Equal access: Submission in response to the Productivity Commission Draft Report *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;
- 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 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

As was noted in our submission to the *Issues Paper*,[1] PIAC has a long history of working to achieve access to justice for marginalised and disadvantaged people. 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's comments in this submission are limited to a few specific areas where we have expertise: public purpose funds, costs for pro bono parties, court fees, a public interest litigation fund and the distribution of funding to community legal centres.

PIAC gratefully acknowledges the assistance provided by University of Sydney student, Prajesh Shrestha, in preparing this submission.

[1] Jessica Roth, Deirdre Moor and Edward Santow, *Equal before the law: Submission in response to the Productivity Commission Issues Paper about Access to Justice Arrangements* (4 November 2013) Public Interest Advocacy Centre < http://www.piac.asn.au/publication/2013/11/equal-law>.

PIAC's response to specific information requests and draft recommendations

Information request 7.4

How should money from 'public purposes funds' be most efficiently used?

In PIAC's view, there is a strong community benefit from applying public purposes funds for legal assistance, particularly to community legal centres, such as PIAC, that can tackle the underlying causes of legal need.

PIAC is dedicated to obtaining social justice for disadvantaged individuals and at the broader, systemic level. PIAC has an excellent record of achievement in pursuit of this objective.

Support from the New South Wales Public Purpose Fund (PPF) has been crucial to PIAC's past success, and it remains vital to the organisation's future. While PIAC has worked hard to develop a range of funding sources, the PPF provides the most significant portion of its funding. Over 30 years, the continuity of the PPF's support, and that of its precursors, has allowed PIAC to undertake long-term planning and projects that address deep-seated social problems.

PIAC's success – in large part enabled by the long-term support of the NSW PPF – is built on the integration of PIAC's three key strategies: public interest litigation; law reform and policy development; and, education and training. This enables PIAC to tackle challenging public interest issues, applying a range of strategies to achieve lasting, systemic change.

If PPF (or similar) funding were not available, community legal centres would need to be more aggressive in seeking remunerative work in at least two ways. First, community legal centres would need to prioritise representing clients in costs jurisdictions, where the legal representative can generally recoup the cost of representing a client if the client is successful. Secondly, community legal centres may need to consider charging more of their clients for the services provided.

However, both of these changes in community legal centre practice would make it more difficult for impecunious people to obtain legal assistance and representation. If community legal centres receive insufficient funding to provide their legal assistance services, this would have the most unfortunate consequence of centres being forced increasingly to restrict their services to clients who can afford to pay and/or to costs jurisdictions.

For instance, the *initial* forum to resolve discrimination disputes at the state and federal levels is not a costs jurisdiction. Such disputes often involve impecunious claimants, and a disparity in the power and position of the two disputing parties. The assistance that a community legal centre can provide in ensuring a just outcome at that initial stage is crucial in resolving the dispute in a way that provides justice to all parties and also ensures a relatively quick disposition of the matter (with the attendant benefits to the state).

Public purpose funds also enable longer-term systemic work that can have very significant benefits for an entire community. Take the following example. The genesis of the successful

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 that caused unintended negative consequences for this group of people – contributing to a cycle of poverty and disadvantage that was very difficult to escape.

Based on its experience running the Homeless Persons' Legal Service, PIAC developed a systemic solution – WDOs. That solution was refined through PIAC's partnership with the NSW Government and other community organisations. This collaborative approach is a core part of PIAC's strategy.

Since the trial WDO scheme was made permanent in 2011, Legal Aid NSW has facilitated access for eligible people, particularly in regional areas. A total of $29 million of outstanding fines has been managed since the scheme commenced.[2]

From the frontline experience in 2004 where the need was identified, to the scheme becoming fully implemented and successful, PIAC was involved at every step. Systemic solutions take time to develop, and ongoing secure funding for community legal centres involved is a necessity. In PIAC's view, this is an effective use for PPF funds.

Draft recommendation 13.4

Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.

Information request 13.1

The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to:

- *the legal professional providing pro bono representation*
- *the not-for-profit body providing or coordinating the pro bono service*
- *a general fund to support pro bono services.*

The Commission is interested in any other options that could be examined.

Currently, pro-bono parties are not able to seek an order for costs against their opponent. This has been justified on the ground that the purpose of an order that the losing party pay the legal expenses or costs of the winning party is to provide an indemnity to the whole, or part, of the contractual obligation to pay lawyer's fees. If there are no fees incurred, then the indemnity principle states that the successful party cannot recover costs from the opponent.

This can create asymmetric payoffs at the expense of pro bono parties, as they can still be liable for an adverse cost order.

[2] Productivity Commission, *Access to Justice Arrangements Draft Report*, 2014, 635.

Denying cost awards to pro bono clients presents the opportunity for some parties to abuse the legal system to exploit disadvantaged groups that are likely to require pro bono services. Opponents of pro bono clients are aware that they will not have to pay costs, and thus, have reduced incentives to settle.

The inability to seek an award for costs in pro bono matters has meant that PIAC often acts on a contingency fee basis, so it can recover the costs of its professional fees and disbursements if there is a favourable outcome for the client. In the event that a costs order is made in favour of PIAC's client, or a matter settles on the basis that the other side pays an amount to the client for costs, PIAC recovers its costs and disbursements and this helps fund PIAC to provide further legal assistance to disadvantaged clients.

PIAC supports the awarding of costs to pro bono parties, as set out in Recommendation 13.4.

In relation to the most appropriate way to allocate the funds, the Commission considers three viable options. Costs could be awarded to:

1. The lawyer representing the client;
2. The legal centre or clearing house involved;
3. A general fund to support pro bono services.

PIAC considers each of these options in turn below.

Awarding costs to the lawyer representing the client

It is arguable that costs should be awarded to lawyers that show a willingness to take on the pro bono matter. Large law firms' pro bono policies have generally recognised that when costs are recovered in pro bono litigation, they should be put back into their pro bono programs to facilitate greater pro bono activity by the firm.[3] Therefore, awarding funds to the relevant law firm could encourage more pro bono work by the firm.

Awarding costs to legal centre or clearing house

There is also a strong case for arguing that cost should be awarded to the legal centre or clearing house involved, as there are significant costs associated with providing pro bono services. This is clearly illustrated by PIAC's largest project, the Homeless Persons' Legal Service (HPLS). HPLS is a collaborative venture that brings together community sector organisations, such as St Vincent De Paul Society and Wesley Mission, with Legal Aid NSW and 11 other commercial law firms. PIAC trains and supervises over 350 lawyers to provide pro bono legal advice and representation to people experiencing or at risk of homelessness.

Last year, PIAC worked with its commercial law firm partners to assist 1,384 clients through pro bono legal services worth, at the equivalent charge-out rate, more than $1.95 million. The vast majority of the more than 350 lawyers who staff the legal clinics do not come to the HPLS project with expertise in areas of the law that the clients require assistance with, or with experience in dealing with people with complex needs, mental illness or those who have suffered from significant trauma.

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[3] Public Interest Legal Clearing House, Submission to the NSWLRC Consultation paper 13, *Inquiry into security for costs and associated costs orders* (19 August 2011) 9.

HPLS provides the pro bono lawyers with training, and HPLS staff supervise the information and advice given to every client who attends every HPLS clinic.

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.

Thus, the financial burden on the legal centre or clearing house coordinating the pro bono work could be partially offset if the legal centre or clearing house involved were allowed to recuperate the costs and disbursements from litigation. The Productivity Commission is correct in suggesting that distributing any costs awarded to the relevant bodies providing the pro bono services would help improve the resourcing of these organisations to provide more pro bono services to others.[4] More specifically, any cost awards PIAC might recover through HPLS could be expended on improving the efficiency and quality of service provided by the HPLS clinics.

Therefore, PIAC considers that there are strong grounds for allocating cost awards to the legal centres or clearing house providing or coordinating the pro bono service.

A general fund to support pro bono services

Another possible way of awarding costs to pro bono parties is to establish a general fund to support pro bono services. This is the model that has been adopted in the UK.[5] In the UK, the losing party is required to pay the costs, including costs in settlements, to the prescribed fund, the Access to Justice Foundation. The Foundation then distributes the funds to agencies and projects to support the provision of free legal help to those in need. The costs cover any period when free representation was provided, and the amount is based on what a paying client would recover.

An analogous fund could be established in Australia and proceedings from cost awards in pro bono cases could be awarded to the fund. In turn, the fund could then distribute the monies to community legal centres and clearing houses.

It appears, however, that the Access to Justice Fund in the UK has had limited success to date. As of 2011, the Fund (established in 2008) had only raised £130,000 and there was a lack of awareness about the existence of the fund.[6]

Considering the potential administrative costs of setting up and running a new, independent, fund and in light of the UK's experience with the scheme, PIAC does not recommend that pro bono cost awards should be allocated to a general fund to support pro bono services.

In conclusion, PIAC suggests that a pro bono party who has been awarded cost awards should have the ability to elect whether the costs should be allocated to the legal centre or clearing house or the law firm. Allocating costs to either the legal centre, clearing house or the law firm

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4 Productivity Commission, above n 2, 416.

5 Access to Justice Foundation, *Unlock funds for justice: Acting pro bono? Please seek pro bono costs*, 3.

6 Owen Bowcott, 'The ingenious scheme to make pro-bono work pay', *The Guardian* (UK), 12 May 2011 <http://www.guardian.co.uk/law/butterworth-and-bowcott-on-law/2011/may/11/pro-bono-costs-scheme-lord-goldsmith>.

has positive consequences and empowering the party to choose as to where the cost awards are allocated seems to be a reasonable and fair method of allocating funds.

Draft recommendation 13.7

Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.

These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.

Information request 13.2

The Commission invites comment on the most appropriate arrangements for the governance and funding of a public interest litigation fund (PILF), including:

- *appropriate mechanisms and criteria to govern access to the fund*
- *whether the PILF should be established as a new entity, or integrated into existing legal assistance funds or bodies.*

For many people seeking to enforce their legal rights, the risk of an adverse cost order as a result of unsuccessful litigation is a significant impediment to accessing justice. In PIAC's experience, even where pro bono legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an adverse cost order. Many of PIAC's clients have abandoned meritorious claims that have significant public interest and strong prospects of success because they were not in a position to take the risk of an adverse cost order. Therefore, PIAC welcomes the Commission's recommendation for the establishment of the public interest litigation fund (PILF).

The PILF could be modelled on the 'Justice Fund' (the Fund) proposed by the Victorian Law Reform Commission (VLRC). According to the VLRC, the law firms would be expected to conduct the case without any financial contribution from the Fund other than a guarantee that the firm would be paid agreed fees and reimbursed agreed expenses if the case was unsuccessful. Thus, in all successful cases the Fund would receive income without having to outlay monies. In return for this guarantee, the Fund would recover an agreed percentage of the amount recovered in successful cases and recovery would not be limited specifically to cost awards.[7]

Mechanisms and criteria to govern access to PILF

In order to ensure the financial viability of the PILF, there needs to be effective merits screening. Selecting cases that do not have reasonable prospects of success, could lead to the fund losing substantial amounts of money as it will be liable for adverse costs orders. Thus, in order to gain access to the fund, potential litigants should be able to demonstrate that their case has merit.

[7] Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

The approach adopted by New South Wales in assessing the merits of potential cases in relation to its Litigation Support Fund (LSF) offers some guidance. In assessing the merits of each case, the Law Foundation of NSW approached barristers in the relevant practice area. They agreed to advise on the basis of a small fee per application, representing a substantial reduction on their regular fee.[8]

Applications were sent to merit assessors each week. The assessors advised on the extent of liability, provided estimates of quantum of damages, length of the case, cost of disbursements, and whether the case had merit. The test for merit was essentially whether the case had reasonable prospects of success.

According to the Law and Justice Foundation of NSW, this system of assessment proved very successful in meeting the needs of the LSF. The Foundation has said that this merits assessment system was efficient and cost effective as it relied primarily on the advice of disinterested lawyers acting for a reduced administrative fee. The LSF scheme had a success rate of 94.3% while in existence.[9]

However, it is important to note that the LSF was primarily limited to personal injury cases, which had little or no relevance to the public interest. In contrast, the PILF primarily relates to public interest and, therefore, there is a need to examine the scope of the public interest involved in potential cases. There needs to be explicit criteria for assessing public interest.

Defining public interest

As PIAC has submitted previously, public interest should be defined broadly to include all cases that could benefit a class of disadvantaged people, clarify a law that has an impact on a significant sector of the community, or affect the interpretation of fundamental human rights, even though the case may benefit the applicant as well.

PIAC suggests that the definition of public interest litigation for the purposes of the proposed PILF should include the following:

- The matter raises an issue of public importance;
- The matter will have an impact beyond the rights of the individual parties to affect a larger group of people. It heightens the public dimension of a matter if that larger group of people includes, in particular, disadvantaged and marginalised people; and
- Important rights and obligations will be determined or enforced by pursuing the matter.[10]

Criteria for assessment

The Commission has suggested that the criteria used by the courts for making protective costs orders (PCOs) may form a suitable basis for assessment as to whether to indemnify a particular litigant. In the absence of clear guidelines, it is not certain what such criteria would look like and current case law seems to offer limited guidance. The case of *Bare v Small* summarises the

8 Law and Justice Foundation of New South Wales, *The Litigation Support Fund: a reflection on the New South Wales experience*, Sydney (2000) 134-137.

9 Ibid, app A.1.

10 Alexis Goodstone, *Submission to NSW Law Reform Commission: A Public Interest Approach to Costs* (19 August 2011) Public Interest Advocacy Centre, 2.

current law in relation to PCOs.[11] In that case, Mr Bare sought to appeal the decision of the Supreme Court but first lodged an application for PCO to limit any costs ordered against him should he be unsuccessful.

The Court held that, as the appeal would raise questions of public importance, a PCO was appropriate to ensure a just determination of the proceeding. In arriving at its decision to grant a PCO, the court considered the following factors:

1. If application for the PCO was denied, the appeal would be discontinued as it would bankrupt the appellant (Mr Bare).
2. Mr Bare had unsuccessfully attempted to reach an agreement with the respondents not to seek costs in the event that the appeal was dismissed.
3. The application for PCO was made in a timely fashion.
4. Mr Bare was not seeking damages in the appeal.
5. The appeal raised questions of law and public importance.
6. Mr Bare's claim was not vexatious or frivolous.

In relation to the proposed PILF, only factors 1, 5 and 6 seem to be applicable. Hence, the relevant criteria for assessing a public interest case may include the following factors:

1. Without funding (or indemnity), the case would not be pursued;
2. The matter raises issues of public interest;
3. The claim is not vexatious or frivolous.

The criteria for assessing PCOs in Canada, as outlined in *British Columbia (Minister of Forests) v Okanagan Indian Band,* [2003] 3 SCR 371 (the *Okanagan* case) includes:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial. In short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Security for costs

As well as indemnifying the plaintiff against any possible adverse cost awards, PIAC submits that the PILF should also provide security for costs. If security for costs were requested of an impecunious plaintiff, their ability to litigate would be severely compromised unless the fund provided such security.

The Government could also move to limit the scope of security for costs orders in respect of matters in which the PILF is engaged, so as to limit the risk exposure faced by the PILF in any single matter.

[11] *Bare v Small* [2013] VSCA 204.

Application fee

A small application fee has the ability to recompense the PILF, to a minimal extent, for the administrative expenses incurred by the fund and can support its financial viability.

Furthermore, a small application fee may act as a deterrent against frivolous or vexatious applications. The fee would need to be set very low, so as not to deter potential plaintiffs from applying.

Appeals

Again, in relation to the question whether there should be a right to seek merits review of a decision of the PILF, the LSF scheme in NSW provides guidance. The LSF expressly provided that there was no right of appeal (merits review) for any decision of the fund. To balance this, unsuccessful applicants could reapply at no additional cost.

Determining applications quickly

As PIAC has previously said, an important element of a fund such as a PILF is that decisions about whether or not to indemnify the plaintiff should be made prior to the proceeding or early in the proceedings to ensure that applicants know the risk that they face.[12]

Structure

It may be desirable that for administrative convenience and reducing the amount of seed funding required, the PILF should be set up, at least initially, as an adjunct to an existing entity. In 2008, the VLRC recommended that a Justice Fund should be set up as an adjunct to Victorian Legal Aid, or alternatively the existing LawAid scheme could be modified to incorporate the proposed features of the Justice Fund.[13] The PILF could be set up as an adjunct to the legal aid schemes of each state or territory - subject to any legislative, administrative or financial reforms necessary.

Administering the fund in this way has the potential to negate the requirement for seed funding, reducing the amount of staff required, and reducing administrative costs.

Tax

The PILF should be structured to minimise potential liability for income tax or capital gains tax on any revenue it derives from costs awards.

Draft recommendation 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

- *in cases concerning personal safety or the protection of children*
- *for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.*

12 Goodstone, above n 10, 8.
13 Victorian Law Reform Commission, above n 7.

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

Rationale for increasing court fees

The Commission has provided a number of different justifications for increasing court fees.

Encouraging alternative dispute resolution

The Commission has noted that increasing court fees can encourage parties to explore alternative means of dispute resolution. PIAC believes that this is not always desirable.

There is no doubt that alternative dispute resolution (ADR) can be useful, but it is important to acknowledge that there is a significant difference in the 'justice' afforded by non-court processes as opposed to official court proceedings. The Commission has noted the potential advantages of 'test cases' or 'public interest cases' being determined by the court. Court proceedings may be desirable not only in such public interest cases, but also in other 'ordinary' cases.

In official court proceedings, matters determined definitively according to the law by an impartial and independent judicial officer subject to certain safeguards that are not available in other, less formal, means of resolving dispute. A determination by a court provides finality for the parties concerned that other methods of resolving disputes generally are not able to achieve.[14] Furthermore, and very importantly, determination by the courts evidences open justice and can establish precedents.

It has been suggested that for the fundamental right of access to justice to be upheld, disputants should be able to make a genuine choice about whether ADR or the courts better meets their needs. Promoting and encouraging ADR can be beneficial, but litigation must still be a real option for the parties concerned. Steep court fees could impede access to the courts and therefore force people to accept substandard settlements during negotiations (due to their inability, perceived or actual, to access the court system). Undoubtedly, this significantly undermines the rule of law.

Private benefits to users

According to the Commission, the current, subsidised, fees do not reflect the private benefits accrued to users of the court system. PIAC believes that this statement, whilst ostensibly true, misunderstands the fundamental nature of the court system. As the Law Council of Australia has stated, courts are a public good for which the state has the responsibility to provide access on the same basis as other essential public infrastructure.[15]

Seeking proportionate contributions from parties based on their financial resources is not controversial. However, to implement a blanket rule that the courts should, subject to exceptions, fully recover costs is inconsistent with the notion that the courts are an independent arm of government and, moreover, a public good rather than a private service where individuals have to pay.

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[14] Professor Legg, Submission 9 to Legal And Constitutional Affairs References Committee, *Impact of federal court fee increases since 2010 on access to justice in Australia*, June 2013, 7.

[15] Law Council of Australia, Submission 26 to Legal And Constitutional Affairs References Committee, *Impact of federal court fee increases since 2010 on access to justice in Australia*, June 2013, 12.

Improve the effectiveness of the existing system

Courts already possess the ability to summarily dismiss vexatious proceedings. Furthermore, there are existing requirements that require the parties to undergo forms of ADR before commencing legal proceedings. Thus, it appears that justifying increased cost recovery on the basis that it will deter frivolous cases or encourage ADR is questionable and possibly misguided.

Enforcing a 'user-pays' approach has the potential to exacerbate inequality and enforce power disparities between parties. There is a very real possibility that such a system runs the risk of becoming a trifurcated system divided between:

- The wealthy who possess the financial resources to access the legal system despite the increase in costs;
- The low income individuals who, because of their impecuniousness qualify for financial exemptions, thus, enabling them to gain access to the legal system;
- The low to moderate income middle class individuals who are on the margins of qualifying for fee exemptions and are unable to access the legal system due to increased costs.

Any increase to court fees impacts unequally on parties by giving a significantly greater advantage to the party with greater financial resources. Increases in court fees operate inequitably against parties who are not wealthy and have other financial responsibilities, thus, enabling wealthy parties to 'wait out their opponents' and force them to concede for financial reasons.[16]

Arguably, a user pays system, as the one recommended by the Commission, runs the risk of pricing low to middle income individuals out of the legal system, thus, forcing them to settle on less favourable terms or, worse, unable to achieve any semblance of justice.

If court fees are increased, fee waivers and reductions become even more vital to address accessibility issues for financially disadvantaged litigants.

Fee waivers

Currently, the 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.

[16] Ibid, 17.

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. These categories for fee waivers should be retained under any change to the court fee structure.

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 where the clients are represented by community legal centres or by private solicitors on a pro bono basis. The AAT should also be able to waive application fees in public interest cases.

This ensures that vulnerable parties are at least partially shielded from the proposed increase in court fees. Although an extensive waiver system is important as it can facilitate access to justice for people of lower socio-economic background, PIAC reiterates that an increase in court fees will have a disproportionately negative impact on those people who are on the margins of qualifying for a waiver or an exemption.

Draft recommendation 21.4

The Commonwealth Government should:

- *discontinue the current historically-based Community Legal Services Program (CLSP) funding model*
- *employ the same model used to allocate legal aid commissions funds to allocate funding for the CLSP to state and territory jurisdictions*
- *divert the Commonwealth's CLSP funding contribution into the National Partnership Agreement on Legal Assistance Services and require state and territory governments to transparently allocate CLSP funds to identified areas of 'highest need' within their jurisdictions. Measures of need should be based on regular and systematic analyses in conjunction with consultation at the local level.*

Information request 21.3

The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.

PIAC is concerned that the approach to allocating funding outlined in Draft recommendation 21.4 may result CLCs having limited capacity for systemic work.

As noted in the draft report, where legal assistance funding is limited, it is important that it be used as efficiently as possible. Because of its strategic approach to systemic issues, PIAC's work is very cost effective.

For example, PIAC has a long-standing concern about access to public transport for people with a disability. In 2011, the Australian Bureau of Statistics found that 1.2 million Australians with a

disability reported difficulty using public transport.[17] This widespread problem can severely limit the capacity for people to participate in all forms of public life – from employment, to education, to family and communal life and much more.

As noted in PIAC's submission to the Issues Paper,[18] PIAC successfully represented Graeme Innes AM in a discrimination case against Railcorp NSW (now Sydney Trains). As a result, Sydney Trains agreed to take specific steps to monitor and improve on train announcements, with consequent benefits for all blind and vision impaired travellers.

Similarly, PIAC successfully represented wheelchair-user Julia Haraksin in a discrimination case against Murrays Australia Limited who advised they were unable to accept her booking on a bus to Canberra because they had no accessible buses. Justice Nicholas said that Murrays was in 'flagrant disregard' of the Disability Transport Standards. The decision put all public transport providers on notice to comply with the standards or risk a finding of unlawful discrimination.

PIAC has been advocating for accessible public transport for people with disability for several years, previously acting in cases against Virgin Airlines, the NSW Department of Transport and two large taxi companies. These cases highlight some of the challenges faced by people with disabilities using public transport. They have paved the way for lasting change to improve accessibility for people with physical disabilities.

PIAC is concerned that a funding model that is based on identified areas of 'highest need' may preclude funding to centres such as PIAC, who, as well as direct service delivery programs such as HPLS, has a strategic litigation practice where test cases are used to deliver public interest outcomes that give benefit far beyond the individual client.

PIAC would be pleased to contribute to any further consultation about any of the matters raised in this submission.

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17 Australian Bureau of Statistics, *4446.0 - Disability, Australia, 2009* (2011) <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4446.0Main%20Features122009?opendocument&tabname=Summary&prodno=4446.0&issue=2009&num=&view=>.

18 Roth et al, above n 1, 6.