 unmitigated expense of losing that - it's extremely costly. The fact that I get hours of volunteer time from people who are prepared to go and research cases and to spend time thinking about what the fair and just outcome could be, I think, it is working.

10 **DR MUNDY:** You said you had a capacity to undertake own-motion investigations.

MS LAWTON: Yes, certainly.

DR MUNDY: Some of the statutory schemes don't think - - -

15 **MS LAWTON:** I don't know who can't do own-motion. I'm very interested in that. We are in a bit of a place at the moment - - -

DR MUNDY: (indistinct) the South Australians (indistinct)

20 **MS LAWTON:** Yes, they were a bit hamstrung. We can always commence an own-motion complaint and we might do that on the basis of a court - if the court were to send something to us, that would end up being an own-motion complaint. If there's something the newspaper - you know, when I say it would - we have certain policies and procedures around how and when we arrive at the decision to commence
25 an own-motion complaint, in a state of constant improvement - - -

DR MUNDY: It's a public nature. You don't have to have someone bring it?

30 **MS LAWTON:** No.

DR MUNDY: So, notoriety would be sufficient for that sort of - - -

MS LAWTON: Yes.

35 **MS MacRAE:** If someone wasn't happy with the outcome of a complaint, can they go to an ombudsman or - - -

40 **MS LAWTON:** Yes. You go on to the Tribunal. We have had a complainant - when I say a complainant, it was a lay-representative of an unhappy client. He represented his client, whether for fear or what, I don't know - in Family Court proceedings and, as is common in complaints about Family Court matters, it's a complaint about the other side's lawyer, so "The other side's lawyer was terrible for these reasons", and that person elected to go down the path of taking the matter to the Tribunal and we were very gravely concerned that his client was unaware of the

implications of that, that there was absolutely no merit in that. We have had - once we asked him to bring his client on before the Tribunal to confirm he had these instructions, the matter just disappeared. People do go on to the Tribunal and then on to the Court, we have had matters that do that, so, yes, it's not - - -

5

DR MUNDY: It's not the end - - -

MS LAWTON: No.

10 **DR MUNDY:** I'm just mindful of the time but you mentioned Tribunals; we understand there's no general civil administrative Tribunal in the Northern Territory, although there are Tribunals that deal with lands matters and mental health. Do you think that absence of a general administrative Tribunal creates an access to civil justice issues for the territory (indistinct)

15

MS LAWTON: Yes. You may have heard - - -

DR MUNDY: - - - and, if so, how?

20 **MS LAWTON:** Yes. I think it's poor government decision-making, in essence. I think that there's no - that's my concern about alternative dispute resolution. If it's transparent and published that a decision of that nature would be overturned or that you'll go down, or whatever, you can inform your practice, whereas alternative dispute resolution, who knows what goes on? Poor government decision-making in
25 the Northern territory; I believe that you don't have to necessarily give reasons, or have reasons, at times - no publication of government policy. These things are changing but we've just had our NT CAT legislation come into force and there'll be a few low-hanging bits of fruit that will attribute jurisdiction to that. I can only see an improvement in the quality of government decision-making and the accountability
30 of government decision-making as a result of that. Yes, I think it's a huge access-to-justice issue, particularly when sometimes your only avenue is the Supreme Court, inherent jurisdiction, and that's over a \$1000 filing fee. Who's got that when they're complaining about not having a house?

35 **DR MUNDY:** Yes. You've mentioned your concern about ADR. Does that extend to things like industry ombudsman - like the telecommunications - - -

MS LAWTON: I think the telecommunications Ombudsman - nothing works because people have to put their hand in their pocket if they want to go to the next
40 level, not the poor complainant but the industry. I'm not sure with that - - -

DR MUNDY: There's a lot of complaints which are essentially of the same nature, and we don't learn very much from them.

MS LAWTON: Yes.

DR MUNDY: What we probably learn is from the aggregation of those complaints, and that's what the Ombudsman actually does.

5

MS LAWTON: Yes.

DR MUNDY: On individual administrative matters, it might be a different story.

10 **MS LAWTON:** I'm not convinced here in the territory that we are getting a good service from our government Ombudsman but part of that goes back to "Let's prevent the problems in the first place". At the moment, we're - I'm sure NAAJA spoke about the remote tenancy legal advice service, how that just gets handballed between agencies and they can't see that it's an opportunity to prevent bad things
15 happening. I guess that's the only other aspect - we've talked about the national partnership agreement, how that's really borne fruit for us here in the territory. I thought we were a well-connected and well-working sort of team, most of the legal services are on our social justice committee but the legal assistance forum and the jurisdictional forum have actually helped us come together and work even more
20 collaboratively.

My biggest concern is about the advocacy. It's a really unicameral parliament here and we have volunteer committees within the society to help us without submissions on law reform and we are often talking about "Hey, that appeal
25 mechanism is illusory because you've only got three days and you don't even give them a decision in writing. Come on." That's the kind of stuff we advocate on. We're immensely supported by the advocacy and the coalface experience of the legal services out there and I do think it's an alarming - and it's potentially going to be a huge negative impact on access to justice.

30

DR MUNDY: The proposed reductions in funding for advocacy, in your view, will
- - -

35 **MS LAWTON:** I think it's alarming and concerning because it's about trying to prevent the systemic problems emerging and then, when, suddenly, three months down the track we're going, "Why is this happening?" we're going "I told you so". There's a need to hold government to account before it passes tough-on-crime legislation or even - we had the advanced personal planning or the Crown protection jurisdiction stuff, yes - I'm very concerned about that, and that's an issue that I'm
40 quite strong about. I'm very - just been Marian and I making all the submissions, advocating on all aspects of the law - - -

DR MUNDY: I think we've already observed the desirability of advocacy.

MS LAWTON: Good.

DR MUNDY: We'll have to draw it to a close there but thanks very much for your time.

5

MS LAWTON: Thank you so much. There was one other thing. You wanted local rates for lawyers. Did you want - - -

DR MUNDY: Yes, please.

10

MS LAWTON: That's the survey of practitioners. That's not confidential but I just needed to - I put a call out to the profession about the rates and \$350 an hour is about the standard rate for a partner.

15

MS WILSON: As opposed to 600 or whatever was in - - -

MS LAWTON: 600 in your report.

DR MUNDY: Okay.

20

MS LAWTON: I'll send you a written confirmation.

DR MUNDY: Can you please state your names and the capacity in which you appear?

5

MS BRAYBROOK: Importantly, before I begin I would like to acknowledge the traditional custodians of the land, the Larrakia people, and pay my respects to their elders, past and present. My name is Antoinette Braybrook. I'm an Aboriginal woman, born in Victoria, on Wurundjeri country, but my family are from Kuku Yulanji in Far North Queensland. I am here today in my capacity as National Convenor for the National Aboriginal Family Violence Prevention and Legal Service Program. I've been the CEO of the Victorian Family Violence Prevention Legal Service for 12 years.

10

MS DOVE: I am Nadu Dove. I am here as the support to the secretariat for the national forum.

15

DR MUNDY: Thank you. Will you please, if you'd like to, you don't have to, make a brief opening statement? "Brief" means about five minutes, not 15.

20

MS BRAYBROOK: It will not be 15; we've tried to make it five - - -

DR MUNDY: If it's six and a half or seven, that's all right too.

MS BRAYBROOK: - - - but there's some really important stuff. We're happy for you to start giving us the signal.

25

DR MUNDY: Off you go.

MS BRAYBROOK: Firstly what I should say is, given the diversity across our national program, it may be that we have to take some of your questions on notice.

30

DR MUNDY: That's fair enough.

MS BRAYBROOK: Family Violence Prevention Legal Services were established in recognition of the gap in access to legal services for Aboriginal victims of family violence and sexual assault, and that's most particularly Aboriginal women and children. They were also established in recognition of the high number of conflicts within the Aboriginal legal services and also in recognition of the high rates of family violence within our communities.

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Aboriginal people are significantly over-represented as victim survivors of family violence, and Aboriginal women are 31 times more likely to be hospitalised for family violence than non-Aboriginal women. In 2008-2009, family violence cost

the Australian economy in excess of \$13.6 billion.

In recent years, the Family Violence Prevention Legal Service Program has been subjected to numerous reviews. However, little progress has been made towards developing a secure funding model or an appropriate evaluation framework. Constant uncertainty and short-term program arrangements continue to have a detrimental impact on our services.

The Family Violence Prevention Legal Service Program services 31 northern remote communities. Since the inception of the program, service regions have been identified and imposed by the Commonwealth government. Family Violence Prevention Legal Services provide specialist, culturally safe, legal services to approximately 5000 clients annually.

Commonwealth government policy prevents Aboriginal people who experience family violence and are living outside of the FVPLS regions from accessing our services. Most importantly, Aboriginal people who live in urban Australia do not have any access to a Family Violence Prevention Legal Service because that is prevented by that policy.

DR MUNDY: Certainly be outside those regions that you mentioned.

MS BRAYBROOK: Those regions which the Commonwealth identified and imposed.

DR MUNDY: Yes. Thank you.

MS BRAYBROOK: FVPLSes provide a broad range of high-quality, holistic legal service models, recognising the complex nature of the socio-legal service requirements of our clients. In direct response to the Commission's draft report, our concerns are as follows.

We do not support an amalgamation of Aboriginal Legal Services and Family Violence Prevention Legal Services. The reason for the creation of the Family Violence Prevention Legal Service Program in the first place was because of the high number of conflicts within ATSILS, because of their major criminal focus. Family Violence Prevention Legal Services have built client and community trust and confidence. Clients do know that they will not find perpetrators at our services. The delivery of Family Violence Prevention Legal Services is an essentially specialised, unique and valuable skill set.

In relation to alternative and family dispute resolution, it may not be appropriate service delivery model for cases involving family violence. In many cases, victims, most particularly women, come to our services after experiencing

extreme violence for many years. It is at that point that they just want to be safe, believed and want legal intervention and other important support and it's not appropriate at that point to talk to the women about mediation or dispute resolution.

5 Our experience has shown that Aboriginal women are not always informed of their rights to bypass dispute resolution processes where family violence is involved. It also requires a disclosure of family violence, and the many barriers to Aboriginal victims disclosing violence in a mainstream setting are well-documented. We also have experience of inappropriate use of FDR for our clients. Any increased use of
10 FDR or ADR should be approached with caution in consideration of these concerns.

MS DOVE: In response to eligibility tests, we'd like to reiterate that eligibility tests must reflect the priority groups around access to justice and ensure service access for Aboriginal victims and survivors of family violence are not restricted in any way.
15 Concerns around single-point access, as reiterated in our submission, web-based and telephone legal access points will not increase access to justice for Aboriginal communities and specifically to Aboriginal survivors of family violence, and they'll continue to require community engagement and outreach activities in order to ensure access to justice.

20 **MS BRAYBROOK:** We do support these services and that they should be developed in consultation with Aboriginal communities and delivered through Aboriginal-community-controlled organisations to ensure the development of culturally-safe practices. With further investment into Aboriginal interpreter services, many of our member services use those interpreter services and it is recommended that further consultation with those communities and services take place.
25

30 With respect to state and territory investment in the Family Violence Prevention and Legal Service Program, firstly we'd like to say that family violence is a national concern in our country and there should be additional funding from the state and territory for our services, and there needs to be careful consideration of Commonwealth and state and territory accountabilities. Some of our member organisations have been supported through individual service agreements by the
35 states to fill geographic gaps for legal service delivery, and that model has enhanced the security of those services and stability of those services. In both instances, it is important to note that the state funding that both of those member services have secured is on a three-year funding cycle and it is also important to note that our Commonwealth funding is only for a 12-month period at this stage.

40 **DR MUNDY:** Thank you for that .

MS BRAYBROOK: We've just got very short - very, very, very short - - -

MS DOVE: In terms of the establishment of appropriate funding models, following on from Antoinette, we would recommend three-to-five-year funding models to enable organisational sustainability. We've been - a barrage of continuous insecure, unstable, short-term, three-to-six to 12-month agreements don't allow us to attract, retain staff, let alone deliver appropriate services. On the development of an effective evaluation framework, recognising the unique services of family violence prevention, we would welcome that; we would encourage the government to consult with us and collaborate with us on that development, so that you have appropriate benchmarks.

MS BRAYBROOK: We see clients every day experiencing physical, emotional, verbal, financial, system and institutional abuse. These clients experience chronic disadvantage, alcohol and drug issues, the effects of child removal, inter-generational trauma, high rates of disability, self-harm and homelessness - than the general population, and lower rates of numeracy and literacy, health and wellbeing, and personal safety. Our services have worked really hard to build and maintain trust and confidence, and that is a really critical component of delivering effective services to our community.

Our concluding comments are that, with the responsibility of the Family Violence Prevention Legal Service Program shifting in December 2013 from the Commonwealth Attorney-General's Department to the Prime Minister & Cabinet, and the recently-announced \$500 million rationalisation of indigenous programs incorporates the Family Violence Prevention Legal Service Program, and that creates further uncertainty for the future of our services and for our communities, and we feel that the rationalisation process may have impacts on Aboriginal victims' access to justice and we believe that the government should be looking at reinvestment into frontline culturally-safe legal services, rather than withdrawing it. Thank you.

DR MUNDY: Thank you. We might start on the last point first. Money is always a good place to start. Have you experienced any particular challenges for the movement of the responsibility for the program from the Attorney's department to the Prime Minister's department?

MS BRAYBROOK: The challenges have been about the uncertainty. In December 2013, we were unclear about how long our funding was going to go for and we were told that it would be for a further six months, which took us up to December 2014, and then, on budget night, that was even in question - appeared to be in question - and also I had attended meetings with the ATSILS, other CLCs, and their funding cycle was - they had been given funding for a further 12 months, so we were questioning why our organisations had not been given funding for a further 12 months, but now we find that we do have funding for a further 12 months, until June 2015.

MS DOVE: Part of the concern that separating us out from the other three legal assistant services means there's a disconnect around the - - -

5 **DR MUNDY:** That was, I guess, what was partially (indistinct) was explained to us that, whilst the services you provide are quite distinct, they're not un-associated with funding issues and issues about overlap and so on, particularly in the Northern Territory and Western Australia perhaps. It just struck us as a bit odd. Has the national body had the opportunity to discuss these issues with Mr Mundine?

10 **MS DOVE:** Kind of.

MS BRAYBROOK: I've had a couple of conversations with Mr Mundine but I've also had some conversations with Minister Scullion's office, when we first shifted over, and they saw it as a really positive move for our organisation. Our concern was, as Nadu said, around us being separated from the other legal service providers.

DR MUNDY: I guess it's a question of, do you locate the program with other indigenous policy programs or do you locate it with other legal assistance programs?

20 **MS DOVE:** Part of our concern was whether or not the perception is, because we are a holistic wrap-around service, that we are a legal service that offers a range of services, as opposed to a health and safety wellbeing service.

DR MUNDY: That does a bit of law on the side.

25

MS DOVE: That does a bit of law on the side and has a lawyer, yes.

MS BRAYBROOK: Yes.

30 **DR MUNDY:** Thank you for that.

MS MacRAE: Just in relation to your comments about where you're situated, in relation to those 31 communities that you service, were you consulted about where that would go or was that just, apparently, sort of an independent decision of the Commonwealth?

35

40 **MS BRAYBROOK:** The program has been in existence since 1998 and there has been massive expansion of the program, from one to six units, to 26 units, to 31 units, servicing 31 rural and remote locations, and then there was a time when the program was regionalised, so small units were brought under one unit. Perth, for example, has six units under it and there are eight units in total in WA; there are Albany and Fitzroy Crossing and six units under the Perth unit. Those service regions, getting back to your question, were imposed by the government; they were not chosen by our organisations at all.

DR MUNDY: How does the government - we know a little bit about Western Australia. I'm curious that, on a priorities basis, you don't locate a service in Albany but you don't appear to have one in the Pilbara or - - -

5

MS BRAYBROOK: Yes. It's the same for Victoria, for example, where I'm from; we don't have a service in Shepparton or Swan Hill, which we've identified as really high-need.

10 **DR MUNDY:** Where is the service?

15 **MS BRAYBROOK:** In Victoria we have a service that looks after Mildura and Robinvale and parts of - just a bit over the border, with Wentworth and Dareton in New South Wales. We've also got an office in Warrnambool, which services the Barwon southwest region, and one in Bairnsdale, which services the Gippsland region. We know that there is really high need in the Swan Hill area but we cannot service that from our Mildura service, which is only a couple of hours away; we have to do that from our Melbourne head office, from our state funding, not from our Commonwealth funding, because Swan Hill falls outside of the Commonwealth service region.

20

DR MUNDY: So the Victorian government provides you with funding to cover the bits, effectively, the Commonwealth doesn't - - -

25 **MS BRAYBROOK:** It's not restricted funding in that sense.

DR MUNDY: So, a sensible allocation of resources on your part would (indistinct) resources?

30 **MS BRAYBROOK:** Yes. We identify major and minor-presence areas within our state.

35 **DR MUNDY:** Do all states provide resources or - sometimes I ask questions and I know what the answer will be. My next question is, which states provide funding and which don't? Just tell us which ones - - -

35

MS BRAYBROOK: To our knowledge, Queensland has provided funding to QIFVLs, and also, in Victoria, the state government has provided funding to the Victorian service.

40

DR MUNDY: So there are significant areas of indigenous in Western Australia, New South Wales and South Australia, I guess, and also in this jurisdiction who go without services?

MS BRAYBROOK: Some time ago, the Western Australian Attorney-General's Department allocated some funding for a family violence prevention legal service and put it out through a tender process and our program expressed some concern about that funding going to a mainstream service.

5

MS MacRAE: Just in relation to, then, to the way - you said you're not able to service women who might approach your service that are outside of the catchment area. In relation to those states that have state funding, you can service them through those sorts of avenues, through state funding, but, in those areas, just to be clear, where there's no state money available, or very limited, where would those women go in those instances?

10

MS BRAYBROOK: I think it's different for every state and every area. Some of our member organisations show extreme frustration when you've got communities side by side but you can only service one community and not the other, and there's movement between communities as well. I think, for our services, it's just about trying to find somewhere that will support those women that fall outside of our catchment areas because, the reality is, we are contacted by people, or clients, outside of our catchment areas.

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DR MUNDY: The reality for those women in accessing the services of ATSILS - the issues which you describe are no different, depending on which side of the line drawn on the map they reside.

25

MS DOVE: Absolutely none.

MS MacRAE: You talked a bit about the problems with the - maybe I can call it filtering, it's probably not the right word but in relation to the use of family dispute resolution services. Are there specific things that should happen at that point that the streaming to ensure that people that - where it's not appropriate - you said that there are rights there but people aren't aware of them. Is that a matter of education for the courts and the registrars and other people, is that the prime way to sort of tackle that problem, or are there other groups that need to be better informed about that so that women are more aware of their rights?

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MS BRAYBROOK: Other member organisations might like to contribute to this and we could bring you some information back but, for Victoria, we did a little bit of work in that area and surveyed some women and what we've been advocating for for many years is that staff in those dispute resolution centres under ongoing cultural-awareness training, understand the barriers that Aboriginal victims face, or Aboriginal women, and to also have Aboriginal workers available; and, as soon as an Aboriginal person comes into one of those places, give them the option of being referred to an Aboriginal service.

40

MS MacRAE: Would the resources currently be available to allow for that or would you have to fund something separate - or would you need more funding - to be able to refer them in that way, is there a service you could currently refer them to or is that - - -

5

MS BRAYBROOK: There's the Family Violence Prevention Legal Services.

MS MacRAE: Yes. You'd have that (indistinct) where you'd still have, potentially, difficulty in referring them because they're not in the right (indistinct) or the right (indistinct)

10

MS BRAYBROOK: It would be a good starting point to have that conversation with the Family Violence Prevention Legal Service and then they could identify what other appropriate services there are to refer that woman to, if they can't service that woman.

15

MS DOVE: And increased training within the courts around family violence, so that people aren't referred inappropriately to dispute resolution.

DR MUNDY: We made some observations about which I think the national forum has formed a view that we perhaps were suggesting that ATSILS and your organisation should be amalgamated. If that's the way it was read, we'll go back and - that wasn't what we were trying to get at. What we were trying to find were ways, given that we know that, across the legal assistance sector are organisations typically small and they have reporting requirements and that - I guess what we were looking for was, rather than what you might call the co-location of services or the amalgamation of shopfronts, however you want to describe it, but rather, were there any administrative-type things that could be done that could lead to reduction of costs, not only between - would it be possible for women's legal service to auspice one of the members' services just to provide to small organisations with essentially - they need to run a payroll and this and that and find some savings (indistinct) that's more what we were trying to explore because we know it's a problem across the legal assistance sector; it wasn't so much amalgamation of shopfronts.

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MS DOVE: More back-room processes?

DR MUNDY: Yes, more back-office stuff, or is it too difficult?

MS BRAYBROOK: I think that it's too difficult and this needs to stay in Aboriginal community control.

40

DR MUNDY: Okay.

MS MacRAE: What would the - and I apologise - you probably know this from the

submissions we had but what would the size of a - we call them (indistinct) pools but I notice you have a different way of describing it but what would the average size of one of those be and do you feel they've got sufficient scale to function well? One of the concerns we had around CLCs was that some of them are - you know, they're
5 very small and they might have only one and a half staff in a centre. Do you feel you've got sufficient scale to make good use of the resources you've got?

MS BRAYBROOK: I think, since the regionalisation of the program, that's positioned us very well, whereas, I said before, Perth, for example, has six of the
10 Family Violence Prevention Legal Services units under that now, so it's one service in - - -

DR MUNDY: So it's effectively done the amalgamation (indistinct)

MS BRAYBROOK: It's an amalgamation internally. In Victoria, there was funding allocated for two Family Violence Prevention Legal Services and they all sit under the Victorian-based service. Our head office - we've always been based in the CBD, and that has allowed us to be able to build relationships with state government. I sit on a number of key state-wide committees and that's how we've been so
20 successful in securing funding from not only the state but the legal aid service as well.

DR MUNDY: Indigenous women in Melbourne who have needed your services can come into your office, perhaps not in the same way as indigenous women (indistinct)
25

MS BRAYBROOK: That's right. We're not saying that we're over-resourced or have enough resources to do that but - - -

DR MUNDY: No, but you're there.
30

MS BRAYBROOK: We're there.

MS DOVE: We can't just turn Melbourne women away. We have the state support to be able to - - -
35

MS BRAYBROOK: But other states don't have - - -

DR MUNDY: That view.

MS BRAYBROOK: Not that view but that capacity.
40

MS DOVE: Capacity or the funding arrangements - - -

MS BRAYBROOK: State governments don't have that view.

DR MUNDY: State governments have alternative fiscal priorities, is probably the way it could be described - - -

5 **MS DOVE:** Interesting way to describe it.

DR MUNDY: - - - at least, apparently - no alternative apparent fiscal priorities.

10 **MS MacRAE:** We are nearly out of time. There was a concern that our draft report didn't reflect enough of the work that you do in the community education area. Could you just give us a little snapshot of how much of your services fall into that area and what the costs and benefits of that sort of work you said you do?

15 **MS BRAYBROOK:** We may have to get some information back from our member organisations because we all do it in different ways but, just from our experience in Victoria, that has been a really critical part of the work that we do and the early-intervention prevention work that we do, for which we do not receive any funding because that was taken away under the former federal government - one of our really successful programs in Victoria is Sisters Day Out, which has a community legal education focus to it, as well as an early-intervention prevention focus, and that is us going to the women because we know that Aboriginal women who experience family violence will not just come to our door and knock on the door; we have to do really hard yards in the community, take programs to communities. That talks about - it breaks down barriers because you're building confidence in other mainstream in
20 Aboriginal services through those programs and also informing people of their rights.
25

We do really basic presentations at our community legal education events and the other events that we hold and it's just amazing to see that women say, "I did not know that I could get an order to exclude him from my home. I did not know that I could get an order for us to live under the same roof. I didn't know that I could get legal advice in relation to child protection; I thought that I just had to sign those documents when Child Protection became involved".
30

35 **MS MacRAE:** Have you had any formal evaluation of any of those programs?

MS BRAYBROOK: We, in Victoria, did an evaluation some time ago in our Sister Stay Out program and we're doing one again now, which should be - I think it should be almost finalised.

40 **DR MUNDY:** Is that something you could share with us?

MS BRAYBROOK: Yes, we can.

DR MUNDY: We'd prefer it publicly but, if you want to give it to us on a

confidential basis, that - - -

MS BRAYBROOK: We will share that with you and we can also ask our other member organisations what they might have to share.

5

DR MUNDY: One of the problems we have in this whole inquiry is how can we satisfy ourselves that these programs - what's our evidence base for making - they, on face, look like they do but some evidence of evaluation is really very helpful for us.

10

MS BRAYBROOK: We have been talking about evaluation stuff just recently, how we can capture that.

DR MUNDY: Yes. It's very difficult and it's best thought about before you start, so you've got to go, "If we'd only asked ourselves - - -"

15

MS BRAYBROOK: Yes.

MS DOVE: We do individual evaluations for the women to evaluate sessions and things but in terms of actually evaluating impact longitudinally or - - -

20

DR MUNDY: Yes. If you could get us something on that program, that'd be great.

MS MacRAE: Any evaluation work that any of your organisations have done would be enormously helpful to us, anything you could provide us with - - -

25

MS BRAYBROOK: Okay.

DR MUNDY: If you're concerned about it being released, we're happy to take material confidentially and keep it to ourselves, and it's very hard for people to get it off us.

30

MS DOVE: We trust you.

DR MUNDY: We've never been (indistinct) confidential material. We are out of time. I hope you haven't come all the way from Melbourne just for us.

35

MS BRAYBROOK: Yes and no. I had major conflicts with every other area that you're hearing in.

40

DR MUNDY: We do appreciate your time and we do appreciate the submissions you've made to us and we look forward to (indistinct) get that material to us.

MS BRAYBROOK: Thank you.

DR MUNDY: These proceedings are adjourned until 1.15.

ADJOURNED

[12.35 pm]

5

RESUMED

[1.03 pm]

5 **DR MUNDY:** We'll reconvene this hearing. For the record, could you state your name and the capacity in which you appear.

MR LANE: Tony Lane, Chief Executive Officer of the North Australian Aboriginal Family Violence Legal Service Aboriginal Corporation.

10

DR MUNDY: Mr Lane, we're in your hands.

15 **MR LANE:** Thank you. I just thought, Commissioners, that I'd just do a quick presentation on some aspects of NAAFVLS, being the North Australian Aboriginal Family Violence Legal Service. So what I've put together for you at this particular point in time is just a small document which provides NAAFVLS' vision statement which is to become the national leader for the culturally appropriate and holistic service delivery of the Family Violence Prevention Legal Service Outreach Program to remote communities.

20

NAAFVLS' mission statement. NAAFVLS will continue to provide holistic and culturally appropriate legal services and support to indigenous victims of family violence living in remote indigenous communities in the Top End of the Northern Territory. We will attract and retain well-qualified and skilled staff who are passionate in achieving our vision. We will provide community legal education to reduce violence and advocate for justice for our indigenous clients.

25

DR MUNDY: Can I just interrupt, Mr Lane. How many staff do you have?

30

MR LANE: Sixteen staff.

DR MUNDY: Of which, other than yourself, are lawyers?

35 **MR LANE:** There are a total of seven solicitors, one being the principal legal officer, and the rest are support staff to the legal team.

DR MUNDY: So paralegals, social workers?

40 **MR LANE:** No, mainly a finance manager, receptionist, four client support officers and a finance person and admin person.

DR MUNDY: Okay, thank you.

MR LANE: So moving on to our purpose. I won't read to you our purpose. But

this is the purpose that is on our rule book or constitution. So if we move on two pages, we move on to the latest Northern Territory yearly assault statistics. For the Northern Territory, this indicates that in the last 12 months to the period ending March of 2014, that there's been a total DV – domestic violence – assaults of 4586 in the Northern Territory.

When I break those particular numbers down to our service delivery area, it comes out at just over 1500 domestic violence matters per annum in NAAFVLS' service delivery area in remote communities. Sixty-six per cent of domestic violence in the Northern Territory is alcohol-related. So I think there are some sort of fairly alarming statistics. Just one I'll read out to the Commissioners. In Tennant Creek in the last 12 months, 13 per cent of the population were issued with DVOs.

MS MacRAE: Sorry, how much?

MR LANE: Thirteen per cent in a 12-month period. Moving on to the next page, Commissioners, this is a map of the Northern Territory showing indigenous remote communities across the whole of the Northern Territory. NAAFVLS look after the top half of the Northern Territory. So you can see that there are a great number of communities that we service.

DR MUNDY: So that Tennant Creek - - -

MR LANE: From the north of Tennant Creek, yes. So from Lajamanu, which is out to the left of Tennant Creek at the top of the Tanami Desert.

DR MUNDY: That's the first one.

MR LANE: That's the first one. And up from there. The following two pages for the Commissioners are the current court circuits for the bush courts. NAAFVLS do both the Darwin northern circuit and the Katherine circuit courts. In total, we do about 150 bush court visits annually.

Moving on to indigenous languages. Within our service area, as you can see, there are many indigenous language groups. The majority of those indigenous language groups do speak in the majority one of six different language groups. Obviously that sort of points out the essential need for us to be able to use the Aboriginal Interpreter Service to take instructions from clients.

DR MUNDY: Is there an extent to which the language groups are – how can I express this? I want to say “funded”, but if I speak Dutch, I can have a fair crack at at least understanding someone speaking German. Is it about character, is it someone speaking and they're trying to understand someone speaking Chinese?

MR LANE: I think a lot of the languages I've listed there are probably going out. As I've mentioned, there are sort of six main language groups that the indigenous clients of ours do speak.

5 **DR MUNDY:** Is there a fair chance I could at least get by in another way?

10 **MR LANE:** No. There is a sort of more generic language, which is Creole. The following page shows nine communities in total. There's only eight circles there, but one does encompass two communities. Nine communities where NAAFVLS is not funded under its current contract with the Commonwealth to provide services. Estimated population on those nine communities in total is just over 4000 people. The domestic violence rate as indicated on the police statistics, being the NT balance, being remote communities, is 2 per cent. So 2 per cent of the 4000 population is about 80 client per year who do not get any services provided to them in relation to family violence.

15 **DR MUNDY:** Not provided by NAAJA.

20 **MR LANE:** No.

25 **DR MUNDY:** Roughly how much – and you might want to get back to us on this, Mr Lane. But roughly, how much would it cost you to service those nine communities that are currently not within your contract?

30 **MR LANE:** Probably in the order of 150,000.

35 **DR MUNDY:** A year?

40 **MR LANE:** A year to service them reasonably well.

45 **DR MUNDY:** Thank you, Mr Lane.

50 **MR LANE:** The next page, Commissioners, is an initiative that NAAFVLS undertook in partnership with the AFL of the Northern Territory, AFLNT. We're provided with a grant of rights in relation to that particular sponsorship agreement, partnership agreement. I'd particularly like to draw the Commissioners' attention to 2.5 under grant of rights. This was a stipulation and it falls in partnering with AFLNT: that all players participating in the All Stars team were to undertake a police check to screen for domestic violence orders. Those found to have domestic violence convictions will not be able to participate in the program. I would just like to inform the Commissioners that we identified three players who had current DVOs in the initial list of players. We informed AFLNT of those three players and those three players were immediately removed from the Remote All Stars team. So we are of the opinion that that sends a very strong message out to the communities and out

to the young men that having a domestic violence order can have certain ramifications on your sporting career life.

DR MUNDY: And the AFLNT were not resistant in fulfilling their obligations?

5

MR LANE: No, they immediately fulfilled their obligation. On the next page – two pages forward, Commissioners, just a quick story on Two Dollar Creek. As part of the operational guidelines of the FVPLS program, service providers are not supposed to do home visits. NAAFVLS do not have offices in communities, so therefore we are required in most instances to undertake home visits to locate our clients, to check on their wellbeing and to check on their legal needs. These directions were given to one of my solicitors. And I'll just read them out, if that's okay:

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15

Two Dollar Creek. It's only about 2 kilometres from town. Drive down that road next to that shop. You will see the cemetery and the dump. When you get to that main road, don't turn right onto that bitumen, (indistinct). turn left onto that dirt road. Go along that dirt road and you will see a little dirt road going left. Don't take that one. It goes back into the loop of Mara Camp where you are. Keep going. You will see some old cars and demountables. That's where we are.

20

Photos are provided for the Commissioners. That first photo, it took us actually three attempts to locate Two Dollar Creek. It was actually a 10 kilometre drive on the roads but which ended up actually being 2 kilometres from where we were if we'd gone directly through the bush. Subsequently, at a hundred kilometres an hour we were told to look for a tyre and a sign saying "Two Dollar Creek". As you can see, they do have a very well worded sign on the following page indicating it is Two Dollar Creek. The last photo is their accommodation at Two Dollar Creek.

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DR MUNDY: Thank you for that.

MS MacRAE: That's your vehicle, is it?

MR LANE: No, that's one of theirs, actually.

35

MS MacRAE: One of theirs?

MR LANE: Yes.

40

MS MacRAE: It's just the car looks out of proportion with the (indistinct) rather more salubrious.

MR LANE: Now, I was going to play our TV advertisement for the Commission, but I won't do that. I was also going to play some radio advertisements. One of the

initiatives that NAAFVLS has undertaken recently to try and let our indigenous clients know who we are on the remote communities is we have put six radio advertisements in six indigenous languages. We will now negotiate with the community radio stations to have our advertisements played on those communities in their language so that, hopefully, more indigenous clients can understand who NAAFVLS are and what NAAFVLS can do in relation to supporting victims of family violence on those remote communities.

MS MacRAE: Are you going to get 30 seconds for your advert?

MR LANE: We've made them 30-second adverts, yes.

MS MacRAE: So you have to be pretty direct about what you do and where to come.

MR LANE: That was actually one of the difficulties that we discovered. We wanted to keep consistency on the wording for our radio advertisements with our TV advertisement. At the end of our TV advertisement we inform clients in English that they should phone NAAFVLS' office on one of two phone numbers. Subsequently, we realised that if we did that in language and somebody actually phoned us in the office, that nobody in the office would actually be able to speak that particular language. So if you have a distressed client who is going to reach out and all of a sudden can't communicate with anybody on the other end of the phone, we realise that that'd be a distressing situation. So we now ask clients to contact their night patrol service or their local safe house for a referral so that we can communicate with somebody in English or another language that my staff might understand. Then subsequently we can contact the Aboriginal Interpreter Service and get them involved to get further instructions.

Now, on top of all of that, if I can just throw a couple of other things to the attention of the Commissioners. There is a great lack of infrastructure on remote communities. A number of communities where the bush court sits don't have courtrooms. So therefore, there's no single justice on those particular communities. There are no offices for services like ourselves and NAAJA to operate over. That means that there are no interview facilities to provide confidentiality when interviewing clients.

In response to that, NAAFVLS will seek approval in the next 12 months to use an operating surplus that has been generated in the last two years to purchase a mobile office, which will be a dual-purpose vehicle, all-terrain, off-road vehicle, which will double as both an office and accommodation facility for staff. So that my staff will have an office when on community in the Katherine district. Thank you.

DR MUNDY: Thank you. I know we had this discussion when I was last in

5 Darwin. In your submission you note that the Commonwealth should give consideration to the differences between cash acquittals and financial reporting requirements of corporation. We understand that since the time of that submission this issue has been resolved. I guess my question is, has it been resolved to your satisfaction?

MR LANE: Yes, this issue has been resolved to my satisfaction and also the satisfaction of our auditors with the Department of Prime Minister and Cabinet.

10 **DR MUNDY:** So that's only since late last year.

MR LANE: That's correct, yes.

15 **DR MUNDY:** Do you think it was the change of administering agency or would it have fallen over the line if the matters had have been still in the province of the Attorney's department?

20 **MR LANE:** I think that across the program there was some inconsistency that the Attorney-General's Department when they had the portfolio had in relation to the accounting standards and how a certain organisation should be adopting those standards. I'm not sure with the Department of Prime Minister and Cabinet whether that is now a consistent approach across the program for all service providers around the country. But it certainly is now a satisfactory outcome for NAAFVLS.

25 **DR MUNDY:** So you don't actually know as a matter of fact whether it's been solved across the - - -

MR LANE: No.

30 **DR MUNDY:** I'm sure we can ask that question of the Prime Minister's department. The Commission noted in its draft report that your services are incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and hence regulated by the Office of the Registrar of Indigenous Corporations, or ORIC. Whereas we note that there are some other services that are incorporated
35 under the Corporations Act 2001 and therefore presumably subject to the rigorous supervision of ASIC. Do you have any sense of the pros and cons of these two separate arrangements?

40 **MR LANE:** I think on the positive side ORIC does provide governance training free of charge to Aboriginal corporations. It does provide job-seeking support and supporting in other areas of operations. So I see that as being a positive. The major negative that I see operating under ORIC as opposed to operating under ASIC relates to governance issues and specifically relates to the membership of the corporation. So under ORIC, especially with NAAFVLS – if I can just sort of use NAAFVLS as

our example, thanks.

5 Our membership base are all indigenous and from remote communities. The
main issues occur when you call an annual general meeting, that you have difficulty
in actually getting a quorum to attend an AGM. So as an organisation, we're not
funded to actually bring our members in to an annual general meeting and they
obviously don't have the funding themselves or resources themselves to actually be
able to come into Darwin or Katherine to attend an annual general meeting. So we
find that extremely difficult to get a quorum to actually hold an annual general
10 meeting. Last year we were unable to get a quorum together. We still conducted the
meeting as it should have been held and subsequently advised ORIC or the registrar
of ORIC that we were unable to get a quorum but we continued to proceed. One of
the functions at that annual general meeting was to remove a large percentage of the
members on the basis that our organisation had not been able to make contact with
15 those members for a period in excess of two years.

DR MUNDY: So these members, how do they become members?

20 **MR LANE:** Any indigenous person from our service delivery area who's over the
age of 18 years of age can become a member.

DR MUNDY: But it's inactive. They have to opt in to be a member?

25 **MR LANE:** Yes.

MS MacRAE: Has there been any fallout from that? Has someone that was
removed get back in touch and say this is a problem?

30 **MR LANE:** No, we've had no feedback from any members at this particular point
in time. The reason certainly why we informed ORIC was for transparency and in
case in the future there were difficulties that might arise. My discussions with the
registrar and deputy registrar of ORIC is that they, at this particular point in time,
have no concerns and that a member would need to take legal action through the
courts to actually challenge what occurred.
35

MS MacRAE: So will that make it easier for you to get a quorum next time?

40 **MR LANE:** It will make it easier because a quorum is based on a percentage of
members and that's certainly one of the reasons why we reviewed our membership
base. I know of some members who were listed with ORIC and had an address
which was, for example, Jabiru, when I know that that particular person is an elder
Angurugu on Groote Eylandt and has never left Groote Eylandt. So I think there's –
when I look at certain membership bases on Aboriginal corporations on the ORIC
website certain organisations I look at all of their members will live virtually at the

office of the corporation. So I think there really needs to be a lot of work done in cleaning up ORIC's membership base of Aboriginal corporations.

5 **DR MUNDY:** Is there any – so there's training and support in that regard. You're comfortable being subject to the regulation of ORIC as opposed to ASIC?

10 **MR LANE:** I have always, prior to this appointment with NAAFVLS, operated under ASIC. I really don't see a great deal of differences between ORIC and ASIC. That may well be because with my previous skillsets in operating under ASIC I tend to operate the organisation under that model anyway, under those regulations.

15 **DR MUNDY:** Can I just ask. It was in the documents you provided us and you identified some communities which you weren't able to provide services to. I notice that neither Darwin and Katherine are so circled. Are there services provided to people in Darwin and Katherine or is this just an area the Commonwealth doesn't provide services to?

20 **MR LANE:** No, there are services that do provide family violence services in both Darwin and Katherine besides ourselves. In Katherine you have the Katherine Women's Information Legal Service. In Darwin you have the Top End Women's Legal Service and also Domestic Violence Legal Service.

25 **DR MUNDY:** So they effectively would – we heard from a previous witness that, for example, there are no such indigenous family violence services provided in metropolitan Sydney but they are in metropolitan Melbourne.

MR LANE: So there's no specific indigenous service provider in Darwin.

30 **DR MUNDY:** Is it your view that that's a service gap that should be filled or do you think it's - - -

35 **MR LANE:** I think from an indigenous client's perspective it would be more appropriate if a service like ours was operating in Darwin. I would think at this particular point in time that services would be provided to them by other service providers.

40 **DR MUNDY:** What happens if an indigenous – I mean, the intricacies of Commonwealth service provision are not well understood by most citizens of the Commonwealth. What would happen if a woman who would otherwise be eligible for assistance by yourselves but happens to live in Darwin and happens to know that you're around the corner comes and bangs on the door?

MR LANE: Our job would be to refer her to another service provider.

DR MUNDY: What if that service provider was conflicted in some sense?

MR LANE: We would then give due consideration to taking her on, yes.

5 **DR MUNDY:** You have some accepting capacity.

MR LANE: Certainly, yes.

10 **MS MacRAE:** You talked before about the necessity for you to do home visits and your guidelines currently say you're not supposed to do them. Do you have other problems of that sort? How important would it be that those guidelines should change or effectively do you just have to get on and do what you have to do?

15 **MR LANE:** I think for most service providers of the FVPLS program that those guidelines are probably appropriate. There is a risk that if my staff, for example, were doing a home visit that the perpetrator may be in the vicinity or actually on location and may take offence at our service and therefore take offence at my staff who are attending that particular residence. So I certainly see that there is a need from a national perspective that those home visits don't occur. However, most other
20 service providers do have offices in sort of regional locations where the client can actually access the office.

In our situation there are no offices on the remote communities. A victim of family violence on a remote community is likely to move in to residence with
25 another person who's going to provide some safety to them whilst they're on that particular community. Our difficulty is that when we get to the community to be able to provide any service to that particular client we need to locate that client.

30 **DR MUNDY:** I know we've spoken about this before and given your background you're probably uniquely placed to assist the Commission in this regard. But do you have any views you'd like to share with us about unnecessary regulatory burdens that the administration of the program places upon your organisation, organisations like yours, and what's probably an appropriate framework for the Commonwealth to satisfy its getting value for money without destroying (indistinct) unnecessary
35 paperwork?

MR LANE: I certainly think that certain processes could be streamlined. Reporting has always been onerous. I think now I've been reporting to the Commonwealth for about eight or nine years on various programs and the reporting has always been
40 fairly onerous. I guess it's fairly difficult for me to comment too much as the CEO of NAAFVLS which is an organisation that came out of special administration and, whilst placed under special administration for a period of about 18 months after coming out of administration, we were actually required to double our reporting requirements. So our reporting became twice as onerous as other organisations,

which really does sort of distract you from other operational issues that you should be focusing on during that period of time to get an organisation back to solvency.

5 **DR MUNDY:** Such would be the circumstance of any organisation who goes through some form of administration.

MR LANE: Certainly, yes.

10 **DR MUNDY:** Is there any guidance that you can provide us with how we might – any recommendations we might be able to make to get rid of a sense of what's unnecessary compliance burdens or policies?

15 **MR LANE:** I'd certainly like to try and assist the Commission in the future in relation to it, yes.

DR MUNDY: If you'd like to think about that and perhaps come back to us in writing.

20 **MR LANE:** Yes, certainly.

DR MUNDY: We'd like to get it on the public record if we could.

MR LANE: Yes.

25 **DR MUNDY:** That would be very helpful.

30 **MS MacRAE:** Just in relation to the funding that you do receive, can you just perhaps inform us about how secure your funding base is and whether you operate sort of month to month, year to year, in a three-year cycle? How do you manage your budgets and how difficult is it for you, given the sort of sources of funding and security of those sources?

35 **MR LANE:** The initial contract that we're operating under at the moment was a three-year contract which was due to expire on 30 June last year. That was extended for a period of 12 months and has just been extended once again for another 12-month period ending 30 June next year. Depending on where the Commonwealth sort of see the program going, I'd certainly like to think that there could be longer term funding agreements in place, perhaps out to five years, certainly to provide further security to the organisation and to the organisation's staff.

40 I think sort of short-term contracts and those sorts of things do imply a level of uncertainty and if you're looking to retain good staff when you're not guaranteed that your funding source will continue, more than likely you're going to start to lose those good staff to other organisations.

MS MacRAE: Can I just ask, in your presentation you've got a fairly innovative sort of communication strategy around the deal that you have with the AFL. Prior to signing up to that, was there funding put aside to do an evaluation of that program or are you looking to try and evaluate the outcomes from that? Because I'm assuming it's a fairly new thing, is it?

MR LANE: Certainly, this is the first time that we've ever entered into a sponsorship agreement with AFLNT. One of the main objectives of partnering with AFLNT is that they have a permanent presence on the indigenous remote communities through playing AFL. Our objective was to try and establish a more permanent look, I suppose, on those particular communities that we provide services to. So we saw this as an opportunity for AFLNT to sort of advocate our services on communities.

MS MacRAE: And we've certainly had a lot of evidence that it's really hard to engage with some of these groups. I can appreciate that you'd see this as a great opportunity because it is something that the communities are typically strongly engaging in. So I'm just wondering whether there's scope or whether you're proposing to do an evaluation of it to see how successful it might have been.

MR LANE: I think it has been extremely successful. I think the exposure that we've got has been good to date and will continue. For example, I've been out to a couple of communities to follow the bush courts and I've actually seen the guernsey being worn around the streets, which is a good sign because our logo is on that particular guernsey. So it does associate us with that. Three hundred footballs with our logo have just been distributed to the communities and will get utilised by the young kids on those communities.

Five of the players from the NAAFVLS Remote All Stars football team were given contracts into the NT Thunder team, which is the equivalent of sort of the Northern Territory state side that plays in the Queensland league. Every game that NT Thunder play, whether it's here in Darwin or interstate, at halftime our TV advertisements are streamed as part of our advertising. But I think the real value that an organisation like ours have already got and will continue to get on the basis that we continue with the agreement is getting the message out, especially to young men on communities, is that domestic violence is not allowed and the violence should stop.

I think one of the other stipulations was that our organisation would provide community legal education around family violence to those young footballers. Five of those footballers who have the contracts into NT Thunder are now NAAFVLS ambassadors and have actually joined up as members of NAAFVLS. So hopefully, we can continue to associate with them in the future and hopefully with them being

role models on their particular communities, we will get some good exposure through those individual players.

5 **MS MacRAE:** Do we have any information from you on what the funding arrangement is or is that confidential?

MR LANE: I think it should be confidential, but it wasn't a very large amount.

10 **DR MUNDY:** Thank you very much, Mr Lane, we appreciate your time. If you could get those suggestions as to how we may reduce some administrative burdens for organisations such as yours we'd be very grateful.

MR LANE: No problem at all. Thank you for the opportunity to present.

DR MUNDY: Can we have Jane Carrigan, please?

MS CARRIGAN: Afternoon, Commissioners.

5

DR MUNDY: Could you, when you get yourself settled, please state your name and the capacity in which you appear?

MS CARRIGAN: My name is Jane Carrigan and I appear just as an interested individual, I guess.

10

DR MUNDY: It is all right to appear as an ordinary citizen of the Commonwealth.

MS CARRIGAN: Thank you.

15

DR MUNDY: Just before I ask you to make an introductory statement, you have provided us with some material in-confidence.

MS CARRIGAN: I have.

20

DR MUNDY: There's a couple of things I'd like to ask you about that material. I'm happy to take that from you in-confidence, if you'd prefer. Then once I've asked you those questions, you can decide whether you want to let it out in public or not. I thought it'd probably be easiest - - -

25

MS CARRIGAN: Okay. No, that makes good sense.

DR MUNDY: And if it's kept in-confidence, only officers of the Commission will have access. It's mainly so that I can communicate material back to my colleagues.

30

MS CARRIGAN: I appreciate you flagging that for me.

DR MUNDY: Please make an introductory statement.

MS CARRIGAN: Well, having just seen the gentleman's, mine is relatively light-on. I guess really I rely on the submissions I've put to the Commission and, as you've noted, some of the material has been put in under the cover of confidence. In any event, I guess I'm here to prosecute the relatively unsexy case of self-represented litigants. I do so very mindful and rather grateful that I'm at the end of the day and don't have a roomful of lawyers glaring at me.

40

But in any event, I feel that notwithstanding that the legal system is moving to recognise the reality, I suppose, of the self-represented litigant – and I refer in particular to some very good works by people like John Granger and there's a lady in

5 New Zealand currently doing a PhD in the area. But I still am concerned that,
notwithstanding legal conferences and like about the subject matter, much of the
focus is coming from – well, the focus, naturally enough I guess, is coming from the
legal community and that perhaps those people who are the very people who are
appearing as self-represented litigants are not actually having an opportunity to stand
up and say, “Well, for me, my most scary aspect of being a self-represented litigant
was I appeared in front of somebody who might as well have been speaking Latin in
terms of for all I understood.” So I guess really perhaps I’m here more as much as
whether you had questions of me rather than putting in a very sophisticated
10 preliminary submission.

DR MUNDY: I think it probably is appropriate if we take the bulk of this evidence
in confidence. But before doing that, the matters that you’re concerned with largely
involve litigation against the Commonwealth.

15 **MS CARRIGAN:** In respect of that particular matter, yes. Obviously my
experiences I think provide a salient case study, I suppose, in terms of the difficulties
people face. I concede I’m in a much more advantaged position than many people
who might have a case against the Commonwealth in those particular forums. The
very fact that I had those sorts of issues just says to me what it would be like for the
20 poor bugger who, quite frankly, doesn’t have my benefits of English language, my
benefits of an understanding of the legal system. I do really think that my matter
raised very serious issues about our understanding of how tribunals are operating and
people’s capacities to put their cases clearly and freely before those tribunals. So
yes, in that sense my concern, I guess, would flow from those events.

DR MUNDY: I guess my reason for asking that is obviously – and it goes to the
Commonwealth’s model litigant rules – are there any observations you’re happy to
make publicly on the record about the effectiveness of those rules and how they
could possibly be reformed?

30 **MS CARRIGAN:** Well, my experience was those rules were not – played no part in
the Commonwealth’s management of their case or the defence of their case against
my application. One thing that did and continues to puzzle me is the way that the
model litigant rules apparently only apply if the Commonwealth relies on them
themselves. For instance, I can’t stand before a judge and say, “It’s not fair. The
Commonwealth have failed to – they’ve excluded important potential material” or
something like that. I can’t fall back on the model litigant rules and try and hold the
person appearing opposite me to account of those rules. I think from some of the
35 more querulous self-represented litigant cases I’ve seen, I think much of the
frustration flows from the misunderstanding from ordinary Commonwealth citizens
that those rules can actually not be relied upon by an applicant to hold the
Commonwealth to account on. Certainly my experience was I can’t look at one of
those rules and say, “Well, in fairness, the Commonwealth did try and do that.”
40

They just simply didn't.

5 **DR MUNDY:** Can I ask in your matter whether the Commonwealth agency concerned appeared in its own right? Was it represented by the Australian Government Solicitor or was it represented by - - -

10 **MS CARRIGAN:** Before the AAT they were represented in their own right by one of their own advocates. Then before the Federal Court they were represented by a third party.

DR MUNDY: So not the Australian Government Solicitor.

15 **MS CARRIGAN:** No, not by the Australian Government, one of their external contracted lawyers.

20 **MS MacRAE:** Just looking at the facts of your matter, I guess I would say you'd have to be one of the most persistent people I think you could ever come across. In essence, the matter itself was relatively small in the sense that the sum at stake is small. But I guess you persisted because you were interested in – well, I guess I'd be interested to know why you persisted. And I'm guessing it was because you were somewhat – well, you were concerned about the property interest here and the concern about process. So we've talked about – sorry, I should let you answer that part of the question first.

25 **MS CARRIGAN:** Well, I guess, yes, "persistent" is probably the only word to describe it. Really, my only reason for persisting was – initially I was just going to let it go until I realised fully what the reasons they were relying on for having denied the 12 days. But the original decision was just utterly irrational and I had been assured by frontline Centrelink staff that it was so irrational it would be overturned at
30 the first original decision.

MR LANE: Can I stop – and that's at the internal appeal process?

35 **MS CARRIGAN:** That's at the internal – so when I talk about the original decision, in Centrelink speak that means the very first time you say, "Oi, this doesn't seem right." So in that sense, I honestly thought it would be resolved at the initial decision. Then when it wasn't and on such a cavalier dismissal, I was like all right, well, I'll take – I was again assured by the frontline staff, "Don't worry, the internal reviewer of the original decision will overturn it." Then when that person didn't, I
40 realised that there's a – Centrelink is – the staff themselves are overwhelmed by an unwieldy oppressive regime framework in terms of their operational procedures and the social security guidelines.

But one guideline – I don't know how I stumbled across it, but there was one

guideline that made me realise that, in actual fact, they just take a position where they just say no and 99 per cent of people will walk away. That is guideline 1.3.5 which says:

5 *A person affected by a decision of an officer under the Social Security Act may apply for a review of the decision. Liability should not be accepted if an incorrect decision has been made under the Act and there's a right of review.*

10 Well, you know, quite frankly, my right of review almost led me right through to the High Court the way things were going; it was just ridiculous. While I've quoted that I believe the department spent 80 times what they were trying to defend in their external court costs, not their internal costings, I actually think it was probably closer to a hundred, but I'm still waiting on my final freedom of information application on
15 that one.

 But I honestly think that particular guideline just says it all. They will just continue to deny and most people, for very sound reasons, will just walk away. I can tell you I honestly – when I got the internal review I thought very hard about
20 pursuing it. But I feel that they get away because their clientele base are people who are born down – and notwithstanding I felt pretty jolly born down myself by the whole process – I just felt I had a moral obligation, quite frankly. It sounds a bit trite but that was my reason.

25 **DR MUNDY:** There's still a few people around with these old-fashioned principles.

MS CARRIGAN: Doesn't necessarily make you popular, the old-fashioned ideals and principles.

30 **DR MUNDY:** A wise man once said you don't do this for popularity. Can I just ask you about, coming back to you've used – you clearly aren't convinced the Commonwealth has acted in relation – has acted in accordance with the model litigant guidelines. I think it's fair to say that your case is not the first - -

35 **MS CARRIGAN:** Stand-alone, no.

DR MUNDY: - - - (inaudible) that that's an unusual occurrence. Have you pursued the option of raising this matter with the secretary of that department?

40 **MS CARRIGAN:** I have - - -

DR MUNDY: Because that's the recourse, isn't it?

MS CARRIGAN: Yes. I mean, I sought to – in the AAT when my matter was

remitted back to the AAT and in fairness to the poor vice president who had remitted – well, he didn’t really have a hearing but because of the way the events flowed he had a summary hearing, I suppose. And, as he rightly noted, he was in no position to be making orders that the secretary I had any contact. That was one of my greatest frustrations, to be perfectly honest. I didn’t even know – it took me a while to realise it was actually the secretary of the Department of Human Services, not the secretary of Department of Employment and Workplace Relations who actually was the person who was running the case in the AAT. So I was – and then I was frustrated because everyone kept talking about “our client”, “our client”. I didn’t actually know who the client was. I didn’t even know who the secretary was until I went looking. So, yes, no, I’ve had no capacity and that has been one of my greatest frustrations.

DR MUNDY: Our understanding is that – and we may form a view that it’s not a satisfactory arrangement. But our understanding is, as legal services directions currently state, that persons who are aggrieved with the conduct of Commonwealth agencies in relation to the model litigant rules contained in the directions, their first port of complaint is the secretary rather than some other person like the ombudsman perhaps.

MS CARRIGAN: Yes.

DR MUNDY: So you haven’t raised this matter formally with the secretary?

MS CARRIGAN: Well, eventually as part and parcel of some of the more overt behaviours in the Federal Court, I just started to cc the secretaries in on emails. Now, I was very mindful, I didn’t want to become an obsessive pest or something like that. I’m also considerate of the fact that a secretary relies on her people that she has in place to be dealing with those matters. So I sent maybe two or three, I’m not sure, but it was with the purpose of her - -

DR MUNDY: Can you remind me when this matter occurred? The year will probably be sufficient for my purpose.

MS CARRIGAN: Well, it started in 2011 and middle of 2013 was when I got that final decision.

DR MUNDY: The reason why I ask this is one of our colleagues was formerly secretary.

MS CARRIGAN: Okay. Well, I’m sure it wasn’t that person.

DR MUNDY: It clearly frustrates her. Okay. So you’ve copied the secretary in. You haven’t formally written say, “Oi, secretary - -”

MS CARRIGAN: Well, in fairness, I had discussions with the department's legal representatives. They were on very clear notice that – quite frankly, if the secretary had sent me a note saying, “Gosh, I’ve just realised what’s been going on. This is not good and I undertake to have someone look into it,” I’d have been down the road.
5 But, as it is, the vice president in the summary hearing suggested I do a complaint. In fact, he strongly encouraged me to make a complaint to the ombudsman; and that is the complaint.

DR MUNDY: So you have raised the matter with the ombudsman.

10 **MS CARRIGAN:** Yes. And again, I’ve tried to do it in an objective, non-querulous fashion, but I’ve been wrecked for choice in terms of issues to raise with them it’d be fair to say.

15 **MS MacRAE:** Can I just ask, the other question I have for you. You mentioned at the beginning that the person opposite you in the AAT might as well have been speaking Latin. You also said you had some understanding of the legal system. So just to get an idea of self-represented litigants in your sort of - - -

20 **MS CARRIGAN:** Sure. Sorry, Commissioner, I should be clear on that. To be honest, this is not the first time I’ve represented myself. I represented myself in a matter back in ’95. I’ve never been in the court before. My very first directions hearing I thought was my hearing. So I was surprised to turn up and find lots of other people in the courtroom. I was mostly annoyed because I’d worn my best
25 outfit and in the end it was just a directions hearing. I guess that’s – going back to my very first time appearing in court is that the registrar barking orders at me might well have been speaking Latin, not because he wasn’t a fair registrar, but I simply had no idea.

30 It’s the system really that I think drowns people who are representing themselves. In that respect, I think the system could be made easier for people appearing before courts by – and I’ve printed it out, I’ll leave it with you. But somebody sent it through to me, but I do think it’s a good example of – that’s from the New Zealand High Court and it sets out for self-represented litigants the various
35 options they’ve got. I do think it’s quite a good example, given some I’ve seen. So I think access to information would make a great difference to self-represented litigants or people whose English is a first language and don’t have other impediments.

40 So very separately, that was my issue there. In terms of – so the person appearing opposite me in the AAT, no, I understood. But that was because I’ve since then – well, since then I’ve – since my very first experience I found myself, courtesy of a workplace accident, unemployed and unemployable and so doing a law degree seemed like a good way to fill in the spare time. I’ve never practised as a lawyer and

I was never interested in practising as a lawyer; literally was to – I had had quite a significant injury and I was unable to work and so it was to keep me from going insane. I’m not entirely sure doing a law degree was a good idea.

5 **MS MacRAE:** I wasn’t trying to inquire too much into your private life. But it’s just interesting - - -

MS CARRIGAN: No, no, it’s actually - - -

10 **MS MacRAE:** You’ve actually done some legal training, you’re still finding the barriers - - -

MS CARRIGAN: Yes, well, exactly.

15 **DR MUNDY:** When you first started to encounter the AAT on these matters and you turned up unrepresented, which is not unusual for someone at the AAT - - -

MS CARRIGAN: Absolutely.

20 **DR MUNDY:** I’m sure if he was here the president of the AAT would say that’s - - -

MS CARRIGAN: No, exactly.

25 **DR MUNDY:** Were you given any – and putting aside the fact that you may have studied law, did you have the sense that you turned up and they were there ready – they were going to give you a bit of a – they were going to tell you what was going to go on?

30 **MS CARRIGAN:** Of course that goes to the nub of the issue, particularly in those tribunals. No, I had no – I had a very nice registry staff member, but I was not given any direction in terms of – it wasn’t till everything was over that I was trawling through the AAT site, for whatever reason – I can’t remember – but and I stumbled across a document and it was like, “Why didn’t I find that to start with?” I do think
35 that is a key issue is that there often is information but it’s buried so deep in everything else.

40 Now, I’m not suggesting that courts or tribunals have on their homepage, “Yoo-hoo, litigants in persons, over here, this section is especially for you.” But I do think that as soon as the tribunals or courts become aware that a person has filed as a self-represented litigant, that they should immediately be sent notice of where they can locate the information, who might be able to assist them in terms of external legal advice and – yes.

DR MUNDY: So when roughly did these matters – when was your first encounter with the AAT?

MS CARRIGAN: It was in 2011.

5

DR MUNDY: I guess the experience was similar when you ended up at the Federal Court?

10 **MS CARRIGAN:** Yes, it was. In fairness to – again, I have great sympathy for the staff in these places because they themselves are not equipped to be trying to reason with people who are, through anxiety or just through being sheer unpleasant and rude, are very difficult people to reason with. So all I got told immediately they became aware I was a self-represented litigant was they couldn't give me any legal advice. Now, I understand that, but in actual fact, you know, somebody who's doing
15 a family law matter or something has no understanding around that. If someone at the registry tells them something, they will regard it as - - -

DR MUNDY: It was in the Federal Court in Melbourne?

20 **MS CARRIGAN:** No, mine was in the Federal Court in Queensland because the Northern Territory is linked to Queensland for - - -

DR MUNDY: So there wasn't any – we know that in some courts, some (indistinct) federal courts legal aid services will have a duty solicitor there.

25

MS CARRIGAN: No, but – and thank you for reminding me. As part of the paperwork I did get from the Federal Court, they put me onto QPILCH and Elizabeth Pendlebury who I think is still there. She was excellent. Now, for me she was excellent because one of the greatest difficulties for self-represented litigants is
30 understanding the whole formatting. You put in an affidavit, it has to read like this. You put in your form, it has to read like this. So she was fantastic and putting me straight, guiding me in that sense. I did my own legal research and, as I discovered, it's very difficult to overturn on a question of law. So between the two of us – but I was also very mindful it's a free service and she herself, her own – so I tried to keep
35 my contacts with her very limited. But there was that option.

40 But again, they can decide whether they will assist you or not and, in fairness, I think the assistance I received was mostly informal. So, yes, in that first instance. And again, but the same with the – and this goes back to the model litigant rules. The AAT did put me on to a legal aid lawyer. To be honest, when I was offered the opportunity I sort of thought I'll end up with an enthusiastic 21-year-old who has – anyway, I didn't, I got a very nice gentleman who obviously did this day in, day out. But because the case that had been put by the department to the AAT was fundamentally wrong, we had a discussion about that. He armed me with various

things which – well, in fairness, he pointed me in completely the wrong direction because we both had a fundamental misunderstanding of what the case was. It wasn't until I had to start appealing to the Federal Court that I became aware of how unsound the case that had been put to the AAT.

5

Now, again I don't blame the individual. I think it's reflective of a department that just takes a one-size-fits-all line and operates particularly on that basis; that they will not give in. They will just keep denying.

10

DR MUNDY: So in a funny way the root cause of this problem is the complaint handling at the first instance.

15

MS CARRIGAN: Absolutely. I seriously think if I can get the ombudsman to look at nothing else, if he pulls out social security guideline 1.35, that seemed to be the mentality. "We know we're not wrong, but we're not going to deny it." It was just ridiculous.

20

DR MUNDY: Thank you very much for your time, Jane, and the material that you've (indistinct).

MS CARRIGAN: Yes, no, I am. I haven't mentioned any names or anything, I don't think.

25

DR MUNDY: No, the only name you mentioned was the name of the person who helped you.

MS CARRIGAN: Yes, exactly. And I'm more than happy for her to get credit.

30

DR MUNDY: Thank you very much, Jane. These hearings are now adjourned until 9.00 tomorrow morning in Brisbane.

35

**HEARING ADJOURNED AT 2.06 PM UNTIL
WEDNESDAY, 18 JUNE 2014 AT 9.00 AM**



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 WEDNESDAY, 18 JUNE 2014, AT 8.56 AM

Continued from 17/6/14 in Darwin

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DR MUNDY: Good morning, ladies and gentlemen. Welcome to the public hearings of the Productivity Commission's access to justice inquiry. My name is Dr Warren Mundy, and I'm the presiding commissioner on this inquiry. With me is Commissioner MacRae, and together we exercise the capacity of the commission with respect to this inquiry. Before going any further, I'd like to pay my respects to elders past and present of the Djirubal and Jagera peoples, the traditional owners of the land on which we meet today, and to the traditional owners, past and present, and elders of all indigenous nations which have continuously inhabited this continent for over 40,000 years.

The purpose of these hearings is to facilitate public scrutiny and discussions of the commission's draft report which was released in April 2014. We're keen to get feedback from people on the report, in particular the recommendations and the information request we have made so that we may draw upon that evidence as we complete the final report. We will provide the final report to the treasurer some time in September, and that report will be released in accordance with our Act within 25 parliamentary sitting days by way of tabling in both houses of the parliament. Whilst we like to conduct these hearings in a reasonably informal manner, I would like to remind participants of part 7 of the Productivity Commission Act which gives the commission certain powers to act in the case of participants who provide false information or refuse to provide information required by the commission.

As far as we are aware, these provisions have not been used since the Act was passed in 1998. As I said, we like to conduct these proceedings in a relatively informal manner, however to facilitate the transparency of our processes and also to facilitate the work of our staff back in Canberra, we do keep a full transcript, and that transcript will be placed on our web site in a few days time. Participants are not required to take an oath, but are of course required to be truthful, and we welcome comments from participants not only in relation to their own views, but those expressed by others.

That said, because of the way we take the transcript, it is not possible for people to make comments from the floor, but we will provide an opportunity at the end of the day's proceedings for any person who may wish to make a comment who wasn't scheduled to appear. I'm required under Commonwealth occupational health and safety legislation to advise you of the emergency evacuation procedures of this building. Staff will be on hand to assist you, and the intercom will direct you if an evacuation is necessary. In the event that we need to get ready, an evacuation alarm, which I'm told goes "beep, beep, beep," will be activated and the cause will be investigated. We are to remain calm and await further instructions.

In the event that the building needs to be evacuated, the alarm will go "whoop, whoop, whoop". At that point we are to exit the building via the fire exits. These are opposite the lifts or on the left of the terrace. The meeting point is located on the

corner of Turbot and North Quay, which I am told is go out, turn left and turn left again. Don't use lifts or return to your room.

Right. That's the end of the formal proceedings. Could I please ask the first participant, which is the Law Society of Queensland to come up, and they have. Could each of you, for the benefit of the transcript, just state your names and the capacity in which you appear?

MR BROWN (QLS): Yes. My name is Ian Brown. I am the president of Queensland Law Society.

MR REED (QLS): My name is Robert Reed. I am the chair of the Queensland Law Society access to justice and pro bono committee.

MS SHEARER (QLS): My name is Elizabeth Shearer. I am a counsellor of the Queensland Law Society and a member of the access to justice and pro bono committee.

DR MUNDY: Thank you. Mr Brown, would you like to make a brief opening statement? By "brief", we mean something less than five minutes. The record is currently held by the Australian Bar at three minutes without pausing.

MR BROWN (QLS): I'll speak quickly.

DR MUNDY: We thought it was quite surprising. They obviously went very fast.

MR BROWN (QLS): Thank you, Commissioner. Can I thank the commission for the opportunity for the Queensland Law Society to address the hearing today. The fundamental position of the Queensland Law Society is that everyone without exception should have access to legal services, and that access to justice is a fundamental right for all. Promoting access to justice is a constant feature of our advocacy and education to the profession, and we've undertaken some significant recent advocacy work including sustainable legal assistance for disadvantaged persons, a state election platform from 2012 which sets out general positions from QLS on access to justice, involvement with both state and federal reviews of legal assistance sector funding and advocating for Queensland to retain the right to access common law compensation schemes.

Today, together with my colleagues, we'll address the issues raised in the Law Society's submission. I'll discuss briefly the issues in relation to chapter 7 of the draft report as they relate to professional indemnity insurance. My colleague, Ms Shearer, will discuss chapter 19 and Mr Reed will discuss chapter 13. I'll make some brief comments in relation to the PI insurance issues raised in chapter 7. In 2009 the COAG taskforce confirmed there was no case for moving away from single

supply professional indemnity insurance arrangements. Reliance on the purely open commercial market in the United Kingdom has led to significant volatility in premiums, uncertainty of coverage with premiums of up to 47.5 per cent of fee income for some legal practitioners.

Current arrangements provide benefits with the universal coverage of all firms which, in our view, aid consumer protections. The policy available provides greater coverage than would usually be found in the commercial market, and there is a significant program of assisted risk management within legal firms. I'll now pass to my colleague Ms Shearer.

MS SHEARER (QLS): Thank you. I just wanted in opening remarks to talk a little about some of the aspects of the bridging the gap chapter, particularly around discrete task services and unbundling. Promoting the wider use of discrete task legal services has been a focus for our committee with the Queensland Law Society, and we welcome the recommendations of the draft report on those issues. Our committee has taken the approach that what's required is a relatively simple amendment to the Australian Solicitors Conduct Rules just to make clear that this is a legitimate way of practice, and then we see a role for professional associations, including ours, to work to overcome the barriers there are to delivering discrete task services by developing practice guides about how to do it, but equally as importantly when to do it, and then promoting this within the profession and within the public at large.

We don't see discrete task services as a complete solution to the access to justice gap, but we do see it as an important contribution the profession can make. It enhances pro bono efforts, because pro bono work is often done on a discrete task basis, but it also has the potential to establish a new service offering in the market that we think will, in appropriate cases, provide good value for money for people who can't afford other options, and another more visible form of legal work or practitioners. Rob?

MR REED (QLS): Yes. So my focus in relation to chapter 13 has been on the issue of costs awards for pro bono clients. So the access to justice and pro bono committee of the Queensland Law Society certainly agrees with the Productivity Commission recommendation that pro bono clients should be entitled to seek an award of costs. Our committee has been working with the litigation rules committee of the society and in consultation with the Bar Association of Queensland and the Court of Appeal Rules Committee to facilitate this. Our approach to the issue has been to firstly educate the profession on the need for properly worded costs agreements, and we think that is the way to address the issues that have come up in recent case law.

In particular we've done that through the society's recently published cost guide, and secondly we're working on preparing an appropriately worded template

cost agreement which, when completed, will be provided to all practitioners and relevant stakeholders as an agreed form of wording that will get across those issues. Our committee sees our work in this area as not only addressing the inequalities which we recognise can certainly arise for pro bono clients involved in litigation, but also complementing the other work that the society is undertaking in encouraging pro bono as one avenue - only one avenue of providing access to justice to those in need.

DR MUNDY: Thank you very much. Sorry, Mr Reed, I may have just misheard you as I was flipping through my notes, but did you indicate - and I'm not wanting to put words in your mouth, because I genuinely think I may have misheard you. What is the position about cost orders in favour of self-represented litigants?

MR REED (QLS): I hadn't comments on self-represented litigants. I had commented on pro bono.

DR MUNDY: Do you have a view about the merits of providing cost orders in favour of self-represented litigants?

MR REED (QLS): I think the society certainly supports the concept of providing costs awards in favour of self-represented litigants as well, yes.

DR MUNDY: Thank you.

MS SHEARER (QLS): One issue that arises from my work is that people aren't either self-represented or represented. They may be represented for various parts but not at court, and it's certainly my experience that some of my clients have taken my invoices along to the Federal Circuit Court and asked for costs orders, not necessarily successfully, but they've certainly been given an indication by the Court that it would be considered.

DR MUNDY: We might just stay on this. I mean, our initial concern about the general practice not to provide awards of costs to self-represented litigants has actually changed since the incentives in litigation but that's our primary concern. It wasn't about the equitable notions, and we probably made some observations along the way at some point that that period for yourself is not costless in an economic sense, because lawyers aren't doing something else when they're appearing in court. But we're quite interested to hear that. Ms Shearer, you just raised that question about the relationship between bundled services and costs orders. We don't need it now, but is there any recorded case material from the courts on the presentation of, essentially, unfunded - there's nothing?

MS SHEARER (QLS): I've not had a client who has got to that stage at the end where a cost order is made, but they've certainly been encouraged to produce my invoices along the way.

DR MUNDY: You indicated that they had not always been successful. What reason was given by a court - - -

MS SHEARER (QLS): Just that the matter hasn't got so - this is in family law matters in the Federal Circuit Court where typically a costs order is considered at the end of the whole stage of processes. So it's more that they haven't got to that stage.

DR MUNDY: Okay. So it's a jurisdiction also, isn't it, where the parties end up with their own costs anyway?

MS SHEARER (QLS): Yes. Costs are not routinely awarded. So it's not an example of a court in which costs are usually awarded.

DR MUNDY: Are there any matters of - sorry. Are there any matters that you're aware of where, other than in family law matters - sorry. In forum where it's usual the costs are awarded against the loser, are there any circumstances where the courts have put their minds to the question of unbundled costs? Or is your experience just in the family law area?

MS SHEARER (QLS): My work is in the Family Court and tribunals, but also the Magistrates Court in Queensland, but not in the higher courts where costs awards are more.

DR MUNDY: Given Mr Reed's previous comments, I presume that the position of the Queensland Law Society would be that if a person turns up with having sought some advice but ultimately isn't represented in court, that those costs should be dealt with in the normal matter, irrespective of whether the lawyer themselves had actually been on their feet.

MR REED (QLS): Well, there's certainly a strong argument for that in the sense that those are costs properly incurred in the conduct of the matter.

DR MUNDY: The mere fact that the person hasn't been physically represented in court by a lawyer should really not be either here nor there.

MR REED (QLS): Well, there's strong argument that it would be artificially entirely limited to that part of the process, because of course the process is a much longer one.

MS MacRAE: I was just interested in your comments about pro bono and cost awards. In some other jurisdictions we've heard that while it's possible to structure a costs award by carefully wording your agreement, but that is quite a pain and can be quite onerous and that they would prefer to see some other kind of reform so that that

requirement to get this carefully worded sort of agreement wouldn't be required. But it's your view, I think, if I hear you correctly, that you think you can come up with a sort of a template of the way you would structure a fees agreement that you feel would be robust in having an award presented, so you wouldn't need to make any other change for this jurisdiction at least.

MR REED (LSQ): The position that we've taken at this stage, certainly in relation to this jurisdiction and taking into account the guidelines that you can find in *King v King*, and also *LM Investments*, a recent decision of Justice Mullins. We think there's enough there that we can construct a template costs agreement that sets up an indemnity and then sets up adequate conditions subsequent that will allow a waiver of fees should the matter be unsuccessful, and then also limit the fees to the costs award should the costs award eventuate.

So we do feel at this point in time in this jurisdiction there is sufficient guideline, and I guess we're taking the pain. That's part of the point of what we're doing is we'll take the pain to consider the wording and create a template that we can then provide to all stakeholders to use with confidence.

MS MacRAE: Okay.

DR MUNDY: I guess my question is whilst I understand that what you're doing, would it be made easier and clearer - is there any way the parliament could help out in making it easier and clearer is my first question. My second question is, once you've completed this work, do you think it would be relatively - with this costs award document, costs agreement would be relatively transferable between jurisdictions.

MR BROWN (LSQ): I might answer that and say, I think we would be reluctant to see a legislative solution. It probably isn't necessary to have a legislative solution given the structure that we presently have in relation to legal costs in this jurisdiction at lease and an appropriately structured and worded client agreement, as Rob has alluded to, in terms of the general guidance we now have from the court, we think that an appropriately worded costs agreement that complies with the obligations under the Legal Profession Act can adequately deal with the situation.

DR MUNDY: And obviously by virtue of that answer, my second question about would the agreement readily travel obviously depends on the interaction with the legal services regulations of the jurisdiction concerned.

MR BROWN (LSQ): Yes, but - that's correct, and in many ways they're largely analogous across the jurisdictions in terms of the requirements to make costs disclosure, et cetera. So I would - and this is just an opinion without having looked at it in more detail, but I would think that it would be reasonably readily transferable.

DR MUNDY: So I guess, wrapping this bit of the discussion up, is that when you've finished your work, it shouldn't be too hard for people in other jurisdictions to take what you have done and tweak it to meet their circumstances and that would be a more timely way and possibly a more effective way than having to run these sorts of issues through the parliament and get them to fix it.

MR BROWN (LSQ): Subject to the legislative provisions that prevail in particular jurisdictions, and also subject to the relevant case law that might pertain in particular jurisdictions if there is decided case law that articulates a particular position must be taken, so subject to those riders.

DR MUNDY: Okay, thank you.

MS MacRAE: I understand that you've got pre-practising certificates for volunteers. Is that right? And I'm just wondering if you could tell me a little bit how long they have been operating and what the take up is like and whether you have experienced any problems with them. So if I just say, just to round it out a little bit, we did have a recommendation in the report about possibly making pre certificates available for, you know, recently retired people, people on career breaks, and some of the concerns we've had expressed around that are in relation to requirements for continuing education and for insurance, and so if you could talk about those things in particular in relation to how they're operating in Queensland, that would be great.

MR BROWN (LSQ): We might have to take that question on notice.

MS MacRAE: Okay.

MR BROWN (LSQ): Because I haven't come today armed with the relevant data in relation to the actual numbers of those who practice under a volunteer practising certificate and I think we would rather give you a much more fulsome picture of how that regime has worked and the uptake and, if we can, the sectors in which it's operated.

MS MacRAE: That would be very helpful.

DR MUNDY: Could we just perhaps ask you some questions in general though, because some of your sibling organisations in other jurisdictions have indicated to us that they have significant concerns around these sorts of certificates and they raise them in respect to three matters, continuing professional education, contributions to the fidelity fund, although I think perhaps these aren't matters, often matters in which fidelity fund issues particularly apply, and thirdly, indemnity insurance. Are you able, Mr Brown, just to give us a sense of how those issues are dealt with under these voluntary certificates in Queensland?

MR BROWN (LSQ): Well, certainly in relation to Community Legal Centres where people are undertaking purely voluntary legal work, Community Legal Centres operate under policies of indemnity insurance and anecdotally and certainly in my experience engaging in Community Legal Centre work, it's a generally fairly strict regime, well applied in terms of ensuring that people have practising certificates and ensuring that appropriate risk management is in place in relation to the way the schemes operate. So I'm not sure that that's a particular - that certainly isn't a particular concern from the Queensland Law Society's position.

You alluded to the issue of the fidelity fund. Well, as you said, it really isn't an environment in which there is exposure to the risk of fidelity fund issues arising. The issue of continuing legal education again is something that perhaps I would like to take on notice and come back to you, because what I think we would like to be able to do is to get some data if we can just on the engagement at that level by volunteer practising certificate holders so that we have a more fully informed view for you.

DR MUNDY: Okay. That's fine, thank you very much.

MS MacRAE: Could I just mention your work. You've mentioned there you worked with CLCs so I'm going to a different subject so if we need to come back let me know, but in your opening comments you talked about the work that you do in advocacy and we know that CLCs do quite a lot of work in advocacy. We also know that there's been some changes in the way the Commonwealth is funding CLCs to say that they shouldn't be using Commonwealth money at least to advocacy work. I just wonder to the extent to which you think you might be able to take up that role should CLCs become less able to do that work, and whether your role in advocacy, how similar your role in advocacy is to the role that CLCs play.

MR BROWN (LSQ): Well, the Queensland Law Society has 26, shortly 28 committees which essentially undertake a range of advocacy, policy development type work, as well as other activities. So our policy work is spread across a policy team of four lawyers and covers all of the activities that those committees undertake, so it's a vast array of policy work that's undertaken and well outside the scope of what would be undertaken by community legal centres. It's a difficult question to give a precise answer to - - -

MS MacRAE: Sure. I appreciate that.

MR BROWN (LSQ): - - - given that the breadth of Community Legal Centres and the activities that they undertake and community organisations and the activities they undertake as to the level of advocacy and in what areas they advocate and how the Law Society would fill the gap, but I suppose to answer the question, the Law

Society probably plays the most active advocacy role in the legal sector in Queensland already simply in terms of the breadth of the work that we undertake, the volume of work that we undertake, and the level of engagement that we have with government in relation to advocacy work.

DR MUNDY: So you're in - one of the things that has been put to us is that CLCs are in a reasonably unique position as much as - particularly working with people who experience some particular of disadvantage, or perhaps in a limited range of other matters such as environmental protection, that their casework is what actually facilitates and underpins their advocacy and law reform work. Now, in the absence of CLCs undertaking law reform work, and I think it's fair to say that the Commonwealth position is not that they shouldn't do it, but rather that they shouldn't use Commonwealth money to do, I think is probably an accurate statement of the Commonwealth's position. That access to the learnings from the casework, how would you see that information rising up to your committee? Would that mean that you would have to have a much stronger engagement with the casework of these organisations than you do today?

MR BROWN (LSQ): We already have a very close level of engagement in the sense that we have active involvement on our committees by representatives from various organisations. We undertake an active engagement in terms of engaging with Community Legal Centres already through the society. How that would actually impact in terms of the work the society does, again we would have to probably take that on notice and give that some consideration - - -

MS SHEARER (LSQ): Can I - - -

MR BROWN (LSQ): But I will have my colleague address it.

MS SHEARER (LSQ): I think it would be fair to say that there are a lot of issues on which CLCs provide really strong advocacy that wouldn't make their way up through the Law Society's policy committees because they're of very limited interest to people in private practice. It's just areas of work that we have nothing to do with. Some around consumer protection is more mainstream and something that we have a banking and finance committee that's comprised of people who act for banks and people who act for consumers, and that provides a process, but when you're thinking about something like the sort of advocacy that welfare rights or disability services provide, that really would struggle to find a home in the Law Society because it's not an issue that is of sufficient import to another - - -

DR MUNDY: It's not an issue with private practice.

MS SHEARER (LSQ): - - - private practitioners and I think that the real strength of Community Legal Centres advocacy work has been that close link with casework

and identifying issues and identifying solutions that are more systemic so that you don't have to keep doing 50 cases like this, you can get one legislative amendment and it's solved.

MS MacRAE: Yes, thank you.

DR MUNDY: We made an observation in chapter 10 about tribunals and I think it was - I'm prepared to fess up and say we should have been more careful about our drafting. Our concern here was that with what has been described to us by participants, CLCs in various forms, and indeed a number of presiding tribunal members about what they have referred to as creeping legalism, and what we're concerned with here, and as you would know, there are certain, at least, lists within tribunals which are set up essentially for people to represent themselves, so leave is required for people to appear and we absolutely understand why there are really legitimate cases in those tribunals, why leave should be given for people to be represented, particularly if they suffer some disadvantage.

I guess our real concern was, and what was put to us, was leave was being granted increasingly in circumstances which perhaps the design of the tribunal hadn't intended. So that's what we were trying to get up. But perhaps we can have just a more general discussion about self-representation and both in tribunals but also in the Magistrates Courts as well. I mean, one presiding magistrate has mentioned to us prior that he thinks that ordinary citizens should largely be able to go to a Magistrates Court and get their matters resolved without having - necessary to be represented in court.

I mean, we didn't quite explore issues with him, but do have a sense in which - and it also comes, I guess, to lay people appearing in certain types of tribunals, trade union officials historically have appeared and some planners in others. Do you have a general view about, you know, this whole tribunal space which certainly in Victoria VCAT is becoming a very legalistic and congested place, you've only got to go down there - do you have any views about how we can facilitate these things whilst ensuring people still have the safeguard of representation if they really do need it?

MR BROWN (LSQ): Well, I suppose what I can say about that is the society's overarching position is that people should be entitled to have legal representation in tribunals. Our primary concern is that even in a tribunal, relatively benign tribunal environment, there can be significant imbalances between parties who are appearing and it is - I note the comments, the anecdotal comments or the private comments made by a presiding magistrate. I think that the risk in relation to views that legal representation isn't required in most cases fails to, I think, address the subjective implications for individuals and the power imbalance that can occur that needs to be addressed.

It can be through a range of issues, it could be through age, infirmity, physical ability, race, language, a whole of different things. What I might do is invite my colleagues to make some commentary about that in terms of legal representation in tribunals and in the Magistrates Court.

MS SHEARER (LSQ): I think while ever you're in an adversarial process, there's no doubt that representation is of assistance, and whether it's representation in court on the day, or whether it's assistance with putting your case into a comprehensible way so that you can have something to present, I think while you're in an adversarial process where there's a tribunal that is saying, "You tell me what you say, you tell me what you say, and I'll make a decision," then representation is of great assistance in that process." The more inquisitorial the tribunal becomes, the less - and the more they structure the information they obtain and put processes in place to assist people to put their material forward in that way, the less need there is in a process sense for representation.

MR BROWN (LSQ): Could I just add also that despite - and knowing and understanding why various tribunals have been set up, including QCAT in Queensland, matters that come before QCAT would, in many instances be as complex, if not more complex than matters that from time to time go before the Magistrates' Court and - - -

DR MUNDY: I've run a few planning cases in another place, so I know how complex they can get.

MR BROWN (LSQ): And they can become complex. They can be seemingly not complex at the outset, and a particular individual may not really have the insight to understand exactly how complex a matter may potentially become and how prejudicial it may be for them, particularly at the outset, to not have legal representation. So it's a complex issue.

DR MUNDY: I guess places like QCAT, say in the planning list, you'll get people who will turn up there who aren't professional planners, in effect, and they're probably more used to their typical employers but sometimes their clients than plucking, you know, your average solicitor off the street, if you pardon the expression.

MR BROWN (LSQ): Yes.

DR MUNDY: They're experts in - and that's while the old industrial advocates and the industrial tribunals, that's what they did and they knew it. So you don't see a problem with people, suitably qualified people, whatever that means, appearing on behalf of others in what you might consider to be specialist lists, like the planning list?

MR BROWN (LSQ): That's another issue in relation to lay advocates.

DR MUNDY: Yes. Let's move on to lay advocates.

MR BROWN (LSQ): The society does have a strong concern in relation to the role of lay advocates and I think that can be articulated that the view of the society, and I'm fairly confident it's a view shared by the Law Council of Australia, is that advocacy work, and appearances in court should properly be undertaken by legal practitioners for a range of reasons in relation to firstly the training, the qualifications required to become a lawyer, secondly in relation to the fact that lawyers are highly regulated and therefore have a whole range of obligations both regulatory but also ethical, and professional obligations that are set out either in legislation or the common law and the obvious and overarching duty to the court that a legal practitioner has when appearing in court as an advocate.

There is the issue in relation to supervision of lay advocates by legal practitioners if, in fact, that is a way that is seen to address the issue, and there are all sorts of issues that go with that - and there's finally the issue in relation to professional indemnity insurance and issues that can arise in relation to having lay advocates appear without appropriate insurance.

DR MUNDY: But if I'm in the City of Brisbane and I've got a matter in the planning tribunal, you're not suggesting that senior planning officers employed by the City of Brisbane shouldn't be able to go act on behalf of - - -

MR BROWN (QLS): Well, there certainly may be some circumstances in which - - -

DR MUNDY: I'm trying to identify those circumstances.

MR BROWN (QLS): Yes. I think it's difficult to put a ruler across it and say, "Well, in this circumstance this is acceptable, in this circumstance this isn't acceptable." You'll probably end up, in that situation, with a patchwork of - - -

DR MUNDY: But the circumstance I just described is happening today.

MS SHEARER (QLS): But that's essentially self-representation. That's an employee of the entity appearing.

DR MUNDY: So that's self-representation, that's okay. But there are circumstances, I know, in other jurisdictions where professional planning practices, persons who are fellows of the relevant learned society, 20, 30 years' experience as professional planners, do act for private property developers. Is that an unacceptable

circumstance? And these are not people at any particular disadvantage, they're moderately-sized competent businesses, and they choose to have this person act on their behaviour because of their expertise in that particular forum, which has been developed for that purpose.

MR BROWN (QLS): And accepting that in the particular fora and the particular area, they have an area of expertise - - -

DR MUNDY: Yes, and I'm not suggesting they should turn up on appeal in the District Court or anything like that.

MR BROWN (QLS): Our concern, though, is that even in that environment it is a court environment. It is an environment in which, as a legal practitioner, the overarching duty is to the court, to the tribunal, to the administration of justice. Those are just duties that lay advocates don't have, don't recognise and haven't been schooled in their entire careers. There are also the issues in relation to professional indemnity insurance. So if a significant issue arises in the conduct of a matter, even at that level and even given the particular level of expertise, if it then becomes problematic down the path and becomes a matter which goes on appeal to higher courts, there are significant concerns in relation to the right of redress of the client should they be significantly impacted.

DR MUNDY: But having personally acquired the services of such a person as I described, the first thing I did was see what the professional indemnity insurance was like, and it looked like a firm of its size.

MS SHEARER (QLS): I think the issue is, is there really an access to justice benefit in that? Certainly I don't have anything to do with the Planning and Environment Court, but I do assist people with employment law matters. So to that extent, my competitors are people who aren't subject to the same degree of regulation and control as I am, and in my experience could easily charge a whole lot more than I do for the same service.

DR MUNDY: Presumably the consumer wouldn't use the service if they charged a whole lot more than you did.

MS SHEARER (QLS): Well, they don't necessarily know that at the outset.

DR MUNDY: What people know when they start down the path of advice is something that has concerned us particularly.

MS MacRAE: I just ask, just coming to the unbundling point, and I appreciate that your - or the discrete task offering us, as you describe it - that you support that, and you were saying that you think that there would be ideally an amendment to the

Solicitors' Conduct Rules. You refer to the American Bar Association rules in that regard. Can you just elaborate a little bit on whether there's something in those in particular that you would see as being - as what you would use to amend - is that the idea, that you would look at those rules and amend the - - -

DR MUNDY: It's on page 8. Is what you're suggesting that the Solicitors' Conduct Rules should reflect what is in the Bar Association - - -

MS SHEARER (QLS): Yes.

DR MUNDY: So a lawyer may limit the scope of representation if limitation is reasonable under the circumstances and the client gives informed consent?

MS SHEARER (QLS): Yes.

DR MUNDY: So basically, I come along here and say, "Look, I need this bit of family law advice. I'm pretty confident I can hop up on my own two feet down at the Circuit Court, but I'd really like you to give me - this is the issue I need resolved, and could you perhaps draw up the documents for me?" You then give me a bit of - you'd say, "Fine, Dr Mundy. Happy to help you out on that. I just need you to consent in writing that this is the scope of what you and I have agreed I'm going to do."

MS SHEARER (QLS): Yes.

DR MUNDY: Gee, that seems pretty straightforward.

MS SHEARER (QLS): It does.

MS MacRAE: And that would be sufficient, in your view, to cover off the concerns we've had - - -

MS SHEARER (QLS): I think that then makes it visible in the Australian Solicitors' Conduct Rules that this is a way of practising. I think there's then a role for other professional associations to flesh that out for our members and provide them with resources and stuff. But I think that's enough.

DR MUNDY: Because that's really what legal aid commissions do with duty solicitors and their 40 minute, free, go in. It's happening in the assisted sector all the time, it seems to us.

MS SHEARER (QLS): And I think it happens in private practice quite a lot more than we think.

DR MUNDY: Yes, I'm pretty sure that's true too. So the view of the Queensland Law Society is that that would be enough from - and then the rest of it's practice development for the - that's truly very helpful.

MS MacRAE: Sorry, now I'm returning back, so I've changed the subject and now I'm going to change it back again. Just coming back to pro bono, we've had some quite strong evidence from the jurisdictions where pro bono targets apply that they've been helpful, but I note that you would be opposed to it for this jurisdiction. I'm just wondering if you could expand a bit more on your views around pro bono targets and why they may not be a good thing for Queensland? Noting that they would be voluntary and aspirational, I think everyone is agreed that our position on that is correct as well, not a mandatory target.

MR BROWN (QLS): I think it would be fair to say at the outset that there is a divergence of view about this issue within the profession. The concern that we have at the Queensland Law Society is that the imposition of mandatory targets in relation to undertaking government work is to the disadvantage of smaller regional and rural firms, and given the spread of the practitioners across Queensland, and the fact that most firms in regional and rural Queensland are smaller firms, there are potentials for significant disadvantage in requiring those firms to on the one hand reach certain targets and its reporting requirements potentially, and undertaking and having free equal access to undertaking government tender work. So I think that's the general proposition that is of concern to the Queensland Law Society.

DR MUNDY: So what you're concerned about is Main Roads, or whatever it's called at the moment, is for the roads up around Cairns, there's three or four local firms, the contractors are probably going to be local, the issues are all essentially local, and local law firms aren't going to be able to compete, and also maybe major Brisbane and national firms mightn't be interested.

MR BROWN (QLS): And they may not be able to compete, not that they wouldn't be interested. They simply may not have the resources to accommodate undertaking the work, bearing in mind also that a lot of regional and rural firms, if not the vast majority of them, already undertake a significant amount of pro bono legal work. I can advise the commission that in our process of renewing practising certificates this year, for the first time we sought feedback from the profession in relation to the amount of pro bono work that is being undertaken, and on average it's just shy of 70 hours per practitioner that has been identified in terms of the amount of annual pro bono work that has been undertaken. Now, that doesn't include, is my understanding, the large law firms, so in fact the figure may be higher than that. So there's already a significant amount of - let's call it formal pro bono work - being undertaken by practitioners. On top of that, they're also doing a lot of pro bono work that probably doesn't fit the definition of pro bono.

DR MUNDY: I mean, one of the things that has been suggested to us about the large firm scheme, Commonwealth arrangements and so forth is that relatively little of the pro bono work that's being done is actually of an access to justice character, and it's perhaps providing what we might call transactional services to cultural institutions. The data that you just mentioned that you're collecting, is it of such a character that it would facilitate the identification of how much of that 70 hours a week being done by what I think you described as - they're non-metropolitan Brisbane firms - - -

MR BROWN (QLS): It's all of Queensland.

DR MUNDY: Are you able to identify that regionally?

MR BROWN (QLS): We probably will be able to drill down into the data and do that. I'd have to take that on notice.

DR MUNDY: No. I don't want you going to too much trouble. Particularly if you could identify - I don't know how you've collected the data, but whether you could identify that which is of an access to justice character.

MR BROWN (QLS): We would not be able to do that. The data that we've collected is fairly broad.

DR MUNDY: So it could be representing someone in the Magistrates Court, it could be doing a lease for the local golf club to put another hole on the golf course?

MR BROWN (QLS): It could be anything, and certainly in terms of - but can I say anecdotally in terms of regional and rural practitioners, a lot of that will be access to justice work in the regions.

DR MUNDY: I suspect you're probably right. The difficulty we have is getting a handle on, getting any traction on that data.

MR BROWN (QLS): Well, this is certainly the first year we've done it, and the feedback has been pretty positive, and the response - the take up in terms of responses from the profession, I think it was something in the order of 30 per cent, I stand to be corrected on that, gave feedback. So next year I suspect we'll look at a little more sophisticated process to have more meaningful data.

MS MacRAE: So to the extent you've got that data available now, is it of a form that might be helpful to us, and can we access it?

MR BROWN (QLS): Well, we can certainly come back to you in relation to the nature of the - - -

DR MUNDY: That's if you can get whoever in the office is handling it, to give someone a call rather than do it by - a phone call might find the nuggets or decide that we're tilling barren soil.

MR BROWN (QLS): Certainly.

DR MUNDY: All right. Look, we are out of time. Thank you very much for your submission and the time you've taken to come and speak to us today. We appreciate it.

MR BROWN (QLS): Thank you. I appreciate the time.

DR MUNDY: Could we please have Christopher and Deborah Jenkinson? For the benefit of the transcript, could you both please state your names and the capacities in which you appear today?

MR JENKINSON: Christopher Jenkinson. I'm here in regard to trying to present some areas which don't seem to be catered for with the current system. I seek some sort of means from the federal government to override problems when an individual in Australia is being affected by another state and nothing can be done about it.

MS JENKINSON: Deborah Jenkinson. I'm here also in that same means. I'm concerned from a lay person's point of view that's been through a situation where an elderly person has been abused and governments in two states see fit not to support that person or to reinstate their actual rights and liberties when they have capacity.

DR MUNDY: Thank you. Before I ask you to make an opening statement, I'm sure our staff have advised you that we're not in a position to retry or reconsider matters and make recommendations about individual cases. I should also advise you that whilst these proceedings occur under the auspices of our Act, unlike a parliamentary inquiry, there is no protection of defamation in these proceedings for any persons other than Commissioner MacRae and I. So I just want to let you know that because I know that sometimes people seem to think that we're parliament, and sadly we're not. So with that, would you like to make a brief opening statement, and then we can ask you some questions?

MR JENKINSON: Okay. Well, the submission that I presented covers most of the things in general form. I kept specific for those same reasons, but everything that I've said, I support and there's documentation for. The problem we have is that as a general problem is that there's a part of society, some of the most vulnerable and disenfranchised are those elderly that are either disabled or are deemed to be disabled through a guardianship tribunal where they have their rights and liberties taken from them, taken over by the crown or the state, and they also control their finances in doing so. What happens when the state fails in its duty to protect those people after it takes their rights away? In the situation which I have presented, the state offices are the abusers.

There appears to be no possible means to have it addressed. If you go - in the situation of my mother, she lives in Queensland, the abuse comes across the boarder. Queensland state government says they can't do anything about the state government of another state. If an offence occurs in the other state, then it has to be addressed in the other state. Now, under South Australian law, the crown is accountable for those offences. So where do you get it addressed? I've been to the District Court twice. Both times I had orders from the District Court to government officers. Both times all those orders, every order was just ignored, disobeyed.

Now, if it had been me or some other individual, then that would be contempt of court, I would assume. But it doesn't apply, and the court says that it can't do anything about it. Now, in the situation where you go to the federal government, the federal government says, "Look, we'd love to help, but we can't because we can't intervene in matters in another state." Well, an Australian citizen living wherever they live in Australia should be protected by the same laws everywhere, or the same quality of law. That won't happen when you have states with different legislation and some are weak, and some have got these big gaps in it that they can wiggle around and get through, but if the laws don't - if the laws of the state where the offence occurs are not being addressed, where does an individual go to protect a person that is being abused by those laws?

I've tried every avenue and the consistent part of what happens is that while I have the evidence and I've provided the evidence to the attorney-general of South Australia, all I get is, "Thank you, we'll look at it and get back to you." They don't get back to you. But when you raise an issue, what happens is that the issue is addressed before they even look at the evidence. They don't - you know, the consistent part of this has been they've never asked me for the documents, they never looked at the documents, and they already make a conclusion that the government office is not wrong.

In the case of an ombudsman, this was done and every - the issue - the ombudsman said no government department has done anything wrong. This was back in the early stages. Since that time, everything that I have raised has been proven to be right. Perjury, the contempt of court, the disobeying court orders, now fraud, et cetera. All those things are there, and to show the problem that people get is that when a government officer makes a report, to get that report changed when they make an error in that report is near impossible because they don't want to show that they were incompetent or lax in their investigation. They would prefer just to say, "We're not changing it."

It took me three years for one report that contaminated legal process. For three years I kept asking for that report to be fixed and the records to be corrected, and they didn't do it. Then a change in the head of the government office occurred and I presented the information to him, and he at least had the decency to write a five-page report to say that that earlier report should never be used again. But it already contaminates things, and the problem is that - what I'm trying to say is the problem is if the - if it was an individual person with the offence, then the government would help you. But when the government is at fault, where do you go to get help? What I'm doing now is - I don't want to do this. I'm sick of it. It's been 10 years and 25 hearings so far, and I've got another one on 7 July.

So what I discovered is there are systemic problems in South Australia that are

impacting on large numbers of people in the way that the guardianship board operates, the way they produce their transcripts, the way they now - you talk about statistics. They're trying to reduce the number of people going to appeals, so what they do is they don't provide any details for anyone to go to appeals. So they use ex tempore, which now they're like a pre-determined template that says, "The person has no capacity. We've looked at all the evidence before us and we've come to this conclusion."

The latest one was - for reasons they gave a couple of reasons and they were both wrong, but then they also said, "There could be other reasons." It's up to them if they feel it's appropriate that they should provide the other reasons. Now, we're talking about going to appeal in the District Court, which in our case costs me a thousand dollars roughly each time I go to South Australia and do that. Now, when you go to the District Court and you get orders that are in your favour and no-one does anything about it, then what is the purpose of an appeal process and why can it occur? As I said, my mother lives in Queensland. She doesn't live in South Australia any more, but South Australia is controlling - made the offences and - a recent situation was what I was saying about - they take away rights and liberties and control the assets.

I asked for my mother to be represented - have legal representation to oppose what they were doing to her in a recent situation in Queensland. The person that holds the funds said that they won't provide any funding for legal representation, yet they were using a crown solicitor from South Australia to push their case through in Queensland as a third attempt to get it through, and they actually got it through this time. But third attempt, they used a crown solicitor with all those resources on the basis that it was complex matter of fact and law, and they then said that my mother could have no - they would not provide any funding. We talk about free legal aid, et cetera. In the tribunal that it was in, they don't provide lawyers and they don't normally allow lawyers.

I questioned why the other party were using lawyers, and as I said, there's a little clause in the Act that says if you say that it's complex matters of law and fact and you're a government office then you can use your lawyer, but an individual then doesn't have equity in representation, and my mother had no legal representation. She has had no legal representation in any hearing except for in the District Court where you have a lawyer appointed at an appeal to represent the person. Now, the first case the lawyer was good and she read stuff and looked at stuff and supported my mother.

The second case we had the situation by example where I contacted that lawyer firm to try and get some advice before the hearing as to what the appeal process was, and I was told that the barrister would look at the two transcripts for \$3000. The barrister had said, "Yes, there's complex matters of - there's three areas of law that's

been breached," and things like this. I said, "Well, I can't afford to do that." Because all the money is coming out of my pocket, so I don't get any refund for that sort of thing. So although I'm my mother's guardian, they just ignore that part of it. But then we went to the hearing and that actual - that barrister was appointed to represent my mother, luck of the draw what the court presented.

But what happened was that he didn't come to the hearing. He used a junior lawyer to go to the hearing, and that junior lawyer had told me previously that she didn't know much about guardianship board matters and that the other guy should do it. So she went there and she had the audacity in the hearing to say that - I understand it's legal process, but because she was not instructed by her client, she will remain silent. Now, how is that legal representation? My mother can't talk. She's had a stroke. So she can't represent herself, she can't put in an appeal by herself, I have to put - well, I don't have to. I can turn away now. But I put the appeal in, it's my cost. The whole system is wrong.

There's this little group of people, the elderly that can't look after themselves whether disability of whether they're just too frail or don't want the stress or whatever, because it is a stressful thing going to appeal. But there is this little group of people where you can't get support, and I tried everywhere for support, and one consistent issue is that you can get free legal advice on some matters that are simple like, you know, the tree is hanging over your fence or something, but you ask them about constitutional administrative law and the majority of normal lawyers don't know what - they don't practice in that anyway.

You go to the Legal Aid people and they say, "We're not here to give that sort of advice. You need to go to a normal lawyer." They say, "We're here for simple matters, 15 minutes." That's the general thing. So therefore what do you do? If you go to the government, they say go the free Legal Aid. Well, free Legal Aid is not there. If you happen to find someone that wants to do some help and it's a complex matter, they have to weigh up whether - if they're a single lawyer, whether they're going to use a large amount of their time, which is required for complex matters, on pro bono, or just say, "It's too difficult." That's what I've had - you know, they'd love to help, but it's going to take all their time and they've got to make a living.

If you go to a large legal firm then there's a conflict of interest in administrative law if you're taking it against the government, because - the number of people that do administrative law in Adelaide is very small. Most of them, their client is the government. So there's all these problems that are just there, and I feel the only solution - the only solution is through the Supreme Court to get some sort of relief, and what I'm trying to do is that the systemic problems that I've identified I believe impact on hundreds or thousands of other people in South Australia. If I turn my back on my mother, which - she's safe now. She's in Queensland, but she's 94.

If I turn my back on this when I have the evidence, then I'm turning my back on all those people, particularly between the period of 2006 and 2012 where my records show problems, and so I just turn my back on them and that's not - we're not comfortable with that. As I said, I feel that there must be some means for the federal government to be able to oversee a situation where, if a state is not abiding by its own laws, then where do you go to get someone to intervene for an Australian citizen? I hope I've made sense. I just don't know where to go.

The only avenue - I used to look at these people that sit on the corner with their placard and I used to think, "Crazies." But I understand what they're doing now. Some may be wrong with what they're doing, but I understand the frustration. The frustration when you have the evidence, it's their own government documents and no-one will look at it shows, as I said, fraud, perjury, contempt of court and a lot of other things and no-one does anything, what do you do? The only avenue - I tried looking at going to the Supreme Court. I asked a lawyer what would it take to take the government of South Australia on in the Supreme Court. They said, "More money than you've got because they've got deep pockets and they'll keep it going until you run out. Even if your case is going to win, they'll drag it on."

The other part of dragging on, you look at the need for access to justice, some of the state laws mean that if you don't address certain matters within a certain time, then they're never going to be able to be looked at. Criminal matters are fine, but the others you can't. Where you talk about ombudsmen - and I've got a good case for that, but I'm not going to go into that here, but I can give you the documents to show it - the approach is, if it's a government office - I don't know whether it makes any difference - but, "Have you known about the problem for more than 12 months, or is there another avenue that you can take to address the program? There is in either of those? Sorry, we can't help you." Now, that's not assistance, and as I said, something has to be done so it can be properly addressed.

In my submission I mentioned a case in 2006 under case law where the courts were upset by the Guardianship Board of South Australia, in that they delayed process so that by the time it gets to the court, the orders are extinct and the court can't do anything about it. Now, they're still doing that today, and this extempore things that they're attempting now, all that they're for is to reduce the statistics that say that X number went to appeal. The way the hearings are being carried out is atrocious, and when you don't have a judge in an establishment, like they're in the Guardianship Board, the president is just a lawyer, he's not a judge, and the decisions that that tribunal makes are more important than a number of other tribunals, they take away people's lives, and if they don't abide by proper process, then those people's lives, once they're taken away, they're never going to get them back, that's the way it works.

So I just feel that if you provide more benefits and more ability for these

tribunals to make decisions when there's no real way to challenge them or to put safeguards, then you're putting more people at risk, and that was one of the factors that I was concerned about. There's too much discretion throughout the law as it is, and that's fine if those people are using that wisely, but if they're misusing it, then something has to be done. As I said, I don't know, if you can tell me where I can go in the federal government to get this fixed, then I'll be happy.

The alternative I have at the moment is that I release the government documents on the web, and then I get prosecuted for releasing documents. But that I believe is the only way that I can actually get the public of South Australia to be aware of what is happening. But that risks my family's wellbeing and life when it shouldn't have to be. It shouldn't be us that is doing this. It should be them fixing the - they put the laws in place, they have an obligation to abide by those laws and to enforce them. They're not doing it.

MS JENKINSON: Transparency.

MR JENKINSON: Yes, transparency is the key. If you can get in whatever recommendations you make on whatever matter, you put an area where there's transparency in all those areas, so that will help build the quality of the services that are being provided and also allow people to get legal advice on them easily. In the case of South Australia, for example, a tribunal hearing, they record the hearing, they won't provide the DVDs even under Freedom of Information, they say in South Australia. They won't give you a transcript unless you take it to the District Court, so you have to apply to the District Court in advance, then under the court rules they are required to provide a reason statement and a transcript.

Now, what I found in the early stages was the transcript was not what I attended, not the hearing I attended. I subpoenaed information, the audio, and I asked the courts to hold that audio, and I asked the Guardianship Board of South Australia to hold that audio, and I wrote to the attorney-general saying that that audio should not be removed, and I also said I was concerned that the Guardianship Board would not abide by the court orders. In the end the audio was lost, the court orders were not abided by, and there's no ramifications to anybody.

In Queensland, in the earlier QCAT and GAT situation - which was really good, I thought; I think they've gone downhill a little bit since - but in those cases you could get hold of a CD of the recording for - I think it was around \$60 or something at that stage. Now it's \$300 per certain amount of time or whatever. If you want a transcript, it costs you \$1200. So if you want to appeal a QCAT decision, you have to pay five hundred and something dollars to QCAT so that they will then themselves look at it again - it's not in another court, they themselves will look at it again. You require transcripts for lawyers, so if you had two hearings there's \$2400 or more for transcripts before you even get started. It's making it so the process is

unchallengeable, and that's the way the system is. As I said, if it was a government office, then they're untouchable.

DR MUNDY: Mr Jenkinson, I'm going to have to draw you to a close there, because we only have about another five minutes for you, and I'm sure Commissioner MacRae has a few questions she'd like to ask you.

MS MacRAE: My goodness. I do feel very sorry for you. It sounds like you've been through hell and back. I guess from our point of view, I really do sympathise with you, and I'm sure you've tried to address - you know, looked at every possible avenue you could, and I think it's difficult for us to try and give you any - well, I think the sort of assistance you're seeking isn't the sort of assistance unfortunately we can provide you. So I'm very sorry about that, that there's going to be another forum you've come to and you're going to feel like, "I've spoken to another bunch of government people who aren't going to help me." It isn't because I lack sympathy for your position, it sounds like you really have had a terrible time.

From a systemic point of view, I guess the key issues that you've raised that are sort of germane to the areas of the law that we're looking at, access to Legal Aid, it seems like you've raised cases here where - why isn't there something available for people in your sort of position? So the rules around access to Legal Aid is an area I think that we can look at your case and maybe make some observations about that. In terms of the government departments or boards doing the wrong thing, we have tried to make some observations around internal review mechanisms, trying to make those transparent and ensuring that governments do themselves have first an internal review mechanism that works, and we did actually hear another case yesterday where there seemed to be a breakdown in internal review which would have been, I guess, a first port of call for you, which seems to have - - -

MR JENKINSON: I've found that self-review is inadequate. It just doesn't happen. They don't even ask for the evidence, and they make a decision. I'll give you an example of how - - -

DR MUNDY: And briefly, please, Mr Jenkinson, because we do have another witness at 10 past 10.

MR JENKINSON: Okay. But self-review is behind closed doors, one head saying to another, "We've got a problem. Can you ease my conscience and say you're doing something about it?" Then the evidence that I've got is that the email comes back, "Yes, we're looking at it, it's all in hand," and then the other guy writes back and says, "Thanks, I don't have to investigate." That's how things are happening behind - and people rely too much on what is claimed to be independent when it's not, when it happens to be a government office. If it's a council or something else, that's a different thing. But if it's a government office, when the problems are severe, and

what I've suggested in my submission, then they're not going to fix it, just bury it. That's the way it is.

Therefore, I'm not asking you to tell me where to go, I'm saying if there is a possibility that there is something in your recommendations that can fix - provide - overseen by the federal government over issues where particularly states are not abiding by their laws, then that - you know, maybe that's the best we can get at this stage. I don't know the answers. I've been everywhere, and each time you go to places, you become a complainant after the first few times because you don't accept that what they're telling you is correct when you know it is incorrect. You know, too much reliance on the verbals of what governments say they do, and too much reliance on at face value reports and decisions of government when you've got to look at whether there's a conflict of interest. But I don't know.

DR MUNDY: Well, thank you very much for your very detailed submission. We'll - I'm not - as Commissioner MacRae says, I'm not sure there's an awful lot we can do to alleviate the situation. The constitutional question you raised was debated in the 1890s as to whether the Commonwealth should have a capacity to compel the conduct of the states, and as we know the states remain solid. I'd have to be honest with you and say that if we were minded to make a recommendation to that effect, I very much doubt whether a majority of citizens in the majority of states would vote to support it or their governments would support it.

MR JENKINSON: Well, in 2010 the federal government offered the states the opportunity to put their public trustees under the federal Act. Now, that would have solved a large part of my problem, because with the financial information, the public trustee has no financial licence and has no overseeing in South Australia. The private trustees are under the federal Act and ASIC. I could have taken my stuff to ASIC and had it fixed. Now, there's an inequality - - -

DR MUNDY: There is the nub of your problem, Mr Jenkinson, is that the Commonwealth can only get these powers with the consent of the states. So I suspect, as you've learned, that won't be - - -

MR JENKINSON: Even at that stage they were offering a bit of money to try - as part of the deal, and that wasn't good enough.

DR MUNDY: We regularly advise on policies to get compliance from the states, and we're often disciplined. But look, thank you very much for your time here today.

MS JENKINSON: Could I just say something?

DR MUNDY: Yes, but very quickly.

MS MacRAE: Very quickly.

DR MUNDY: We do have others who have taken time to be here.

MS JENKINSON: Part of the problem I see is that the process is cyclic, and at the coal face if you could get legal representation for the person in the guardianship board so that person and the family can tell that legal representative the truth, the whole truth, nothing but the truth, the story that's happening, then those people can be represented in the guardianship board, and maybe the outcome wouldn't be negative on those people. As far as I'm concerned there's a whole stolen generation of elderly people out there that are having their rights and liberties taken away from them. By doing so, by having that legal representation, I would imagine that there would be a lot of people that wouldn't even need to go to appeals.

MR JENKINSON: The quality of the tribunals would be - the conduct of the tribunals would be higher. So - - -

DR MUNDY: Thank you very much.

MS JENKINSON: Thank you.

DR MUNDY: Could we please have Shearer Doyle Pty Ltd, please? Welcome back, Ms Shearer.

MS SHEARER (SD): Thank you.

DR MUNDY: Could you please again state your name and the capacity in which you appear?

MS SHEARER (SD): Yes. My name is Elizabeth Shearer and this time I'm here in my capacity of legal practitioner director of Shearer Doyle Pty Ltd which operates Affording Justice.

DR MUNDY: Would you like to make a brief introductory statement?

MS SHEARER (SD): Yes, I would. Just a bit of background about what Affording Justice is. We operate exclusively in what you've described as the retail sector of the legal services market. Our clients are individuals and small business in legal matters where sadly there is no pot of gold at the end of the legal rainbow to fund legal fees. So we deal with cases that are not about money, so children's cases in the Family Court's jurisdiction, domestic violence matters, or not directly about money, like employment matters, or about modest sums of money, so small - low value disputes. Consumer disputes, low value property settlements in the family jurisdiction, or often about large amounts of debt. So small business or consumer credit debt.

We provide three services; legal diagnosis; legal advice; and discrete legal task help, which is essentially discrete task services. We don't provide full representation in court, although we can through an associated practice if that's appropriate. We do provide representation at negotiation and in ADR processes, but as limited scope engagement, and we never go on the court record unless we're just filing consent orders in the Family Court. We do almost all our work on a fixed fee basis, and almost all our work falls below the \$1500 threshold in Queensland for full cost disclosure. So we use a simply two page terms of service document to document our engagement with clients.

A lot of our work is relatively simple and straightforward, but some of it, particularly coaching and assisting people through contested children's matters in the family law is quite complex. We've been operating since the beginning of 2012 and we spent our first year as a virtual practice where we interacted with our clients only by telephone, Skype and email, but we established a physical presence with an office in the Brisbane CBD at the beginning of 2013, but because of our skew towards working virtually, we can assist people from any location, and in fact we've had a number of clients from rural and quite remote locations.

In some ways what we do is really no different to what small firms have always done, but we try to package it up in a way that it's visible to the client about what it is that they're getting so that it addresses the concerns people have about going to see a lawyer about, "I don't know how much this will cost and I don't know what's involved and what am I getting myself into?" So we try and make it an accessible product, I guess. We're still in the development phase, and our model is really only possible by keeping a really strong focus on very low overheads by a significant reliance on technology, and by recognition that we are firmly in the retail sector of the market and a level of comfort in charging fees that are appropriate to that sector.

I should say that limiting - doing this work limits our ability to engage in some of the access to justice work that law firms have traditionally done. For example, I can't afford to do legal aid work as well as charge the rates that I do, and I can't really afford to do any significant level of pro bono work either. The challenges we face, and a number of these are addressed in the draft report which I was very pleased to see, is a lack of recognition about discrete task, legal service and a sort of lack of legitimacy: is it really a proper way to provide high quality legal assistance? Is it too risky? All that sort of stuff. We're largely invisible to courts, and we're largely invisible in a lot of the access to justice discourse that's all about represented or self-represented and not about a lot of people who are represented for parts of the process.

There's a high regulatory burden on legal practices that impact on a small practice like us, and some of those burdens are things that our non-lawyer competitors don't face. I'd have to say there's a lack of clarity in the community about what legal services people should expect to be able to get for free and what they should have to pay for. So a large part of my staff's time is spent explaining to people, "No, we do have to charge fees if we're going to work for you." The sustainability and replicability of what we do should be assisted by some developments in the legal services landscape, particularly the significant supply we've got of newly qualified lawyers who are, you know - the sort of simple work we do is great for them to do.

A supply of experienced lawyers who are looking for other options apart from traditional legal practice and are willing to work virtually and flexibly. So I see that there's a labour supply for the sort of work we do. Continued improvements and reducing costs of technology will also assist this sort of practice, and I think also the incorporated legal practice structure where - which opens up ownership of practices to capital that perhaps doesn't expect the same level of return on investment as has been traditionally expected by owners of law firms. So that was all I wanted to say at the outset, and I'm happy to assist you in any way I can.

MS MacRAE: Well, I'm pleased you like some of the report and we certainly are

very interested in unbundled services and I guess innovative service delivery, which it sounds like you're at a bit of a cutting edge here, so that's great. I was interested to say that you're never on the court record, or almost never on the court record. One of the problems that we've heard discussed is that sometimes where a lawyer provides an unbundled service they don't want to be on the court record, but the court may insist and in fact drag a lawyer up and say, "Why didn't you provide service of X when you only provided service of T?" Is that an issue that you're conscious of or is it something that you feel confident won't arise and be a problem to you?

MS SHEARER (SD): We don't appear in the higher courts, or we don't assist people in the higher courts, by which I mean the District and Supreme Courts in Queensland and the Federal Court of Australia. So it's not so much an issue in the courts and tribunals in which we assist people. I think there are impediments in some court rules, where you're on the record and then it's very hard to get off. I think we gave an example of the Federal Circuit Court rules where it's relatively easy to get off the record once you're on.

In terms of the material that I draft for clients that they're going to take to court, it's often a matter of judgment about whether you're disclose in that material that it's drafted with the assistance of a lawyer and, you know, say who we are. So that it's apparent to the court or tribunal that the clients had assistance, and I particularly do that with people who I think are likely to be less eloquent when they get to court, and if the court has got quite a well drafted affidavit and then expects a certain standard of advocacy on the basis of that affidavit, I think it's important to disclose that. We're really in a grey area in terms of how court rules apply. So we just exercise judgment about whether that's going to be helpful or not.

DR MUNDY: But it's been suggested by some that these are not only issues about court rules and attendant issues about liability, but there are also ethical issues.

MS SHEARER (SD): There are ethical issues in that we can't represent that we're providing a greater level of assistance than we are. So that's always up front when we speak on behalf of people.

DR MUNDY: But presumably that's no different to anyone else who makes an offer of services and the normal requirements of the consumer protection law.

MS SHEARER (SD): Yes. I mean I think, for example, I couldn't write a letter of demand in which I said, "I hold instructions to commence court proceedings," when I clearly don't and that's not something I would ever do. So there are ethical parameters, but I don't find them oppressive.

DR MUNDY: Yes, but these really are no different to any other form of representation that someone might make - - -

MS SHEARER (SD): Not really.

DR MUNDY: In normal constitutional trade and commerce to which the Australian Consumer Law would otherwise apply.

MS SHEARER (SD): Yes, the Australian Consumer Law would apply in addition to our ethical obligations under the Solicitors' Conduct Rules.

MS MacRAE: I was also interested in your comments about having a higher regulatory burden than some of your competitors. Regulatory burdens are things the commission has been asked to look at on a very regular basis, and we appreciate how hard it is to reduce them. But do you have any suggestions around ways that we might be able to reduce that? Are there things that you're asked to do that you think are superfluous, I guess, to real requirements or - - -

MS SHEARER (SD): Well, as I said in my submissions, I've got concerns about the cost disclosure regime in that it produces a whole lot of documents that people will never read, and if that could be scaled in some way, I think that's appropriate. One of the things that troubles me as a legal practitioner is that I can't accept payment from a client until I've actually done the work, and so if they want to pay me and I want some security of payment, I've got to run a trust account, which seems an unnecessary burden for the affording justice style of practice. Any other person can make whatever contract they want with people about how their services and when their services will be paid for, but I can't. I think - - -

DR MUNDY: Can I just stop you there. I mean, it's always struck me as passingly strange, and particularly since we started this inquiry, is that many people have encouraged us to be mindful of the ethical obligations of lawyers, and in some sense they appear to have, at least for most people, to have a priori higher ethical obligations than any other citizen of the Commonwealth, yet they're the only people who we require to have a trust fund if they take payment in advance.

MS SHEARER (SD): In advance.

DR MUNDY: Builders do it all the time.

MS SHEARER (SD): I know.

DR MUNDY: I mean, do you have a sense of what the reaction of the profession might be - I'm not asking you to speak on behalf of the Queensland Law Society.

MS SHEARER (SD): No, I can't do that here.

DR MUNDY: But your view as someone who observes the profession, what would the reaction be if we were to recommend that there really was, in most cases, no good reason for this piece of regulation and the need to use trust funds in the way that we do? Would there be howls in the streets?

MS SHEARER (SD): Well, from what I know of my work with the Queensland Law Society, we have a focus towards less regulation in the profession. So I can't say what their attitude would be. But certainly consistently my view - - -

DR MUNDY: I'll ask the Law Council tomorrow.

MS SHEARER (SD): But, you know, different matter if you're taking someone's funds to settle a conveyance.

DR MUNDY: Yes, if I'm settling a house and I've got to hold the money in trust, that's fine. But - - -

MS SHEARER (SD): Yes, but where someone's got the money now, they want to pay me, I've got an interest in making sure they pay me. To run a trust account for that sort of - - -

DR MUNDY: It just strikes me as odd that these people, who we're supposed to acknowledge the ethical contribution of - - -

MS SHEARER (SD): Yes, and yet we have a higher - - -

DR MUNDY: Have higher fidelity requirements than builders.

MS SHEARER (SD): I don't know that it's a regulatory matter, but certainly I have a fiduciary obligation to my clients to do things that are in their interests, which mean that I have an entirely different approach to dealing with people with debt problems than lots of other people offering services to people in debt, and yet I'm subject to a higher degree of regulation about cost disclosure in that arena.

MS MacRAE: Just in relation to consumer ignorance of fees and what they might expect, and you mentioned in your opening statements about the problems you have about people expect to get quite a lot for free when that's not the case. I was interested in your submission that you weren't attracted to the idea of having a centralised sort of online resource that people would go to. One of the reasons that we'd recommended that was because we, like you I think, have a concern that people have no idea what to expect when they go to a lawyer about what things will cost.

So I think partly we've had a response to our recommendation that has sort of misunderstood what the intent of that would be and what it might look like. But

what we thought would be ideal would be to just give people an idea of the sort of ballpark they might be entering. If they had a matter of a certain type, what could they reasonably expect within a range - you know, no point estimates as such. No individuals talked about, no individual lawyers identified.

But just what might be a reasonable cost if you were to go and ask a lawyer, you have a family law problem and you've got some typical sort of situations that might arise. If you have a case of this sort, what sort of costs might you be looking at? Because our sense is that people really do have absolutely no idea, and so the idea of the online resource would be to give them some notion of, "Okay, this is the sort of range I might expect. Now I might do a bit of a ring around or see what I can find."

Sure, people might be outside the range and I might have to ask them about why they would be charging differently and if they want to say they can offer me a better service or a higher level and they're outside the range, I might be prepared to accept that. That was the idea of the online resource. So I'm just wondering; (1) whether your comments in your submission kind of misunderstood what we were looking for there and what it might look like, (2) whether you think it would be possible to have a resource of that sort, and now I've described it in a bit more detail whether you think it would be helpful or not.

MS SHEARER (SD): I think such a resource would provide information where the ranges were so broad as to be meaningless, and I think it's far better to focus on having people understand what the cost drivers are of their matter. So within one legal firm the estimate for a matter to interim hearing stage in the Federal Circuit Court could range between \$5000 and \$30,000 depending on what issues are in dispute, and that's on the same charging basis, because the scope of the work is so unknown because it's dependent on not only the issues of fact and law, but also, well, what's the attitude of the other party, and what's the attitude of their solicitor and how much is it actually going to take until we get to that stage. I mean, I think you can do - and we fix the fees for stages of matters, so to an extent if you added up what all of those were, you could say, well, this is a range for a whole matter, but I think any ranges that would emerge from that process would be so broad as to not be very helpful because I don't think it's helpful to know it's going to cost me between 5000 and 30,000.

DR MUNDY: See, that appears in stark contrast with the chief justice of Western Australia whose view is that if you can cost the construction of a 35-storey office building, you should be able to construct a cost at the start of the litigation.

MS SHEARER (SD): See, you don't know whether it's a 35-storey office building or a five-storey office. I mean, you can give people worst-case estimates, but they're not helpful either.

DR MUNDY: But with great respect, I've been involved in a few infrastructure projects, and the ranges that the people get and the constructor bears the risk.

MS SHEARER (SD): Yes, they will also have clauses to manage - - -

DR MUNDY: Yes. It just seems to me that, I mean, lawyers are best placed to work these matters out, and ordinary citizens just have no idea, and they will often come to you in circumstances where there is some stress.

MS SHEARER (SD): Absolutely.

DR MUNDY: So they're not going to say, "Well, look, it's not as if, you know, I'm going to retain the services of an architect who is going to build my dream home, where I'm probably feeling quite positive about the experience," at least at the start, maybe not at the end, but at least at the start I'm in the position - of a mind where I can say, "Well, look, go and talk to half a dozen architects," whereas if I've been served my initial response is to probably go to one where I get on with it. So I think it's - and therefore the question in our mind is how do we arm consumers with some reasonable knowledge ex ante where the likelihood of a normal economic search process is much less likely than it would be in the retention of any other professional services.

MS SHEARER (SD): I mean, I think the cost range that we give clients when we're entering into the cost disclosure thing is an estimate of a range for that matter based on what we know at that time, and I don't have any problem with that, but when you're talking about aggregating that up across a whole range of legal issues, I mean, if you were really targeted about the ones that you wanted to include but say, for example, because it's a process people are commonly involved in, property settlement in the Federal Circuit Court, there are so many variables, what's the complexities of factual issues; what's the property pool' what's the attitude of the person on the other side; are you going to have - what judge have you got and what sort of docket do they run, because one of - I mean, I agree the docket system is very useful, but it also allows the development of quite different processes with different requirements, and so there are so many variables that rather than come up with a figure - a range that's so broad as to be meaningless, I think it's better people understand what those variables are and to have good conversations about that. I think lawyers can get a whole lot better at talking to clients about costs.

MS MacRAE: I think we probably agree about that. Can I just then take you to your - in your business you use fixed fees a lot.

MS SHEARER (SD): Mostly.

MS MacRAE: I'm just wondering if you could talk to me a bit about the reaction that you have from clients about that, you know, whether they like them or not, and whether you feel that it's more practical - are you able to use fixed fees because of the nature of the work you do, and is it much more - or is it much easier to use fixed fees for particular kinds of work, and given that most of what you're saying is relatively low-cost work, that that fixed fee is a much easier sort of service to provide than an hourly rate for something that may be more complicated.

MS SHEARER (SD): I set the fixed fee with how many hours I think are in the job in the same way that a, you know, plumber giving a quote does, but I give fixed fees for stages and in open ended things, for example, somebody is wanting to start negotiation for a property settlement, we will agree on a fixed fee for this amount on the basis that we do this much work and then we re-evaluate. So the fixed fees, yes, I wouldn't purport to give someone a fixed fee for taking a case from here to there because so many things change as you go, but we'd say this, give an estimate across the board and then fix the fees as we go stage to stage.

DR MUNDY: So in a matter you might say, "Look, to get to this stage it's going to cost you X dollars and then we'll have a discussion when we get there but, look, we'll have a discussion about how much more work I need to do but, you know, it's going to be of the order of X bucks an hour once we get there. Is that - - -

MS SHEARER (SD): Yes. So I'd say I set my estimates with reference to the number of hours on this hourly rate and, you know - - -

DR MUNDY: Yes. And you're prepared to commit, and sometimes on the fixed lumps you spend more time and sometimes you spend less.

MS SHEARER (SD): Mostly I spend more.

DR MUNDY: But definitely, yes, I used to be in private consulting practice and I think I understand.

MS SHEARER (SD): I rarely spend less.

DR MUNDY: Yes, that's right. Okay.

MS MacRAE: We have probably already discussed it, particularly with the earlier discussion we had with the Law Society, but are there any other regulatory barriers to offering unbundled services that you're aware of. We talked about some of these issues earlier when you were here with the Law Society, but are there any other barriers that you're aware of that prevent you from - - -

MS SHEARER (SD): I don't see them as regulatory so much as cultural barriers

within the culture of what legal practice is, but I mean, I have worked more than half of my career in legal aid setting where discrete task work is basically the way it is done, so I see no issue with translating that to private practice.

MS MacRAE: Okay.

DR MUNDY: You mentioned in your introduction that you have a number of clients who are small businesses.

MS SHEARER (SD): Yes.

DR MUNDY: What's the character of the disputes that they have? Are they tenancy type - - -

MS SHEARER (SD): Getting paid.

DR MUNDY: Okay. So they're debt collection.

MS SHEARER (SD): Mostly getting paid, having claims made against them, sometimes they have got themselves in a whole lot of debt and we're just trying to negotiate some resolution.

DR MUNDY: The reason why I ask is that the commission from a previous matter made recommendations about small business commissioners - I was the presiding commissioner - and we note that Queensland along with Tasmania and the Northern Territory and the ACT do not have a small business commission. Is it your view that it's the absence of that Small Business Commissioner is generating more work for you than would be the case if there was a Small Business Commissioner there?

MS SHEARER (SD): I don't know that I can comment on that.

DR MUNDY: Because you don't run a small business - - -

MS SHEARER (SD): I don't have a clear view of what the Small Business Commissioner would do.

DR MUNDY: That's okay. Do you have any views given your practice about the access to justice issues that particularly face small businesses - and I'm not fussed whether they happen to be incorporated or they're sole traders with five employees, but just generally, because it is an issue that we're quite interested in and we haven't had much evidence on.

MS SHEARER (SD): I mean, my clients are people who feel like they're spending their own money on legal fees. So they're relatively small businesses. I think they

often face - well, none of the free legal assistance services is available to them with the exception of whatever is put through the Small Business Commissioners in other states. So they - you know, their only option is advice from private practice or whatever their industry association offers and puts them on to. So I think there is a gap there. I think there are - I mean, I will often assist people with stuff in QCAT which is not the sort of work that other practices assisting small businesses tend to do too much and, in fact, I get referrals from other legal practices because it's in no-one's interest to be, you know, putting what would be the original expectation of legal fees on matters that are really very small and where the assistance that the client requires, you know, can be tailored.

I think the other area though where there's a significant problem is people getting claims against them for quite unmeritorious debt claims and it's very hard for small businesses in those circumstances to get any help that's proportionate to the amount of the value that's involved. I had one - - -

DR MUNDY: What sort of matters in QCAT do you find? Are they small claims type matters?

MS SHEARER (SD): Yes. Stuff in the small claims. Sometimes I assist people with matters in the employment registration, blue card, working with children sort of - sometimes guardianship, but most of what I do is the consumer and debt stuff. The QCAT jurisdiction, unlike in other places, is not just every claim under 25,000, it's only particular types of claims. So there are ones that fall through the gaps and end up in the Magistrates' Court.

DR MUNDY: Okay. Thank you very much for your time.

MS MacRAE: Thank you.

DR MUNDY: These hearings are adjourned now until 11 o'clock.

DR MUNDY: We'll reconvene these hearings. Could you please - I'll start again. Could you please state your name and the capacity in which you appear for the benefit of the transcript?

MR REILLY (LAQ): My name is Anthony Reilly. I'm the chief executive officer of Legal Aid Queensland.

DR MUNDY: Mr Reilly, would you like to make a brief opening statement? By briefly, I mean not much more than five minutes.

MR REILLY (LAQ): Sure. First of I'll I'd just like to begin by commending the Productivity Commission on the draft report. Chapter 20, titled The Legal Assistance Landscape, I think provided an excellent summary of that landscape, and given what is a complex sector, I think it was a really good piece of work. Secondly, chapter 21, Reforming Legal Assistance Services I think raised a lot of really important issues. Thank you for bringing those to the fore. Legal Aid Queensland didn't provide a separate written submission for two reasons; first of all because I thought the report, in a sense, was so good and had explored things that need to be explored; but secondly, the National Legal Aid submission I thought was very good, and we're very content with a lot of the views put forward there and the way they were articulated, and of course we contributed to that.

So by way of introduction I'll just whip through a couple of things, and they're things that you might want to ask me about anyway during the 45 minutes. First of all, at page 663 you make the observation that Australia is a relatively low funding nation of legal assistance services. I think that's - my understanding is that that's still true, despite cuts in other jurisdictions. I think what I'd like to put on the table right up front is that we have a very good system in Australia. It's world's best practice. We have the Legal Aid Commission as this big bureaucratic hub, if you like, at the centre of it all.

We have localised CLCs around that, and we have a really good specialist capacity on the outsource, and they're very important. We work closely with the outsourcing, and I'd like to put on the record how important that partnership is. I'm not sure if it's possible to bring that out in the report, but I think it might be useful to note that we do have a good sector in Australia, and I think the fundamental design's pretty good in terms of its combination of elements. Another point I'd just like to make is that we are a relatively low funding nation, so the question is, well, how do we manage to provide what I think is a good suite of legal assistance services within that low funding? I think one of the secrets is that the government has given to legal aid boards at a state level the job of managing within that funding envelope.

Those boards have a unique combination of skills; professional skills, both

legal profession, but other skills that enable them to work through all the complex issues in their local circumstances and come up with solutions that meet local needs, and I think that's really important, and I would hope that recommendations about future funding agreements and so on acknowledge the variables that sometimes boards have to juggle in order to achieve an outcome that gets the job done within funding, and that agreements that say, "Do this, do this, do this," aren't sometimes as sensitive as boards can be to managing some of those local issues.

I've made a few notes here on cost drivers for grants of aid, but I'm happy to defer that to questions if you want to ask me questions about that, but I'll just say the way in which I approach cost drivers for grants of aid is that it's about volume times unit cost, with administrative overhead added on top, and each time you play with one of those variables, you're pushing the equation out and we have to make adjustments elsewhere to manage within a funding envelope. So I'm happy to talk about some of that in a minute.

The second thing I'd just like to get on the record is that firstly at page 574 it's stated that the focus of Legal Aid Commissions is providing legal assistance for disadvantaged Australians, and of course it is, and it's absolutely our focus, but another focus that probably isn't acknowledged as much is that we actually help the legal system to simply function, and I'll give you two examples of that.

Duty lawyer schemes that operate in local courts, particularly for criminal law matters, they're very high throughput courts, high volumes. They couldn't get through their workload without the Legal Aid duty lawyers, and if you've ever had the, I guess pleasure is a word to use, of seeing one of those things in action, the throughput is very quick and the duty lawyer is an essential part, along with police prosecutors and the magistrates in getting the job done each day. So it's not just about a sort of a right goal of access to justice, it's actually just about keeping the system going, and Legal Aid Commissions fulfil that role and are asked by government to do, and it's one of the things we do.

In the context of civil law, a really important type of that service is the appointments of independent children's lawyers and my consultations with the judiciary, they always say, "Can you please help us by looking after those appointments," because they need those appointments to get through the complex matters they do. So there's a whole range of ways in which Legal Aid Commissions actually just help keep the justice system functioning, and that's an important part of what we do, as long as the access to justice thing.

I think contributes to my next point, which is while there are four legal assistance providers in Australia, there is a qualitative difference between what Legal Aid Commissions do and what the other three commissions do, and it's simply because of the size of Legal Aid Commissions and the infrastructure that they bring

to service delivery. So, for example, the infrastructure that Legal Aid Queensland brings, we have an extensive, constantly updated legal information web site which attracts over a million hits per year. We have a statewide call centre which includes a legal helpline that operates nonstop five days per week.

We have 13 regional offices, including in most of the low socioeconomic areas in south-east Queensland and up and down the coast and out west, and each of those has within them a core of lawyers, customer service officers, and also family dispute resolution facilities, and that's all over the state, and that offers a whole lot of opportunities for growing or expanding services. We have large in-house practices of very experienced lawyers who, through being employed lawyers, can take on the more complex, messy matters that sometimes the private law firms can't take on within legal aid fee rates, and can I say thank you very much for acknowledging the efficiency and other benefits of the mixed service delivery model in which we have employed lawyers and private lawyers. It was a really welcome thing because it is a really good system and it really helps balance up costs in getting the job done.

Another thing we have is we have a network of around 350 private law firms available for legally aided work across the state, and that gives us incredible reach around the state. Then we have a grants processing infrastructure, including sophisticated bespoke IT business systems, and that grants processing infrastructure enables us to process about 100,000 grants of aid per year, and push through \$55 million per year into private law firms who are small businesses, and it's a big, complex operation.

Around all this service delivery we have a very mature bureaucracy that can ensure that we are accountable within government framework. So we're accountable in the same way government departments are, but can also ensure that we have really good policies and processes to drive high quality consistent services across the state, and I think in that sense Legal Aid Commissions are qualitatively different to the other players, and I think a reflection of that is the role that Legal Aid Commissions play in supporting and coordinating the sector as a whole.

For example, here in Queensland some of the things we do include we provide secretariat support for the Queensland Legal Assistance Forum, and that includes maintaining the Queensland Legal Assistance Forum web site which includes a whole list of all the publications across the state. We manage the regional legal assistance forum programs for the whole sector. We administer community legal centre service delivery agreements and step in to help out when problems arise, and we also support ATSILS through grants of aid for disbursements.

Those are the main points I wanted to make. There were just three little things I just wanted to focus on, if I could just take one more minute of your time before answering questions. They're three little very specific things. Firstly, at page 616

you refer to community legal centres leveraging off Legal Aid Commissions more for information resources. I agree with that entirely.

This is our community legal education strategy, and the direction we put in there includes we collaborate with other service providers to reduce duplication, and we leverage existing resources to achieve the greatest reach and optimal outcomes. The way we drive this strategy is through an overarching community legal education forum that CLCs and Legal Aid Commissions participate in, and the ATSILS. We also have a CLE collaboration fund in which we provide smaller grants to CLCs to undertake community legal education activities. But we'll only fund things if they don't duplicate what's already out there, and in fact we say no to things that do duplicate. So that strategy is available for the commission if you're interested.

The second thing is - I didn't have the page reference, but you request information about the benefits from meeting civil legal needs of disadvantaged Australians and the amount of unmet need. If I could give you two examples. From 2010 to 2013 Legal Aid Queensland led the flood and cyclone legal help response. It's something I'm very proud of. It was nice to be able to help the community out in a very difficult time. But at page 15 of our report, and I have a copy of that here which will be on the Web soon, we recovered more than \$15 million in insurance payments for clients that I don't think they would have otherwise got, and it was probably an investment of around a million dollars. It's hard to really accurately cost it all, and I think that's really good value for money. It shows the value of civil law services.

The other - in terms of unmet need, we opened up employment law advice clinics in February using some of the additional Commonwealth money we received in June last year, and in three to four months we had provided a thousand legal advices in employment law, and for me that shows that flow through of work, it was just snap. The moment we turned that opportunity for advice on, the work just flowed in and I was really - I thought, "Wow, you know, there is some need out there." Finally I've got some information about the civil litigation legal assistance scheme that I think you're interested in in the report, and we're very fortunate to have a good scheme in Queensland. It's funded by the Public Trustee. So I can talk more about that too, if you like, and that's it from me.

DR MUNDY: Thanks for that. You said that the employment law program - presumably that's a program to assist workers who feel they've been in some sense hard done by.

MR REILLY (LAQ): Yes. So it's for financially disadvantaged low-paid workers who have been dismissed from their employment or otherwise mistreated in the workplace.

DR MUNDY: Yes, and you mentioned that it came from moneys that were made available in June - - -

MR REILLY (LAQ): - - - Yes.

DR MUNDY: - - - of last year. I think these moneys might be euphemistically referred to as the Dreyfus moneys. Have those moneys been discontinued or reprioritised?

MR REILLY (LAQ): yes. So in terms of our funding, we receive very good core funding from the Commonwealth here in Queensland, and we're very grateful for that, under the national partnership agreement, and so the Dreyfus moneys, as you say, were supposed to be two years of \$3 million, and the second year of the \$3 million won't be coming in, and what we were using that money for was to fund a whole lot of new - well primarily a whole lot of new civil law activity. So we set up a civil law regional network for the first time, which was really exciting for us, and also established - and through that civil law regional network of about - had about nine employees, we were able to set up a whole lot of new clinics, advice clinics, and unfortunately we're now going to have to end those, so that regional network won't continue. So what we all need to do now is regroup and think - - -

DR MUNDY: So that was in regional centres up and down the Queensland coast.

MR REILLY (LAQ): Yes. So we had put civil lawyers into centres such as Townsville, Mackay, Rocky, Toowoomba.

DR MUNDY: Where you would expect them to go, yes.

MR REILLY (LAQ): Yes, and possibly bulked up our Brisbane practice just to make sure we had a high bespoke sort of model. So what we'll have to do now, you know, through our planning and budgeting processes we'll have a look at look is civil law still the priority it was, and if it was how do we support that priority within our other funding which, as I said, is good funding. We get the Commonwealth funding under the - yes, it's good here in Queensland.

DR MUNDY: What sort of matters were people getting advice on in that civil law - - -

MR REILLY (LAQ): Okay. Well, because it was Commonwealth funded, we focused on Commonwealth civil law areas, and what's interesting is that due to law reform processes in recent years, a lot of civil law issues with financially disadvantaged people are now Commonwealth areas of law, so you've got consumer law, discrimination law which is state and Commonwealth, employment law which is now Commonwealth, and social security law. Those are the sorts of things we were

looking at, yes.

DR MUNDY: Yes.

MS MacRAE: Just quickly with the employment advice centre, so that will also be scaled back, do you think, as a result of that money?

MR REILLY (LAQ): Yes. Look what we'll probably do is try and maintain a core service, but access to it, we'll have to set up some gateways for people to get in to maintain it within capacity.

MS MacRAE: You said you'd had a thousand advices given. What time frame was that in?

MR REILLY (LAQ): I'll just get you the - January to May.

MS MacRAE: Wow.

DR MUNDY: So that's - - -

MS MacRAE: For five months.

DR MUNDY: January to - so that's four months, or 16 months?

MR REILLY (LAQ): Sorry. January to May 2014. So we really only got it up and running in January and - - -

DR MUNDY: So that's about a thousand in four months, so you could annualise that to - - -

MR REILLY (LAQ): 350 a month.

DR MUNDY: - - - 3000 a year so.

MR REILLY (LAQ): Yes, maybe, yes, and it would have built because number of - - -

DR MUNDY: Yes. People would have found out so, yes, okay.

MR REILLY (LAQ): So I was really surprised by that. People had told me there was demand out there. Scott McDougall from Caxton Legal Centre, and they run a little, small clinic, you know, another CLC that does a great job, he said there is demand out there, so when we opened it up, it really came in.

MS MacRAE: Will you find now that you've got quite a lot of sunk capital costs that you can't get back if you're going to have to close some of these centres - - -

MR REILLY (LAQ): No.

MS MacRAE: - - - that you've opened?

MR REILLY (LAQ): No, because we have that existing infrastructure, that's the thing, you can bolt on extras pretty easily.

MS MacRAE: Right, okay.

MR REILLY (LAQ): So it was about, you know, apart from the odd extra computer here or there, we already had a good IT infrastructure and network, and so it was just putting another desktop terminal - - -

DR MUNDY: So it's just really people.

MR REILLY (LAQ): It's people, yes. So, you know, we've got the call centre already, so all it means is you just change the business manual that governs their work and you add in a chapter about employment law so they know what to tell people about that and where to refer them to, and that's why I wanted to talk about that infrastructure issue because I think it's significant in terms of efficient service delivery that that infrastructure is sitting there and can be easily - - -

DR MUNDY: I mean - and we often head off down these paths and not sure we ever find very much, but at the risk of doing so again I'll go down. Is that infrastructure amendable to supporting say - you know, is there capacity within that infrastructure or with modest augmentation to provide support for CLCs, rather than them have all their little stand-alone bits? Is that something that would be possible?

MR REILLY (LAQ): Look that's a really interesting idea.

DR MUNDY: No-one ever tells me it's a really boring question.

MR REILLY (LAQ): Community legal centres are independent non-government organisations.

DR MUNDY: Yes, got that.

MR REILLY (LAQ): So community legal centres have probably got strong views about that sort of idea, but I think in a theoretical sense there probably is. Many years ago I had the privilege of travelling to Canada to have a look at indigenous health organisations in Canada, and they had a model of centralised hubs of

back-office support within the centres themselves, you know, focusing on actual service delivery, and that seemed to work. Apparently it worked pretty well, and I always remember seeing that, one reason being they had a giant tepee building that had the administrative hub. It was quite astonishing.

Anyway so look, yes, you'd have to look at models of whether that stuff does create efficiency. One of the problems of course, and I think governments sometimes find this of having a shared administrative entity, is that it gets to lowest common denominator support levels, and so what then the entities that rely on it do is tend to then start regrowing their own admin support to cater for their own special needs, and that can sometimes happen, and no doubt there's evaluations of all this sort of stuff.

DR MUNDY: Think it's fair to say that shared services haven't always delivered the outcomes which were expected of them.

MR REILLY (LAQ): Absolutely but, look, it's an interesting idea, but it would really cut into the fact that CLCs are proudly, and I think appropriately, independent community organisations, yes.

DR MUNDY: Yes. No. It's more an administrative cost issue in our minds rather than anything else.

MR REILLY (LAQ): But, look, once again the great thing about having the Productivity Commission look at this is your independence and your intelligence in looking at those sorts of things, and so it's great that, you know, your views can be brought to bear on it.

DR MUNDY: Whilst I guess we're interested and we've made some observations about - I mean one of the concerns that we've certainly expressed in the report is how can governments be assured that their legal assistance dollars however spent are going to the areas of greatest need, and one of the things we're keen to ensure is the avoidance of duplication, and I think we're probably getting to a place where we think the best people to avoid duplication are the people on the ground. So we're trying to explore some institutional models - - -

MR REILLY (LAQ): Okay.

DR MUNDY: - - - as to how that might be done, and I guess what we're interested in understanding a bit more, and we've heard from people, particularly in Western Australia and Victoria, about the organisational relationships between the Legal Aid Commission and the CLCs. So are you able to give us a bit of a flavour about how you work with them and cooperate with them?

MR REILLY (LAQ): Yes. In terms of formal structures, we have 1.5 to two officers, depending on how you count it, who provide administration of the CLC agreements, so that's a very formal function.

DR MUNDY: And they have an agreement with you, the Legal Aid Commission, or do you support their relationship with the Commonwealth?

MR REILLY (LAQ): Yes, so the funders are the state and Commonwealth governments.

DR MUNDY: So the Queensland Government funds the CLCs.

MR REILLY (LAQ): Yes.

DR MUNDY: Okay.

MR REILLY (LAQ): So it's a joint funding arrangement, and the sources of State Government funding are the LIPITAF, the solicitors trust account, and treasury money.

DR MUNDY: Yes.

MR REILLY (LAQ): So those moneys are provided by government. The Queensland Government now has a small unit in the Department of Justice that emerged out of a review of LIPITAF that was done a few years ago, and their function is really strategic program management, so as I understand it they have been responsible recently for designing what the accountabilities are in new agreements in terms of outputs and funding levels and so on, and then we administer them. So we're sort of a conduit and the funding flows through us to the CLCs. We're sort of a bank or a conduit, if you like. The money flows through and we have this administrative role. So there's that administrative role that we play.

But then to the side of that there's statewide - and there's lots of statewide and local formal and informal collaboration. The statewide collaboration occurs in things like the Queensland Legal Assistance Forum where we all get together and talk to each other where the government knows about what's happening, what the priorities should be and that sort of stuff. Then at a local level we have the regional legal assistance forums which are really good.

They often depend on the energy at the local level. But the ones where there is energy area really good and they do good stuff together. For example there's a south-west legal assistance forum that goes on these roadshows out to the schools out in the far west and talk to young people about legal issues. It's fantastic, and we fund that through our collaboration funds, and that's a really good example of where

there's a bit of energy locally good things can happen. But that sort of level of collaboration is really more of an information sharing and doing stuff together when you can. It's not a hard core program designed to avoid duplication.

DR MUNDY: And it's mostly in the legal education space?

MR REILLY (LAQ): No. Well, yes, it is at the moment, but also ensuring - we also have what we call an information and referral legal assistance forum where we're trying to workshop referral pathways throughout the sector and make sure that those referral pathways were sensible and working okay, and that was really well attended and seemed to go well. There was also information and referral, but can I just - I think those forms were really good, but in a sense, participation in them is consensual and it's not like those forums mandate service delivery or mandate avoidance of duplication. That stuff is really hard, and in my view should come through from good program design by funders.

MS MacRAE: So when you say you have an administrative role and you're a conduit for funds, can you just be a bit more specific? Do you play a role in determining who gets what? Does your board have a say?

MR REILLY (LAQ): No. Who gets what is determined in Queensland by the Department of Justice and Attorney-General, and then we administer the agreements in terms of making sure that accountabilities aren't under - you know, reporting arrangements and so on are done for the Department of Justice. So it's sort of a split function. It's only fairly recently this has emerged. But no, we don't - unlike Victoria, I think, which has a much stronger role, we don't have a role in saying where the money goes or in changing where the money goes. That's the government's responsibility.

MS MacRAE: Is that how you like it?

DR MUNDY: Would there be benefits from an alternative point of view you could describe to us?

MS MacRAE: Much more diplomatic way of putting it.

MR REILLY (LAQ): It depends on what the policy - it depends on the government's view on what they want from legal aid commissions. Do they want us addressing certain policy priorities? So for example, ensuring that criminal law and family law services are provided and the courts are supported. Do they want that from us? Or do they want us to be a program designer? They're very different things. At the moment we're a service delivery agency, and that's a big, difficult job, and it's plenty on its own. To ask us to step up from that into being a program designer is a big step up.

So I really welcome the fact that recently the Department of Justice in Queensland has established this unit to try and put some more focus on program design. I think that's a good thing. Whether that should be within government or legal aid commissions - look, we work very closely with government anyway, so it might be six of one, half a dozen of the other, really. As long as someone is doing it and there's rational planning of it happening.

DR MUNDY: We've heard as a result of budgetary constraints a number of legal aid commissions are having to make decisions about not providing assistance in certain types of matters, and the one which has received a degree of notoriety, particularly out of Victoria, has been the circumstance of - you know where I'm going with this - of women unrepresented in property only matters facing cross-examination from somebody, particularly a man, who may have assaulted them or otherwise - well, assaulted them or otherwise harmed them. Legal Aid Victoria have explained to us the circumstances of that arising, and they say that they assist that person up to the court door, but then they're on their own. What is the situation in Queensland for a similar person?

MR REILLY (LAQ): Well, there's a whole lot of variables in that. We apply the, for want of a better word, the national family law grant of aid guidelines. I think Victoria have made - changed those guidelines a bit for their local circumstances.

DR MUNDY: I think we ascertained that Tasmania has done the same thing.

MR REILLY (LAQ): So we still apply the national ones. So there's a means test to get through, a merits test to get through, and then the guidelines. If that property dispute is part of a substantial dispute, then - and the means and merits test is satisfied and various other things, then funding should be available. But the priority for family law funding is of course children, and so property matters need to have a connection to that. So - but at the end of the day, parties can get funding from a conference through to a hearing if they satisfy the various guidelines. So we don't exclude representation at hearing. There's no specific exclusion or cutting off, if you like, at the door of the court. Apart from merit having - - -

DR MUNDY: Yes.

MR REILLY (LAQ): We're actually going through a process at the moment of redesigning our family law grants of aid. Not the guidelines that underpin them, but the processes - sorry, the stages to make sure that those stages align better with court processes, and I can provide you with a copy of that paper as well, if you like. That's a really interesting process to go through.

DR MUNDY: That would be helpful.

MR REILLY (LAQ): Okay. It's actually - yes, it's a good paper. I'm quite proud of it. We should have it up on the web site.

MS MacRAE: Just in relation - we've also heard evidence from some CLCs, but it's also mentioned in the National Legal Aid submission, about the serious concerns about family dispute resolution occurring in family law matters without the benefits of parties having legal representation. So a more general concern. Do you have - are there areas, I suppose, of reform that you think would be helpful there?

MR REILLY (LAQ): Well, look, I don't see myself as an expert on family law resolution apart from saying the emphasis on early resolution and negotiated resolution is good. It's important. The fact that the government has legislated to say that you don't get into the court unless you've made a genuine attempt to resolve things through agreement is really good and needs to be maintained. Legal Aid Queensland has a very large lawyer-assisted family dispute resolution program. I think on a per capita basis we're the largest in the country. It's a really good program. It operates across the country. We get good outcomes, and I think your report quotes some of the good resolution outcomes of around the 70 to 80 per cent, somewhere similar.

We've actually - the grant of aid guidelines that require the substantive dispute to be in place before the conference is available to people, we've actually broadened that a little bit to try and get in before the substantive dispute is under way to try and resolve things before it gets to a substantive dispute. That seems to be going well as well. So the lawyer-assisted dispute resolution we think is really important. I guess the benefit of having lawyers in the room is that the risk of saying everyone should just mediate it without lawyers is that people - there are rights at stake. There are often - there can be differences in acknowledging those rights between the parties, and a lawyer helps to overcome those differences in knowledge and make sure that proper advice is given. But provided those sorts of issues are looked after, it's okay.

DR MUNDY: Is it really necessary that the person involved be a lawyer as opposed to - a lawyer as we would understand in Australia, as opposed to some other suitably trained and credentialled person who may be an expert in family law matters and understand the law of family law, but perhaps hasn't had to deal with a whole pile of issues and contract torts as part of their education? We're interested in this because there's such a scheme in Washington State in the US where you can effectively become a family law lawyer, but that's all you do. So you've still done all the stuff and problems and other stuff that lawyers don't do along the way.

MR REILLY (LAQ): There's a lot of stuff in family law that links into other area of law. Property law, for example, child protection, domestic violence, other things. I personally would be cautious about that. I think - in our system we say that - we try

and have these highly trained professionals called lawyers to help people resolve legal problems. If you want to create other classes of professionals - I think it's okay to use paralegals, for want of a better word, for lower level processing-type problems. But when you're into family law, you're into high order complex legal problems with significant issues at stake for parties. I think then maybe it is arguable you do need a fully trained lawyer to help with that rather than somebody who has done, say, a six week course or something.

DR MUNDY: No, we're talking about courses that take three years.

MR REILLY (LAQ): Okay.

DR MUNDY: We're not talking about a social worker who has done 15 hours of legal education.

MR REILLY (LAQ): Yes. Okay. Well, look, it's a matter for the Productivity Commission. All I would say is that significant legal issues are at stake. The parties are often vulnerable, and there are interconnected areas of law that flow out of family law. So it's just something to be approached on that basis.

DR MUNDY: Just before we leave the family law space, the NLA's submission suggests the creation of, I guess, a duty mediation service as opposed to a duty solicitor - a duty lawyer service.

MR REILLY (LAQ): Where was that one?

DR MUNDY: I don't know. Page 19 by the looks of things. I guess the question more broadly that we'd probably appreciate your views on is the extent to which - if mediation is, from what you said previously I think you agree, the most desirable way to deal with family law disputes. Should we be bringing our minds to funding through legal assistance services mediation as well as legal services? Do you have - well, (a) do you do that in Queensland, and (b) do you have any other views you'd like to share?

MR REILLY (LAQ): Well, family law mediation services are currently funded in the sense that our family law program includes - you have to go through the dispute resolution conference first. Also what people don't realise is that sometimes the court throughout the process will send people off to our mediations and say, "Right, before I list this for hearing, I need you guys to go and have one more crack to see if you can sort this out between you." They send them off to our mediation. So we'll fund that mediation. In terms of a duty mediation service, I can't recall the specifics of this and I can provide you with some further information if you like after the hearing, but we have tried to make sure that there are strong links between our existing duty lawyer service and access through it to mediations from that.

I can get some information about how we do that. But yes, look, the more mediation the better, and as long as - of course some of the cases that legal aid commissions provide grants of aid for involve very serious allegations of abuse and very serious violence of men against women, primarily. Of course mediation isn't the appropriate solution in those sorts of situations, so litigation is often very appropriate. But where possible, mediation is a good thing to try and get people to do.

MS MacRAE: Is that - we've heard little bit of evidence that sometimes that streaming that needs to occur to get people out of FDR when it's not appropriate doesn't always occur.

MR REILLY (LAQ): Well, we have a very through assessment process. So in addition to the application having to go through our grants of aid guidelines, then we have family conference organisers who put the information through another round of assessment to make sure that it's an appropriate matter for mediation, and then they invite the parties in. If it's not an appropriate matter for mediation then consideration gets given to funding it for litigation. So that's - look, it's a very professional service, and - you know, perhaps I should have brought along one of our experts to have a talk to you today.

DR MUNDY: That's fine. I'm about to go off the script. Yesterday we heard from your colleagues in Darwin, we get around a bit, and the challenges that they fund with having to pick up indigenous matters where there's significant conflicts of interest, either between - you know, the ATSILS has acted for the family before and it's representing one side, or a whole range of conflict-type questions which also relate to kinship groups within indigenous communities, particularly in remote areas. Are these areas of concern to you in those parts of Queensland where there are large indigenous populations?

MR REILLY (LAQ): Look, conflict is an issue across all areas of Legal Aid service delivery whenever you get into a smaller community, including smaller regional centres.

DR MUNDY: Can I just stop you? By "small" we mean - - -

MR REILLY (LAQ): Like - - -

DR MUNDY: Cairns small, or - - -

MR REILLY (LAQ): Bundaberg, for example. The office, they have - you know - the great thing we've got up our sleeve is that network of 350 private law firms. So if we can't - if our in-house lawyers are conflicted out by the fact that another in-house

lawyer at some stage has dealt with the problem, then we can contract out the work to a private law firm. We do that - we use that in all sorts of ways to manage conflicts from multi-head criminal trials through to family law matters and advices. So that's a good part of that mixed service delivery model, that it gives you that option to deal with conflicts. That's legal conflict.

DR MUNDY: Yes. That's what we're concerned with. Do you find a large number of matters coming to you from aboriginal legal services because it's their - the concern of legal aid in the NT is there's a large number of matters that come from the ATSILS to them. They don't come with funding attached, and it's created significant work. I'm trying to understand whether it's a significant burden on them because of the peculiarity of the Northern Territory, or is it a more general issue across the country?

MR REILLY (LAQ): I'd have to have a look at - I don't have the numbers in my head about the numbers that are referred across. In a sense anyone can access legal aid services. Large numbers of Aboriginal and Torres Strait Islander people do access legal aid services for criminal law, family law and other services, and we, for example, have an indigenous hotline. We work in partnership with the Aboriginal and Torres Strait Islander Legal Services to work together to support this important client group. In terms of clients coming across, one of the ways we managed that same criminal law is for higher court trials where a barrister and an expert report might be needed.

We fund those disbursements. So the ATSILS looks after the cost of the solicitor, which saves us money, and then we fund counsel for the trial and the report. So it's sort of a win-win. It works really well. I think we're the only state that does it that way, but in criminal law that works really well. We don't have - I'm not sure if we have a similar set up for - actually, I think we do, for family law as well. We can fund the disbursements, which we do for CLCs as well. That helps them out when they've got that problem. But look, our relationship with ATSILS is really positive, and I'm just really glad they're there, actually.

I did a map the other day of all the duty lawyer services they provide and marked them all in yellow across the state. They've got a big reach and they do a lot of the remote and regional stuff. It's really tough work. I did a tour of the Mornington Island Magistrates Court circuit with the ATSILS guys and the local magistrate about six months ago, and I was just amazed by what they managed to pull off up there.

MS MacRAE: Just in relation to the - you're talking about the strong relationship you had with private providers. We've heard in a number of other jurisdictions that in some cases they're having trouble attracting private firms to be involved in legal aid because of legal aid rates, and I'm wondering if you can talk a little bit about how

that's moved, and whether - in particular family law seemed to be an area they particularly talked about problems of juniorisation where, you know, less and less senior counsel were prepared to be involved at the sort of rates that legal aid are now currently having to pay.

MR REILLY (LAQ): We take our relationship with our law firms really seriously because legal aid service delivery can't happen without law firms. So we contract out 80 per cent of our legal representation services to private law firms, 20 per cent is done in house. So it's very important for us. We haven't - we've recently set up an industry reference group with representatives from the solicitor and barrister side of the profession to talk through these sorts of issues, and we did a presentation the other night about some of these sorts of things. Law firms are private - are businesses, and they have to make a profit. So they don't do legal aid work if it's going to make them go broke, because they'll go broke and they can't do it.

Our deputy CEO who spent a lot of time talking to law firms has been advised by law firms that they make about a 10 to 15 per cent profit margin. That doesn't apply to all law firms, and there's no doubt that many law firms do more hours than we pay for et cetera, but the fees we're paying seem to be sufficient for law firms to justify staying doing legal aid work. That's the first thing. In terms of supply, we have plentiful law firms who want to do legal aid work in south east Queensland and in most of the big regionals. Plentiful in south east Queensland, enough in most of the big regionals.

Where we've got challenges are central Queensland and the far west and north west. The problem in the far west in particular is there are - there are hardly any law firms any more. So that's the problem we've got there. But there are still significant population centres, and there's less law firms in Mount Isa than there used to be. In central Queensland, Rocky and Mackay we value everyone. But look, Queensland is a big decentralised state, and we value every single one of our regional law firms that do legal aid work. In terms of family law, yes, look, I think that because family law is more a mixed practice, you can get a lot of good private work if you like, whereas criminal law, my understanding is, for example, that about 70 per cent of higher court trials are legally aided. So Legal Aid is a really big player in that market, it's not so much in family law.

DR MUNDY: If you're going to be a criminal lawyer, you're not going to be a criminal lawyer if you don't do Legal Aid.

MR REILLY (LAQ): You can do it without Legal Aid, but you've got to have a really good client group of privately paying clients. So a lot of the family law firms, I think they do often ask themselves, "Why am I doing this, is it worth it?" and they really do run the ruler over it and really grateful they stay in the game. Is there juniorisation? I couldn't talk specifically about that, because it probably varies from

firm to firm. But junior lawyers have always done Legal Aid work, I did it when I was a young lawyer, supervised by my boss who kept an eye on me. But I think, yes, there probably is more tension between family law. That said, I think there are many families who enjoy doing things like independent children lawyer work and so on, and there is a sort of status involved with it. It's sort of like a very senior part of the profession and they enjoy giving something back and helping the kids out.

DR MUNDY: Your colleagues in Victoria made the observation to us that they didn't necessarily think it was necessarily the rate at which people were being paid but the amount of work that was being acknowledged the rate was being applied to, I think was more the concern.

MR REILLY (LAQ): In terms of grants of aid, so grants of aid, the total expenditure is volume times unit cost plus administrative overhead. In terms of unit cost, it's not just about the hourly rate. A lot of Legal Aid fees are capped fees or lump sum fees, if you like, and so it's the number of hours that are allowed, and sometimes those lump sum fees aren't even a product of an hourly rate times a number of hours, they're just an historical rate and everyone has kind of managed to survive within it and life goes on.

But in family law actually it is probably more hourly rate times hours. So for example, in Queensland we allow six hours per day when the matter is in court, some other states only allow five, and so while our hourly rate is a bit lower the total amount paid is actually okay. Another variable that affects the unit cost is whether you only fund a solicitor or you also fund the barrister, and there's differences across the jurisdictions about that, partly because there's different legal profession models in professionalism and stuff. So it's the hourly rate, the number of hours and whether you only fund a solicitor or you also add on a barrister to help a solicitor out. If you fund a barrister, that really helps the solicitor because that means they can share the workload and the barrister takes on the burden of getting ready for court and appearing in court. It's really helpful to the solicitor.

So in terms of volume, volume is the result of the gateways you put in like some means test and guidelines, and I just wanted to put on the record that if we have to operate within a limited funding envelope. If you increase volume through lifting the means test, then the Legal Aid Commission boards within a limited funding envelope have to make adjustments elsewhere. So they might have to change their guidelines to further narrow - or they might have to reduce the unit cost, or if unit cost is lifted we've got to drop the volume by increasing the means test. So it's like a steam engine with all these things popping out everywhere. That's why the boards are well positioned, because they're always sort of thinking, "Yes, well you know, we'll try this and try that."

MS MacRAE: It was a main reason I guess that - one of the reasons you're making

that is that you really value not having too much prescription in what you do so that they have those levers they can move as they see appropriate for what's - - -

MR REILLY (LAQ): Yes, but I'd like to say thanks to the Productivity Commission for raising the idea of having at least some boundaries. I think having a little bit of protection for civil law funding is really good, because that way the board can say, "Look, we want to invest some money in civil law and the government is saying we should, so we're going to put some money into it," and I think actually - I'll put on the record - and there are differences in Legal Aid Commissions about this, my view is that the demarcation between the Commonwealth and the state money is actually helpful in terms of managing our service delivery portfolio.

Because if you just put it all in one bucket, there is a risk that the expenditure on criminal law could just grow to dominate everything - it's so huge and it's sort of mandatory that you get out there and get involved, whereas family law and civil law are less mandatory, if you like, and so can suffer at the expense. So it's kind of nice having that boundary.

DR MUNDY: So as long as the Commonwealth says, "Commonwealth money for Commonwealth matters," you've got a reasonable certainty that your family law programs can be funded with a degree of safety?

MR REILLY (LAQ): And all those Commonwealth civil law programs as well, because a lot of the civil law is now Commonwealth, and even within that it would be nice to sort of say, you know, "Make sure you've got a little bit of money for the civil." Not everybody agrees with me on that, but my view is that it is helpful to have those boundaries, just in terms of managing stakeholder interests and so on.

DR MUNDY: I think we've probably come to the end of our time. We really do appreciate you coming and spending time with us.

MR REILLY (LAQ): Thank you. Thank you for the time.

DR MUNDY: If you could give those documents to Mr Raine as you leave, who's here, and also he'll provide you with an email address that you can send that other stuff to.

MR REILLY (LAQ): Thank you.

DR MUNDY: Thank you very much.

MS MacRAE: Thank you.

MR REILLY (LAQ): See you later.

DR MUNDY: Could we please have QPILCH? Could you please for the record state your names and the capacities in which you appear.

MR BUCHANAN (QPILCH): My name is Andrew Buchanan, I was the founding president of QPILCH and for my sins I'm still on the managing committee some 13 or 14 years later.

MR WOODYATT (QPILCH): I'm Tony Woodyatt, I'm the director of QPLICH.

DR MUNDY: Would one of you like to make a brief opening statement?

MR BUCHANAN (QPILCH): I'd just like to make a brief statement. You have our response to your draft and as you'll see we're often in large agreement with it. We just want to make just brief points about three areas. One is the issue raised in the draft report for competition for funding, which causes us as a small CLC some concern. Because what has happened over the last few years in Queensland is there's an awful lot of cooperation between the organisations.

So the LIPITAF review found there's not very much overlap and so forth, and the cooperation involved extends to Legal Aid. Anthony Reilly is on our committee and is a very active member of our committee. So we're really concerned about, you know, if there's competition for funding, and of course CLCs really don't have the resources to - - -

DR MUNDY: Mr Buchanan, can I just stop you there and allay your fears. We merely raised it as an option, not as a preference.

MR BUCHANAN (QPILCH): Okay. Well, we urge that it - - -

MS MacRAE: Fall off the list of options.

MR BUCHANAN (QPILCH): Yes.

DR MUNDY: Yes, you're not the first person who's misinterpreted that.

MR BUCHANAN (QPILCH): Rightio. Well, then the second thing is sort of in a way related to that, and that's just funding. We'd prefer CLC funding to remain separate from the big pool, because they are quite separate organisations to the Legal Aid Commissions. Legal Aid Commissions are a lot more muscly, as it were, when it comes to asking for funding, and funding also - CLCs need certainty of funding. LIPITAF now has granted us three years' worth of funding, which has made a big difference to the way we run QPILCH to employment prospects for the people there. It's made it a lot more settled.

So a way that funding could be handled that's long-term is better for CLCs, and the last sort of brief point I want to make is, one thing that QPILCH is having difficulties with is the red tape surrounding reporting and accountability. There are different organisations want different reporting and it actually is an expensive, difficult thing for a small CLC to do. Tony was telling me, we use MYOB, but the state government doesn't accept the reports that MYOB uses, so they have to be changed for that whereas all CLCs use MYOB reports, but no, that's not acceptable and so forth. So it's a bit of an expensive burden, even though we have to have accountability.

If it could be simplified it would be a good thing. But basically, those were our submissions. We'd just like to finish to really say it would be good when the findings are done if there could be some way that there's more involvement by the various bodies in the implementation of those decisions, rather than just leaving it to government. Things might actually get done then. Thank you.

DR MUNDY: Sadly, our act does not extend to that.

MR BUCHANAN (QPILCH): I know. Recommendations, anyway.

DR MUNDY: Yes. That's something we struggle with all the time. Could I bring you back to this issue about red tape, because we love a red tape fight. One of the things we were trying, or one of the things that we see is that - and it varies between jurisdictions, because it in part depends on whether you get state funding or not - is that what we were trying to do is to try and find an institutional framework whereby I guess the Commonwealth could provide it's resources in such a way to - within guidelines, not just a block of dough - and that organisations could report back to a state body for governance-type issues and the Commonwealth's concerns would primarily be about outcomes.

There were some attractions to this arrangement about making sure there's not duplication or overlap, and I guess our thinking was it's the people on the ground are more likely to be able to work that out than bureaucrats sitting in Canberra, particularly if there's funding sources coming from state jurisdictions as well. So we heard before from Queensland Legal Aid how they effectively act as a reporting mechanism and I think the Legal Aid Commission referred to it as a bank.

In Victoria there's a different model whereby the Legal Aid Commission makes the decisions about the Victorian government's money. I understand that decisions about the allocation of money in Queensland are made by the just the attorney-general's department and then Legal Aid Queensland administers it, and the Western Australians have a sort of collaborative sort of model which we quite haven't unbundled yet. Do you have any - because ideally I guess what you're saying, Mr Buchanan, is you'd like to report once.

MR BUCHANAN (QPILCH): That would be the best idea.

DR MUNDY: And in a form of reporting that is convenient and sensible for an organisation of your type.

MR BUCHANAN (QPILCH): Yes, and perfectly reasonably one which has put up flags. So whoever the supervising body is can go, "My God, that CLC or whatever, that body has gone through 80 per cent of its money in six months or less." Yes, one central reporting thing would make a big difference, and that I think then would also be acceptable to private donors too, because we have to present our accounts to people who donate substantial amounts of money. Not that we get all that much of it, sadly.

DR MUNDY: Presumably, a reasonable amount of time as well.

MR WOODYATT (QPILCH): Commissioner, we've actually prepared a submission which has gone to the state Justice Department and Australian Government Attorney-General's Department, which outlines clearly all our current reporting requirements and also some suggestions about how it could be improved, and where there is so much duplication and how as Andrew says, there are simple ways that - I mean, of course our program managers are very concerned about the proper use of public funds, and we totally support that. But for them even, it's a very difficult task to quickly get at whether, you know - in any organisation, not just community legal centres, but any organisation can go off the rails.

DR MUNDY: I even understand the ACCC overruns its budget from time to time.

MR WOODYATT (QPILCH): There could be very simple flags that could be put in place by a simple accounting system that would give the program managers the opportunity to quickly see if something was going awry.

DR MUNDY: Is that a document you're able to share with us on the public record?

MR WOODYATT (QPILCH): It is, yes, I've got two copies here.

DR MUNDY: If you could just give them to Mr Raine on your way out, that would be most helpful.

MR WOODYATT (QPILCH): Sure.

MS MacRAE: Can I just ask, it seems absolutely amazing that they don't accept MYOB. Do you have to reformat all your reports from MYOB to put it in a format they want? Is that the problem?

MR WOODYATT (QPILCH): That's right.

MS MacRAE: So they're not saying there's any problem with MYOB as such, it's just, "We don't like the format that that produces and we want something else."

MR WOODYATT (QPILCH): That's correct, yes.

MR BUCHANAN (QPILCH): Which unfortunately that means the auditor has to reconvert it back to see that we're not cheating the government.

MS MacRAE: Well, that's what I'm thinking, that the auditors would be totally comfortable with MYOB.

MR WOODYATT (QPILCH): But the Department of Communities in Queensland, where we used to get some funding from that, they had a system where you'd just get the MYOB reports and send them in.

DR MUNDY: Presumably because the Department of Communities is used to dealing with voluntary organisations and had already worked this one.

MR WOODYATT (QPILCH): That's right.

DR MUNDY: You know, I thought we'd dealt with this years ago.

MR WOODYATT (QPILCH): But we costed one year, I think the year before last, and our accountant said that the process of reconverts and making sure that the reports to government were the same as our reports to the management committee, so the management committee get the MYOB reports, cost about \$1000 extra on our costs to our audit.

DR MUNDY: Does the Commonwealth accept - because I presume you get some form of Commonwealth funding, do you?

MR WOODYATT (QPILCH): A very small percentage.

DR MUNDY: Does the Commonwealth have a different reporting style again, or - - -

MR WOODYATT (QPILCH): Look, the reports are the same. But I understand that the reports - for example, that particular report is a Commonwealth requirement. So the states have just accepted that that's the way - so the program managers at Legal Aid do a very good job. They are required to collect the data in that format, and so it goes to both Commonwealth and the state. But it's apparently the

Commonwealth that requires that format.

DR MUNDY: Okay, thank you for that.

MS MacRAE: Unbelievable.

DR MUNDY: Commissioner, do you wish to proceed while I go and bang my head - - -

MS MacRAE: I think in your submission you talk about reviewing legislation to try and simplify the legislative language and develop new ways of laying out legislation. I must say, this is an area that we felt we hadn't really addressed enough in our draft and we're not quite sure how much more we're going to be able to say in our final. But I guess if you could just elaborate for us a bit on the value you'd see in that, what it might cost and what you see the benefits of that sort of approach might be, given that we do seem to have had quite a few failed attempts at simplifying legislation at the Commonwealth level at least and the problems that, and I guess when you go and talk to these people they say, "We try and use these simpler layouts and we are using plainer English." I guess the gap between what's said and what's done is a problem and how you'd address that.

MR WOODYATT (QPILCH): Sure. You know, what we're about as a community legal centre is that everything that should be available to the public that is the simplest format that they can understand it. I mean understanding the law should be the first thing that we make clear and accessible. Just as an example, in the early 90s there was a new - I worked at Caxton Legal Centre at the time and there was a new parliamentary - OPC, Office Parliamentary Counsel, who had been appointed and they went through a process of reviewing the way the laws were then presented, and this is sort of in the early days of computerisation.

So in the area that we've been working in, specialised in, it was mostly crime. We thought that there was a better way that the laws could be laid out that would make it more accessible. You know, just simple explanations, the intent of the legislation, more simple English in the actual terms. Separate penalty clauses and at the time at least, most of it was in this long stream. You know it was all sort of hard for lawyers to even access, let alone - and there are clear examples since then of where lawyers had trouble in understanding amendments and that sort of thing.

Anyway, we saw the new parliamentary council and said, "What about using computer systems, they're modern, it's coming in, make it different layout, make linking of sections," and he basically said at the time, "There is a standard for legislation in Australia. We can't unilaterally in Queensland change that approach, and so we're not going to. But we think your ideas are terrific. You know that would be a really great way and a simple way of laying it out. But we're not going to

change it."

So I note that - and I think we mentioned in our submission - that the parliamentary council's office in the UK is going through a review of how its legislation - and I suppose we were just seeing that as a useful precedent, and then also you would be aware that - I think it's Monash that's going through a review of time periods, and there are so many different time periods that for the layperson make it very hard to understand - you know, they've got 28 days in the Industrial Relations Commission, or 30 days here, or three months there, and there are so many different figures. That has occurred for reasons historically, but maybe there are ways that some of those time periods could be standardised, that everyone would have a clear idea of when they've got to act.

MS MacRAE: Would you then say you would look at sort of time pieces of legislation as the first things you would try and tackle, and from what the OPC has told you in Queensland previously, would you need all the states to agree that this is a new approach they would be prepared to take, or do you think there is opportunity to do some things unilaterally?

MR WOODYATT (QPILCH): Well, I can't answer that, but I assume all the parliamentary counsel from the states and Commonwealth get together at times and talk about these things. So I don't know what would be necessary. I imagine that states might be nervous about doing something unilaterally.

MR BUCHANAN (QPILCH): It would be good if something could be done. That legislation affects normal people who can't afford big litigation. You know, residential tenancies, even family law.

DR MUNDY: Well, we've quoted his Honour Kerr J, the president of the AAT, about legislative complexity, and I think it's fair to say that he wonders how he can understand the Social Security Act, so he doesn't know how disadvantaged people receiving benefit payments can possibly really understand what's - - -

MR BUCHANAN (QPILCH): And QPILCH's experience with its self-represented clinics is just so - even though the lawyers thought the standardised court rules in Queensland were quite simple, when you've got someone who's self-represented, they're like an opaque block in the road.

DR MUNDY: I think, coming to self-represented litigants, we had an interesting discussion earlier with the Law Society, who I think indicated that they could see merit in people who represent themselves being the beneficiaries of cost orders. Also they raise an interesting question, I think more broadly, about in circumstances where people are receiving some form of assistance other than representation in a court that those cost orders should have regard to whatever moneys they've spent on

advice prior to actually the physical appearance in the court. I guess a couple of questions: do you have a general view about cost orders in front of self-represented or pro bono litigants - we accept they are different, at least on some level - but also, where limited assistance is provided to a litigant, how those expenses that they incur should be reflected in cost orders.

MR WOODYATT (QPILCH): Well, if I can just quickly say, I think that - I mean, there's English precedent for costs being awarded to self-represented litigants in the very narrow circumstances where they can show that they have incurred costs, you know, not - obviously the whole purpose of costs orders is to - - -

DR MUNDY: So expert witness statements and - - -

MR WOODYATT (QPILCH): That's right.

DR MUNDY: I don't think there's much dispute around that.

MR WOODYATT (QPILCH): But costs to compensate them for their time.

DR MUNDY: We came to this issue primarily on the basis of the behaviour of litigants inasmuch as if you know that you're facing a self-represented litigant, and I'm sure most lawyers know when they do, then you know that the likelihood of an adverse costs order from you dragging it out - the economic consequences are much different, putting aside the ethical considerations of such behaviour. It did seem to us that there was a perversion of incentives, shall we say, when one is faced with - that's what we were trying to get at.

MR BUCHANAN (QPILCH): I concede that there is an argument for compensation for the effort if successful, in much the same way as they face the penalty if they're unsuccessful. Quantifying it, of course, is the other difficult thing, and as you raised, if they've had some partial support, there would have to be some form of body to sort of do a divvying-up, I would imagine, because otherwise whoever has provided the money for the partial support would want it all back first up.

DR MUNDY: But would it be sufficient to say, "Well, this matter has run for three days and the scale is X dollars a day for a solicitor, and therefore you're going to get X dollars a day?"

MR BUCHANAN (QPILCH): That would be a very simple solution. Maybe - - -

DR MUNDY: Putting aside the adequacy of scale.

MR BUCHANAN (QPILCH): Yes, leaving aside the adequacy of scale, and

people would argue that you weren't really a solicitor, but a self-represented litigant is taking their time and having to do a lot of - a lot of them that we see have to do a lot of research and a lot of preparation.

DR MUNDY: Perish the thought there may actually be professional people who choose to represent themselves whose hourly rates might be higher than your average suburban solicitor.

MR BUCHANAN (QPILCH): I think that's all most people could only afford to represent themselves, even some of those whose hourly rates are quite high. But I think there's quite a strong argument in favour of that. It always has the counterargument that a lot of self-represented litigants don't have many assets so they don't care about the result. But that's a different kettle of fish.

DR MUNDY: Yes, and it also comes back that if you're really concerned about the behaviour of litigants in court, that's why we have the people on the Bench. That's their job.

MR BUCHANAN (QPILCH): It would be an incentive for people to settle, on the other side of self-represented litigants, if they knew this person has got a good case - as you say, it could change litigation behaviour, they go, "Well, let's drag this out, let's get costs orders against them on interlocutory points," whereas if they know in the end they could have to pay them costs, there would be a much greater incentive to settle.

DR MUNDY: Thank you, Mr Buchanan.

MR WOODYATT (QPILCH): Can I just add, sorry, in relation to the pro bono representation, we think the law here is pretty settled, and so long as firms acting pro bono have a clear costs agreement in place that permits them to claim the funds from the unsuccessful party and not an uplift from the client, then that seems to be the accepted law, I think, here.

DR MUNDY: That's the law in Queensland.

MR WOODYATT (QPILCH): It is, yes.

DR MUNDY: And the incentive arguments that Mr Buchanan just outlined, presumably that lodging applies equally to pro bono as opposed to the conduct of the other parties. The mere fact that there are economic consequences in costs, that would model behaviour. Do you think there's any need - I mean, we've had a number of - we had the pro bono partners from Clayton Utz, Ashurst and Allens. We had submissions from the three of them, and one of the As was missing at the hearing, I can't quite remember which.

They indicated - I mean, we've raised the question of whether it was a genuinely open question about, in a pro bono settlement costs order, whether the money should go to the firm concerned, whether it should go to some sort of fund, and they suggested to us that certainly as far as the large firms were concerned, they'd probably just plough the money back into their pro bono practice anyway, so they would effectively be running an internal fund, if you like, for pro bono. Do you think there's any real need for government to interfere in that? I mean, part of the suggestion is, if someone acted pro bono for a CLC, then the CLC should get the dough. Or do you think we should just let these matters rest, and if pro bono lawyers are prepared to act pro bono and they're doing it for a CLC, they might give the money to the CLC anyway?

MR BUCHANAN (QPILCH): Well, I was a partner of Allens. I think it can be met because there is so little money recovered from pro bono matters, and it's not really an issue, and when we have had recoveries, the odd couple of occasions, people have donated money to people.

DR MUNDY: It has been suggested to us that the retention in some pro bono cases by junior members of the bar probably actually isn't a bad thing for struggling junior members of the bar, and it might encourage - whilst they might be paid that amount because of their self-employed nature, that may encourage them to do more pro bono work. Is that a reasonable proposition?

MR WOODYATT (QPILCH): Yes, I think that's true. I agree with that.

DR MUNDY: So QPILCH's general view is that we should leave the distribution of precious pro bono costs awards in favour of pro bono lawyers, and it would be a matter for them to sort out with the organisations that they provide pro bono support.

MR WOODYATT (QPILCH): Yes.

DR MUNDY: Okay. Thank you.

MS MacRAE: I'd just be interested - I think you've got good on-the-ground experience of legal health checks, and I'd just be interested in your views about how effective they are, whether you have had evaluations of those, and how important you think it is for people that might not be lawyers - how important it is do you think that non-legal workers should be trained in the use of these sort of tools, and how helpful that might be to the work you do and the people that you see.

MR WOODYATT (QPILCH): Look we're currently undertaking an evaluation of the legal health check with funds from Legal Aid's community legal education fund, and so hopefully we'll have that in the not too distant future. A few months off I

think. But we think they're a really effective tool, and they're particularly effective for caseworkers who support, you know, people with mental illness or homeless people or whatever, and we have a very strong training program for - so we have twice a year we train caseworkers in the homelessness area how to - you know, generally but includes a component on using the legal health check because once they're able to use it effectively, then it's a way of drawing in, you know, most effectively I think, from that much broader pool of people, you know, an understanding of what legal issues and how they can be assisted by us or by other appropriate services.

So we think it's a really good thing, and we've had - our mental health service has only been going now for just over a year, and we've had one training for caseworkers in that, and we've applied for funding to run that caseworker training up in mental health caseworkers up through the state because that's - particularly in regional Queensland mental health legal services particularly are in dire need, and so with those caseworkers knowing how to use them, then they can feed that into us and to QAI and other mental health services, we'll be able to better help people in those areas.

MS MacRAE: Sort of how many health checks do you have? How tailored are they to particular population types?

MR WOODYATT (QPILCH): Look we do tailor them, so we've really only got two, one for the homelessness area and one for mental health, and that's, you know, because you're dealing with different clients and, you know, different issues. It's about sort of drawing out because, you know, most people who are, you know, experiencing a mental health issue, that's virtually their primary focus clearly, and particularly if they've got appearances in the Mental Health Review Tribunal or whatever. So it's about getting beyond that particular issue that is dominating their life to often find issues that are underneath that that are causing stress and pressure.

MS MacRAE: Yes, and so the evaluation that you spoke about, is that doing both of those checks that you're doing, or you're just looking at the homeless?

MR WOODYATT (QPILCH): Look, it's just in the homelessness one.

MS MacRAE: Right, okay.

MR WOODYATT (QPILCH): Although I'm sure it will be useful for the mental health one as well.

MS MacRAE: Is it possible - will that be a public document when you get your results?

MR WOODYATT (QPILCH): Yes, yes.

MS MacRAE: Is that something you might be able to - I mean obviously the time frame will determine whether or not it will be in time for us - - -

MR WOODYATT (QPILCH): Yes, for sure. Everything we do is public.

MS MacRAE: Yes, okay. If you could keep us informed of that, that would be great.

DR MUNDY: We had a brief discussion with the Law Society about volunteer certificates for pro bono lawyers, and they've undertaken to go away and get some data for us as to, I guess, the relevant issue. I guess the issue that's been raised with us of concern around this sort of framework goes to, I think probably in decreasing order of importance, continuing professional development for these folk, public indemnity insurance, and then the last one is issues around fidelity issues and fidelity fund, although I think the Law Society agreed with us that fidelity fund issues are unlikely to be encountered certainly in a sensible pro bono type framework, so let's forget about that one. But the other two issues, are they matters that you think are properly dealt with, or the concerns may be overcooked?

MR BUCHANAN (QPILCH): I think really that they are overcooked. A lot of the volunteer lawyers, particularly the ones who are older lawyers, they've had a hell of a lot of experience. To make them sit through 10 points of training on the Trust Account Act and so forth like they do, I think it's well overcooked. Fair enough to have practising certificates for the young lawyers who are employed there, but for volunteers anything to encourage them to volunteer is helpful.

MR WOODYATT (QPILCH): In Queensland, you know, you can only use that volunteer certificate through a community legal centre, so we have a lot of volunteer practitioners who either career break or retired, and they're incredibly useful. They've got, you know, incredible experience and we - in any event through our normal structures there's everything that QPILCH produces is supervised by solicitors who are, you know, with current practising certificates who are doing all the training, who are experienced in what they're doing. So we've got no concerns about the current Queensland regime.

MR BUCHANAN (QPILCH): And the fidelity insurance, which all the CLCs have, covers volunteers so that's not an issue.

DR MUNDY: Yes, and the indemnity insurance.

MR BUCHANAN (QPILCH): And the indemnity insurance.

DR MUNDY: Yes. I think the concern has been well this is somehow a lesser class of lawyer and they don't have the same professional standards. I mean we did hear in New South Wales of one former Supreme Court judge in New South Wales who spends most of his time driving around in his four-wheel drive doing assistance work for Aboriginal communities, so I'm not sure whether judges deteriorate at a rapid rate or not but - - -

MR BUCHANAN (QPILCH): I must confess I don't have a practising certificate. I retired from law five years ago, but continued to be active in QPILCH. I'd have a volunteer - if there was a volunteer's practising certificate, I'd keep it up and keep up membership of the Law Society, but the thought of having to pay for continuing legal education with no return was one step too far.

DR MUNDY: Okay.

MS MacRAE: You talk I think in your submission about an example in the US where some jurisdictions actually recognise pro bono work for the purposes of continuing professional development, so I guess to some extent if we adopted that sort of arrangement, you solve your problem by saying well by undertaking this work you're undertaking that education, and that's how you get your 10 points.

MR BUCHANAN (QPILCH): Yes.

MS MacRAE: I guess it's another way of dealing with it, and presumably it works for them. Okay. Could I just ask - we haven't really asked much of anyone else in Queensland, and perhaps you're not the best people to ask, but do you have views about information for consumers, and particularly redress where things don't go well? Are consumers aware of the complaint mechanisms, and do you feel that they - or are you in a position to say whether or not they work very well?

MR WOODYATT (QPILCH): Sorry, which complaint - - -

MS MacRAE: If consumers are unhappy with the legal service that they have been provided with - - -

MR WOODYATT (QPILCH): I see. Sorry.

MS MacRAE: - - - are they able to - either in terms of costs or quality, how do those mechanisms work in Queensland?

MR BUCHANAN (QPILCH): It's part of the retainer letter that solicitors have to give clients, and I must say it's a very long letter. So while they are made aware of their rights, I don't know how many of them would actually read or understand it.

DR MUNDY: You seem to describe a situation that I think is often referred to as the mobile phone contract.

MR BUCHANAN (QPILCH): Yes.

DR MUNDY: Or the old product disclosure form. So the question is is it information or is it just data, your view would be that it's not particularly alive to informing people of their rights.

MR BUCHANAN (QPILCH): It's a personal opinion, but just from retainers letters, yes, they are. It's like sign here and return it. It's like, you know, they have read the terms and conditions. I suppose people - you could always send people to go back and look at it if they have an issue, but a lot of people probably wouldn't even remember that it's there. Once again something simple would have - - -

DR MUNDY: There are people who I think are obviously familiar with these documents, but in your view if they were people of, you know, limited education, perhaps suffering some form of disability, English wasn't their first language, would these be documents they would be likely to be able to understand?

MR BUCHANAN (QPILCH): Very unlikely I would say because they are quite convoluted.

MS MacRAE: I think the other issue you raised in your submission is the concern that people just don't really understand what the powers of the Legal Services Commission are so that they might think that they can apply for some sort of compensation from that body which, you know, is really not available. So what more do you think could be done to try and address some of those issues?

MR WOODYATT (QPILCH): Well, it's incredibly hard, I think, just, you know, generally getting information out in an accessible form that people can use, you know. I think the Legal Services Commission here has lots of, you know, relatively good information on its web site and we get quite a few complaints against lawyers at QPILCH which are, in fact, our first ever referral was a complaint against a firm that led to a District Court hearing that changed the rules, the way lawyers charge costs, and we've got a fact sheet on our web site about the process, you know, it's not easy, it's not, you know.

MR BUCHANAN (QPILCH): A legal ombudsman could be a help that someone can go to first up before, because the legal information commissioner, it is quite formalistic thing, whereas if there was an informal route that people could take, the ordinary consumer, that might encourage them and that would also be a way of educating them on their general rights.

DR MUNDY: So much in the way that I can go to the banking ombudsman or telecommunications ombudsman.

MR BUCHANAN (QPILCH): Yes.

DR MUNDY: Of course Queensland have the notable exception of having relevant legal complaints body headed up by someone who wasn't a lawyer, I understand.

MR BUCHANAN (QPILCH): Yes. We have some interesting appointments in Queensland.

DR MUNDY: So we understand.

MS MacRAE: I mean, on a serious note, do you think there's real value in that? Because I mean, we do hear, and I guess our organisation in general would say that, you know, having a profession - whether people that are reviewing the profession are of the profession can at least in perception if not in reality create concerns about conflicts there so, you know, would it be a useful thing to have a requirement that some non-law or non-legal professional people should be involved in any sort of complaints mechanism?

DR MUNDY: We see it very commonly now on medical and quasi medical registration bodies typically will have non-practitioners, they're typically lawyers.

MR BUCHANAN (QPILCH): I haven't really thought about it, but it could be helpful if you get, dare I say, a voice of reason.

MR WOODYATT (QPILCH): The old QLS, when the QLS ran the complaint process there was at least one lay person on that.

MR BUCHANAN (QPILCH): But that was a more formal sort of body rather than, you know, an initial one to go to.

DR MUNDY: Yes, and I mean, I think it's an interesting issue that it's often decided that there's a need to distinguish the ethical conduct type complaint from what we might call the commercial conduct complaint, although I think they sometimes look very much to be part of the same problem.

MR BUCHANAN (QPILCH): Yes.

DR MUNDY: We had an interesting discussion about the unbundling of services with the Law Society earlier on and I think they largely support our propositions with respect to bundling and then we had Ms Shearer here who actually runs an unbundled practice for a living and we found that very helpful. They suggested to us

that the adoption of a very simple rule within the rules of the American bar whereby the obligation is made clear about the extent of liability and a clear acknowledgment of an acceptance of that limitation, in their view would go a long way to facilitating the constraints that people see of unbundling. I note that in your response to the draft report you think the issue around insurers is in favour of a minimalist approach. I'm just trying to understand precisely. So you like the idea of unbundling because that's, I suspect, to some extent what you do for people.

MR BUCHANAN (QPILCH): It is, yes.

DR MUNDY: But I'm not quite sure where your view is on the insurance question.

MR WOODYATT (QPILCH): Look, it was more - earlier on when we started the service we had a reference group who was chaired by a former Supreme Court judge and a group of people who we were just starting up the service and we thought, well, perhaps we need some - you know, we're doing something that was unique at the time, I mean, it happened across the profession, but we were providing a service and potentially exposing our volunteers to something and so we thought, well, maybe it needs clear protections that would be, you know, legislative or through the rules some way that would ensure that volunteers and staff were, you know, because they didn't necessarily have the full picture and, you know, we're just doing steps in the process that that might help, but now I'm on a Law Society committee that's been looking at it, and the general consensus is that maybe, you know, taking some simple steps first and seeing how it goes and just making, as you say, adopting that US rule would be sufficient at least.

DR MUNDY: It does seem pretty simple to us.

MR WOODYATT (QPILCH): It does.

DR MUNDY: It does seem to do the trick.

MR WOODYATT (QPILCH): Yes.

MS MacRAE: I'll maybe just ask about limited licences. Again, I think you have appropriately interpreted our report as saying that we're not suggesting that completely unqualified people could just come in and represent people if they chose to, but rather that there might be people that have qualifications but in a narrower area of law than a general lawyer might have that might be able to represent in particular fields, and we know in Washington state they're looking at having lawyers - paralegals work in the family law area after some years of training, but not the full range that you would have if you were a general lawyer there. You spoke in your submission about the possibility of using this sort of qualified but not necessarily fully qualified lawyer in the area of tenancy disputes. Are there other areas that you

would see this would be appropriate, and how would you see it operating in the tenancy field?

MR WOODYATT (QPILCH): Look, I suppose we haven't really given enough - I mean, we saw a particular discrete area in tenancy since there's been defunding of tenancy services in Queensland and it is something that is relatively straightforward that, you know, that it may be useful to fill that gap and with appropriate supervision, so there's all those things that have to go with it, but how far you potentially extend that, I think you would have to take it on a case by case basis and see - well, is this something, you know, that would be an appropriate use, you know, to help fill gaps and that sort of thing. I wouldn't sort of suggest that across the board.

MS MacRAE: What sort of qualifications would you think someone might need to deal with tenancy disputes? Would you see them having to sort of do an academic qualification that would give them two years or something that would specialise in this area, or would they need to have other experience?

MR BUCHANAN (QPILCH): I would have thought a couple of years of study because - - -

MS MacRAE: Yes, okay.

MR BUCHANAN (QPILCH): But that is quite a discrete area of law. The trouble is when you get to other areas of the law, it can expand - - -

MS MacRAE: Yes, much broader. Yes.

MR BUCHANAN (QPILCH): Even - well, family is probably a bit more discrete, but even it's a lot more to tenancy disputes.

MS MacRAE: Yes.

DR MUNDY: What actually drew our minds is there's a scheme in Washington state where people become effectively family lawyers but nothing else, but the course is certainly more than two, it's three or four, plus a significant period of professional supervision after that. So what we're not talking about - and I think some have felt we might have been talking about six weeks of TAFE and off you go.

MR BUCHANAN (QPILCH): No.

DR MUNDY: We're actually talking about serious professional qualifications.

MS MacRAE: And then I think limiting their scope as well.

DR MUNDY: Yes.

MS MacRAE: So in Washington state, for example, you can't represent somebody in court but you can help them with their documentation and gathering evidence and all those sorts of things.

MR BUCHANAN (QPILCH): And interestingly as a practical point, and sort of a mirror image of that, is that a lot of law firms don't do family because it is such a speciality.

MS MacRAE: Yes.

DR MUNDY: Yes, and you see other areas - I mean, historically industrial matters were dealt with advocates of employers or of unions, you see a bit of it in planning matters where the planning matters are very discrete.

MR BUCHANAN (QPILCH): Yes.

MR WOODYATT (QPILCH): At least a couple of universities, I think, in Queensland have paralegal courses where, you know, it's a broader course, it doesn't necessarily, but it gives them an insight into a lot of those legal issues, you know, just fundamental legal issues that could be built on for specific areas. It's, you know, an important resource, I think. We use students heavily at QPILCH. It's a way we get - obviously again under close supervision, but it's a way that we get through a lot of our - you know, we have far more applications than the staff alone can deal with.

MS MacRAE: Perhaps just one last thing. Just in relation to tribunals, and again I think we probably weren't as clear in our draft as we could have been, but we see some value - our concern was that there might be what's been described to us as creeping legalism and more lawyers being in tribunals than might necessarily be absolutely necessary and I think it's fair to say in your submission that you support or views that there is value in keeping the extent of legal representation in tribunals to some extent in check, even though obviously vulnerable participants may need to be protected.

I understand that QCAT does still have quite a low rate of legal representation and I think it's fair to say VCAT started out that way and it's not that way any more and that's one of the reasons that we've made this sort of recommendation. Can you just give us a bit of an idea about how you see that impacting on proceedings, I guess in relation to what you would regard as fair outcomes for participants and cost and accessibility of QCAT as a result of that?

MR WOODYATT (QPILCH): Sure. We think - you know, we'd differ from the Law Society in this respect because we think that those proceedings need to be, you

know, not necessarily legalistic unless obviously they're areas where legal issues are important but that, you know, they need to be fast to get, you know, appropriate justice and we think QCAT is doing a good job in that regard and that where - and as far as I understand that where lawyers do apply because they think their clients need representation and so they seek leave of the tribunal, they get it in most cases I'm aware of, and I think the QCAT stats bear that out and you have probably heard that.

DR MUNDY: I guess the question that begs and the concern that we have is leave granted too readily. It's probably interesting to know how many they knock back as well. I guess coming back to you raised tenancy, I mean, one of the concerns that has been raised with us is that major real estate firms will probably deal with tenancy disputes in QCAT more regularly than your average tenant and, I mean, do you have a view - I mean, and the argument was put to us, I'd be interested in your view of it, is that sometimes to ensure that there is a quality between the parties, that it may well involve someone experiencing some form of disadvantage, English mightn't be their first language, say, appearing against someone who whilst isn't a lawyer is pretty well competent to perform in such a jurisdiction. So are those cases in your experience particularly common or are they easy to conceive of, you know, small property owners dealing with local council officials and planning matters is another one, are they common occurrences or - - -

MR WOODYATT (QPILCH): Look, I can't answer that for sure, but we run a self-representation in QCAT and whilst that's a self-representation service and obviously the whole jurisdiction is meant to be largely self-represented, we help people, particularly those who are vulnerable who may be in circumstances where the other side has, you know, a stronger position because - - -

DR MUNDY: An organisation which - - -

MR WOODYATT (QPILCH): That's right. We help a lot of people every year. I'm not sure if we said in our submission, but since the defunding of the tenancy advice services, the demand on our service for tenancy has increased, I think, from last year about 24 per cent to about 40 per cent this year and we set the service up to focus on the main areas of vulnerability, guardianship and administration, child protection, and discrimination and so, you know, we said we'd help out as best we could in tenancy. It's important, obviously a human right for people to have access to a home, and so we do what we can, but it's starting to dominate to a certain extent, that we need to monitor that, so we are changing our guidelines to make it the more serious cases that we'll assist with so that we can get some balance back. But, look, I can't answer your specific question, but I think - because we don't obviously - we don't see everyone, there's 30,000, most of them are in debt matters that we don't have any - I mean, we've done a couple for people who are really vulnerable and helped out, but basically we help out in that human rights jurisdiction.

MR BUCHANAN (QPILCH): It may be, to use something you said earlier, the person on the bench has to take that into account.

DR MUNDY: Yes. All right. Look, we've pretty much run out of time, so thank you very much for your submissions and your time for coming here today. These hearings are adjourned until half past 1.

(Luncheon adjournment)

DR MUNDY: Okay, we'll resume these proceedings. Could you please state your name and the capacity in which you appear?

MR BIRD: My name is Andrew Bird. I'm appearing as an individual. I do run a couple of businesses, but I just want to present a submission today.

DR MUNDY: Okay, Mr Bird. Could you perhaps make a brief opening statement for five minutes or so, and then we'll come to some questions?

MR BIRD: Thank you. Thank you for the opportunity to present at the hearing today. For the next five minutes I'll talk about my original submission and provide my intended future direction. I'll also provide some unique recommendations for your consideration. The majority of my original submission is on my business Access Point Law. I'll start by providing some highlights and thoughts about the future direction of this web site which can be accessed at www.accesspointlaw.com.au.

I'm pleased to announce that I have received positive feedback in relation to Access Point Law from the office of the Premier Queensland, the Queensland Attorney-General, and the Tasmanian Attorney-General. Unfortunately I have not received a grant pursuant to the Legal Profession Act. This outcome was not surprising, but nevertheless disappointing as financial assistance would help my current financial situation.

A lot of time has to date been invested in Access Point Law with little financial return. I strongly believe in the merits of Access Point Law as a concept. Free legal education is something that should be provided to the public. A listing of searches and a location gallery of important public institutions is also a valuable resource. At the moment I have reached 55 per cent coverage for free legal education on Queensland's statutory law.

If I cover another 91 Acts, I would have covered all the Queensland Acts I believe significantly affect Queenslanders. I intend to complete the flagged 91 Acts in the near future and will proceed to do so as quickly as I can. At the same time I will commit to maintaining the currency of all the summaries I have published. In the meantime I'd encourage lawyers and members of the public to contribute either by submitting original work, or by providing feedback. Your input will assist in the growth and sustainability of the web site.

After covering Queensland law, the next step would to expand to Commonwealth law. This, however, is not yet guaranteed as a course of action. Maybe another state would fund coverage prior to the Commonwealth, in which case I would proceed to kick start coverage of that state. If the Commonwealth law was

covered, it is possible that laws will be classified according to constitutional categories.

Prior to passing on to the topic of ebook publishing and the law, I wish to state that it would give me great pleasure if the art gallery for Access Point Law would continue to grow. If a drawing or artwork represents an Act of Parliament, I believe the law would be more treasured by the public, and indeed the Act would appear less frightening to those without legal training.

I also wish to state that Access Point Law provides an important function in providing the public with law assurance. This assurance will increase as many of our laws are codified. I believe there is a current push at the moment for contract law to be codified in this state. I believe in time that most common law will be codified, and once this happens that categorisation will provide the public and small business with peace of mind that they are compliant, or close to being fully compliant, with the law.

I will now move on to discuss ebook publishing and the law. I must admit that my ideas in this space are novel. Since my original submission I have tested my ideas and thinking and can now provide my conclusions as to beneficial future action. From my research I can report that defamation laws are a major blocker to a successful transition to an environment where disputes can be resolved with less formality. I do not support the current system where writing the truth can result in a defamation claim against you, with your only saving grace being a defence which is less than ideal in its operation.

It is my belief that the truth and freedom of speech should be championed. What does society have to lose? Generation Y and younger generations are exposed to mountains of information via social media and via this exposure their lives are becoming more and more open. They are becoming less bothered by what is written out there, as long as they can write back, and I believe is the general course for that action to happen. Why would the youth of today bother with a defamation claim? In my own personal experience as long as your friends and family know the truth, who cares what people think?

In closing on this point I submit to you that writing in all forms is to be encouraged. If nothing else, it is therapeutic to the writer. Society can only benefit from issues being vented. To aid venting I submit that civil defamation laws should perhaps be limited to only benefit those in society who are under a legal disability. Until the defamation laws are relaxed, I can only recommend the following three recommendations.

(1) An independent government body be set up for the purposes of receiving writing in all forms relating to disputes or anything. This body would help to

provide issue closure, which I referred to in my original submission. The writing submitted would be open to all members of the public. The writing submitted would be kept on a confidential basis and could be collected one time by the submitter. I would suggest it be known that submissions can be used for government research, and after a period of 100 years, for example, the writings could be open to the public by the public archives, libraries, museums, et cetera. It may be acceptable for the relevant body to be the Law Reform Commission.

Number 2, precedent ebooks be continued to be rolled out. I publish two today. One is called McKenzie Friends, full of material for Queensland, Australia, and the other is called The Truth as a Defence to Defamation, full of material for Queensland, Australia. Once published and placed next to any relevant Act of Parliament, a member of the public could be educated about the common law. Such ebooks will aid future law codification, for the time being allow access to the common law extracts that in my opinion could not be reasonably accessed by those in society without legal training.

Number 3, McKenzie friends be continued to be supported as a legal right. I've rolled out this common law concept on my web site safesailing.com.au. I published one ebook before-mentioned, and created a basic template for appointment of a McKenzie friend. It is my belief that without some form of public writing on a topic, common law rights are not really in existence. A member of the public would fear enforcing a right without some official writing or support. I encourage all common law rights to be converted to statutory law. In the meantime I believe governments should take it upon themselves to ensure all significant common law cases are published on a prominent web site accessible for free to the public. I submit that may be an easier task for a new law to be created.

If defamation laws are limited in operation, I believe the following could be a reality, that is ebooks serving as a means to issue resolution, as mentioned in my original submission. I have published an example template on the web site safesailing.com.au as to how this concept would work. This concludes my presentation on topic, but before asking some questions I wish to provide notification that my presentation will be published as an ebook on www.safesailing.com.au as per my original submission.

I also wish to take this opportunity to put it out there to the general public that I'm looking for employment as a solicitor. Please contact myself by email at andrew@safesailing.com.au if you have any opportunities available. I thank you again for the opportunity to present today. It's wonderful to have an audience. I now look forward to being questioned on my submissions. Please proceed when you're ready.

DR MUNDY: Mr Bird, I'm sure it wasn't in the mind of the parliament when it

enacted the Productivity Commission Act to provide a forum for people to solicit for employment.

MR BIRD: Okay, yes.

DR MUNDY: So I must tell you I find your behaviour in that regard both unique and inappropriate.

MR BIRD: Yes.

DR MUNDY: Unfortunately there are no provisions in our Act to bring action with respect to contempt. I also for the record, given you've raised the issue of defamation, indicate for the record that a number of years ago certain comments were published about me by News Limited and subsequently they withdrew all but one of those comments. I won't go into the reasons behind the withdrawal because that would breach confidentiality that I have with News Limited. Mr Bird, could you perhaps take us through the observations you made about McKenzie friends in a bit more detail?

MR BIRD: Okay. Basically on my web site I've actually got an ebook I've published on that topic. It's a precedent - - -

DR MUNDY: Mr Bird, I'd appreciate it if you could address our questions rather than use this as a forum to advertise ebooks that you have published.

MR BIRD: Okay.

DR MUNDY: Because, to be frank with you, a number of the submissions you have made to us and your comments today are of that character.

MR BIRD: Yes.

DR MUNDY: Again I don't think this commission was established for the purposes of providing advertising, and again your behaviour in this regard is entirely without precedent in my four and a bit years as a commissioner.

MR BIRD: Yes. So I done research on the topic McKenzie friends and I found some cases that are relevant. In the original report I saw that it wasn't really mentioned as something that happened in Queensland, but the cases support there's a right in Queensland for that, and so I guess I tried putting it out there that these cases exist, and I just wanted the public to be informed about that because it's surprising how many people don't know of a McKenzie friend, or laypersons assistance, the right to that, and even lawyers, I speak to them and they, a lot of them don't know unless they went to that - there was an oration at the Supreme Court couple of

months ago that Prof Dame Hazel attended. She gave some insights about the experience in the UK.

DR MUNDY: Sorry. You're referring to Prof Dame Hazel Genn.

MR BIRD: Genn, sorry, yes. She attended, done an oration. Basically it enlightened a lot of people about the concept. I did speak to people after the oration, and they were familiar with it, but some people, some solicitors even, they're not so familiar with the concept, and during legal training at the university I never came across the concept. So it's more one of those silent kind of a rights.

MS MacRAE: I think you've also done a fair amount of work in trying to summarise and simplify the law, and we have had some evidence from others to this inquiry that there's concerns around the complexity of the law itself. Do you see that there's ways that we could try and make the laws less complex, other than having someone separately go and have to try and summarise key points from the law? Do you see ways in which we could make the law simpler and more accessible for people in terms of the way laws are written, or the way that the language in law is expressed?

MR BIRD: Generally I see that the laws are being written a bit better in time because they've got kind of better definitions and things like that. It's all coming. If you look back to earlier Acts, they've got no reasons for the Acts and they're kind of very short and very complicated, very long paragraphs. I do see that the Acts are improving. The next thing I thought would be categorisation would help it again because some Acts could be combined and things happen in that space. Recently the Property and Motor Dealers Agents Act has now been split, and I do see that as positive action because the points are now separated and the public can understand it better.

I just think that - so I do appreciate that kind of action, so the law getting condensed and more points on topic together. I do note that in the federal space with the tax laws, I know years ago they tried making it more simple. Now, they've got two Acts, and so it's kind of - I guess it depends on the people who are involved and whether they've got kind of scope, or even some kind of freedom by the public to actually make things into something simpler, because it just tends that the more energies in a space, the more outcomes people expect, and tends to be more and more writing produced. So I'm kind of hopeful in that space that things will improve.

DR MUNDY: I mean a number of jurisdictions have had in place programs over time for language simplification and amalgamation of legislation. But do you see any risks in this, and I guess I'm particularly concerned about if regularly litigated, or even occasionally litigated statutes were to be subject to this sort of actions that you describe, then that may undermine the value of the precedential law that underpins

the understanding of interpretation of those laws. Secondly, how much do you actually think this activity is going to cost, and is it the best use of the relatively scarce resources of parliamentary counsel who still have to produce the laws as the parliament enacts them?

MR BIRD: Okay. Could you just say the first question again, sorry?

DR MUNDY: Well, what's the effect on precedent if we're going to amalgamate all our laws, presumably change the language, and therefore precedents that have been relied on - for example, you might decide to rewrite the language in Part IV of the Competition Law and change what is understood by substantial lessening of competition.

MR BIRD: I always see that there's - there's always interaction between the statute law and precedent law. You read through some of the statutes and there's references to precedent law, and if you don't have the ability, legal training, or you don't have the knowledge of it beforehand, you kind of struggle to get anywhere with the Act. I do think that - I have seen some common law rights been espoused and Acts described. I think that's a beneficial action and I would encourage that to happen. It does take away the value of precedent law, but I kind of argue that advocacy in effect is arguing with things. Even if it's not precedent itself, it still could have a bearing on the court in its outcome, being argumentative in that way.

DR MUNDY: But precedent emerges from statutory interpretation, doesn't it? So the mere fact that we rewrite a statute doesn't alter the fact that we're going to do away with the need of precedent, but moreover if we rewrite statutes to make them more simple, then we create the risk of new precedential law or the existing precedent being undermined, don't we?

MR BIRD: Yes. Where I was kind of going with my thoughts was that where a case is handed down, it's important perhaps the parliament should actually look to put that into the statute law itself, and that would actually improve the law, and maybe those reasons for the law being interpreted to that degree out in the court system would be mitigated, it would be lessened.

DR MUNDY: So something like the Mabo judgment?

MR BIRD: Yes. That could - sorry, the Native Title Act is there, they're still both in existence. Maybe the one could just now stand, and if there was any more cases on the Act, well, then the points that are raised and important, they could be fed into the Act for improvement. Eventually you might find there would be less precedent for an Act.

DR MUNDY: And my question about cost?

MR BIRD: There is costs. I do think that it's one of the most important things of society is the law. If you get it running more streamlined and people understand the cost, they would be justified.

DR MUNDY: Okay.

MS MacRAE: You talked about the importance of free legal education. I guess I'd just be interested to know how easy you think it is, given the much wider accessibility of electronic communication now and the Internet - how easy is it for people to find the legislation that might be most relevant to their dispute? And to what extent do you think we need - well, I guess how much of the issue around access to justice is about access to resources to help people, and how much is it access to resources for qualified people who can take on that role? So where do you draw that line?

MR BIRD: The first one - sorry. The Internet is kind of more - everyone is on the Internet at the moment, everyone knows how to do it. Well, the old generations are now being trained. It's kind of - I do like how it is at the moment. You can go on to the Queensland parliamentary web site and it's all there for you. Every jurisdiction I kind of know in Australia has got that in place. I know that some appear differently. I think Northern Territory is a little bit different in the way that you click on things. Some Acts have got links that are - the sections are separated by links. I do see that as a positive thing, but AustLII does that anyway.

So with AustLII in place and, like in Queensland, the PDFs, that's a good thing. You've got a bit of an option of how you want to look at things. I guess the current parliaments could actually present them in both formats, but that would double the work. I do think the way that AustLII and the parliament kind of run together. That's a good thing, and that's to be commended.

I don't know whether presentation of the law on the parliament web sites could be improved, because if you start - I guess to some degree what I'm doing, categorising, it's not really - it would just be too much burden for the parliament to handle unless they have a lot more employees in that space. Even when the parliament is categorising, they categorise wrong and then people don't find information that they need. So that's problematic. I think that's answered that question. What was the next one again, sorry?

DR MUNDY: Could I just interrupt? The Commonwealth parliament doesn't publish common law statutes. It's published by the Commonwealth Attorney-General's Department, isn't it?

MR BIRD: ComLaw. I'm not sure.

DR MUNDY: ComLaw.gov.au I think you'll find is hosted by the Attorney-General's Department, not by the parliament.

MR BIRD: Okay. Sorry.

MS MacRAE: That's all right. I guess I was really just trying to get at - you saw value in free legal education. I was trying to just get at what - where you thought that would be best aimed and what level of education are you really thinking about. So I guess in terms of the education for people that may want to, or be required to represent themselves versus whether you'd be thinking that - I guess how much free legal education would you need, knowing that when things get very complicated, that you're likely to need assistance of some sort from a more qualified individual to help you in that space.

MR BIRD: Yes. Okay. There's a kind of bit of a dilemma that I kind of faced earlier on at my work. It's basically how much is enough? I kind of always thought that access - point of access is the best, whether it's a bit simplified entire level, but at least you kind of know you're on the right track. I think that's probably enough. Whether you can revise saying, "That's more relevant to every day life," and people think, "Well, that's useful to know," that's always good as well. But it gets to a point where the law is complicated and you need lawyers to perhaps get the best out of it for the person. I think with the - for example, I kind of looked at the Supreme Court Act and the use of PR and things like that.

The use of PR is massive. Whether you try explaining it to a normal person in the public, it would be just too much for them. At least if you tell them that all the rules are here, that's at least something that's good for them and gives them a lead in. Whether they need, after looking at it, somebody, well, then it's up to them to make that decision themselves. So I guess it's probably coming onto at least - if you can get enough people to give them empowerment to get to an outcome, that's the best outcome. Then they can make the decision whether they want legal advice or not.

DR MUNDY: Mr Bird, can I just ask you whether you've been recording your comments here today?

MR BIRD: I haven't been recording them, no.

DR MUNDY: Thank you. Look, I think that's about all we have for you. Just for your information, because you weren't here earlier, a transcript of these proceedings will be placed on our web site. I suspect it will be early next week at the rate at which they're being produced. But thank you for your submissions and the time you've taken to come and see us today.

MR BIRD: Thank you.

DR MUNDY: I suspect that there is someone here from the Queensland Bar. My only issue is would she like me to wait for her colleague to arrive? Well, we will adjourn until 2 o'clock or some earlier time when the Bar is ready for us. Thank you, Mr Bird.

DR MUNDY: When you're ready could you please state your names and the capacity in which you appear for the benefit of the transcript?

MR DIEHM (BAQ): Thank you. My name is Geoffrey Diehm, G-e-o-f-f-r-e-y D-i-e-h-m. I'm a Queen's Counsel, I'm vice president of the Bar Association of Queensland and appear in that capacity.

MS MARTIN (BAQ): And I'm Robyn Martin, R-o-b-y-n, Martin with an I. I'm the chief executive officer of the Bar Association of Queensland.

DR MUNDY: Would one of you like to make a brief opening statement and we'll move to questions? Mr Livesey QC was able to do this in about three minutes and 12 seconds. We were most impressed and observed he probably wasn't being paid by the hour on this occasion.

MR DIEHM (BAQ): Thank you. I'll see if I can beat that record. Thank you for the opportunity to address the commission with this very important work. We think that Queensland barristers, amongst no doubt other lawyers, have important perspectives that we appreciate are focused on some matters rather more so than necessarily all matters that are going to be within the consideration of the commission, and obviously our focus is really going to in the end by on matters that we deal with on a day to day basis.

There are some broader socioeconomic considerations, I suppose, that the commission has turned its mind to and will continue to do so, and we can offer some comment about some of those items, but perhaps aren't well placed to say things about other matters. We've appreciated the draft report, which obviously gives us something material to work from in terms of providing further responses. We note that the issues that are being considered here are of great complexity.

It's not novel that they're being considered in the way that this commission is. They've been considered in this state, nationally and internationally very many times before, and it seems that nobody yet has come up with any kind of perfect answer, and no doubt nobody expects that they will, that we just aim to see if we can make improvements. One of the realities that we think that needs to be grappled with is that very often times what might be expected to be an effective or meaningful change may in fact produce, at least in some cases if not in all cases, the exact opposite effect of what was intended, so that reforms can be introduced for instance to the litigation process and instead of making it cheaper and more accessible in fact increase barriers and in particular it can increase expense from time to time.

One example of that of course is case management. If you asked a large group of lawyers what they thought about case management you would get some

experiences that suggested that it just added to the cost, because there are a heap of extra hearings of an interlocutory nature that don't achieve very much but just add to the cost because of the preparation as well as the time spent in attending there. We expect that that is real, that observation, that that does happen.

We don't suggest, however, that that means that the sorts of considerations and opportunities that the commission has identified in the draft report aren't worth pursuing. It merely reflects a need to ensure that they're pursued, both in structure and in actual delivery, at a higher quality than may be the case on some other occasions, and the commission with respect has sought to address a number of those things with recommendations, for instance about cultural change, recommendations about judicial education, education for lawyers as well that would all help with respect to delivering better outcomes in those sorts of matters.

One of the other unintended consequences that might be thought to potentially arise from some of the ideas that are mooted in the draft report that has occurred to me is one that sees a potential reduction in barriers to access to justice by providing for more efficient and indeed more timely resolution of disputes through the litigation process. So case management, for instance, that results in strict time limits being developed and adhered to, that are intended to reduce the cost by in part perhaps reducing procrastination, making the parties get on with their litigation and having it dealt with quickly.

One of the problems that could arise in some cases - I don't suggest all, but in some cases where that is adopted - is that parties who are well resourced can be advantaged because when there's a short time frame, those with the greater resources are the ones who have the greater capacity to effectively manage the short time frame, and for many of the people who've faced barriers in terms of access to justice because of limited resources, it may merely exacerbate their disadvantage in that regard.

This goes back to the point that I was aiming to make, that we think it's important to bear in mind that every time there's a solution, the solutions may in fact give rise to problems in some perhaps, even if not all cases, and those potential outcomes need to be contemplated. We think there's much to commend in the draft report, with respect to various areas that have been contemplated and we'll be happy to make some additional comments specifically in the area of cultural change, court processes that have been mooted in section 11 in particular of the report, and issues about the complexity of law, including legislation that add to burdens, as well as some brief comment about something that we said in our written submission in response to the draft report about the role of organisations like ASIC and the ACCC in particular, because there may be some clarification that we can offer about what we were meaning to convey by that.

DR MUNDY: Thank you for that, Mr Diehm. Could I perhaps bring you to paragraph 38 of your submission to us. There is a claim made about a different agenda altogether. Would you like to inform the commission what the Bar Association of Queensland believes that agenda to be, or would you like to remove that statement from the record?

MR DIEHM (BAQ): If the statement is taken as implying that the commission had a different agenda altogether, it is not intended to convey that.

DR MUNDY: Okay, thank you. We don't need to pursue that any further.

MR DIEHM (BAQ): Thank you, and I apologise if that was thought that that may be what it meant.

DR MUNDY: Well, there is a general tone, particularly in that part of the submission to us which, if I can be frank, does actually tend to lead - - -

MR DIEHM (BAQ): I see, yes.

DR MUNDY: - - - in its rhetorical character to impugning both the intentions and the competence of the commission, and I'm sure that wasn't the intention.

MR DIEHM (BAQ): It's certainly not intended, no.

DR MUNDY: Perhaps in reflection, we would be happy to receive a more suitably drafted submission from the Bar, if that was within your resources to do so.

MR DIEHM (BAQ): Thank you, yes.

DR MUNDY: At the last point in 38, the last sentence says, "Abolition of court fees would actually be apt." Is it the position of the Queensland Bar that court fees should be abolished?

MR DIEHM (BAQ): We consider that in the ideal world they would be, yes.

DR MUNDY: We had the opportunity to hear from Chief Justice Martin of Western Australia on the Friday before last in Perth when he appeared before us, and he drew to our attention the Bell Resources case, and his Honour advised us that the cost to his court of that case was some \$15 million. He also advised us - and for the sake of this discussion I'm sure the Chief Justice can be taken to be a credible witness - he advised us that his court recovered roughly in the order of \$700,000. Now, that was a dispute between a pile of banks and a couple of insurers. Would it be the view of the Queensland Bar that that expenditure of \$14 million, which was a private, commercial dispute, was an appropriate use of either that court's money or the

taxpayer of Western Australia's money more generally?

MR DIEHM (BAQ): Yes.

DR MUNDY: It was?

MR DIEHM (BAQ): Yes.

DR MUNDY: Can you explain why the chief justice, who has a view that it wasn't, might be in error? You haven't had the benefit of his argument, but perhaps you could explain to us why that \$14 million was perhaps not better spent, let's say, expediting the processing of wills within the Supreme Court of Western Australia, or dealing with criminal appeals where people were being incarcerated but for the want of the resources of the court?

MR DIEHM (BAQ): Thank you, I'm happy to do so. A different point of view of course indicates no disrespect whatsoever to Chief Justice Martin, who's held in high regard, as I'm sure you are aware. Our association has a long association with his Honour, and a proud one at that, and the point of view that you have just articulated is again, with respect, obviously a respectable one too.

But the difficulty with it is, in our view, is that courts are not, as it were, service providers. They are an arm of government that are there as part of our institutions to resolve disputes between private citizens as well as disputes between the state and citizens, when those disputes are unable to be resolved otherwise between them.

When large corporations have private disputes between them, they are entitled, as it were, as part of the administration of justice to the same opportunities with respect to having their disputes resolved by the courts as what all other persons and companies are. That piece of litigation is obviously in many regards - never mind what the private interests of those concerned may be - regrettable and apart from consuming enormous amounts of court resources, it no doubt consumed enormous amounts of the parties' own resources along the way.

DR MUNDY: But they had a say in the matter.

MR DIEHM (BAQ): Well, they did have a say in the matter. But to deny them access to the courts unless they pay for that access at something approaching its true commercial cost is in our view to deny what the role of the courts in our society is, and that is to act as an arm of government would in determining the dispute between the parties and in our view it would be somewhat akin to suggesting that where a bank or a group of banks wished to convey points of view and to try and persuade politicians that a particular point of view should prevail and that therefore there

should be legislative reform in a certain area, with a view to suiting their own private interests no doubt when they make such representations, that they should have to pay something towards the costs of operating the parliament and the ministerial offices or that of their local members.

DR MUNDY: Which of course would constitute an offence unless it was mechanically done.

MR DIEHM (BAQ): Quite so.

DR MUNDY: You mention though that you said that disputes which were - I think your language, and correct me if I'm wrong - but "disputes unable to be resolved otherwise" I think was the phrase you used.

MR DIEHM (BAQ): Yes.

DR MUNDY: Of course, perhaps not in the Bell matter, but in a wide range of other disputes, parties do have a choice as to whether they use the courts. They could agree to have the matter privately arbitrated. Not all matters, I accept, and indeed in my professional experience in the aviation industry where I used to be involved in the development of access agreements for airlines to access airports, at least a tenth of the document was actually about how the parties were going to resolve disputes without the use of the courts.

MR DIEHM (BAQ): Yes.

DR MUNDY: I'm sure you're familiar with these sorts of agreements.

MR DIEHM (BAQ): Indeed.

DR MUNDY: So I guess the question is, in those matters - and I accept there are some matters, and the commission readily acknowledges in its report that there are matters that must go to court for the general establishment of precedent - and for other reasons, not perhaps commercial matters but where civil liberties and human rights are involved - but in those cases where there is a real and viable alternative to court - that is, some form of private arbitration of a matter - what's your view then, where the matter could be resolved elsewhere but the parties choose to go to court? Now, they may do that for any number of reasons, but as we know, they choose often to do these things privately, for any of number of legitimate reasons as well.

So I guess what I'm trying to get at, in those circumstances where there is a genuine alternative to a court based - and by that, it's either some mediated matter in the courts or by trial - does your view still hold, that the parties should have a choice between an arbitration which will cost them significant amounts of money, perhaps,

or in your world, free access to the courts, which isn't actually free because they must pay people like yourselves and those who instruct you?

MR DIEHM (BAQ): Yes, it does. Every piece of civil litigation that invokes the aid of the court to determine it involves a choice by at least one of the parties to have access to the courts. Every piece of civil litigation that there is could be resolved by another means.

DR MUNDY: I'm not sure there are child protection matters that fall into that category, but let's keep our focus on commercial matters.

MR DIEHM (BAQ): Well, commercial and a whole variety of other matters.

DR MUNDY: But there may well be some civil matters which have almost criminal characteristics.

MR DIEHM (BAQ): A regulatory-type regime. I accept that. So all of those other cases only go to a court for resolution because at least one of the parties will not agree to having the dispute resolved by some other means. So in that sense we think it's a complete answer.

DR MUNDY: So there is no case to be made that, given the availability of alternative dispute resolution for some of these matters, it's not appropriate public policy for the state to construct some form of incentive to encourage people to solve their disputes other than by court, or alternatively that it may well be appropriate, and we know that in fact the state does encourage people to resolve disputes other than by court, and the family law jurisdiction is replete with these sorts of examples, your contention would be - and I don't want to put words in your mouth - that court fees are not an appropriate form of public policy to encourage dispute outside of court?

MR DIEHM (BAQ): That's so.

DR MUNDY: Okay. Thank you. I just might finish on this court fees business before Commissioner MacRae asks you some questions. Given the reality that court fees exist, have existed for a long time and are likely to continue to exist, despite your advocacy, given that reality, how do you think court fees should be set? Given that they're going to be there, and the commission has made observations that fees may not be appropriate in certain matters, for example - - -

MR DIEHM (BAQ): Yes. I appreciate that.

DR MUNDY: And given that some commercial matters - in probably courts in which you don't regularly appear, but in the Magistrates Court there might be 10 or 20 thousand dollars at issue, and we talked about the Bell case where you see seven

figures - do you have any views about - given that these fees are going to be there and they're real, should the commercial building dispute in the Magistrates Court down the road for 50 grand be subject to the same sort of fees as massive intercommercial litigation, or is there some guide which you could provide us with around - given this evil is likely to persist, how should the evil be constructed and who should it be visited upon?

MR DIEHM (BAQ): You may recall that I said at the beginning of my comments in answer to your question that in an ideal world court fees would be abolished.

DR MUNDY: But we live in a world of sin, Mr Diehm.

MR DIEHM (BAQ): We most certainly do. The realities in terms of setting a quantum of a fee, I suspect, are really best addressed somewhat arbitrarily; that is, by fixing, for instance, as is done now, a hearing fee at a particular amount per day that is seen as some sort of cost recovery, even if the true cost varies from day to day and case to case.

DR MUNDY: And that's not an unreasonable proposition, there is a question of how much should be recovered in total, and that's a different issue. I don't think we probably actually disagree profoundly in that. But should the value of the matter be relevant to that? I mean, I think it's in the courts in South Australia, there's a sliding scale depending on both the length of time - it's a stage based thing, but also there's some reflection upon what's at issue. I'm thinking of disputes which are able to be characterised in a monetary sense.

MR DIEHM (BAQ): By adopting arbitrary figures that are very varied between court and court - that is, between jurisdiction and jurisdiction - I think that you'll do the best that you can do by that means. So the Magistrates Court will have a much lower fee, I suggest, than the Federal Court or the Supreme Court. The Family Court might see fit to adopt something in between, perhaps, because of the nature of the disputes. The difficulty with, I suspect, trying to adopt any kind of regime that is said to reflect the value of the dispute is that some claims, that is easily determined, others it's not. So a party may be seeking an injunction, for instance, and nothing more, to restrain particular conduct. How does one know what the value of that dispute is to the parties involved? It may be worth more than the Bell Resources case.

DR MUNDY: Indeed, and large environmental litigation has that character.

MR DIEHM (BAQ): Quite so. For that reason, about the only distinction we think can be made, which is probably what is happening in practice, is that distinction between jurisdiction, with an arbitrary presumption that things have a different value between - - -

DR MUNDY: And perhaps some recognition of the character of the litigant.

MR DIEHM (BAQ): Yes, as my suggestion about the Family Court, where larger sums of money may be involved, but in a different context - - -

DR MUNDY: And you may be a person making an appeal in the Federal Court, the consequence of the lack of success of that appeal is removal from the country. That's a profoundly different sort of matter.

MR DIEHM (BAQ): Quite so, yes.

MS MacRAE: I just wanted to take you up on your opening comments about court processes, because your written submission says very little about what we suggested there. But your opening comment appeared to me at least to suggest that some of what we're proposing might have the opposite effect of what we were suggesting. I guess I wanted to put it on the record that I think in all of our recommendations there, we weren't proposing that one size should fit all, and that while we were recommending that courts look at certain options, we certainly weren't saying that there would be hard and fast rules over which there would be no judicial discretion.

So I just wanted to make sure that you were comfortable with the style of recommendation in that chapter. I guess if there was something - you made some general comments about case management sometimes having the opposite effect to what was intended, but was there anything specific to our recommendations in that chapter where you felt that what we recommended might be of that sort, where there had been a recommendation, and you think, "Wow, if we did this - I can see why they're recommending it, but we're going to get the opposite outcome if that was to be adopted."

MR DIEHM (BAQ): Look, I think generally speaking not, in response to that last proposition. The written submission noted, I think, that we considered there was much to commend in the draft report, and so much of what's in the recommendations about that aspect of things meets with general approval from us. I'm in a position to add some comments about some particular matters. Can I also just clarify that that opening comment where I said that care needs to be taken because of the potential for, in some or all cases yet, a different outcome than what you might expect, I wasn't meaning by that that therefore recommendations shouldn't be pursued, but just a wariness, if you like, or a caution about what may yet be some consequences from those, and some of those, and hopefully more than not, can be addressed by exercises of individual discretion in the management of cases from time to time, and much of that is recognised by the commission in the draft report.

MS MacRAE: Yes.

DR MUNDY: Because we have had the opportunity to meet with a very large number of superior court presiding judges and others, and our sense is that they all think case management generally is a good idea.

MR DIEHM (BAQ): Yes.

DR MUNDY: We've been counselled that one may need to exercise some caution in particular regards if the court has - the Land and Environment Court Preston J makes an observation, and I'm sure he'd be happy for me to say this in public, about because of the nature of the way that court works, and because it has commissioners and judges sort of working through, and the smaller courts, but my sense of what you're now saying, Mr Diehm, is that we just need to be aware that sometimes case management comes a little unstuck, a bit like the old diary system working well became a bit unstuck.

MR DIEHM (BAQ): Yes. Yes, quite so, quite so. One observation that I might make - - -

DR MUNDY: Sorry, can I just finish that? And would your general view be that the management of those events which may not be common is a matter we really can leave for the judges to sort out?

MR DIEHM (BAQ): Yes. I mean there's a - - -

DR MUNDY: Rather than us trying to make policy to prevent them or to manage them.

MR DIEHM (BAQ): Absolutely, and one matter that has been raised in the draft report seeking further comment upon was a question about whether with discovery there should be a prescription of different regimes for discovery between different types of litigation, and to that I was going to say we think not because to think that the appropriate range of options out of the broad range of options considered by the commission that may be adopted from case to case for methods of dealing with disclosure can be quarantined by reference to a type of litigation, probably doesn't recognise that within different types of litigation there are different types of cases.

DR MUNDY: I think it's to be fair - I think this is a fair comment, that most people we have spoken to haven't thought as of today that discovery is the issue that it once was, and is not causing the problems that it once was.

MR DIEHM (BAQ): Yes.

DR MUNDY: So I don't think we need to - - -

MR DIEHM (BAQ): All right.

DR MUNDY: We probably won't detain you or probably the final report at any great length on that.

MR DIEHM (BAQ): Okay. Thank you. One of the matters though that I would speak against that was contained within the draft recommendation 11.1, and it is only one of the items within that recommendation, was the flagging of the abolition of pleadings. Now, I noted from the draft report that that recommendation has followed from comments that have been made in submissions or through more informal submissions about the unsatisfactory use of pleadings in litigation. I've got absolutely no doubt that there are many experienced lawyers who would share stories of cases where the pleadings have borne little resemblance, or have been very uninformative as to the issues being dealt with between the parties when a case actually comes to trial.

This is one of these perplexing problems that the commission has noted elsewhere in the report on more than one occasion, that a lot of these sorts of considerations and comments are being made with an absence of data to more definitively inform these sorts of comments, and so anecdotally it's pretty easy to come up with a statement to say, "Oh, pleadings are just hopeless and the expense that goes into them and the use that comes out of them," but I have a view, and I've canvassed this with some of my colleagues who have given me feedback about it, not just in preparation for today, but it's a topic that comes up from time to time because of another context that I'll mention.

Pleadings might be like democracy in that sense: not a very good alternative, but the best out of the lot of them, because there are many jurisdictions in which we practise in which there are no pleadings, and we do not like it, and we either construct pleadings in the absence of a formal requirement for them to exist, or we wish that we could because they do serve a useful purpose. They could be done better, there's no doubt about that, but like many other things that are considered by the commission in the report, just because something could be done better doesn't mean that you do away with it altogether.

So we would speak against that idea, speak in favour of better pleadings no doubt, and better use of them, and happily support the next recommendation there which is focusing on early identification of the real issues in dispute, which may in itself in case management identify the problems with the pleadings long before a matter gets to trial. But that is one point that we would urge reconsideration about, at least in terms of the way it's expressed at the moment as a more absolute statement.

One of the other comments I wanted to make was a consideration of

pre-litigation stage dispute resolution processes and how they may fit in with the litigated stage case management. I can give you some examples about this. In this state, and perhaps in others as well, in personal injury litigation there is a regime - under various different pieces of legislation there are regimes that require pre-court processes. That is, before you can commence proceedings for your claim for damages, you must serve a notice, and you must exchange documents, and there are opportunities for asking questions and particulars, and also getting expert reports for the claim, and then the parties are required to attend a settlement conference or mediation, and only if all of that fails, and offers which are exchanged aren't accepted, is the party entitled to commence proceedings - the claimant entitled to commence proceedings.

I pause to note that I wholly endorse a comment made by the commission in the draft report about the risk of pre-litigation processes merely front-loading the costs because this is an area of litigation I think where it was thought that these processes would reduce costs and it may well have had the opposite effect, particularly for cases that do go on to be litigated because all of the same costs that had the matter ready for trial before are incurred before the litigation commences, and then the parties start over again to an extent. Now much of that groundwork is done, but much isn't, and they end up replicating, or altering even, processes beyond there.

But aside from that issue, one of the other issues that arises out of that process is the impact that it would then have on case management, and we see that again in this state. The commission has made a number of comments about expert evidence, and has referred to the various regimes that exist for managing it under rules in different states, and we agree with everything that has been said I think in that area. But one of the problems happens with those sorts of cases, and it can happen in other cases as well, where the parties, or at least one of them, has already obtained the expert evidence that they propose to rely upon before the litigation has even commenced. So the opportunities for control then, and what you do about that when you are bringing it into a case management regime, become problematic.

DR MUNDY: Indeed the expert evidence may have been necessary to form a view whether to bring the litigation at all.

MR DIEHM (BAQ): Yes, quite so and - - -

DR MUNDY: Particularly in some sort of industrial defect matter or something.

MR DIEHM (BAQ): Yes. So in a range of commercial litigation very often perhaps it might be thought that when the litigation has actually commenced, absent any pre-court processes at all, one party, that is the plaintiff or applicant, will have obtained expert evidence, and the other one has 28 days to file a

defence and has done nothing. So those sorts of problems exist obviously from a practical point of view.

There are also contemplated by the commission with respect to these pre-litigation sorts of processes a range of different models that are in place, I suppose, in different jurisdictions that may require parties to have some kind of negotiation for instance before commencing proceedings, and all of those sorts of reforms have been introduced for plainly very good reason, and are useful. A thought that may arise from what the commission has set out in section 11 of the report is whether there is identified there a connection between the pre-litigation processes and then the post-litigation case management, and whether or not the commission might give some further consideration to identifying just what's intended in that regard because as I read through it I wasn't certain as to what that connection necessarily was meant to be.

DR MUNDY: Others have made that point to us. Just want to come to the question of contingency fees on litigation funding before we close.

MR DIEHM (BAQ): Yes.

DR MUNDY: But just at item 45, and I'm happy for you to take these on notice, Commissioner MacRae and I know a little bit about GST. The reason why we didn't bother to look at the impact on the cost of legal services due to GST is we have every confidence that the ACCC enforced the law at the time, and we don't see it would have gone up by anything very much different to 10 per cent. So we're not quite sure why you want us to devote resources to that, to the pursuit of that question, but if you've got some evidence that suggests that it was anything other than 10 per cent, we'd love to see it.

At 45(b) you go on to say that we don't identify and quantify the per capita trend of substantially increased funding for civil and litigation assistance by state and federal governments. Perhaps again you'd like to take on notice and advise us why you consider the material contained in figures 20.7, 20.8, 20.9, 20.10, 20.11 and 20.12 as not adequate because that is about all the data that is publicly available. It breaks it down by jurisdiction, type of service, type of provider, and so on. So perhaps you might reflect on that, and if you are minded to provide us with a substitute or replacement submission, you might think that is a matter that's been properly dealt with.

MR DIEHM (BAQ): Thank you.

DR MUNDY: Can I just finally bring you to an issue that has led to some commentary at least in The Australian and other media outlets about the views we've expressed about litigation funding, and by and large I think it's fair to say that our

view is litigation funding is something that can support access to civil justice.

MR DIEHM (BAQ): Yes.

DR MUNDY: And I don't think that's in dispute. The concern seems to be within the debate is a rise in what might be called securities class actions.

MR DIEHM (BAQ): Yes.

DR MUNDY: Of which we have been advised there might be three or four a year within Australia as a whole. I guess there's a couple of issues here, and it becomes also the question of contingency fees because when we look at litigation funding and contingency fees, from an economic perspective, and that's sadly what we are, other than who is providing the funding, they actually sort of look to work the same, putting aside an ethical question which actually cuts both ways. So I guess I'd be interested in your views about litigation funding and why, if you see this sort of IMF Bentham type - you know, the cases like the ANZ fees case for example - - -

MR DIEHM (BAQ): Yes.

DR MUNDY: - - - as undesirable or not. Any views that you might have on the relationship between contingency fee basis on one hand, and litigation funding on the other, and one other thing that you've raised with us, which I think we may bring our mind back to, and that's the question of the role of the economic regulators, and particularly you're referring to the ACCC and ASIC. I guess the question that would be asked is what is the relationship between ASIC and the fact that a litigation funder had to bring the ANZ fees case which was ultimately about a consumer protection issue and an interpretation of contract issue.

MR DIEHM (BAQ): Yes.

DR MUNDY: I know there's a bit in that, but tell us what you think, and we'll ask you some more questions.

MR DIEHM (BAQ): All right. I don't think that we would make any submission in a broad or general sense against litigation funding.

DR MUNDY: So as long as it's properly regulated and there's appropriate prudential standards and ethical - and all the stuff we've talked about basically.

MR DIEHM (BAQ): Yes, quite so, quite so, and on contingency fees, it's obviously a topic that's been considered widely, and you've had some very detailed submissions about it, and I don't think I can add anything to any of that.

DR MUNDY: Okay.

MR DIEHM (BAQ): The issue about the role of the regulators is something that we were intending to allude to by our written submission, and I mean I see, and perhaps I've misinterpreted it, but what I read in the draft report that spoke about the role of those particular organisations, ASIC and the ACCC, was a role shared by many other government and semi-government organisations that are listed in the report, from a point of view perhaps of an ombudsman type service, and that's desirable and is what it is, and we don't derogate from that, but of course there is a greater capacity for the regulators, either concurrently with or separately from, bringing regulatory proceedings to bring proceedings that seek recovery of losses for consumers as a class in particular, but perhaps even sometimes as individuals and - - -

DR MUNDY: But also other parties presumably in section 4 matters under the competition law where there's been unlawful conduct.

MR DIEHM (BAQ): Yes.

DR MUNDY: Cartel conduct if you like.

MR DIEHM (BAQ): Yes. Yes, those very sorts of examples. So what we were meaning to address is that, certainly from the point of view of an access to justice issue, that is an area where obviously a more expanded role being played by those sorts of regulators may help with respect to alleviating - - -

DR MUNDY: And presumably bodies like environmental protection authorities and public health - you know, food safety bodies.

MR DIEHM (BAQ): Yes, yes. A wide range of such bodies.

DR MUNDY: Not something we've thought about. We do an awful lot of work about regulators, but I think you make a reasonable point, Mr Diehm, and we should perhaps at least reflect upon that for a paragraph or two on the way. The last thing we want to do though is recycle 20 years of work.

MR DIEHM (BAQ): Yes, quite so.

DR MUNDY: Do you have any more?

MS MacRAE: Not on this one.

DR MUNDY: All right. Well, look, thank you very much - time. As I said, if the Queensland Bar Association is mindful and wish to put something further to us - - -

MR DIEHM (BAQ): We shall.

DR MUNDY: - - - or replace its current submission, we'd be more than happy to facilitate that.

MR DIEHM (BAQ): We will do that. Thank you.

DR MUNDY: Thank you.

MS MacRAE: Thank you.

DR MUNDY: These hearings are going to adjourn for approximately five minutes.

DR MUNDY: Could we have Mr Stuart Venn, please? Could you please state your name and the capacity in which you appear?

MR VENN: Thank you, Commissioners. My name is Stuart Bruce Venn. I appear as a trustee.

DR MUNDY: Okay. Mr Venn, before I ask you to make a brief opening statement, because you weren't here this morning, I should remind you that this commission is not able to investigate individual matters. We're concerned with public policy. Nor are we able to overturn or make recommendations for the reversal of any particular decision that any regulatory agency or court has made. I must also advise you that whilst our statute requires you to be truthful in the statements you make to us, you are not afforded any protection against defamation in participating in these proceedings. We are not a parliamentary committee, and any person aggrieved with what you might say can bring action against you for defamation.

MR VENN: Yes.

DR MUNDY: So I just want you to understand that because some people think we're like a parliamentary committee, but we don't afford that form of protection.

MR VENN: I've read the scope of the inquiry initially from the assistant treasury of the former government, and to be quite honest with you I'm thankful that you will even allow me to appear today because obviously it didn't really canvass complaints of actual cast studies. I think the relevance of the case study - - -

DR MUNDY: We're interested in - I just want to make sure - - -

MR VENN: - - - or even how the system is working - - -

DR MUNDY: I just want to make sure that you don't have any expectation that there's something we can do to resolve a matter.

MR VENN: No. It's simply when you don't receive access to justice, can I just say before I commence, you're always searching for closure.

DR MUNDY: Yes.

MR VENN: For me today I'm getting closure.

DR MUNDY: Okay.

MR VENN: Thank you.

DR MUNDY: Thank you. So if you would like to make a brief statement, and then we will move on to ask you some questions.

MR VENN: I believe that the format is that I have five minutes to give a background, and then 25 minutes of question and answer, so I've structured it around that.

DR MUNDY: And if you take eight minutes for an opening statement, that's fine too.

MR VENN: I do have a copy of what I'm going to say for you to follow - each to follow, if you'd like me to hand that up to you.

DR MUNDY: Look, just say what you want to say. That will be fine. We're paying attention.

MR VENN: Okay. Thank you, Commissioners, for the opportunity to appear today. I appear before you as a trustee, a person who employed hundreds of workers completing construction projects before I became financially incapacitated by wrong directly and indirectly in connection with the A New Tax System, ANTS. My business, my home and superannuation property has been taken by false pretences. Before the ANTS I remitted subcontractors' PPS taxes as required by the tax regime and did not have issues with the taxation authority before ANTS as I recall.

I hear in the previous session that both of you are familiar with GST, so I do welcome being before people that have an understanding of what is a very simple tax that was made into a nightmare. The evidence of unjust transaction I now disclose to you both is annexed to my statutory declaration dated 18 June 2014 now on the public record. I believe this commission of inquiry into access to justice gives effect to a right provided by law to a complainant. Others have chosen otherwise. Could I hand you up my statutory declaration?

DR MUNDY: Yes, if you wish. If you just give it to Mr Raine, he will make sure it enters the public record appropriately. One copy will be sufficient for us for the record.

MR VENN: Okay. I'll keep it here in case you need to look at it. Thank you. The two pages of evidence are a product of either an unknown person in connection with the Australian Government Taxation Office, or its own public official. In any case, that document's a shadow account of the truth surrounding five transactions somewhere hidden in the background. ASIC, as watchdog, are simply complicit. What I'm saying there is I've got two pages of evidence of a document owned, produced, authored, by a public official in the Taxation Office.

DR MUNDY: Okay. I'll want to review that document before I admit it to the public record because we won't allow documents that identify individuals, but we'll have to form a view of that.

MR VENN: It doesn't identify an individual.

DR MUNDY: Well, it's not a document that I've sighted, so I can't form that view.

MR VENN: So anyway.

DR MUNDY: But we will consider it and then make a decision, but we won't do it immediately.

MR VENN: There's the page 2. So what we have there is a document produced with a whole lot of blacked-out figures on page 1, referred in the statutory declaration. On page 2 is a scanned version of that and you can see that the blacked-out figures have been scanned. Because I had the original given to me by a public official, that document is electronic and able to be scanned. So unknown, I suppose, that the tax official gave me a document, it took me years to understand what happened that I eventually scanned and now found five hidden amounts that they were wanting to conceal from me in a tax assessment. This is the first time I have ever been able to speak to someone about this, despite representations and so forth to Mr D'Ascenzo and people appointed by him, no-one wants to know about it.

The significance of, in the third transaction on 28 February 2002, you can see how there was two blacked-out amounts in that period. Someone is double dipping. On the right-hand side you can see columns called GST On Cash and GST On Non-Cash. Well, at this time, I'd only been involved with GST for a couple of years because it only came in in 2000, but nowhere in the documents that were published or in any law books can I find the terms "GST on cash," and "GST on non-cash." I haven't been able to have anyone over this period of time explain that to me. I have my own thoughts on what that means and the consequences of it.

All of the figures in these documents, in page 1 that page 2 reveals the secrets, are total fallacious account of a financial transaction. They never happened. Well, that movement of money didn't happen as a result of me constructing something, paying out money and receiving money. Someone was doing this in the background. That's all I can say about that without labouring on the point that it's a total phoney document, a false account, shadow account, call it what you like, it's another account of the truth - it's a false account of the truth.

Acted on by the banking system, accountants, financial planners, lawyers and at least one other person, the five unjust transactions at page 1 that I've highlighted for you that were scanned, down in the third-last column, operated against me

without my consent, knowledge or permission. In all probability, through seven layers of accountability summarised below, (1) banking; (2) constructor; (3) accounting; (4) financial planner investment superannuation; lawyer (5); tax office (6); body corporate (7). So in access to justice me at point number 2, have got banking above me and 3, 4, 5, 6 and 7 is make up by tax office, lawyers, financial planners, accountants, and body corporate. To get access to justice to establish that of all those seven entities and I'm number 2, six duped me, well, it's pretty impossible, I put to you, without being too trite.

My submission to the Productivity Commission in November 2013 at page 1 included issues surrounding misuse of Commonwealth refunds, risky operation by banks' lawyers, not for value accounts, shadow accounts, not for profit entity invention, the diaspora of wealthy Australian professionals who do very well out of this sort of thing, a pattern followed of ill-gotten gains in the 80s and 90s, poor administration of government concerning rural assistance schemes and other health schemes, state of impecuniousness, pioneering restructure models by National Australia Bank Ltd arguably in complete disregard of trust, in all probability over many years unfortunately, double dip Commonwealth Bank, furtiveness, secrecy. These are all matters I raised in my initial submissions to you that I'm now thanking you today. Business models, lawyers and banks follow into the future.

I'm on page 2 of my background now. How Someone Breaks The GST Law, How It Works In Banking - that's heading - (a) breached relevant laws or duties imposed by law and did not give effect to a right provided by law to the complainant in relation to the subject matter of the complaint. I then have a table here of split loan, non-compliant with relevant laws, how it works. This is a case study that was before the Commissioner of Taxation and Hart, a Canberra person. Anyway, the lawyer summarised it in 2004, a couple of years after it seems like I was subjected to the same illegal operation.

Loan account 1 refinanced a taxpayer's home loan, and loan account number 2 funded an investment property. That's complex steps 1, 2 and 3. Complex steps 4 and 5, the terms of the agreement allow the taxpayer to repay principal on the home loan rapidly. Complex steps, points 6 and 7, while no principal or interest was repaid on loan account 2. 8, the interest on loan account 2 compounded. 9, 10 and 11, to complete the operation, and a deduction was claimed for interest and compound interest. So that's the loan system that followed that was found in 2004 by appeal by the Commissioner of Taxation to be illegal.

All of these numbers that were hidden in the Tax Office document were part of the scheme. My property was used as a loan account 1, refinanced to taxpayer's home loan. Well, I know that didn't happen, but I know someone might have replaced my home loan with their own debt and carried out an operation like this. (b) under this heading, how someone breaks the GST law, how it works in banking is

breached an applicable code of practice obviously. (c) did not meet standards of good faith and practice in the financial services industry, and (d) acted unfairly towards the complainant. So that's how someone breaks the GST law and how it works in banking. They're all principles, the (a), (b), (c) and (d) of an injustice of the law.

My case study, I was interested to hear recently - I think it was the very well respected, and I call him a friend - not that I've ever met him, but I've seen him enough on TV - Prof Fels, where he said he knew that a lot of things were going on out there - well, he knew that things were going on. But the essence of what he said was, it's just hard to prove. That's why the battle that regulators have - so my case study has got 10 points here. Mortgage number 705292225 constructed plus GST conditions added. GST conditions added are call GST gross-up provisions. Signature of trustee, me, obtained on page 1 and page 3. I have the document here if you would like to just see it so you can see what my signature is.

DR MUNDY: Mr Venn, you've gone well over the five minutes, and we do need to ask you some questions. So if you could bring your opening comments to a conclusion.

MR VENN: Okay. So if I can just go through this case study of how a person's signature is taken and used in a mortgage document. At point number 7, Australian Taxation Office forgery applied from 2001. Mortgagee retains GST on sales throughout 2002 and 2003. When I say that, you may well be aware from the senate inquiries that retention of GST by banks was in fact a loophole in the system. Australian Taxation Office engages an AGS lawyer for liquidation of the constructor, April 2003. Australian Taxation Office issues three Crimes Act notices to three banks, November 2003. There's the document from the Australian Taxation Office requisitioning three banks. This is requisitioning National Australia Bank to pay the Commonwealth \$292,510.12. It gives a warning: if the debt or any part of the debt is not paid, offences under the Crimes Act 1914 shall apply. Are you interested to see that document?

DR MUNDY: Yes, sure.

MR VENN: I then go through just in the case study how three of those amounts added up to \$877,530.36, three banks: National Australia Bank, Suncorp Metway, Bendigo Bank. What they did then was add my balance owing on a business account by the National Australia Bank of \$8000. They issued a notice to resume all my property, take my superannuation of property, on the eve of me starting construction, on a time when, according to this false statement, the operation was under way. When you do all that and you take away what the actual home loan was and superannuation property was, with NAB and Macquarie Bank, you come up to a situation where what I believe was happening, and I proved, is an offshore banking

unit of \$215,000 operated by CBA and Macquarie Bank.

I can finish. That's my background. There were a couple of other points, I wanted to hand up another statutory declaration, and I would like to provide you a copy of the Commonwealth Ombudsman summary of my complaint that was made in 2007, also for the public record.

DR MUNDY: Okay. We'll consider those documents as to whether we put them on the public record in accordance with our normal policy, because we do have procedures about how - we need to satisfy ourselves that no individuals are identified. That's something we have to do, out of fairness to others who aren't here. But we'll form that view and let you know what we decide in the next couple of days, when we get back to the office and we've had a chance to do so.

MR VENN: Yes. In that respect, I'm just saying that I've been around for a long time seeking justice, I've been through the ombudsman service, but the ombudsman gets a report, something to investigate, and then goes back into the Tax Office files and sees, at the end of the Tax Office report by a Devron Schwinn that was reporting back to the minister in 2006, that says, "No-one shall ever speak to Mr Venn again," the ombudsman is hamstrung.

DR MUNDY: Okay. I did ask you not to identify individuals, and you've just done so. I would ask you not to do that again. But we'll have a look at the material and form a view on it. Can I ask if and when you formally approached the Australian Taxation Office with respect to its dispute resolution processes, roughly? When did you do this?

MR VENN: It was in 2006. You would be aware, once the Australian Taxation Office put my company into bankruptcy in April 2003 by the AGS solicitor. I can't say anything. It wasn't until June 2006 that the liquidator resigned. By October 2006, I've gone to the Commissioner of Taxation Office, through the minister, Peter Dutton MP. So that's my attempt from there. After that, when it was concluded that the Tax Office made an error in the proof of debt delivered to the liquidator on 23 April 2003, but the Tax Office would not make any correction. I then became really concerned there is no access to justice. I then took the - sorry, I was trying to answer the chronology of my attempts to get - - -

DR MUNDY: You've answered the question that I wanted the answer to. You've obviously had some interactions with the banks which have been less than satisfactory. Have you raised the conduct of the banks with the banking ombudsman?

MR VENN: No, I spent three or four years of my life trying to get justice through the banking system and took an action against the Bendigo Bank. I was able to do

that even though the company was in liquidation because I'm a trustee of a property trust. I was just a builder, that was a sideline, but I'm a trustee of a property trust. I have all of the original documents, the secretarial notes, of two property trusts.

DR MUNDY: I was just interested as to whether you had raised the matter with the banking ombudsman.

MS MacRAE: I think the best thing would be to take these materials away and - - -

DR MUNDY: What we will do is we'll take these materials away and have a look at them and re-read the transcript. We may be in a position to at least write to the tax commissioner and draw his attention to the fact that these matters have been raised with us. There's little else we can do about the particulars of your matter, but that's the nature of the organisation that we are.

MR VENN: I just appreciate the chance of being able to talk to people. For me, I'm feeling I'm getting closure. I've said and done what I can. In preparation for today, I've read the draft report issue thus far by the commissioner. I've even had 700 or 800 pages printed. So I did want to come and appear here, not just to sort of think that maybe you will help me, but - and I went on to say, only a handful of submissions, it seems, have arisen from persons citing actual case study of injustice. I do appreciate the scope of the inquiry from the former assistant treasurer may not necessarily have canvassed these, otherwise most of the submissions are from groups seeking additional funding from government as a means to help various classifications of disadvantaged persons that arise one way or the other.

I like the work that's been done in the draft reports to this inquiry. I will try to be helpful to the inquiry. I then extracted (b) in the summary pages, unmet legal need, and I then saw your analysis of the different percentages and problems relating to insurance and banking service account at 17 per cent, instances of unmet legal need in the consumer category, two industry ombudsman and the financial ombudsman services and the credit ombudsman service provide avenues to address these disputes, however, with the telecommunications there are relatively few instances of ombudsman being used to resolve those problems. You then went on - the report then went on:

Government problems, and the third most common problem associated with the unmet legal need in the government category related to tax assessments and tax debts. Australian Taxation Office offers the opportunity to review complaints about taxation assessments and decisions.

Well, they don't, in my case.

DR MUNDY: In your case, yes. We understand that.

MR VENN: And there's been plenty of evidence before senate inquiries that maybe there's something happening there from the model litigant that's a little bit, you know, not good. Failing that, the Commonwealth ombudsman can also hear some tax related disputes, been there, done that, and then they talk about the AAT. I then extracted - because I've read the transcript from the Canberra sittings that you've had, and that's why I'm saying I'm trying to be helpful and give you feedback and, Dr Mundy, you said in relation to one of the submitters, "You said you might come back to Outreach," well, I suppose I've outreached, and then you said:

Perhaps start there. One of the things we were asked to do is to try and get a handle on unmet needs. Getting a handle on met needs is hard enough, but trying to know what isn't met is even harder. Do you have thoughts, irrespective of the measurement problem, and do you have any thoughts about the measurement problem and, in particular, observations being made about the law survey?

Well, are you to ask me that, or have I given you an idea as to what I think about that?

DR MUNDY: No, I mean, without having the benefit of the transcript before me but having a reasonable recollection of what I would have said, that would have been in the context of the way the law survey is constructed which is a phone base survey, so obviously it doesn't facilitate surveying people who don't have fixed line telephones, indigenous communities probably being one of the more notable. So we are interested in the matter. I mean, I think it does - the commission over recent years has received a substantial amount of work material and views about the Australian Tax Office in its behaviour and it covers a broad sweep.

So this is further to that stock of evidence and we do find the material that you and other individuals have given to us about very poor outcomes in getting their disputes resolved quite helpful. So we do appreciate your time to come and see us today and we will, once we've had a chance to reflect upon the material, see what, if anything else we might be able to do and how, you know - I think part of the challenge always is - and I do note that these matters have obviously dragged on for a long period of time and there have been a number of senate inquiries into the conduct of the ATO and some of the participants of those I am particularly close to, so I am aware of the very profound impact that poorly handled matters by the ATO have and still do have on people. So we do understand and we do appreciate the time that you have taken to come and see us. So we will - and if there's anything further that we would like to ask you once we've had a chance to look at the material we'll certainly get in contact.

MR VENN: Yes. Well, thank you for that. Can I just say a few things in terms of trying to be helpful, and I put it under the heading What Can You Do For Me. Anyway, please don't - you don't have the power to do it obviously, but anyway, these are what I think should happen overall. Stop land being seized from anyone when they are not present. That's what happened to me. A person, a lawyer gets up in court and says, "This person owes this amount of money, \$155,000," and the court, without me present, without the documents being served, orders seizure of my property. Someone must stop that. It's endemic out there, it's happening to lost of people.

Point number 2, stop signatures of a person becoming a tool for forgeries. What happens when a person signs a home loan or something, they sign it, and then it goes off and gets stamped with something - another stamp appears on the document related to stamp duty for a different amount than the loan. Now, it could be said, "Well, you could have looked that up straight away after your loan started and then raised the question," but you don't know that that's the sort of procedure that goes on.

My next point is, stop accounts being used against any person that are not certified not true and correct by a director of the corporation who is alleging you owe them money. All that happens is there's an affidavit that this person owes this amount of money, and here's the bank account, it's not certified. It's not certified true and correct. If people had the onus, a director had the onus of certifying it true and correct, there would be a different outcome.

Point number 4 - sorry. Stop the hiding of money engaging in bogus offshore transactions. I've shown you five amounts hidden. There's offshore transactions of \$215,000 offshore banking. You've got to stop it. It's ruining the economy, not just my economy. It's happening, it's widespread. Offshore banking units are widespread. Chicago, USA, I can take you to that document, \$206,000, July 2002, just before I got a copy of this. So I just ask you, number 4, not just for me, a lot of other people out there have been hurt by the hiding of money, engaging in bogus offshore transactions.

Thank you. I do have my wife here with me who was going to read something out, but that's past. John Salmon is a banker from past experience that is able to make a witness statement from his experience, what it does to people when they're served an injustice.

DR MUNDY: I think, Mr Venn, I did advise you at the start of this discussion that we weren't in a position to revisit the decisions of others. I think from our view we've got the evidence that we need to do our job. As I've indicated, subject to reviewing the written material that you've given us, we'll place it - and you're obviously for it to be placed on the web site - we just need to apply our normal

processes, which we will do, and then we'll have a look to see whether there's anyone that we may be able to refer these matters to. I am mindful of time and that we do have other witnesses that we need to hear from. So again, thank you very much for your time and coming here today and these proceedings are adjourned until half past 3.

DR MUNDY: We'll resume these proceedings. Could I ask you, please, to state your name and the capacity in which you appear.

MR FARRELL (QAILS): My name is James Farrell. I'm the director of the Queensland Association of Independent Legal Services, the peak body for Queensland's network of 34 community legal centres.

DR MUNDY: Thanks, James, and thank you particularly for the support you have provided us to date in the course of this inquiry and your regular attendance. Did you want to make a brief opening statement, five minutes or so, and then we'll ask you some questions?

MR FARRELL (QAILS): I will keep it brief, thank you, commissioner, because I think our time would be better spent engaged in a bit of conversation, and I understand you've had conversations with some of my peers in other parts of the country over the last few weeks.

DR MUNDY: And hopefully we've clarified some misunderstandings.

MR FARRELL (QAILS): Terrific. I'm glad to hear that. Thank you for the work that you have put into the draft report. It's an outstanding report and generally one that legal assistance services are very supportive of much of the work that you've done there. I think one of the key pieces of work, and I know that you've seen this in supplementary submissions, including our fourth submission with other community legal centre peaks, was around the need for some measurement of the need and the cost of addressing that need, which at this stage I think is the large missing piece of the puzzle here, and I'm sure that I'm not - - -

DR MUNDY: So do we.

MR FARRELL (QAILS): - - - the first person that you've heard that from. Thank you.

DR MUNDY: Hopefully everyone in the office just heard that.

MR FARRELL (QAILS): So in that context while a number of the recommendations that have been made that apply specifically to legal assistance services address some of the efficiencies that can be made in the design and delivery of legal assistance services and legal assistance programs, I think it should be noted the extent to which organisations look for efficiencies in the way that they already operate, and we see that in community legal centres here in Queensland.

We had one late last year that was kicked out of its building because the

building became condemned. They're the kind of spaces in which we're operating, and the types of efficiency and the type of hand-to-mouth existence of community legal centres. So, like you, we work very hard to find efficiencies to ensure that we can provide as many direct legal services and community development services, including legal education, including systems advocacy that we can.

But ultimately the question I think that we should answer, and I don't know that I can provide you with answers for this, but certainly a large piece of the work that needs to be done is around trying to understand and quantify the legal need, and then work out what an effective response to that legal need looks like in terms of service delivery, and how it ought be resourced. I'm quite happy to leave my opening remarks there, Commissioners, because, as I said, I think our time would be far more usefully spent in a bit of a conversation.

DR MUNDY: Okay. Thanks, James. I guess the first question that I'd probably like to ask you - and we aren't seeing very many of your members. Bit different to other jurisdictions. That's not a criticism, it's just an observation. But I'm sure you're aware that the Commonwealth has recently reprioritised expenditure and that has led to I guess two things: a reduction in that expenditure; but also a move away from what might be described as advocacy and law reform to frontline services. So I guess my question comes in several parts.

The first is what's been the extent of those funding reductions in Queensland for your members, and can you illustrate the sort of outcomes that that funding activity has led to, and is it your view that that funding reduction or reprioritisation has in fact impacted only advocacy law reform type issues, or has it actually directly impacted the frontline delivery of services, and particularly to vulnerable or disadvantaged people?

MR FARRELL (QAILS): My short answer is yes it has had more - or deeper impacts than were intended, but I might take a bit of time to explain how Queensland - - -

DR MUNDY: Please do.

MR FARRELL (QAILS): How it applies, particularly in Queensland, and respond in part to the observation that you made that there aren't many of our members attending here, differently to other parts of the country. The geography in Queensland is such that with such a decentralised state we have far fewer - relatively to other major metropolitan cities, particularly Sydney and Melbourne, we have far fewer community legal centres in Queensland. I note an observation in other submissions talking about 10 or 12 community legal centres within 10 kilometres of the GPO in Sydney or Melbourne. It would be, I suspect, three or four in Queensland of those generalised community legal centres in the same - - -

DR MUNDY: What about the specialists?

MR FARRELL (QAILS): Most of those are based in Brisbane. There are some based in northern Queensland, and I'll give you the example of the North Queensland Women's Legal Service, or the Environmental Defender's Office in North Queensland, again reflecting the geography of Queensland, and a particular concern sometimes in non-metropolitan areas that where services are focused and resources are directed solely at Brisbane, people in the regions suffer.

You made some important observation in the draft report I think about the way in which people in regional, remote and rural areas have significant difficulties of accessing legal assistance, and particular types of legal problems from time to time, and we see that writ large here in Queensland, and so I would note that of my 34 members, half of them are outside what we would call the south-east corner of Queensland, reflecting that decentralisation.

DR MUNDY: So that's the Sunshine Coast down to the border.

MR FARRELL (QAILS): Effectively, yes, and as far west, I suppose we would probably say that Toowoomba is outside that.

DR MUNDY: Is outside, but Ipswich is in it.

MR FARRELL (QAILS): That's right.

DR MUNDY: Okay.

MR FARRELL (QAILS): So it was particularly disappointing I suppose that of the 11 centres that are going to have funding redirected from them, six of them are regional centres, three of them are in the outer suburban areas of Queensland, and two of them are statewide services, so - - -

DR MUNDY: The six in regional areas, could you just advise which they are?

MR FARRELL (QAILS): If I could take that on notice.

DR MUNDY: More than happy for you to take that on notice.

MR FARRELL (QAILS): My recollection is though, and I will check this, Sunshine Coast, Townsville, Cairns, Hervey Bay, the Aboriginal and Torres Strait Islander Women's Legal Service of North Queensland - - -

DR MUNDY: That would be based in Cairns or Townsville?

MR FARRELL (QAILS): Both.

DR MUNDY: Both.

MR FARRELL (QAILS): Mainly in Townsville, but with outreach into Cairns. And the sixth escapes me, and I apologise for that, but I will take that on notice and come back to you. So it is those regional centres that are hit by these things. To give you some examples of how the - because these were, if you like, additional funds provided under the previous government, it might be illustrative to talk about how those centres directed those funds because they haven't made decisions yet about what services are going to be cut.

But if I could give some examples, South-west Brisbane Community Legal Centre is in Inala, one of the more disadvantaged areas in Queensland - sorry, in the Brisbane area. They use their services to ensure that there were child protection duty services and youth justice services available for young people that are caught up in the criminal justice system. The Sunshine Coast Community Legal Centre used their funding to employ a specialist family lawyer because otherwise they had practically zero family law expertise on staff there. The Gold Coast Community Legal Service developed a duty lawyer service for domestic violence applications that assisted people with family law services, initiated another two or three outreach family law services through the Gold Coast and Scenic Rim local government areas. In Townsville I understand that the majority of the funding that was provided there was directed towards family law services, again increasing the need there.

So that's what the funding is being used for at the moment, and those organisations retain that funding until 30 June 2015, but what happens after that and what services are going to be cut are unclear at the moment. But I also flag that those services do very little, and often no, law reform or systemic advocacy work, and so the suggestion that it is law reform activities for which resources are being withdrawn does not reflect the activities of the organisation as they have existed till now, and as they have used their resources up until now. So I think that's - it's disappointing that there is a perception that there's all of this law reform activity happening in regional areas at the expense of frontline services, because that's not what CLCs are doing in Queensland.

DR MUNDY: And it appears from the evidence we have received nowhere else. Can I just - you mentioned the two statewide specialist services. I suspect one or both of those might be an environmental defender's office.

MR FARRELL (QAILS): So to clarify, this is a second round of funding in addition to - - -

DR MUNDY: Yes.

MR FARRELL (QAILS): There was an announcement in December withdrawing funding from environmental defender's offices. The statewide service is the Welfare Rights Centre which assists people with disputes with Centrelink, of whom there are many in the disadvantaged client groups that CLC focus with, and the - - -

DR MUNDY: They would be predominantly Commonwealth matters, if they're disputing with Centrelink.

MR FARRELL (QAILS): Predominantly that's right, but our State Government recognises the importance of that work and does provide some funding to that organisation. The other is Tenants Queensland. Queensland was fortunate up until about slightly less than two years ago. We had a network of tenancy advice and advocacy services. There were 29 offices around the state funded by the interest on residential tenancy bonds.

DR MUNDY: Yes. Bit like the solicitors trust account.

MR FARRELL (QAILS): Not dissimilar to, as we call it in Queensland, the LIPITAF, the Legal Practitioners Interest on Trust Account Fund.

DR MUNDY: Thank you for that. Someone was going to have to work out what that was. Thank you.

MR FARRELL (QAILS): But, yes, a similar design. My understanding is Queensland has more renters than any of the other states in Australia. It was a fantastic program. I think there's about 500,000 renting households and in the last full financial year in which that service operated, they provided assistance to 80,000 of those households to provide them with information and advice.

DR MUNDY: Was that 80,000 of those households? There weren't 80,000 matters, there were 80,000 households.

MR FARRELL (QAILS): That's my understanding of it, yes. But again I can seek clarification.

DR MUNDY: Yes. No. That would be helpful.

MR FARRELL (QAILS): I think that's a great model particularly - and something in the way that we think about how like paralegal or quasi-legal services can provide access to justice. I think that tenancy model is a terrific one, as is the model of financial counselling, which is in some ways paralegal type work undertaken by extremely skilled and knowledgeable people in areas where there are significant

issues, and I think one of your previous witnesses today spoke about the Law and Justice Foundation of New South Wales' findings about consumer law being the biggest - consumer and credit debt being the biggest area where people report having legal problems. Having highly skilled paralegal roles in some of those areas is a particularly beneficial service for the community we would say.

DR MUNDY: We'll come back to that just in a moment, but before leaving the funding issues we've been advised that it's likely if circumstances don't change that the EDOs in certainly the ACT and Tasmania will probably cease to function at all, or certainly in anything that vaguely looks like their current form. Are you able to advise us what the impact of the cuts of last year have had on - because I don't - - -

MR FARRELL (QAILS): They are members of mine, but I don't feel that I can - because there's so much uncertainty, I'm not sure where they're at today. So again - - -

DR MUNDY: Could you perhaps inquire of them - - -

MR FARRELL (QAILS): Certainly.

DR MUNDY: - - - if they wished either to make a submission to us very promptly, or if you could get back to us as part of your responses, that would be helpful. Okay. Beyond that - put me off my game now. We were coming back to paralegals and those sorts of questions. The circumstances you just seemed to have described are actually people who are skilled in a particular area for which a knowledge of a particular part of the law is essential for them to provide the services to their clients. Is that the sort of model that you've got in mind?

MR FARRELL (QAILS): Certainly, and that's - I mean to use those two very real examples in Queensland, generally speaking financial counsellors undertake a recognised qualification by a TAFE that provides them with the skills to advocate in terms of consumer problems that people have. Similarly the tenants' advocacy service, they receive significant training delivered by Tenants Queensland as the specialist CLC in the space which provided support to that network of offices, again recognised jointly with the Tenants Union of New South Wales as a registered training organisation.

So again formal qualifications with some rigour around them. I should say too our governing legislation for the profession recognises that where schemes - again I will come back to you with some information about this, but where schemes are funded by government or otherwise recognised in legislation, then it may be that people can offer these quasi-legal services while not lawyers because, as you know, there's generally a prohibition in engaging in legal practice unless you're a qualified lawyer, but there is a carve out for some of these types of programs, and I think that's

appropriate - - -

DR MUNDY: So that would recognise, in an historic context, provision of industrial advocacy services by recognised trade unions and their employer organisations.

MR FARRELL (QAILS): They are specifically mentioned in that section of the Act from my recollection.

DR MUNDY: They get a special tick. Do you see any other areas where this sort of model training might be useful to be extended? I'm thinking perhaps disability advocacy areas, or those sorts of matters.

MR FARRELL (QAILS): I think there's many, and where you can reflect a high volume - - -

DR MUNDY: Mental health might be another.

MR FARRELL (QAILS): Yes. Where you can reflect high volume users of a system that have difficulties navigating that system or understanding their rights. You mentioned mental health. I think that's a great example. In the Northern Territory there is a legislative requirement, as I understand, that people appearing before their equivalent Mental Health Review Tribunal have advocates appearing for them, and so as a result 100 per cent of people for whom compulsory treatment orders are made receive that level of advocacy. In Queensland there's no such expectation, and it's less than 2.3 per cent of people appearing before the Mental Health Review Tribunal who receive legal assistance and legal advocacy. To put that in context, there's somewhere north of 10,000 people who are having compulsory medical treatment applied to them against their wishes who do not understand the - or are not being provided with assistance to understand their legal rights or represent themselves before the - - -

DR MUNDY: So it may or may not be against their wishes, but they - - -

MR FARRELL (QAILS): The definition of coming before the tribunal is that it is against their wishes, otherwise you just go to the doctor and just get an injection or the treatment that you need.

DR MUNDY: Yes.

MR FARRELL (QAILS): So these are people who are receiving involuntary treatment that aren't getting that support. I understand you're hearing from QPILCH earlier today, or possibly tomorrow.

DR MUNDY: Yes, we did.

MR FARRELL (QAILS): They run a lay advocate program in that context that's providing some assistance. Another of our members, the Queensland Advocacy Inc has one and half or two lawyers doing work in mental health representation, and that is the extent of those services across Queensland which, as I mentioned before, is one of the more decentralised states in the Commonwealth. So certainly there could be the capacity for mental health advocates to provide more support in that space. I think issues like disputes with Centrelink might be another example where kind of building up from a paralegal to supervising lawyers to that kind of thing is a way that people can get independent advice about that kind of thing. So it is those matters where it's fairly strictly defined and where some specialisation is needed. I think it varies - - -

MS MacRAE: What sort of qualifications would your mental health advocates have?

MR FARRELL (QAILS): To answer your question indirectly, my understanding is that there's a certificate IV in community services advocacy, and there are modules of that that are designed for tenancy advocates. I suspect you could get a similar type of qualification in some of those - - -

MS MacRAE: Right. Okay.

MR FARRELL (QAILS): - - - other areas should that be appropriate.

DR MUNDY: Just before we move off this general area of non-lawyers helping out with legal need, we've identified a program which is operating I think in Centrelink at the moment about skilling up some of their frontline desk personnel who, when they're dealing with people who have experienced a number of difficulties with them, to give them some skills to recognise, "Hey, is there really a legal problem here," and we've heard that there's actually a search or program in South Australia for - a central course for - - -

MS MacRAE: Community workers.

DR MUNDY: - - - community workers legal knowledge in effect. So effectively both I think are trying to facilitate a better identification in improving referrals from other community workers into the community legal system so that people don't fall between the cracks, possibly as a substitute to co-location and other things. Are there any programs like that in place in Queensland?

MR FARRELL (QAILS): Can I answer your question with a question? Has QPILCH appeared before the commission yet, or is that happening - - -

DR MUNDY: Yes.

MS MacRAE: Yes, it has.

MR FARRELL (QAILS): Their homeless persons legal clinic - - -

DR MUNDY: Yes.

MR FARRELL (QAILS): - - - works fairly closely with the Department of Human Services, particularly around identifying some of those clients, and some of those referral pathways. Use of tools like the legal health check, and I know this is something of particular interest reflected in the commission's draft report, are the type of tool that can be used sometimes, rather than the more fully developed vocational education things that we've been speaking about.

The legal health checks I think are a fantastic resources. Part of the difficulty with that is training people how to use them properly. It becomes difficult, as does ensuring that there's a referral pathway at the back end. So you are recognising that somebody has consumer law issues, and they're in a particular regional area. Is there actually a consumer law service there? Well, in Queensland probably not because we have two centres in the state that have specialist consumer law programs. Unlike other states, we don't have a statewide consumer law service. So I think they're great tools but ensuring that there's training at the back end and appropriate services to whom clients can be - people with legal problems can be referred at the back end is vitally important to make sure that it's an effective tool.

MS MacRAE: Could I maybe just ask two questions? Going backwards a little bit, but there was just a couple of issues on the funding side that I just would like to get your comments on. One was when we were talking to the Northern Territory about the cuts to their funding, one of the CLCs there, I think, was talking to us about how they had just established a new program that they were going to be up and running, and they had just started it, they had got it running for about three or four months, and now the funding is going to be gone and they will have to - so they have invested in all this infrastructure, now the whole system is going to have to be unplugged, and they really lost all that sunk capital that they put into a program which they could see was very much in demand, but which now won't proceed, and I wonder if you had any examples of that, or whether that problem of sunk costs is going to be an issue for you with the withdrawal of funding.

Then second to that, QPILCH mentioned to us today how beneficial it had been that their funding has been moved recently to a three year funding commitment rather than a year on year commitment, and I'm wondering if you could comment on the vagaries or the certainty of funding and how that impacts on your services as

well, or the services of your members.

MR FARRELL (QAILS): It's hugely problematic, and this isn't only an issue that's happening with this funding announcement, and I should say we've had effectively 14 or 15 months' notice of this funding withdrawal, which is substantially more than has happened previously. My understanding is when the Environmental Defender's Office lost its state funding in Queensland, they were advised on about 6 or 7 July that funding had ceased six days earlier on 30 June.

So without any type of certainty about continuing funding, those challenges exist, and so where we seek to introduce innovative or new projects, we always need to recognise that there is the very high likelihood really that that funding will not continue, and that that service will need to be withdrawn at some stage, and when you're talking about the kinds of disadvantaged communities with whom community legal centres, legal aid commissions, Aboriginal and Torres Strait Islander services and family violence legal services work, to go into a community to build those relationships, for people to know that you're actually going to be at the Land Council on this day every month, or that you're going to be visiting the Centrelink office every Tuesday, or whatever the arrangement is, it takes a long period of time for people to even know that.

Then to suddenly cut that because funding has been cut, because although funders express some support for those kinds of things, it's difficult to sustain some of that funding, becomes hugely problematic. So it goes not only to, if you like, the sunk capital cost that you've referred to specifically, but in terms of raising the expectations of disadvantaged people who have had their expectations smashed by service providers and institutions for many years, often for their entire living memory, because of insufficient funding or short-term funding, becomes hugely problematic and hugely damaging for those community members.

MS MacRAE: Can I just ask you one more question if I'm - - -

DR MUNDY: No. Keep going.

MS MacRAE: Keep going. We asked the Law Council this morning - sorry, the Law Society - about the sort of advocacy work they do, and one of the suggestions we've had is that if the advocacy work of CLCs was to be reduced, that people like the law societies might be able to pick up that advocacy work. Their view was that - as long as I'm not - I don't think I'm verballing them - was to say that there's some elements of that advocacy work they may pick up, but there's a whole raft of it which they wouldn't because it's just not the sort of work that goes to private practitioners to see the sort of casework that you would deal with. Would you like to comment on that?

MR FARRELL (QAILS): For several years I was the manager and principal lawyer of the Homeless Persons' Legal Clinic in Melbourne, and so the types of legal issues that people experiencing homelessness experience aren't the kinds of things that for profit legal practices are exposed to. The extent to which people who are homeless engage with low-level criminal issues for which there is no legal aid available because it is kind of under the threshold of the types of more serious things that legal aid commissions are required to direct their resources to, if it wasn't for the safety net that is community legal centres and other legal assistance services, no-one would know about the types of impacts that those laws are having on disadvantaged people in the community.

I acknowledge the import advocacy work at the Law Society and contribute to that. Certainly I sit on the access to justice and pro bono committee which I understand was represented here today, and I think that's vitally important, but the extent to which we can take the lived experiences of highly disadvantaged people and speak to government and other decision-makers about those things, can be limited where we're relying on professional associations to do that work.

MS MacRAE: Thank you.

DR MUNDY: In its submission to us NACLC suggested that the minimum sort of scale to operate a CLC is probably sort of like about five people with a budget of somewhere around 600 grand a year. Can't remember the precise details, but I'm sure you're familiar with it. Can you give us a sense of how many CLCs in Queensland would not meet that benchmark?

MR FARRELL (QAILS): Can I take that question on notice?

DR MUNDY: Yes.

MR FARRELL (QAILS): Can I also disclose I'm the treasurer of the National Association of Community Legal Centres and contributed to - - -

DR MUNDY: Yes. We're just interested given - I mean we're not disputing the benchmark and it sort of seems - - -

MS MacRAE: Sounds about right.

DR MUNDY: - - - to make a bit of sense to us. We're just interested in getting a sense of how many CLCs in each jurisdiction fall below that, and is there any particular characterisation of them?

MR FARRELL (QAILS): QAILS doesn't have a particular view on the benchmarking, recognising that we are a member of the national association and

that's an appropriate benchmark for them to have adopted. There are a number of community legal - the mix of community legal centres in Queensland is quite different. To give you some extremes of that, I suppose, there's a three-day a week lawyer operating in Goondiwindi, which is essentially on the border, the southern border but towards the west of the state.

DR MUNDY: Just north of Moree.

MR FARRELL (QAILS): Yes. It actually does some outreach into New South Wales in a cooperative arrangement with the New South Wales Legal Aid Commission. There's a three-day a week lawyer there. QPILCH and Caxton Legal Centre would have, I imagine, somewhere above 25 or 30 staff each, and so it's quite a range. We also have a number of services, and it goes to the integration model, that the literature recommends in a lot of ways and that you've given some thought to clearly, where small services exist within essentially neighbourhood house. So the Goondiwindi one is an example. Nundah Community Legal Service is based in the Nundah neighbourhood centre, and that's essentially one lawyer working alongside social workers, domestic violence services, emergency relief, so it really goes to that kind of integrative model that - - -

DR MUNDY: So they're really part of the community welfare service.

MR FARRELL (QAILS): Absolutely.

DR MUNDY: But they have a CLC badge because it solves a pile of problems for them - - -

MR FARRELL (QAILS): Absolutely. Certainly in terms of the way that we're regulated, needing to have some level of separation is important. A similar type of service exists in Hervey Bay with the Taylor Street Community Legal Service being part of the Hervey Bay Neighbourhood Centre. So I think the historical development of CLCs in Queensland, and we talk about the historical development in terms of funding and where they are and those kind of things, but the history of it has been that where communities have identified the need for these services they have shot up, and often the neighbourhood centre as a hub for that community is an appropriate place for them to be based.

DR MUNDY: So the sort of issues that were of concern around scale and back office and, you know, who is going to see the client at the front desk sort of thing, in the sort of models you describe and are known to Hervey Bay, effectively their integration with other community service providers in a sense deal with that administrative type issue to some extent. They might share the same office manager and someone might - - -

MR FARRELL (QAILS): Absolutely.

DR MUNDY: - - - have to do their accounts and things like that.

MR FARRELL (QAILS): Absolutely. There can be some difficulties sometimes where, to give a practical example, and I'm not sure if this has arisen in any of our services, but where's there's a domestic violence service within the organisation that's assisting a victim of violence and the perpetrator of violence comes in to understand their legal rights and responsibilities, and so there are protocols or policies or practices in place in these places to deal with exactly those kind of things, but it does address those questions of efficiency of scale because they are, you know, not huge organisations but within the context of those communities - - -

DR MUNDY: They have got one kitchen and one tea room.

MR FARRELL (QAILS): Yes, that's right.

DR MUNDY: So the whole pool of that organisational-type issue.

MR FARRELL (QAILS): Quite right. So I think criticism of small community legal services is not warranted in those cases because in those communities it's an appropriate model with an economy of scale that is able to deliver the services that that community needs.

DR MUNDY: Yes. The scale issues that we were I think concerned about have been dealt with in a different way rather than a bigger legal service. We have been giving some thought to, you know, appropriate institutional models and it's - certainly in Victoria we know the Legal Aid Commission determines the distribution of the state's money. We've heard earlier today that there's a different model here, and I guess one of the things we're keen to investigate is, you know, institutional models - well, it seems to us that the people who are best place to actually made a decision about the distribution of resources on the basis of need are people as close to the needs as possible.

We're interested in models - we know that the Western Australians appear to almost have a periodic objective assessment of need and the CLCs there work collaboratively there with the Legal Aid Commission. I am just wondering if you have got any views, because one of the things is we're keen to just also get some red tape out of here and get outcome based performance going. Do you see any issues around institutional arrangements that perhaps put the CLC and the Legal Aid Commissions in the same realm - I'm not necessarily saying that the Legal Aid Commissions will be making the decisions as is the case in Victoria, although they seem reasonably happy with that. Do you have any views on these sorts of institutional models, which one seems to work better?

MR FARRELL (QAILS): In broad terms, we would agree that it's the people delivering the services that are best placed to identify where the need is and what resources should be directed to meet that need. The model in Queensland, just to - I'm sure others have made this point - the model in Queensland is the Queensland Legal Assistance Forum, or the QLAF, is consulted on general strategy and priorities. Those recommendations are taken to the LIPITAF committee which is made up, I think, of five senior officers of the Department of Justice and Attorney-General, senior officers of Treasury and the Premier and Cabinet, and they make recommendations to the attorney who ultimately makes the decision there.

That's quite new. That's really only been the last 12 months that that model has existed. Prior to that, well, it was before I moved into my role, and my sense is that there wasn't the same stage decisionmaking and ultimately there was greater discretion for the attorney-general around those decisions or he wasn't briefed in the same structured way. I think - and certainly QAILS' position as the LIPITAF fund was being reviewed last year was that an organisation like QLAF with representations of representatives of the state, the Commonwealth and the four branches, if you like, of legal assistance services ought have greater input into the decisionmaking and I think that's entirely appropriate given the expertise that those organisations have.

The difficulty sometimes though in all honesty is when - and I think others have made some observations, it certainly was in our joint submission with NACLC, around moving to competitive tendering, but where there's that competitive environment it breaks down trust and reduces the capacity for services to collaborate and I think ensuring that it's not competitive and that it is truly collaborative requires work. I think in Queensland with the QLAF - I should just disclose too, as the chair of the QLAF, I think QLAF is moving in that direction, where we're going there, but where those funding decisions come, it can create tension and they clearly need to be managed.

DR MUNDY: At the risk of repeating myself, there seems to have been a misapprehension that we recommended competitive tendering; we only said it was an option. We would say that, wouldn't we? I guess the more important question, and one of the appeals of competitive tendering is some assurance that funders can get value for moneys being achieved or outcomes are being - at least at the start of the process, going to be achieved at less cost.

So if we were to recommend this sort of collaborative model as something that should be maintained, how could both the Commonwealth and those states, relevant states, be assured that they're getting value for money, not only in a productive sense - and I think the smell of an oily rag is probably not a bad description of the business model, but how could governments also be assured that if funding allocations were

devolved that outcomes would still be achieved in accordance with Commonwealth policy objectives, which I'm sure you'll agree, the Commonwealth has every right to establish?

MR FARRELL (QAILS): Can I as a pedantic opening or initial response, I think the idea of outcomes in the legal assistance base is something that is particularly under developed. We talk about outputs in what we do. The number of duty lawyer services that we provide, the number of hits on web sites for Legal Aid Commissions, the number of advices and new cases that we open, there is - under current arrangements it is number of widgets, it's not social outcomes for people.

I think one of the great missing parts of what we talk about in legal assistance services is how did your intervention make someone's life better, and we're not doing that and we're not measuring that, and there's an aspiration in the national partnership agreement which binds the states and the Commonwealth but my understanding is in the three or four years of the existence of that agreement, there's not been much progress in that space.

DR MUNDY: I think your advocacy for us to come up with a funding model has somewhat been obstructed by precisely that problem.

MR FARRELL (QAILS): Yes, that's right, and it is the barrier - - -

DR MUNDY: How does the Commonwealth satisfy itself it's getting what it thinks it's paying for, or what it says it's paying for?

MR FARRELL (QAILS): I think it's quite - I mean, it is quite appropriate for governments to identify the priorities and the principles of the outcomes, of the social outcomes that it seeks to achieve in policy and in the allocation of resources. That doesn't necessarily mean dictating the number of widgets that small community organisations should be producing. So if we can get to a point where there are principles, priorities, particular - it might be geographic regions, there might be vulnerable client groups or it might be areas of law that ought be the priority in the way that these decisions are made, then it should be possible for service providers and funders and policy makers to co-design systems that identify the types of outcomes we're trying to achieve and what outputs are required to achieve those outcomes.

So coming back to me, it's a matter of sitting down and co-designing. So in our most recent submission when we talked about the ALAF having more of a role in identifying those national priorities and in co-design and conversations about this stuff because it is the services closest to the ground that can best suggest to government what kinds of things are required.

It may be sometimes that those suggestions are we need to see half as many clients because the clients that we're seeing have much more complex social issues, require far more intensive support, and so the kind of triage model that legal assistance services seem to be directed at where there's kind of telephone - a web site, telephone advice, face-to-face advice with a lawyer, and then ongoing casework in very much quite a sharp inverted triangle, you know, that might not be appropriate if it is particular client groups of particular types of legal issues that we're trying to assist people with. But we should have that conversation.

DR MUNDY: The current performance management framework, if I can call it that, you obviously don't think it's directed at outcomes. Is it in fact directed at how many widgets have been produced? Or is it even more directed at how the widgets are being produced?

MR FARRELL (QAILS): More the former, I suspect. I mean, where the only measure is a numerical output, it would make sense to focus on easier stats, or soft stats, if you like. So we could very easily set up particular services with a more sophisticated - with a person in the community with a more sophisticated understanding of their legal problem and the legal opportunities that are available to them, point them in the right direction, set them off on their way - - -

DR MUNDY: Tick.

MR FARRELL (QAILS): - - - never see them again, do a lot of stat. Or we can recognise that going out to a soup kitchen or homeless shelter every week to build a relationship with a client before you even start to talk about what their legal problems are, because they need to have that level of trust, you know, which one of those is going to create the greater social outcome for the more disadvantaged person? It's pretty self-evident, I think.

MS MacRAE: Can I just clarify something? The ALAF has Commonwealth and state officials as well as the - - -

MR FARRELL (QAILS): Not state officials is my understanding. Certainly our submissions suggested that if there was to be an increased role for them, then state and territory governments should be invited to participate in those conversations.

MS MacRAE: That's true - when you were talking about what happened specifically in Queensland, that it's only Commonwealth officials again that are involved in that?

MR FARRELL (QAILS): No. Both state and Commonwealth officials.

DR MUNDY: Because the Commonwealth puts money in so it turns up?

MR FARRELL (QAILS): Well, under the national partnership agreement there's a requirement for jurisdictional forums, because there was the existing infrastructure of these LAFs across the country. They were - my understanding is they need to do that twice a year. Our practice in Queensland has been to invite them to every meeting, and generally they attend by videoconference.

DR MUNDY: The regional forums that you spoke of within Queensland, does the Commonwealth ever attend those?

MR FARRELL (QAILS): Not to the best of my knowledge. They might be invited.

DR MUNDY: If they wanted to turn up out of curiosity it wouldn't be a problem?

MR FARRELL (QAILS): I can't imagine it would be a problem, but that would be a question for each of the regional LAFs, I suspect.

DR MUNDY: Fair enough. We did make some observations about eligibility criteria for the LAFs and CLCs. I think we again might have not expressed ourselves as well as we could have. A number of organisations similar to yourselves have indicated to us that whilst there is clearly some - well, you can construct absurd examples why it doesn't make sense, but as far as broad principles are concerned, a number of CLC representative bodies and CLCs have said themselves that that wouldn't be such a problem. Would you agree with that?

MR FARRELL (QAILS): I would agree with that. I think particularly as the resources don't meet the need, there is quite properly, in my view, a focus on the legal needs of disadvantaged groups within the community. I think that's a great example of the types of principles or priorities that legal assistance services - that it's appropriate for governments to create for legal assistance services.

DR MUNDY: Give you're - given the unusual level of decentralisation in Queensland, how do you think that regional character would need to be reflected in those principles? Or do you think it would be - I'm thinking here from the view of the Commonwealth and its funding, a process may well be that Queensland comes back and says, "Here's how we're going to give - given our peculiar regional characteristics, here's Commonwealth - here's how we think we're going to build those into the overlying principles. This is a peculiar issues for us. What do you think?" Then they could just turn around and say, "Yes, that's okay."

MR FARRELL (QAILS): I come back to my earlier point, the importance of the co-design or conversations around developing these policy priorities. So I'd be - I think it would be less helpful if the Commonwealth came down with, you know, a

list of, "These are the ten principles. You must implement these," and it's the first time that we see them. I would think that that would be a particularly - the danger there is that it fails to understand the evidence and experience of existing services and existing communities. I come back to that point around co-design and conversations and the importance of an ALAF, or something based on a ALAF as a suggested model for that.

MS MacRAE: You get the requirements of the remote or regional communities effectively reflected in those principles that your - the eligibility principles that you agree, and once you've done that then you don't need to think about them every time about how you adopt them.

MR FARRELL (QAILS): I think that's right. I think the reality though is those principles or priorities would be updated fairly regularly, changing priorities of government and emerging research around particular needs of particular communities.

DR MUNDY: Well, hopefully we could establish priorities that could be reasonably constant through time and - - -

MR FARRELL (QAILS): Again, it should be subject to a conversation between - - -

DR MUNDY: Yes, and how they're delivered again is probably the thing that needs to be dealt with. James, we're probably out of time, but thank you for coming along, and we look forward to that other material that I'm sure will be heading our way soon. You know where to find us.

MS MacRAE: Thank you.

DR MUNDY: Thanks, James.

DR MUNDY: Could we have our last participant for today, which is Maurice Doube and Roslyn Page, I sort of understand. My notes are not entirely clear. Roslyn Page. Thank you.

MS PAGE (AOBC): Good afternoon. I don't know why I'm here, because I've just listened to someone else and I don't know if he was a solicitor - - -

DR MUNDY: Before we start there's certain things we have to do. Could you state your name and the capacity in which you appear? It's just so the transcript can be made sense of by people who aren't here.

MS PAGE (AOBC): My name is Roslyn Page, I'm from Alpha One Business Consultancy which is my business. I'm here today with my personal assistant, which is Greg Page, also my husband, Maurice Doube who has decided not to come. He's my client. I'm here to inform and ask a few questions.

DR MUNDY: Well, we don't have a submission from you, so could you perhaps give us a brief opening statement of the issues that are of concern to you?

MS PAGE (AOBC): Let's see if they come under your - what we're here for. Editing of transcripts of court proceedings. Like, once you've been in court, my belief is it's taped, then it's typed up and then it's edited from that typed up transcript. Barristers becoming judges, redirections in court cases. Solicitors and barristers, how do people in how do people in general know if they're being represented correctly? The appeals court, how the edited version can really affect the appeals court, why a lot of them don't get through, and court positions where it can be very confusing to witnesses.

DR MUNDY: So your concern is that the act of transcribing court proceedings may lead to a written record being created which doesn't properly reflect what was actually said?

MS PAGE (AOBC): In actual fact, it can go the opposite way. 100 per cent the opposite way. Mr Doube came to me because in 94 he went through the court system. From that, I did many, many hours of reading searching through evidence that the government actually - it was a government department that did the investigation. When it did the investigation, it leaked information to unions, but they couldn't leak information to the actual company that's being investigated. There was actually fraud that took place by two employees. The company was never informed.

DR MUNDY: Ms Page, can I just briefly stop you there. You need to be aware that unlike a parliamentary inquiry, there is no protection of defamation for anything that is said here to us. It will be recorded and it will be made public. The only people who are protected from defamation in these proceedings are my

colleague and I.

MS PAGE (AOBC): Okay.

DR MUNDY: So you should just be aware of that, and you should also be aware that we have no power or capacity to investigate any matter.

MS PAGE (AOBC): One of the biggest questions, probably, that I'm here for is editing of transcripts. Reading through, listening to tapes, to my knowledge what happened in court, there was a tape, then it's typed up and then it's my understanding that the judges edits the transcript - has the power to edit. On doing that, he has put the word "without" changed it to "with". On doing that where someone said, "15, 16 months," when it was actually 15, 16 weeks, but none of the lawyers have picked it up and it's not true, he's actually taken that out of the edited transcript.

Then - the problem being there, that edited transcript comes to the appeals court, not the original transcript. When you have things changed like that, it is a problem where you're trying to have something overturned. In fact, it makes it impossible. So I have the proof in research that I've done, which doesn't mean it's gospel, but what I'm actually trying to say to you guys is how in the heavens does this happen? Why does it get through?

DR MUNDY: I certainly know that - I mean, we take transcripts in these proceedings. In days gone by in court there were originally people with shorthand notebooks and then there was stenographers, typewriters, and a very similar thing happens in the parliament with the Hansard, and I'm sure you'd agree that someone needs to proof these things because despite - we use, of course, the best transcription services in the land, but sometimes we have to edit them because people's names are misspelled or, you know, there are simple clerical errors.

MS PAGE (AOBC): I can understand - - -

DR MUNDY: But what you're saying is that you - there are circumstances where you believe that the intention of what was said has been deliberately manipulated.

MS PAGE (AOBC): When you buy the tapes, like you've bought the tapes of the proceedings of that court case, then you follow it through to the transcript and you can find things missing. No additives, but you'll find things missing. Like I said, using the word where its definitely happened, "without" and "with", that becomes majorly opposite.

DR MUNDY: Yes. Or negating the word. In the case that obviously you're aware of, what happened? Was anything done to try and draw this matter to the court's attention? Because it could, on its face - - -

MS PAGE (AOBC): There was few things come up in the re-address where the judge said that - the redirection and the judge said that he would do that, but then after the redirection finished he said he wasn't going to do the corrections the next day, so - my concern is that case has gone through, that case is over and done with. The whole idea today was to bring it to your attention and what can be put in place for this not to happen.

DR MUNDY: I think probably the best we can do is now that you've brought this matter to our attention is - may I ask, without naming the judge involved, which court this matter was in?

MS PAGE (AOBC): Toowoomba.

DR MUNDY: Was it in the District Court of Queensland?

MS PAGE (AOBC): It was actually a Commonwealth case.

DR MUNDY: So it was in the Federal Magistrates Court or the Federal Court?

MS PAGE (AOBC): That's the strange part about it. Apparently they take whatever court is available.

DR MUNDY: Okay. I suspect it was probably the Federal Court or Magistrates Court on circuit. We'll look into that. I guess the question in my mind is are there rules in place where someone who is aggrieved about the transcript rather than just talk to the judge who may be overseeing it, or is there need to be some? But we can - - -

MS PAGE (AOBC): There's - like, the case shouldn't have even went to court. There was evidence in where they call witness in and you give your statements. If you read through the statements, it's all there. You've just got to make connections. You've got to have the memory of who said what and where and how and whatever. But it was all there. Knowing that, it shouldn't have went through. It should have been pulled up by solicitors.

But unfortunately it wasn't. Then in the appeals court, once you've sort of got things through, to try and - on appeals court, to my knowledge, and I'm blind to your system, it doesn't put a lot of faith in me for your system, but it tells me in the appeals court, once you've got something through like that and it's changed, it changes the direction. It's very hard to overturn something in general in appeals court, but that just makes it so much harder.

DR MUNDY: Was the fact that the transcript was, for want of a better word,

inaccurate, known at the time that the matter went on appeal?

MS PAGE (AOBC): No. It's been picked up 20 years later.

DR MUNDY: So subsequent - so there wasn't a reasonable opportunity for somebody to say to the appeals court, "The transcript is wrong." So the revelation that the transcript was in error emerged well after the matter in the appeal court? Okay.

MR PAGE (AOBC): One of the things that concerns us is this happening on a regular basis.

MS PAGE (AOBC): Yes. Is it? The other thing - - -

MR PAGE (AOBC): Because the transcript is the only thing that's used under appeal. The tape is never looked at.

MS PAGE (AOBC): The amazing thing about this case, the edited transcript was put in place the very next day, because they asked for something to be - the tape to be played back. The first thing the judge could do was they would read it back. They wouldn't play the tape. It's already the edited version. So that's done pretty quick. That's basically overnight, which amazes me. I think there's something wrong, but like I said, I can give you the facts. I can give you the proof, because I have spent many hours on this particular case.

DR MUNDY: As I indicated to you, we're really not in the position to - - -

MS PAGE (AOBC): That's fine.

DR MUNDY: Particularly we're not in a position to re-investigated a matter that's been in court, because we may find ourselves in contempt.

MS PAGE (AOBC): That's fine. We're thinking about the future.

DR MUNDY: Well, we'll see what - we can have a look at what's in place to make sure these sorts of arrangements - these sorts of incidents don't occur.

MS PAGE (AOBC): One other thing. Can you tell me when it comes to government departments doing investigation, does it come in, what you're after today?

DR MUNDY: Yes.

MS PAGE (AOBC): Okay. What guarantees - - -

DR MUNDY: Or disputes with government departments.

MS PAGE (AOBC): Okay. What guarantee do we have in the future that they are handled correctly?

DR MUNDY: I can't give you any guarantees. That's not what I'm employed by the Commonwealth to do. I'm employed to make public policy advice. They're questions that you should probably properly direct to your members of parliament.

MS PAGE (AOBC): I have. I've already seen the federal member for our area. I brought up my concerns there.

DR MUNDY: I'm afraid that that's not something that we are able to do from here. Okay?

MS PAGE (AOBC): Okay.

DR MUNDY: Well, thank you very much for your time in coming along today. We will have a look at that issue, if only because it's timely so that we ensure that our transcripts aren't inadvertently used.

MS PAGE (AOBC): The other question was the positioning of the courts. I know that this particular court case was a little bit different because they were renovating courts and whatnot else, but a lot of the witnesses I have interviewed, like for instance they were for the public prosecution. When they walked into court, nerves and all the - imagine how they felt. They didn't know who was actually the public prosecution, they didn't know who was the defence counsel because the witness was not sitting next to the defence counsel, he was sitting over in a chair on his own sort of thing. I think it's actually called the dock or something like that.

DR MUNDY: Yes.

MS PAGE (AOBC): So that's another important thing, especially for the general public.

DR MUNDY: We understand the lack of awareness and knowledge that people have for court processes. It's been a constant theme. All right - - -

MS PAGE (AOBC): Please take on board the reason I'm here today. It's not for the past, it's for the future. That's the important thing. If it gets addressed and looked into and something done about it, then at least I haven't wasted my time. I feel as though I could waste your time, but I'm not worried about my time, I'm also concerned about your time.

DR MUNDY: Great. Thanks very much. These proceedings are adjourned until 8.50 tomorrow morning.

AT 4.31 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 19 JUNE 2014



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

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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 if 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 it's 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 it 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 of 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 it 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 we have the Family Court of Australia which has pre-action protocols and the Federal Circuit 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 its 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 thing, 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 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