

Access to Justice & Legal Needs

A project to identify legal needs,
pathways and barriers for
disadvantaged people in NSW

Background Paper

Louis Schetzer, Joanna Mullins, Roberto Buonamano

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Introduction

The objects of the Law and Justice Foundation are to contribute to the development of a fair and equitable justice system which addresses the legal needs of the community, and to improve access to justice by the community (in particular, by economically and socially disadvantaged people).¹

The Foundation's priority during 2002–2003 is the Access to Justice and Legal Needs Project, which will investigate the access to justice and legal needs of economically and socially disadvantaged people in New South Wales.

The principal purpose is, via a thorough and credible process, to develop a statement of these needs, which we hope will inform government, non-government and community agencies helping to improve access to justice for disadvantaged people in New South Wales.

This paper is a background paper to the Law and Justice Foundation's Access to Justice and Legal Needs Project. In particular, this paper will assist those individuals and organisations intending to make a submission or be involved in subsequent stages of the project. The paper outlines the project's terms of reference and provides further details regarding the issues which will be the subject of examination for the project.

It also provides

- a discussion of the terms 'access to justice' and 'legal needs' in the context of this project
- an initial identification of some disadvantaged groups whose access to justice and legal needs will be relevant to the project, and
- a brief description of several studies and research literature on access to justice and legal needs issues.

The Foundation invites submissions from interested groups and individuals. The closing date for submissions is Monday 30 September, 2001.

There is no special form required for submissions.

¹ *Law and Justice Foundation Act 2000* (NSW), s. 5(1).

All submissions should be directed to:

Louis Schetzer
Senior Project Manager
Law and Justice Foundation of NSW
GPO Box 4264
SYDNEY NSW 2001
Tel: (02) 9221 3900
Fax.: (02) 9221 6280
TTY: (02) 9223 4229
Email: lschetzer@lawfoundation.net.au

Terms of reference

Project Aim

To identify the particular legal and access to justice needs of economically and socially disadvantaged people in New South Wales.

Objectives

The project will examine the ability of disadvantaged people to

- **obtain legal assistance** (including legal information, basic legal advice, initial legal assistance and legal representation)
- **participate effectively in the legal system** (including access to courts, tribunals, and formal alternative dispute resolution mechanisms)
- **obtain assistance from non-legal advocacy and support** (including non-legal early intervention and preventative mechanisms, non-legal forms of redress, and community based justice), and
- **participate effectively in law reform processes.**

This will involve both qualitative and quantitative investigations into

- legal problems encountered by disadvantaged people
- services and processes to deal with these problems
- the barriers that obstruct access, and
- useful services and processes not provided by the legal system.

Project Outline

The project will be carried out in three stages.

Stage 1

This stage will focus on obtaining an overall picture of the legal and access to justice needs of the community, and will lay the groundwork for the research projects that follow. The main aims for the first stage are

- to identify those features of economic and social disadvantage which result in inequitable access to law and justice
- to identify the principal barriers which obstruct access to justice
- to identify the range of legal issues, problems and complaints which are handled by organisations involved in service delivery to the public.

Stage 1 will include

- an in-depth literature review of existing studies on access to justice and legal needs
- an extensive consultation process, including inviting submissions from interested agencies and individuals
- a review of data collected from various legal assistance and complaint handling organisations and agencies.

Stage 2

Stage 2 will involve quantitative and qualitative research into particular disadvantaged groups within the NSW.

The quantitative research will centre around legal needs assessment surveys in a number of disadvantaged localities across NSW. Up to six localities will be selected, on the basis of the Australian Bureau of Statistics indices for disadvantage. The regions selected will also reflect a sample of inner urban, outer regional, rural and remote communities.

The Foundation will also undertake a series of in-depth studies of the particular legal needs of specific disadvantaged groups. These will involve a combination of literature reviews, analysis of submissions received during the first stage, and focus groups and consultations with individuals and service providers.

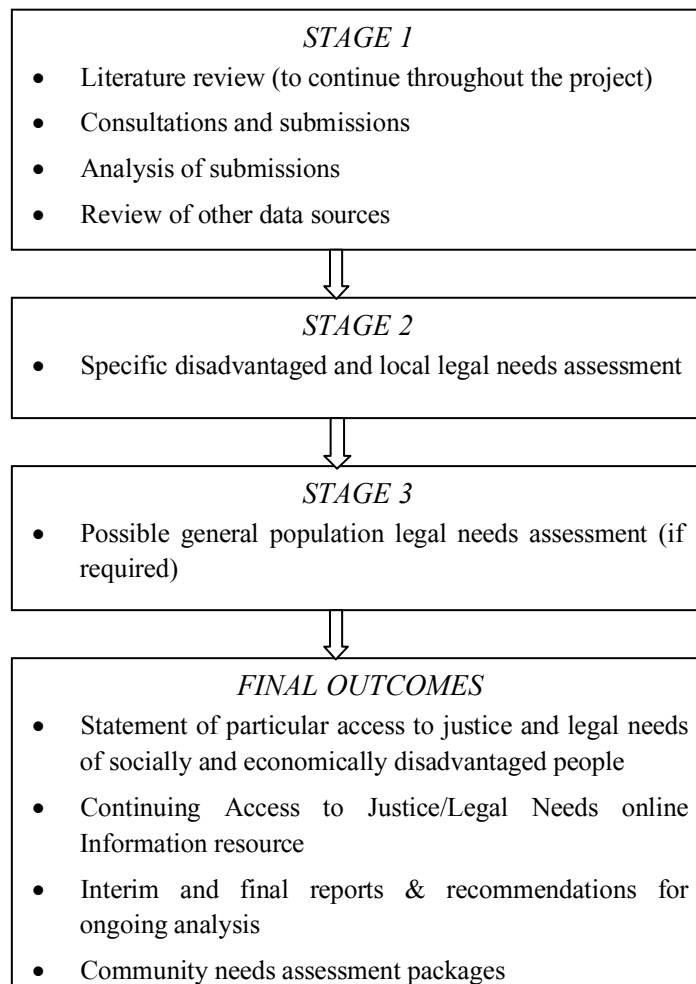
Stage 3

The third stage, undertaking a statewide general population survey of legal needs, will depend upon the results of a feasibility study assessing the usefulness and resource implications of carrying out such a survey.

Output and Outcomes

The Law and Justice Foundation has identified the following outcomes for the project:

- i. A statement on the particular access to justice and legal needs of socially and economically disadvantaged people in New South Wales.
- ii. Reports detailing the access to justice and legal needs of different groups of disadvantaged people, including papers from workshops, forums, conferences and consultations.
- iii. A database/online information resource of literature and studies on access to justice and legal needs for disadvantaged people. It is anticipated that this will be accessible to the wider community.
- iv. Reliable community needs assessment models to facilitate the measure of access to justice needs and legal needs of disadvantaged people.



Understanding access to justice and legal needs

This section of the discussion paper explores current understanding of the terms “legal needs” and “access to justice”, as well as providing further details concerning the terms used in the terms of reference for the Foundation’s Access to Justice and Legal Needs Project.

The terms ‘access to justice’ and ‘legal needs’ defy precise definition. They have been used in socio-legal research in a variety of contexts, often interchangeably, and generally without explicit explanation of their meaning.

There is an argument for treating ‘legal needs’ as a more restrictive concept than ‘access to justice’. Under this argument

- ‘legal needs’ would refer to a limited set of possible actions for securing existing legal rights available within a given legal system, and
- ‘access to justice’ would refer to the desire for a form of ‘justice’ which may or may not be possible through the existing legal system, and therefore may involve a substantial reform of the actual system rather than merely the mechanisms for utilising it.

In practice, however, the terms tend to merge, especially in the context of their functions. People do not need legal services in and of themselves. Their need is of the ends which legal services can bring about. This may be in the form of specific legal remedies, reconciliation with another party, or, quite simply, a sense of fairness or closure from some dispute.²

Legal Need

There are a number of considerations relevant to a discussion of ‘legal needs’:

- While the potential to seek a legal resolution to a problem may indicate some form of legal need, a decision not to do so cannot on its own warrant a finding that legal need does not exist.
- Either by preference or circumstance a person may choose not to have recourse to the justice system at all, and instead seek to use alternative forms of problem resolution. These may involve models which fall under the broad heading of ‘alternative dispute resolution’, or they

² P Pleasence, A Buck, et al., *Local legal need*, Legal Services Research Centre, London, 2001.

may involve less formal, more personal initiatives. An individual may decide to resolve the matter themselves, or that it is easier to do nothing. In these circumstances it would be artificial to conclude that the individual does not have a legal need.

- Even where an individual would prefer to have recourse to the legal system to resolve their problem, they may
 - decide not to have such recourse for a number of reasons.
 - perceive that the courts and tribunals provide a cumbersome, expensive or inefficient route to resolution
 - be concerned with the financial resources and the investment in time required from them, or the anticipated delay in resolving their matter.

Whether a decision to avoid the formal legal system means that an individual has no 'legal needs' is a difficult question. On the one hand, there may be an element of personal priorities and values informing the decision, in which case it may be said that there is no unmet legal need. On the other hand, the circumstances which create those priorities and values may be the result of the failings of the legal system or the existence of barriers that prevent the individual from using dispute resolution mechanisms.

Many access to justice studies which emphasise legal needs presume that an individual is able to identify when they have a legal need. For example, in its 1998 Access to Justice inquiry, the Law Society of NSW chose to focus on the right to participate in the justice system, underpinned by the principles that the justice system is seen to be, and is, accessible and affordable, is easy to understand, and is fair, efficient and effective. Implicit in this was the assumption that meeting legal needs is confined to the issue of ability to participate in the justice system.³

Unfortunately, such a presumption inevitably excludes those people who, as a result of lack of knowledge or external advice, do not realise that their problem may be regulated by law and has a remedy obtainable through the legal system. It is arguable that these people have as great (or perhaps greater) a legal need as those who are aware that they have a legal problem but cannot access the legal system, since they are excluded from its operation from the start by their ignorance.

Access to Justice

The term 'access to justice' is most commonly used in reference to the various mechanisms by which an individual may seek legal assistance. In 1994, the Commonwealth Government

³ Law Society of New South Wales, *Access to Justice: Discussion Paper*, Sydney, 1998.

appointed the Access to Justice Advisory Committee. That Committee stated that the concept of 'access to justice' involves three key elements:

- Equality of access to legal services—ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.
- National equity—ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy.
- Equality before the law—ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in such fields as education, employment, use of community facilities and access to services.⁴

Thus, the focus of this Committee was the goal of equal opportunity to participate in the formal justice system, both in terms of access to legal services and access to courts and tribunals. To achieve this goal, the matters targeted for particular attention included the funding and allocation of legal aid, the costs of legal services and legal proceedings, and the public availability of legal information.

However, a broad interpretation of the terms 'access to justice' will yield a number of possible perspectives on 'access to justice' that go beyond the focus on access to legal services. These include

- the equal ability of all in society to access the processes to enforce existing rights or laws (This perspective assumes that the rule of law provides an effective vehicle to achieving just or fair outcomes. Accordingly, such a perspective concentrates on equitable access to adjudication, conflict resolution institutions and intermediaries and legal remedies.)
- the existence of widely accepted rights under international and regional laws that may not be protected through the domestic justice system (for example, the application of ratified international conventions)
- equal access for all minority groups to all legal rights enjoyed by the majority (This approach would not accept differential laws applying to, for example, asylum seekers vis-à-vis citizens, or homosexuals vis-à-vis heterosexuals.), and
- the relative underdevelopment of the common law in areas associated with poverty law, due to the lack of access to litigation opportunities.

For the purposes of this project, 'access to justice' and 'legal needs' will be interpreted more broadly than just involving access to formal legal representation and courts. However, the terms will not be interpreted in such a broad fashion as to consider contested political issues concerning

⁴ Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994, p. xxx.

broader notions of 'rights' and 'justice', where the law is clear. The project will endeavour to investigate issues of access to justice according to law. The Access to Justice and Legal Needs Project will therefore seek to examine the ability of disadvantaged people to

- obtain legal assistance
- participate effectively in the legal system through access to courts, tribunals and alternative dispute resolution
- obtain assistance from non legal advocacy and support, and
- participate effectively in law reform processes.

These concepts are discussed in the following sections.

Obtaining Legal Assistance

Obtaining legal assistance will be defined to encompass at least the following general areas.

Legal information. Legal information includes standard, plain language, generic legal information which may be available in the form of pamphlets, frequently asked questions, internet sites, videos, tapes, or pre-written oral information delivered via helplines. Legal information also includes more formal written information, including legal textbooks, legislation and case law. Related to this is the availability of on-line interactive information: information which is standard in nature, but allows consumers to enter fields reflecting their particular situations and which may tailor responses accordingly. This includes the provision of standard and plain English legal documents, which consumers can complete and lodge themselves.

Legal advice. Legal advice involves the application of legal knowledge to the particular circumstances of a consumer's problem, either by phone, email or face-to-face, where the consumer receives advice that is targeted to their particular needs and issues. The traditional service method of direct consultation with a legal professional (whether a private lawyer, a legal aid officer or a community legal centre solicitor) has been supplemented most notably with legal advice telephone (both general services such as LawAccess and specialist services such as the Tenants' Union Hotline) and internet services (LawStuff email advice service).

Initial legal assistance. Initial legal assistance refers to situations where a legal professional is engaged to further advocate or negotiate a matter, without having to lodge formal court proceedings or initiate litigation. The vast majority of legal problems are resolved either through direct negotiations or correspondence from a legal professional to the other party or their representative.

Legal representation. Legal representation covers a range of services provided by legal professionals that go beyond the initial negotiation or advice. This includes as drafting formal

documents (wills, contracts, etc.) and representing parties in commercial dealings (purchase/sale of properties or businesses, deceased estates, etc). It also covers services such as preparation and lodgement of legal documents, court applications, preparation and representation in interlocutory proceedings, and preparation for, and representation in, court and tribunal hearings.

The availability of legal assistance, whether it be information, advice or representation to deal with a legal problem, is undoubtedly a primary field for analysis of legal and access to justice needs. It is a grounding assumption of much of the legal needs literature that '[R]espect for justice and laws is diminished when large segments of our society do not have equal access to justice because they cannot obtain legal assistance to resolve disputes that touch on the very basics of life (for example, health care, food, and shelter) or to seek legal redress of their grievances'.⁵

Consequently, significant emphasis is placed on the relationship between the individual's economic status and their ability to obtain legal assistance. Poverty has traditionally been a key social indicator of legal need, and many empirical studies have targeted persons of low-income status. Persons who are economically disadvantaged clearly lack equitable access to forms of justice that cost money, through either direct charges or the advantages to be gained by legal advice and representation.

However, the needs associated with obtaining legal assistance encompass more than merely being able to afford the services of a private lawyer. Access to free forms of legal assistance such as community legal centres and grants of legal aid as well as knowledge of the existence of these services is also an important component of access to justice for disadvantaged members of the community.

The availability of legal aid may only address this barrier to a limited extent given the constraints which exist in relation to grants of legal aid. For example, a grant of legal aid for representation is often conditional:

- In relation to civil matters aid may only be available if the applicant can show that they have a reasonable prospects of success in the proceedings.
- In relation to family law matters where a party is applying for a parenting order, aid may only be available if there is a dispute about a substantial issue, and, in most cases, the parties have attempted resolution via primary dispute resolution processes.
- In relation to family law matters generally a grant of aid is subject to a ceiling of \$10,000 in professional costs.

⁵ KA Lash, P Gee & L Zelon, 'Equal access to civil justice: pursuing solutions beyond the legal profession', *Yale Law & Policy Review*, vol. 17, 1998, pp. 489–501.

In addition, obtaining legal assistance encompasses the provision of information to assist in the resolution of legal problems and matters. This information is not targeted to the particular needs of individuals, but is of more general application and relevance. Legal information is now being disseminated in increasingly diverse ways. In addition to the legal profession, legal information can be obtained from government agencies, community organisations (both specialist agencies such as legal centres and more general welfare agencies such as Migrant Resource Centres and church-based care organisations), libraries and internet services (such as the Australasian Legal Information Institute, LawAccess and Lawstuff).

Effective participation in the legal system through access to courts, tribunals and alternative dispute resolution

Equating access to justice with access to legal services ignores the barriers that exist for the individual once they have made contact with a legal service. This can result in a failure to examine and criticise the aspects of the legal system that present barriers to the individual.

This approach also involves an assumption that access to justice is ensured when legal assistance being provided to the individual regardless of what follows in the legal process and the many possible forms of injustice that they may face even with legal advice. Certainly, this assumption serves to place emphasis on the role of the legal profession in mediating the otherwise difficult relationship between the individual and the legal system.

Court structures and litigation procedures bear directly upon the individual's ability to resolve their legal problem. The more prominent issues are those of the cost and delay of legal proceedings, and some courts have responded to these issues with the development of case management systems to streamline the legal processes, encourage early resolution of disputes and to impose a timeline for the proceedings.

However, there are other fundamental and equally critical issues which reduce access to legal processes. The complexity of the rules of court and court forms produces a significant barrier to litigants, especially those who are unrepresented. The lack of availability of interpreters and the difficulties associated with their use in courts remains a constant challenge for many courts and tribunals. Even the physical environment of courts, which may produce an atmosphere of exclusion, alienation or disempowerment, or may simply lead to problems of audibility, impinges upon the individual's access to just processes.

The emergence and proliferation of tribunals has been in response to many of the main barriers to equity and fairness inherent within the court system such as the complexity, cost and delay of proceedings. Tribunals function as court-substitute forums for administrative review and dispute resolution, and often operate without formal pleadings and without regard to technicalities or legal forms. They commonly dispense with many of the strict rules of evidence—in some cases with oral evidence altogether—and generally do not award costs. In some tribunals, however, the

'informality' is more in theory than in practice, as the tribunal hearing processes appear to replicate the same formalities and protocols which exist in courts.

In many tribunals legal representation is either prohibited or discouraged by requiring leave of the tribunal. In these jurisdictions litigants are mostly unrepresented or represented by non-legal advocates. This can serve to equalise a power imbalance between the parties.

These procedural differences permit tribunals to act expeditiously and at a much lower cost to litigants and applicants than is the case with courts. At the same time, they raise numerous issues of access to justice peculiar to their jurisdiction. For example, the informal and inquisitorial procedures have an effect on the extent to which a litigant or applicant is able to present their case, call witnesses and introduce evidence, and their right to appeal is generally more restricted.

Finally, an increasingly important and expanding area of the legal system is what is known as Alternative Dispute Resolution (ADR). ADR mechanisms have been incorporated within courts and tribunals, in some cases as a statutory requirement and in other cases as an option available to parties by consent. Courts and tribunals generally introduce ADR mechanisms, such as mediation, pre-trial conferences and pre-trial conciliation, at an early stage in the proceedings as a way of preventing the disputes or matters from going to hearing. In some jurisdictions, particularly those of certain tribunals, the majority of matters are dealt with and finalised through ADR, hence the significance of ADR processes for dealing with the legal problems of economically disadvantaged persons.

ADR processes themselves have raised other issues of access to justice. For example, there are issues as to whether the use of ADR processes in family law proceedings in situations where there has been a history of violence serves to obstruct access for the victim of such violence. In other situations and jurisdictions where there is a distinct power imbalance between the parties involved in the ADR process, there are similar questions of appropriateness, and whether in the pursuit of a timely and less costly result, the relative fairness of the process has been compromised.

Obtaining assistance from non-legal advocacy and support

Despite the importance of access to legal services and systems, it is likely that disadvantaged persons are more likely to receive at least their initial assistance in relation to a legal problem from non-legal sources than from the legal profession. The non-legal players who provide support and assistance to persons with legal needs are many and varied.

At the most informal level, there are family members, friends and acquaintances who generally provide *ad hoc* assistance, either because of their experiences with the legal system or more commonly because of some skill such as an ability to communicate in writing or knowledge of the English language.

There are also a broad range of community-based workers who provide general support to individuals—which may include assistance or referral in relation to their legal problems—such as social workers, welfare workers, health workers, financial counsellors and psychological counsellors. The increase in court-alternative forums such as tribunals which emphasise informality and lack of expense have in some cases increased the role of non-legal advisers, such as welfare workers, in providing assistance or representation before hearings or in mediation sessions.

There are also numerous government authorities, non-government organisations and professional bodies which, in the course of their dealings with individuals, provide advice and assistance. For example

- the NSW Department of Fair Trading provides telephone and in-person assistance in areas such as consumer protection and tenancy
- the NSW Police service, as a result of its role in criminal law enforcement, may directly or indirectly advise individuals of their rights and obligations in the course of its investigations or when approached by members of the public
- Members of Parliament are frequently called upon by their constituents to give advice and advocate in relation to issues such as enforcement of a particular right or expedition some bureaucratic process, and
- trade unions and professional associations advise, advocate for and even represent their members on industrial legal issues.

In addition, there has been a proliferation of government and industry based complaint bodies in recent years, which aim to provide a speedy and accessible option to consumers seeking to resolve particular problems for which the formal court system may be too cumbersome and expensive. These include State and Commonwealth Ombudsman's offices, the Banking Ombudsman, the Telecommunications Industry Ombudsman, the Australian Competition and Consumer Commission, and the Insurance Complaints Scheme. Consideration of the accessibility of these bodies to disadvantaged people in the community forms an important part of any investigation into access to justice and legal needs.

Any comprehensive analysis of legal and access to justice needs must take account of the existence of these wide-ranging non-legal sources of assistance, the extent to which they are used by disadvantaged persons, and the consequences of their use for those providing the assistance (for example, the expense in resources). These consequences may impact on both the individuals in need (in terms of both positive and negative results and the formal structures of the legal system (which may at some stage need to deal with persons who have received support from non-legal sources).

In addition, such analysis should also consider procedural issues, such as the ability for non-legal advocates to get standing to appear in courts and tribunals.

Participation in law reform

Effective access to the legal system requires not only that formal processes work without unnecessary impediment to the litigant, but that the system itself is approachable by the lay person. Included in this is the accessibility for disadvantaged people to mechanisms in place to review and reform the legal system.

This suggests the importance of law reform processes and of the involvement of the individual in these processes. Inevitably, most law reform initiatives derive from the work of bodies from which the public is, in a practical sense, largely excluded: parliamentary committees, law reform commissions, law societies and bar associations.

To some extent, law reform commission inquiries and parliamentary committees permit public involvement through calls for submissions, conducting public hearings and taking oral submissions. However, the realities of disparities in knowledge, language skills, communication pathways and personal associations makes it difficult for the ordinary and uninvolved individual to be in a position to make influential submissions on complex areas of law and policy. As part of the Foundation's consideration of access to justice, we will examine the accessibility of these processes for economically and socially disadvantaged people.

There is often scope for public participation in law reform through involvement in community organisations. The advocacy role performed by many community agencies aims to express and protect the interests of the disadvantaged groups that they deal with on a daily basis. At least in some of these community agencies, there is the possibility of direct public or client involvement in their actual decision-making or operations. This allows for the positions and views of the disadvantaged groups to be instrumental in the policy and lobbying work of the agencies.

Social and economic disadvantage

This section of the paper complements the broader discussion of access to justice by examining which people are most likely to face barriers in accessing justice. It deals with the following questions:

- Who are the economically and socially disadvantaged people?
- How do these disadvantages reduce their access to justice?
- Which areas of law are likely to be most relevant to which groups of socially or economically disadvantaged people?

Included in this section is a limited analysis of specific literature relating to the legal and access to justice needs of particular disadvantaged groups in the community, as well as statistics concerning the incidence of a range of disadvantages in Australia or (where available) New South Wales. Generally, statistics are sourced from the Australian Bureau of Statistics (ABS), or from other sources that have analysed statistics obtained from the ABS. While use is made of the 2001 Census information when referring directly to the basic community profile statistics, at this stage many of the statistics utilised or presented in the secondary literature are drawn from the 1996 Census.

Overview of disadvantage

In an affluent society such as Australia, disadvantage can be viewed in relative rather than absolute terms. Generally speaking, an individual suffers from 'disadvantage' where, for whatever reason, he or she is not able to access the range of social services/institutions that can be accessed by the majority of the population.⁶

Social and economic disadvantage can affect access to law and justice through

- direct exclusion from access to law and justice on matters of importance
- direct and indirect discrimination

⁶ Australian Bureau of Statistics, 'Poverty and Deprivation in Australia', *Year Book Australia*, AGPS, Canberra, 1996.

- in some cases, the absence of legal rights equivalent to those that may be enjoyed by others in society
- the inability to take effective action to enforce legal rights, for example, because of disability or confinement
- ignorance of the processes and avenues for seeking a remedy
- lack of communication skills, and
- lack of access to appropriate advocacy and support services, both legal and non-legal.

A number of groups are particularly vulnerable to suffering disadvantage. In particular

- those with intellectual, psychiatric or severe physical disabilities who may be unable to access the justice system without an advocate
- people from diverse cultural backgrounds who are not familiar with the legal and cultural context in which Australian law operates and who may also have limited English language abilities
- people from regional, rural or remote areas where services are less likely to be available
- people from disadvantaged urban areas
- people with low levels of education, poor literacy skills or limited relevant knowledge
- people suffering systemic discrimination and exclusion on the basis of ethnicity, gender, sexual preference, age or other grounds (including many of those groups listed above who might lack protection against discrimination or in fact suffer discrimination by the legal system itself)
- women, who, for example, may have special needs in relation to discrimination, pregnancy, responsibility for children and sexual abuse
- young people and children
- older people
- those with low disposable incomes, and
- those in institutions, or who have recently been released from institutions such as psychiatric hospitals, nursing homes, detention centres and prisons.

Avoiding stereotypes

In discussing the nature of disadvantage and its effect on access to justice, this paper attempts to identify the types of barriers that may be encountered by people falling within different disadvantaged groups, and the types of legal issues that are likely to be relevant to them.

However, it is also important to recognise that not all people who fall into 'disadvantaged' groups will suffer difficulty with accessing justice. Individual circumstances will always differ, and some disadvantaged people will already have access to the means to overcome any or all of the barriers caused by their disadvantage. For example, an economically disadvantaged person with higher education and good literacy skills is likely to face fewer difficulties in seeking access to justice than a person with the same income but poor literacy skills.

Similarly, it is important to remember that the groups are not mutually exclusive, and individuals may face disadvantages which would place them into several groups. For such people, the barriers and problems they face in accessing services are often compounded.

Further, it is easy to fall into the trap of stereotyping the legal issues that will be important to a particular disadvantaged group. An overemphasis on any single area of law, however problematic, can lead to those responsible for legal service delivery overlooking large areas of unmet need. For example, while policing and criminal law issues are often emphasised when discussing young people and the law, the fact is that only a very small percentage of young people come into contact with the juvenile justice system. By contrast, given that young people are high consumers of goods and services, areas of law involving consumer, trader and credit issues may deserve more attention than it currently does.

Social disadvantage

Disability

In 1998, 3.6 million people (19% of the population) in Australia were identified by the ABS as having a disability. Of those with a disability, 78% (representing 15% of the total population) experienced restrictions in core activities (communication, self-care and mobility), schooling or employment.⁷

In 1998 in NSW, 1.2 million people (19% of the population) were identified as having a disability. The rate of disability ranged from 4% for those 0–4 years to 83% of persons over 85. People of working age (15–64) with a disability were less likely to be in the labour force, with only 50% employed compared to 80% of those without a disability. In 1998 the median gross income of people with a disability was \$190 per week, less than half that for people without a disability.⁸

For the purposes of this paper, disability is seen to create a disadvantage when

⁷ Australian Bureau of Statistics, *Disability ageing and carers*, Canberra, 1999.

⁸ Australian Bureau of Statistics, *Disability (NSW)*, No. 4443.1, Canberra, 2001.

- i. it is not directly compensated for at the individual level (for example, by spectacles, hearing aids, medication or prosthetic devices), and/or
- ii. lack of disability is a prerequisite for participation (for example, if an institution does not provide wheelchair ramps or alternative information sources for visually impaired persons).

Any analysis of access to justice issues must break the generic term ‘disability’ down into separate groups, since each disability group is likely to face different barriers in accessing justice.

Intellectual disability

Estimates of the prevalence of intellectual disability in Australia show wide variations in operational definitions, measurements, survey approach, data sources and geographic locations. As with other measures of disadvantage, intellectual disability is a relative definition, the key being the need for more support in everyday life skills when compared to others of the same age. In its report, *People with an Intellectual Disability and the Criminal Justice System*, the NSW Law Reform Commission recommended a new and uniform statutory definition of intellectual disability, namely

‘Intellectual disability’ means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour.⁹

The NSW Legislative Council Standing Committee on Law and Justice adopted a broad definition in its report, *Crime Prevention Through Social Support*, referring to ‘a person with a permanent condition of significantly lower than average intellectual ability’.¹⁰

In the 2001 Report into Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and those at risk of Offending (*The Framework Report*), ‘intellectual disability’ was defined on the basis of the 1983 American Association on Mental Retardation three point definition of ‘mental retardation’, namely

- significant sub-average intellectual functioning
- existing concurrently with limitations in two or more adaptive skill areas, and
- manifesting itself before age 18 years.¹¹

The ABS disability surveys are the only existing national data containing information concerning disability. While there are a number of limitations in the survey methodology, the following

⁹ NSW Law Reform Commission Report No. 80, *People with an Intellectual Disability and the Criminal Justice System*, Sydney, 1996, p. 52.

¹⁰ NSW Legislative Council Standing Committee on Law and Justice, *Crime prevention through social support*, Report no. 11, Sydney, 2000, p. 159.

¹¹ J Simpson, M Martin, J Green, *The Framework Report—Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and those at risk of offending*, NSW Council for Intellectual Disability, July, 2001.

national estimates of the prevalence of intellectual disability were derived from the 1993 ABS *Survey of Disability, Aging and Carers*¹²:

- 328,000 people (1.8% of the population) had an intellectual disability, of whom 174,000 (0.99% of the population) reported the need for assistance with three basic living activities: self care, mobility and verbal communication.
- 1.7% of the population responded positively to the screening question of ‘slow at learning or understanding’.
- Of those reporting intellectual disability in the 1993 survey, 44% also reported associated physical impairments or disabilities and more than a quarter presented with speech problems, while 22% reported associated psychiatric disabilities.

People with intellectual disabilities are more likely to have poor educational outcomes and thus have little knowledge of their rights, obligations or where to seek assistance. They also have more limited access to employment opportunities, a greater likelihood of being dependent on income support payments, and may have a history of multiple or inappropriate placements in care.

Access to justice issues

People with intellectual disability are significantly over-represented in the criminal justice system, both as prisoners and as victims of crime. The over representation in the criminal justice system has been recognised by both the NSW Law Reform Commission¹³ and also *The Framework Report*¹⁴. According to a report by the NSW Legislative Council Standing Committee on Law and Justice, more than 20% of people currently in NSW prisons have a mild to severe intellectual disability.¹⁵ The same report notes that there is believed to be significant under-reporting of crimes against those with an intellectual disability, particularly where incidents occur in residential institutions.¹⁶

Lack of access to appropriate advocates can cause significant access to justice problems for those with an intellectual disability. Those with an intellectual disability may face discrimination in employment and other areas. There are also some specific legal consequences of intellectual disability, including the inability to make a will, or the presumed ‘unreliability’ of evidence. Issues of capacity and guardianship are also common for people with an intellectual disability.

¹² Australian Institute of Health and Welfare, *The definition and prevalence of intellectual disability in Australia*, Canberra, 2000.

¹³ NSW Law Reform Commission Report No. 80.

¹⁴ J Simpson, M Martin, J Green, p.8–14.

¹⁵ NSW Legislative Council Standing Committee on Law and Justice, pp. 159–161.

¹⁶ NSW Legislative Council Standing Committee on Law and Justice, p. 162.

Physical disability

In general terms physical disability focuses on physical impairment (that is, a loss or abnormality of body structure or function) resulting in either a limitation on activities or on social participation, or both. Physical impairment that is corrected, or that does not limit activities of participation, does not constitute 'disability'.¹⁷

About 2,350,300 Australians (13.3%) reported one or more physical impairments in 1993. Of these, 620,400 persons (3.8% of the population) also had a severe or profound handicap. The Australian Institute of Health and Welfare (AIHW) uses these and other statistics to estimate that the prevalence of physical *disability* is 11.9% of the Australian population (2,099 600 people). NSW had a slightly lower prevalence rate of 10.9%.¹⁸

Some people with a physical disability also have other disabling conditions. Hearing disability was the most commonly associated disability (27.0%), followed by psychiatric disorders (14.1%) and acquired brain injury (13.5%).¹⁹

Access to justice issues

Physical disability creates a range of barriers, the most obvious being difficulties gaining physical access to services for those with mobility problems. Some physical disabilities can also create problems in accessing information held online. In addition to the normal range of legal issues encountered by any member of society, those with a physical disability may face discrimination in employment and other areas. Those with more profound disabilities are also likely to be in receipt of a disability allowance, and thus face dealing with legal issues associated with social security and administrative law. They are also likely to be in contact with State government disability providers and need to deal with problems related to service delivery issues.

Sensory disability

Sensory disability refers to an impairment affecting one or more of the senses. These include

- hearing disability (deafness, hearing impairment, hearing loss)
- vision disability (blindness, vision impairment, visual handicap not corrected by glasses/contact lenses)
- deafblind (dual sensory impairment), and/or
- speech disability (speech loss, impairment and/or difficulty in being understood).²⁰

¹⁷ Australian Institute of Health and Welfare, *The definition and prevalence of physical disability in Australia*, Canberra, 2000, p.30.

¹⁸ Australian Institute of Health and Welfare, *The definition and prevalence of physical disability in Australia*, p.53.

¹⁹ Australian Institute of Health and Welfare, *The definition and prevalence of physical disability in Australia*, p.47.

In 1998, 1.2% of the population aged below 65 (200,700 people) had a sensory disability. The most prominent sensory disability was hearing related, which accounted for 159,900 individuals (1% of the population under 65).²¹

Access to justice issues

Sensory disabilities create communication and knowledge barriers. Those with a vision disability will have particular difficulties gaining access to information held in printed or electronic formats. Hearing and speech disabilities also create specific communication problems. A study of hearing impaired people's access to justice in the United Kingdom²² found a number of significant barriers to equal justice for people who communicated using British Sign Language (BSL):

- BSL interpreters often have no specialised legal interpretation training and may have no formal interpretation qualification at all, yet they are required to interpret complex legal language in courtrooms and police stations, where the issue involved may be of critical importance to the life of the individual.
- In a courtroom situation one BSL interpreter will often be expected to interpret for all people who wish to communicate with a hearing impaired person, and to do so from an inadequate position in the courtroom and without breaks.
- The fact that there is no written form of BSL means that there is no signed written record of a hearing impaired person's statement to police, only of the *interpretation* of that statement. This is compounded by the fact that it is more common for unregistered interpreters to be used in police stations.
- BSL itself is a visual-gestural language that typically encodes visual information that may be ignored in spoken interpretation, even where it is providing information that may be highly relevant to the court.

As with more general physical disabilities people with a sensory disability may face discrimination in employment and other areas. They are also more likely to be recipients of government payments and services and thus face legal issues associated with social security and administrative law.

Psychiatric disability

The ABS uses the International Classification of Diseases, 10th Revision (ICD-10) definition of psychiatric disability: 'the existence of a clinically recognisable set of symptoms or behaviour

²⁰ Australian Institute of Health and Welfare, *Definitions for Commonwealth State Disability Agreement Minimum Data Set Data Items*, <http://www.aihw.gov.au/disability/datacubes/def.html>

²¹ Australian Institute of Health and Welfare, *Australia's Welfare 2001*, Canberra, 2001, p. 446.

²² M Brennan & R Brown, *Equality before the law: deaf people's access to justice*, Deaf Studies Research Unit, Durham, Durham, 1997.

associated in most cases with distress and with interference with personal functions'. These include such illnesses as anxiety disorders, psychoses, substance abuse/addiction, personality disorders, depression, stress and affective disorders.

Mental disorders caused an estimated 13% of the total disease incidence in 1996. In particular, mental disorders were estimated to be responsible for about 30% of the disability incidence. For males substance abuse disorders accounted for 33% of this incidence, while for females affective disorders such as depression were more significant and accounted for 39% of the non-fatal disease incidence.²³

In 1997 the ABS conducted a *National Survey of Mental Health and Well Being* to provide information on the prevalence rate of a range of major mental disorders for Australian adults. According to the ABS

- 18% of the population reported a mental disorder at some time during the twelve months before the survey, and
- the prevalence of mental disorder generally decreased with age, with young adults 18–24 having the highest prevalence (27%), declining steadily to 6.1% of those aged 65 and over.²⁴

Access to justice issues

Homelessness can be a particular problem for persons with a mental illness. A 1998 report²⁵ by five major welfare agencies found that 75% of persons using inner city hostels had at least one mental disorder, often in combination with a substance addiction. According to this study

- 58% had been physically attacked/assaulted
- 55% had witnessed a serious assault/death, and
- 68% of women had been sexually assaulted.

There is an established association between certain mental disorders (notably schizophrenia and severe affective disorders) and increased rates of violent and criminal behaviours.²⁶ A range of studies in Australia and overseas have attempted to estimate the prevalence of psychiatric disability amongst prisoners. While the results vary, it appears clear that the rate of psychiatric disability amongst prisoners is higher than that found in the rest of the population.²⁷ A study of Victorian prisoners found that over 25% of offenders had had prior contact with mental health service providers. The study also found that males who had been diagnosed with schizophrenia

²³ Australian Bureau of Statistics, *Australia now: mental health*, <http://www.abs.gov.au/>.

²⁴ Australian Bureau of Statistics, *Mental health and wellbeing: profile of adults*, Australia, No. 4326.0, Canberra, 1998.

²⁵ St Vincent de Paul, Sydney City Mission, Salvation Army, Wesley Mission & Haymarket Foundation, *Down and Out in Sydney*, Sydney, 1998.

²⁶ P Mullen, *A Review of the relationship between mental disorders and offending behaviours on the management of mentally abnormal offenders in the health and criminal justice system*, Criminology Research Council, Melbourne, 2001, p. 44.

²⁷ P. Mullen, *passim*.

and a coexisting substance abuse were over 12 times more likely to be convicted than the general population.²⁸

People with a psychiatric disability can face significant communication and information barriers. They may also face systemic social and cultural barriers, often based on the application of stereotypes and ignorance of their condition. Access to appropriate intermediaries and assistance with advocacy, both legal and non-legal, is an essential step in achieving access to justice for this group.

Acquired disability

While there is general community consensus that the disabled require support and assistance, there would appear to be less sympathy for those whose disability is perceived to be “self inflicted”. People in this category include

- people who suffer from addiction
- people who acquire a disability through dangerous or foolhardy activity, and/or
- people who acquire a disability through unhealthy activities such as smoking.

Access to justice issues

People who are disabled due to addiction may suffer discrimination in employment, and in seeking accommodation or financial services such as loans. The NSW Government has recently amended the *Anti-Discrimination Act 1977* to exclude persons who are addicted to prohibited drugs from being persons with a disability to whom the unlawful discrimination in employment application provisions of that Act apply. However, such exemptions do not apply in relation to issues of dismissal from employment or access to services.²⁹ Nor is there any similar exclusion under the Federal *Disability Discrimination Act 1992*.³⁰

Those who acquire disability due to so called “high risk” activities may also face additional barriers in seeking compensation in the future. Recent problems related to public liability insurance have lead to a call for restrictions on common law negligence rights. Such restrictions may shift the cost burden from insurance companies to the taxpayer through government welfare services.

²⁸ P. Mullen, p. 11.

²⁹ *Anti Discrimination Amendment (Drug Addiction) Act 2002* (NSW)

³⁰ As indicated earlier, this project will not be considering issues of ‘rights’ and ‘justice’ where the law is clear. However, the limited application of the exclusion, and the apparent inconsistency between the *Anti-Discrimination Act 1977* (NSW), and the *Disability Discrimination Act 1992* (Cwlth) means that there is still some confusion for consumers on this point.

Cultural and linguistic diversity

Many immigrant groups within the Australian community come from countries with different cultures, customs and languages to those of Anglo-Celtic Australians. Many of these people face several barriers in accessing a range of services, including legal services.

Whilst language barriers are significant for these groups, cultural issues and barriers are also not confined to linguistic differences. For the purposes of this project, this group therefore encompasses people who may be proficient in English but derive from a cultural background that is fundamentally different to that of Anglo-Celtic Australians.

It is also important to note that there is no monolithic 'ethnic community'. Different individuals or groups from different cultural backgrounds in different geographic locations will encounter different problems in accessing the legal system and be affected by different areas of law.

Non-English Speaking Background

NSW has a diverse ethnic mix, with over 18 percent of the population speaking a language other than English at home. The table on the following page shows the 'top ten' non- English languages spoken in NSW.

According to the 2001 Census 189,810 NSW residents either could not speak English at all or could not speak English well.³¹ The Department of Immigration and Multicultural and Indigenous Affairs has been conducting a Longitudinal Survey of Immigrants to Australia (LSIA) to examine the experiences and activities of immigrants during their early years of settlement. The three waves of the LSIA cover the first three and a half years of life in Australia. While English skills tend to improve with time, for some migrants this is not the case. 25% of migrants surveyed either could not speak English at all or could not speak it well after three and a half years of residence.³²

An inability to communicate proficiently in English has implications for migrants' ability to access labour markets and government services, and their ability to participate in Australian society. For example, differences in labour market success relate to English language skills and post secondary qualifications. The probability of being unemployed was five times greater for persons with poor English speaking skills than for those with more advanced English speaking skills.³³

³¹ Australian Bureau of Statistics, *Basic community profile*, Table B09.

³² A Vandenheuvel & M Wooden, *New settlers have their say – how immigrants fare over the early years of settlement: an analysis of data from the three waves of the longitudinal survey of immigrants to Australia*, Executive Summary, Department of Immigration and Multicultural Affairs, Canberra, 1999, <http://www.immi.gov.au/research/publications/overview/newset2.htm>.

³³ A Vandenheuvel & M Wooden, Executive Summary.

Language spoken at home by sex (NSW)³⁴**Persons aged 5 years and over**

	Male	Female	Persons	% of NSW Residents
English only	2,355,998	2,421,495	4,777,493	74.98%
Arabic (including Lebanese)	75,213	70,407	145,620	2.29%
Chinese Languages	96,468	105,199	201,667	3.17%
Greek	44,984	45,196	90,180	1.42%
Hindi	14,156	14,004	28,160	0.44%
Italian	48,459	48,331	96,790	1.52%
Korean	14,492	15,602	30,094	0.47%
Macedonian	15,679	14,979	30,658	0.48%
Spanish	23,729	25,586	49,315	0.77%
Tagalog (Filipino)	18,091	24,758	42,849	0.67%
Vietnamese	33,440	34,430	67,870	1.07%
Other	75,669	72,883	148,552	2.33%
<i>Total non English</i>	<i>588,516</i>	<i>607,688</i>	<i>1,196,204</i>	<i>18.77%</i>
Not stated	172,205	165,266	337,471	5.30%
Total NSW Residents	3,145,445	3,226,300	6,371,745	100.00%

Access to justice issues

An inability to communicate proficiently in English limits a person's ability to understand information or advice concerning legal rights, obligations and consequences of certain actions, unless that information/advice is provided in their preferred language.

Different cultural background

At June 2000, Australia's overseas-born residents comprised 4.5 million, constituting 24% of the total population. Between June 1995 and June 2000 the number of overseas-born residents increased by 8%, exceeding the rate of general population growth for the same period (6%). NSW had the largest share of net overseas migration (41%) during this period.³⁵

³⁴ Australian Bureau of Statistics, *Basic community profile (NSW)*, No. 2001.0, Canberra, 2002.

³⁵ Australian Bureau of Statistics, *Migration, Australia*, No. 3412.0, Canberra, 2001.

In the years 1999 to 2000, over 92,000 people migrated permanently to Australia. The largest proportion of these were from Asian countries (33%), New Zealand (23%) Europe and the United Kingdom (both 10%).³⁶

According to the 2001 Census, of the total NSW population of 6,371,745

- 4,450,772 (69.9%) were born in Australia
- 455,568 (7.15%) were born overseas in one of the main English speaking countries (Canada, New Zealand, Ireland, United Kingdom, United States or South Africa), and
- 1,019,419 (16%) were born elsewhere overseas.³⁷

(Note that 7% of the total NSW population on Census night were either overseas visitors or did not state their place of birth.)

Recent migrants have a higher unemployment rate than the rest of the Australian population; however, labour market outcomes tend to improve as the period of residence in Australia lengthens.³⁸ According to the ABS most adult migrants (55%) arrive with a post school qualification. Of these, 34% have a bachelor degree and 35% have a skilled or basic qualification. However, only 48% of migrants with skilled or basic qualifications have these qualifications recognised in Australia.³⁹ This means that many migrants face the additional upheaval of a change in occupation on arrival in Australia.

Access to justice issues

While access to justice issues often focus on language barriers cultural barriers to justice are equally significant for some people. For many, the Australian legal system differs markedly from that in their country of origin. Those from countries with a civil law system may not be aware of the way the Australian legal system works and the role of lawyers, even if they have good English language skills. Ignorance concerning the workings of the legal system results in the denial of opportunity for individuals to participate in the process or to understand the reason why the legal system affects them in particular ways. While this problem is not unique to ethnic communities, barriers to accessing information are greater for those whose first language is not English, who are used to different methods of acquiring knowledge, or who are used to a different legal system.

Similarly, some people have been intimidated by the legal system in their country of origin and do not believe that the Australian legal system will protect their interests. These people require extra assistance and assurance to establish confidence in the Australian legal system.

³⁶ J Buckingham, 'A Changing Australia', *Judicial Officers' Bulletin*, Vol. 13. No. 10, 2001, p. 74.

³⁷ Australian Bureau of Statistics, *Basic Community Profile*, 2001.0, Canberra, 2002.

³⁸ Australian Bureau of Statistics, *Migration, Australia*, No 3412.0, Canberra, 2001.

The 1992 Australian Law Reform Commission (ALRC) report, *Multiculturalism and the Law*, identified a range of issues faced by people of culturally and linguistically diverse backgrounds in accessing the Australian legal system including

- a lack of information about the law, including information in languages other than English
- a lack of access to suitable interpreters, including a lack of skills amongst those administering the legal system in identifying the need for an interpreter in individual cases
- a perception among ethnic communities that there is widespread cultural insensitivity in the operation and administration of the law. This includes both stereotyping individuals and the failure of courts, lawyers and others involved in the legal system to acknowledge the role of culture in a person's behaviour.⁴⁰

The report also examined problems associated with particular areas of the law:

- Family law focuses on the narrowly defined 'nuclear family', and does not pay sufficient regard to the diversity of family structures that exist in a multicultural community. It is also seen as failing to recognise the importance of cultural values and cultural identity.
- There is inadequate support for victims of domestic violence from culturally diverse backgrounds.
- The Commission also identified a number of areas where compliance with the law is more difficult for some people, and where the individual's cultural values may not be taken into account in determining criminal liability or sentencing.
- Migrants from repressive regimes will not necessarily understand the role of the police force in an Australian context, and therefore be reluctant to report crimes to the police.
- Credit contracts can cause particular problems for people of non-English speaking background. The reliance on written contracts may cause difficulties for people who have a tradition of oral communication in relation to commercial agreements. These people are particularly vulnerable to unfair practices such as the overselling of credit, over-commitment, inadequate or misleading information about terms and conditions and inappropriate reliance on guarantors to protect lenders' interests.
- Insurance contracts also raise problems for people from non-English speaking backgrounds, mostly because of a lack of knowledge and information. This occurs at every stage of the process, from deciding to insure to disputing a rejected claim.

The issue of 'visibility' may also be more important for persons of some cultural backgrounds than for those of others. Communities that are more visibly 'different' from the wider

³⁹ Australian Bureau of Statistics, *Labor force characteristics and other characteristics of migrants*, Australia, No. 6250.0, Canberra, 2000.

⁴⁰ Australian Law Reform Commission, *Multiculturalism and the Law*, Report no. 57, Canberra, 1992.

community are more likely to be subject to discrimination and racially motivated crime. The Commission found that some groups also perceive themselves to be more vulnerable to suspicion and arrest due to their different physical appearance and to negative ethnic stereotyping.⁴¹

Indigenous Australians

The economic and social disadvantages faced by Indigenous Australians, together with their over representation in the criminal justice system, has been the subject of several inquiries and royal commissions. In addition to facing a range of cultural and communication barriers, they face particular issues, such as dispossession and the 'stolen generation', which place them in a uniquely disadvantaged position.

The following statistics are drawn from the 1996 Census⁴².

- The estimated resident Aboriginal and Torres Strait Islander population in Australia as at 30 June 1996 was 386,000. One hundred and ten thousand (28.5%) of the Indigenous population resided in NSW, and Indigenous people constituted 1.8% of the total population of NSW.
- The Indigenous population is becoming increasingly urbanised, with 72.6% living in an area defined as urban. However, Indigenous people are more likely to live in smaller urban centres (42.3%) than in large cities (30.3%). Nearly 20% lived in areas classified as 'very remote' when compared to only 1% of the non-Indigenous population.
- In 1996 the median personal income of Indigenous Australians was \$190 per week, being 65% of the median income for all Australians. Median household income was also less than for the general population, despite the fact that Indigenous households tend to be larger.

A range of studies have unearthed a range of social disadvantages suffered by Indigenous Australians:

- In 1999 Indigenous Australians were more likely than the non-Indigenous population to live in conditions considered unacceptable by general Australian standards. Overcrowding, high housing costs relative to income, poorly maintained buildings and facilities and inadequate infrastructure are major issues associated with the housing of Indigenous people.⁴³
- Indigenous people experienced lower levels of access to health services than the general population. Indigenous people are nearly twice as likely as members of the general

⁴¹ Australian Law Reform Commission, *Multiculturalism and the Law*.

⁴² Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander Australians: A statistical profile from the 1996 Census', *Year Book Australia*, AGPS, Canberra, 1999.

⁴³ Australian Bureau of Statistics, *The health and welfare of Australia's Aboriginal and Torres Strait Islander people*, No. 4704.0, Canberra, 2001.

population to live outside urban centres and are more likely to live further from a range of health services and facilities.⁴⁴

- The Indigenous population is much younger than the general population, with a median age of 20 (compared to 34). Life expectancy over the period 1997–9 was 56 years for males and 63 years for females, nearly 20 years less than for the total population.⁴⁵
- Data from national surveys in 1994 and 1995 indicates that Indigenous people were more likely than non-Indigenous people to smoke, consume alcohol at hazardous levels, be exposed to violence and to be categorised as obese. Indigenous Australians also suffer from higher levels of many mental and behavioural disorders.⁴⁶
- When compared to the rest of the Australian population the Indigenous population had a lower employment to population ratio, a considerably higher unemployment rate and a lower labour force participation rate. In February 2000 the employment to population ratio was 44% for Indigenous persons compared to 59% for non-Indigenous people. The unemployment rate was 17.6% for Indigenous people, when compared to 7.3% for non-Indigenous people. The labour force participation rate was 52.9% for Indigenous people and 63.7% for non-Indigenous people.⁴⁷
- Indigenous Australians are less likely to be in full-time education than other Australians. In the 1996 census 44% of young Indigenous people in NSW were attending an educational institution. Only 3% of Indigenous people in NSW were attending a university or other tertiary institution.⁴⁸
- The rate of home ownership among Indigenous households residing in NSW (34.2%) is much lower than for all family and lone person households (69.1%). In 1996, approximately 63% of Indigenous households were renting their dwelling, compared to 27% of other households.⁴⁹
- Indigenous persons are over-represented among people receiving emergency accommodation support. 15.7% of the clients of the Supported Accommodation Assistance Program in NSW were Indigenous, while Indigenous people represent 1.8% of the NSW population.⁵⁰
- On 30 June 2001, 15.1% of the NSW prison population (1,339) were Indigenous. Indigenous persons are much more likely to be imprisoned than non-Indigenous persons, with an

⁴⁴ Australian Bureau of Statistics, *Health and welfare*.

⁴⁵ Australian Bureau of Statistics, *Health and welfare*.

⁴⁶ Australian Bureau of Statistics, *Health and welfare*.

⁴⁷ Australian Bureau of Statistics, *Labour force characteristics of Aboriginal and Torres Strait Islander Australians*, No. 6287.0, Canberra, 2000.

⁴⁸ Australian Bureau of Statistics, *New South Wales' young people*, No. 4123.1, Canberra, 1998.

⁴⁹ Department of Women (NSW), *Issues of importance to women in NSW*, Sydney, 1998, p. 17.

⁵⁰ Australian Institute of Health and Welfare, *SAAP annual data collection annual report 2000–2001*, 2001, p. 10.

imprisonment rate of 1,829 per 100,000 adult Indigenous population, about 15 times the rate for the non-Indigenous population.⁵¹

- The six major factors underlying the high rates of Indigenous arrest include (in order of magnitude): sex, labour force status, alcohol consumption, whether a person had been physically attacked or verbally threatened, various age factors, and level of education.⁵²
- A number of studies have shown that Indigenous violence is widespread and disproportionately high compared to non-Indigenous violence in Australian society. Types of violence include spousal violence, homicide, sexual assault, child neglect/abuse and self-injury. Rates of violence are increasing, and the types of violence are worsening in some Indigenous communities and regions.⁵³

Access to justice issues

Indigenous Australians therefore face a daunting array of barriers to accessing justice, from institutional cultural insensitivity to significant information deficits. They suffer from ‘visibility’ and are over-represented in the criminal justice system. Generally, low socio-economic status further compounds these problems.

It is easy to stereotype the Indigenous population as being concerned primarily with criminal law, welfare, family violence and native title issues. These are certainly the areas of need that have been most explored in the past. However, as members of the broader community, Indigenous Australians are potentially subject to the same range of legal issues as any other group. For example, the high proportion of Indigenous Australians that rent their home means they are likely to be susceptible to tenancy problems. Intellectual property is another area of increasing relevance to Indigenous artists and communities, and one that is often neglected.

Age

Different legal issues and problems will be relevant at different stages of an individual’s life. Similarly, different barriers to accessing justice may arise according to one’s age.

Young people and children

For the purposes of this project, children will be defined as a person of up to 11 years of age, and a ‘young person’ as a person aged between 12 and 25 years. The question of when a person ceases to be ‘young’ is a matter of some debate. This is particularly so where many benefits and

⁵¹ Australian Bureau of Statistics, *Prisoners in Australia*, No. 4517.0, Canberra, 2001.

⁵² B Hamilton Hunter, *Factors Underlying Indigenous Arrest Rates*, NSW Bureau of Crime Statistics and Research, Sydney, 2001, p2

⁵³ Quantitative and qualitative studies on the incidence of Indigenous violence are reviewed in Section 1 of P Memmott, R Stacy, C Chambers & C Keys, *Violence in Indigenous Communities*, Attorney-General’s Department, Canberra, 2001

consequences of 'adulthood' legally arise from the age of 18. The age of 25 has been chosen because it is commonly used by welfare groups and other organisations in defining young people. This is largely because government Youth Allowances are payable to full-time students below 25 years of age.

Age by sex (NSW)⁵⁴

Children and Young People				
	Male	Female	Persons	% of NSW Residents
0-4 years	216,880	205,461	422,341	6.63%
5-9 years	228,763	217,220	445,983	7.00%
10-14 years	228,255	216,771	445,026	6.98%
<i>Total 0-14</i>	<i>673,898</i>	<i>639,452</i>	<i>1,313,350</i>	<i>20.61%</i>
15-19 years	223,830	212,796	436,626	6.85%
20-24 years	207,358	201,361	408,719	6.41%
25 years	41,483	41,437	82,920	1.30%
<i>Total 15-25 years</i>	<i>514,154</i>	<i>455,594</i>	<i>928,265</i>	<i>14.57%</i>
Total NSW Residents	3,145,445	3,226,300	6,371,745	

According to the 1996 census⁵⁵:

- 1,201,779 young persons lived in NSW, constituting 20% of the population of NSW.
- Young people represent a declining proportion of the total population, falling from 23% in 1986. This trend is expected to continue.
- 64% (766, 391) of young people in NSW live in Sydney.
- 2.3% (27,821) of NSW young people were identified as Indigenous. The proportion of Indigenous people in the older population (over 26) is 1%.
- 16% (190,193) were born overseas. One quarter (47, 873) of overseas born young persons originated from the main English speaking countries.
- Of Australian-born young people living in NSW, 66% had both an Australian-born mother and father. Thirty-three per cent had at least one parent born overseas, with 21% with at least one parent born in a non-English speaking country.

⁵⁴ Australian Bureau of Statistics, *Basic community profile*.

⁵⁵ Australian Bureau of Statistics, *Young people*.

- 19% of NSW young people spoke a language other than English at home. Of those young people who spoke another language, 92% reported that they spoke English well or very well.

In 1996, 47% of all children in Australia were in families with working parents. The structure of Australian families is also moving away from the traditional 'nuclear' family. In 1999, one in five Australian children lived in a single parent family. Children living apart from one of their natural parents are twice as likely to suffer from a mental health problem and at eight to ten times greater risk of child abuse and neglect than children living with both of their natural parents.⁵⁶

In 2000 about 20% of the Australian labour force was made up of young people.⁵⁷ Changes in the labour market over the last fifteen years have had a significant impact on young people's participation in the workforce. Many jobs previously considered 'entry level' have disappeared. An Australian Council of Trade Unions background paper⁵⁸ notes the following:

- There has been a marked increase in the proportion of casual and part-time workers that are young people. In 2000 more than 63% of 15–19 year olds and 28% of 20–24 year olds were employed part-time (the rate for those over 25 is 23%). The incidence of casual employment is highest amongst teenagers, who constitute almost one quarter of all casuals in the workforce.
- Young people often combine employment with full-time or part-time study. 78% of teenagers who are casually employed also attend school or tertiary education full-time.
- The unemployment rate amongst young people is considerably higher than the general unemployment rate. In 2000, 22.2% of 15–19 years were unemployed.

Access to justice issues

Young people may be more vulnerable to discrimination and disadvantage in the labour market, in some cases as a result of their lack of knowledge of their rights.

Statistics also suggest that young people are more vulnerable than other Australians in their dealings with the social security system. People under 30 are more likely to incur social security 'breaches' (and consequent reduction or loss of benefits) than any other age group. A study by the Australian Council of Social Service found that in February 2001 job seekers receiving Newstart Allowance and Youth Allowance who were under 25 represented 30.6% of recipients, but accounted for 50.6% of all Activity Test breaches and 57.6% of all Administrative breaches.⁵⁹

⁵⁶ Buckingham, p. 75.

⁵⁷ Australian Council of Trade Unions, *Young people and unions background paper*, ACTU Congress, 2000.

⁵⁸ Australian Council of Trade Unions, *Young people and unions background paper*.

⁵⁹ Australian Council of Social Service, *Breaching the safety net: the harsh impact of social security penalties*, Sydney, 2001, p. 21.

In NSW one in four young people aged 18–24 years will be diagnosed with a mental health problem or disorder. Some non-English speaking groups, such as refugees, experience higher rates of illnesses such as post traumatic stress disorder and anxiety/depressive disorders. The vulnerability of refugee children and young people to mental illness is heightened where their parents cannot provide support.⁶⁰

The difficulties and barriers faced by young people and children in accessing legal services relevant to their specific needs and issues have been well documented in the 1997 ALRC/HREOC report, *Seen and Heard: priority for children in the legal process*. These include:

- The difficulties faced by young people in participating in the legal process and pursuing their rights under the law, insofar as they often lack legal capacity to participate in legal processes, particularly in relation to areas like consumer issues, contract issues, personal injuries.
- Many young people often don't see their problems and crises as having a legal component. For instance, issues that arise in a school context, such as bullying, school exclusions and discrimination, are not seen as legal issues, even though young people's legal rights may be affected and potentially protected by having access to specialist legal assistance.
- The alienation that children and young people experience in attempting to participate in an essentially adult legal system. Courts are adult controlled, and young people are only perceived as having a role within the court system in a context of crisis, whether it be criminal, family dispute, or in need of care and protection.
- The reluctance of children and young people to initiate legal proceedings where their rights have been infringed. Most legal processes involving children relate to family law, care and protection and criminal law—situations where children/young people are compelled to be involved in the legal system. However, adult legal processes do not lend themselves to children and young people seeking redress in areas such as civil law, consumer issues, legal related education issues, employment and discrimination issues, and social security and income support.
- The lack of legal aid services to assist children and young people to initiate legal proceedings in key civil law areas, including discrimination in education, breaches of procedural fairness in education, discrimination in employment, consumer issues, breaches of duty of care in education and social security.
- The failure of generalist legal aid services to recognise or cater to the distinct patterns of youth legal needs. Young people feel intimidated by legal services which essentially serve adult legal needs, and where the legal needs of young people are seen as being either crisis-oriented or afterthoughts in the context of serving legal need in the community.

⁶⁰ Drug & Alcohol Multicultural Education Centre, *NESB young people and substance abuse*, Sydney, 2001, p. 7.

- The failure of substantive law to provide adequate protection in areas such as the administrative discretion of child welfare authorities.⁶¹

It is important to note that young people are subject to the adult criminal justice system once they turn 18 years of age. At 30 June 2000, 26.1% of the adult prison population in Australia were under 25 years of age.⁶² As at 30 June 2001, young males in the 20–24 years age group had among the highest rate of imprisonment, of any age group, while young females in the 20–24 years age group had the highest imprisonment rate.⁶³

Older people

For the purposes of this paper the term ‘older person’ refers to a person aged 65 years and over. According to the ABS:⁶⁴

- In 1998 there were 807,200 older people living in NSW. This represents 13% of the total population.
- The older population is increasing, both in number and as a proportion of the total population. While in 1972 older people made up 9% of the population, it is expected that this will rise to 18% by 2021.
- In 1998, 54% of older people had a disability, 22% had a profound or severe restriction relating to communication, mobility or self-care.
- The majority of older people (93%) lived in private dwellings. The likelihood of a person living in an institutionalised setting increased with age; of those 85 and over, 34% lived in nursing homes and retirement and aged care accommodation.
- Older people are more likely to own their own home or board with their children's families. In 1996, 79% of older people lived in a home that was fully owned by a member of the household, and 5% lived in homes where a mortgage was being paid off. Few older people (12%) lived in rented accommodation, of which about half was rented from the state housing authority.
- In 1997–8 government pensions and allowances were the main source of income for 77% of older people.

The prevalence of disability increases with age.⁶⁵ Older people with mobility difficulties may have problems gaining physical access to both intermediaries and to the basic institutions of

⁶¹ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report no. 84, Canberra, 1997.

⁶² Australian Bureau of Statistics, *Prisoners in Australia*, No. 4517.0, Canberra, 2001.

⁶³ Australian Bureau of Statistics, *Prisoners in Australia*.

⁶⁴ Australian Bureau of Statistics, *Older people*, New South Wales, No. 4108.1, Canberra, 2000.

⁶⁵ Australian Bureau of Statistics, *Disability, Ageing and Carers*, 4430.0, Canberra, 1998.

justice. Both physical and mental disabilities (in particular dementia) may also reduce older people's capacity for independence and render them reliant on carers or family members.⁶⁶

Older people are also much less likely to be conversant with new technologies, and thus often cannot take advantage of the range of information available over the internet.⁶⁷ A higher proportion of older people is less educated and more likely to have poor or very poor literacy skills.⁶⁸ Older people from a linguistically diverse background are more likely to be less conversant and literate in English.

Average income falls markedly with age, and in 1996–97, government pensions and allowances were the principal source of income for 74% of households headed by a person 65 years or over.⁶⁹ Affordability of legal advice and legal services may therefore be a major issue for older people. The exclusion from paid employment by the practice of retirement and age discrimination by some employers may also reduce their options for increasing their incomes through paid work.

Access to justice issues

As noted above, older people are more likely to be dependant on social security, and therefore more likely to face issues associated with social security and administrative law. The rapid expansion in superannuation has also seen an increase in the number of self-funded retirees, who face issues associated with taxation, investment and estate planning. Older people also appear to be more vulnerable to falling prey to financial 'scams', and thus consumer protection laws and mechanisms can be relevant. Older people are also vulnerable to being subject to financial guarantor obligations, particularly where they are requested by their adult children for the parent's home to be provided as financial security for funds borrowed by the adult child. Older people residing with their adult children may also be subjected to manipulation and abuse by other occupants of the home, whether related or not. Breakdowns in such living arrangements often leave the older person vulnerable to eviction. Where older people are reliant on aged care services, their rights as consumers are often compromised.⁷⁰

Like young people, older people also lack access to appropriate specialist legal services, and may lack confidence in using generalist legal services which often lack the specialist expertise in issues which particularly affect them.

⁶⁶ Australian Institute of Health and Welfare, *Older Australians at a Glance*, Canberra, 1999, Chapter 11.

⁶⁷ Australian Bureau of Statistics, *Use of internet by Householders*, Australia, 8147.0, Canberra, 2001.

⁶⁸ Australian Bureau of Statistics, *Aspects of Literacy: Assessed Literacy Skills*, 4228.0, Canberra, 1997.

⁶⁹ Australian Bureau of Statistics, *Older People, Australia: A Social Report*, 4109.0, Canberra, 1999.

⁷⁰ For further discussion of the types of legal issues faced by older people, see McCullough, Sandra, *Older People and the Law*, the Consumer Law Centre of Victoria Ltd, Melbourne, 1995, Chapter 4, and *Alternative Law Journal*, Vol 27 No 2, April 2002, passim.

Geographic disadvantage

Remote, rural and regional areas

The ABS defines 'urban' as a population centre of 1,000 or more people. However, a measure based solely on the size of a population centre is not necessarily an accurate reflection of disadvantage in terms of access to justice.

The Accessibility/Remoteness Index of Australia (ARIA) project was sponsored by the Commonwealth Department of Health and Aged Care as an attempt to develop a standard classification and index of remoteness for the whole of the country. The ARIA classification has been widely accepted by a variety of users since its release in 1999. The ABS will be including ARIA related scores as part of the 2001 Census data releases.

ARIA calculates remoteness as accessibility to service centres based on road distances. Remoteness values for localities are derived from the road distance to service centres in four categories (a weighting factor is applied for islands). To create an associated classification, ARIA values are grouped into five categories:

1. **Highly Accessible**—relatively unrestricted accessibility to a wide range of goods and services and opportunities for social interaction.
2. **Accessible**—some restrictions to accessibility.
3. **Moderately Accessible**—significantly restricted accessibility.
4. **Remote**—very restricted accessibility.
5. **Very Remote**—very little accessibility of goods, services and opportunities for social interaction.⁷¹

The question of remoteness and accessibility, like many other disadvantages, should be viewed in relative terms. For example, while residents of regional cities such as Wollongong and Newcastle have significantly greater access to services than those in small towns such as Cobar or Moruya, they are still relatively disadvantaged when compared to the range of services available in central Sydney.

- In 1996 the State-wide percentage of low-income families was 20%. However, the proportion of low-income families in Sydney was only 16.6%. In non-metropolitan areas, the

⁷¹ Commonwealth Department of Health and Aged Care, *Measuring remoteness: accessibility/remoteness index of Australia (ARIA)*, revised edition, Canberra, 2001, pp. 1,3.

proportion of low-income families was 26.5%.⁷² Newcastle (24.1%) and Wollongong (22.5%) also fell above the State-wide average.

- Indigenous Australians make up increasingly large proportions of the population as the location becomes more remote. They represent 1.2% of the population in highly accessible areas, but 32.8% of the population in very remote areas.⁷³
- People living in very accessible areas had the highest rate of educational participation. As accessibility reduces, people are increasingly likely to have left school early, with 10% more early school leavers.⁷⁴
- In 1996, 214,444 children in non-metropolitan areas of NSW (54% of children in these areas) lived in families that received an income support payment.⁷⁵
- Non-metropolitan areas of NSW have considerably higher levels of unemployment than occurs in Sydney. This is evident for both males and females in every age group except those 65 and over. Youth unemployment is also significantly worse in non-metropolitan areas. Particularly high rates of unemployment occur along the north-east coast of NSW.⁷⁶

Access to justice issues

People living outside the Sydney metropolitan area face a range of physical access problems. This includes both lack of access to institutions such as courts and tribunals and lack of access to appropriate intermediaries and early intervention services. More remote areas are also more 'technology poor', and have less access to internet services and other on-line assistance. As noted above, many also suffer from other disadvantages that compound their geographic isolation.

Disadvantaged urban

Economically and socially disadvantaged individuals are also likely to live in disadvantaged communities, either socially or geographically. This is due to differential housing costs, cultural ties or the fact that the lifestyles they can afford provide limited opportunity to intersect with the lifestyles of communities that are not so disadvantaged. Many do not have friends, family or other informal support networks who can provide assistance or advice on legal issues.

A study undertaken by The Ignatius Centre examined the distribution of social disadvantage in Victoria and NSW.⁷⁷ The study used a range of socio-economic indicators⁷⁸ to measure

⁷² J Glover & S Tennant, *A social health atlas of Australia—NSW*, 2nd ed., University of Adelaide Public Health Information Development Unit, 1999, pp. 32–34.

⁷³ J Glover & S Tennant, p. 53.

⁷⁴ J Glover & S Tennant, pp. 48–9.

⁷⁵ J Glover & S Tennant, p. 100.

⁷⁶ J Glover & S Tennant, pp. 40–1.

⁷⁷ T Vinson, *Unequal in life*, The Ignatius Centre for Social Policy and Research, Richmond, 1999.

inequality between different geographic areas. It found the existence of *cumulative disadvantage*. A relatively small number of postcodes accounted for a large percentage of locations that rank highly on the nine social indicators of disadvantage. On a per capita basis, the 'Top 30' disadvantaged areas accounted for

- four-and-a-quarter times their share of child abuse
- three-and-a-quarter times their share of emergency assistance
- three times their share of court convictions and long term unemployment
- twice their share of low-income households, and
- a little under one-and-a-half times their share of people who left school before 15 years.⁷⁹

Education

Low education level

In 1997, 40% of 15–64 year old Australian residents had post-school qualifications. The most common highest qualifications held were basic vocational qualifications (19%) and bachelor degrees (14%).⁸⁰

Educational attainment can be both an important determinant of socio-economic status and a result of such status. A range of studies have established that children from families with low socio-economic status are more likely to exhibit the following outcomes than those from high socio-economic status families:

- lower levels of literacy, numeracy and comprehension
- lower retention rates
- lower rates of participation in university
- higher levels of problematic behaviour such as truancy and displaying negative attitudes to school
- less likely to specialise in maths and science subjects
- more likely to have difficulty with studies
- less successful school-to-labour market transitions.⁸¹

⁷⁸ Unemployment, low income, low birth weight, child abuse, education, emergency assistance provided, court convictions, long term unemployment and unskilled workers.

⁷⁹ T. Vinson, p. 44.

⁸⁰ Australian Bureau of Statistics, *Education and training in Australia*, No. 4224.0, Canberra, 1999.

Lack of education compounds with other disadvantages. For example:

- 62% of Indigenous people did not complete secondary school.⁸²
- In 1997, 85% of those with post-school qualifications were in the labour force, compared to 70% of persons without such qualifications.⁸³
- As geographic accessibility decreases people are more likely to have left school early, with 10% more early school leavers in non-metropolitan areas of NSW.⁸⁴

Age left school by sex (NSW) 1996

Persons aged 15 years and over						
	Male	%	Female	%	Persons	%
14 and under	273,420	11.87%	291,338	12.11%	564,758	11.99%
15 years	449,463	19.51%	520,376	21.63%	969,839	20.59%
16 years	457,744	19.87%	469,043	19.50%	926,787	19.68%
17 years	373,276	16.20%	395,146	16.43%	768,422	16.31%
18 years	366,679	15.91%	341,634	14.20%	708,313	15.04%
19 years and over	97,164	4.22%	80,736	3.36%	177,900	3.78%
Still at school	112,783	4.89%	114,282	4.75%	227,065	4.82%
Never attended school	16,545	0.72%	23,904	0.99%	40,449	0.86%
Not stated	157,196	6.82%	169,224	7.03%	326,420	6.93%
Total	2,304,270	100%	2,405,683	100%	4,709,954	100%

Literacy

The 1996 ABS *Survey of Aspects of Literacy* (SAL)⁸⁵ was a national survey designed to measure the literacy and numeracy skills of the Australian population. The survey focussed on ‘functional’ literacy—the skills necessary to understand and use information from material which is printed in English and found in everyday life. Literacy skills were defined in a continuum, and a five-point scale (with 1 as very poor, 3 as adequate and 5 as very good) was developed.

⁸¹ G Zappala & G Considine, *Educational performance among school students from financially disadvantaged backgrounds*, The Smith Family, Camperdown, 2001.

⁸² Australian Bureau of Statistics, *Survey of aspects of literacy*, No. 4228.0, Canberra, 1997.

⁸³ Australian Bureau of Statistics, *Education and training*.

⁸⁴ J Glover & S Tennant, pp. 48–9.

⁸⁵ Australian Bureau of Statistics, *Aspects of literacy*.

About 2.6 million Australians (almost 20%) were at Level 1 on the literacy scales and could be expected to experience considerable difficulties in using many of the printed materials encountered in daily life. A further 3.6 million Australians (about 28% of the population) are at Level 2, and would experience some difficulties.⁸⁶

The Survey report analyses the relationship between a range of socio-demographic factors and literacy skills and makes the following findings:⁸⁷

- Not surprisingly, English literacy skills were strongly related to whether English was the first language spoken. 48% of those who did not speak English as their first language were at Level 1 compared to 14% of those for whom English was their first language.
- Younger people have higher levels of literacy. The literacy skills of those over 45 decline markedly with age, with 75% of those aged between 65–74 at Levels 1 or 2. The proportion of older females at Level 1 (45%) was markedly greater than for males (37%).
- There was a clear relationship between literacy and labour force status. Only 11–12% of employed people were at Level 1 compared to 30–31% of unemployed people.
- Only 6% of people at Level 1 on the prose scale had an income in the highest quintile, while 63% of people at Level 1 had income in the lowest two quintiles.
- Greater proportions of Indigenous people were at low literacy levels, with 41% at Level 1 on the prose scale. Significantly, the SAL did not survey remote and sparsely populated areas. This means that the estimated 25% of Indigenous people who live in such areas were not included in the survey. It is therefore possible (if not likely) that the overall English literacy of Indigenous Australians is even worse than suggested by the survey.

However, the survey also notes that no single factor is likely to determine an individual's literacy. 'Rather, throughout life, individuals encounter different circumstances and the interaction of many circumstances will affect their literacy skills'.⁸⁸

Social rather than economic factors may be more important in determining educational outcomes. A 2001 Smith Family study examined variation in education performance of students from financially disadvantaged backgrounds according to a range of other family, individual and contextual factors. The study found that the level of parental education was a key predictor of the educational success of students.⁸⁹

The SAL also asked participants to rate their own literacy skills. One interesting result was that, of those who self rated their literacy skills as excellent, 28% were at Levels 1 and 2 on the

⁸⁶ Australian Bureau of Statistics, *Aspects of literacy*.

⁸⁷ Australian Bureau of Statistics, *Aspects of literacy*.

⁸⁸ Australian Bureau of Statistics, *Aspects of literacy*.

⁸⁹ G Zappala & G Considine.

literacy scale.⁹⁰ This suggests that a considerable percentage of those with objectively poor skills do not seem to recognise this fact. Such people may unknowingly encounter problems and barriers due to misinterpretation of information.

Access to justice issues

Most information about the law is text based. Those with poor literacy skills may experience difficulties in both accessing information about legal rights and obligations, and in understanding any information they do manage to access. They may also be hampered by poor verbal and aural communication skills.

In addition, those with poor verbal communication skills may experience difficulties in police interview situations, and in giving evidence in court.

Sexual orientation

Gay/lesbian

It is difficult to locate reliable statistics on the number of homosexuals in either Australia or NSW.

Access to justice issues

As with other disadvantaged groups, homosexual people may encounter the same broad range of legal issues as other members of the community. However, they are most likely to suffer discrimination, whether in employment or other aspects of daily life. Homosexuals are also subject to substantive barriers to justice in some areas, such as superannuation and family law. The age of consent for certain sexual activity is different for gay men, then it is for heterosexual men. This has the effect of criminalising certain behaviour for young homosexual males, potentially creating a further need to access legal services.⁹¹

They may also become victims of homophobically motivated crimes. Gay men are four times more likely to be assaulted than other men, and lesbians are six times more likely to be assaulted than other women.⁹²

Transgender

The NSW *Anti Discrimination Act 1997* defines a transgender person as someone who

⁹⁰ Australian Bureau of Statistics, *Aspects of literacy*.

⁹¹ As indicated earlier, this project will not be considering issues of 'rights' and 'justice' where the law is clear. However, where certain laws give rise to demand for legal aid resources, it is relevant to the consideration of disadvantaged people being able to obtain legal assistance.

⁹² Gay and Lesbian Rights Lobby, *Fact sheet: discrimination against gays and lesbians*, <http://www.girl.org.au>.

- identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex
- has identified as a member of the opposite sex by living as a member of the opposite sex
- being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex, and includes a person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

It is very difficult to accurately ascertain the number of transgender people in the population. A 1994 study on transgender lifestyles and HIV/AIDS risk suggested that there was a total of about 5,000 transgender people living in Australia, with up to half living in NSW.⁹³

Access to justice issues

A paper on transgender inmates by the Australian Institute of Criminology notes suggestions that social stigmatisation associated with transgender status often leads to an inability to hold regular employment, low self-esteem and drug use. The need to pay for hormone therapies combines with these factors to lead to a relatively high rate of involvement in crime, particularly prostitution. The paper also notes that transgender people are also at a higher risk of self-harm and sexual assault than the general population.⁹⁴

Women

At the time of the 2001 census there were 3,226,3003 women and girls living in NSW, representing 50.6% of the NSW population.⁹⁵ 1.8% (58,574) identified as Aboriginal or Torres Strait Islander⁹⁶, 23% (743,095) were born in non-English speaking countries, and 18.6% (607,688) of those over 5 years of age identified as speaking a language other than English.⁹⁷

Although women as a group suffer disadvantage in comparison with men, their experiences can vary considerably. Factors such as age, race, marital status, family responsibilities, cultural and linguistic background, education, sexual orientation and disability have specific social and legal ramifications. While the relationship between women's social and economic status is a complex one, it is clear that each can have an important impact upon the other:

⁹³ R Perkins, *Transgender lifestyles and HIV/AIDS risk*, AGPS, Canberra, 1994.

⁹⁴ J Blight, *Transgender inmates*, Australian Institute of Criminology, Canberra, 2000.

⁹⁵ Australian Bureau of Statistics, *Basic community profile*.

⁹⁶ Australian Bureau of Statistics, *Basic community profile*.

⁹⁷ Australian Bureau of Statistics, *Basic community profile*.

- Women earn less than men. In August 1998 women's average weekly earnings excluding overtime was 79.83% of men's. Women are also more likely than men to work unpaid overtime.⁹⁸
- While there are differences in the labour market participation of women from different ethnic groups, age, English proficiency and length of residency are important factors in determining the employment status of migrant women. Amongst women, those from non-English speaking backgrounds, early school leavers with low levels of English and women who are recent arrivals have the highest probability of being unemployed.⁹⁹
- A greater proportion of women than men are unemployed, or employed on a part-time, casual or temporary basis. In September 1998, 76% of NSW employees were employed full-time, but women represented only 59.3% of full-time employment. In the 5 years from 1991 the number of women employed as part-time, casual or temporary workers rose by 31%.¹⁰⁰
- Indigenous women are more unlikely to be in employment than Indigenous men. In NSW 47.9% of Indigenous women were in the labour force compared to 63.9% of Indigenous men.¹⁰¹
- Nationally, 89% of sole parent families with dependant children are headed by a woman (488,000 families). Sole parent families are more likely to be renters (46%). One third of all female renters lived in public housing and a further 10% were on public housing waiting lists. By comparison, one fifth of male renters lived in public housing, with 7% on waiting lists.¹⁰²

Access to justice issues

The law was developed at a time when women were not able to participate in it, not even as litigants, let alone as legal decision-makers. Married women lacked legal capacity until well into the 20th century. It is not surprising then, that legal rules and principles were developed around a set of ideas and experiences that were pertinent to men, but had no necessary relevance for women.¹⁰³

The law not only reflects women's unequal status, in some cases it can exacerbate or perpetuate this inequality. The ALRC report, *Equality before the law – justice for women*, found that gender bias can affect the drafting of legislation by parliaments, the interpretation of legislation and the development of legal principle by judges. It can also affect the treatment of women and their experiences in the court process, for example, leading to a lack of credibility given to women as

⁹⁸ Department of Women (NSW), p. 9.

⁹⁹ Department of Women (NSW), pp. 8–9.

¹⁰⁰ Department of Women (NSW), p. 9.

¹⁰¹ Department of Women (NSW), pp. 8, 14.

¹⁰² Department of Women (NSW), p. 17.

¹⁰³ R Graycar & J Morgan, *The Hidden Gender of the Law*, 2nd Edition, Federation Press, Sydney, 2002.

witnesses. Discrimination may be unconscious, based upon attitudes and stereotypes that have not been actively questioned rather than on active decisions.¹⁰⁴ Specific areas addressed by the ALRC in its report included:

- The prioritisation of legal aid for criminal matters, particularly violent or serious criminal matters, discriminates against women (Report I, Chapter 4).
- The need for improved court support for women, including access to specialist women's legal services (Report I, Chapters 5–6).
- Court facilities and processes are not conducive to making women feel comfortable with the process. Problems include the shortage of interpreters, lack of child care facilities, lack of separate waiting areas for victims of violence and the intimidating and often hostile nature of court processes, particularly in relation to domestic violence and sexual assault (Report I, Chapter 7).
- The gender bias of the law breeds gender bias in legal education, and subsequently gender bias in the number of lawyers and judges. Women also continue to be primarily clustered at the lower end of the legal profession despite representing more than 50% of law students (Report II, Chapters 8–9).
- Women are more likely to be involved in unpaid domestic work and financially dependent on men, presenting them with significant financial barriers in accessing legal services (Report II, Chapters 10–11).
- Women may face financial hardship caused by 'sexually transmitted debt' (Report II, Chapter 13).¹⁰⁵

Employment related issues are of varying importance to women. A higher proportion of women from non-English speaking background are employed in low paid manufacturing or service industry positions. The overwhelming majority of outworkers in the clothing and textile industry are newly arrived migrant women with low English proficiency. These women have little knowledge of employment rights and are vulnerable to exploitation.¹⁰⁶ The other legal needs of newly arrived migrant women relate to family law, domestic violence and immigration law issues. Barriers include their limited financial ability, lack of knowledge of the Australian legal system and limited access to skilled impartial interpreters.¹⁰⁷

Women also dominate part-time, temporary and casual employment. In 1997, 86% of permanent part-time workers, 73% of regular casual workers and 69% of irregular casual workers in New

¹⁰⁴ Australian Law Reform Commission, *Equality before the law: justice for women*, Report no. 69, Sydney, 1994.

¹⁰⁵ Australian Law Reform Commission, *Equality before the law*, passim.

¹⁰⁶ Department of Women (NSW).

¹⁰⁷ Keys Young, *Quarter Way to Equal—A Report on Barriers to Access to Legal Services for Migrant Women*, Women's Legal Resource Centre, Sydney, 1994.

South Wales were women.¹⁰⁸ This increases their vulnerability to discrimination and disadvantage in the labour market.

Sexual assault and domestic violence are significant problems for women. Surveys of women indicate that violence in the community is their highest concern. The 1996 ABS Women's Safety Survey indicated that 133,100 Australian women experienced some form of sexual violence in the preceding 12 months. Of women who were married or in a de facto relationship, 2.6% had experienced physical violence by their partner in the previous 12 months and 8% reported an incident of physical violence by their partner at some time in the relationship.¹⁰⁹

Another survey showed that only 18.8% of victims reported sexual assault to the police. Additional language and cultural barriers mean that reporting is significantly lower for women from non-English speaking backgrounds.¹¹⁰ Women who recently arrived as spouses of Australian men are particularly vulnerable. They often feel unable to report domestic violence because of their dependence on their partner for information and financial support, and because they fear losing their residency if the relationship breaks down.¹¹¹

People living in institutions

People living in institutions suffer from physical barriers accessing both the legal system and appropriate intermediaries. They can also have difficulties getting access to information about their rights and where to get assistance. Depending on the nature and reason for incarceration, they will also be subject to a range of other barriers to accessing justice.

Prisoners

There were 22,458 prisoners in Australia on 30 June 2001, a rate of 151 prisoners per 100,000 of adult population. On this date, New South Wales had 8,846 prisoners.¹¹²

- There were 8,226 male prisoners in NSW on 30 June 2001, constituting 93% of the total NSW prison population. Most prisoners were young adult males, with over half (56%) of all prisoners nationally being males in the 20–35 age group.¹¹³
- The over-representation of Indigenous people in prisons is well documented. On 30 June 2001, 15.1% of the NSW prison population (1,339) was Indigenous. Indigenous persons are

¹⁰⁸ Australian Bureau of Statistics, *Part-time, casual and temporary employment*, New South Wales, No. 6247.1, Canberra, 1998.

¹⁰⁹ Australian Bureau of Statistics, *Women's safety Australia*, No. 4128.0 Canberra, 1996.

¹¹⁰ Department of Women (NSW), p. 5.

¹¹¹ Ethnic Affairs Commission and Ministry for the Status and Advancement of Women, *Against the odds: how women survive domestic violence*, Canberra, 1998.

¹¹² Australian Bureau of Statistics, *Prisoners in Australia*, No. 4517.0, Canberra, 2002.

¹¹³ Australian Bureau of Statistics, *Prisoners in Australia*, 2002.

much more likely to be imprisoned than non-Indigenous persons, with an imprisonment rate of 1,829 per 100,000 adult Indigenous population, about 15 times the rate for the non-Indigenous population.¹¹⁴

- It is also estimated that more than 20% of people currently in NSW prisons have a mild to severe intellectual disability. This compares with a prevalence rate of about 2-3% in the general population.¹¹⁵
- Prisoners born in Australia dominate the prison system in terms of the overall numbers. However, according to the Australian Institute of Criminology (AIC), in 1998 the rate of imprisonment of Australians born in Vietnam, Oceania (Other), New Zealand, Lebanon and Turkey exceeded the rate of imprisonment for those born in Australia. Prisoners born in Australia, New Zealand, the United Kingdom and Ireland are most commonly gaoled for violent offences. Drug offences contribute a significant proportion of prisoners born in other countries, particularly Vietnam and other Asian countries. Property offences account for 20% of prisoners regardless of birthplace. However, the AIC also notes that this may not represent the rate of offending patterns, but may instead reflect differences in how individuals of different cultural background are treated by the justice system.¹¹⁶

Juvenile corrective institutions

As of 30 June 2000 there were 274 10–17 year olds in juvenile corrective institutions in NSW: 251 males and 23 females. As with adults, the rate of incarceration of Indigenous youth is significantly higher than the general population, with 109 NSW juvenile detainees (approximately 40%) being Indigenous. This represents an incarceration rate 16 times that of non-Indigenous youth.¹¹⁷ While low absolute numbers of juvenile detainees make trend analysis difficult, other ethnic groups such as Indo-Chinese, Lebanese, New Zealand/Maori and Pacific Islanders also appear to be over-represented in the juvenile detention system when compared to their representation in the broader community.¹¹⁸

¹¹⁴ Australian Bureau of Statistics, *Prisoners in Australia*, No. 4517.0, Canberra, 2001.[Check date. See fn 112, fn 113]

¹¹⁵ NSW Legislative Council Standing Committee on Law and Justice, pp. 159–161, 163.

¹¹⁶ Australian Institute of Criminology, *Australian corrections: main demographic characteristics of prison populations*, Canberra, 2000.

¹¹⁷ Australian Institute of Criminology, *Persons in juvenile corrective institutions 1981-2000*, Canberra, 2001.

¹¹⁸ See discussion in NSW Attorney-General's Department, *Juvenile crime in NSW—a review of the literature*, <http://www.agd.nsw.gov.au/cpd.nsf/pages/cpdreviewindex>.

Immigration detention centres

During 2000–01 there were 7,993 unlawful non-citizens admitted to Australia's immigration detention facilities. This is slightly fewer than the 8,205 admitted in 1999–00 but more than double the number of 3,574 in 1998–99 and 2,716 in 1997–98.¹¹⁹

As at 2 November 2001, there were 2,736 persons in immigration detention, with some 910 of these awaiting removal. The majority of detainees are housed in remote and isolated locations¹²⁰. There were 347 detainees in NSW's only detention centre, the Villawood Detention centre, at this time.

The detainee population covered 84 nationalities. The five main nationalities of detainees in 2000–01 were Afghan 27.7%, Iraqi 13.2%, Iranian 7.0%, Chinese 5.2% and Indonesian 4.5%. Five years ago the main nationalities were Vietnamese and Chinese.¹²¹

The Human Rights and Equal Opportunity Commission (HREOC) has informed the Foundation that in late November 2001 there were a total of 582 children in immigration detention nationally, including a number of unaccompanied minors. Children in immigration detention have special needs, and HREOC is currently conducting an inquiry into the adequacy and appropriateness of Australia's treatment of child asylum seekers and other children who are, or have been, held in immigration detention. Issues of access to legal advocacy and representation for child asylum seekers will be investigated under the inquiry's terms of reference.¹²²

Nursing homes

Australians have a strong preference for remaining in their own home, and most older people are able to do this. However, as age increases so does the incidence of disability and the need for assistance in everyday activities. While family and friends are a common source of assistance some older people require the intensive assistance that is available in a nursing home.¹²³

¹¹⁹ Department of Immigration and Multicultural and Indigenous Affairs, *Fact sheet no 70: Border control*, 19 November 2001, <http://www.immi.gov.au/facts/70border.htm#11>.

¹²⁰ Department of Immigration and Multicultural and Indigenous Affairs, *Fact sheet no 82: Immigration detention*, 16 November 2001, <http://www.immi.gov.au/facts/82detention.htm>.

¹²¹ Department of Immigration and Multicultural and Indigenous Affairs, *Immigration detention*.

¹²² http://www.humanrights.gov.au/human_rights/children_detention/index.html.

¹²³ Australian Bureau of Statistics, *Older People, Australia: A Social Report*, 4109.0, Canberra, 1999, Chapter 2.

Persons aged 65 and over in nursing homes and hostels Australia, 1998¹²⁴

	Nursing Homes		Hostels	
	'000	%	'000	%
Males				
65–79	8.0	1.0%	4.8	60.0%
80 and over	11.0	1.9%	14.1	1.4%
<i>All over 65</i>	<i>18.9</i>	<i>6.1%</i>	<i>9.2</i>	<i>5.1%</i>
Females				
65–79	11.3	1.2%	9.1	3.4%
80 and over	37.7	11.2%	34.4	10.2%
<i>All over 65</i>	<i>49.0</i>	<i>3.8%</i>	<i>43.5</i>	<i>3.4%</i>
All persons 65 and over	67.9	3.0%	57.5	2.5%

(Note: percentages refer to the percentage of all persons in the age/sex group)

Other institutions

People living in other institutions include those in orphanages, psychiatric institutions and other cared accommodation. Many are suffering from profound intellectual, physical or psychiatric disabilities, and thus face all the barriers to justice associated with that disability. However, they may also suffer from the additional barrier of physical isolation from both intermediaries and information.

Living arrangements – Australia 1998¹²⁵

	0–14 years	15–64 years	Total
In Cared Accommodation	900	22,000	22,900
Other Non Private Accommodation	17,900	145,000	162,900
Total	18,800	167,000	185,800

¹²⁴ Australian Bureau of Statistics, *Australian social trends 1999, housing—housing assistance: home care, hostels and nursing homes*, Canberra, 1999.

¹²⁵ Australian Bureau of Statistics, 'There's no place like home', *Year Book Australia*, Canberra, 2000.

People released from institutions

Those who have recently been released from institutions may also face barriers in accessing justice. For example, people are usually released from institutionalised psychiatric care because their condition has been stabilised rather than because they have been 'cured'. Without appropriate follow up and support after release, those who have a psychiatric disability may face significant difficulties.

People recently released from prison may face problems reintegrating into society. They will often have lost their accommodation while in gaol and may therefore be released without any fixed address. Ex-prisoners may also face discrimination in employment, and in seeking accommodation and financial assistance. Economic hardship and homelessness can unfortunately lead people back into crime.

People released from immigration detention will face the same communication and knowledge barriers and problems that are experienced by other people from cultural or linguistically diverse backgrounds. Given that they will almost all be refugees, they will also face additional psychological problems, and will therefore require additional support.

Recent changes to the *Migration Act 1958* (Cwlth) also mean that many recent onshore arrivals do not have the right to access the same support services that are offered to other refugees. Such people will receive a three-year temporary protection visa (TPV). They may apply for further protection visas if they have a continuing protection need. However, they will have access only to a further three-year temporary protection visa.¹²⁶ 5577 people were granted protection in Australia in 2000–01. Of this number, 4452 were TPV and 1125 were Permanent Protection Visa grants.¹²⁷

Economic disadvantage

Overview

What is economic disadvantage?

The measurement of poverty cannot be undertaken independently of national customs, values and standards of living. In Australia economic disadvantage is quite different from the absolute deprivation or subsistence poverty that exists in many developing countries. Whilst such poverty exists in pockets within the Australian community (e.g. homelessness), generally, as with social disadvantage, economic disadvantage is a relative term.

¹²⁶ Department of Immigration, *Temporary Protection Visas*, Fact Sheet No 64, July 2002.

¹²⁷ Department of Immigration, *Australia's Refugee and Humanitarian Program*, Fact Sheet No 60, December, 2001.

In rich countries like Australia, poverty is conceived in relative rather than absolute terms. This implies poverty is defined not only in terms of a lack of sufficient resources to meet basic needs, but rather as lacking the resources required to be able to participate in the lifestyle and consumption patterns enjoyed by other Australians. To be relatively poor is thus to be forced to live on the margins of society, to be excluded from the normal spheres of consumption and activity which together define social participation and national identity.¹²⁸

Any indicator of resources is an imperfect measure of a person's standard of living, partly because it will not capture intangible factors such as family ties and friendships and partly because even the tangible material factors are hard to quantify precisely.¹²⁹

Ideally, studies of poverty and deprivation should use multiple indicators and incorporate qualitative studies of non-monetary factors. A new longitudinal survey has recently been commenced by a consortium headed by the Melbourne Institute of Applied Economic and Social Research, University of Melbourne. The Household, Income and Labour Dynamics in Australia (HILDA) survey is a major longitudinal panel survey of Australian households to be conducted over a four year period. The primary objective of the HILDA survey is to support research regarding three inter-related objectives:

- i. income dynamics
- ii. labour market dynamics
- iii. family dynamics.

The poverty line

Much has been written about poverty measurement, and there has been much discussion of where and how the poverty line should be drawn. There is no agreement about precisely where to set the poverty line or which scale to use. As noted by the Australian Bureau of Statistics:

None of the conceptual approaches to poverty...avoid (*sic*)the need for values to enter into the way poverty is defined...The fact that the measurement of poverty is not value free does not mean that poverty research cannot embody scientific principles...What it does imply is that estimates of poverty will always be challenged—and should always be challenged.¹³⁰

Most poverty analysis in Australia is based on the surveys of household income conducted by the Australian Bureau of Statistics. Relative poverty is a measure of disadvantage derived by comparing a household's income to others in the community. By international convention, the low income cut-offs commonly used to identify those in relative poverty are set as a proportion,

¹²⁸ Australian Bureau of Statistics, 'Poverty and Deprivation in Australia' *Year Book Australia*, AGPS, Canberra, 1996.

¹²⁹ For discussion of this issue see H Greenwell, R Lloyd & A Harding, *An introduction to poverty measurement issues*, National Centre for Social and Economic Modelling, Canberra, 2001.

¹³⁰ Australian Bureau of Statistics, 'Poverty and Deprivation in Australia' *Year Book Australia*, AGPS, Canberra, 1996.

usually one half, of either average income or median income, after incomes have been adjusted using equivalence scales.¹³¹

A recent study conducted by the National Centre for Social and Economic Modelling (NATSEM) for the Smith Family used half the average family income of all people in Australia as its measure of the poverty line. The poverty line was set at \$416 for a couple with 2 children and \$225 for a single person. Using this measure, about one in every eight Australians and 14.9% of Australian children (743,000) lived in poverty in 2000.¹³²

Despite an economic boom in Sydney the poverty rate in NSW has risen from 11.1% in 1990 to 13.9% in 2000, the highest poverty rate of all the States and Territories.¹³³ The 1990s have seen a widening gap between the incomes of the poor and the incomes of the rich, lifting the 'half average income' poverty line.¹³⁴

The position of low-income families is usually tied to the amount of money spent on accommodation. Many older people own their own home, and may have greater disposable income after accommodation expenses are taken into account, particularly where they have income apart from the pension. Public housing tenants fare better than private renters due to the lower cost of public housing. For example, refugees have very limited income and means of financial support during their first few years after arrival. Rent increases place a significant burden on such families.¹³⁵

Who are the economically disadvantaged?

People without income

Broadly speaking, the poorest members of society are those with no income, such as newly arrived migrants, non-residents and others who for any reason are ineligible for social security support, including those whose income support has been cancelled for breaching activity test conditions. At the 1996 census 327,985 persons over 15 (6.9%) reported either negative or nil income.

¹³¹ Australian Bureau of Statistics, *Measuring Wellbeing: Frameworks for Australian Social Statistics*, 4160.0, Canberra, 2001.

¹³² A Harding, R Lloyd and H Greenwell, *Financial Disadvantage in Australia 1990 to 2000*, The Smith Family, Camperdown, 2001, p. 3.

¹³³ A Harding, R Lloyd and H Greenwell, p. 20.

¹³⁴ A Harding, R Lloyd and H Greenwell, p. 6.

¹³⁵ J Glover & S Tennant, pp. 84–97.

26% of participants in the Immigration Longitudinal Survey referred to earlier in this paper had nil income at their first interview. This proportion dropped to 5% three and a half years later.¹³⁶

A special group is those precluded from income support through family means tests, including dependent spouses and young people. While most of these can be assumed to be adequately provided for by family support, the smaller group for whom families fail to provide can face acute need. This is also the case for migrants covered by assurances of support.

Social security recipients

Social security recipients represent over a quarter of the New South Wales population. These vary, from pensioners to those receiving unemployment benefits (Newstart) and related payments, and include those with some additional income or assets and those without. More than half of people with a disability depend on a government pension or benefit as their main source of income.¹³⁷ For almost six in ten people in poverty, government cash benefits are their family's main source of income:

- 4.5 % of 15–64 year old persons received a disability support pension
- 6.2% of women received a sole parent pension
- 5.8% received unemployment benefit
- 67.7% of persons of pensionable age received an aged pension.¹³⁸

Low income

Using less than \$400 per week, there were 160,289 low-income families in Sydney in 1996. This represented 16.6% of all families in the city, up from 15.7% in 1986. In non-metropolitan areas the proportion of low-income families rose to 26.5%.¹³⁹

This group is often referred to as the 'working poor' and includes part-time and casual workers. Since 1991 there has been a 50% increase in the number of persons in NSW employed in their main job on a casual, part-time or temporary basis, from 455,2000 to 685,000. Most of this rise has been in casual full-time employment, from 14,400 in 1991 to 147,900 in 1997.¹⁴⁰ In 1997 there were 50,400 full-time casual workers in New South Wales, of which 34,100 (68%) were male.¹⁴¹ These workers do not receive benefits such as holiday pay and sick pay and have no

¹³⁶ A Vandenhoevel & M Wooden, Executive Summary.

¹³⁷ Australian Bureau of Statistics, *Disability*, No. 4443.1, NSW, 2001.

¹³⁸ J Glover & S Tennant, pp. 84–97.

¹³⁹ J Glover & S Tennant, p. 32.

¹⁴⁰ Australian Bureau of Statistics 1998, *Part-time, casual and temporary employment*.

¹⁴¹ Australian Bureau of Statistics 1998, *Part-time, casual and temporary employment*.

security of employment. They are therefore in economically vulnerable positions that are open to exploitation.

Many small business owners also fall into the category of economically disadvantaged.

How does disadvantage accumulate?

For some individuals lack of financial resources will be the primary barrier to justice. For these people, systems of assistance offsetting such costs through waiver, pro bono, direct provision or subsidisation are important. A number of forms of assistance have been established to provide legal advice and representation aimed particularly at low income people, including Legal Aid, Welfare Rights, community legal centres and pro bono/legal assistance schemes involving the private legal profession.

However, economic disadvantage often compounds with other social disadvantages:

- While there has been a fall in poverty among sole parent families due to improved government assistance and increases in child support from non-custodial parents, sole parent families continue to face the highest risk of poverty. Those living in families consisting of couples with children had the second highest risk, with the risk steadily increasing as the number of children in the family increased.¹⁴²
- Not surprisingly, 57.5% of unemployed people live in poverty. Only 4.6% of Australians who hold a full-time job are in families that live in poverty, with the poverty risk increasing to 11.7% among Australians over 15 working part-time.¹⁴³
- While having a job provides significant protection against poverty so too does higher education. Poverty rates among those 15 and over decline significantly as educational qualifications increase, with the risk of poverty among those with university education being less than half for those with no post-secondary qualifications.¹⁴⁴
- The most striking trend is the steady increase in poverty rates among the aged during the 1990s, up from 7.3% in 1990 to 11.2% in 2000. The ageing population and early retirement are resulting in people over the age of 50 making up an increasing share of the poor.¹⁴⁵

Access to justice issues

Economically disadvantaged people are less likely to have the skills or education to prevent escalation of a legal problem. They also have less access to non-legal, early intervention

¹⁴² A Harding, R Lloyd and H Greenwell, p. 7.

¹⁴³ A Harding, R Lloyd and H Greenwell, p. 12.

¹⁴⁴ A Harding, R Lloyd and H Greenwell, p. 15.

¹⁴⁵ A Harding, R Lloyd and H Greenwell, p. 17.

strategies and non-legal support services. Similarly, they are less likely to be able to access direct involvement in law reform or systemic change.

Legal issues which may be more prevalent for the economically disadvantaged include

- legal issues relating to unserviceable debts
- issues relating to rights, obligations, appeals and penalties under the *Social Security Act 1991* (Cwlth)
- the effectiveness of the administrative appeals system in dealing with discretionary decision making in Centrelink and the marketisation of employment services through the Job Network
- tenancy law relating to both public or private housing tenants
- industrial relations laws regulating such matters as employment and dismissal
- workers' compensation issues.

Existing research

The purpose of this section is to provide a brief overview of a number of generalist and specialist studies undertaken into access to justice and legal needs, both in Australia and overseas. It is not intended to be an exhaustive review of all literature available. The overview provides a brief description of the objectives of the studies, as well as a summary of the methodology employed in carrying out the studies.

The generalist studies focus on assessments of needs in the general population. There is also an abundance of qualitative research on the access to justice needs of particular socially and economically disadvantaged people. While some of this research is contained in dedicated ‘access to justice’ studies, the majority appears as parts of larger studies on specific groups of disadvantaged people or specific forms of disadvantage. The Australian Law Reform Commission has produced a number of reports which to varying degrees canvass access to justice issues. Notable amongst these are the reports on women, children and multiculturalism.

General studies

Australian research

Legal Needs of the Poor Inquiry, 1975

One of the earliest general studies on access to justice in Australia was the *Legal Needs of the Poor* inquiry in 1975 (Cass and Sackville). This inquiry was specifically concerned with the legal needs of the poor rather than the public in general. It therefore took as its sample people residing in one of three specific local government areas—South Sydney, Botany and Fairfield—which the 1971 census suggested contained a high incidence of factors often associated with poverty: low occupational status and thereby low income, low educational attainment, a high degree of shared facilities such as bathrooms and kitchens, and a high level of State-subsidised housing. The study sought to determine the situations experienced by respondents during the five-year period prior to the survey, in which they might have benefited from legal advice.¹⁴⁶

¹⁴⁶ M Cass, R Sackville, *Legal needs of the poor*, AGPS, Canberra, 1975.

Back to Basics: Legal Needs in the '90s, 1992

A demographically broader survey on legal needs and services in New South Wales, conducted by the Australian Bureau of Statistics in association with the Legal Aid Commission of New South Wales, culminated in *Back to Basics: Legal Needs in the '90s*¹⁴⁷. Survey respondents were questioned as to whether they had experienced one or more of a number of pre-defined legal events and what action they had taken in response to the event. In answering the preliminary question, 'What constitutes a legal problem?', the report comments that defining legal need in terms of the use of legal services privileges people whose socio-economic status renders them more likely to use lawyers. However the report fails to account for why and how particular groups of people are precluded from accessing legal services (for example, poverty, aboriginality, language and culture, gender, youth and disability). It also discounts the possibility that a more appropriate resolution of certain problems for individuals lies in accessing other professionals or agencies such as social workers and community health centres.

Commonwealth Access to Justice Advisory Committee, 1994

In 1994, the Commonwealth Attorney-General convened the Access to Justice Advisory Committee to develop an Action Plan on the subject of access to justice. As mentioned above, three objectives were central to the Committee's efforts to construct an Action Plan for reforming the justice system

- equality of access to legal services
- national equity, and
- equality before the law.

The scope of the committee's inquiry included such issues as

- equality before the law, with a focus on Aboriginal and Torres Strait Islander peoples, women and people from a non-English speaking background
- the legal services market, including regulation of the market, information for consumers, regulation of legal costs, contingency fees, complaints and discipline, and tax deductibility of legal costs
- legal aid reforms, including funding for legal aid and alternative funding for litigation
- dispute resolution outside of courts, including alternative dispute resolution, ombudsman and consumer complaint schemes, state administrative law and child support
- court reforms, including the relationship of courts to the community, court fees, efficient civil court procedures, issues relating to criminal courts, court dress and the electronic media, and

¹⁴⁷ E Fishwick, *Back to Basics: Legal needs in the '90's*, Legal Aid Commission of New South Wales, Sydney, 1992.

- legislation, including the accessibility of legislation and the harmonisation of laws affecting access to justice.¹⁴⁸

The committee undertook a literature review of 34 principal reports canvassing issues such as the cost of litigation, the complexity of court procedures and accountability in the legal profession and the judiciary. The committee did not undertake any quantitative or qualitative research of its own.

The report makes recommendations for reform of the Commonwealth justice and legal system, in order to enhance access to justice and render the system fairer, more affordable, more efficient and more effective. In particular, the report directs attention to initiatives that the Commonwealth could implement, either by legislation or administrative action.

Law Society of NSW Access to Justice Task Force, 1998

In 1998, the Law Society of NSW Access to Justice Task Force conducted an inquiry into accessibility of the legal system to the community. The study focused on the structure and management of the courts, the legal profession and legal aid, with the objective of making recommendations to make the legal system more accessible, affordable, understandable, fair, efficient and effective. The Task Force distributed a discussion paper and called for submissions. A total of 23 written submissions were received, which formed the basis of the final report and recommendations. The Task Force did not undertake any quantitative research of its own.¹⁴⁹

Legal Assistance Needs Project Phases I and II

More recently a series of studies have been undertaken by Rush Social Research on behalf of the Commonwealth Attorney-General's Legal Aid Branch between 1996 and 1999. The first study, known as the Legal Assistance Needs 1 model (LAN-1), had the objective of developing a model for the allocation of funding for legal aid to individual States and Territories. As such, its quantitative methods were based on the rates of application for legal aid, which was determined to be the measure of 'expressed legal need'. In other words, the starting point for the model was the stage at which an individual, either on their own account or through a legal representative, made an application for legal aid and thereby expressed their legal need. It did not purport to address the case of those persons who might have required legal aid assistance but did not have the awareness, knowledge, contacts, advice or interest to make an application, or those who knew that they would be ineligible. However, the need to move beyond expressed demand to consider

¹⁴⁸ Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994.

¹⁴⁹ Law Society of New South Wales, *Access to Justice: Discussion Paper*, Sydney, 1998.

the 'felt need' for legal aid was set down as a requirement for the development of a more sophisticated needs-based model as part of Phase II of the project.¹⁵⁰

The Legal Assistance Needs Project Phase II (LAN-2)¹⁵¹ was based on the objective of addressing unmet need rather than merely expressed need. Legal assistance need was defined as the legal services required to enable those in the community in need of legal aid to adequately protect or assert their rights and interests. The study was based on

- a series of in-depth interviews with key stakeholders
- a national telephone survey of the legal assistance needs of low-income households, and
- a series of focus group discussions with people applying for legal assistance.

The national survey sought to measure

- the levels of awareness of the potential client group of the existence of legal assistance
- the availability of such assistance to them when needed
- the manner in which it can be accessed, and
- the results of any attempt to do so.

A weakness of the LAN-1 and LAN-2 studies was that they were only focused on expressed and unmet legal need regarding legal matters arising under Commonwealth law. The studies were not concerned with issues of legal need for matters arising under State/Territory law. For consumers of legal services, it could be argued that the distinction is somewhat artificial.

Overseas research

Since the 1970's there have been numerous legal needs studies conducted in the United States. In particular, there have been a number of nation-wide surveys that have focussed on the legal needs of the poorer sectors of the population. For example, the American Bar Association's Consortium on Legal Needs and the Public conducted a national survey of randomly sampled low and moderate-income households to measure the incidence and prevalence of legal needs. The survey sought to assess the extent to which low-income households use the justice system (defined to include lawyers, mediators, arbitrators and courts) to resolve legal issues, compared to

¹⁵⁰ Rush Social Research Agency & John Walker Consulting Services, *Legal assistance needs project: phase one: Estimation of a Basic Needs-Based Planning Model*, Commonwealth Attorney-General's Department, Barton ACT, 1999.

¹⁵¹ Rush Social Research Agency & John Walker Consulting Services, *Legal assistance needs project: phase two: summary report*, Commonwealth Attorney-General's Department, Barton ACT, 1999.

moderate-income households.¹⁵² It also sought to assess unrepresented litigant's satisfaction with the justice system, compared with those who had some form of legal representation or assistance.

Among the most important of the recent studies on legal needs in the United Kingdom is Genn's *Paths to Justice*¹⁵³ study. Conducted in England and Wales and later replicated in Scotland, it considered 'access to justice' in terms beyond the use of legal services to achieve court-based solutions. The study analysed the phenomena of what people do and think when faced with 'justiciable events' (i.e. matters experienced by a respondent which raise legal issues, whether or not it is recognised by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system).¹⁵⁴ The studies examined whether respondents took any action, what action they took, who they consulted for information and advice, how they followed up on such information and advice, what their perceived barriers to access to justice were, what motivations they had for taking no action or for using established forms of dispute resolution, and what their experiences and perceptions of the legal proceedings were. The study used both quantitative and qualitative research methods.

The quantitative stage of the research involved surveys of randomly sampled adults who had experienced a non-trivial justiciable problem within the previous five years. They were questioned as to the type of problem, whether and which type of advice or assistance they sought, their use and experience of legal processes, their objectives in taking action and the outcomes achieved, and the experiences and perceptions of those who did not use legal processes.

The qualitative stage of the study involved face-to-face interviews with individuals based on a mixture of problem types and responses to those problems. The purposes of these interviews was twofold:

- to elicit in-depth information about behaviour, decision-making and motivation, thereby permitting a more detailed tracing of the processes through which disputes were handled; and second,
- to supplement the questions posed on the main survey about attitudes to the courts and legal services.

Thus, questions were asked in relation to the influences on decisions about how to deal with disputes and problems, the motivations and objectives underlying choices about particular courses of action, the experiences of using legal and other advisers, the perceived barriers to advice, and the experience of being involved in legal proceedings.

¹⁵² Consortium on Legal Needs and the Public, *Legal needs and civil justice: a survey of Americans. Major findings of the comprehensive legal needs study*, American Bar Association, Chicago, 1994.

¹⁵³ H Genn, *Paths to justice: what people do and think about going to law*, Hart, Oxford, 1999.

¹⁵⁴ H Genn, p12.

Specialised studies

Women

Published in 1994, *Equality before the Law: Justice for Women*¹⁵⁵ is a comprehensive analysis of issues of gender inequality, bias and discrimination in laws and the justice system in Australia. The report was the result of consideration of approximately 600 submissions from a wide range of individuals and organisations from all parts of Australia. Most of the submissions were from individual women who described their experiences with the law, although legal practitioners, academics, community-based services and government and non-government agencies also contributed.

Children and young people

In a similar vein is the *Seen and Heard: Priority for Children in the Legal Process*¹⁵⁶ report published by the Australian Law Reform Commission in 1997. It investigated the participation of children in the legal process, including child advocacy, representation and litigation, children's involvement in family law proceedings, the care and protection system, consumer issues, education related legal issues, criminal justice processes, sentencing and detention.

The Inquiry initiated multiple methodologies to canvass and analyse all relevant issues. Apart from seeking submissions to the terms of reference and the issues papers, information was gathered via a variety of sources:

- Public hearings throughout Australia to take oral submissions from interested persons, enabling the direct elicitation of the views of community members, including many young people, and organisations about their concerns regarding children and the legal process.
- Forums with legal practitioners, medical professionals and youth workers, and direct consultation with individuals and organisations who had extensive dealings with children in different legal processes or who were experts in those processes.
- Focus groups were conducted across Australia in which approximately 100 young people participated, furnishing information about children's impressions and experiences of legal processes.
- Information from these focus groups was supplemented by a specialised survey of approximately 2,000 young people (from which 843 responses were received) in government and independent schools and in detention centres throughout Australia, seeking first-hand

¹⁵⁵ Australian Law Reform Commission, *Equality before the law: justice for women*, Report no. 69, Sydney, 1994.

¹⁵⁶ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report no. 84, Canberra, 1997.

information about children's views on their experiences with the legal process and their suggestions regarding those processes.

- The Inquiry was provided with statistical information on children's involvement with legal processes from judges, courts and tribunals, government agencies, education and juvenile justice departments, Directors of Public Prosecutions, legal aid commissions and the Australian Bureau of Statistics. The statistical information was used extensively in the report to inform and support the qualitative analyses.

The breadth of the issues covered, the range of methodologies employed and the extent of involvement of interested parties including children themselves, make the report a significant and comprehensive source for information on the legal and access to justice needs of young people at that time.

People from culturally and linguistically diverse backgrounds

The *Multiculturalism and the Law*¹⁵⁷ report, a thematic study looking at the general subject of the intersection of the law with multiculturalism, also raises numerous issues of the access to justice needs, in this case of ethnically and culturally diverse people.

To assist in identifying and examining the issues the Commission consulted with other government agencies, with community organisations throughout Australia, and with lawyers, police officers, interpreters and other professionals working in the legal system. The consultation process included the organisation of seminars for community workers, and the eliciting of responses from members of migrant and other communities in their own languages. Submissions were called for in response to an issues paper and a series of discussion papers, and over 400 written submissions were received. Further, the Commission held public hearings in the capital city of every State and Territory and in Townsville, in which a total of 117 people made oral submissions.

The report discusses access issues such as language barriers, the use of interpreters, information and education, and the culturally significant areas of the family, marriage relationships and responsibility for children.

A specialised study on interpreters in the legal system that was used and further developed in the *Multiculturalism* report is the Commonwealth Attorney-General's Department's *Access to Interpreters in the Australian Legal System*. The Attorney-General sought submissions on

- i. the availability of competent interpreters in the legal system
- ii. the adequacy of existing and proposed arrangements for the provision of interpreters

¹⁵⁷ Australian Law Reform Commission, *Multiculturalism and the Law*, Report no. 57, Canberra, 1992.

- iii. the level of awareness by the public, service providers and the legal profession of the role and use of interpreters
- iv. the means by which the professional standards of interpreters can be maintained or improved
- v. how interpreter services can be provided in the most cost effective manner, and
- vi. who should be responsible for the costs of interpreters.

In addition to the call for submissions and consultations with a wide range of government, community, university and ethnic council bodies in each State and Territory, a survey was conducted of courts and tribunals in which interpreter use was likely. The survey involved the completion of a form for every occasion in which a litigant or witness had difficulties in comprehending or speaking English. In addition to questions on the court proceedings and the use of an interpreter, demographic information such as sex, age, occupation and employment status was collected in the survey.

The survey showed that

‘Interpreter usage varied considerably between different courts and tribunals surveyed depending upon the jurisdiction, practices and location of the court concerned. Whilst providing useful indicative data, the survey results did not provide conclusive evidence on levels and characteristics of interpreter usage.’¹⁵⁸

Notwithstanding this limitation, the findings would be pertinent to analyses focussing on certain marginalised groups disadvantaged by their lack or limited comprehension and facility of the English language, primarily migrants and Indigenous peoples.

In 1994, the NSW Women’s Legal Resources Centre commissioned a study to report on barriers to access to legal services for migrant women. The *Quarter Way to Equal* study aimed

- to identify the legal needs of newly arrived migrant and refugee women
- to assess their knowledge of available legal services and their ability to access these services
- to assess the views of the women, key informants and legal service providers on the adequacy of current legal services and their responsiveness to the needs of newly arrived migrant and refugee women
- to identify access barriers and also gaps in services, and
- to develop recommendations to address legal access and service provision needs.

The focus of the study was on newly arrived migrant and refugee women who have been resident in Australia for five years or less. To focus this study further, the consultations were confined to five groups of women residing in the greater Western Region of Sydney: Arabic speaking

¹⁵⁸ Commonwealth Attorney-General’s Department, *Access to interpreters in the Australian legal system*, Canberra, 1991, p. 17.

women, Vietnamese, Turkish and Filipino women, and also women from Central and South America. The choice of groups was intended to include women from a wide range of cultural backgrounds with variation in English language ability, labour force participation, and category of entry into Australia. The methodology included a review of relevant literature, consultations with over 90 key informants from ethno-specific services, migrant and refugee services, women's services and a range of legal service providers, and discussion groups and interviews with 35 newly arrived migrant and refugee women.¹⁵⁹

¹⁵⁹ Keys Young, *Quarter Way to Equal—A Report on Barriers to Access to Legal Services for Migrant Women*, Women's Legal Resource Centre, Sydney, 1994.

Conclusion

The term 'access to justice' means different things to different people. For some, the subject centralises the issue of overcoming the procedural barriers within the court system itself. Such an approach tends to concentrate on issues of overcoming delays within the court process, efficiency, formality and cost of proceedings, and the organisation, structure and administration of courts and tribunals.

Whilst not negating the importance of these issues, the Foundation's project must take a broader view of what is included within the term 'access to justice'. In particular, in considering the issue in terms of the particular needs of socially and economically disadvantaged people, it is necessary for this project to consider the variety of legal services to which disadvantaged people may seek access, the variety of services from which they seek legal assistance, and the preferred methods of resolution which they seek to employ. This will involve a broader investigation than procedural barriers within the court system. However, as stated earlier, the terms will not be interpreted in such a broad fashion as to consider contested political issues concerning broader notions of 'rights' and 'justice', where the law is clear, and parliament has clearly enacted its will. The purpose of the project is to seek to examine issues of access to justice according to law. With this in mind, the Foundation will seek to investigate the ability of disadvantaged people to

- obtain legal assistance (including legal information, legal advice, ongoing legal assistance and legal representation)
- effectively participate in the legal system through access to courts, tribunals and alternative dispute resolution
- access non legal advocacy and support
- participate in law reform processes.

In initially identifying some disadvantaged groups, this paper has canvassed some of the various barriers with which individuals in these groups are confronted. Neither the various groups identified within this paper, nor the issues initially canvassed, are meant to be exhaustive lists. It is an essential element of this project for the Foundation to identify other groups within the community who by virtue of their socially or economically disadvantaged position, face significant barriers in accessing legal services and non-legal advocacy and support. This paper serves as a stimulus for further discourse and submissions, which we hope will identify further issues for investigation.

The Access to Justice and Legal Needs project intends to cover these various issues, many of which raise complex and difficult questions. The Foundation acknowledges that this is a challenging and ambitious project. However, the importance of undertaking such a project using innovative and empirically reliable processes cannot be understated. We hope that the project will contribute significant input into the policies and practices of government, non-government and other interested agencies helping to improve access to justice for the people of New South Wales.

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