Equal before the law: Submission in response to the Productivity Commission Issues Paper about Access to Justice Arrangements

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on access to justice

PIAC has a long history of working to achieve access to justice for marginalised and disadvantaged clients. PIAC has pursued this goal by developing and piloting models for unmet legal need, exploring and promoting innovative ways of funding and progressing public interest law and identifying, challenging and preventing systemic barriers to access to justice.

PIAC has been instrumental in the development of several Community Legal Centres (CLCs) to address unmet legal need, including the Communications Law Centre in 1987 and the National Children's and Youth Legal Centre, which became a separate entity based at the University of NSW in 1993.

In 1992, PIAC, together with the NSW Law Society and the private bar, established the Public Interest Law Clearing House (PILCH). This was the first formal scheme to provide access to pro bono legal assistance from the private legal profession in Australia. PILCH links individuals and not-for-profit organisations with legal and other professional service providers to address issues of concern in the community.

PIAC'S Indigenous Justice Program (IJP) was initiated in 2001 as a response to the unmet need

of Aboriginal and Torres Strait Islander people for access to civil law advice and representation. With financial support from law firm Allens, the IJP has assisted clients in relation to stolen wages claims, claims against police, race discrimination claims and a wide range of other civil matters.

In 2004, PIAC, in partnership with PILCH, established the Homeless Persons' Legal Service (HPLS). Under PIAC's supervision and management, HPLS brings together approximately 400 lawyers from private law firms and Legal Aid NSW to deliver legal advice and assistance to people who are homeless or at risk of homelessness in the greater Sydney region. HPLS operates ten legal clinics based at welfare agencies that provide other services to homeless people. HPLS provides legal information, referral, advice and, where appropriate, ongoing casework, in a wide range of areas of law.[1] HPLS develops policy and law reform recommendations arising from its experience assisting homeless clients.

In 2008, PIAC launched the Mental Health Legal Services (MHLS) Project, a two-year pilot program that aimed to explore the unmet legal needs of people in NSW with mental illness. In early 2009, with funding from the NSW Public Purpose Fund and supplemented by a grant from the Federal Attorney-General, PIAC established four service delivery pilots that aimed to improve access to justice for people with mental illness in NSW. The MHLS Project also piloted community legal education training for consumers, their carers and advocates, and continuing legal education for legal and related professionals to assist them provide effective services to people with mental illness.

PIAC has also written papers and contributed to the debate about access to justice including making submissions to the Standing Committee on Law and Justice (formerly known as the Standing Committee of Attorneys-General or SCAG) on litigation funding in Australia,[2] the National Alternative Dispute Resolution Advisory Council (NADRAC) Inquiry into Alternative Dispute Resolution in the Civil Justice System,[3] the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice[4] and Australia's Judicial System,[5] the Attorney-General in response to A Strategic Framework for Access to Justice in the Federal Civil Justice System,[6] and the Australian Law Reform Commission's Inquiry into Discovery in the Federal Courts.[7]

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1 The clinics are hosted and supported by Edward Eagar Lodge, Matthew Talbot Hostel, Newtown Mission, Newtown Neighbourhood Centre, Norman Andrews House, Parramatta Mission, The Salvation Army Streetlevel Mission, The Station, Wayside Chapel, Women's And Girls' Emergency Centre and Vincentian House. The PILCH members that provide lawyers to staff the clinics are Allens, Baker & McKenzie, Corrs Chambers Westgarth, Deacons, DLA Phillips Fox, HWL Ebsworths, Gilbert + Tobin, Henry Davis York, Legal Aid NSW, Minter Ellison and Maddocks.

2 Simon Moran and Gordon Renouf, *Litigation funding - consumer protection and access to justice* (13 September 2006) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2006/09/060913-acapiac-litigation-lending-submission>.

3 Alexis Goodstone, *Alternative Dispute Resolution in the Civil Justice System* (22 May 2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2009/05/piac-submission-nadrac-inquiry-adr>.

4 Alexis Goodstone, Robin Banks, Chris Hartley and Vavaa Mawuli, *Justice – not a matter of charity: Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice* (20 May 2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2009/05/piac-access-justice-submission>.

5 Alexis Goodstone, *Inquiry into Australia's Judicial System and the Role of Judges* (20 May 2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2009/05/piac-submission-judicial-inquiry>.

6 Elizabeth Simpson and Robin Banks, *Improving access through translating principles into practice: Submission in response to the Attorney General's report, A Strategic Framework for Access to Justice in the Federal Civil*

PIAC has addressed selected questions where we believe we can most add value to this inquiry. This submission draws, as far as possible, on an evidence base acquired through PIAC's experience from its own litigation, policy and training work.

Response to Topic 1: About this inquiry

How can the Commission best add value?

In what areas can the Commission most add value in undertaking this inquiry? Reform of which particular aspects and/or features of the civil dispute resolution system will generate the greatest benefits for the community?

As the Productivity Commission acknowledges in its Issues Paper, there have been a number of recent inquiries and reviews concerning access to justice. The Productivity Commission's focus on cost as a barrier to access to justice is a welcome one.

PIAC urges the Commission to take a human rights approach to access to justice. Australia is a party to the International Covenant on Civil and Political Rights (ICCPR)[8] and therefore has certain international obligations in this area. For example, Article 14 states 'All persons shall be equal before the courts and tribunals.'

Access to justice is a precondition to fulfilling this right. Australia is a vibrant liberal democracy with a sophisticated economy. While every reasonable effort should be made to simplify the process by which legal disputes are resolved informally and in the court system, it is probably inescapable that Australia's legal system will remain complex. The ability to obtain assistance from those with appropriate expertise in understanding the law, and navigating the legal system, is crucial to the practical fulfilment of a person's Article 14 right.

It has surely been established beyond question that all rights costs money.[9] That is, the rule of law itself comes at a price that must be shared by the community. The government institutions, such as the courts and police, which preserve and protect rights (be they property rights, human rights or other important interests), cost money. So too do those bodies that exist to support government – community legal centres included.

Rights are costly because remedies are costly, and legal rights do not mean anything unless they are enforced. As a roundtable participant in the National Human Rights Consultation put it, 'A right that can't be enforced isn't a right. It's just a good idea'.[10] The Commission should rightly be concerned with efficiency, but also acknowledge that access to justice should not be solely about cost savings. Even if that were the primary goal, it would be a false economy to seek to

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Justice System (30 November 2009) Public Interest Advocacy Centre <http://www.piac.asn.au/sites/default/files/publications/extras/09.11.30-PIAC_sub_A2J.pdf>.

7 Elizabeth Simpson, *Discovery for all: Submission in Response to the Australian Law Reform Commission's Consultation Paper into Discovery in Federal Courts* (20 January 2011) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2011/01/discovery-all>.

8 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

9 See Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes,* 1999.

10 Brisbane Community Roundtable, quoted in Father Frank Brennan AO, Mary Kostakidis, Tammy Williams and Mick Palmer, National Human Rights Consultation Report, September 2009, 19.

minimise all costs associated with the legal system as the price would certainly be to the preservation of the rule of law. Aside from the highly deleterious social consequences that would flow from any significant deterioration in the rule of law, it would also engender a new type of sovereign risk for those wishing to invest in the Australian economy. In this light, the Commission needs to be very conscious that the drive for improving the efficiency of the system and reducing costs does not create other barriers to individuals accessing justice.

While access to justice involves ensuring access to legal information, advice and representation, as well as other specialised legal services, it also necessarily involves a capacity to review existing laws and policies to identify where justice is being denied systemically and to propose reform. This has been at the core of the work of CLCs since they were first established in Australia in the mid-1970s.

CLCs are able to offer effective and creative solutions to legal problems based on their experience with their client community. This community relationship enables CLCs to respond to the needs of their community as these needs arise and change, and this community relationship distinguishes CLCs from other legal services. That community may be a geographically-defined community (generalist legal centres), or it may be defined by an area of law or a particular client group (specialist legal centres).

While providing legal services to individuals, CLCs also work beyond the individual. Community legal centres undertake community development, community legal education and law reform work, based on their experiences of client and community need. The clients of CLCs are most commonly those who face economic, social or cultural disadvantage and whose life circumstances are often impacted severely by their legal problem.

In addition, CLCs harness the energy and expertise of thousands of volunteers. Centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for their clients and the system of justice in Australia. PIAC believes that investing in CLCs creates a highly efficient return on investment for the community.

Response to Topic 2: Avenues for dispute resolution and the importance of access to justice

Avenues for civil dispute resolution

What should the objectives of the civil justice system be? Are they being achieved?

PIAC refers the Commission to the general principles outlined in comments above in response to ‘Topic 1: How can the Commission best add value?’. As set out in that part of the submission, PIAC proposes that the civil justice system should be accessible to all regardless of one’s means or background, it should promote and protect the rule of law, and it should operate efficiently.

Why is access to justice important?

What are the benefits to individuals and the community of an accessible civil dispute resolution system? How does a failure to provide adequate access to justice impact on individuals and the community more broadly?

The benefits to individuals and the community of an accessible civil dispute resolution system are many and varied.

> **Case study**
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> PIAC represented Graeme Innes AM, who is blind, in a disability discrimination claim in response to the failure by Sydney Trains (formerly RailCorp NSW) to provide reliable audible 'next stop' announcements on trains. The announcements are crucial because they allow passengers with vision impairment to know when they have reached the right station. This case tested the Disability Standards for Accessible Public Transport.
>
> The litigation funder, IMF (Australia) Ltd, agreed to indemnify Mr Innes against an adverse costs order. Following several unsuccessful attempts at mediation, *Innes v Railcorp NSW* was heard before the Federal Circuit Court in October and November 2012. On 1 February 2013, the Court found RailCorp had breached federal disability discrimination law by failing to make audible announcements on 36 train journeys undertaken by Mr Innes between 28 March 2011 and 9 September 2011. Sydney Trains agreed to take specific steps to continue monitoring and improving on-train announcements and Mr Innes is now 'satisfied with measures that have been put in place to make on-train announcements clear, consistent and audible.' This has had consequent benefits for all blind train travellers.

This was a highly unusual situation, in that Mr Innes was a very capable client and indemnification was provided by IMF, and yet he still needed legal assistance from PIAC. However, the fact that he was able to bring this case, with representation from PIAC and the attendant benefits that PIAC negotiated, has brought very significant benefits to the many other blind and vision-impaired people who wish to use public transport in Australia.

The vast majority of clients cannot obtain an indemnity, and they do not have the understanding of, and familiarity with, the legal system that Mr Innes has. Thus, for the vast majority, access to justice is far more difficult to obtain. This means that they may have been forced to take alternative means of transport or always travel on a train with someone who can read the station signs for them, which in turn makes it more difficult to participate equally in society.

A failure to provide adequate access to justice impacts on individuals and society more broadly.

> **Case study**
>
> Kaye (not her real name) attended an HPLS clinic after failing to appear at a tribunal hearing about an application lodged by Housing NSW seeking to evict her from her house for non-payment of rent. Kaye and her 5-year-old daughter were both sick on the day of the hearing. Orders for termination of the tenancy and possession of the premises were made in her absence.

> Kaye told the HPLS lawyers that her failure to pay rent was due to an administrative error and a misunderstanding about the automatic payment of rent through the Centrepay system. When they did not receive any response to multiple letters sent to Housing NSW, the HPLS lawyers secured a stay on the orders made in Kaye's absence so that she was not at risk of being evicted from her apartment before being heard at the tribunal.
>
> The HPLS lawyers attended the tribunal and negotiated a payment plan with Housing NSW as an alternative to eviction. Kaye is currently complying with the negotiated payment plan and continues to live in her house with her young daughter.
>
> Without legal representation from HPLS and access to the tribunal, it is likely that Kaye would have been evicted from her house and become homeless. A simple administrative error can easily escalate to a major problem with much more serious consequences.

The findings of the Legal Australia-Wide Survey (LAW Survey) 'reinforce[d] the fundamental role of access to justice in promoting well-being throughout the wider community and highlights the importance of a justice system that facilitates effective resolution of the wide range of legal problems commonly experienced by the general public.'[11]

Response to Topic 3: Exploring legal needs

What is legal need?

How does legal need relate to the concept of access to justice? What constitutes unmet need in the civil dispute resolution system and how significant is it? What are the consequences of unmet legal need? For example, what are the social and economic impacts arising from problems that are either unresolved or escalate due to lack of access to legal assistance?

The LAW Survey, completed by the NSW Law and Justice Foundation in 2012, provides the most useful answer to these questions. The LAW Survey involved 20,716 telephone interviews with household residents aged 15 years or over across Australia. It provides the first comprehensive quantitative assessment across Australia of an extensive range of legal needs on a representative sample of the population, examining the nature of legal problems, the pathways to their resolution and the demographic groups that struggle with the weight of their legal problems.

The Law Survey recognised that legal problems are encountered routinely by people from all walks of life. Many of the problems people commonly experience as a consequence of being consumers, borrowers of money, employers and employees, and so on, are nested within legal rights and obligations.[12]

The survey concluded: 'Legal problems often had considerable impacts on everyday life, including adverse consequences of health, financial and social circumstances.'[13] Just over half of the legal problems (56%) in NSW were 'substantial' problems that had a 'severe' or 'moderate'

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[11] Law and Justice Foundation of NSW, 'Prevalence of legal problems in New South Wales' (Updating Justice No 4, October 2012) 3.

[12] Ibid.

[13] Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in New South Wales* (2012) 175.

impact on everyday life. The most common consequences resulting from legal problems were income loss or financial strain (29%), followed by stress-related illness (21%), physical ill health (20%), relationship breakdown (10%) and having to move home (6%). At least one of the five adverse consequences measured was reported for almost half (45%) of the legal problems examined. One consequence was reported for 24% of problems, two consequences were reported for 11% of problems, and at least three consequences were reported for a further 11%.[14] The LAW Survey found a greater number of adverse consequences were experienced when respondents had multiple legal problems. Family problems were rated as having the most adverse consequences, followed by personal injury and health problems.

The English and Welsh Civil and Social Justice Survey estimated that the economic impact on health and other public services of the adverse consequences of legal problems was at least £13 billion over a 3.5-year period.[15] PIAC would support the Productivity Commission trying to quantify the economic impact arising from problems that are either unresolved or escalate due to lack of access to legal assistance.

Legal needs surveys have repeatedly shown that many people in Australia ignore legal problems. NSW respondents sought advice for 50% of legal problems, handled 30% of legal problems without advice and took no action for 19% of legal problems. Inaction does not always equate to a legal need going unmet, but the LAW Survey suggested that ignoring legal problems often resulted in unmet legal need.

Two disadvantaged groups in NSW had higher levels of inaction: respondents with a non-English main language, and respondents who had not finished school. In many cases, failure to take action was a result of poor legal knowledge, other personal constraints or possible systemic constraints. In NSW, reasons for inaction included that it would take too long to resolve the problem (34%), it would be too stressful (30%), the respondent had bigger problems (28%), it would cost too much (28%), the respondent did not know what to do (21%), and it would damage the respondent's relationships with the other party to the dispute (15%).

There are a number of disadvantaged groups that have higher rates of unmet legal need than the general population. This is examined in the response to 'Topic 5: Is unmet need concentrated in particular groups?'

How many Australians experience legal need?

How well does the legal system identify and deal with cases of persistent need? What are the characteristics of individuals who experience multiple problems and what types of disputes are they typically involved in?

PIAC works with a number of clients, especially homeless clients, who experience multiple problems and have interrelated complex needs. For these clients, pressing needs, such as finding accommodation and a meal, leave little time or motivation to see a lawyer, and their legal problems accumulate and compound the longer they are left unattended.

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14 Law and Justice Foundation of NSW, 'Adverse consequences of legal problems in New South Wales' (Updating Justice No 5, October 2012).

15 Pascoe Pleasance, *Causes of action: civil law and social justice* (Norwich: The Stationery Office, 2nd ed, 2006).

These problems are often compounded by drug or alcohol addiction, and/or mental illness, which makes the practical problems of interacting with the legal system even more difficult. Since 2008, PIAC has employed a Solicitor Advocate with specialist criminal law skills to assist this group of clients through PIAC's Homeless Persons' Legal Service. Using a recent sample group, from January 2010 to December 2012, the Solicitor Advocate provided court representation to 241 individual clients facing criminal charges. Of these:

- 48 per cent disclosed that they had a mental illness;
- 63 per cent disclosed that they had drug or alcohol dependency;
- 41 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 72 per cent had either a mental illness or drug/alcohol dependency.

These statistics indicate a highly vulnerable client group that requires intensive specialised services to address their multiple needs.

Finally, many homeless people have both legal and non-legal problems and may not be able to distinguish easily between the two, or even know that they have legal rights to assert. It has traditionally been difficult for them to obtain assistance to address their various issues via a single forum or in a way that promotes co-operation between those assisting them. It can also be hard to know where to find appropriate help and how to arrange appointments with different services.[16]

Response to Topic 4: The costs of accessing civil justice

Simplicity and usability

The Commission invites comments and evidence on the 'user friendliness of the civil dispute resolution system'. Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed?

PIAC believes that the way civil laws are drafted certainly contributes to the complexity of the law. PIAC proposes that there should be a regular review of legislation to ensure that it is necessary, clear and effective, including legal aid impact assessments. For a further explanation of this, please refer to PIAC's response to 'Topic 6: Avenues for improving access to civil justice'.

How does complexity impact on parties to a dispute? Which particular mechanisms, processes or court practices have improved the 'user friendliness' of the legal system?

PIAC often receives inquiries from individuals who need assistance in navigating a complex legal system. Informal dispute resolution mechanisms can also be complex, reducing the ability of individuals to deal directly with their own legal needs, and increasing delays.

> **Case study**
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> Solar photovoltaic systems are a popular form of distributed generation in NSW. There are three organisations involved in resolving disputes related to these systems.
>
> Fair Trading NSW deals with disputes related to:

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[16] See generally, Suzie Forell, Emily McCarron and Louis Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW* (2005).

- price;
- warranty; and
- level of service provided by the designer/installer.

The Clean Energy Council deals with:
- faulty workmanship;
- breaches of Australian Standards; and
- misinformation/dishonesty regarding payments, rebates and grants.

The Energy + Water Ombudsman NSW deals with:
- connection or transfer issues;
- metering; and
- billing.

This situation is complex for consumers to navigate, and can generate protracted timeframes in resolving disputes. PIAC understands that open lines of communication and goodwill between the stakeholders mentioned above have served to reduce consumer inconvenience. However, it is unclear whether informal arrangements would be capable of producing quality outcomes for consumers if future disputes were to involve several service providers, especially where it is unclear which dispute resolution service (if any) has jurisdiction.

PIAC suggests that consideration be given to providing consumers with a single point of contact for resolving such disputes, via the consolidation of dispute resolution in this area, or through the provision of a triage service offered by a key dispute resolution stakeholder. This would improve the 'user friendliness' of the system.

Geographic constraints

How important is face-to-face contact with lawyers or court officers? Does a lack of physical proximity represent a barrier to accessing justice? To what extent can technology overcome geographic barriers?

It may be possible that the increased use of new technologies can improve the co-ordination and availability of legal information and services. However, PIAC cautions that new technologies are not equally accessible to everyone in the community because of disability and issues such as print and computer literacy and barriers to access in remote communities.

Further, people in institutional care or detention (including prisoners) are at a significant disadvantage when considering the use of new technologies to deliver both legal information and legal services. As far as PIAC is aware, prisoners in Australia are generally prevented from access to the internet for security reasons although there is limited access in some prisons to a closed intranet. In addition, access via telephone to services is severely limited. Specific consideration needs to be given to ensuring that people in institutional settings are provided with legal information and services.

Which particular regions, groups or case types face geographic constraints to accessing the justice system? What are the costs to individuals and the community as a result of geographic barriers?

As PIAC noted in its 2009 submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice,[17] Aboriginal and Torres Strait Islander people, taken as a group, face proportionately greater geographic constraints in accessing the justice system. As at 30 June 2006, 43% of Aboriginal and Torres Strait Islander people were living in regional areas and a further 25% in remote or very remote areas.[18] The challenge of accessing essential legal services is even greater in regional areas where the services are either not available or difficult to access because of infrequent service delivery or distance. There is little capacity for the private sector to expand its pro bono services to regional and remote communities. Further, the ability of legal services such as Aboriginal and Torres Strait Islander Legal Services (ATSILS) to retain experienced staff in regional and remote areas is a significant challenge. This is explained further in response to 'Topic 12: Effective and responsive legal services' (legal assistance services).

Legal outreach programs coordinated by Legal Aid Commissions (LACs) and efforts by the NSW Legal Assistance Forum's Working Group on Civil and Family Law Needs of Indigenous People, which aim to provide community legal education and increase awareness about the legal services available to assist people in regional and remote areas with their legal needs, are important measures designed to deliver legal services to Aboriginal and Torres Strait Islander people in their communities and thus create more equitable access. There is a need, however, to address the systemic issues that create barriers to accessing justice such as addressing long-term funding problems and ensuring legal services operating in regional and remote areas are well supported and adequately resourced to cater for the needs of their clients.

Response to Topic 5: Is unmet need concentrated among particular groups?

What groups are particularly disadvantaged in accessing civil justice? What is the nature of this disadvantage? What data and information is available on the extent of disadvantage faced by particular groups?

There are three particular groups of PIAC clients who are especially disadvantaged in accessing civil justice. They are most vulnerable to legal problems, and often experience multiple and substantial legal problems. The three groups are:

1. Those with a physical disability or mental illness;
2. Those who are homeless or at risk of homelessness; and
3. Aboriginal and Torres Strait Islander Australians.

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[17] Goodstone et al, *Justice – not a matter of charity,* above n 4, 15.

[18] Australian Bureau of Statistics, *The Health and Welfare of Aboriginal and Torres Strait Islander Peoples* (2010) 5.

Single parents and unemployed people also have increased vulnerability to legal problems, but PIAC does not have particular expertise with these groups, so they are not the focus of this submission.

Disability and mental illness

The LAW survey found:

> In all jurisdictions, people with a disability stood out as the disadvantaged group that had higher prevalence [of legal problems] according to the greatest number of measures …. In NSW, people with a disability had significantly higher prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems from most of the 12 problem groups.[19]

The regression results showed that people with a disability were about twice as likely overall to experience legal problems than other respondents. In addition, 61% of respondents with a disability experienced one or more legal problems compared to 47% of other respondents.[20]

In addition, people with a disability often have many non-legal needs in addition to their legal needs. They tend to suffer multiple types of disadvantage, such as poverty, poor housing, unemployment and crime victimisation. Consequently, they have been described as the 'most socially excluded' of all disadvantaged groups.[21] It has been suggested that the link between disability and legal problems is bidirectional: the impact of legal problems of people with a disability may further entrench their social exclusion, and people with a disability are more likely to experience legal problems.[22]

There is also a lower level of finalisation of legal problems for people with a disability. This may indicate a reduced capacity to achieve legal resolution for people with a disability. The LAW Survey suggested that a number of factors could contribute to this reduced capability, such as the possibility that they have lower legal knowledge or legal capability, the fact that they have to deal with a greater number of substantial legal problems, and the possibility that their health and other non-legal needs complicate the legal resolution process.[23]

LAW Survey respondents with combined mental and physical illness or disability of a high severity were the most disadvantaged in accessing civil justice.[24] People with mental illness are more likely than members of the community as a whole to be:

- the victims of crime;
- living in poverty;
- imprisoned; or
- homeless.[25]

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19 Coumarelos et al, *Legal Australia-Wide Survey,* above n 13, xv.

20 Law and Justice Foundation of NSW, 'Legal needs of people with a disability in Australia', (Updating Justice No 16, November 2012) 2.

21 Ibid.

22 Ibid. See also Christine Coumarelos and Zhigang Wei, 'The legal needs of people with different types of chronic illness or disability' (Justice Issues No 11, Law and Justice Foundation of NSW, 2009).

23 Law and Justice Foundation of NSW, above n 20.

24 Coumarelos et al, *Legal Australia-Wide Survey,* above n 13.

They are also potentially subject to specific mental health laws and have extremely limited access to legal support in respect of the operation of those laws. In a paper on advocacy and legal representation in mental health tribunals, the authors reported that:

> Representation at Australian MHT hearings is still comparatively rare (5-10% in Victoria), partly because legal aid concentrates on involuntary in-patient admissions, neglecting the vast bulk of people on Community Treatment Orders (CTOs). In Swain's 2000 Victorian study, advocates appeared in just 8 per cent of cases, a rate that has remained stable. Similar rates (8.3%) apply in WA. Representation was higher in NSW in 2006 (16.2%), but mostly for inpatient rather than CTO reviews. This low rate of legal representation is not for lack of evidence about need.[26]

Homelessness

Homeless people are some of the most vulnerable members of the community. The 2012 census data from the Australian Bureau of Statistics show homelessness in NSW has increased by 20 per cent since 2006.[27] The LAW Survey found that '[p]eople who had lived in disadvantaged housing had high prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems from seven problem groups'.[28] Homeless people had the highest odds ratio of legal problems in the areas of consumer, credit/debt, crime, employment, government, housing, money and rights.[29] In addition to their disadvantaged housing status, the homeless group had 2.2 types of disadvantage on average, compared to 1.9 for the basic/public housing group and 1.1 for the non-disadvantaged housing group.

Anecdotally, it is known that many homeless people also suffer from mental illness and/or drug and alcohol disorders. This is reflected in the casework of PIAC's Solicitor Advocate, as noted above.

Through HPLS, PIAC has been successful in addressing some unmet need in the provision of legal advice and representation to people who are homeless or at risk of homelessness, but it has also demonstrated a number of gaps in the ability of people to access legal services.

The Solicitor Advocate was at (or beyond) capacity within 12 months of the position being established and demand for assistance continues to grow. This reveals that while the Legal Aid

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25 Jeanne Choe, Linda Teplin and Karen Abram, 'Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns' (2008) 59(2) *Psychiatric Services* 158-161; Kristie Carter, Tony Blakely, Sunny Collings, Fiona Gunasekara and Ken Richardson, 'What is the Association Between Wealth and Mental Health?' (2009) 63 *Journal of Epidemiology and Community Health* 222-225; Eris Perese, 'Stigma, Poverty, and Victimization: Roadblocks to Recovery for Individuals with Severe Mental Illness' (2007) 13 *Journal of the American Psychiatric Nurses Association* 286 & 288-290.

26 Terry Carney, Fleur Beaupert, Julia Perry and David Tait, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe Dreams?' Mental Health Review Board of Victoria [3] <www.mhrb.vic.gov.au/publications/documents/AdvocacyinMH.doc> at 15 May 2009 [Internal citations deleted].

27 Australian Bureau of Statistics, *2049.0 – Census of Population and Housing: Estimating homelessness, 2011* (2012).

28 Coumarelos et al, *Legal Australia-Wide Survey,* above n 13, 76.

29 Christine Coumarelos and Julie People, 'Home is where the heart of legal need is: homelessness and legal problems' (Updating Justice No 23, Law and Justice Foundation of NSW, April 2013).

Duty Solicitor plays an important role in access to justice, the model is not able to assist certain vulnerable and disadvantaged groups, like people experiencing homelessness, and people with a mental illness, intellectual disability or cognitive impairment. The limited time offered for interviews, the lack of continuity of legal representation, the difficulties facing people with complex or chaotic lives and needs in prioritising and attending court, and the logistics of locating a duty solicitor in a busy court environment are all obstacles that inhibit vulnerable and disadvantaged groups from obtaining the best possible outcome.

Through its work with the homeless community, HPLS has identified that many rough sleepers are still not able to access legal advice simply because they are unwilling or unable to access the services that host the HPLS clinics. This may be for reasons including past experience with the host agency, conflict with other homeless people or fear for personal safety. Another more simple reason is that many rough sleepers do not even recognise that some of the barriers that confront them daily, such as difficulties with government agencies caused by lack of proof of identification, are legal problems and/or could quite easily be resolved with appropriate legal assistance. PIAC is considering opportunities to extend its HPLS services to enable rough sleepers to access legal advice and representation; however, the principal obstacle in PIAC doing this remains a lack of resources.

According to the 2006 Census, women make up 44% of the homeless population in Australia, yet there is a dearth of targeted legal services for women. It is HPLS's experience that, in the main, women do not access mainstream homeless services. If a woman is leaving a domestic or family violence situation, she is generally more likely to access a specialised service. This service may not be able to provide legal assistance beyond the immediate family law or apprehended violence order issues.

Unfortunately, a homeless woman's legal situation is usually far more complex and often involves issues such as tenancy (for example, where a lease is held in joint names) and debt (for example, where bank loans are in joint names). These situations often involve renegotiating contracts and, if not resolved in a timely manner, can escalate into difficult legal problems. HPLS is currently expanding its outreach legal advice service on a trial basis by arranging appointments to meet women who are homeless or at risk of homelessness in a place where they feel safe and which is accessible to them.

Aboriginal and Torres Strait Islander Australians

Aboriginal and Torres Strait Islander Australians have diverse legal needs influenced by socio-economic disadvantage and a range of social factors. Needs range from legal assistance with criminal, family and civil law matters to assistance with native title, wills, tenancy issues and intellectual property among others.[30] The key legal aid service providers for Indigenous people in Australia are Aboriginal and Torres Strait Islander Legal Services (ATSILS), Family Violence Prevention Legal Services (FVPLSs), Legal Aid Commissions and Community Legal Centres. As a result of the increasing demand for criminal law services and the inadequacy of funding,

[30] L Schetzer, J Mullins and R Buonamano, *Access to justice & legal needs, a project to identify legal needs, pathways and barriers for disadvantaged people in NSW Background paper* (2003) Law and Justice Foundation of NSW <http://www.lawfoundation.net.au/report/background>.

ATSILS focus the majority of their limited resources on criminal law services.[31] Priority is given to criminal matters where the accused is at risk of incarceration.

As a result, gaps exist in the provision of other essential legal services such as family law, childcare and protection and other civil law services. Such services are not offered by ATSILS to the same extent as criminal law services, if at all.

The Aboriginal Legal Service (NSW/ACT) received a funding boost in the 2013 Federal budget to restart a small family law practice to address huge unmet need in the Aboriginal and Torres Strait Islander community. The family law service was cut in 2008 when the recurrent funding of Aboriginal Legal Service providers around the country was frozen. Broader civil law advice is provided in partnership with Legal Aid NSW.[32] It is vital that this funding is maintained to minimise the gaps in in the provision of vital legal services for Aboriginal and Torres Strait Islander people.

Response to Topic 6: Avenues for improving access to civil justice

What approaches to improving access to justice are not captured in the taxonomy [set out in sections 7-14]?

There are two approaches to improving access to justice that are not captured in the taxonomy, namely the importance of test cases and legal aid impact assessments.

Value of test cases

Since its establishment in 1982, PIAC has used public interest litigation as one of a number of strategies to achieve public interest outcomes. Public interest litigation – also known as strategic test case litigation – can be an important mechanism for highlighting a particularly problematic aspect of legislation or conduct and, as a result, increasing public concern for amendment or reform. It can also be an important mechanism for ensuring that rights and obligations are understood and upheld, at an individual, organisational and governmental level. In short, public interest litigation has the capacity to achieve systemic change for large groups of people without the need for each person to bring a separate legal claim. By linking its three key strategies – public interest litigation, policy development and community education – PIAC is able to build a compelling evidence base from its litigation and casework experience and consultation to promote law and policy that better deliver social justice outcomes.

Regular review of legislation and legal aid impact assessments

PIAC recommends regular review of all legislation to ensure that it is necessary, clear and effective. PIAC contends that this review process should be mandatory and systematic, as distinct from the current practice of reviewing legislation on an ad hoc basis as determined by individual ministers. These reviews should allow for community consultation and participation.

Such regular reviews of legislation should also consider whether there are sufficient resources in the community to address the legal needs created by the legislation. It is noteworthy that

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31 Joint Committee of Public Accounts and Audit, *Inquiry into Access of Indigenous Australians to Law and Justice Services, Report 403* (2005) 9.

32 Aboriginal Legal Service, *History* <http://www.alsnswact.org.au/pages/history>.

legislative instruments are subject to regulatory impact analysis in respect of their impact in particular on business with a 'business cost calculator' provided by the Office of Best Practice Regulation.[33] However, there is no corresponding analysis focusing on the impact on individuals and their legal rights (and the cost to exercise those rights). Even though there is a requirement at the Commonwealth level to undertake a human rights impact analysis of draft laws via the statement of compatibility process established by the *Human Rights (Parliamentary Scrutiny) Act 2011* process, this does not generally consider the additional legal needs created by the legislation.

Case study

PIAC's Indigenous Justice Program did not have sufficient resources to respond adequately to the legal needs of Aboriginal people with claims under the Aboriginal Trust Fund Repayment Scheme (AFTRS). While the AFTRS was, in the main, a constructive response by the NSW Government to repay monies held in trust by the Government for Aboriginal people between 1900 and 1969, no funding was made available to provide access to legal services so that claimants and potential claimants could navigate the complexities of the AFTRS process.

The AFTRS is a largely administrative scheme but that does not change the fact that people with claims against the AFTRS had a legal entitlement to have the monies paid to them and should have access to legal advice about what is being offered to them, on what terms, and what the alternatives might be to recover the monies owed.

When the AFTRS was first established in 2005, PIAC was virtually the only legal service provider in NSW systematically assisting people to register their claims. Since then, PIAC worked in conjunction with PILCH and private law firms to establish the Stolen Wages Referral Scheme, and with Legal Aid NSW and other CLCs to assist as many people as possible to both register their claims and understand the process the AFTRS uses to deal with claims.

The private law firms, PIAC and Legal Aid NSW were stretched beyond capacity to assist people. This situation is a prime example of the establishment by government of a mechanism that impacts on legal rights without adequate provision for individuals affected to access the legal advice and representation needed to participate effectively in the process.

An example of where a legal aid impact assessment was conducted was at the introduction of the *Disability Discrimination Act 1992* (Cth). Consideration was given to the increased demand for legal services for people with disabilities and a funding program was implemented, after consultation with CLCs, disability organisations and legal aid providers, to fund the establishment of disability discrimination legal services in each state and territory. Unfortunately, the level of resourcing was low, with the largest of the services—now the Australian Centre for Disability Law—initially having funding for less than three staff.

By comparison, in some jurisdictions, legal aid impact assessments are mandatory. For example, in Northern Ireland there is a requirement for those involved in government policy development within the court service and in other government departments to consider whether

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[33] Department of Finance and Deregulation, *Business Cost Calculator* (2009) <http://www.finance.gov.au/obpr/bcc/index.html>.

policies being developed have a potential to impact on the 'workload of the courts or a legal aid cost'.[34] The UK implemented this requirement in 2005.

In PIAC's experience there are a number of reasons why legislation is often not accessible to many people. While ensuring that legislation is drafted in plain English is an important step towards improving the accessibility of legislation, there are also other practical issues that need to be addressed. For example, often 'the law' on an area is not contained in a single piece of legislation but is found in a number of different sources, spanning primary and subordinate legislation, policy and other soft-law instruments, and the common law.

Furthermore, it is impossible to pick up a piece of legislation and read it like a book: established rules of statutory interpretation govern how legislation is interpreted, yet most lay-people have no knowledge of these rules. PIAC submits that in addition to plain English drafting, CLCs and LACs be provided with additional funding to provide community-based training or guides on important areas of law that impact on individuals, and especially vulnerable groups.

What lessons can be learnt from the criminal justice system that could improve access to and outcomes from the civil justice system or interactions between the criminal and civil justice systems?

PIAC's experience with HPLS is relevant to this question. As noted above, since January 2008, PIAC has employed a Solicitor Advocate within HPLS and in this time, the Solicitor Advocate has provided legal representation in minor criminal matters for 367 clients.

The role has been shown to overcome some of the barriers homeless people face accessing legal services, including: a lack of knowledge of how to navigate the legal system; the need for longer appointment times to obtain instructions; and the capacity to address multiple and complex inter-related legal and non-legal problems, such as mental health or addiction issues.

The LAW Survey has underlined 'the importance of more integrated responses across both legal and non-legal services for people who face interrelated legal and non-legal problems.'[35] This is the approach taken by the HPLS Solicitor Advocate.

Case study

Greg was a homeless alcoholic with a long history of offending. He had a history of assaults, including assaults on police. He had made numerous attempts to sort out his alcohol issues but without success. He contacted HPLS requiring assistance in relation to a string of charges. As a consequence of the offending he was in breach of good behaviour bonds.

He had spent nearly two months in custody until the Supreme Court granted him bail; however, any convictions on the offences were likely to lead to considerably longer terms of imprisonment unless he addressed the causes of his offending.

34 *The Legal Aid Impact Test* (2008) Northern Ireland Court Service <www.courtsni.gov.uk/en-GB/Services/LegalAid/LAImpactTest/Pages/Thelegalaidimpacttest.aspx>.

35 Coumarelos et al, *Legal Australia-Wide Survey,* above n 13, xxii.

With the assistance of PIAC's Solicitor Advocate, Greg was accepted into the Salvation Army rehabilitation program in Canberra. In September 2013, he had spent four months on the program, the longest he had spent in rehabilitation. The Court took no actions on the breaches of bonds and imposed further good behaviour bonds for the other offences.

Greg continues with the rehabilitation program and is due to finish it in March 2014.

An integrated response from legal and non-legal services is as important for vulnerable clients with civil law problems as with criminal.

Response to Topic 7: Preventing issues from evolving into bigger problems

What strategies could assist avoidance and early resolution of civil disputes? What mechanisms help people deal directly with their own legal needs? How successful and cost effective have these been in resolving disputes?

The LAW Survey concluded: 'The considerable adverse impacts of legal problems stress the potential value of prevention and early intervention strategies so that legal problems can be resolved before they resonate throughout numerous life areas.'[36] The findings of the LAW Survey also provided strong support for the continued integration of legal, health and human services more generally, and for the further development of effective referral practices between such services.[37]

Community legal centres play a very important role in assisting avoidance and early resolution of civil disputes, as well as helping people deal directly with their own legal needs.

On a range of justice issues, CLCs have worked together to identify how laws and government programs fail the needs of the general community, particularly those facing financial disadvantage, and to develop more appropriate systems going forward.

It is important to have the capacity not simply to provide advice and casework services to respond directly to individual needs, but also to be able to analyse the nature of legal problems being presented by clients, and whether there are trends or patterns in those legal problems that indicate a systemic issue—whether substantive, such as the disproportionate impact of a particular area of law on the identified client community, or procedural, such as particular difficulties the client community has in accessing or interacting with legal services or the legal process. Where such issues are identified, CLCs also need the capacity to conduct research into how such problems may have been addressed elsewhere, where the problem needs to be addressed and to develop and promote solutions. The benefit of having CLCs involved in this work is that they can analyse the likely effect of proposed changes through their understanding of the characteristics and circumstances of their client community and have already-established

36 Law and Justice Foundation of NSW, above n 14.

37 Christine Coumaerlos, Pascoe Pleasance and Zhigang Wei, 'Law and disorders: illness/disability and the experience of everyday problems involving the law' (Updating Justice No 22, Law and Justice Foundation of NSW, April 2013).

relationships within that client community that they can use to ensure consumer input to the solution.

It is important, in considering access to justice and preventing issues from evolving into bigger problems, to ensure that there is capacity within the CLC sector to continue to undertake this sort of work and capacity to respond to new and emerging legal issues and needs – it is a successful and cost effective model, as the following example illustrates.

Case study

The genesis of the NSW Work and Development Order (WDO) system lies in PIAC's work providing legal assistance and representation to homeless people. PIAC identified structural problems with the fines system in NSW that caused unintended negative consequences for this group of people – contributing to the cycle of poverty and disadvantage that was very difficult to escape.

HPLS first raised this issue in March 2006 in a report entitled *Not Such a Fine Thing.* The report collected experiences of homeless individuals and the fines system, and identified that for people living in poverty, the imposition of fines they cannot pay compounds their social and economic disadvantage. The report suggested 18 options for reforming the fines system in NSW, especially in relation to on-the-spot fines. In making these suggestions for reform, HPLS drew on its casework experience and that of other community-based organisations that often assist disadvantaged people who cannot afford to pay their fines, or who feel they have been treated unfairly.

This report was followed by a 2011 supplementary submission, *Still Not Such a Fine Thing,* to the NSW Law Reform Commission reference into Penalty Notices. On the basis of these reports, HPLS worked closely with the NSW Attorney General's Department to achieve reforms on this issue. HPLS recommended that a voluntary work model be included as an option to 'pay off' fines, and that alternative treatment programs for individuals whose offending was the result of mental health, drug and alcohol problems be introduced. The NSW Government announced a pilot program to trial the option of WDOs in 2008. The WDO program is now permanent. The decision to expand the WDO program followed a program evaluation that showed:

> More than 700 people had been approved to do WDOs and reduced $294,000 worth of their fine debt. A further $1,933,755 worth of fine debt is now under management through WDOs. More than 80 per cent of participants had no further fines or penalties referred for enforcement. At least 200 people with mental illness participated.

PIAC also helps prevent issues from evolving into bigger problems through its Energy and Water Consumers Advocacy Program (EWCAP). In 2012, PIAC ran workshops for community workers in regional centres including Wagga Wagga, Dubbo and Broken Hill. The one-day workshop, *Electricity and Water: helping your clients stay connected,* is designed to help community-sector workers keep their clients connected to the essential services of energy and water. With over 18,000 households disconnected from electricity in NSW in the past financial year, the workshop focussed on practical information about available electricity and water rebates. This community

education aims to prevent people being disconnected and the resultant disputes with electricity and water companies.

In the ways explored above, legal education, training and policy work undertaken by CLCs represents a very cost effective way to help people deal directly with their legal needs, identify systemic problems in the system, and prevent issues from evolving into bigger problems.

How can early intervention programs be best targeted and delivered?

PIAC has recently released a discussion paper, *Sentencing Contradictions: Difficulties faced by people living with mental illness in contact with the criminal justice system,*[38] which illustrates some of the benefits and problems with alternative diversionary sentencing initiatives available in NSW.

Using case studies from HPLS, the report also details some 'best practice' programs available in Australian jurisdictions and internationally. In particular, the paper examines 'justice reinvestment' and 'problem-solving justice' approaches. 'Problem-solving justice' redirects public resources to address the underlying factors that contribute to offending and re-offending. Examples include strengthening programs that support housing, job training, education, and treatment. Even though the paper is focused on reducing recidivism in the criminal justice system, it has some application to the civil justice system in that civil legal problems for vulnerable people are often the result of underlying complex needs and could be in some measure be prevented by addressing the root causes.

Collaboration between legal and non-legal services is vital to properly meet a person's legal and broader needs. This idea has underpinned a number of PIAC's projects.

For example, as noted above, PIAC undertook the Mental Health Legal Services Project to develop and pilot responses to unmet legal and related needs by people with mental illness.[39] The project commenced in 2008 with research into different models that have been developed in Australia and overseas to respond to these needs. From that research, PIAC developed four pilot service delivery programs and two training modules to focus on early intervention and prevention of legal and related problems for people with mental illness.

The four pilot service delivery models were:

- a social work support service at the Shopfront Youth Legal Centre (Shopfront) in Darlinghurst;
- a legal support service at the Multicultural Disability Advocacy Association (MDAA) in Harris Park;
- an Indigenous Men's Access to Justice (IMAJ) Worker supporting men in the Gamarada Indigenous Men's Healing Program; and
- a legal support service at the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) in Carramar.

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38 Sam Sowerwine and Louis Schetzer, *Sentencing Contradictions – Difficulties faced by people living with mental illness in contact with the criminal justice system* (15 October 2013) Public Interest Advocacy Centre <http://www.piac.asn.au/sites/default/files/briefing_paper_problemsolvingjustice.pdf>.

39 For more about this project and its funding, see <http://www.piac.asn.au/project/mental-health-legal-services-project>.

The underlying principle that informed the development of each of these pilots is that, to be effective in achieving access to justice for people facing significant disadvantage and complex needs, it is necessary to address their legal issues as part of a co-ordinated response to their broader needs.

The other underlying principle is that to be effective in terms of justice more broadly than individual legal needs, it is necessary to have the capacity to bring together the diversity of those working in individual service delivery to identify trends and systemic issues.

Each of the pilots sought to create a more holistic approach through creating a direct service interface between legal services and other supports, such as non-legal advocacy, social work, clinical treatment and rehabilitation and community development. Many CLCs aim to implement this model in their own community but have insufficient resources to employ a multi-disciplinary team and/or to afford the costs of co-location with other community service providers.

The training modules that were developed as part of the Mental Health Legal Services project are:

- 'How to Sort Out Your (Pre)-Legal Problems', for consumers and their advocates; and
- 'How to Work With Consumers', for lawyers and other advocates.

Through these, PIAC worked with the staff and consumers of the pilot services and more broadly to enhance the capacity of legal and related service providers to work effectively with people with mental illness and for mental health consumers to get the best from legal and non-legal advocacy support.

The pilot projects demonstrated innovative ways to apply a multi-disciplinary approach to meeting need and are a good example of how early intervention programs can best be targeted and delivered. Three of the projects, Shopfront, STARTTS and Gamarada have been ongoing with independent funding after the end of the pilot program.

Response to Topic 9: Using informal mechanisms to best effect

Alternative dispute resolution

What evidence is there that ADR translates into quicker, more efficient and less costly dispute resolution without compromising fairness and equity (particularly where there is an imbalance of power between disputants)? What is the potential for resolving more disputes through ADR without compromising fairness or equity? How might ADR be strengthened to improve access to justice? In what circumstances or settings is it appropriate (or not) to facilitate greater use of ADR in resolving civil disputes?

PIAC reiterates the comments it made about alternative dispute resolution (ADR) in the civil justice system in previous public submissions on this issue.[40]

[40] See Goodstone, *Alternative Dispute Resolution,* above n 3; Simpson and Banks, above n 6.

PIAC believes that the availability of ADR processes may produce better access to justice by, for example, preventing costly and traumatic litigation and promoting earlier settlement of disputes. ADR processes can, if effectively designed and resourced, occur at relatively short notice, procedures can be tailored to suit particular disputes and parties can generally exercise more control over the process. Parties may also be more likely to preserve their relationship and ADR can offer more creative solutions to disputes than is generally available through court-ordered remedies. Further, significant cost savings can be achieved not only for the parties, but also in the justice system more broadly if reduced numbers of disputes are litigated in the courts.

While ADR can achieve the benefits identified above, PIAC considers that ADR should not be seen as a substitute for other dispute resolution options simply because it can be more cost effective. ADR should be used where it is appropriate for the circumstances of the case but not at the expense of fundamental rights and obligations such as the right to a fair trial and public hearing by a competent, independent and impartial tribunal.[41]

ADR is inappropriate if it fails to address power disparities between the parties, which may be exacerbated in an informal setting. Certain types of disputes, such as between a consumer and a large corporation, are characterised by unequal bargaining power. Some consumers may accept a negotiated settlement in order to avoid the risk of adverse costs orders and the stress of litigation, yet by doing so do not have their rights fully realised or the merits of their case properly assessed. It may also be in the interests of an organisation to pay an individual a confidential settlement rather than risk having a test case judgment made against them, which would be costly if applied to a large volume of consumers.

Such settlements have a detrimental effect on other similarly affected consumers as each must take separate legal action, whereas a court determination would provide a clear and public precedent and would be likely to result in a change in policy or conduct without the need for further legal action. For this reason, and perhaps counter-intuitively, the expansion of ADR itself relies on a well-functioning system of formal justice administered through courts and tribunals. That is, where that formal system articulates clear legal rules, it is much more viable to treat similar disputes more expeditiously via ADR.

This also has expenditure implications for the government: where the law is uncertain, and particular categories of claimant cannot obtain reliable access to the courts in appropriate cases, ADR can be *less* attractive because the only viable way to obtain justice is to take one's chances in court. To put this another way, where a person clearly understands the relevant law that applies to their situation, and there is the realistic prospect of curial supervision if the dispute cannot be resolved informally, that person is far more likely to trust the ADR process itself.

Any requirement to participate in ADR processes must consider these power inequalities between parties, preferably through court oversight. Any reforms to try to resolve more disputes through ADR should ensure that more powerful parties cannot exploit ADR to the detriment of less powerful parties who may be afraid of incurring court costs and the ongoing stress of litigation. A court could consider the benefits of ADR in both the individual case as well as the wider social justice context.

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41 See Article 14(1) of the ICCPR to which Australia is a State Party.

Parties participating in ADR processes ideally should have access to independent legal advice. In court proceedings, the disadvantage experienced by unrepresented parties can at least be partially compensated for by judges and by the procedural and substantive safeguards built into the litigation process. Unfortunately, many potential litigants are unlikely to have the funds to engage a solicitor for ADR processes.

PIAC draws the Commission's attention to the research by Associate Professor Beth Gaze and Professor Rosemary Hunter for an analysis of access to justice issues for complainants in proceedings in which ADR is the norm. They show that access to legal representation is often limited and power imbalances are the norm rather than the exception.[42] Therefore, PIAC recommends that before agreeing to ADR, unrepresented litigants should have access to independent legal advice. In addition, the Australian Government Attorney-General's Department should ensure that funding for CLCs and Legal Aid agencies is increased so that they are able to represent clients in ADR processes.

In contrast to court hearings, ADR processes are usually conducted in private and resolutions are generally confidential. Neither the reason for a dispute nor the basis upon which it is resolved need be made public. Disputes settled through ADR thus do not allow for laws to be tested and have less capacity to achieve legal precedents or significant public interest outcomes.

This does not mean that there is no place for ADR. It just means that ADR will not be appropriate for every dispute or for achieving broad-based public interest outcomes. Therefore, while in general referral into a less formal process can be beneficial to resolving simple disputes earlier, such processes generally are not suitable where a matter raises issues of systemic or public interest. There is a clear societal benefit from such matters being determined by courts with higher authority as their judgments have greater precedent value and there is generally more capacity to promote public awareness of the outcome.

It is important that people do not choose ADR because of the inadequacies of the court system or the limited availability of legal assistance, but rather because of the benefits of ADR. Thus the court system must deliver cost-effective, expeditious and fair resolution of disputes and ADR should not be viewed simply as a less costly and more efficient substitute. The costs and time associated with litigation continue to rise beyond the reach of many members of the community. This issue must be addressed separately, and not simply through increased reliance on ADR.

It should be noted that increasing access to justice in the court system could also incentivise the resolution of disputes through ADR. As explained below in response to 'Topic 11: Improving the accessibility of courts', liberalising standing restrictions to allow representative proceedings in the federal human rights jurisdiction is likely also to have a considerable impact on the likelihood of settlement in conciliation at the Australian Human Rights Commission (AHRC).

Finally, if lawyers are to be involved in ADR processes, they must be adequately trained for the task. The principles of dispute resolution and the skills required to act for a party in ADR are different to those needed in typical court proceedings. ADR training should be included as a compulsory component of law degrees and of mandatory continuing legal education.

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42 Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW LJ* 699.

ADR processes in the federal discrimination jurisdiction

PIAC regularly acts for clients in ADR processes in the federal discrimination jurisdiction. In this jurisdiction, discrimination complaints are made to the ARHC, whose role is to attempt to conciliate complaints. If the parties do not settle, the complainant has the right to file an application in the Federal Court or Federal Circuit Court.

The issue of imbalance of power is a particular concern in this jurisdiction, so it is important to ensure that the processes are designed to counter to the greatest extent possible the effects of that imbalance. Conciliators need a degree of experience, skill and gravitas to deal effectively with uncooperative conduct by parties and their legal representatives.

In 2011-12, the complaint-handling section of the AHRC received 17,047 enquiries and 2,610 complaints. Of the complaints finalised in 2011-12, 48% were conciliated. Of those matters where conciliation was attempted, 66% were resolved. The AHRC finalised 93% of matters within 12 months, 85% within nine months and 66% within six months. This is a significant improvement on previous years, and also challenging to maintain. The resources provided to the AHRC need to be maintained in real terms, and possibly increased to further educate AHRC conciliators in creative methods of facilitating dispute resolution and better deal with power imbalances between the parties.

How successful has ADR mandated by courts and tribunals been in resolving disputes and lowering the cost of litigation?

While courts and tribunals should encourage ADR processes, PIAC believes it should be up to the parties to determine if ADR is appropriate and the parties should not be pushed into ADR processes by either professional bodies or the courts. Bearing in mind the limitations to ADR that PIAC has identified in its comments above, PIAC does not believe that ADR should be regarded as standard practice in the federal court system.

Ombudsmen

The Commission invites comments on the scope and operation of ombudsman services in Australia. Are ombudsmen an efficient and effective way of resolving disputes with government and industry? Where do they work best? How might ombudsman services be improved?

PIAC has most direct experience with the Energy and Water Ombudsman NSW (EWON).[43] EWON is not a conventional public sector ombudsman; rather it is an industry-funded scheme.

Industry ombudsmen

While in some cases, industry ombudsmen focus on resolving disputes between individuals and government or industry, in other cases, once the complainant has made the complaint he/she has extremely limited input into the conduct of the investigation and resolution of the complaint.

Another difficulty with industry ombudsmen can be that while the association or regulator can impose sanctions on a business for failing to comply with the recommendations of the industry

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[43] Carolyn Hodge, Senior Policy Officer, Energy + Water Consumers' Advocacy Program at PIAC, is also a Director of EWON.

ombudsman, this is not necessarily a satisfactory outcome for a consumer as it leaves the consumer with no direct enforcement mechanism that they can activate.

The effectiveness of industry-based external dispute resolution schemes from a consumer perspective is directly related to the governance of those schemes. Ensuring that the schemes are not beholden to industry interests and agendas is critical to their effectiveness. In this regard, EWON is an effective scheme with appropriate governance in place.

Industry external dispute resolution schemes offer all consumers, including disadvantaged consumers, a speedy, effective and inexpensive mechanism to deal with problems, most of which would not be appropriate to resolve via litigation. They offer access to many remedies that are appropriate and preferable to pursuing litigation. However, there are a number of limitations on the effective use of industry ombudsmen.

Energy and Water Ombudsman NSW

PIAC noted above the difficulty consumers face accessing efficient dispute resolution services in relation to the NSW Solar Bonus Scheme (see the discussion about simplicity and usability in response to ‘Topic 4: The costs of accessing civil justice’). EWON continues to receive complaints regarding the NSW Solar Bonus Scheme. These matters are complicated by the fact that such disputes involve companies within and outside of EWON’s jurisdiction. For consumers, this means they may need to deal with multiple regulators, such as Fair Trading NSW, the Clean Energy Council and EWON, to resolve a single dispute. This is frustrating and inefficient for consumers and it is not best practice.

Energy market innovations, such as demand-side participation activities, may realistically involve providers within and outside the jurisdiction of Energy and Water Ombudsman services, and may be facilitated by interaction between energy service companies (that are not within EWON's jurisdiction) and retailers or networks (that fall within jurisdiction of EWON). There is an opportunity while these schemes are new to bring them within EWON’s scope, and in PIAC’s view this should be capitalised on proactively and not as a knee-jerk reaction to growing complaints at a later date.

PIAC acknowledges that an expansion of the jurisdiction of EWON to provide this service to consumers will require engagement with Ombudsman services and the development of methods to facilitate appropriate cost recovery. While EWON is free for consumers, it is funded by membership fees and charges paid by industry.

In PIAC’s view, consumers will benefit not only from the single access point but also because Energy and Water Ombudsman Schemes have the capacity to collect data on complaints that can be used to provide an evidence base for the development of consumer protection that may be necessary in the near future. Without this evidence base, the framework is at risk of being too onerous or not appropriately designed to protect consumers against issues that are unknown at this time.

It is also important that disputes are resolved by services that have expertise in a particular area. While EWON staff have a range of expertise and systems to deal with energy, gas and water matters, the fact that LPG provision does not sit within EWON's jurisdiction means that any

consumer disputes to do with LPG must be referred to Fair Trading in NSW. Fair Trading has jurisdiction over a very broad range of issues and its staff are not able to bring the same level of knowledge on energy matters to resolving these disputes. Additionally, Fair Trading has not had systems in place to collect data and report on LPG matters, and its staff have no capacity to compare consumer protections between reticulated gas customers and LPG customers. EWON's public reporting of complaints also provides a level of transparency about consumer issues that PIAC values highly.

PIAC advocates for all consumers to have the same level of protection and access to essential services. Independent dispute resolution is an important plank in the consumer protection framework. In addition to gaps noted above, exempt consumers (those who purchase from non-retail entities such as caravan parks or retirement villages), do not have the same level of access to independent dispute resolution as those who purchase energy from a retailer. Some state schemes do not act for these customers at all, while others have resolved to take some action as long as the numbers of complaints are relatively low. In some ways, these consumers are more vulnerable, and more in need of an independent arbiter, because their energy provider has significant power over their home as well as essential service provision. Resolving this issue will require consideration of how industry ombudsman schemes can recover the costs of dealing with these complaints. As noted above, this should occur in close consultation with the particular ombudsman schemes in question.

Response to Topic 10: Improving the accessibility of tribunals

How are tribunals being used to promote access to civil dispute resolution and justice more broadly? What lessons can be learned from the various tribunal structures used across different jurisdictions in Australia? How and to what extent has the move towards consolidated tribunals impacted on access to justice and affected efficiency?

PIAC has considerable experience in appearing before administrative tribunals such as the NSW Administrative Decisions Tribunal (ADT) and the Commonwealth Administrative Appeals Tribunal (AAT). As with ADR, part of the rationale for the establishment of a tribunal system in Australia from the 1970s, was to provide individuals and organisations with an avenue to resolve disputes about government decision-making, which is fair, just, economical, informal and quick.[44]

Those objectives need always to be balanced so that the tribunal system does not become a second-rate avenue for achieving justice. Problems, for example, have arisen from time to time regarding the backlog of matters to be heard. For instance, the backlog in matters to be heard by the Office of the Australian Information Commissioner (OAIC) has become excessive, and inhibits the achievement of the objectives of the legislation (freedom of information and privacy) that the OAIC is empowered to pursue. In 2012-13, the average time taken to complete Information Commissioner FOI review applications was 268 days, compared to 169 days in 2011/2012. FOI complaints were completed in an average of 152 days and privacy complaints in an average of 110 days in 2012-13.[45]

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44 This is the AAT's objective as stated the *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.

45 Office of the Australian Information Commissioner, *OAIC Statistics 2012-2013* (30 June 2013) <http://www.oaic.gov.au/images/documents/about-us/corporate-information/Budget-and-statistics/OAIC_quarterly_statistics_as_at_30_June_2013.pdf>.

PIAC generally supports the move towards consolidated tribunals, as there is a public interest in establishing efficiencies in relation to the administration and functioning of the various tribunals. However, PIAC believes that where tribunals have been established for a clear public purpose (such as in the case of health disciplinary tribunals, for the purpose of public protection from the conduct of unethical, impaired or incompetent health professions) and have developed a level of expertise and experience in their jurisdiction, it is not in the public interest to merge the functions of these tribunals with tribunals in other jurisdictions. For more detail about PIAC's views in relation to a single Health Practitioners Tribunal, and the amalgamation of the Mental Health Review Tribunal and the Guardianship Tribunal, we refer the Commission to PIAC's 2011 submission to the NSW Legislative Council Standing Committee on Law and Justice.[46]

In its 2002 report, *Restoring Identity*, PIAC proposed an alternative to litigation for members of the Stolen Generations who seek redress for their experiences as a result of forcible removals.[47] PIAC proposed a framework for a national Stolen Generations reparations tribunal modelled after the recommendations from *Bringing them home*. The function of the proposed tribunal would be to provide a comprehensive reparations package including, but not limited to or focused on, monetary compensation to Aboriginal and Torres Strait Islander people and communities to acknowledge and address the harms caused to members of the Stolen Generations. To date, the governments of Tasmania, Queensland and Western Australia have established implementation schemes designed to provide ex-gratia payments to people who experienced harm in state care, and Tasmania has implemented a compensation scheme for Aboriginal children removed from their families.

Response to Topic 11: Improving the accessibility of courts

The conduct of parties in civil disputes and vexatious litigants

What processes are most appropriate for declaring an individual a vexatious litigant? What principles should courts use in making such declarations? How could less 'binary', more graduated arrangements produce better outcomes? What account should be taken of the long-term impacts that vexatious litigants have on their own personal wellbeing when making court declarations? Having been declared a vexatious litigant, how difficult is it for a litigant to access justice when a dispute has merit?

In relation to vexatious litigants, PIAC repeats the comments it made to the Access to Justice Taskforce.[48]

While PIAC accepts that vexatious litigants can cause considerable problems within the legal system both in terms of time and resources, declaring an individual a vexatious litigant restricts that person's fundamental right to justice and therefore should only be issued in extremely limited circumstances. Furthermore, there is a risk that people with disability, particularly a mental

46 Peter Dodd, *NSW Tribunals: getting the balance right* (25 November 2011) Public Interest Advocacy Centre, <http://www.piac.asn.au/publication/2012/01/nsw-tribunals-getting-balance-right>.

47 Amanda Cornwall, *Restoring Identity: Final Report of the Moving Forward Consultation Project* (15 August 2002) Public Interest Advocacy Centre, <http://www.piac.asn.au/publication/restoring-identity>.

48 Simpson and Banks, above n 6.

illness, are more likely to be labelled difficult or vexatious, further reinforcing their vulnerability and inability to access justice.

PIAC therefore submits that any proposal to amend the law that deals with vexatious litigants should be approached with caution. For example, PIAC submits that adopting the threshold test of 'frequently instituted proceedings' is too low. As the Federation of Community Legal Centres (Vic) noted in its submission to the Inquiry into Vexatious Litigants by the Victorian Parliament:

> Care must also be taken to ensure that any legislation … concerning vexatious litigants does not become a mechanism to silence unpopular causes and 'difficult' people… major social justice changes have sometimes been achieved by people who simply insist on pursuing justice over a long period and who refuse to be perturbed.[49]

Furthermore, PIAC notes that there has been a lack of substantive research conducted into vexatious litigants and proceedings.[50] The most relevant publication for the Productivity Commission to consider is *Maverick Litigants: a history of vexatious litigants in Australia 1930–2008*.[51] PIAC recommends that before there is any further legislative reform in this area, quantitative research should be undertaken into the true extent of the problem of vexatious litigants. The research should ideally also focus on the effect of orders declaring a person vexatious both on the individual concerned and the wider court processes. The research should also analyse the increased focus on whether the particular legal action in question is vexatious, rather than the person instituting it.

Court processes

How are imbalances in the resources available to disputing parties best addressed so that outcomes are not based on one party being able to effectively exhaust the resources of another, rather than winning on merit?

PIAC has long been concerned with the imbalance of resources in many legal cases. Throughout this submission, PIAC has suggested a number of ways to address the imbalance: refer to PIAC's comments below in relation to arrangements for awarding costs, specifically PIAC's suggestion to create a Justice Fund or increase the application of Order 62A.

Discovery

How and to what extent do the current discovery rules impact on access to justice? In what areas does discovery particularly affect access to justice? How could rules of discovery be reformed to improve access?

The *Access to Justice (Federal Jurisdiction) Amendment Act 2012* made two substantial changes to the discovery rules, which implemented two of the recommendations of the Australian Law

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49 Federal of Community Legal Centres (Vic), *Submission to Parliament of Victoria Law Reform Committee: Inquiry into Vexatious Litigants,* (2008) [3] <http://www.communitylaw.org.au/lrs.php#Access%20to%20justice> 3.

50 Ibid. See also Victorian Law Reform Commission, *Civil Justice Review Report, Report No 14* (2008) <http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf>, 599.

51 Simon Smith, *Maverick Litigants: a history of vexatious litigants in Australia 1930-2008* (2009).

Reform Commission (ALRC) Inquiry into Discovery in the Federal Courts. In its report, *Managing Discovery: Discovery of documents in federal courts*, tabled in Parliament on 25 May 2011, the ALRC made 27 recommendations aimed at improving the functional operation of discovery laws, and so make civil justice more accessible and effective. The focus of the report was on the need to promote cultural change to manage discovery more proactively.

The Act implements two of the Report's recommendations:

- Recommendation 9-2: The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that, without limiting the discretion of the Court or a judge in relation to costs, the Court or judge may make an order that:
    i. some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery
    ii. a party requesting discovery give security for the payment of the cost of discovery, and
    iii. specifies the maximum cost that may be recovered for giving discovery or taking inspection.
- Recommendation 10-1: The *Federal Court of Australia Act 1976* (Cth) should be amended to provide expressly that the Court or a judge may order pre-trial oral examination about discovery.

These recommendations were designed to clarify and reinforce the Federal Court's powers to limit the costs of discovery and encourage proportionality when dealing with discovery.

In its submission to the ALRC, PIAC opposed the proposal that a party seeking discovery of documents should be required to pay the estimated costs of discovery in advance. PIAC's principal concern is that many litigants – particularly those who are self-represented, legally aided or otherwise disadvantaged – simply could not afford to pay the estimated costs of discovery in advance. For many ordinary individuals, such interlocutory costs orders could prevent them from pursuing their legal rights, irrespective of the merits of their case. In addition, there is a real risk that the other party may provide an over-inflated estimate of costs and that a court, without seeing the discovered documents, will struggle to assess the reasonableness of the estimate.

Finally, adding another layer of interlocutory disputation between the parties may actually make the proceedings more costly, lengthy and cumbersome. PIAC also notes that if a court orders pre-trial oral examination about discovery, this will require increased funding to legal service providers. PIAC recommends that these concerns should be considered by the Productivity Commission in assessing how current discovery rules impact on access to justice.

Reforms in court procedures

Case management

How could the case management systems, processes and practices adopted in different jurisdictions be improved to reduce the costs of litigation and improve access to justice more broadly? How might modern management and communication practices inform alternative approaches to the administration and delivery of court services?

One particular aspect of the way in which courts operate—as distinct generally from tribunals—is the listing of multiple matters on a single day (particularly in the lower courts) and requiring all parties, and their legal representatives (if they have them) to be available at court until their matter is called.

This is a significant inefficiency that adds to the costs incurred by the parties by increasing the unproductive time spent by their legal representative waiting at court. It also creates broader negative impacts on dispute resolution. These include delays (sometimes of weeks or months) in getting to the substance of the issue in dispute. This can make the positions of parties more intractable and alienate disadvantaged participants through their perception that they and their legal problems are not a priority. There is also a cost to the parties of having to take time away from work, education or other activities without any progress being achieved. This in turn may lead to parties deciding to withdraw from the process or giving up on the enforcement of their legal rights simply to get the matter over and done with.

Cost awards and court fees

Arrangements for awarding costs

The Commission seeks information on different approaches adopted by courts and tribunals to the allocation of legal costs among the parties to a dispute. What principles should apply in deciding how to award costs so that they create appropriate incentives for equity and efficiency in civil dispute resolution? In particular, what principles should apply to help ensure that the costs incurred are proportionate to the issues in dispute?

A significant impediment to accessing justice for many people seeking to enforce their legal rights is the risk of an adverse costs order as a result of unsuccessful litigation. In relation to the issue of costs, PIAC reiterates the comments it made to the Senate Legal and Constitutional Affairs Committee in its 2009 Inquiry into Access to Justice[52] and to the Access to Justice Taskforce in 2009.[53]

In PIAC's experience, even where pro bono legal representation or representation on a conditional fee is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. This is especially the case in matters where there is a great disparity in resources between the applicant and respondent.

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52 Goodstone et al, *Justice – not a matter of charity,* above n 4, 21-22.

53 Simpson and Banks, above n 6.

In the discrimination arena, many complainants decide not to pursue discrimination complaints beyond conciliation at the Australian Human Rights Commission to the Federal Court or Federal Circuit Court. This is because it is not uncommon in a Federal Court discrimination matter for the legal costs of a respondent to exceed $15,000 per trial day and for hearings to involve a number of days (both at the preliminary stages and in the hearing of the substantive matters). By comparison, applicants in state anti-discrimination matters are much more likely to proceed to a hearing in the Administrative Decisions Tribunal in NSW, where, in most cases, costs orders are not made.

PIAC proposes three possible solutions to this problem.

First, it is PIAC's view that the human rights jurisdiction of the Federal Court should be a 'no costs' jurisdiction, where the general rule that should apply is that each party bears their own costs, with a discretionary power to award costs in extraordinary circumstances.

There are strong public interest reasons why the human rights jurisdiction of the Federal Court should be treated differently from its other jurisdictions in relation to costs, including the purposes of human rights legislation and the lack of access to resources faced by many applicants in human rights cases. Alternatively, the costs rule should be amended in 'public interest' cases only. Absent change in the federal human rights jurisdiction in relation to costs, many applicants with meritorious cases will fail to proceed and the realisation of rights under federal anti-discrimination law will remain limited.

Second, another way of alleviating the negative impact of adverse costs orders on federal human rights litigation would be to strengthen the application of Order 62A rule 1 of the *Federal Court Rules* (Cth). Order 62A provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party and party basis. An Order 62A costs order has the potential to remove uncertainty about the level of risk of an adverse costs order, thereby allowing the applicant to proceed in cases where they otherwise might be unfairly inhibited from doing so.

One problem with the Order (and other similar costs-limiting orders in other jurisdictions) is its infrequent use, due to a lack of awareness by practitioners and judges, and in cases where applications have been made, the reticence of judges to make orders limiting costs. The Productivity Commission should consider what more could be done to encourage the judiciary to understand the benefit of such orders in promoting access to justice through enabling public interest litigation.[54]

For example, amendments to Order 62A could be made to ensure that it becomes commonly used in human rights cases to limit costs. This could be by way of a presumption in favour of costs limiting orders in human rights cases, and/or by way of guidance to judges in exercising their costs discretion in human rights cases. At the very least, where an applicant seeks a ruling under Order 62A, there should be a presumption in favour of limiting costs in 'public interest' matters, where 'public interest' is defined broadly to include all cases that could benefit a class of disadvantaged people, even though they may benefit the applicant as well.

[54] Joanna Shulman, 'Order 62A of the Federal Court Rules' (2007) 32 *Alt LJ* 75.

Case study

PIAC represented Julia Haraksin in her disability discrimination claim against Murrays Australia Ltd (Murrays). Ms Haraksin, who has brittle bone disease and uses a wheelchair, attempted to book a return ticket on a Murrays bus to Canberra to attend a work conference. She was informed that Murrays had no wheelchair accessible buses. The claim alleged discrimination and a breach of the Disability Standards for Accessible Public Transport.

PIAC successfully represented Ms Haraksin in her application for a costs cap under Order 62A of the Federal Court Rules. This cap meant that PIAC was not able to recover the full costs of the proceeding when we won, but without the costs cap Ms Haraksin would not have been able to bring the case, due to the risk of an adverse costs order.

A potential benefit of costs-limiting orders being made early in proceedings is that it can help to refine the issues in dispute as it is the interests of all parties to limit their expenditure to those matters where real and substantive disagreement exists. Despite this benefit, PIAC recommends that such orders should be able to be made at any stage in the proceedings, rather than requiring the party seeking the order to apply effectively at the first directions hearing.

In respect of the concern that changing the costs rules would result in a potential flood of vexatious litigation, PIAC notes that such a flood is likely to be held back by the limited access to legal assistance. Most legal service providers give significant consideration to the merit of matters before they allocate limited resources to assisting and representing litigants. By limiting the application of such rules to truly public interest matters it is highly likely that costs-limiting orders would only be available in a limited number of matters and certainly not in matters involving vexatious litigants. PIAC notes that, in contrast, there is no limit on corporate litigants obtaining tax deductions for their legal expenses, no matter how frivolous or vexatious their litigation. This is discussed further below, in response to 'Topic 13: Funding for litigation'.

Finally, consideration should be given to significant reforms of the Attorney-General's Test Case Fund. PIAC, on behalf of a representative body, sought funding under this scheme and found that the process for obtaining funding was so lengthy as to make the application effectively meaningless. The decision whether or not to grant the funding was not made until after the matter was determined. This approach to a targeted test case fund is seriously flawed and in effect means that the Fund cannot be used as a means of ensuring that important test cases get to court.

A review of the rules of the Fund and its processes is needed to ensure that funding is available in a timely manner to assist litigants bringing test cases. Consideration should also be given to having the fund operate as an indemnity fund against adverse costs orders in federal proceedings in the same way that a grant of legal aid in NSW provides an indemnity against costs in state proceedings.[55] Alternatively, the Productivity Commission should consider the establishment of a new mechanism to fund public interest cases. PIAC refers to the various reports of the Law Council of Australia,[56] the UK Civil Justice Council,[57] and the Victorian Law

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55 *Legal Aid Commission Act 1979* (NSW) s 47.

56 Law Council of Australia, *Litigation Funding,* Submission to the Standing Committee of Attorneys-General [No 1907] (2006) <http://www.lawcouncil.asn.au/library/submissions.cfm>.

Reform Commission,[58] which have all developed detailed proposals and models for establishing a public interest litigation fund. Please refer also to PIAC's comments in response to 'Topic 13: Funding for litigation' about the creation of a Justice Fund. PIAC notes, however, that such funds do not necessarily overcome the impact of the risk of an adverse costs order on parties with limited resources.

Court fees

The Commission invites comments on the appropriateness of court fees. What factors should be considered in determining court fees? How can processes for determining fee structures be developed to improve the incentives for disputants?

PIAC strongly supports a comprehensive system of fee exemptions that would apply in appropriate public interest and human rights cases. PIAC notes that currently federal courts have fixed categories of non-discretionary exemptions of fees. Some of these categories include:

- persons who have been granted legal aid under a legal aid scheme approved by law or by the Attorney-General;
- holders of Commonwealth Health Care Cards;
- pensioners;
- inmates or persons otherwise legally detained in public institutions;
- persons under the age of 18; and
- persons in receipt of a Youth Allowance, Austudy or Abstudy payment.

As well as these categories, the federal courts and tribunals have the discretion to waive fees in circumstances of financial hardship.

PIAC believes that the current system of fixed exemptions is clear and predictable and generally enables those with limited financial capacity to access the legal system. However, PIAC submits that in addition to the existing categories of fixed exemptions, there should also be a category where the presumption is in favour of fee exemption for public interest cases and cases in which clients are represented by CLCs or by private solicitors on a pro bono basis. The AAT should also be able to waive application fees in public interest cases.

The use of technology

As stated previously in response to 'Topic 4: The costs of accessing civil justice', it may be possible that increased use of new technologies could improve the co-ordination and availability of legal information and service. However, PIAC cautions that new technologies are not always accessible by everyone in the community because of disability and issues such as print literacy, computer literacy and barriers to access in remote communities. Further, people in institutional care or detention (including prisoners) are at a significant disadvantage when considering the use of new technologies to deliver both legal information and legal services. As far as PIAC is aware, prisoners in Australia are generally prevented from access to the internet for security reasons and access via telephone to services is severely limited. Specific consideration needs to be given to ensuring that people in institutional settings are provided with legal information and services.

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[57] Civil Justice Council, *Improved Access To Justice – Funding Options and Proportionate Costs* (2005) <http://www.civiljusticecouncil.gov.uk/files/improved-access-to-justice-240805.pdf>.

[58] Victorian Law Reform Commission, above n 50.

Other than the matters discussed above, are there any other court or tribunal practices and procedures which may impede access to justice?

PIAC believes there are three other court practices and procedures that impede access to justice. These are:

1. Issues of standing;
2. The need to allow public interest organisations to provide effective and useful interventions as *amicus curiae*; and,
3. Lack of funding of disbursements

Standing

PIAC reiterates the comments it made to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice[59] and the Access to Justice Taskforce.[60]

Test case litigation has the capacity to create systemic change for large groups of people without the need for each person to bring a separate legal claim. This is a clear benefit for access to justice as well as reducing the costs of the justice system.

In Australia, test cases that promote the public interest by creating, enforcing or clarifying legal rights must generally be brought by individuals prepared to expend significant financial resources, time and emotional energy on the proceedings. Litigation pursued by individuals may have broad-reaching effects and benefit others. However, test case litigants are often almost crushed in the process. As a public interest legal practice seeking to promote access to justice, enhanced democracy, consumer protection and human rights, PIAC has also witnessed the situation where no person is prepared to take on the enormous burden and risk of bringing a legal claim, despite significant numbers of people suffering harm.

Case study

In September 2004, Access for All Alliance lodged a complaint with the then Human Rights and Equal Opportunity Commission (HREOC). The complaint alleged that the Hervey Bay City Council installed bus stops that did not comply with the *Disability Standards for Accessible Public Transport 2002* (Cth). Access for All Alliance, an incorporated association, is a volunteer community group established to ensure equitable and dignified access to all premises and facilities, whether public or private to all members of the community.

When no agreement was reached at conciliation and HREOC terminated the complaint, PIAC, on behalf of the Access for All Alliance, filed proceedings in the Federal Court. However, the Court dismissed the application on the basis that Access for All Alliance did not have standing to bring the proceedings as it was not an 'aggrieved person' within the meaning of s 46P(2) of the *Human Rights & Equal Opportunity Commission Act 1986* (Cth).

There is an important public interest in ensuring that the Disability Standards are an effective compliance promotion tool to reduce the incidence of discrimination against people with disabilities. If only aggrieved individuals prepared to take on significant financial risks have

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59 Goodstone et al, *Justice – not a matter of charity,* above n 4, 22-24.

60 Simpson and Banks, above n 6.

> standing to make a complaint of a breach of standards, few complaints will be made and opportunities to ensure proper implementation of the Disability Standards will be limited.

Standing rules in a number of other jurisdictions (such as South Africa, India and the United States of America) reflect a more open approach that accommodates the demands for wider public participation in judicial decision-making and for greater access to justice. PIAC considers that the rules of standing should be broadened to allow a wider class of people to bring civil proceedings. The Access to Justice taskforce recognised this and recommended that:

> The Government should consider amendments to allow representative and advocacy groups to bring actions based on claims of discriminatory conduct under the *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), *Age Discrimination Act 2004* (Cth) and the *Racial Discrimination Act 1975* (Cth) before the federal courts (when conciliation in the Australian Human Rights Commission has failed). Action would be constrained by the requirement that there be a justiciable issue, and that actions may only be taken by established groups with a demonstrated connection to the subject matter of the dispute.[61]

PIAC strongly endorses this recommendation and urges the Productivity Commission to adopt it. The experience in environmental law reveals the benefits that could flow from broader standing provisions, in terms of the development of law and policy. PIAC recommends the adoption of a provision along the lines of s 123 of the *Environmental Planning and Assessment Act 1979* (NSW) that provides for open standing. While such an approach was originally considered radical and potentially opening the floodgates to frivolous or vexatious litigation, this has not proven to be the case in practice. Furthermore, to safeguard against misuse of such a provision, the court could have discretion to refuse standing where an application is clearly frivolous or vexatious, or where the applicant has no basis for establishing a prima facie case.

If the Productivity Commission were not inclined to recommend the introduction of an open standing provision, PIAC submits that the test for standing contained in s 27(2) *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) in respect of organisations is another possible model. Section 27(2) enables an organisation to bring proceedings provided that the decision being challenged relates to a matter included in the objects of the organisation. While not as broad as the test proposed by the Access to Justice Taskforce or contained in s 123 of the EPA Act, PIAC is of the view that this provision would overcome the problems of the existing test thereby encouraging valuable public interest litigation.

In particular, standing rules in public interest cases should be broadened so that organisations can bring proceedings on behalf of aggrieved people or groups of people. Broadening the standing provisions in the Federal human rights jurisdiction is likely to also have an impact on the likelihood of settlement in conciliation at the Australian Human Rights Commission. Amendments to legislation to enable representative proceedings as already contemplated under the *Disability Discrimination Act 1992* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) are long overdue and should be introduced as a matter of priority to enable the systemic potential of federal anti-discrimination laws to be more effectively realised.

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[61] Ibid 114.

Amicus curiae and other interveners

Amicus curiae interventions are a legal procedure that can be used to achieve access to justice without the significant cost and risk associated with being a party to litigation. An *amicus curiae*, or 'friend of the court', is a person who seeks leave to intervene in proceedings to assist the court on a point of fact or law.

Public interest *amici* often seek to alert judges to the broad ramifications of the decision they will make in the context of the dispute between the parties before them. Thus, their involvement in litigation may enhance the rights of people who are not parties to the proceedings.

An 'intervener' (as opposed to an *amicus curiae*) must normally have a direct financial or other interest in the outcome of the proceedings. An intervener becomes a party to the proceedings and usually possesses the privileges and risks associated with being a party, such as the capacity to tender evidence, appeal the decision of a lower court, participate fully in the argument and be liable for costs.

PIAC has acted for various organisations that have sought leave to intervene in proceedings as *amicus curiae*. PIAC represented the NSW Combined Community Legal Centres' Group Inc and Redfern Legal Centre as *amici* in *APLA & Ors v NSW Legal Services Commissioner & the State of NSW* [2005] HCA 44. The Australian Plaintiff Lawyers Association, as it was then known, challenged the validity of Part 14 of the *Legal Professions Regulation 2002* (NSW), which made it an offence of professional misconduct for a legal practitioner to publish advertisements that had a connection with personal injury. The *amici* were concerned that the Regulation significantly impeded the work of CLCs, by preventing their solicitors from publishing information about civil liberties, discrimination, domestic violence, sexual assault and welfare rights (which arguably all have a connection to personal injury as it is broadly defined in the Regulation). The *amici*'s submissions highlighted the effect that the Regulation had beyond that presented by the parties.

The Supreme Courts of Canada and the United States of America, as well as the Constitutional Court of South Africa, have welcomed submissions from public interest organisations and others, and have created court rules to accommodate and facilitate the participation of *amici* in cases raising important issues of public policy. In Australia, however, the superior courts have been reticent to grant leave to *amici* or interveners and court rules have been absent or unhelpful in encouraging the participation of third parties in public interest and public law cases.

In 1996, the Australian Law Reform Commission proposed a new framework designed to facilitate the involvement of *amici* and interveners in litigation before the courts.

In 2002, Order 6 Rule 17 and Order 52 Rule 14AA were inserted into the *Federal Court Rules* by the *Federal Court Amendment Rules 2002 (No 2)* (Cth). In *Sharman Networks Ltd v Universal Music Australia Pty Limited* [2006] FCAFC 178 (7 December 2006), the Australian Consumers' Association Pty Ltd, Electronic Frontiers Australia Inc, and New South Wales Council for Civil Liberties Inc (CCL) made a joint application for leave to be heard in the appeals as *amici curiae*. The Full Federal Court recognised that they could make useful submissions in the public interest on the proper construction of certain provisions of the *Copyright Act 1968* (Cth). Instead of accepting their application to be heard as *amicus curia*, however, the Court said at paragraph 11:

> [W]e think that the new rules are intended to regulate comprehensively the practice of the Court with respect to the intervention of non-lawyer parties in proceedings, both original and appellate. We think it is only the legal practitioner who is invited by the Court to assist it, who stands outside the rule regime. Even in that case, of course, the terms on which a legal practitioner is invited to participate as *amicus curiae* should be defined by the Court in an exercise of its implied power.

And at paragraph 12:

> It would be inconsistent with the obvious intention of the rules for a non-lawyer entity to be free to seek leave to be heard as *amicus curiae* outside the comprehensive framework now provided by O 6 r 17 and O 52 r 14AA.

Considering the request as falling under Order 52 Rule 14AA, the Court then took the view that the question whether the *amici* should have any liability for costs should be determined at the conclusion of the matter. Due to the resulting uncertainty over the potential costs of continuing, CCL did not seek to exercise the leave granted to the *amici* jointly.

The Full Federal Court's interpretation of the Rules in the *Sharman* case, and its resulting decision in relation to costs, served to discourage the intervention of CCL. This approach will thwart future interventions in the public interest and thus indirectly impact on people's access to justice in a negative way. Rather than encourage a culture of effective and useful intervention by public interest organisations, Australian case law appears to be heading in the other direction. PIAC recommends that the Productivity Commission review the productive role of *amicus curiae* interventions in the United States and Canada, and consider recommending improving access to standing as *amicus curiae* in Australia.

Lack of funding for disbursements

PIAC often acts on a contingency fee basis, seeking to recover the costs of its professional fees and disbursements only if there is a favourable outcome for the client. In the event that a costs order is made in favour of our client, or a matter settles on the basis that the other side pay an amount to our client for costs, PIAC will recover costs and disbursements accordingly. In other cases, the cost of disbursements is borne either by the client or, in most cases, by PIAC. The common disbursements that PIAC encounters are barristers' fees, fees for accessing government information pursuant to freedom of information requests, fees for obtaining health records for clients, court fees, court transcript fees, travel and accommodation expenses for solicitors and barristers to appear in courts and tribunals outside Sydney and photocopying and printing charges. These can be substantial and can impede access to justice.

PIAC refers to its submission to the Financial Assistance Consultation of the Attorney-General's department in relation to its consultation paper about a new scheme for assistance with disbursements.[62] PIAC supports the establishment of a Commonwealth-funded consolidated financial assistance scheme to cover the cost of disbursements in a wide variety of legal matters. PIAC believes that the scheme should allow barristers' fees to be claimed for cases that are in

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62 Alexis Goodstone, *Where are the gaps? Consultation paper – a new scheme for assistance with disbursements* (18 May 2012) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2012/06/where-are-gaps-consultation-paper>.

the public interest, in order to increase the chances of attracting senior and experienced counsel to run such cases. Where matters are successful in a costs jurisdiction, barristers' fees generally will be payable by the losing party and reimbursed to the scheme.

Allowing barristers' fees to be claimed under such a scheme would remove some of the barriers to conducting public interest litigation. Further, such a measure would improve access to justice for disadvantaged and marginalised people seeking to bring cases that are in the public interest.

PIAC suggests that the scheme should allow claimants to apply for, and if successful, receive a disbursement grant at the beginning of a matter, and prior to expenses being incurred. Under such an approach, claimants could outline, in an initial application to the scheme, the types of disbursement costs anticipated in the matter and claim an up-front payment to meet those costs. To ensure transparency and accountability, claimants would need to keep appropriate accounts of expenditure of the grant and provide these accounts to the scheme periodically or as requested.

At the conclusion of the matter any unexpended amount of the grant should be reimbursed to the scheme. Similarly, if the disbursement costs are later recovered from another source, for example, as part of a settlement or pursuant to a costs order, the amount advanced through the grant should be paid back to the scheme.

Legal cases, particularly complex litigious matters, often take a long time to conclude. Having to pay expenses up-front during the course of the matter can place a significant financial burden on some legal service providers. PIAC's suggested approach would assist legal service providers, in particular, community legal services, by providing financial assistance up-front rather than delaying payment until the conclusion of the matter.

Response to Topic 12: Effective and responsive legal services

A responsive legal profession

Legal education and skills

What reforms could usefully be made to the academic qualifications and legal training required of prospective lawyers?

PIAC believes that undergraduate and graduate law courses should have a greater emphasis on social justice and access to justice issues. One way to achieve this is through greater opportunities for the students to participate in clinical legal education programs and undertake volunteer work in community organisations.

While the availability of subjects that involve clinical work or internships in legal environments is to be encouraged and expanded, students should also be encouraged to make a voluntary contribution to the community outside a formal legal setting, such as a homeless shelter, an environmental protection organisation or similar. Exposing law students to a diversity of situations and social issues is of benefit to the development of those students and to their capacity as lawyers of the future. The 2007 Carnegie report on legal education specified the challenge for legal education as 'linking the interests of legal educators with the needs of legal

practitioners and with the public the profession is pledged to serve – in other words, fostering what can be called civic professionalism.'[63] Encouraging involvement in community organisations in a voluntary capacity as well as placing greater emphasis on social justice, human rights and access to justice issues within formal legal training would be important and beneficial.

As mentioned above in response to 'Topic 9: Using informal mechanisms to best effect', PIAC also considers that ADR training should be included as a compulsory component of law degrees and of mandatory continuing legal education.

Billing practices

What evidence is there of the uptake of alternative fee arrangements in Australia? Are there any barriers (legal or practical) to their uptake?

PIAC does not have any evidence of the uptake of alternative fee arrangements in Australia. However, PIAC draws the Commission's attention to a comment in a recent *Updating Justice* publication: survey findings indicate that if alternative payment mechanisms are available (such as 'no win, no fee' agreements), income has little bearing on lawyer use.[64]

Legal assistance services

Do legal assistance service providers deliver the right mix of services (in terms of forms of assistance and across the various areas of law)? Is the current model of legal assistance service delivery efficient, effective and appropriately focused on specific legal needs?

Legal assistance service providers generally deliver the right mix of services. CLCs are generally very efficient and effective in meeting specific legal needs. An independent cost-benefit analysis commissioned by the National Association of Community Legal Centres showed that every dollar spent by government on community legal centres returned, on average, $18 in economic benefit to society.[65]

The Final Report of the Senate Legal and Constitutional Affairs Committee's 2004 Inquiry found that CLCs are a crucial part of providing access to justice for all Australians but noted that CLCs appeared to be facing a funding crisis.[66] The inadequacy of CLC funding and the detrimental effect on CLCs' ability to meet client demand has been noted in recent years by a variety of reputable sources, for example:

> Along with services for housing assistance and disability supported accommodation, CLCs are amongst the service providers with the highest 'turn away' rate for clients seeking assistance.[67]

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63 William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law,* San Francisco: Jossey-Bass, 2007.

64 Pascoe Pleasence and Deborah Macourt, 'What price justice? Income and the use of lawyers' (Updating Justice No 31, September 2013).

65 Carolyn Bond, 'Legal aid cuts a worrying sign from the Abbott team', *The Sydney Morning Herald* (Sydney) 19 September 2013.

66 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 218.

67 Australian Council of Social Services, *Australian Community Sector Survey Report 2007* (2007) <http://www.acoss.org.au/Publications.aspx?displayID=1&subjectID=27>.

> The program in NSW 'is underfunded to meet the growing demand for services' and 'almost all centres are overwhelmed by demand for their services and cannot sustain their current levels of service, nor meet emerging service gaps'.[68]

> The comparison of funding levels confirms that community legal centres are generally poorly funded.[69]

In 2013, former Attorney-General Mark Dreyfus QC announced a 7% funding boost for legal commissions, 25% to community legal centres and 8% to Aboriginal and Torres Strait Islander legal services. However, it is critical that there be a move towards sustained funding increases for all CLCs, rather than one-off injections of funding that leave CLCs unable to develop ongoing responses to legal needs.

The current Attorney-General, Senator the Hon George Brandis QC, has expressed a preference for CLCs to only provide legal assistance to individuals.[70] While a focus on individuals in need is welcome, such an approach needs to be flexible enough to accommodate the efficiency and preventive benefits of law reform and policy advocacy. Please refer also to PIAC's comments in response to 'Topic 7: Preventing issues from evolving into bigger problems', especially the discussion about how legal education, training and policy work represents a very cost effective way to help people deal directly with their legal needs, identify systemic problems in the system, and prevent issues from evolving into bigger problems.

How effective and appropriate are the current eligibility criteria for legal aid at targeting service provision? Which Australians are not eligible for legal assistance but also not in a financial position to pursue a legal problem?

A number of surveys indicate that if legal aid is available, there is a 'U'-shaped relationship between income and lawyer use, with people at the top and bottom of the income scale accessing lawyers more than some middle income groups.[71] The impact of cost is mitigated for those on lowest incomes with problems where there is low or no cost assistance available from legal aid or community legal centres, indicating the success of those programs in broadening the accessibility of legal services. Lawyers are used most often by those on higher incomes. The small percentage of people who take no action to resolve severe problems because of cost concerns are characterised by their relative social disadvantage.

In addition, the LAW Survey findings point to the ability of alternative funding mechanisms (such as 'no win, no fee' agreements) to broaden the accessibility of legal services. Pleasance and Marcourt also suggest that capable middle-income families may also benefit from forms of limited (ie, unbundled) assistance or support for self-help.[72]

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68 Legal Aid NSW, *Review of the NSW Community Legal Centres Funding Program Final Report* (2006) 5.

69 Commonwealth Attorney-General's Department, *Review of Commonwealth Community Legal Services Program* (2008) 45.

70 Chris Merritt, 'George Brandis to reclaim rights agenda', *The Australian* (Sydney) 30 August 2013.

71 Pleasence and Macourt, above n 64.

72 Ibid.

How well do legal assistance services assist those with complex needs? What is the evidence on the relative merits and success of targeted strategies to increase access to justice for particular groups? What are the costs and benefits of these strategies?

PIAC reiterates the comments it made to the Senate Legal and Constitutional Affairs Committee in 2009 about access to justice and Indigenous disadvantage.[73]

There are a number of free legal services available to Aboriginal and Torres Strait Islander people through Indigenous-specific and mainstream legal aid service providers. The key legal aid service providers for Aboriginal and Torres Strait Islander people in Australia are ATSILS, Family Violence Prevention Legal Services (FVPLSs), LACs and CLCs. However, there is an acute legal need for increased access to civil law services for Aboriginal and Torres Strait Islander people in NSW.

ATSILS are the specialist legal aid service providers for Aboriginal and Torres Strait Islander people nationwide. Established in the 1970s in response to the over-representation of Aboriginal and Torres Strait Islander defendants in the criminal justice system, ATSILS remain the legal aid service provider of choice for most Indigenous people.[74] In 1991, Commonwealth funding for the services increased dramatically following the report of the Royal Commission into Aboriginal Deaths in Custody, which highlighted the continuing and critical need for criminal law services for Aboriginal and Torres Strait Islander people.

Presently, Indigenous deaths in custody continue to occur at disproportionately high rates. In 2009, PIAC said ATSILS struggle to adequately meet the demands for their service as a consequence of inadequate funding arrangements. ATSILS 'function in an environment of effectively static funding and increasing demand which compromises their ability to provide sufficient quality and quantity of legal services'.[75] As a result of the increasing demand for criminal law services and the inadequacy of funding, ATSILS focus the majority of their limited resources on criminal law services.[76] Priority is given to criminal matters where the accused is at risk of incarceration.[77] As a result, gaps exist in the provision of other essential legal services such as family law, childcare and protection, and civil law services. Such services are not offered by ATSILS to the same extent as criminal law services, if at all.

In the final days of the recent Federal election campaign, the Federal opposition announced if elected, they would impose a $42 million funding cut over four years to ATSILS. This position has not changed since the election. They said this funding only covers policy and law reform. ATSILS receive around $70 million a year in Federal funding. Reducing this by $10 million a year is likely to affect much more than just law reform work. ATSILS are already overstretched and any funding cut will affect access to legal representation for Aboriginal people. The cuts also indicate a lack of understanding of the preventative role of law reform and policy work by ATSILS.

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73 Goodstone et al, *Justice – not a matter of charity,* above n 4, 12-16.

74 Aboriginal and Torres Strait Islander Commission, Office of Evaluation and Audit, *Evaluation of the Legal and Preventative Services Program* (2003) 3.

75 Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Island Legal Services, Issues of Equity and Access' (2008) 32 *Crim LJ* 38, 39.

76 Joint Committee of Public Accounts and Audit, Parliament of Australia, *Inquiry into Access of Indigenous Australians to Law and Justice Services, Report 403* (2005) 9.

77 Ibid 10.

As already explained, governments should be encouraging law reform and policy work as it is ultimately cost saving.

Even before this announcement, there was a disparity between the funding allocated to ATSILS as compared to LACs, the mainstream, statutory legal aid service providers. LACs operate on a significantly greater budget than ATSILS yet the day-to-day workload of ATSILS lawyers is significantly higher than that of LAC lawyers. Cunneen and Schwartz state, '[t]here is a significant lack of parity of funding between these two organisations that has severe ramifications for ATSILS capacity and therefore for adequacy of legal services for indigenous clients'.[78]

The disparity that exists between ATSILS and LACs demonstrates a systemic barrier to access to justice for Aboriginal and Torres Strait Islander people. Indeed one of the critical challenges ATSILS and other providers of legal services to Indigenous people face is the inadequacy of funding and resources to enable the provision of vital, accessible and quality legal services to Aboriginal and Torres Strait Islander people.

How difficult is it for legal aid services to attract and retain appropriately qualified lawyers as core staff?

PIAC believes it is challenging for all legal assistance services, not just legal aid services, to attract and retain appropriately qualified lawyers as core staff, particularly in regional and remote Australia. Even PIAC, located in metropolitan Sydney, has difficulty attracting and retaining appropriately qualified staff for the demanding work that we do on the salaries that are offered. Mercer conducted a national benchmarking study as a joint project of the Community Legal Centre Associations. The study concluded:

> Overall remuneration levels for the benchmark positions within CLCs are positioned below other Federal and State award remuneration levels … [R]emuneration competitiveness decreases significantly for [the comparator] awards for those more senior positions…[79]

In particular, the ability of ATSILS to retain experienced staff in regional and remote areas is a significant challenge for a variety of reasons including:

- uncompetitive salaries compared to government Legal Aid agencies (LACs) and private legal practices;
- extremely large workloads and lack of time to adequately deal with the work;
- lack of support and appropriate supervision of junior lawyers; and
- lack of potential career progression within the ATSILS.[80]

Another barrier that has been identified to PIAC staff by current law students is the fact that most students leave university with a significant Higher Education Contribution Scheme (HECS) debt and feel unable to afford to work in CLCs due to the lower remuneration offered. This concern is further exacerbated for CLCs in rural, regional and remote areas of Australia.

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78 Chris Cunneen and Melanie Schwartz, above n 75, 39.

79 Mercer, *Benchmarking Review*, June 2011, 21.

80 Cunneen and Schwartz, above n 75, 48.

PIAC notes the work that has been done to encourage graduating health practitioners to work in disadvantaged areas and urges the Productivity Commission to consider ways of enhancing opportunities for legal and other professionals to work in the CLC sector, including in regional and remote areas of Australia. PIAC urges the Productivity Commission to consider and recommend an incentive to be offered to graduating lawyers and other relevant professionals through HECS debt relief based on an amount of debt written off for each year of service in a CLC. To deal with the particular challenges of recruiting and retaining staff on regional, rural and remote areas the amount written off could be greater for work in CLCs in those areas.

Legal assistance service funding

How should the total volume of funding and distribution of funds for legal assistance in Australia be determined and how should it be managed over time?

PIAC refers the Productivity Commission to the paper published by National Legal Aid (NLA), *A New National Policy for Legal Aid in Australia*.[81] PIAC supports the policy position and practical proposals put forward by NLA in that document, which refers to legal aid in a broad sense, including CLCs and other community legal service providers as well as government legal aid agencies.

PIAC notes the continuing problems created by the decision to quarantine Commonwealth funding to legal aid to 'Commonwealth matters'. This characterisation of certain matters is unworkable and creates artificial barriers to early resolution to problems that could be facilitated through the appropriate and speedy allocation of legal assistance.

In relation to CLC funding, PIAC refers the Commission to its comments above in response to legal assistance services. In addition, PIAC believes there should be funding available to properly test new models of service delivery and to conduct evaluation during the course of such projects. Generally, there is only funding available to perhaps add one worker or a short-term project to the existing services available in a CLC.

In the past, PIAC has received short-term pilot funding for new initiatives and has experienced the problem of lack of continued funding despite achieving the specified outcomes. For example, PIAC received one year's pilot funding from the Australian Government Department of Family, Community Services and Indigenous Affairs in 2004 to commence the Homeless Persons' Legal Service. Towards the end of the first 12 months of operation, PIAC engaged an independent consultant to evaluate the service and that evaluation report was provided to Government. Despite the evaluation indicating that the pilot was highly successful and evidence about the particular need that homeless people have for longer-term interventions in order to develop trust, the Department rejected PIAC's application for further funding on the basis that the project was no longer a pilot.

[81] National Legal Aid, *A New National Policy for Legal Aid in Australia* (2007) <http://www.nla.aust.net.au/category.php?id=11>. Three critical points made in the NLA policy paper are: the need for the Australian Government to change Commonwealth legal aid policy to end the current division of state/territory and Commonwealth responsibilities in legal aid; the need to significantly increase funding for civil law legal aid; and the need for the Commonwealth to increase its funding overall and return to a more equitable matching by the Commonwealth of its funding with state/territory funding.

PIAC received some additional funding from the NSW Public Purpose Fund (PPF) for the pilot but was unable to secure ongoing funding during the funded period. As a result, one of the two staff members left the project and PIAC used its limited reserves to continue the employment of the other staff member for seven months while waiting for decisions on funding applications. Fortunately, the NSW PPF determined to allocate funding to enable the continuation of the service. That funding has been ongoing to date, but it too is now affected by cutbacks. Many areas of important public policy need ongoing resource allocations to ensure there is capacity for research and development outside of government. The experience of CLCs is that such funding in the area of justice is extremely limited and is not often available to those working most directly with communities.

PIAC's principal source of funding has traditionally been the NSW PPF, providing at one stage almost 60% of PIAC's budget. Since 2008, official interest rates have decreased significantly and this has had an adverse effect on the income of the PPF and it has reduced its funding to all beneficiaries, including PIAC. This has affected PIAC's ability to undertake its core work, and so has affected access to justice.

PIAC also refers to its comments above in response to 'Topic 11: Improving the accessibility of courts' in relation to financial assistance for disbursements.

Pro bono

How important is pro bono work in facilitating access to justice? How much pro bono work is currently undertaken, by whom and for whom? What are the costs and benefits that accrue to legal service providers who provide pro bono services?

PIAC's largest project is HPLS which, as noted above, is a collaborative venture that brings together community sector organisations, such as the St Vincent de Paul Society and Wesley Mission, with Legal Aid NSW and 11 commercial law firms. PIAC staff train and supervise approximately 400 commercial lawyers to provide pro bono legal advice and assistance to people experiencing homelessness. Since 2004, HPLS has provided free legal advice and representation to nearly 8000 clients who are homeless or at risk of homelessness.

This innovative partnership is a substantial one. Last year alone, PIAC worked with its commercial law firm partners to assist 1,384 clients through pro bono legal services worth more than $1.5 million.

HPLS is extremely important in facilitating access to justice for homeless people or people at risk of homelessness. Unlike many community-based legal centres, HPLS is not restricted by geographic catchment, is not gender- or client-specific nor is it dedicated to a specific legal problem type. HPLS has assisted clients with a wide range of legal problems, including: consumer complaints, credit and debt, bankruptcy, civil, criminal discrimination, employment, family law, fines, guardianship, immigration, personal injury, motor vehicle, social security, tenancy, victim's compensation, violence/restraining orders, will and probate. Where HPLS has been unable to provide direct assistance, assisted referrals are made.

The vast majority of the 400 lawyers who staff these legal clinics do not come to the HPLS project with expertise in areas of the law that the clients require assistance with, or with extensive

experience or expertise in dealing with people with complex needs, mental illness or those who have suffered from significant trauma. In light of this, all of the pro bono lawyers need training, and HPLS staff supervise the information and advice given to every client who attends every HPLS clinic in a timely manner. During an average week, this involves the supervision of at least 20 solicitors providing advice to at least 35 clients face-to-face at an HPLS clinic, in addition to 200 ongoing casework files.

This example illustrates that pro bono does not equate to free. There are substantial costs associated with training and supervising lawyers to do pro bono work, and this coordination role needs to be properly funded so the benefits of pro bono work can be fully realised. HPLS is a good example of how a project harnessing pro bono resources can demonstrate unmet legal need and creative and effective ways to meet that need, but it needs to be understood that to be effective the underlying training and support needs to be funded.

What cost effective ways are there to make the provision of pro bono services more attractive? How well do pro bono programs operate, how are they resourced, and are they effectively targeted? What barriers are faced by lawyers seeking to provide pro bono services? How are they being addressed?

In relation to HPLS, the more training and support that is provided to HPLS lawyers, the more attractive it is for the private law firms to commit to the project.

There is also scope to make the provision of pro bono services more attractive through the process of Government procurement of legal services. Both the Victorian and Commonwealth Governments have encouraged and promoted pro bono legal practice through their procurement processes. By considering a firm's commitment to pro bono in the process for assessing tenders for legal services, governments can incentivise private firms to offer more pro bono services.

In this regard, PIAC regards the Victorian Government's Legal Services Panel Arrangement Scheme (the Victorian Scheme) as a model. The Victorian Scheme was established in 2002 to complement the work of the Victorian Government Solicitor's Office. Two panels consisting of general and specialist law firms were established. All Victorian government departments are required to select legal services from either of these two panels or from the Victorian Government Solicitor's Office. In turn, members of the general and specialist law firms must commit to the provision of at least five per cent of the value of total hours billed under any contract to pro bono work, and can nominate up to 15 per cent. Firms that do not meet the pro bono requirement are not considered for government tenders.

The Commonwealth Legal Services Direction scheme similarly promotes pro bono work in the procurement process but, unlike the Victorian model, it is voluntary. PIAC notes the pleasing announcement by the former Attorney-General, Mark Dreyfus QC, that law firms with more than 50 lawyers providing legal services to the Commonwealth will be required to be signatories to the National Pro Bono Aspirational Target by 1 July 2014.[82]

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[82] National Pro Bono Resource Centre, *National Pro Bono News: Issue 82* (August/September 2013) <http://www.nationalprobono.org.au/page.asp?from=4&id=330>.

There are also other ways to incentivise pro bono work. For example, the various Law Societies could offer free practising certificates for lawyers such as retirees or those temporarily out of the workforce who only want to do pro bono work.

Response to Topic 13: Funding for litigation

Litigation funders

What risks are posed by litigation funding arrangements and how do these differ from the risks posed by contingent and other billing practices? What proportionate and targeted regulatory responses are required to manage these risks? Is more uniform regulation required across jurisdictions on this matter? What are the benefits of litigation funding? In what areas of civil justice is it appropriate to consider use of litigation funding?

Litigation funding can increase access to justice for civil remedies by enabling individuals to pursue meritorious matters in circumstances where they would not otherwise be able to do so. Very significantly, a litigation funding company not only agrees to pay for the costs of representation for the litigant, it agrees to indemnify the litigant in the event that the litigant is unsuccessful and the court makes an adverse costs order.

Despite the benefits of litigation funding for access to justice, PIAC believes it is important to have regulation that ensures that consumers are protected and the agreements are fair. There are a number of proportionate and targeted regulatory responses to manage the risks posed by litigation funding arrangements. PIAC supports the view of leading funder IMF (Australia) Ltd that all funders should be required to hold an Australian financial services license. IMF has voluntarily taken out a financial services licence. The consumer protection disclosure requirements for financial services in Parts 7.7 and 7.9 of the *Corporations Act* would therefore apply. PIAC also supports mandatory disclosure requirements, including full disclosure of information to potential litigants who are considering entering into a litigation funding agreement, including information about the manner and conduct of the litigation as well as information about the financial product.

For further detail about possible reforms, PIAC refers the Productivity Commission to its joint submission with the Australian Consumers' Association to the Standing Committee of Attorneys General on Litigation Funding in Australia, dated 13 September 2006.[83]

Currently, commercial litigation funders generally only assist class action litigants where all class members agree to pay to the litigation funder a specified percentage of the amount recovered if the litigation is successful. As a result, the defined class is limited to persons who have agreed to enter into litigation finance arrangements – this has a number of undesirable policy consequences, the most pronounced of which is that the class action does not contain a remedy for all of those adversely affected by the conduct giving rise to the litigation.

There are a number of ways these problems might be addressed:

[83] Moran and Renouf, above n 2.

- Adopting a legal mechanism to allow litigation funders to claim a share of the total amount recovered by litigation without requiring each of the class members to enter into separate contractual agreements;
- Empowering the court to deduct the amounts payable to a litigation funder from the settlement/judgment;
- Abolishing the prohibition on law practices being able to charge a fee calculated by reference to the amount recovered in the litigation (at least for class actions);
- Establishing a fund to provide financial assistance in class actions.

The Victorian Law Reform Commission prepared a report entitled *Civil Justice Review: Report* in 2008. Chapter 10 of this review considers a new funding mechanism named the 'Justice Fund' to provide financial assistance to parties with meritorious civil claims, provide an indemnity in respect of an adverse costs order and meet any requirements by the court for security for costs. In return for providing this financial support, the proposed fund would, subject to judicial approval, receive an agreed percentage of the amount recovered in successful cases. It is proposed that the Justice Fund would initially be an adjunct to Legal Aid, eventually become self-funding and that for the first five years, the liability of the fund should be limited.

Any profits received would be used for the purposes of providing additional funding for commercially viable meritorious litigation, funding important test cases or public interest cases, financing research on civil justice issues, or funding initiatives of the Civil Justice Council.

PIAC considers that this proposal of the Victorian Law Reform Commission warrants further investigation on the basis that it would support public interest litigation generally.

Class actions

How effective are class action procedures in providing access to justice?

As mentioned above, class action procedures can be very effective in providing access to justice.

Case study

PIAC and Maurice Blackburn commenced a class action in 2011 on behalf of a number of young people who claim to have been wrongfully imprisoned for breach of bail conditions. The case started after PIAC became aware that many children and young people were being arrested, detained (sometimes overnight) as a result of a flaw in the Police computer database. The problem stems from inaccurate or out of date information on the system known as COPS (Computer Operational Policing System). The problem is ongoing.

A recent hearing considered the interpretation of the relevant provisions in the Bail Act relied upon by police officers to arrest and detain people on suspicion that they have breached their bail conditions. The Court decided that NSW Police have no excuse for arresting young people who were not on bail at the time they were arrested and depriving them of their liberty.

Many of the young people participating in the class action would not have been prepared to bring a case in their own name, and so this class action is providing them with access to justice. It should be noted that PIAC first tried, through the Children in Detention Advocacy Project, a suite of other approaches to resolve the problem before commencing litigation. This included more

than 10 formal representations to the NSW Government over several years, negotiating settlements for individual clients, and proposing systemic solutions. None of these approaches worked, so litigation was the only remaining option.

Tax deductibility of legal expenses

Do tax arrangements create and/or accentuate imbalances in bargaining between business and private litigants? Do such arrangements encourage businesses to pursue litigation? Should tax deductions for legal expenses be limited, for example, restricting deductions to a percentage of total expenditure on litigation costs or restricting deductibility to only those costs that are assessed as reasonable? What other options are available for reducing inequities created by tax deductibility arrangements? What are the potential costs and benefits associated with such measures?

PIAC believes that the ability of businesses to claim legal expenses incurred in the pursuit or defence of civil legal proceedings represents a problem for the civil justice system. The effect of such a deduction is that it lowers the real cost of litigation to businesses involved in civil legal proceedings. This inequity is exacerbated in disputes where one party is a business able to deduct the legal expenses, and the other party is an individual, who must bear the full cost of the expenses. Further, unlike for legal aid grants, businesses do not have to pass a means or merits review in order to claim the deduction. The result of this is that the Government may effectively be subsidising businesses to engage in groundless or strategic litigation.

It is not clear whether the arrangements actually encourage businesses to pursue litigation. The Australian Law Reform Commission noted that there was no evidence to suggest that businesses litigate inappropriately because their legal expenses were deductible. The ATO informed the Commission that it has not found a problem in practice with unsubstantiated claims for legal expenses.[84] However, it is unlikely that parties would be as willing to engage in mega-litigation as seen in the C7 and Bell liquidation cases if they were unable to offset the costs as tax deductions.

As proposed in the Issues Paper, tax deductions could be restricted to a percentage of total expenditure on litigation costs or to only those costs that are assessed as reasonable. The ATO could limit deductibility based on an objective test, similar to the merits review required by legal aid. Alternatively, the ATO could cap the amount able to be claimed; disallow legal expenses to be claimed as a deduction if the corporate party is unsuccessful in their claim or defence; extend tax deductibility and legal aid for individuals for civil litigation; substantially increase direct funding of the public and community legal sector to provide more legal assistance to individuals; or give judges more power to order large companies out of publicly-funded courts and into binding private arbitration.

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84 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).