THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Public Law & Government Committee
Civil Litigation Committee
Human Rights Committee
BushWeb Regional Issues Committee

NSW Young Lawyers Public Law and Government Committee, Civil Litigation Committee, Human Rights Committee and BushWeb Regional Issues Committee:

Submission to Access to Justice Inquiry

11 November 2013

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NSW Young Lawyers

NSW Young Lawyers (NSWYL) is a division of the Law Society of NSW. NSWYL represents approximately 13,000 members.

Membership of NSWYL is open to all lawyers under the age of 36 and/or in their first five years of practice and to law students.

Committees refers to the NSWYL Public Law and Government Committee, the Civil Litigation Committe, the Human Rights Committee and the BushWeb Regional Issues Committee.

The **Public Law and Government Committee** aims to foster a social and educational environment for those who wish to keep informed of jurisdictional and practical developments, as well as those who wish to gain awareness of their potential career paths in these areas. Our areas of focus include (but are not limited to) administrative law, constitutional law and government law.

The **Civil Litigation Committee** promotes understanding of civil litigation and dispute resolution in the profession, offering a support base and information resource for our members. The committee seeks to improve the administration of justice, with an emphasis on advocacy, evidence and procedure.

The **Human Rights Committee** comprises a group of lawyers and law students interested in Australian and international human rights issues. The objectives of the Committee are to raise awareness about human rights issues and to provide education to the legal profession and wider community about human rights. Members of the Committee share a commitment to effectively promoting and protecting human rights.

The **BushWeb Regional Issues Committee** is responsible for representing and facilitating peer support for young lawyers members throughout NSW, particularly those in regional and rural areas. To overcome the tyranny of distance, BushWeb started as an idea to use the internet and technology to bridge physical distances and to connect young lawyers in regional and rural areas to others in their region and throughout NSW.

Inquiries

Inquiries may be directed to Greg Johnson, President of NSWYL, at

Introduction

This submission from the committees of NSW Young Lawyers in response to the Productivity Commission's issues paper on Access to Justice Arrangements, released 16 September 2013.

Summary of issues raised in this submission

The Committees raise the following key issues:

- Reliance upon quantitative data in assessing issues such as legal need, access to legal services and dispute resolution may provide only limited insight into access to civil justice.
- Factors such as timeliness, consistency, fairness, transparency and independence should be used when assessing the effectiveness of the civil justice system.
- Legal need should be defined broadly to include non-traditional legal resolution strategies.
- In assessing whether civil justice is 'complex', consideration should be given to the community's perception of civil justice as well as quantitative data (for example, through the use of qualitative feedback).
- Increased use of technology such as videoconferences have improved access to justice for those facing geographic constraints, but technology does not overcome all issues of disadvantage (in particular, socio-economic or disability related disadvantage).
- Disadvantage should be understood as a multifaceted experience and some users of the civil justice system may require non-legal support in addition to legal assistance.
- It is important to review the totality of legal assistance schemes and pro bono services and assess how providers can work together more effectively to meet the needs of the community.
- Referrals for Alternative Dispute Resolution or case management procedures should be done by way of comprehensive assessment on a case by case basis, rather than by category or class of matter.
- The Committees recommend that principles for participation in ADR in each jurisdiction should be provided in plain language and explained to parties, to promote a just outcome for ADR disputants and to increase participation.
- The increased use of the 'super tribunal' in Australia should ensure that accessibility and speciality are not compromised in favour of fast-tracking matters.
- The increased use of case management systems in courts have increased the accessibility of civil justice, but could be improved for example by reducing the number of required court attendances and increasing the use of technology.
- Law Students and young lawyers should be encouraged (to a greater extent than they currently are) to work in regional areas.
- A key area of improvement for access to civil justice is increasing community awareness of legal resources, assistance schemes and pro bono services.
- Practising certificate and indemnity issues need to be addressed in order to increase the number of legal practitioners able to provide pro bono legal services.

1. About this inquiry

In what areas can the Commission most add value in undertaking this inquiry?

In light of the research that has already been done in this area, the Committees consider that the Commission can add value in the following areas:

- identifying issues in relation to legal need and how to prioritise appropriately in meeting legal need;
- developing avoidance and early intervention strategies;
- a review of the totality of legal assistance programs and provision of pro bono services. In particular, whether there is capacity for legal assistance providers and pro bono service providers to better collaborate, making it easier for eligible persons to access appropriate services quickly (avoiding the 'referral roundtable'), to avoid duplication, to assist in the 'joining-up' of services and to help decrease the number of gaps;
- the analysis of legal education and skills in Chapter 12; and
- the performance analysis relating to Chapter 14.

The Committees warn against relying too heavily on quantitative data analysis, and note that even qualitative data analysis might result in overlooking important factors. There are many factors of the justice system that are difficult or impossible to measure. In particular, where there are significant barriers to access to justice, it can be difficult to be sure that all relevant factors have even been identified. That said, the Committees appreciate that this inquiry is an attempt to deal with both of those issues to the greatest extent possible.

In addition, the Committees consider that much of the previous research has focused on either a jurisdiction or a particular part of the justice system. The breadth of the Commission's terms of reference means it is well-placed to draw the previous research together and address any lacunae.

Reform of which particular aspects and/or features of the civil dispute resolution system will generate the greatest benefits for the community?

It is the Committees' view that reform of the following aspects and features of the civil dispute resolution system will generate the greatest benefits for the community:

- assisting disputants to access appropriate legal services for relatively low-value disputes (whether through community education, reform of existing legal services or any other methods);
- the development of avoidance and early intervention strategies;
- improving accessibility issues identified in relation to courts and tribunals; and
- improving awareness of informal methods of dispute resolution, to the extent lack of such awareness is identified as a problem.

2. Avenues for dispute resolution and the importance of access to justice

The Commission invites comment and evidence on the main strengths and weaknesses of the civil justice system.

Civil disputes can cover a broad range of subject matter, circumstances and parties. Matters might range from administrative appeals, to employment disputes, class actions or contractual disputes between private individuals, and the means and imperatives of involved parties will vary substantially. The Committees submit that access to justice, and, in turn, an accessible civil dispute resolution system must consider (and require of parties and practitioners) concern for principles beyond mere participation.

Practitioners and judges alike might find themselves remarking on the difficulty in ensuring proceedings are heard quickly. Busy court lists are, on the surface, a suggestion that the Australian public are readily able to access the justice system. In this regard, the Committees would draw the Commission's attention to the remarks of Gleeson CJ on this topic.[1] His Honour remarked on the high volume of particular kinds of disputes (such as personal injury) suggesting that for some varieties of dispute our system minimally provides for access to justice.

The limitations of relying on minimum data (i.e. numbers of proceedings) are twofold. The first factor was explored by His Honour, in that for personal injury claims, practitioners commonly offer contingency fee arrangements, which may offer additional opportunities to persons who might not otherwise be able to afford ongoing costs for a dispute that might take years to conclude. The Committees submit that differences in options available to fund particular types of claims might distort both the relative representation of those claims, compared to others. This is not to diminish the value of alternative fee arrangements, merely to note their popularity and, currently, lack of prevalence outside a few set practice areas. The second factor is that the proliferation of one type of dispute may well mask an unmet need to deal differently with others. Quantitative research methods must work carefully to ensure that they don't cloud any perception of other groups or other forms of legal need which might remain.

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 Committees agree with the position of the Law Society expressed previously that access to justice is of fundamental importance to democracy and to our legal system as a whole.[2] Equality of access and equality of representation ensures that members of the public who are engaging with the justice system, ideally, do not find themselves at a disadvantage solely on the basis of their own personal knowledge of legal proceedings or financial circumstances.

With this in mind, the Committees submit that factors such as timeliness, consistency, fairness (including equality of access), transparency and independence must also be carefully considered when remarking on the virtues

[1] Gleeson M, 'Access to Justice: A New South Wales Perspective (1999) 28(2) University of Western Australia Law Review 192. Available at: http://www.austlii.edu.au/au/journals/UWALawRw/1999/12.html

[2] NSW Law Society submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Access to Justice, 2009. PDF available at: http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/026806.pdf

and import of an accessible civil dispute resolution system. These factors, and a number of others, were identified by the Victorian Law Reform Commission's 2008 Civil Justice Review Report.[3]

[3] Victoria Law Reform Commission, Civil Justice Review, Report No 14 (2008). Available at: http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf

3. Exploring legal need

The Commission invites comment on how best to define and measure legal need. How does legal need relate to the concept of access to justice?

The Committees endorse the use of broad definitions for the concepts 'legal need' and 'access to justice' as outlined by the Law and Justice Foundation of NSW ('Law and Justice Foundation') in the 2012 Legal Australia Wide Survey: Legal Need in Australia.[4] Instead of equating 'access to justice' to 'access to lawyers and redress through the courts' and confining 'legal need' to problems accessing the formal dispute resolution system in court, it is preferable to view legal need as encompassing 'non-traditional legal resolution strategies' (such as alternative dispute resolution measures) in addition to formal resolution of disputes.[5] This means that legal need should include attempts made by a person to seek legal information, advice or assistance – even in situations where the person is unaware of the legal implications or available avenues for resolving the dispute formally.[6]

The Committees agree with the Law and Justice Foundation's suggestion that a broader approach to 'legal need' allows one to better estimate the amount of unmet legal need, with 'unmet legal need' defined as 'legal problems that remain unresolved or are unresolved unsatisfactorily, regardless of whether any action is taken and regardless of whether there is any involvement of lawyers of the justice system'.[7]

This broad approach recognises that people do not necessarily immediately seek advice from legal practitioners, but rather may undertake a variety of different actions in response to perceived legal problems.[8] It is generally more common for disputes to be resolved via agreement between parties (with under one-tenth of legal problems finalised in formal court or tribunal proceedings).[9] It is therefore appropriate, and imperative, that the Productivity Commission take this into account in evaluating legal need and access to justice in the context of resolving civil disputes. As Steve Mark and Tahlia Gordon argued, 'we [and the Commission] need to think about access to justice creatively and position the argument well outside the box'.[10]

[4] Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs: Volume 7, *Legal Australia-Wide Survey: Legal Need in Australia*, August 2012.

[5] Ibid 3–4.

[6] Ibid 4.

[7] Ibid 5.

[8] Ibid 106–8. See, on these pages, the results from the survey in relation to the varied actions that may be taken to resolve a dispute.

[9] Ibid 39.

[10] Steve Mark and Tahlia Gordon, 'Lawyers Monopoly under Spotlight', *The Australian* (Sydney), 11 October 2013, 30.

4. The costs of accessing civil justice

Simplicity and usability

Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed?

While positive attempts have been made by courts and various public sector agencies to simplify the civil dispute resolution system and make it 'user-friendly' for consumers, the Committees are of the view that the system remains, overall, complex, and may be difficult to navigate in the case of lay parties or self-represented litigants. Further, many people do not realise what their rights are or that a cause of action exists and they may be unaware of available avenues for redress or agencies who can assist, or both.

Civil laws are complex and are not easily comprehensible to a lay person. Lawyers (with legal qualifications, acquired skills and training in interpreting legislation and cases) are best suited to understanding the applicable body of law and presenting legal arguments. However, as discussed above in the response to Chapter 3 on legal need, the Committees believe that many people do not approach a lawyer as their first point of call.

However, it is the reality that not all people who would like to obtain legal representation can afford it. For those who cannot afford private lawyers and turn to government-funded legal assistance, only those with incomes within the lowest specified income bracket will be eligible for legal aid assistance (with legal aid and other government-funded legal assistance programs suffering various funding setbacks).[11]

Do legal practitioners contribute to complexity, and if so how? What, if any, incentives do legal practitioners face to contribute to a more user-friendly system?

Legal practitioners may contribute to complexity of matters by engaging in, for example, large requests for discovery or seeking to adjourn matters which may cause unnecessary delay and expense.[12] The advent of case management, with the 'managerial judge' having greater control over the proceedings has lessened such unnecessary delay (although its impact on costs is unclear).[13]

Additionally, lawyers are bound by professional conduct rules and should seek to assist in the effective administration of justice (while non-legal practitioners are not held to the same standard). Legal practitioners would be acting in the interests of their client, and more importantly, in the interests of the proper administration of justice, by working to make the court process run as efficiently as possible and assisting in reducing unnecessary delays.

Which particular parts of the civil system are unnecessarily complex? Are there leading examples of reducing complexity

[11] Community Law of Australia, 'Unaffordable and Out of Reach: the Problem of Access to the Australian Legal System' (2012) 3. Available at: http://www.communitylawaustralia.org.au/wp-content/uploads/2012/07/CLA_Report_Final.pdf

[12] Justice PD McClellan AM, Chief at Common Law, 'Civil Justice Reform – What has it Achieved?' (14-15 April 2010) 10. Available at: http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mcclellan140410.pdf

[13] Ibid 50–4.

and promoting transparency? How does complexity impact on parties to a dispute?

In light of case management reforms and procedures to expedite matters (such as court-issued practice notes for listing and managing proceedings)[14], the Committees would not suggest that formal proceedings are *unnecessarily* complex, although they are often complex. The Committees do acknowledge that civil proceedings may be difficult to comprehend and meaningfully engage with as a self-represented litigant. Self-represented litigants can, for example, unintentionally delay and prolong proceedings by failing to adhere to an agreed timetable of submitting documents, or be at a disadvantage by failing to understand the relevant law or how to best present their case.

The Committees thus suggest that the formal civil resolution system *itself* is not *unnecessarily* complex, but rather is *perceived* to be so as a result of people's unfamiliarity with the law. As mentioned above, people may be unaware that of their legal rights or may not know where to look for basic assistance. As a result, people may choose not to take any further action.

Which particular mechanisms, processes or court practices have improved the 'user friendliness' of the legal system?

Inside court and formal proceedings

The Committees recognise that costs may not have necessarily decreased significantly as a result of new case management procedures. Additionally, as Justice McClellan notes, 'not all judges are adept case managers'.[15] However the Committees consider that the rigorous management of cases by a judge in order to identify the issues in dispute and ensure that court resources are efficiently used is of significant benefit.[16]

Case management principles are enshrined in legislation and implemented in practice in courts.[17] For example, the accepted practice in complex civil law trials in the New South Wales Supreme Court is now for parties to prepare timetables in advance of hearings, estimating time to be taken and witnesses to be called.[18] The New South Wales Supreme Court and, more recently, the Federal Court, conduct special lists for 'fast-tracking' commercial matters.[19]

The increased use of technology has made court proceedings much more accessible, through transmission of court proceedings online, hearings via telephone and electronic facilities for lodgment of documents.[20]

Examples outside court

Former Attorney-General, Robert McClelland, has said that 'access to justice is not just about access to a court or a lawyer, it is about providing practical,

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[14] Justice PD McClellan AM, above n 12 3–61. See the response to question 11 in this submission for further detail.

[15] Ibid 53.

[16] Ibid 54.

[17] See, eg, in NSW, *Civil Procedure Act 2005* (NSW) pt 6; *Uniform Civil Procedure Rules 2005* (NSW) pts 2,3; Supreme Court Common Law Division – General Case Management List Practice Note No. SC CL 5. See also the response to question 11, later in this submission, for further references.

[18] Justice PD McClellan AM, above n 12, 21; Supreme Court Common Law Division – General Case Management List Practice Note No. SC CL 5.

[19] Justice PD McClellan AM, above n 12, 22; Federal Court of Australia, *Fast Track System* (2013). Available at: http://www.fedcourt.gov.au/case-management-services/case-allocation/fast-track-system

[20] Justice PD McClellan AM, above n 12, 24 See a further discussion on the use of technology in the response to question 11, later in this submission.

affordable and easily understood information.'[21] Some examples of programs and schemes outside of the court that attempt to achieve this are:

- 'Access to Justice',[22] launched by the Federal Attorney General in 2010, which provides links to relevant law, information and services. The website gives the user the ability to choose a type of dispute (eg. 'bankruptcy', 'consumer', 'family', 'unsure…') to access a range of local services in this area.
- LawAccess NSW,[23] a free state-wide hotline (funded by the government) providing legal information, assistance and referral to appropriate authorities.
- LawStuff[24] – website created by the National Children's and Youth Law Centre (and developed and funded by various organisations), designed to provide legal information to children and youth in Australia, in an easily readable fashion.
- Four Mental Health Legal Service (MHLSP) pilot projects coordinated by the Public Interest Advocacy Centre targeting young homeless people, refugees, non-English speaking people and Indigenous people whom have all suffered from mental illness. These programs successfully utilised a 'multidisciplinary approach' focusing on both barriers to seeking legal assistance and associated socioeconomic disadvantage exacerbated by mental illness.[25]
- The Cooperative Legal Service Delivery (CLSD) program targeting disadvantaged people in regional NSW through a combined effort of government, public legal service providers, private lawyers, non-legal service providers and community groups.[26]
- The Council of Australian Governments (COAG's) (2010) National Partnership Agreement on Legal Assistance Services,[27] which represents an intergovernmental commitment to minimising social inclusion and enabling resolution of disputes and access to justice (for the period July 2010 to June 2014).
- Services provided by Community Legal Centres (CLCs),[28] which includes generalist and specialist legal advice, social awareness and reform initiatives.
- Law for Non-Lawyers courses offered at the Public Interest Advocacy Centre[29], Macquarie Law School[30] and TC Beirne School of Law (University of Queensland).[31] These courses respectively offer training and or education on law for those with non-lawyer backgrounds.

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[21] Lawyers Weekly, *New Legal Website Launched* (17 May 2010) Available at: http://www.lawyersweekly.com.au/ news/new-legal-website-launched

[22] Available at: http://www.accesstojustice.gov.au

[23] Available at: http://www.lawaccess.nsw.gov.au/

[24] Available at: http://www.lawstuff.org.au/

[25] Public Interest Advocacy Centre, *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 Justice System*, 30 November 2009, 6 *('PIAC Report')*. Available at: http://www.piac.asn.au/project/mental-health-legal-services-project

[26] Law and Justice Foundation, above n 4, 223. See other state initiatives at 224. See also Penny Ryan and Kitty Ray, Social Policy & Evaluation Consultants, *Report: Evaluation of the Cooperative Legal Services Delivery Program*, August 2012 ('CLSD Report'). Available at: http://www.legalaid.nsw.gov.au/what-we-do/community-partnerships/cooperative-legal-services-delivery-clsd-program

[27] Available at: http://www.federalfinancialrelations.gov.au/content/national_partnership%20_agreements/Other/Legal_Assistance_Services_NP.pdf

[28] Available at: http://www.naclc.org.au/

[29] Available at: http://www.piac.asn.au/trainingevent/law-non-lawyers-0

[30] Available at: http://www.law.mq.edu.au/future_students/law_for_non-lawyers/

[31] Available at: http://www.law.uq.edu.au/law-for-non-lawyers

- Immigration Application Advice and Assistance Scheme (IAAAS)[32], which provides limited funding for Australian immigration lawyers and migration agents to assist asylum seekers with preparing protection visa applications.

The small sample of measures and programs listed above are indeed formidable attempts aimed at increasing access to justice. However, the Committees are of the opinion that the accessibility of these programs is inhibited by the fact that the general public may be largely unaware that these measures exist.

To illustrate the Australian public's general unfamiliarity with available not-for-profit legal services, the Committee refers to results obtained by the Law and Justice Foundation. Only 9.0 per cent recalled the services offered by Community Legal Centres when not cued. Recognition of LawAccess NSW was exceptionally low at 1.2 per cent of NSW respondents. The Law and Justice Foundation recorded, in cases where advice was sought, that Legal Aid was utilised in 6 per cent of cases, court services in 2.7 per cent, CLCs in 1.7 per cent and LawAccess NSW in fewer than one per cent of cases.[33]

At the time results were collated in this survey, the Attorney-General's website 'Access to Justice' was not in existence. However the Committees consider that this website may suffer a similar fate and needs to be much more rigorously promoted. As suggested by the Law and Justice Foundation, 'wide-scale advertising or education campaigns' may prove useful at promoting, and encouraging people to use the site. Law Access NSW and other such hotlines should similarly be rigorously promoted.

Further, as suggested by the Public Interest Advocacy Centre (prior to the 'Access to Justice' website being brought into effect), it is important that feedback mechanisms are incorporated into the website, so as to provide valuable information to the Government as to the site's effectiveness as a 'common referral database' and regarding the success of referrals.[34] Legal resource websites require heavily monitoring and updating to ensure that the content remains legally and factually correct and relevant.[35] The Committees are unsure as to whether this is currently happening.

How should non-financial factors such as psychological and physical stress caused by legal disputes be taken into account when they relate to access to justice issues?

The Committees believe that State and Federal governments should develop programs and initiatives to reduce the onset of and, where possible, alleviate people from these non-financial adverse consequences of legal disputes. These programs should be both targeted and generalist in their approach to dealing with these factors. As discussed by the Law and Justice Foundation, specific measures could be targeted to particular kinds of vulnerable people (such as those with a mental illness, a disability or living in socioeconomic disadvantage) in order to provide tailored legal and non-legal assistance that would seek to reduce stress and enhance access to justice.[36] In addition to targeted measures, a 'one-stop shop' referral site providing people with easy access to basic law principles and links to agencies for further information and assistance with non-

[32] More information available at: http://www.immi.gov.au/media/fact-sheets/63advice.htm

[33] Law and Justice Foundation, above n 4.

[34] *PIAC Report,* above n 25, 9.

[35] Ibid.

[36] Law and Justice Foundation, above n 4, 229–40.

legal matters would aim to also reduce stress and illness caused in attempting to deal with complex legal problems.[37]

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?

The Committees' view is that face to face contact could be considered to be the traditional method of providing advice and appearing in the court system. It is no longer essential for a lawyer to require clients to attend her or his office or for parties to attend court in person, due to videoconferencing technologies. Documents can be easily shared via email and other programs, avoiding the need to use (sometimes slow) postal services. However, face to face contact has the advantage of allowing the giving and receiving of legal advice to be a more personable experience.

While it is widely accepted that those who live remotely are inhibited in accessing justice (by reason of their location), it is important to note that results collated by the Law and Justice Foundation did not reliably reflect greater legal need among people living in remote areas (albeit remote areas tended to be the most disadvantaged areas).[38] Notwithstanding this, the lack of physical proximity can represent a barrier to access to justice in terms of the practical limitations; such not being able reach services within opening hours or to be able to seek face-to-face contact at all.[39]

A limitation that may apply to technology generally, regardless of the person's location, is the person's ability to use the relevant communication software or hardware. While many people are familiar with using email, clients may struggle with new technologies or they may not have the relevant programs or hardware. Additionally, people with intellectual disabilities, mental illnesses or communication difficulties may find it difficult to comprehend information unless it is tailored to their particular needs.[40] It is important to have processes in place which accommodate people living in these areas and allow them access to assistance which, where possible, involves face-to-face contact.

Increasing the availability of telephone and video conferencing services, particularly for court and tribunal attendances, may contribute to overcoming geographic barriers.[41] However, for people living in regional areas who are experience other disadvantages such as disabilities, whether intellectual or physical, or for whom English is not their first language, technological advancements such as the examples above may only assist them to a limited extent.[42]

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

[37] Ibid 206–29.

[38] Law and Justice Foundation, above n 4, 240.

[39] Ibid 245.

[40] Ibid 37

[41] Ibid.

[42] Ibid 216.

barriers? Which particular mechanisms or jurisdictions have been effective at dealing with these barriers?

Regions that face geographic constraints to accessing justice are those that do not have a court sitting permanently in their area. For example, in the family law jurisdiction, conciliation conferences used to be conducted face-to-face with a Registrar who had travelled from a capital city in attendance. These conferences, addressing financial property settlements, are now being conducted by phone.

The Committees note that the Federal Circuit Court of Australia ('FCC') is committed to extending access to justice to rural and regional areas by holding court sittings in these locations on regular 'circuits'. However, the FCC is restricted by funding and must ensure that, before establishing a new circuit location, the location is suitable, justified and 'can be met within existing budget allocations'.[43] The Committees believe that there is great value in parties sitting face to face and trying to resolve their dispute, although the Committees understand there are funding constraints.

In an area that only has access to the FCC four or five times per year, one issue is the lack of judicial officers available and willing to travel to regional areas. This can have a direct impact on issues such as the time taken between filing an application and a hearing can be several months. In parenting cases, this means that a child can be removed from their primary parent and the court is unable to hold a final hearing until up to 12 months after the removal.

The costs of inadequate resourcing for regional areas to individuals include: time between court dates is lengthy; parties may be forced to travel to a major city to seek justice or legal assistance from a court; financial costs associated with travel; parties experience mental health problems as their legal problem cannot be resolved for months on end.

The costs to the community include: parties suffer from mental health issues requiring community support; the large 'one stop' services may also be overburdened; the community loses faith in the 'justice system' and; lawyers and courts alike are viewed negatively.

The Committees note that some of these concerns have been partially addressed. For example, Federal Court sittings in many regional areas have been increased. The courts are also using improved technology to try to assist geographically isolated parties, such as the eCourtroom (an online courtroom). However, the Committees' experience is that the number of days the court is locally available still does not service the number of matters before it.

<u>Other programs to overcome geographic constraints</u>

- The Cooperative Legal Service Delivery (CLSD) program targets disadvantaged people in 11 areas in regional NSW through a combined effort of government, public legal service providers, private lawyers, non-legal service providers and community groups.[44] Programs implemented under this scheme include community legal education and a focus on community workers.[45] The aim is for CLSD partners to foster relationships, build networks and identify and address unmet legal needs.[46]

[43] Federal Circuit Court of Australia, *Circuits* (3 July 2013) Available at http://www.federalcircuitcourt.gov.au/html/circuits.html

[44] Law and Justice Foundation, above n 4, 223–4.

[45] *CLSD Report*, above n 26, 4

[46] Ibid 10.

- Regional Legal Assistance Forums[47] in regional Queensland were established by Legal Aid Queensland to promote cooperative partnerships between service providers, evaluate disadvantaged people's needs and 'enhance access to justice' in this way.

In addition to financial costs, timeliness, complexity and geographic constraints, what other issues affect accessibility?

As discussed above in relation to people living remotely, other issues affecting accessibility are disadvantage, socioeconomic disadvantage and personal characteristics, such as low literacy, poor grasp of English (as a second language) and poor communication skills. Disadvantage will be discussed by the Committees further at Chapter 5 below in relation to unmet legal need.

The implementation of programs to increase access to justice in remote areas is incredibly difficult, given the long distances between services and lack of infrastructure compared to major cities or suburbs. The Committees recommend that the Productivity Commission, in making policy recommendations, should require that plans for action are actually capable of being implemented in practice, and are not simply broad aspirational statements devoid of meaning as a result of being so broad.[48] Thus the CLSD program, for example, should have clear guidelines for implementation of measures and be organised efficiently and effectively by the Regional Coordinator.[49]

The Committees believe that it would be beneficial to have 'case workers' or professionals who are able to visit the homes of people who are immobilised and/or have communication difficulties affecting their ability to utilise telephone services to seek advice. These workers would have been referred to the people in need by non-legal professionals already assisting the people with other non-legal needs. The Committee strongly supports the Law and Justice Foundation's proposal regarding more formal training offered to non-legal professionals to provide initial assistance and refer people to appropriate legal services.[50]

[47] Available at: http://qlaf.org.au/regional-forums.php

[48] See comments in the *PIAC Report*, above n 25, 39.

[49] *CLSD Report*, above n 26, 29.

[50] Law and Justice Foundation, above n 4, 220–46.

5. Is there unmet need concentrated among particular groups?

What groups are particularly disadvantaged in accessing civil justice and what is the nature of this disadvantage?

In answering this question, the Committees rely on the definition of 'legal need' and 'unmet legal need' outlined at Chapter 3. That is, in adopting the definition used by the Law and Justice Foundation, 'unmet legal need' means 'legal problems that remain unresolved or are unresolved unsatisfactorily, regardless of whether any action is taken and regardless of whether there is any involvement of lawyers of the justice system'.[51]

Certain groups are recognised as being disadvantaged or socially-excluded in society, and this includes: 'sole parents, the unemployed, low-income earners, people with a disability, Indigenous Australians, public renters and the homeless', in addition to people suffering from mental illnesses or disabilities.[52] It is statistically the case that when these groups of people experience legal problems or disputes, the adverse consequences of these disputes (in terms of causing psychological or physical stress) are particularly exacerbated, as the difficulties disadvantaged or vulnerable people encounter in tackling legal problems can further their social exclusion.[53] These groups of people often require 'broader non-legal support' in addition to legal assistance in order to solve their problems.[54]

However the following comments by the Law and Justice Foundation are pertinent and highlight that unmet legal need does not only lie with the socially disadvantaged or excluded, but also affects the 'affluent':

> Despite the tight nexus between social exclusion and legal problems, the evidence also shows that legal problems are frequently encountered by people from all walks of life, including people of all ages and people from more affluent backgrounds. Thus, it has been argued that policies concerning access to justice must be broadly directed to enable all citizens to make effective use of the available legal remedies.[55]

How can disadvantage in accessing justice be meaningfully measured?

The fact that disadvantage in accessing justice is multi-faceted makes it difficult to meaningfully measure this disadvantage. People experiencing multiple problems may also find they face disadvantage as the current legal system is geared towards a 'problem-based' approach opposed to a 'client-focused approach' – that is, firms and community legal centres tend to specialise on certain areas and concentrate on giving advice on these areas.[56]

The Committees are of the opinion that the following summary of the Law and Justice Foundation's findings in the Law Survey succinctly outlines the necessary

[51] Law and Justice Foundation, above n 4, 5.

[52] Ibid 31.

[53] Ibid 221.

[54] Ibid 26.

[55] Ibid.

[56] Ibid 221.

'holistic approach' required to counteract current barriers and disadvantages in accessing justice:

> A more holistic approach to justice would include all of the following strategies:
>
> - legal information and education
> - self-help strategies
> - accessible legal services
> - non-legal advisers as gateways to legal services
> - integrated legal services
> - integrated response to legal and non-legal needs
> - tailoring of services for specific problems
> - tailoring of services for specific demographic groups.
>
> Reliance on only one or a few strategies is likely to fall short of achieving justice for the whole community. In addition, a more holistic approach to justice in Australia is unlikely to be achieved simply by injecting more resources into the existing network of legal services, although additional funding and resourcing may be necessary.[57]

Self-represented litigants

What is the impact of self-representation on opposing parties, courts and tribunals and the parties themselves?

The Committees' comments below do not apply to self-represented litigants (SRLs) who are required to represent themselves due to court and tribunal legislation or procedure. The Committees' believe that individuals who *choose* to represent themselves in court usually do so because they can't afford legal representation, they feel they cannot justify the expense, they don't want to pay legal costs or a combination of these reasons.

SRLs may have an impact on opposing parties in that proceedings can be delayed due to the SRL's failure to observe proper court procedure, for example filing and serving documents or complying with procedural orders. The represented party's costs may be increased as a result of the SRL's actions and their lack of knowledge of the law, which may create more work for the lawyer (and rising legal costs).

SRLs may have an impact on the courts in that, as the courts generally tend to deal with a SRL very flexibly, a case can be delayed repeatedly to afford procedural fairness to the SRL so they can comply with orders/procedures. This may occur particularly in a circuit court situation where a different judicial officer may hear the application each time.

How does the legal system accommodate SRLs and does this take into account the attributes of SRLs themselves? How can parties best be assisted to self-represent?

The Committees' view is that judicial officers may be quite accommodating of SRLs – to the point where on some occasions represented litigants may be put at a disadvantage and their costs are increased due to the SRLs failure to adhere to the court or tribunal's procedures or directions.

SRLs can be assisted in self-representation by consulting with community legal centres, legal aid, court websites and publications. SRLs could be directed to

[57] Law and Justice Foundation, above n 4, 208.

these resources by the courts and tribunals enquiries services, so that they can self-educate prior to commencing proceedings. Cases involving SRLs could benefit from case management and directions to narrow the issues in dispute and assist the SRL to understand the process prior to formal hearing.

The Committees are aware that balancing the competing considerations between the SRL, represented parties and court or tribunal resources can pose a difficult task.

8. Effective matching of disputes and processes

How easy is it for disputants to identify the most appropriate dispute resolution pathway, and how could improvements be made?

It is difficult for most disputants, and even many legal practitioners, to identify the most appropriate dispute resolution pathway for their disputes. Mediation is the most utilised alternative dispute resolution ('ADR') process, but there are various models of mediation and a range of other ADR processes which may be useful in different types of disputes.

Courts and tribunals could use case management procedures or enquiries services to give parties some guidance as to the appropriate process or model for their matter (rather than a blanket referral of matters to mediation). This is particularly important for self-represented litigants or in matters where it might be desirable to preserve relationships (such as business relationships), and in commercial cases where the settlement conference model may be over-utilised in favour of other dispute resolution options.

9. Using informal mechanisms to best effect

Alternative Dispute Resolution

The Commission seeks data on the number, proportion and types of disputes resolved through ADR and the relative satisfaction of disputants with the outcomes of using these mechanisms.

The Committees have not sought to produce their own data on the number, proportion and types of disputes resolved through ADR. From the Committees' research into the data on ADR, it is apparent that the utilisation and settlement rates of ADR differ according to the area of law, for example:

- Data produced from the NSW Local Courts, suggests that referral to ADR can produce a settlement-rate of up to 85% of those cases referred.[58]
- In 2011-12 Community Justice Centres in NSW conducted 1,764 mediations with a settlement rate of nearly 80 per cent.[59]
- The 2011-12 Annual Report for the Fair Work Ombudsman states that up to 83% cases referred to Mediation Pilot Program (initiated in March 2012) were resolved.[60]
- The Family Court of Australia developed the Sydney Family Law Settlement Service pilot in 2012 as a joint initiative with a joint initiative of the Law Society of New South Wales, the New South Wales Bar Association, the Family Court and the Federal Circuit Court. Of the initial 148 matters selected as potentially suitable for mediation, only 89 were referred after submissions from the parties and consideration by a judicial officer. Of those 89 matters, 26 settled at mediation and 15 settled prior to mediation.[61]

The Committees acknowledge that it is difficult to monitor the success of ADR processes, and their connection to existing legal proceedings, as settlements are kept private and confidential. The Committees suggest that rates of settlement must not be the only measure used. The Committees support the view of NADRAC which, in its 2011 Terms of Reference, recommends 'development of uniform criteria for the collection of data about the use…of ADR services' and 'qualitative benchmarks for measuring the performance of ADR services.'[62]

What evidence is there that ADR translates into quicker, more efficient and less costly dispute resolution without

[58] Local Court, Department of Attorney General and Justice 'Benefits of alternative dispute resolution' Available at: http://www.localcourt.lawlink.nsw.gov.au/localcourts/adr/benefits_adr.html

[59] Department of Attorney General and Justice Annual Report 2011-12. Available at: http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/AGJ_AR_2012_Complete.pdf/$file/AGJ_AR_2012_Complete.pdf

[60] Fair Work Ombudsman '2011-12 Annual Report' at page 35. Available at: http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2011-12.pdf

[61] Family Court of Australia, *Annual Report 2012-13*, 27. Available at: http://www.familycourt.gov.au/wps/wcm/resources/file/eb15400b582a9de/1560-FamilyCourtAR-WebPDF-FA.pdf

[62] National Alternative Dispute Resolution Advisory Council, *Terms of Reference: Development of a Dispute Resolution Culture in Australia* (2011).

compromising fairness and equity (particularly where there is an imbalance of power between disputants)?

The Committees' view is that parties must have a clear understanding of the principles and the processes of ADR in order for it to be successful. Court guidelines about model practices for mediation and increased public information about court mandated ADR programs may help to minimise the imbalance of power between parties, while still providing ADR practitioners with the opportunity to change their methods to suit individual cases and circumstances. For example, the NADRAC guide to dispute resolution could be a useful source to distribute to parties involved in legal proceedings.[63]

A second issue relates to how disparities of power or resources might best be avoided in the ADR context as when, for example, an individual with limited resources is involving in proceedings with a wealthy corporation. The Committees accept that is no easy answer to this question. The Committees suggest that perhaps maintaining the voluntary character of mediation is an important factor.

Cultural differences can also have an impact in mediation; a mediator dealing with parties who identify with different cultural groups must be aware and sensitised to cross-cultural values.[64] In the NSW context where disputants are increasingly likely to be of multicultural upbringing, the need for court processes to try to accommodate the needs of persons from a variety of socio-/cultural-/ethnic backgrounds may, if the court acts flexibly, enhance the use of mediation, and could thus facilitate a greater use of ADR in civil disputes.

The former Federal Attorney-General Nicola Roxon has stated that 'financial incentives and disincentives can also be a powerful means to get people to consider alternative approaches to resolve disputes.'[65] However, increasing the costs of litigation is not the answer. The Committees' view is that referral by a court to ADR in the early stages of proceedings can be an effective means of reducing costs. The NSW Bar Association has suggested that 'using ADR late in the dispute may mean that substantial costs have already been incurred, thus reducing cost-saving benefits and also, in some cases, making settlement more difficult.' [66] However, early ADR, either before litigation or in its early stages, is not always possible and the appropriateness of its timing varies from case to case.

What is the appropriate balance between public and private provision of ADR?

As discussed previously in this submission, in recent years the NSW Supreme Court has encouraged resolution of disputes via ADR, particularly by mediation. However, consideration should be given to the importance of public hearings for certain classes of matters where the public interest is at stake. The Committees believe that an appropriate balance between public (court-based) and private (ADR) mechanisms is yet to be reached.

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[63] NADRAC, *Your Guide to Dispute Resolution* (2012) Available at: http://www.nadrac.gov.au/publications/DisputeResolutionGuide/Documents/YourGuidetoDisputeResolution.pdf

[64] Prof Bee Chen Goh, 'The Changing Role of the Mediator in Multicultural Australia' *Fourth National ADR Research Forum* 2010. Available at: http://www.nadrac.gov.au/adr_research/Documents/ThechangingroleoftheMediatorinMulticulturalAustralia.pdf

[65] Nicola Roxon, speech to the NSW Bar Association Alternative Dispute Resolution workshop, 2012. Available at: http://www.disputescentre.com.au/blog/Speech-to-the-New-South-Wales-Bar-Association-Alternative-Dispute-Resolution-Workshop-the-Hon-Nicola-Roxon-MP

[66] NSW Bar Association, 'Comments on NADRAC Issues Paper: Alternative Dispute Resolution in the Civil Justice System', 2009 Available at: http://www.nswbar.asn.au/docs/professional/adr/nadrac_comments.pdf

Any provisions specific to practitioner-focused ADR schemes should also consider the effect of additional legislative requirements on public or industry-focused ombudsman schemes[67] or class-level action waiver and individual arbitration provisions[68] which tend to minimise the involvement of both government bodies and independent legal representatives.

[67] For example, the Telecommunications Industry Ombudsman – disputes resolved through this do not ordinarily require a legal practitioner to have involvement and are resolved without direct cost to the consumer.

[68] See *Sony Entertainment Network* Available at: http://www.sonyentertainmentnetwork.com/terms-of-service/ 27 October 2013. Such provisions aren't yet common in Australia at the consumer level, but gain jurisdiction over a dispute by matter of contract. In this regard, they share many features with an ombudsman's scheme but they would bind the consumer to the terms of the arbitration.

10. Improving 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?

The Committees' view is that tribunals have an essential role in the NSW legal system in providing engagement with the civil dispute framework outside of the courts. Fundamentally, the tribunal model should allow for efficient and cost-effective dispute resolution whilst ensuring procedural fairness for all parties, many of whom may be self-represented litigants.

The NSW Civil and Administrative Tribunal (NCAT), due to commence on 1 January 2014, has been proposed as the 'one-stop shop' to cater to the needs of those requiring extra-judicial determination of civil disputes.[69] It is proposed that streamlining in this manner will both reduce costs, and remedy the complex structure of specialised tribunals which presents a confusing and overwhelming array of dispute resolution options to those wishing to access tribunal services.

Indeed, the results following earlier implementation of 'super tribunals' in other States (Victoria, Western Australia and Queensland) have been promising, with the Victorian Civil and Administrative Tribunal (VCAT), for example, publishing performance outcomes which indicate that over 90% of VCAT matters have received a decision within 6 weeks of hearing.[70] It is hoped that NCAT will mirror these results, whilst ensuring that service standards and specialised knowledge can be maintained.

The Committees have previously expressed some concerns as to the potential pitfalls of consolidation; primarily that this could result in a 'one size fits all approach' that erodes the high levels of specialisation in particular jurisdictions.[71]

The Committees consider that the following factors are essential to ensuring that consolidated tribunals maintain an overriding focus on access to justice for all those wishing to utilise tribunal services:

- They should be comprised of permanent and sessional members, as well as judicial members and community members, to ensure that access to expertise is readily available when required;
- Centralisation of registry services so that registry procedure, contact between staff and those accessing tribunal services and registry resources (such as forms) are consistent;
- Promotion of community information and awareness, so that those wishing to access tribunal services are aware of tribunal procedure and services that will be available;
- The establishment of circuit sessions, or regional and online registries, so that rural and regional members are equally able to access the tribunal services;

[69] NSW Attorney General, *Media Release: Simple, quick and effective justice for NSW*, 26 October 2012. Available at: http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/MR-NCAT-26102012.pdf/$file/MR-NCAT-26102012.pdf

[70] VCAT, *Transforming VCAT: Three Year Strategic Plan 2010 – 2013* at page 5. Available at: http://www.vcat.vic.gov.au/sites/default/files/transforming_vcat_report_card_december_2011.pdf

[71] NSW Young Lawyers *Opportunities to consolidate tribunals in NSW: Inquiry by NSW Parliamentary Standing Committee on Law and Justice* (9 December 2011) at page 19. Available at: http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/580279.pdf

- Ensuring that flexibility of approach is promoted in circumstances where appropriate, such as when dealing with more complex and/or non-legal disputes;
- A system of internal merits review and internal appeal, which is guided by an overriding purpose to ensure that each tribunal matter is dealt with fairly and consistently.

11. Improving accessibility of Courts

Case management

How effective have the case management systems, processes and practices adopted in different jurisdictions been in reducing cost and delay? What are the barriers to the effective implementation, operation and evaluation of case management systems, processes and practices?

Case management procedures were introduced in response to investigations into delays in the progress of litigious matters and support the just, quick and cheap disposal of proceedings.[72] The High Court has held that delays and inefficient use of court and party resources can affect whether or not justice is achieved.[73]

Timetabled steps such as directions hearings and status conferences provide focused opportunities for the parties or their legal representatives to discuss the progress of the case, to reassess their position and to focus on the real issues in dispute, and these are a crucial and important exercise of a court's procedural powers.[74] These events compel parties to consider resolution of their dispute on a periodic basis.

In the Committees' view, case management systems generally facilitate the quick, just and cheap disposal of the proceedings by committing litigants to timetables and encouraging the parties to focus on the real issues and the prospect of settlement. However, additional Court attendances for legal representatives may increase the costs of litigation[75] particularly by front-loading those legal costs.

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?

The Committees' view is that case management would benefit from greater individual assessment of matters on a case-by-case basis, to ensure that timetables and referrals reflect each particular matter's needs. Cases may vary in the level of judicial oversight required and some require extended timetables whilst others may be completed more quickly. By contrast, the Federal Court of Australia has recommended presumptive case management by way of categories of dispute such as disputes brought under particular legislation.[76] Either process does require increased resources within courts and tribunals.

It is recommended that tailoring of case management to individual matters should extend to the referral of matters to ADR. The judicial officer may provide guidance on the type of ADR process that may be the most appropriate for the particular dispute. It is particularly important in matters where parties are self-represented. A careful examination of the matter should take place prior to the parties being called into a settlement conference, where they may feel pressured to agree to a settlement under time constraints.

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[72] s56 *Civil Procedure Act NSW* (2005); ss37M(1), N(1) and(2) of the *Federal Court of Australia Act 1976* (Cth)

[73] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

[74] Ibid at [93]-[98]

[75] Federal Court of Australia, *Case Management Handbook* (13 October 2011) at 3.2

[76] Ibid at 5(D)(iii)

Whilst case management encourages parties to regularly reassess their position and potential resolution of the dispute, and the Committees agree this is beneficial, it is important to ensure that referral to ADR does not come at a stage in the proceedings where significant costs have already been expended in complying with case management requirements, which may front-load the costs of litigation.[77] Again, this may be assessed on a case-by-case basis.

Court attendance by legal representatives is expensive, and the Committees recommend that unnecessary Court attendances should be limited in order to reduce costs for litigants. With the increased use of technology in the Court room, in future it may be possible for directions hearings to take place by way of video link, thereby reducing some of the costs to the parties.[78] Further, increasing informal access to the judicial officer with management of a matter (for example, increased contact via email) may be beneficial in some jurisdictions and reduce the need for Court appearances, whilst maintaining judicial management over cases.[79]

Building on existing practices, it may beneficial to require pro-forma documents (wherein the parties are to list the status of the matter, the key issues in dispute as well as details of any attempts to settle) to be handed up in advance of a scheduled case management event. This forces the parties to commit some form of agreement in writing[80] outside of the Court and, perhaps, reduce the number and/or length of Court appearances required.

Pre-action requirements and procedures

How useful have pre-action requirements been in resolving disputes earlier? To which particular disputes are pre-action requirements most suited?

Due to the present limited implementation of pre-action requirements, it is not possible to determine their utility or success. In theory, pre-action requirements are a useful step to ensure parties properly consider settlement prior to commencing litigation. However, in practice, this may cause front-loading of legal costs, or cause parties to treat the requirements as merely a procedure step to comply with when commencing proceedings.

The Committees' view is that it is possible that minor commercial disputes, such as simple debt recovery matters, are likely to settle shortly after the filing of proceedings irrespective of pre-action requirements in place.

[77] See Federal Court of Australia, Case Management Handbook (13 October 2011) at 3.12

[78] See Federal Court of Australia, Case Management Handbook (13 October 2011) at 4.14-4.18

[79] See Federal Court of Australia, Case Management Handbook (13 October 2011) at 4.11-4.12

[80] See Federal Court of Australia, Case Management Handbook (13 October 2011) at 4.13(b)

12. Effective and responsive legal services

Legal education and skills

What evidence is there of a shortage or oversupply of lawyers and how does this impact on legal costs?

The Committees' view is that there is a large shortage of legal practitioners in regional NSW. In many areas around NSW, there is limited access to legal aid and the supply of legal practitioners is equally limited. An example of this is Bourke (NSW) there are, according to the Yellow Pages, two legal firms in the town. However, one of those firms is located near Blayney some 600km away. This stands in stark contrast with the number of police stationed in Bourke. Given the financial and travel costs associated with such distance, the promotion of regional opportunities for lawyers to improve access options for the community ideal.

This situation can impact on costs in two key areas:

1. In a case where one person has engaged the town lawyer, the other person must access a lawyer far away to avoid a conflict of interest, which can be very costly.
2. If the case went to the Bourke court, the lawyer from another region must charge for associated accommodation and travel expenses for the length of the hearing. Thus it becomes even more costly to the other party (or to the State or Commonwealth if legal aid is provided).

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

The Committees' view is that all law students should be encouraged to undertake a period of time in rural and remote communities, similar to the mandatory requirement for medical students. The Committees note that, at the University of New England, there is an elective class in 'Legal Practice in Rural and Regional Communities', which seeks to prepare students for legal careers in rural and regional Australia by sensitising them to the contextual realities of that type of practice and equipping them with practical skills. The unit comprehensively examines the notion of legal practice through the conceptual lens of 'rural social space', considering what a rural or regional legal practice career means for law graduates, their employers, and rural and regional communities. The Committees recommend that courses similar to this should be promoted to all law students across NSW.

The Committees believe that exposure to working in these regional and rural areas can expand the training of the lawyer, in terms of fostering independence, resilience and knowledge in a wide range of areas of law. For example, a graduate working in a large Sydney firm may spend a large amount of his or her initial years of practice doing research for partners under supervision. In regional or rural areas, new practitioners may be placed in a positions requiring the development of independent, managerial and delegation skills.

In addition to improving the skills set of lawyers, regional training may also encourage those lawyers to continue their practice in regional areas and overcome the shortage of supply and variety of firms, discussed above.

Pro Bono

How important is pro bono work in facilitating access to justice?

The Committees believe that pro bono work is an essential element to the mix of legal services. However, it should not be a substitute for Government funded services. Pro bono legal services help provide a more equitable access to justice for; individuals who are financially or socially disadvantaged, those in remote or rural regions, expertise support in public interest cases and community interests not otherwise available.

How much pro bono work is currently undertaken, by whom and for whom?

The National Pro Bono Resource Centre Sixth Annual Performance Report (the Report) on the National Pro Bono Aspirational Target (the Target) published in October 2013 stated: '[a]s at 30 June 2013, the Target had a total of 104 signatories, comprising of 79 law firms and incorporated legal practices and 25 individual solicitors and barristers. The Target covers 8,763 FTE legal professionals…'[81]

In the above referenced chart, a total of 294,329 pro bono hours for 2013 were reported. These figures are only based on those firms and individual solicitors and barristers who have volunteered to become a signatory to the Target which requires the signing of a 'Statement of Principles' and agreement to 'aspire to provide at least 35 pro bono hours per year.'[82]

Not included are the pro bono services provided by: Community Legal Services, the NSW Law Society and Bar Association pro bono legal assistance services, Public Interest Law Clearing House (PILCH) NSW, Public Interest Advocacy Centre (PIAC), Homeless Persons Legal Service (HPLS), Duty Lawyer Schemes, Cancer Council Legal Referral Service.

How successful has the National Pro Bono Aspirational Target been in encouraging pro bono work?

Based on figures published by the National Pro Bono Resource Centre, signatories to the Target are rising. The Report stated: '[a] factor influencing the decision of many firms to sign up to the Target was the inclusion of the pro bono conditions in the application process for the Commonwealth Legal Services Multi-Use List (LSMUL).'[83]

What are the costs and benefits that accrue to legal service providers who provide pro bono services?

The costs that may accrue to legal service providers who provide pro bono services include:

- Financial constraints
- Time constraints
- Travel and accommodation expenses
- Cost of disbursements; expert witness, medical reports and appearance fees, filing fees, barrister fees, search costs, government fees.

[81] The National Pro Bono Resource Centre, Sixth Annual Performance Report on the National Pro Bono Aspirational Target, (October 2013) 2.

[82] Ibid 2.

[83] Ibid 3.

Disbursement assistance schemes do not appear to completely address the issue of disbursements for pro bono assistance.

The benefits include:

- Contribution to the community/society
- Engagement with wide cross-section people
- Sense of personal satisfaction
- Social awareness
- Promotion of strong firm values/culture

What cost effective ways are there to make the provision of pro bono services more attractive?

The Committees' view is that pro bono services could benefit from a reduction in the complexity of the requirements of eligibility and potentially by expanding eligibility for disbursement assistance schemes. The Productivity Commission may also wish to consider whether government fees on approved pro bono services should be waived. Further, low cost or free limited practising certificates available for retired or career break lawyers to provide exclusively pro bono services (not contingency based) could assist in terms of increasing the number of legal practitioners willing to provide pro bono services.

How well do pro bono programs operate, how are they resourced, and are they effectively targeted?

The Committees believe that there are a number of resources and agencies available to offer pro bono legal services. However, as referred to in our previous comments, members of the public may experience difficulty in knowing where to begin searching for these services. Additionally, there is such a variety of services, sometimes targeted to specific areas of law, which in itself raises some issues. The Committees' view is that some of this information is not easily accessible, it is not available on the same site and people that are financially or socially disadvantaged and/or have a disability and/or are from a non-English speaking background may have difficulty accessing the resources.

Anecdotally, the Committees believe that more could be done to ensure that information about pro bono legal services is available in police stations. Additionally, education about access to legal services could be delivered in high schools, to raise awareness of the availability of pro bono legal services that could have a ripple effect throughout the community.

What barriers are faced by lawyers seeking to provide pro bono services and how are they being addressed?

Barriers may include financial and time constraints, potential conflicts of interests and a lack of support and training. The barriers with regards to costs orders for pro bono legal services were recently addressed as part of a NSW Law Reform Commission Report.[84]

The Committees believe that, whilst many government departments and private firms are increasingly supportive of their staff undertaking pro bono legal services, often within internally run programs or staff seconded to external organisations, more could be done to promote the involvement of staff in pro bono activities.

[84] New South Wales Law Reform Commission, Report 137 to Attorney General for New South Wales, Security for costs and associated orders, December 2012, 65.

The issues paper commented that many lawyers, particularly government & retired lawyers face obstacles providing pro bono services because of practising certificate or professional indemnity issues. The Committees suggest that one way around this is for these pro bono services to be indemnified under the *Civil Liability Act* or professionally at a greatly reduced rate. Similarly, appropriate reductions could be made for practising certificates for retired lawyers undertaking some pro bono work.

Practitioners undertaking pro bono work would also require adequate support, training and (where appropriate) supervision to ensure a high quality of service is achieved.

The Committees thank the Commission for the opportunity to comment on the Issues Paper and would be very pleased to provide further information or submissions as required.

Sincerely,

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