

Access to Justice Roundtable

Proceedings of a Workshop
July 2002



ACCESS TO JUSTICE ROUNDTABLE

PROCEEDINGS OF A WORKSHOP

JULY 2002

April 2003

LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES

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National Library Cataloguing-in-Publication data:

Access to justice roundtable : proceedings of a workshop,
July 2002.

ISBN 0 909136 83 1.

1. Justice, Administration of. 2. Equality before the law.
3. Legal services. 4. Legal aid. I. Law and Justice
Foundation of New South Wales.

347.94

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Acknowledgements

We would particularly like to thank Professor Julian Disney, of the Social Justice Project, University of New South Wales, for his collaboration in the workshop and the speakers who provided papers. We are grateful to the Presiding Officers and staff of the New South Wales Parliament for providing the facilities, in particular Mr Graham Spindler, Manager of the Parliamentary Education and Community Relations Section.

The Law and Justice Foundation would like to thank all participants for making the Access to Justice Roundtable such a success.

This report was compiled and edited by Julia Perry, Sarah Ellison and Joanna Mullins of the Law and Justice Foundation of New South Wales. The reports of the working groups were compiled by Sue Scott, Joanna Mullins, Louis Schetzer, Sarah Ellison, Roberto Buonamano, Catherine Lloyd, Maria Karras and Hawa Arya from the Foundation.

PART 1

Background

Introduction

This document reports the proceedings of an Access to Justice Roundtable held at NSW Parliament House on 10 July 2002 by the Law and Justice Foundation of New South Wales and the Social Justice Project, University of New South Wales. It includes the papers presented at the Roundtable, an edited report of discussions at the afternoon Working Groups and a conclusion that draws together the themes of the day's discussion.

The aims of the roundtable were to:

- encourage dialogue between representatives of economically and socially disadvantaged groups and people working within the justice system
- build a better understanding of perspectives from outside the justice system
- raise issues that have not been taken into account in the access to justice literature.

The event was the first and most extensive consultation workshop undertaken by the Foundation as part of the first stage of its Access to Justice and Legal Needs Project, which is investigating the legal needs of economically and socially disadvantaged people in New South Wales. This first stage has involved a comprehensive consultation process, as well as inviting submissions from interested agencies and individuals. This consultation process commenced in July with the publication and distribution of the project's Terms of Reference, which included the aim, objectives and general outline of the Foundation's Access to Justice and Legal Needs project. An extensive report summarising all of the consultations undertaken and responses received by the Foundation during the first stage of the Access to Justice project will be published in the coming months.

Participants were invited as individuals from a wide range of backgrounds, from both inside and outside the justice system. The Roundtable brought together people from the community legal sector, representatives and advocates for economically and socially disadvantaged people, front-line legal and justice institutions, government policy makers, welfare organisations and researchers. A list of participants is at Appendix A.

A copy of the Program is at Appendix B. This report contains the written papers provided by speakers after the event. While two of these are edited transcripts, others may differ to some extent from the oral presentations. The report also contains accounts of the working group discussions held in the afternoon.

In writing these, the Foundation has aimed to reflect the substance of these as fully as possible. The purpose of this report is to present the comments and views of the speakers and participants, and the Foundation has neither entered into the question of whether statements made are accurate nor endorsed the views and judgements expressed by participants.

The day began with opening remarks by Geoff Mulherin, Director of the Law and Justice Foundation. He was followed by Sylvia Scott, an Elder of the Eora People, who gave the welcome to country. Julia Perry from the Foundation outlined the aims and structure of the Roundtable as described in the introduction to this report. This introduction was followed by Louis Schetzer's description of the Foundation's Legal Needs and Access to Justice Project.

In his address Justice Ronald Sackville, of the Federal Court of Australia, outlined various meanings of 'access to justice' and said that the use of complicated language, discrimination and inadequate resources were some of the main barriers to justice for disadvantaged people in Australia. Justice Sackville listed four assumptions which have underpinned the access to justice movement. These assumptions were:

- that the courts were the key to providing justice
- that Governments would continue to increase financial support through Legal Aid for legal advice and representation in the court system
- that new laws would extend people's rights, particularly in the area of appeal against Government decisions
- that Governments would continue to provide basic services to people, rather than outsourcing them to private businesses.

He argued that these assumptions have all come under challenge as each has proved to be inaccurate or at least incomplete in important respects. Strategies for improving access to justice needed to be considered again in the new context.

In the session 'Perspectives from the Community', Joanne Selfe, a Gamilaroi woman, spoke about how Aboriginal people see the law as a possible means of establishing new rights and protection for them against long standing discrimination by other Australians. She stressed that the law needs to respect Indigenous people and culture, and favoured approaches that would take account of the complex historical and social bases of their disadvantage.

Barry Fowler, from Broken Hill, described difficulties for people in rural and remote regions of NSW. He discussed various barriers to obtaining information that particularly affect people in remote areas. He also mentioned the difficulty in recruiting and retaining professional service providers, such as lawyers. He said there was a cultural sense that they felt shut out from being able to participate in the justice system in the way that people in the city can.

Phillip French discussed how the legal system has been a site of great injustice for people with disabilities. He talked about the disadvantages for them as people with rights, as victims of crime, as suspects and offenders, as civil litigants and as participants in the justice system, for example as legal professionals and as members of juries.

The session ‘Options for Reform’ provided overviews of recent public reforms to improve access to justice for disadvantaged people and ideas for broadening the way we see the relationship between the justice system and the community it should serve.

Richard Funston, Director of Family and Civil Law in the New South Wales Legal Aid Commission, talked about the Legal Aid Commission’s work in providing information and advice through telephone services, video conferencing, internet services and publications. He described new community outreach programs and better co-ordination with Aboriginal Legal Services. Many of these measures are aimed at physical and cultural reasons that prevent people accessing services, such as the Video Conferencing Pilot scheme that helps people in rural and remote regions, as well as those who for cannot travel to visit legal services.

Jenny Barga, Director of Youth Justice Conferencing in the New South Wales Department of Juvenile Justice, discussed some constructive and co-operative approaches in civil and criminal law. These are alternatives to the usual adversarial approach, where two parties oppose each other. She described how Youth Justice Conferencing had been developed, what it has achieved and what still needs to be worked out and improved. She encouraged workshop participants to seek out and support alternatives to adversarial methods in the civil and criminal justice systems.

Gordon Renouf’s paper discussed the limits in current ways of thinking about access to justice for disadvantaged people in the community. Current debates focus on access to the legal system. He said they were based on a narrow model of legal services that is directed at an individual with a ‘one-off’ problem requiring advice or court representation. He suggested that these approaches did not allow disadvantaged groups to participate in defining their legal needs or formulating legal rights and responsibilities. Alternative approaches should centre on the client and the disadvantaged social group. He argued that, in order to promote a just and effectively democratic society, we should make more use of the broad range of skills in the communities where legal services were operating. He talked about a project developed by the Top End Women’s Legal Service

which showed how effective legal services can benefit from building relationships between client groups and service providers, where different points of view are heard and influence the way the services are planned and operate.

The participants then separated into four working groups to consider particular areas of interest. The working groups on ‘Access to Legal Information’ and ‘Access to Legal Advice’ both discussed the difference between legal information and advice. Both felt that service providers are strongly conscious of the need to make the distinction because of accountability, duty of care and liability. However, it is often confusing or frustrating for people with a legal issue who are in need of advice but have access only to information.

The group addressing ‘Access to Legal Information’ discussed practical ways to get information to particularly socially isolated groups. Poor reading and writing skills and low English language skills were seen as barriers to getting information. Participants also exchanged views on various sources of legal information, such as libraries and websites, legal training for non-lawyers and community legal education. They raised issues relating to referral and the difficulty of knowing where to refer people and how to avoid them entering a ‘referral merry-go-round’.

The Advice group discussed technological advances in service provision that might be able to reach many more people, such as phone advice and legal websites. They were careful to note that disadvantaged people with the highest need are the least likely to have access to those means. These forms of communication, however, are useful for community workers and others who may be able to translate and provide other assistance to the individuals who need help. In addition to identifying language as a barrier for non-English speaking people, the group also highlighted the lack of cultural awareness and the need for personal contact in legal service provision.

The working group on ‘Alternatives to Traditional Approaches in Civil Law’ talked about the good and bad points of alternative dispute resolution (ADR) noting problems such as:

- varying quality and consistency in mediation/conciliation between different forums
- failures to change power imbalances between the people in dispute
- delays in resolving disputes
- unmet expectations in relation to what ADR can achieve.

The participants talked about the clear barriers in the court system. The most important was the cost of litigation and people being discouraged from using the court system because they were afraid that they would have to pay the costs of the other party if they lost the case. They discussed the merits of tribunals, such as informality, non-adversarial processes, exclusion of lawyers and low cost, although there were also some drawbacks. Participants thought that tribunals and courts could usefully consider other solutions instead of, or as well as, financial compensation. They also said that young people were very disadvantaged and were unlikely to take legal action in civil law to uphold their rights. This group picked up on some of the themes in Gordon Renouf’s paper about strategies for greater community awareness and participation in the legal services available. The group suggested a number of reforms, particularly in relation to costs.

The fourth working group was ‘Alternatives to Traditional Approaches in Criminal Law’. The group defined traditional approaches as adversarial and focused on punishment. As in the Civil Law group, this group generally approved of some of the new alternatives, such as diversionary programs and restorative justice, and also had some criticisms. They thought that police needed to be made more accountable when they used discretion over whether to direct young people away from court, particularly young people of different racial backgrounds. The group generally preferred alternative over adversarial processes. They also

thought that alternatives worked better when they were culturally sensitive, consistent and well funded. In the discussion about penalties the group noted that they do not affect rich and poor people in the same way and this should be taken into account in the sentencing process.

The Roundtable aimed to provide an opportunity for different perspectives to be voiced on access to justice issues. Those who work within the justice system were asked to think about how the law and justice system appears from an outside standpoint; and to participate in sharing their expertise and knowledge in identifying barriers to access and fairness and in developing ideas for improvement. We also sought views, experiences, perspectives and ideas from individuals who are not lawyers and who work in community organisations outside the justice system, as well as the experiences of their clients. It is always valuable to hear community perspectives, and to be aware of how much (or how little) the public knows and understands their rights, their obligations and how to make the best use of the system.

Issues of access to justice are broad and a one-day workshop can only scratch the surface of the main themes. Nevertheless, the discussions provide an indication of what community advocates see as the most pressing issues affecting disadvantaged people in various circumstances. We hope that everyone participating either learned something or gained a new insight, through hearing the diverse views of others. We also hope that this report will stimulate debate and encourage the processes of further research, advocacy and reform.

The Access to Justice and Legal Needs Project

Louis Schetzer

Senior Project Manager, Law and Justice Foundation of NSW

The role of the Law and Justice Foundation of NSW is 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 for the community, particularly for socially and economically disadvantaged people.

In order to achieve this role, the Foundation has embarked on an ambitious project, seeking to identify the access to justice and legal needs of economically and socially disadvantaged people in NSW. Over the next two years the Foundation will undertake extensive consultations, a comprehensive literature review, and thorough and empirical research activities as part of the project. The results of this exercise will form the guiding priorities and principles for the Foundation in carrying out its various functions of research, information collection and dissemination, community education and project sponsorship.

Before I describe the project in more detail, I think it is useful to look at the terms ‘access to justice’ and ‘legal needs’.

Defining Access to Justice and Legal Needs

The phrases ‘access to justice’ and ‘legal needs’ have been used in several contexts and inquiries over the last three decades. In reviewing these studies, it appears that there is no generally accepted understanding of the

terms. Notions of equality of access to legal services, equality before the law regardless of race, ethnicity, gender or disability, affordability, efficiency, understandability, and effectiveness, have all been important concepts in previous access to justice inquiries.

The term ‘legal needs’ also raises certain conceptual difficulties, as often an individual confronted with a particular problem which raises legal issues will not identify it as a ‘legal problem’.

The approach taken by Hazel Genn, in her 1999 *Paths to Justice* studies in the UK,¹ provides a useful model in which ‘legal needs’ is considered in terms beyond the use of legal services to achieve court based solutions. These studies looked at the concept of the ‘justiciable event’—that is, a matter experienced by an individual which raises legal issues, whether or not it was recognised by that individual as being ‘legal’ and whether or not any action taken by the individual to deal with the event involved the use of any part of the justice system.

This acknowledges that people’s real ‘need’ is for the ends which legal services can bring about, whether it be specific legal remedies, a form of some reconciliation with another party, or, quite simply, a sense of fairness, or closure from some dispute.² However, either by preference or circumstance, an individual may use alternative methods of achieving these ends which do not involve recourse to the formal legal system.

The Foundation’s Access to Justice and Legal Needs Project

Sensitive to these conceptual issues, the Foundation’s project will seek to examine the accessibility of a range of dispute and problem resolution options for disadvantaged people. In particular, the project is to examine the ability of disadvantaged people to:

¹ H. Genn, *Paths to Justice: What People Do and Think About Going To Law*, Hart, Oxford, 1999.

² P. Pleasence, et al., *Local Legal Need*, Legal Services Research Centre, 2001.

- 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)
- participate effectively in law reform processes.

In achieving these objectives the project 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
- useful services and processes not provided by the legal system.

Project Outline

Stage One of the project focuses on obtaining an overall picture of the legal and access to justice needs of the community, and lays the groundwork for the various research initiatives which will follow. It will include undertaking a comprehensive literature review and consultation process, as well as calling for submissions from interested agencies and individuals. Today's forum is one of several roundtable forums which will be conducted throughout the first stage to obtain this overall picture.

In addition, we will be undertaking a comprehensive review of data collected from various legal assistance and complaint handling organisations and agencies. Whilst obviously the different approaches and methods of data collection across agencies will limit the extent to which analysis and comparisons can be made, such an exercise will

provide an indication of the problem matter types for which people seek solutions, across a range of demographic criteria. In addition, it will glean information concerning pathways and destination of referral for assistance.

The second stage will involve extensive quantitative and qualitative research into particular disadvantaged groups within the population.

The quantitative research will centre around undertaking comprehensive legal needs assessment surveys in a number of disadvantaged localities across NSW. At this stage it is anticipated that 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 urban, regional, rural and remote communities.

Whilst the general population legal needs assessment surveys undertaken in the UK as part of the *Paths to Justice* studies have provided a useful model for consideration, the Foundation considers that conducting needs assessment surveys at the local level provides a greater opportunity for working with local and community organisations. Importantly, it will also provide a ready indicator for decision makers as to the types of services required at the local level.

As well as the local quantitative legal needs surveys, the Foundation will also undertake a series of in-depth studies of the particular needs for specific disadvantaged groups. These will each involve a combination of specific literature reviews for the disadvantaged group concerned, analysis of submissions received during the first stage, and conducting a series of specific focus groups and consultations with people from various disadvantaged groups, as well as service providers and intermediaries. The Foundation will also look to work with specialist organisations involved in service delivery to particular disadvantaged groups to assist in assessing the needs of those groups of people.

We recognise that in recent years, there have been a number of inquiries both at the State and Federal levels into particular access to justice issues for certain disadvantaged groups. These include reports from the

Australian Law Reform Commission, the New South Wales Law Reform Commission and the Human Rights and Equal Opportunity Commission which provide extensive information regarding the access to justice and legal needs for certain disadvantaged groups within the population.

These reports will be extremely important in ensuring that appropriate use is made of existing knowledge, so that there is no duplication of other recent studies.

The combination of quantitative study and qualitative analysis of specific disadvantaged groups allows for a comprehensive approach. Quantitative surveys alone would give insufficient attention to certain groups whose numbers within a sample may be too small for any meaningful analysis, or by virtue of their disadvantage, may be missed either disproportionately or completely by such a quantitative survey. Qualitative analysis assists in overcoming this problem. The quantitative survey analysis will allow for analysis of differing trends across several regions, and also allows for some limited analysis of people who have multiple disadvantages.

The third stage of the project will involve an assessment of the feasibility and resource implications of undertaking a state-wide general population survey of legal needs, similar to those undertaken for the Paths to Justice studies in the UK. Undertaking such a general population study is an option, but its implementation will be dependent on the feasibility study.

Project Outcomes

Based on the various stages and ingredients of the project, the Foundation is looking to develop a statement on the particular legal and access to justice needs of socially and economically disadvantaged people in NSW. This process will also include the production of interim reports detailing the legal and access to justice needs of different disadvantaged regions and groups of people based on the assessments undertaken.

As part of the project, the Foundation intends to develop a database identifying information resources, studies and literature relating to issues of access to justice and legal needs for disadvantaged people. Such a resource would be accessible to the wider community, and would be a valuable resource for researchers, policy advisers, and community organisations wishing to research particular legal needs and access to justice related issues.

In addition, we will also be developing resources which specialist and generalist community organisations will find useful in assessing the legal needs of their relevant communities. The project will aim to develop a model of local needs assessment which will provide a basis for ongoing analysis of access to justice and legal needs of disadvantaged communities in the future. It is our hope that this will be a resource which can be used by a range of government and non-government organisations.

Conclusion

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, and we hope that the project will assist in informing the policies and practices of government, non-government and community agencies involved in legal service delivery and seeking to improve access to justice for disadvantaged people. In addition we hope that this project will result in local and community organisations being better equipped to assess the legal and access to justice needs of their own constituent communities themselves.

PART 2

Keynote Address

Access to Justice: Assumptions and Reality Checks

Justice Ronald Sackville*

Federal Court of Australia

The Concept of Access to Justice

Few people are opposed, at least overtly, to increased access to justice for disadvantaged individuals and groups. Like other catchphrases, such as ‘fairness’ and ‘accountability’ (if not ‘democracy’ itself), the expression ‘access to justice’ survives in political and legal discourse because it is capable of meaning different things to different people.

In recent times, for example, the expression has been understood by Lord Woolf, in his influential report entitled *Access to Justice*, as referring to the principles that must be adopted ‘**by the civil justice system** in order to achieve objectives within that system’.¹ The 1994 report of the Access to Justice Advisory Committee in Australia, also entitled *Access to Justice*, took a very much wider view of the concept. It saw ‘access to justice’ as embracing three broad objectives: equality of access to legal services and effective dispute resolution mechanisms; national equity (that is, access to legal services regardless of place of residence); and equality before the law (that is, the removal of barriers creating or exacerbating dependency and disempowerment).² It is readily apparent that observers might have

* I wish to acknowledge with gratitude the research assistance provided by Alex de Costa.

¹ Lord Woolf, *Final Report: Access to Justice* (HMSO, 1996), 2. These are said to require, among other things, that the civil justice system should be just in the results it delivers; fair in the way it treats litigants; deal with cases at reasonable speed and at reasonable cost; and be understandable to those who use it.

² Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), 7–9.

very different views as to the role of the legal system in remedying or ameliorating social disadvantage, yet each might fervently support his or her own understanding of ‘access to justice’.

It is useful to reflect on the reasons for different usages of the term. For this purpose, it is as well to start in a distant and largely forgotten land. To the enthusiastic reformers of the late 1960s and the 1970s, the principle of ‘access to justice’ (or analogous expressions such as ‘meeting the legal needs of the poor’) implied that affirmative steps had to be taken to give practical content to the law’s guarantee of formal equality before the law. The idea, as Cappelletti and Garth explained in 1978, was to transform the ‘aggrieved individual’s **formal** right to litigate or defend a claim’ into a right of **effective** access to the legal system.³ To achieve this goal it was necessary to overcome, or at least ameliorate, the barriers inhibiting access. The point was put this way by Sir Leslie Scarman in the 1974 Hamlyn Lectures:

It is no longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their own destinies: social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and exposed, to provide them with financial and other support, and with access to courts, tribunals and other administrative agencies where their rights can be enforced.⁴

The most obvious barrier which had to be overcome was, of course, the cost to individuals of obtaining legal advice and representation. In Australia in the mid-1970s, this barrier was formidable indeed. For those who have not experienced life without a national legal aid system,

³ M Cappelletti and B Garth (eds.), *Access to Justice: A World Survey* (vol 1) (Sijthoff and Noordhoff, 1978), 6–10.

⁴ L Scarman, *English Law — The New Dimensions* (Hamlyn Lectures, Stevens & Sons, 1974), 28–29, cited in R Sackville, *Law and Poverty in Australia* (Commission of Inquiry into Poverty, Second Main Report, 1975), 2.

however flawed the system might be, it is perhaps easy to forget that until the establishment of the Australian Legal Aid Office by the Whitlam Government, there was no publicly funded legal aid scheme of general application in Australia providing legal representation in civil matters.⁵ The very first step in enhancing access to justice was to fill that yawning gap.

There were many barriers to securing justice other than the cost of legal services. Language difficulties, for example, often prevented non-English speaking people from understanding their rights or seeking appropriate advice to assist them in resolving disputes. Aboriginal Australians faced (as they still do) special difficulties because of their over-representation in the criminal justice system and their vulnerability to discriminatory treatment within that system. The access to justice movement sought to address those issues by targeted measures, such as improved interpreter services and special protection for Aboriginal persons undergoing police interrogation.

Although not initially high on the agenda, procedural reforms were also seen as a means of reducing the imbalance in litigation between private individuals and well-resourced 'repeat players'. The Commonwealth Parliament passed legislation albeit somewhat belatedly, providing for representative proceedings, thereby enabling individuals with similar claims against a particular respondent to join together in a single proceeding.⁶ Specialist courts and tribunals, such as small claims courts or residential tenancy tribunals, were established. These were intended to provide speedier and less expensive alternatives to traditional court proceedings, although they often retained some of the trappings of courts.

⁵ S Armstrong, 'What Has Happened to Legal Aid?' (2001) 5 UWSLR 91, 92–94.

⁶ See now *Federal Court of Australia Act 1976* (Cth), Part IVA, introduced in 1992. As to State laws, see *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27.

Four Assumptions

These developments are familiar enough. They rested on a number of assumptions that have continued to shape our understanding of access to justice. I do not suggest that each of these assumptions has been universally accepted, nor that they have escaped critical attention. But they have tended to underpin optimistic beliefs that, over time, the barriers to justice that confronted those suffering disadvantages by reason of poverty, language and cultural difficulties or disability could be substantially reduced, if not entirely overcome.

The first assumption was that the courts—or tribunals that functioned very much like courts, only somewhat more informally—could be relied on to vindicate the rights of disadvantaged groups and individuals in a timely and cost-effective manner. The resolution of disputes was seen as quintessentially the province of the courts. They could be relied upon to deliver just outcomes if appropriate resources were devoted to ensuring a level playing field. While litigation was often expensive and fraught with delays, it was thought that the judicial system could be made much more efficient and user-friendly. It therefore made sense for access to justice proponents to concentrate on providing resources to enable individuals or groups to enforce or defend their rights through the judicial system. The prospect of a swifter, cheaper and more efficient judicial system held out the hope that courts could achieve just outcomes without limited legal aid budgets necessarily being exhausted.

This assumption is also evident in more recent analyses of access to justice. The Law Society of New South Wales' 1998 report on *Access to Justice*, for example, asserts that it is important that the justice system is seen to be and is:

- *accessible and affordable*
- *readily easy to understand*
- *fair, efficient and effective.*⁷

⁷ Law Society of New South Wales, *Access to Justice — Final Report* (December 1998), 11.

The phrase ‘the justice system’ is broad enough to cover dispute resolution mechanisms other than courts. But in a report which concentrates heavily on the workings of the New South Wales court system, the implication is that, if procedural reforms are adopted and sufficient legal aid resources are made available, the courts are capable of meeting all three objectives.

Secondly, it was assumed that governments, especially the Commonwealth Government, would be willing and able to devote sufficient resources to legal aid to make access to the courts ‘effective’. Commentators were not naïve enough to expect that unlimited public funds could be devoted to legal aid. Even so, it was widely thought that, over time, government would be prepared to commit enough funds to provide adequately for the areas of obvious need. These areas included criminal prosecutions, family law proceedings and civil litigation pitting individuals or families against the repeat players such as financial institutions or insurers. The belief that the real resources available for legal aid would rise over time reflected faith in the fundamental principles underlying welfare state, not yet shattered by the triumphal march of the free market. It was even hoped that the Commonwealth would accept a greater share of the welfare burden, thus making legal aid less vulnerable to the vagaries of State finances.

Thirdly, many of the reforms of the 1970s and 1980s were designed to confer rights on people who had previously been dependent on the exercise of administrative discretion or who had been required to work out their destinies within a legal framework that favoured more powerful commercial interests. This reflected a view that the best way to enhance individual dignity and autonomy was to replace dependence with entitlements. It was implicit in a culture of rights that the competence and authority of courts and independent tribunals to resolve disputes, especially between the individual and government, would be enhanced. Australians were comfortable with the exercise of judicial power. After all, the High Court had exercised the power to declare legislation unconstitutional virtually from the beginning of the Federation. Judicial review was axiomatic in Australian federalism.

The reform of administrative law in the mid-1970s gave a powerful impetus to the culture of rights. The new system was designed to enhance the public law values of openness, rationality, fairness and impartiality, by providing effective remedies when those values were infringed.⁸ Administrative decisions were subject to independent merits review. The grounds of judicial review were codified in expansive terms in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The new system was gradually extended to social security recipients, who could challenge adverse administrative decisions by seeking judicial review. Those who had previously been supplicants had acquired enforceable rights.

Fourthly, it was assumed that the provision of essential services would remain the province of government. Energy and water were supplied to householders by public authorities; so, too, were telephone and other telecommunications sources. Income maintenance programs, fundamental to the well-being of millions of Australians, were funded and administered by governments. Such programs were at the very heart of public law and of the culture of rights it had encouraged.

The Assumptions Under Challenge

The assumptions I have identified have all come under challenge. Each has proved to be inaccurate or at least incomplete in important respects. That fact is significant in formulating the goals of a modern access to justice movement and in developing strategies for achieving those goals.

There is no doubt that Australian courts will continue to discharge their core function of administering justice according to law. There is also no doubt that much that is central to the concept of access to justice will require recourse to the courts. But it is counterproductive to adhere to unrealistic expectations of what courts can achieve. Over the past two decades Australian courts have done a great deal to reform court

⁸ M Allars, 'Private Law But Public Power: Removing Administrative Law Review from Government Business Enterprises' (1995) 6 *Public L Rev* 44.

procedures and judicial administration. They have enthusiastically adopted case management and, in so doing, have profoundly changed the workings of the adversary system in both civil and criminal proceedings. The courts have also adopted, albeit with a little less enthusiasm, the principle of ‘consumer orientation’,⁹ thereby altering and expanding the ways in which they make themselves accountable to the community. The fact remains, however, that there are limits to the extent to which the courts can reform or reinvent themselves.

The most important constraints on the courts derive from the requirements that they comply with high standards of procedural fairness and give reasoned decisions. It is no answer to suggest that the courts should sacrifice procedural safeguards and thorough scrutiny of the evidence and the law in the interests of speed and economy. One difficulty is that Chapter III of the *Constitution* imposes irreducible minimum standards that must be observed by courts exercising the judicial power of the Commonwealth. In any event, it is difficult to contend, for example, that fairness in criminal trials or in native title claims should be seriously compromised in order to meet financial constraints or standards of timeliness. None of this is to argue against measures designed to reduce the cost of litigation, or conserve scarce legal aid resources, provided that they are consistent with the fair and orderly conduct of legal proceedings. The fact is, however, that the proper exercise of judicial power is necessarily a labour-intensive and therefore expensive process. While efforts should continue to be made to reduce unnecessary delays or expense and to promote alternative dispute resolution, it is unrealistic to expect that the fundamental character of litigation will change. Strategies for promoting access to justice must recognise this constraint.

The second assumption, that the authority of the courts to resolve disputes will be enhanced, has recently been under challenge from two quarters. It is no coincidence that each concerns judicial decision-making in areas that generate high public anxiety and thus are open to political exploitation.

⁹ *Access to Justice: An Action Plan*, par 1.22.

Judicial review of migration decision has always attracted political controversy. Federal governments of all political persuasions have been wary about court decisions that threaten to thwart, if only temporarily, implementation of migration policy or administrative decision-making in migration cases. There is certainly nothing novel about Parliament enacting legislation, with bipartisan support, to curtail the powers of federal courts to review migration decisions.¹⁰ Nor is there anything novel about privative clauses. What is new about the privative clause recently introduced into the *Migration Act* is that, on one view, it leaves the courts with little scope for judicial review of the vast majority of decisions made under that Act.¹¹

I wish neither to comment on the policy underlying the privative clause nor on its operation, except to note that construction and validity of s 474 are presently before both the Federal and High Courts.¹² My point is simply that it should not be assumed that Parliaments consider that effective access to the courts is an inviolable principle.

Another area in which the authority of the courts has been undercut by legislators is that of sentencing. Mandatory sentencing laws, unlike privative clauses, do not prevent individuals gaining access to the courts. On the contrary, they only apply in the course of criminal proceedings. But mandatory sentencing regimes remove the judicial discretion to fix a penalty by reference to the circumstances of the individual offender. They represent a retreat from the principle that courts, of all institutions, should be able to dispense individualised justice.¹³ For those who might have

¹⁰ See, for example, the now repealed s 476(2)(b) of the *Migration Act 1958* (Cth), limiting the grounds of review available in the Federal Court; *Abebe v Commonwealth* (1999) 197 CLR 610.

¹¹ The privative clause is s 474 of the *Migration Act 1958* (Cth).

¹² Questions relating to the construction and validity of s 474 of the *Migration Act* have been argued before a five member Full Court of the Federal Court. Judgment is reserved.

¹³ See generally Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders Bill) 1999* (Senate Printing Unit, 2000).

thought that repeal of the Northern Territory's mandatory sentencing laws in October 2001 marked the end for such regimes, recent developments tend to suggest otherwise.¹⁴

So far as legal aid is concerned, public resources devoted to legal aid programs increased, albeit modestly, during the late 1980s and early 1990s. This reflected significant increases in Commonwealth funding of legal aid, although State grants and other sources of income also increased substantially during the same period.¹⁵ That these increases occurred at a time when economic rationalism was gaining ascendancy is perhaps surprising. Funding for legal aid is a particularly vulnerable area of social welfare expenditure. The direct beneficiaries of legal aid (not including lawyers), such as persons accused of serious criminal offences or individuals challenging actions of elected governments, not only carry little political influence but attract virtually no public sympathy. One explanation for this apparently surprising state of affairs—although not the whole explanation—is that for a time the Commonwealth was prepared to shoulder a heavier burden than a strict interpretation of 'Commonwealth responsibilities' might have suggested, thereby more than making up for the limitations of funding from State sources.¹⁶

Since the mid-1990s, public funding for legal aid has declined in real terms. It is no accident that this decline coincided with the Commonwealth's decision to cease funding legal aid for matters arising under State or Territory laws.¹⁷ That decision has created difficulties in the administration of legal aid. It has also made it inevitable that regional variations in the availability of legal aid will become more pronounced

¹⁴ Section 233C of the *Migration Act 1958* (Cth), inserted by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), Sched 2, provides mandatory minimum custodial sentences for certain 'people smuggling offences', found in ss 232A and 233A. The *Crimes Amendment (Murder of Police Officers) Bill 2002* (NSW), introduced into the New South Wales Parliament by the Leader of the Opposition, would, if passed, impose mandatory sentences for certain serious crimes.

¹⁵ See *Access to Justice: An Action Plan*, pars 9.23–9.29.

¹⁶ Taking the form of both grants and funds from statutory accounts.

¹⁷ The decision was announced in June 1996 and led to a reduction in Commonwealth funding of legal aid: Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Legal Aid System* (June 1998), Ch 1.

over time, thereby increasing the burden on community legal centres and other community organisations. The history of Commonwealth-State financial relations suggests that unless the Commonwealth is prepared to reassert a leadership role in the funding and co-ordination of legal aid, there is little room for optimism that the public resources available for legal aid will increase substantially.

Of course, public support for legal aid is only part of the picture. Recent reports have pointed to the contribution made by *pro bono* legal services in meeting certain kinds of legal needs.¹⁸ While the precise contributions made by voluntary service providers within the profession is difficult to quantify, there is no doubt that it is substantial. It is also clear that Governments can take steps, at little cost, to encourage and promote *pro bono* activities. But voluntary legal services, however valuable, cannot be a substitute for publicly funded legal aid.

Finally, the relentless rise of free market economics means that access to justice theorists and practitioners must confront the consequences of corporatisation, privatisation and the emergence of the new ‘contractualism’. Functions that only a few years ago were widely considered to be the inalienable responsibility of government are now discharged, wholly or in part, by the private sector. As David de Carvalho has said:

*Not only have those functions that ‘produce tangible and tradeable outputs’ such as electricity and garbage collection been contracted out or privatised completely, but so have those social services that have traditionally been seen as the responsibility of government in its role as guarantor of social rights: health services, disability services, housing for the poor, public transport and employment assistance to name just a few.*¹⁹

¹⁸ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89 of 2000), pars 5.12–5.20; National Pro Bono Task Force, *Recommended Action Plan for National Co-Ordination and Development of Pro Bono Legal Services* (2001).

¹⁹ D de Carvalho, ‘The Social Contract Renegotiated: Protecting Public Law Values in the Age of Contracting’ (2001) 29 *AIAL Forum* 1, 3.

The contracting out of responsibility for decisions governing entitlement to benefits under government programs has severed the direct links between individual claimants and government agencies. The new contractualism has even extended to the making of decisions as to whether individuals applying for income maintenance payments have complied with eligibility requirements. Margaret Allars comments that the novel feature of the current ‘mutual obligation initiative’

is that entitlement consists in a contractual right to benefits in exchange for performance of certain contractual duties. A recipient becomes ineligible for the welfare benefit by virtue of the reported ‘breach’ of the activity agreement. The state has a duty to provide welfare benefits and a right to the recipient’s active involvement in improving his or her employment prospects. A discretionary decision persists in the new regime in that the Secretary’s delegate determines whether ‘reasonable steps’ have been taken. However, the more critical step in the process is the earlier factual finding that a breach of contract has occurred. Continuing eligibility thus depends pre-eminently upon compliance with contractual obligations rather than with meeting statutory criteria.²⁰

The precise relationship between administrative law and the provision by the private sector of ‘collectively consumed resources and services’ is still to be determined. Some public law theorists argue for an extended application of administrative law principles, as a means of ensuring that the private sector adheres to public law values once it takes over traditional governmental functions. Others place (perhaps excessive) faith in the forces of competition to promote those values in the private sector. But it is difficult to see how administrative law, of itself, can make the private sector accountable in the same way as the public sector.

²⁰ M Allars, ‘Citizenship Rights, Review Rights and Contractualism’ (2001) 18 *Law in Context*, 79, 91.

Different mechanisms must be found to ensure that the private sector is accountable to its customers or clientele.

As is often the way, new mechanisms have indeed begun to emerge. Since 1990, a number of important industry-based consumer dispute resolution schemes have been established.²¹ These deal each year with many thousands of consumer complaints, for the most part expeditiously, without the complainants being at risk of adverse costs orders. Anita Stuhmcke argues with some force that these schemes should be seen as a means of public control over the private sector insofar as the latter delivers collectively consumed resources and services.²² The schemes help bridge the divide between the public and private spheres and, if properly monitored and administered, offer the prospect of genuinely effective means of resolving disputes outside the court system. As one door closes, another opens.

Conclusion

One of the problems that has bedevilled discussion about access to justice is a reluctance on the part of some participants to question the assumptions that underlie much of the rhetoric. Attempting to identify the more important assumptions and, where appropriate, to question their validity provides no guarantee of optimal policy outcomes. But the attempt may well reduce the likelihood that the wrong questions will be asked or that unrealistic expectations will be created of the justice system.

²¹ They include the Australian Banking Industry Ombudsman; the Telecommunications Industry Ombudsman; the General Insurance Enquiries and Complaints Scheme; and the Life Insurance Complaints Service: see A Stuhmcke, 'The Relevance of Industry Ombudsmen' (2002) 40 *Law Society Journal* 72; *Access to Justice: An Action Plan*, Ch 12.

²² A Stuhmcke, 'Privatising Administrative Law: the Telecommunications Industry Ombudsman Scheme' (1998) 6 *Aust Journal of Admin Law* 15, 16–17; *Australian Communications Authority v Viper Communications Pty Ltd* (2001) 110 FCR 380.

I have suggested that:

- there are inherent limitations on the ability of courts to resolve disputes speedily
- governments, regardless of political complexion, are not necessarily committed to the principle of effective access to courts
- unless the Commonwealth is prepared to reassert a leadership role in the national funding and co-ordination of legal aid, it is unrealistic to expect the public resources available for legal aid to increase substantially, let alone meet even the most obvious categories of need
- traditional public law mechanisms for ensuring accountability of decision-makers cannot readily be applied to the new world of privatisation and contractualism.

If these observations are right, it would seem that the time has come to recognise that many of the most promising pathways to justice be outside the court and tribunal system. In particular, they are to be found in the work of community legal centres, especially through programs designed to empower people to make ‘effective choices about legal issues’.²³ Perhaps access to justice has got much less to do with lawyers and courts than most of us have realised.

²³ J Giddings and M Robertson, “‘Informed Litigants With Nowhere To Go’: Self-Help Legal Aid Services in Australia’ *Alternative Law Journal*, Volume 26, No 4, August 2001, p 184.

PART 3

Perspectives from the Community

Access to Justice in Rural and Remote Areas

Barry Fowler

Manager/Social Worker, Broken Hill Community Inc

Disempowered People

Thanks very much for inviting me here today. I have just jotted a few points down to try to give you a flavour of the Far West of New South Wales. As a social worker, you are working with disempowered people. That in itself is an important consideration. Whether a person's got to front the court, Centrelink, a doctor, the police, the Housing Department or a bank manager for a loan, they are disadvantaged from day one. Clearly, there is a power imbalance in the relationship that will never go away no matter how much you try with legislation. People have been to those places so many times and the answer has been no. They do not have the confidence or resources to tackle something like a Court or a Tribunal. We have set up various new legal processes but, still, disempowered people aren't prepared or are not receiving redress and improving their life chances.

Whether you're in the inner city or in a small community in Western New South Wales, disempowered people virtually everywhere are faced with that lack of confidence, and that lack of support to take action in those areas. We tell people that there are a range of tribunals that they could access if they have got a problem with a motor vehicle, a trader, a bank or an Ombudsman.

Telephone Access

We tell people that these various bodies (tribunals, ombudsman) can be accessed through a 1800 telephone number. At Broken Hill our phone lines all go via South Australia so that for the first couple of years the 1800 services did not work as you needed a national number and that was more expensive than a state based number. That problem was rectified after we made plenty of noise about inequality of access. A current problem is that disempowered people often have only incoming calls. They cannot access a 1800 telephone number. So people who need to use an 1800 number have to find someone else's telephone that has full access. So if you receive inward calls only you can't actually access 1800 numbers in the privacy of your own home. Generally, these telephone calls are sensitive and you don't want to approach a neighbour to use their telephone. Certainly, the 1800 numbers have been very useful for rural and remote people. Just awareness that there is an 1800 telephone number available is a huge problem. You might be given a leaflet but unless it is relevant for you right now you tend to throw it out. So, doing major mail out campaigns may not be very effective. A fridge magnet with contact details is a safer path. If you can access a telephone, disempowered people have got to have this belief that these people in Sydney can actually make a difference. They seem to be so remote from their community how could they possibly know. I think 1800 numbers are great and are one option to outreach to rural and remote communities.

Visits By Tribunals

This year, a tribunal visited Broken Hill, but no one seemed to know that the body had come to town. I don't know whether that was a strategy, but to me I thought it was a great opportunity to say 'listen, here we are, make a song and dance, here's the tribunal, it's here visiting the bush'. It was an opportunity to say 'here is the legal system at work' and hopefully encourage people to make use of it. People need to be aware of visits as it is a great opportunity to show the flag. Visiting tribunals could highlight

that a case is happening—just the fact that cases have actually got up. So, we have a major problem that disempowered people have no belief that their personal issue can be addressed by the courts, new legislation or a tribunal. At the local level, people really need ‘champions’, people who are prepared to say these visiting tribunals are worth accessing, make people aware and encourage people.

Literacy and Numeracy

Literacy and numeracy is a big issue. In Broken Hill, you might just think that literacy and numeracy rates would be better than the surrounding communities with higher Aboriginal populations. Today, Broken Hill has a population of 20,000 with a quality schooling system, but it has higher rates of illiteracy than the national average. In past years, young males were guaranteed a top job as a miner after leaving school. So why did they have to worry about reading and writing? So quite often social workers and the legal fraternity make this assumption, that these people can read. We give them a brochure, we tell them about a tribunal. We have pockets of people that we assume have good literacy and numeracy. So again we need to be aware of local factors when trying to improve access to services. Virtually, we need to design individual plans for rural, remote and metropolitan communities.

Internet Access

Today, there is trend toward forcing people to access information via web pages rather than in person or telephone. You are told to look up a web page and it is amazing that you cannot actually talk to a human being. You ring down and they will say, ‘oh it’s on our web page’. You look on the web page and there’s not an e-mail address or the postal address. It seems to be collusion to stop you accessing real people. For people on station properties or remote villages, it takes 15 minutes to download a website.

It is very, very slow and therefore expensive via STD rates. Web pages have drawbacks, but at least it's information. We are told that Telecentres (the rural alternative to the capital city cyber café) are going to make a difference. At a Telecentre, where we can access one, there are computers and you can log on with a fast link up. It is planned that Telstra will roll out a satellite service for station properties. But I guess the thing we need to explore is who has a computer. If you do not have a computer, you have to have confidence to go to a Telecentre. If you live in Wilcannia or Ivanhoe where the population might be 100 or 500 people, the ability to remain anonymous is pretty difficult. Logging on can be pretty nerve-racking if you intend to contact ICAC about lodging a complaint about a Councillor, trader or police officer. So just finding information is really difficult in rural and remote Australia.

Confidentiality

Confidentiality is a really big issue in rural and remote areas. It does not matter whether the community is 100 or 20,000 people. These communities don't have a turnover of population. There hasn't been a mobility of people. My own experience highlights confidentiality. When I moved 27 years ago to Broken Hill, my wife said, 'well it is my home town and there are lots of relatives here and they all know everyone's business'. It was amazing that on my first day working for Social Security I did some visits to clients. When I came home at lunch time and she said to me: 'well I told you they would know what you were doing - I can tell you that an aunty said 'does your husband drive a Commonwealth car?' This morning at 11am you were visiting someone on the corner of Beryl Street'. Yes, aunty was spot on. Sometimes, you hoped people might get confused with Telecom cars, but most realised the difference. So, people have never moved, never shifted house and therefore know strangers and can pick out the government people. The result is that when you go to Court, if you go to a government department office or someone calls to your home, everyone makes assumptions about what you are there for.

Media Aggregation

As a result of media concentration, the opportunity for debate of social issues or reporting legal cases has been reduced considerably. Also, in rural and remote areas, people can obtain their news and information from other states. Menindee and Wilcannia has more television and radio than Broken Hill with 20,000 people. It comes from Imparja television based in Alice Springs. Also, QTV has information coming out of Mt Isa, Townsville or Brisbane and late at night it's coming out of Sydney. At 3 am in the morning and you actually see ads for, a car yard on Parramatta Road. So, you are hearing of legal cases, new legislation and tribunal hearings that are happening in South Australia, Northern Territory or Queensland. So there is a lot of confusion that comes from the fact of people living close to the borders due to television and radio coverage. So, one third of the NSW is receiving mixed messages and not hearing of social issue debates. In preparing any media campaign to outreach a new initiative, we need to consider this aspect.

Cultural Values

The other thing I think is that country cultural values are different. People tend to be very, very conservative. My guess is that it reinforces the view that you can't change things. If you have got plenty of money though you can. Recently, there was the case of a grazier whose property was flooded. It was the worst floods in history, something like \$500,000 in damage. The insurance company decided not to pay and that case went right through to the Supreme Court. Again, what happened was this was a story where someone took on big business and government but straight away the locals said 'well it is okay if you are a grazier and you have got money'. And that's the sort of stuff that just reinforced the fact that, if we take someone on, we are not going to win. That we cannot change things.

Recruiting Personnel

In rural and remote areas, it difficult to recruit professionals, whether it is solicitors, social workers, teachers, nurses or doctors. These positions can

support disempowered people in their working the legal system. Generally, a lot of positions are base grade positions. Hence, they are graduates who occupy those positions for a very short period. Like one of the domestic violence workers' positions was filled for two days and the person left because it was just too hard. There was basically no support. So, we often set up a lot of support worker or outreach positions, in rural and remote areas. But they will continue to fail to support disempowered people because they are graded very low, filled by inexperienced professionals and they have no support systems. These positions support people to access the legal system or follow up issues of housing, transport or whatever. There are some positive initiatives that need to be extended to other professions. In the health system there is a lot happening to try and get doctors and nursing staff to get more familiar with the country as part of graduate training. Their graduate program has visiting programmes and financial incentives to relocate.

I guess that it could be the approach of the legal fraternity or people who are working in tribunals, the fact that there is an opportunity for them, as part of their training, to actually come out and actually spend some time there.

Access to Justice for People with Disabilities

Phillip French

Executive Officer, People with Disabilities NSW

The legal system is the site of great injustice to people with disability in many respects. And in this brief discussion this morning what I wanted to do was highlight five roles in which people with disability find themselves and some of the issues that they face.

Most of what I will say will be pretty negative but it is important to recognise that some things are also being done about some of these things that I am going to say. Things are improving but that there's not going to be time to talk about some of those improvements but there are many issues still to be faced.

The five roles that I wanted to highlight are:

- firstly, people with disability as right bearers
- secondly, people with disability as victims of crime
- thirdly people with disability as suspects and offenders
- fourthly, people with disability as civil litigants
- lastly, people with disability as criminal justice system personnel.

Coming back to the first issue and just highlighting a few points. One of the biggest problems that people with disability face is that they don't have the same range of rights that are capable of assertion as do many other people within our community. You might find that rather challenging as a proposition but it remains the case. For example, people with disability who want to immigrate to Australia first of all aren't entitled to emigrate to Australia because they may potentially be a burden

on our health and social security system and if you want to complain about that you've got no forum to go to because immigration law is exempt from the Disability Discrimination Act. It is just one example. Another example is in the area of tenancy law. Many people with disability live in itinerant types of accommodation, boarding houses, caravan parks, those sorts of places. They're boarders and lodgers, many people.

Although the person with a disability is in one of the most vulnerable environments that you can imagine in terms of accommodation and although much of this accommodation is of very poor quality, the fact is that there is very little tenancy law that prevails over this area. People with disability are licensees to be tossed out at any time by the proprietor and very little can be done about it. Even in the area of supported accommodation, tenancy law hasn't developed to the point where it recognises the person with disability as a tenant with enforceable rights under tenancy laws. Because of the nexus between support and tenancy, people with disability have been excluded from residential tenancy legislation. That's the second example.

A third example that I've highlighted there is the rights to due process, to absence of political interference and so forth under the Mental Health Act. If you are a person who is committed to a criminal justice facility under the Mental Health Act at the pleasure of the Minister, even though we have the Mental Health Review Tribunal that is meant to adjudicate the case and provide advice and to safeguard the person's rights, all of that can be over-ridden in an instant because of a decision taken in the Centre for Mental Health or in the Minister's office. But people with a disability are right bearers in the same way that other people are. That is one of the biggest issues that we've got in our justice system—improving the right bearing entitlement that people with disability.

The second role that I want to highlight is people with disability as victims of crimes. I think most people would appreciate that people with disability are, to a much higher degree than many other population groups, victims of crime. That's often because they are in situations that are dangerous and violent. For example, the population of homeless people in Sydney—

in some population groups something like 80 per cent of homeless people are people with disability—people with mental illness, brain injury and so forth. Well, the street culture is pretty violent and people with disability get beaten up very often in those environments. A lot of people with disability live in residential care environments. There is a huge power imbalance between the staff in those environments and often very vulnerable people. You even have Government reports like the Auditor General's survey of large residential centres which illustrate the degree of assault and broken bones and sexual assaults and so forth that occur in those kind of environments. Those crimes don't get reported. Women with intellectual disability and mental illness are particularly susceptible to sexual assault.

So in part it's the circumstance that people are in, but then you face other huge barriers. The barrier of belief among criminal justice personnel. Police often don't believe that a crime has been committed on a person with intellectual disability or a person with mental illness. Even if they do believe that a crime has been committed, even the most courageous police officer faces an enormous evidentiary problem in preparing a successful prosecution and that's because the person with the disability might not be able to give evidence in the usual way or be viewed as reliable and so forth. One of the most important things that needs to happen in fact, even in specialist service areas, is the introduction of some kind of protective regime, similar to the *Children (Care and Protection) Act*, but in relation to adults with disability who aren't necessarily able to report crimes effectively or defend their rights. In the absence of that, often abusive staff will be able to continue to work because there isn't the capacity to sack them, there wasn't proof of misdemeanour or of an assault or whatever and so the person will continue to work there. That doesn't happen so much in the area of children because there is a Care and Protection Act that provides some onus on the state to intervene.

The third role that I want to highlight is people with disability as suspects and offenders. I think most people appreciate that people with disability are vastly over-represented in our criminal justice system, whether that's as suspects or people appearing before the courts or whether it be people

in the criminal justice system. Something like, in some populations, 48 per cent of people appearing before local courts are people with intellectual disability and though the figures are contested hotly it certainly seems to be the case that around 40 per cent of people in our criminal justice system are people who have mental illness or brain injury or people with intellectual disability. So clearly there is a major problem there.

The fourth area I would like to highlight is people with disability as civil litigants. A number of speakers have already talked this morning about the problems faced by all sorts of groups in getting access to legal aid and it certainly has been under enormous pressure over the last five years or so. That's very adversely affected the capacity of people with disability to bring action under key pieces of legislation like the Disability Discrimination Act.

The other point that I wanted to highlight here though is that a lot of what people with disability rely on in terms of assistance is highly discretionary in nature and very connected to the exercise of executive power. And while there have been attempts to establish appeal rights, for example, around the funding of disability services in New South Wales – basically as Simon who is here from PIAC will attest, who has acted for us in a number of these matters—there has been an enormous amount of political interference in administrative and judicial process, even to the extent where tribunal members are removed in the middle of a hearing, basically by Government Ministers whose decisions are being appealed. Tribunal members getting appointed without interview who have connections to one particular political party—just the most unbelievable things that occur in these sorts of jurisdictions—and that's precisely because of closeness of the issue to executive prerogative or effective power, and the Parliament or at least the government being very unwilling to let those sorts of matters be adjudicated.

There is also a major issue, which has improved somewhat, around standing to bring litigation on behalf of people with disability. If you have a severe intellectual disability then clearly it is not going to be very easy for you to bring a matter yourself. It is quite important for people with

disability to have access to the legal system that there be broad standing in the law for third parties to bring matters on their behalf.

Finally, I wanted to highlight the role of criminal justice system personnel. I think it is common to talk in Access to Justice circles about the right of people to see themselves reflected in our justice system, people like you or otherwise you might not feel that the justice system is fair. People with disability are structurally excluded from things like legal education and that flows through then to becoming lawyers and judges and those sorts of things. People with disability don't see themselves in our justice system generally. It is improving in part but there is still a major issue there.

There is also an enormous cultural resistance to the idea that people with disability can adjudicate cases and I will just highlight an example. There was the *Finney v The Hills Grammar School* case, which most of you would have seen, where a number of people wrote letters to the Sydney Morning Herald about Graeme Innes who adjudicated that first instance there as being like Dracula in charge of the blood bank because he was a blind man adjudicating a case involving education discrimination. Now that attitude was not only there in public but it was also there within the legal system itself. I often heard comments of that general nature made about whether he was a suitable person to sit on discrimination cases because he is a person with a disability.

The jury system which is the thing that I will end on is also an important area of prejudice and discrimination against people with a disability. Not just because people who are in a wheelchair for example can't get into a jury box so that remains an issue of our courts. But also the exclusion of people who might be deaf or blind for example as jurors. The New South Wales Law Reform Commission is currently conducting an inquiry into the exclusion of people who are deaf and blind from jury service and I hope that will produce a positive outcome. But there is enormous resistance within the legal profession and indeed the court system itself to accommodate blind or deaf jurors.

So to sum up then, I just wanted to highlight, by way of opening a discussion around these issues, why it is that the experience of the legal system is often justice diminished or justice denied for people with disability. There are some positive things happening but there is an enormous way to go.

PART 4

Options for Reform

Accessible and Equitable Information and Advice

Richard Funston

Director, Family and Civil Law, Legal Aid Commission of NSW

Introduction

The Legal Aid Commission of NSW is one of the major providers of legal services in NSW. Apart from our in-house practice we contract work to the private profession and manage the funding allocated to 32 Community Legal Centres (CLCs). In 2000/2001 the Commission provided 318,821 client services to people in NSW. Advice and information services made up almost half (156,394) of the services provided. In this context I will attempt to provide an overview of how the Commission has provided information and advice services, especially targeting our core client group.

Our client profile from our 2000/2001 Annual Report shows that 60.2 per cent of our clients were in receipt of Commonwealth benefits, 51.4 per cent were women, 30.8 per cent were NESB, 2.0 per cent were under 18, 1.4 per cent were ATSI, 11.7 per cent were from non urban areas and 3.5 per cent were over 60.

We have an obligation to target those that are socially and financially disadvantaged in our community eg young people, people with a mental illness, older persons, people from a culturally diverse background. We have been proactive in developing initiatives in partnership with other agencies in both the government and community sectors. I would like to

think we have learnt the benefits of gaining feedback from our in-house solicitors, staff from CLCs, private practitioners, other Legal Aid Commissions, agencies within the justice portfolio eg. Attorney General's Department, Office of the Director of Public Prosecutions (ODPP), Juvenile Justice, etc.

Accessibility deals with the idea of persons being aware that the agency exists, what services it provides and how to use those services. It is vital clients/consumers understand the information provided. It must be in plain English. Legal concepts and language must be demystified. Demographic information available from government census, local government and other appropriate research is vital. Any work that the Law and Justice Foundation is doing in this area, ie legal needs analysis, has my full support. I acknowledge the views expressed in this paper are my own views and not necessarily those of the Legal Aid Commission.

Examples of Legal Aid providing accessible and equitable information and advice — hot spots:

Community Legal Centres

Historically, funding to Community Legal Centres (CLCs) has been linked to their ability to meet the needs of their communities. Thirty-two centres are allocated funding through a program managed by Legal Aid. The services that each of the centres aims to provide are set out in annual strategic plans. These plans generally include outreach, CLE, law reform and other initiatives. CLCs do not want to duplicate the work of Legal Aid or do work that the combined CLC group would deem core legal aid work. This point was made clear to me recently by the combined CLC group with a family law initiative I had in mind. CLCs traditionally focus on people not able to access mainstream services as a result of their location

or their special needs, women experiencing domestic violence, young people, homeless people, people with disabilities, people from rural areas. Advice and information is a vital part of the work that CLCs undertake. In 2000/01, 34,629 advice sessions were recorded and 34,700 information sessions were provided.

Video conferencing

At present the Commission is participating in a Video Conferencing Pilot scheme, a justice sector initiative, sponsored by the Attorney General's Department, managed by the Department of Public Works and reporting to an interdepartmental committee. This initiative is using video conferencing facilities to undertake tasks related to legal representation that previously required face-to-face attendance. The scheme is being monitored to ensure that it best meets the requirements of all stakeholders involved.

Potentially such facilities could be also be used to provide legal advice and information to persons who cannot physically get to an office where advice is provided and where it is beneficial to both the client and advice provider to have visual contact. Persons in rural communities and those in institutions or group accommodation may be potential beneficiaries of such services. I acknowledge that we need to proceed with caution in this area. It would be dreadful for example to find out that all mental health hearings before magistrates are being conducted by video conferencing.

LawAccess

LawAccess delivers advice and information to people across the state using a free telephone service that is equipped with a detailed database that links local service providers to a legal problem. LawAccess is a new service that has evolved over the last two years, which merges the services formerly provided by the Legal Aid Commission HelpLine and the Law Society of NSW Community Assistance Department. It provides in a

majority of matters a single point of access to legal and related assistance services in NSW. I am mindful, as are the staff at LawAccess, that when a referral is made by LawAccess it must be the right referral. For example, family law information and/or advice that cannot be given by LawAccess staff should be referred to Legal Aid NSW rather than a small frantically busy community legal centre.

Hotline for under 18s

The Legal Aid Hotline for Under 18s was set up in October 1998, in response to the *Young Offenders Act*. Jenny Bargaen will shortly speak about this. The Act requires police to advise young people that they are entitled to get legal advice before a referral is made for a caution or a youth justice conference (sections 22(1)(b), 39(1)(b)). The Hotline provides criminal law advice about all matters affecting those appearing before the Children's Court. Advice is given to children and their families. Priority is given to calls received from young people in police custody.

The Hotline is staffed by a roster of solicitors from the Children's Legal Service of Legal Aid. During business hours, all calls are answered in the first instance by the Hotline information officer. Appropriate calls are then transferred to the solicitor on duty. Inappropriate calls, eg about family law, are referred to the appropriate service.

Expanded Operating Hours

The original operating hours of the Hotline were 9 am to midnight on weekdays, and 12 noon to 12 midnight on weekends and public holidays. On 11 February this year the Premier approved the expansion of the Hotline and the allocation of the necessary funding. On Friday 8 March 2002 the Hotline's hours were expanded for weekends and public holidays. The service is now available 24 hours a day from Friday morning until midnight on Sunday night. Legal Aid is continuing to promote the expanded Hotline operating hours. We are also negotiating a protocol with police to increase the effectiveness of the service.

Statistics

Demand for the Hotline has been increasing steadily since it was established.

- 1 October 1998 to 30/6/99 3005 calls
- 1 July 1999 to 30 June 2000 9375 calls
- 1 July 2000 to 30 June 2001 13476 calls (up 43.74 per cent on previous year)

Snapshot of the three months after the Hotline hours were expanded

Month	Total Calls	Calls during expanded weekend hours
March	1310	153
April	1350	106
May	1248	70
Total	3908	338 (8.65 per cent)

Get Street Smart

On 18 March 2000 the Minister for Juvenile Justice, Carmel Tebbutt, launched our Get Street Smart publication. This pocket size booklet aims to give people under 18 an overview of their rights when interacting with police and security guards in public places, and during police questioning. We released the fourth edition of the booklet in April of this year after additional consultation with police. It includes new information on searches by sniffer dogs and on forensic samples. The back cover of the booklet includes a tear out wallet sized card with the details for the Legal Aid Hotline for Under 18s. It is vital that any publication like this is up to date.

Legal Aid Website

This method assumes that people have access to a computer be it their own or one in a library. Further, it is only of benefit to persons who are literate and have computer literacy skills. It must be acknowledged however that it is a powerful way of providing advice and information to large numbers of people in the community. At present the Commission is investigating ways that it can increase the range of information that it can provide over the website.

Published materials

I have a show bag with me of publications the Commission has produced in the last few years. Many publications have been updated/enhanced following extensive consultation with client groups. These published materials, particularly when available in languages other than English, are all about access and equity. (*See Annexure.*)

Outreach

Legal Aid NSW is actively involved in outreach work across all areas of our legal practice. For the purpose of our discussions today, I propose to concentrate on a few of our outreach programs:

Veterans Advocacy Service

The Veterans Advocacy service has established relationships with the Vietnam Veteran Associations, RSL Associations and with indigenous communities through the Aboriginal and Torres Strait Islander Veterans Association (ATSIVA) in Moree, Kempsey and Coffs Harbour. Many Veterans have a physical and/or psychiatric disability. Current advice and information services are available in Newcastle, Wollongong, Nowra, Bateman's Bay and Coffs Harbour.

In March, at the invitation of David Williams, Aboriginal and Torres Strait Islander Veterans' Association (ATSIVA) and Aboriginal elders, advocates Anastasia Toliopoulos and Jodie Buchanan visited Kempsey to provide community legal education and advice to Aboriginal veterans and their dependants. About 30 Aboriginal families attended the meeting by the riverbank. Veterans, widows, second and third generation dependants of veterans, and RSL representatives all sat together for the first time. They were interested in advice about entitlements and assistance in matters relating to freedom of information, disability and service pensions, war widow's pensions, war graves and medals.

A repeated theme was that second and third generations of veterans are seeking compensation for unpaid entitlements post WWI and WWII to address past injustices. I understand one Aboriginal elder told the story of her grandfather who served in Gallipoli and contracted tuberculosis, needing hospital treatment during service. He did not receive a disability pension for his war-caused condition which plagued him all his short working life. After he died of tuberculosis, his widow did not receive a War Widow's pension. Only one of their 10 children is still alive, living in a nursing home in Kempsey.

VAS will continue to work in close partnership with ATSIVA. Veterans and widows who were assisted to lodge claims for pensions in Kempsey will be given ongoing advice and assistance to see their matters through.

Mental Health Advocacy Service

This service provides advice and representation to people who have a mental illness. Most of these services are provided at institutions throughout the state. Lawyers from our in-house civil law sections complement the services provided by our Mental Health Advocacy Service (MHAS). The MHAS recently submitted a detailed report to the Legislative Councils Select Committee Inquiry into mental health services in NSW.

Women on Wheels

In the last couple of weeks Legal Aid NSW in partnership with the Department for Women joined in again on Women on Wheels (WOW). This successful bus tour provided rural outreach to isolated women travelling to the North and North East of New South Wales. The bus carried women representing a range of organisations to towns that have poor access, or sometimes no access, to free information and legal advice. Legal Aid lawyers promoted our services to local communities and encouraged local practitioners along the way to undertake more legal aid work. Presentations to Aboriginal communities were particularly well attended, with over 50 women turning up in Grafton.

I understand in Lismore, a worker from the Aboriginal Women's Domestic Violence Refuge told one of the Legal Aid lawyers, 'We had only one female solicitor and then she stopped working so we really appreciate getting names of private practitioners who will do Legal Aid work'. In the second leg of the journey covering the Northern Tablelands, the Legal Aid lawyers left behind information and resources that will hopefully help to break down the sense of isolation experienced by many rural women.

Aboriginal Outreach

ATSIFAM (Aboriginal and Torres Strait Islander Family Mediation) is a new mediation program for Aboriginal families, supported by Commonwealth Government funding, and is now open for business and looking for referrals. Two new recruits, field officers Barry Cain in Dubbo, and Frances Ralph in South-West Sydney, are already out on the road talking to their local communities. These areas have been piloted for their large Aboriginal population (estimates in Dubbo vary from 6,000 to 11,000 people) and lack of Aboriginal services. The focus on one regional area and one city area will provide a valuable comparison to help plan the program's future direction.

The new program is part of Legal Aid's Alternative Dispute Resolution Section and follows months of consultation with Aboriginal communities.

Coordinator Ellen Downing believes the service will be very relevant to Aboriginal people. 'Legal Aid is committed to a service that Aboriginal communities will really use. No decisions have been made without the direct involvement of Aboriginal communities.' Twelve people, the majority Aboriginal, were trained in both Dubbo and South-West Sydney. The training course came up with a model of mediation that will hopefully work well within Aboriginal families, and the input and experience of the trainees was essential in the development of this model. I understand the idea of having access to a mediation service has been greeted enthusiastically by Aboriginal people.

A Memorandum of Understanding

Further to the statement of co-operation between the Legal Aid Commission of NSW (the Commission) and the Coalition of Aboriginal Legal Services of NSW (COALS) dated 5 April 2001, the Commission will enter into a twelve month pilot agreement with the Sydney Regional Aboriginal Corporation Legal Service, Western Aboriginal Legal Service and the Kamilaroi Aboriginal Legal Service (the RALS) for these Offices to provide family law advice and, where appropriate, representation (including primary dispute resolution) in those matters that are within the Commonwealth agreement and are consistent with the Commonwealth guidelines for family law matters. A Memorandum of Understanding (MOU) is being negotiated with the Legal Services in relation to this pilot project. The MOU will provide that:

- in order to facilitate this pilot, the Offices will be entitled to be paid by the Commission for all family law advices. The rate for the advice will be pursuant to the Commonwealth agreement. Further, where representation is appropriate the Offices will be entitled to submit an application for legal aid and have that application lodged and assessed like any other private practitioner
- the Offices involved in the pilot will be trained by Commission staff about the Commonwealth agreement and Commonwealth guidelines and recording in family law matters

- the Offices involved in the pilot will be trained by, if possible, Commission staff in the use of e-lodgement
- the Commission will use its best endeavours to ensure as far as practicable, other services including LawDocs, MCLE, library resources and other legal information currently available to Commission staff will be available to the Offices involved in the pilot.

At the expiration of the pilot, and once the pilot has been assessed, the Commission expects that COALS will be in a stronger position (by way of statistics) to submit to their funding body the need for funded family law positions.

Conclusion

Hopefully I have suggested a few ideas or planted a few seeds. With a topic like this and an organisation like Legal Aid there is always a lot more to talk about. I am particularly proud for example of a pilot duty scheme recently introduced by us at the Family Court and the Federal Magistrates Court at Parramatta. No doubt you will hear more about this scheme and other access and equity initiatives introduced recently by Legal Aid down the track.

Of course we can do more. As Her Excellency, Professor Marie Bashir AC, Governor of NSW, stated at the Legal Aid/Law Society Specialist Accreditation Conference on 5 July 2002, ‘One organisation alone cannot do it all’—we are trying to take up the challenge. I urge everyone in this room, if they are not already, to join us in that challenge.

Annexure—Legal Aid Publications

Internal Publications

Annual Report
Legal Aid News
Legal Aid Application Form
Legal Aid Duty Application Form
Legal Aid Policies
Means Test Guidelines
Legal Aid Commission of NSW Policy Manual

General Brochures, Booklets and Tapes

Do You Have a Legal Problem?
Questions You Should Ask Your Lawyer
Family Law: Frequently Asked Questions
Child’s Representative: Your parents are going to court; what will happen to you?
Turning the Tide: Floods and Insurance — a guide to getting your insurance claim paid
Are You Being Squeezed for a Debt?
Get Street Smart: Under 18? Know Your Legal Rights

Specialist Services Brochures

Family Law Conferencing
Mental Health Advocacy Service
Prisoners’ Legal Service
Legal Help for Veterans and their Dependants
Do You Need Help with Child Support?

Criminal Law Information

Apprehended Violence Orders (Applicants)

Apprehended Violence Orders (Defendants)

Are You Applying for Supreme Court Bail?

Are You Facing a Committal?

Are You Pleading Guilty to a Drink Driving Charge?

Character References leaflet

Reviewing and Appealing Local Court Decisions

Have You Breached Your Parole?

Going to Court: A Handy Guide to the Local Court for Defendants
booklet

Telephone Cards

1800 Help Line Card (*Not being reprinted*)

Under 18s Hotline Card

Posters

Under 18s Hotline poster

Who's Who in the Local Court poster

Get Street Smart mini poster

1800 Help Line mini poster (*Not being reprinted*)

External Publications

Fair solutions for separating couples: Family and Child Mediation,
Department of Family and Community Services, Commonwealth
Attorney General's Department.

*What will happen if I don't pay my fine? Information about fine
enforcement*, State Debt Recovery Office, NSW Attorney General's
Department.

The new fine enforcement system: What does it mean?, State Debt Recovery Office, NSW Attorney General's Department.

How We Help: A guide to Community Services, NSW Department of Community Services

Domestic Violence: You can live without it, NSW Department of Community Services

Making a Complaint about Serious Police Misconduct, Police Integrity Commission

Find the Law, Legal Information Access Centre

Love and Loans: What every woman needs to know about relationship debt, NSW Department of Fair Trading

The Rental Guide, NSW Department of Fair Trading

Freedom of Information: Your Right to Know — Guidelines for using FOI in NSW, NSW Premier's Department

Freedom of Information: Your Right to Know — Reviews & Appeals, NSW Premier's Department.

Alternatives to Traditional Approaches in Civil and Criminal Law

Jenny Barga

Director Youth Justice Conferencing, NSW
Department of Juvenile Justice

Firstly I'd like to acknowledge that we're on Gadigal land, and look forward to the contributions from our Indigenous brothers and sisters. Secondly, I'd like to thank the Law and Justice Foundation for initiating this incredibly ambitious project, and to thank Julia Perry and her colleagues for inviting me to participate in its genesis. It's wonderful to be able to meet with and address such a diverse group of people from a wide range of areas who are interested in the broad topic of access to justice.

Introduction

My topic is alternatives to 'traditional' approaches in civil and criminal law. Before outlining some of these alternatives and setting out where we're up to in NSW in their development, and posing a few issues to ponder along the way, I'd like to ask us all to remember, when considering these 'alternatives', that the way we look at and think about an issue, or a program, is very much affected by where we sit and who we are and what we know and how we know what we know. Each of us will think about the programs and issues from our own perspective—rural and regional NSW, disabilities, youth, welfare, legal and many other perspectives are represented here today—let's listen to and learn from each other.

My background, as Julia said, is in researching and teaching in criminal law and juvenile justice. So while I will mention some of the alternatives

in civil law, I will concentrate principally on some recently introduced alternatives in criminal law.

Alternatives to ‘traditional’ law?

I have a problem with the word traditional—which to me suggests the ways in which Indigenous folks have ‘done justice’. Perhaps the most useful description is not that the ‘systems’ of civil and criminal law in operation in NSW are ‘traditional’; rather, they are ‘adversarial’, having been brought to this country by Arthur Phillip from Britain not much over 200 years ago.

Some of the most intractable barriers to access to justice seem to me to be related to the reliance on and belief in an adversarial approach that pits one side against the other and always has declared winners and losers. The alternatives to this approach that I’ll mention today generally reject, modify, or operate alongside an adversarial approach, preferring various forms of mediation, conciliation or conferencing. Many utilise restorative justice processes, which generally situate varying degrees of responsibility for the resolution of harms in the hands of those who are have caused, and those who have been most harmed by, what has happened.

There is another way of comparing and contrasting ways of ‘doing justice’ and that is by considering just who has the power to make the decisions. In some alternative approaches an expert will make the decisions. Yes, everyone has their say, but ultimately the decision is left with the tribunal members or the person who is conducting the mediation or conciliation of the issue. For other processes, such as restorative justice, the aim is to ensure, as far as possible, that those who are most affected by what’s happened to disrupt the balance are those who make the decisions about what should be done to restore it. Let’s keep this distinction in mind, particularly as we consider some of the alternatives in civil and criminal law.

Some civil law alternatives

- Family Law
- Commercial Law
- Neighbourhood disputes—
Community Justice Centre Mediation
- Family Group Conferencing in Child Welfare
NZ since late 1980s
- Vic/SA legislated schemes

These are just some of the civil law alternatives that operate today in NSW and many other parts of Australia. Richard has mentioned some others, and Gordon may well talk about these and other alternatives. Family group conferencing, which draws from restorative justice principles, is available in child welfare matters in some parts of Australia, although not so much in New South Wales. Certainly family group conferencing in child welfare matters has been operating in New Zealand for well over ten years now. Victoria and South Australia have legislated schemes. In New South Wales the 1998 Child Welfare legislation incorporates provisions for the use of family group conferences in working out child protection matters, but no real moves have yet been made to bring these provisions into practice in New South Wales as far as I am aware, apart from a pilot program run by Burnside at Parramatta, in collaboration with DOCS a couple of years ago—which was very positively evaluated. The evaluation report indicated that the effective and skilled use of family group conferences in a range of child welfare matters gives everyone involved with the child a say about what happens with that child and the family.

Alternatives in criminal law

I now turn to some of the ‘alternatives to traditional criminal law’ now operating in NSW, but please note that it is important to distinguish here between adults (those 18 and over), and children (all the rest). For children, the civil and criminal courts generally operate as a benevolent jurisdiction, aiming in the majority of matters to consider how to act in the best interests of the child and to help the child to develop into a contributing, positive adult. Some of the young people who go through the courts and indeed some of those who participate in some of the alternatives such as youth justice conferencing may not think that is the case, but certainly that is a primary aim of the majority of adults working in this benevolent jurisdiction.

a) Circle sentencing

For some Indigenous adults, circle sentencing is currently being piloted by the Aboriginal Justice Advisory Council (AJAC). Briefly, circle sentencing is about empowering those who are most affected by crime and bringing that community into the court with the magistrate to make the decision about what happens to the offender. Circle sentencing originated some years ago from discussions between first nations people and judges in the northern provinces of Canada. There have been some very positive outcomes in the about, I think, eight cases, that have so far have gone through the pilot currently under way at the Nowra local court. Rowena Laurie is here from AJAC and will, I am sure, share some of the wonderful stories of real community involvement that are now emerging from this pilot. Work is already underway to establish another pilot in the Dubbo local court in the very near future.

b) Young adult conferencing

You may have been aware of the consultancies a little while ago on a proposal for a court based conferencing pilot proposal for young adult offenders. All I can say on this is that it may be a while before we see this proposal piloted anywhere in NSW.

c) The Young Offenders Act

For children aged between 10 and 17 in New South Wales the *Young Offenders Act 1997* is the primary legislated scheme for diverting young offenders from the usual route of court and mandated community order or custody.

I and a number of others were very much involved in the gestation of the Young Offenders Act over many years, and are now watching and perhaps participating in its growth as a real alternative. Some of you in rural areas probably feel that it hasn't impacted that much out there but our data is showing that it is indeed starting to do so.

The scheme under the Young Offenders Act

The Act sets out a legislative hierarchy of responses to young offenders (warnings, formal cautions and youth justice conferences), contains a clear set of objects, principles, and purposes, is designed to steer young offenders away from court and talks in terms of eligibility of young offenders to be dealt with in the least intrusive and most appropriate way. The part of the Act for which I am responsible is youth justice conferencing, which is the newest, youngest, and probably the most innovative part of the NSW juvenile justice system. The set of responses under the Young Offenders Act is different from the old system. It talks in terms of the young offender's entitlement to be dealt with in the least

intrusive but most appropriate manner that is commensurate with the circumstances of the offence and the offender. It also requires a great commitment on the part of police to comply with this law. While it is true that police compliance with the Act is not universal around New South Wales it is equally true that all of us involved in the operation of the Young Offenders Act have been working hard with police to achieve significant levels of compliance with both the spirit and letter of the Act. I now can say with some joy that some of the youth liaison officers, a fair proportion of those who have been working under the Young Offenders Act as decision makers and working in the community with young people since the commencement of the Act in April 1998, are probably now the most positive proponents for working positively with young people—having learned that respect generates respect and that responding with a heavy hand to young offenders generally doesn't work and may well generate further offending.

Okay, what is the Act aiming to do? Have we, after four years of operation, begun to meet any of those aims? I'll come back to that question shortly.

Aims of the Act

- To make young offenders take responsibility for their actions
- Encourage families and communities to share this responsibility
- Acknowledge rights of victims
- Repair some of the damage caused by crime
- Avoid cost and time of a court appearance
- Steer young offenders away from detention
- Improve public confidence in the juvenile justice system

Richard mentioned the legal safeguards. These safeguards are important to us because there is a view that the Act could be seen as an inducement to young people to admit offences when they are not guilty. We have worked very hard in collaboration with NSW Legal Aid to ensure that wherever possible, young people can get access to legal advice about whether they should admit an alleged offence before they start talking to police about what happened.

Yes. It is a big ask isn't it? The Hotline was established to meet this need, originally only from 9:00 A.M. until midnight seven days a week, but now expanded to 24 hour coverage on the weekends.¹ And certainly bringing lawyers outside the Legal Aid Commission Children's Legal Service on board on the issue of whether the scheme of the Act encourages inappropriate admissions and trying to set up ways of giving young people access to face-to-face legal advice before they say anything to the police has been one of the biggest challenges of working under the Act! We are definitely not there yet. But certainly, we are starting to get there. And I say to the lawyers here you need to know the Act well if you are going to make it work.

Legal Safeguards

- Same principles for admissions as *s13 Children (Criminal Proceedings) Act 1987*
- Police must provide written notice to young person
- Must advise of right to obtain legal advice and where that advice may be obtained
- Cooling off period of 10 days

¹ For further details, see the description by Richard Funston on page 52 of this report

Youth Justice Conferences

Assuming the child has admitted the offence after getting access to legal advice and has been told what participation in a youth justice conference will mean for them, there are criteria set out in the Act that say police must consider how serious the offence is, the degree of harm caused, the level of violence involved, the prior offending history of the child and other underlying (perhaps welfare) issues in that child's life before deciding to refer the child to a youth justice conference, or putting them before a court.

The hierarchical scheme set out in the Act alerts us to the intention of its framers that conferences are designed to be used for offences that are of a serious nature, with a degree of associated harm and/or a relatively high level of violence, for young people with some prior offending history. There is a view out there that conferences are for perhaps first and minor offenders. That view is wrong. They should never be used, in my view, for first and minor offenders.

There is some evidence now that supports this view. The NSW Bureau of Crime Statistics (BOCSAR) and Research recently published the results of a study comparing times to re-offending following participation in a youth justice conference with times to re-offending following a court appearance.² One of a number of inferences that can be drawn from this study is that the low level responses, such as warnings and cautions, are best for first and minor offenders. The results of the study indicate that participation in a youth justice conference shows very little statistically significant impact on times to re-offending for younger children (10–13 year olds) for first and minor offences, but participation in a conference rather than being dealt with by a court does show a significant positive difference in times to re-offending for older young people who have admitted to committing offences of personal violence. So it will be interesting to see if we can maintain that.

² Garth Luke and Bronwyn Lind, *Reducing Juvenile Crime: Conferencing versus Court*, NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin, Contemporary Issues in Crime and Justice No 69, April 2002

Who goes to conferences?

Anyone who's been affected by the harm caused by the offence, and then some others.

- Police
- Victim and support person or representative
- Young person
- Young person's immediate and extended family (or other person responsible, eg social worker if in care)
- Conference convenor
- Legal adviser for young person
- Law advocate
- Interpreters/experts where young person or others have cognitive/communication difficulties.

Who runs conferences?

Runs is not the right word. Conferences are facilitated by youth justice conference convenors, who are community people, who are not government employees for that purpose. Seventeen conference administrators (full time employees of DJJ who, under my direction, are responsible for the administration and management of youth justice conferences across NSW) recruit, select and train convenors locally. We then engage them by contract, and provide them with ongoing training and supervision. For country people, getting convenors together can be a problem, particularly when there are only one or two convenors in the small towns in the area that are some distance apart. In these cases it is not as easy as it is in the city or in the towns down the east coast of New South Wales where regular convenor training and sharing get-togethers are held every year.

Once a conference administrator has accepted a referral for a youth justice conference, a convenor is then responsible for undertaking the majority of tasks in preparation for the conference. The convenor is selected by the conference administrator for this specific task according to the needs of the potential conference participants, and must meet with and talk about participating in the conference with every single person who has been identified as having been affected by the offence that the young person has admitted to committing. They spend a lot of time, on average about 12 hours, in preparation for the vast majority of conferences.

Are we meeting the objectives of the Act?

How are Warnings and Cautions being Utilised?

- In 1998: Approximately 2500 warnings, 5600 cautions
- In 1999: Approximately 8300 warnings, 8500 cautions
- In 2000: Approximately 13,000 warnings, 9000 cautions
- In 2001: Approximately 20,000 warnings, 9500 cautions

(Source: NSW Bureau of Crime Statistics and Research, *Recorded Crime Statistics*, April 2002)

Well, I believe we have made some real progress in achieving the objectives of the Act, but I also believe we still have a long way to go. You will notice that in the last financial year police warned around 20,000 young people. That is not bad because they don't require admissions and they are tick and flick on the street. So a warning is really the old, as the police used to say, 'kick up the bum', that for lots of kids works well. Keeps them out of the system, and keeps them in the community. Police administered nine and a half thousand formal cautions last year. It is pleasing to see that the number of cautions has increased steadily every year since the Act became law.

**Youth Justice Conference data by Year
April 1998 to 31 March 2002**

- 1141 young offenders participated in 939 youth justice conferences between 12 June 1998 and 30 June 1999
- 1697 young offenders participated in 1452 youth justice conferences between 1 July 1999 and 30 June 2000
- 1567 young offenders participated in 1345 youth justice conferences between 1 July 2000 and 30 June 2001
- Approx 1100 young offenders participated in approx 1000 youth justice conferences between 1 July 2001 and 31 March 2002

(Source: NSW DJJ data collection, June 2002)

We have now processed probably almost 7000 referrals to youth justice conferences since April 1998. But interestingly, consistently, right from the commencement of the Act, only half of those referrals have come from the police. Court referrals were always meant to be a stop gap, but, consistently and probably partly because of the hard work of the specialist lawyers in the city, we are seeing a lot of the serious older, personal violence offences coming from the courts so the courts are game and the police are perhaps not quite so game. Now that we have the evidence from BOCSAR on this point we are hoping they'll get a little bit more game. We run around about 1200 to 1500 conferences a year.

System impacts

The Department of Juvenile Justice data shows that the number of finalised matters in the Children's Court has decreased significantly from approximately 16,113 per year to approximately 9969 per year. The children's lawyers have confirmed that there's not a lot of light relief in the specialist children's courts in Sydney now, so that in the main only the really serious repeat offenders are the ones who are going through there.

This is not the case universally around New South Wales because of the slow take up of the Act in some areas. Note also that the number of children in detention has decreased—although I do not claim that this is solely a result of the operation of the Act, rather, the operation of the Act has contributed to that reduction in numbers. So we now hold fewer young people in juvenile custody than we have for a long time in New South Wales. The number of children in detention has decreased from a daily average of over 500 to a daily average of just under 300.

Unfortunately, other system impacts mean that a very significant and worrying proportion of the kids who are locked up now are kids who have not yet faced court but have been refused bail or can't meet conditions of bail so they're held in custody on remand. The numbers of remandees may well increase with the recent changes to the Bail Act and that is something about which we should really very worried, as we should be about some of the proposed changes to the way that the system views repeat offenders. That will come. And the other really disappointing and difficult to shift piece of data is that we are heading to almost half of the kids in custody being Aboriginal and Torres Strait Islander kids. Now that is something that is of great concern to me and many others. We are working hard on trying to identify the reasons for that.

The recidivism study looked specifically at aboriginal juveniles to see whether conferences worked as well for them as they appear to do on the data, for non-aboriginal kids, and found that, yes, it is pretty much the same times to re-offending for aboriginal kids as for non-aboriginal kids following conferences compared to following Criminal Court appearances.³

³ Garth Luke and Bronwyn Lind, *Reducing Juvenile Crime: Conferencing versus Court*, NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin, Contemporary Issues in Crime and Justice No 69, April 2002

An earlier research report by BOCSAR reported that levels of satisfaction among people who do go to conferences (young offenders, their support people and victims) are high because they have a say in the decisions that are made.⁴ As we have seen, in their 2002 report, the Bureau found that conferences are a good way of reducing juvenile crime in that the times to re-offending following conferences are about 15–22 per cent longer than time to re-offending following court appearance.

Concluding remarks

I trust that, in describing in detail the purposes, process and research findings on youth justice conferences, I have given you some food for thought from your own particular perspective, on this alternative form of justice for young offenders and their victims. I trust also that you will be inspired, by the brief sketches that I've drawn today, to find out more about some of the other alternatives to 'traditional' civil and criminal justice processes that are presently available in NSW.

⁴ Lily Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme*, New South Wales Bureau of Crime Statistics and Research, 2000

A Client Centred Approach to Access to Justice

Gordon Renouf

Tennant Creek Regional Legal Access Project

Introduction: Access to Justice

Like any constructed phrase used in political or social debates ‘access to justice’ means different things to different people at different times. The question arises whether its multiple associated meanings undermine its usefulness. One of its weaknesses—that it draws our attention too much to access and barriers to access and not enough to justice—may mean it is inimical to the interests of the poor and excluded seeking justice. As Andrea Durbach of the Public Interest Advocacy Centre has suggested, some kinds of work have been ‘misguided in that [they have] tended to highlight access to justice as opposed to justice itself’.¹

Many access to justice discussions are concerned with improving the availability of affordable legal services (advice and representation and/or ‘alternative’ dispute resolution services) to people who have an existing legal problem. The model access to justice question is how to provide legal assistance to a person who wants to ‘resolve a dispute’ or to defend or assert a right in a court. Courts and tribunals are perfectly natural places for lawyers, but one that most other people would like to avoid. As one respondent to a recent UK study said, ‘I’d like more access to justice but less access to the courts’.²

¹ A Durbach, ‘Defining Pro Bono — Challenging Definitions For the Public Good’, NSW Law Society Journal, October 2000 p 64.

² H Genn, *Paths to Justice: What People Do and Think About Going to Law*, Hart Publishing, Oxford, (1999). p1

Fine tuning the legal system and improving the ways in which we fund and deliver the existing narrowly conceived ‘legal aid’ services are worthwhile and important, but discussion about increasing access to justice—or moving towards equal justice—does not logically need to centre around those topics.

The President of the Canadian Law Reform Commission, Roderick Macdonald, recently said: ‘I ... once believed that achieving access to justice was essentially a matter of removing barriers to courts such as cost, delay and complexity. Now I no longer see the objective in purely structural terms. Rather the challenge runs much deeper. It is to rethink our attitudes about what law in a modern, pluralistic society actually comprises’.³

Concerns about ‘equal justice’ gained a great deal of momentum in the 1960s and 1970s. In part this reflected an acceptance that people needed legal assistance to obtain the benefits promised by the welfare state.⁴ Legal aid in the US and the UK expanded from assistance in criminal and divorce matters to include assistance to pursue social and welfare rights. At the same time there was a considerable focus within the equal justice movement in the US and later in Australia on more transformative approaches that sought to use the legal system to promote social justice. Later debates, however, became mainly concerned about providing lawyers to assist individual poor clients understand the law, and to take matters to court if necessary. Central discussions concerned how best to deliver legal aid. They focussed on funding and the relative virtues of salaried solicitors and the private profession. Logically associated themes such as the high transaction costs of legal services, the barriers to using courts and alternative ‘dispute resolution’ processes became areas of concern from the late 1980s. These are important elements of the ‘access to justice’ agenda that took hold in Australia in the 1990s. So too are

³ R Macdonald, ‘Implicit Law, Explicit Access’ Australian Law Reform Commission Proceedings of the conference *Managing Justice — the way ahead for civil disputes*, 18–20 May, 2000 , p2.

⁴ T Goriely, ‘Making the Welfare State Work: Changing Conceptions of legal Remedies in D Fleming, F Regan, A Paterson, & T Goriely (eds) *The Transformation of Legal Aid: Comparative and Historical Studies*, Oxford University Press, Oxford, (1999).

preoccupations with measuring legal needs and making best use of new technology, both of which have held the attention of government policy makers in recent times.⁵

In this paper I argue that there are three significant things missing from the access to justice debates as I have just described them.

First, there is insufficient concern for the points of view and voice of disadvantaged social groups within the community. There is a lack of attention given to the understandings of individuals and groups about when they might benefit from legal services. Moreover debate often fails to consider the interests of particular social groups in the identification and definition of legal needs and in the development of services to meet those needs.

Similarly, the right of poor and excluded people to participate in societal decision making including in the definition of rights that affect them—that is to participate in the debates about the formulation of law and the processes of governance—is rarely taken seriously.

Finally, we have too narrow a conception of the appropriate legal and related services that might be made available. This is not just a comment on the practical neglect of long argued for features of legal aid practice such as community legal education or ‘preventative services’.⁶ Rather there would be value in developing a different relation between service providers and clients and disadvantaged groups within communities.

⁵ Concern about needs assessment is also prominent in the UK, Canada and elsewhere — see A Currie, ‘The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research’ paper presented to the 2001 convention of the International Legal Aid Group, Melbourne, June 2001, available at <http://www.dmt.canberra.edu.au/ilag/>, p 1, Genn 1999.

⁶ Preventative legal services are generally conceived of as community legal education or, rarely, as advice you might need prior to entering a transaction. While the latter is often correctly characterised as preventative it is rarely promoted, rarely sought by clients and rarely available from legal service providers. CLE as a whole is on the other hand wrongly characterised as preventative. Certain kinds of CLE are as likely to raise consumers awareness that they have a legal problem and that they have rights they could assert to solve it (thus increasing the demand for legal aid) as to provide information which, if acted on, may avoid a legal problem arising. A third possible consequence of CLE is that clients may structure their affairs so as to be in a better position should a dispute arise, but the CLE does not necessarily prevent a dispute.

To do this we need to develop and maintain an expansive understanding of the role of law in assisting communities. Among other things we need to pay more attention to the transactional, creative and facilitative aspects of law and lawyering.⁷

I conclude that organisations intent on providing legal services to the poor and excluded need to be closer to the communities they work with. To do this they would benefit from adopting a community development approach, to have a broad concept of legal services and to work in close collaboration with people and organisations with other capacities.

Clients' Understandings of their Rights and Needs

For a period of eight years in the 1970s and 1980s a large group of migrant women from the Wollongong area pursued a claim in relation to the discriminatory employment practices of Australian Iron and Steel.

For them to succeed—as they eventually did in various ways—it was not enough that they had access to lawyers to provide legal advice and represent them in court. It was important that the women:

- had a way to become aware that they had legal rights which they might be able to assert
- had access to information about agencies that could assist them
- had a source of legal advice about whether they had an arguable legal claim
- had access to legal representation

⁷ For example by considering when it might be appropriate to work with communities on transactional, facilitative and creative legal processes.

- were able to develop the support required to see through an 8 year battle—this was met in part through the development of a range of activities that bound the women together and to the cause. In this case the need was largely met by the work of a migrant resource centre and of leaders from the group of women themselves.

At least as significantly, they would not have been able to assert a legal claim in the absence of the legal rights created by the provisions of the *NSW Anti Discrimination Act*.⁸

Several of these conditions—all essential to the ultimate success of their claim—would not be met by the normal range of services offered by legal aid agencies through private practitioner grants and the standardised services offered by salaried solicitors. Moreover the need for legislative change and the need for support for long legal battles do not normally register as the kind of legal needs investigated by government legal needs surveys.

Knowing about Rights

There is rarely sufficient attention given to the real situation of client communities and their relationships with the law. An accurate understanding about the likely usefulness of the law and legal services is an important prerequisite for using legal services. The extensive empirical research undertaken for the Paths to Justice project in the UK found that one of the main reasons people who could be assisted by the law do not find a remedy is that they don't know, or don't believe, that the law might be able to assist them. They have 'a sense that nothing could be done

⁸ As residents of NSW they also had the benefit of the provisions of the *Legal Aid Commission Act NSW*, which limit the award of costs against a legal aided party.

about their problem—which flows from the generally low levels of understanding about legal rights and procedures’.⁹

This study was based on a survey of 4000 respondents. It sought to establish how often members of the public are faced with problems for which a legal remedy exists and whether and where they go for help. It found that about 40 per cent of the population had experienced one or more civil problems or disputes over the previous five years. And about 40 per cent of those facing problems either took no action at all or failed to obtain advice.

That it is desirable that members of the community know their rights is widely acknowledged. A typical approach is to focus on what we, the access to justice industry, can do to increase community knowledge—for example by distributing information and undertaking education in various forms. No doubt this is appropriate and effective when done well, but far from guaranteed to create widespread understanding of when the law might assist. Alternatively we look to other outsiders, such as the formal

⁹ H Genn, *Paths to Justice: What People Do and Think About Going to Law*, Hart Publishing, Oxford, (1999) p1. I would go further to suggest that it is not just the people with the legal problem that make this mistake. Many of the agencies they turn to for help — from non lawyers, such as the staff of consumer affairs departments, social workers and financial counsellors, right through to private practitioners and generalist community legal centre lawyers — in short anyone who is not a specialist in the particular relevant area of poverty law — will from time to time incorrectly take the view that nothing can be done. In discussing arguments by Conservative Republican Members of Congress that the specialised services offered by Legal Services Corporation funded legal services could be replaced by private attorneys donating their services, the New York based Brennan Center for Justice argues that pro bono lawyers ‘may not necessarily be well versed in the intricacies of ... legal problems that poor people encounter’ (Brennan Centre for Justice, *Making the Case: Legal Services for the Poor*, Brennan Centre for Justice: Access to Justice Series (1999) Also available at www.brennancentre.org). And in Australia the recently published Action Plan of the National Pro Bono Task Force said ‘At the heart of the mismatch [between the availability of pro bono assistance and the legal needs to which this assistance might be directed] is the fact that the areas of greatest need are in family law and criminal law, personal injury, migration and administrative matters (e.g. social security appeals) [and I would add consumer, housing and discrimination law]. However, these are precisely the areas in which the large corporate law firms do not have in-house expertise — indeed, they generally have made a strategic commercial decision not to work in these areas of ‘personal plight’, most of which are associated with legal aid (to the extent it is available) and/or low fees.’ (National Pro Bono Task Force, Report of the National Pro Bono Task Force to the Commonwealth Attorney-General, Commonwealth of Australia, Canberra, June 2001).

education system, to undertake this work. One suggestion is that the focus—the starting point—should be on the particular groups within communities that may or may not want information and education about the legal system. Such groups need opportunities to take advantage of ways of acquiring knowledge which they perceive to be relevant and useful to them, and to decide whether or not the law and the legal system are tools that they can use to advantage in their particular circumstances.¹⁰ A role for legal service organisations is thus to help create the conditions for particular disadvantaged social groups to make these assessments.

Who Defines Legal Needs?

While the idea of measuring legal needs in some formal way has been around for a while, the last ten or so years has seen a great deal of attention being paid to this subject in the UK, Canada and Australia.¹¹ The problem is that, at least in Australia, the processes used to assess need almost by definition guarantee that the informed views of disadvantaged groups in the community cannot be obtained.

Legal needs are not objectively sitting out there waiting to be discovered. Statements about legal needs often assume or claim that identifying particular needs or the most pressing need is unproblematic. This approach is an example of the common way in which talk about social needs is framed: by asking and then answering a question such as ‘should the State undertake to satisfy the social or legal needs of a given constituency?’¹² This question takes for granted the definition of the needs in question. It obscures the fact that the definition of needs is itself

¹⁰ G Renouf, *Good Practice Principles in Indigenous Consumer Education*, Australian Securities Investment Commission, (2002)

¹¹ A Currie, ‘The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research’ paper presented to the 2001 convention of the International Legal Aid Group, Melbourne, June 2001, available at <http://www.dmt.canberra.edu.au/ilag/>

¹² N Fraser, ‘Women, Welfare and the Politics of Need Interpretation’ in N Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory*, Polity Press, (1989). p145

a political stake.¹³ Needs determination based on national statistical data and the like de-politicise need interpretation by substituting administrative processes of need definition (which exclude involvement of the people whose needs are to be met) for participatory processes of collective self-definition and needs interpretation.

Moreover, the definition of legal needs is not something that can be readily determined by anyone—government, service provider, researcher or the relevant community—in a single snapshot. This is because the knowledge, understanding and point of view of the outsider will differ from the members of the relevant community and vice versa.¹⁴

Finally, if we are to allow the client community to be involved in self-definition and needs interpretation, a longer term relationship must be built between the relevant community and those with relevant knowledge and skill. The community and the experts will have different understandings of the world and different understandings of the possibility of using legal tools and techniques to the benefit of the community. There will also be an imperfect level of trust of the experts by the community. The two must develop a relationship where each begins to understand the world view and expertise of the other. All going well, as the relationship develops, the experts will learn more and more about the issues facing the community and the community will learn more and more about what the experts have to offer. Once this is done each group will have new realisations about, and greater faith in, the things that might be useful to do using the skill of the experts.

¹³ Fraser 1989. See also Amartya Sen's similar discussion of the *constructive* role of basic civil and political rights in the conceptualisation of 'economic needs' in a social context A Sen, *Development as Freedom*, Oxford University Press, Oxford, (1999) p148

¹⁴ The Paths to Justice study (Genn 1999) partially acknowledges this issue. That study didn't expect people to be able to classify their own legal needs — they are likely to have imperfect knowledge of when there may be legal tools and techniques available to assist in their particular circumstances. Instead the surveys sought information about the things that had happened to respondents and later classified which of these issues raised a legal problem. As argued in the text above this only addresses part of the problem.

Obviously it will rarely be appropriate for this relationship to be built up solely around the question of research into legal needs. Normally the relationship will involve the initial provision of some kind of service—possibly limited to advice or casework services, but more likely to be effective if it includes the provision of information, education or training. Even better if the experts explicitly acknowledge that they have something to learn from the community—at the very least they should be consciously trying to learn how best to provide services to the particular client group.

The work of the Aboriginal Women’s Outreach Project of the Top End Women’s Legal Centre over the past six years is an example of this kind of process.

Case study: meeting the legal needs of women from three Top End Aboriginal Communities

Concern about violence inflicted on Aboriginal women has emerged to take its place in the consciousness of policy makers and as a subject for an energetic and sometimes difficult debate. But what do the women affected believe are their needs? In 1992 staff of the Darwin-based Domestic Violence Legal Help service observed that Aboriginal women in remote communities were not getting the same level of service as people who lived in Darwin, let alone the higher level of service that various factors including remoteness and language issues seemed to require. A consultation and education project was undertaken to gain more information about their needs and views.¹⁵

Drawing on this work, the Top End Women’s Legal Service (TEWLS) established a pilot project working with Aboriginal communities. The project committed a lawyer and a Darwin-based Indigenous legal worker to spend a number of days each month in each of three communities. More importantly the project employed several local women part time.

¹⁵ In addition there was the important work of Audrey Bolger, *Aboriginal women and violence: a report for the Criminology Research Council and the Northern Territory Commissioner of Police*, Australian National University North Australia Research Unit, Darwin, (1989)

A process of both formal and informal information exchange began; Indigenous and non Indigenous staff of the service learned more and more about the needs of their clients and the basic reality in which they lived and to which they responded—the local Indigenous staff not only gained knowledge about court processes, what the legal system had to offer and so on, but were able to observe the legal system providing useful assistance to other women from their community.

The project was willing to respond to whatever individual or communal legal needs the Aboriginal women of each community would present. At the beginning there was no presumption that legal remedies available ‘in town’ would be of any interest or use to the women in the remote community.

Over five years the service has been called upon to provide legal advice and representation in relation to domestic violence orders, crimes compensation, sexual assault, recovery of property and other matters. But beyond the (significantly increased) number and range of traditional legal aid services provided several developments stand out.

In effect the project has met a need for the women of the community to develop a new collective understanding of the way the external legal system will respond should women choose to engage it to assist them. There is clear evidence of the transfer of skills and knowledge, and the empowerment of local women to choose and take the action of their choice.¹⁶ As knowledge of the legal system permeates through the community and as trust in some of the agencies of the legal system improves, there has been a significant increase in women seeking assistance. Moreover women are now much more likely to take action in relation to their own problems. Even more importantly there is evidence that communities are solving their own problems either alone or with the help of the local community legal workers. Often there is no involvement at all from TEWLS’ Darwin based staff. The project has also been called upon to assist with developmental projects through, for example,

¹⁶ This comment is based on an evaluation of the project conducted for ATSIC in 2001.

providing assistance to negotiate with the local community government council and funding agencies in relation to establishment of a women's refuge and resource centre.

This high quality and culturally appropriate service did not come about because outsiders assessed a need for a particular kind of service, for example, one that offered assistance to obtain domestic violence restraining orders. Nor did it realise its potential within a few months or even a year. The form of the service, using a model centred on the client community, was key. It was also important that the project staff have been prepared to adapt their ways of working as more has been learnt.

I suggest that, as a result of this project, the workers at TEWLS have gained an understanding of the legal needs of the women on the three communities which would not be possible to obtain in any other way.

In addition to demonstrating the need to involve client groups in needs construction the TEWLS Aboriginal Women's Outreach Project has demonstrated the value of working with community workers drawn from, and immersed in, the client community. This aspect of the model may be very useful for other agencies charged with service delivery of any sort to Indigenous communities. It may also be relevant to agencies working with other communities, particularly those whose understanding of the world is relatively removed from the understandings of people familiar with the legal system. Migrants from Asian countries that did not inherit common law legal systems and young people come to mind.¹⁷

Using community development techniques as part of needs assessment and service development processes is becoming more popular. As well as

¹⁷ Useful projects which meet, eliminate or overcome legal needs may be initiated other than through legal aid agencies. In the Northern Territory, the Office of Aboriginal Development has for a number of years been developing a community justice plan for the community of Ali Curung. The objective is to reduce criminal offending in the community by improving the ability of the community and government and non-government agencies to meet the community's social needs.

being advocated within the US community legal services sector,¹⁸ they have been adopted by the Canadian Federal legal aid agency.¹⁹

While not explicitly identifying it as a part of investigating need, the UK Legal Help service now directs a significant proportion of funding to community organisations that provide a range of services beyond legal and paralegal casework as part of their response to clients presenting with legal problems.²⁰ In Australia, in addition to the TEWLS project described above, Werribee Legal Service in Victorian and the Southern Communities Advice and Legal Service in Western Australia have undertaken significant youth legal projects using a community development methodology. The Queensland and Northern Territory Legal Aid Commissions have each undertaken community consultation²¹ projects aimed at developing services to respond to the needs of particular geographically remote communities.²² What is interesting about some of

¹⁸ Fordham Urban Law Journal, Special Issue: Lawyering for Poor Communities in the Twenty First Century: Seventh Annual Stein Centre Symposium on Contemporary Urban Challenges, Fordham Urban Law Journal, (1998) 4

¹⁹ See A Currie, 'The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research' paper presented to the 2001 convention of the International Legal Aid Group, Melbourne, June 2001. The Canadian approach can be seen from the following discussion: 'A second and quite different aspect of felt needs relates to actually using client user information to identify areas of unmet need, as well as strategies for dealing with them. This arises in progressive clinic based approaches that employ community development strategies as part of the overall delivery approach. Parkdale Legal Services Clinic is a good example. The Parkdale clinic is organised into teams that deal with family refugee and poverty law services. Each team includes a community worker. The community worker carries out a number of community liaison functions. One of them involves holding meetings with client groups to learn about the problems facing them. This community development function is an important part of the process of identifying the needs of client groups and setting priorities'. (D Martin, *A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise of Sustaining a Myth?*, Department of Justice, Ottawa, forthcoming, cited at Currie 2001, p26)

²⁰ R Moorhead, 'The rise of non-lawyers: experience from England and Wales lawyers, non-lawyers and professional service in a contested domain' paper presented to the 2001 convention of the International Legal Aid Group, Melbourne, June 2001 available at <http://www.dmt.canberra.edu.au/ilag/>

²¹ While consultation with specific communities about developing services for that community falls short of the kind of community participation based on long-term relationships here advocated, it does offer alternatives to planning based only on demographic analysis and statistical surveys.

²² G Renouf, *Tennant Creek Regional Legal Access Project Consultation Paper*, NT Legal Aid Commission, Darwin, (2002), Legal Aid Queensland, *Report of the Northern Outreach Project*, Legal Aid Queensland, (2001)

these developments, as Currie notes elsewhere, is that while community development approaches are hardly new, governments are now interested in them.²³

Equal Justice in Defining Rights

The way in which rights and responsibilities are defined by law and shaped by administrative action affects all interests in the community including, and especially, those of disadvantaged people who look to the law for protection or who are more likely to be affected by administrative action, for example in relation to the redistribution of resources through transfer payments. To the extent that people are not able, by virtue of poverty and exclusion, to fully participate in the debates that set the public policy agenda, and to influence the decisions of executives and legislatures, then it is not only legitimate but also necessary to provide support to overcome these obstacles. In a properly functioning democracy everyone needs a voice.

There is a role for legal aid organisations, especially community based ones, in enhancing the quality of our democracy by supporting social groups to have a voice in decision-making processes.²⁴ There is, however, a degree of resistance to providing public money to advance what appear

²³ Beyond the field of legal services, there is a great deal of government interest in 'community strengthening' approaches, including through supporting communities to develop their own responses to particular problems and establishing programs which will fund the community services that people in a particular region believe they need regardless of limiting uniform models of service provision. See for example The Commonwealth Department of Family and Community Services Stronger Communities program (<http://www.facs.gov.au/internet/FaCSInternet.nsf/whatfacsdoes/communities-nav.htm>), the NSW Department of Aboriginal Affairs (<http://www.daa.nsw.gov.au/communitydevelopment/>) and the NSW Premiers Department Community Builders Program (<http://www.communitybuilders.nsw.gov.au/>)

²⁴ The question of *how* legal services can play this role arises. There is a useful discussion in R Brescia, R Golden, R Solomon, 'Who's in charge, anyway? A proposal for community based legal services' *Fordham Urban Law Journal* 831, (1998), pp 855–862, including at p857, the observation that 'legal services must train themselves to hear the voices in the communities they serve.'

to be sectional political interests.²⁵ Of course the nature of democracy is a contested issue: conservatives stress the need for stability and the role of strong leaders while radical critics are concerned about the failure of democratic systems to offer any real participation to the bulk of the population aside from voting for leaders every few years.

But let's take the conservative post-war orthodox position for the sake of argument. This holds that a State is a democracy if it has universal suffrage, reasonably regular elections between competing leadership groups and equal opportunity to participate in public debate and otherwise influencing decision makers between elections.²⁶ It is plain that for exactly the same reasons that individuals and social groups need access to legal services for advice and litigation, they need access to particular kinds of support and skill to participate in public debate and bring their needs to the attention of policy makers. Justice consists in some reasonable fair allocation of resources and opportunities. The way these are allocated and the rules that apply between interests in society are determined by the executive and the legislature as much as the judiciary. Access to justice therefore requires some fairness in different social groups' ability to participate in the debates and processes that lead to particular decisions or actions by these arms of government.

Better Get A Lawyer: What kind of legal services?

I have argued that disadvantaged communities, the poor and excluded are entitled to fully participate in the processes that define needs, rights and obligations and that they will often require appropriate assistance to exercise that entitlement. But objection is taken by some legal aid service

²⁵ Aside from political questioning of their activity such as challenges to the notion of acting 'in the public interest', organisations whose purpose is to relieve poverty and disadvantage predominantly through law reform and advocacy of social change are likely not to be classified as 'charitable' for tax purposes and thus denied access some kinds of public and philanthropic resources.

²⁶ C Pateman, *Participation and Democracy*, Cambridge University Press, New York, (1970), Chapter 1

providers to the proposition that it is their duty to approach community needs holistically, to consider them from client groups' perspectives and to work with disadvantaged groups to devise the most appropriate response. While admitting that poor and excluded people need a voice in policy debates, they say it is no part of the job of legal aid services to provide this support. This argument misunderstands the nature of legal services.

In the course of identifying the legal needs of a group of rural communities a recent report notes that:

*many residents of remote Indigenous communities have been the victims of violent crimes. Accordingly there is a substantial need for victims of crime services.*²⁷

In the limited context of the exercise being undertaken the statement makes sense—it notes a legal need. But stepping back just a little we might suggest that there is a wider and logically prior need—to reduce the incidence of violent assaults on members of the community.

Perhaps this is an example where focussing on the legal system rather than the client communities can narrow our vision. Ab Currie, from the legal aid agency of the Canadian Department of Justice, notes that:

*in common law countries, institutions for the provision of access to justice became dominated early in their development by the legal profession. Access to justice came to mean access to the courts. The definitions of problems were legalistic and the resolution of issues by formal court processes was the predominant mode. Access to justice took on the image of the legal profession. Client centred approaches to needs did not develop naturally in that environment.*²⁸

²⁷ Legal Aid Queensland, *Report of the Northern Outreach Project*, Legal Aid Queensland, (2001)

²⁸ A Currie, 'The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research' paper presented to the 2001 convention of the International Legal Aid Group, Melbourne, June 2001

He goes on to note that a legal response is not always the only or best response to a given problem.

The earliest literature on unmet needs asked questions about needs for legal services on the basis of predetermined categories of problems. [As they were legal in nature] it was not surprising that [they] uncovered large reserves of unmet need for legal services. ... [In response] Phil Lewis posed the question: 'if a tenant has a leaking roof does she need a lawyer or a ladder?' ... if certain problems are spoken of as legal ones ... and official support is give to legal methods of solving them, that is to take a particular attitude to problems of that kind, problems which may be capable of solution in some other way ...²⁹

There are no doubt cases where the best response to a social problem is to do something that has nothing to do with the law, even where the problem seems to fall within the domain of the legal system. But before that question can be determined we need to have a clearer, and I suggest expanded, idea of what legal services are and hence what legal aid services might be.

The work of lawyers and the rule of law

There is something to be learned about what legal services are from the growing body of literature which discusses the process of States in transition from an authoritarian society, much of it focusing on the 'post communist' regimes of Central Europe and their more and less successful attempts to introduce government subject to the rule of law.³⁰ Here a central question is how to establish the rule of law, for which purpose people have needed to think more closely about what the rule of law is.

²⁹ (Lewis 1973)

³⁰ See for example M Krygier, 'Transitional Questions about the Rule of Law: Why, What, and How?' 28, part 1, *East Central Europe/L'Europe du Centre-Est*, Eine wissenschaftliche Zeitschrift (2001) pp1–34 and works there cited.

The presence or absence of the rule of law is not an absolute, but a question of degree. There is no doubt that Australia has it to a high degree, but that there are ways in which we fall short.³¹

But what exactly constitutes the rule of law? Krygier suggests four principles that might be used to judge the extent to which a society is governed by the rule of law. They are:

1. The degree to which citizens obey the laws and expect others to obey them
2. The degree to which they obey because they see the legal order as legitimate (rather than for example because they fear terrible punishment)
3. The degree to which the law counts in relation to people in positions of power
4. The degree to which the law serves as a protective and facilitative device available to citizens in relation to the State and to each other.

Thus, among other things, the rule of law depends on the degree to which the law serves as a protective and facilitative device, as well as a device for social control and a device for resolving disputes. If this is right then equal justice also depends on the extent to which everyone has equal access to these functions of law. The law needs to serve everyone equally not just as a protective device, but also as a facilitative device.³²

³¹ (Krygier 2001) There is also a more or less continual battle between the short-term interests of the powerful and the proper operation of the rule of law. Examples include the increasing range of attacks on the judiciary by politicians when they don't get their way; the removal of disliked members of Industrial Relations and Accident Compensation Tribunals by various governments and the appointment the Chief Magistrate of the NT with unusual salary arrangements settled for a period of two years only.

³² In the US the importance of transactional processes such as those required to support community economic development, job creation or housing developments is clearly recognised. (A Houseman, 'Recent Developments: Civil Legal Assistance in the United States' paper presented to the 2001 convention of the International Legal Aid Group, Melbourne, June 2001 available at <http://www.dmt.canberra.edu.au/ilag/>, p11)

Problems in our thinking about legal services in general and legal aid services as a particular case occur when we focus on ‘dispute resolution’. In doing so we sometimes assume that what happens away from the visible parts of the legal system has little to do with law, and only when a party decides they have a dispute does the legal system—and hence the legal aid system—have a role to play. I think when it is put like this the fallacy of the assumption becomes obvious.

But what is behind this assumption—why is there such a focus on so called³³ ‘dispute resolution’—whether through the courts or alternatives to them?

I think the problem has to do with the way we think about legal services. We typically conceive a legal service as a single instance of legal support to a particular client engaged in some form of dispute resolution. The commonsense model of a legal service is that of a firm using its legal skills on a particular matter (symbolised by a particular file for a particular client) over a discrete period of time - whatever is required to provide the advice, complete the litigation or prepare the documents that meet the client’s legal need.

This is too limited. The range of tasks undertaken for a corporate client by a major law firm is far broader.³⁴ Essentially the firm will, on request, undertake any work for which it has the skills that will make life better for the client corporation. In addition to the obvious kinds of work this includes:

³³ ‘So called’ because it is not really disputes that are being resolved but rights that are being determined. The phrase tends to hide power imbalances and draws attention away from the law related activities that preceded the formulation of the client’s issue as a dispute. For example if a client comes to a service with a debt, the way in which the adviser analyses the problem will determine whether there is a dispute with the finance company or a negotiation about repayment. Cf Moorhead 2001 in relation to the different responses of non-legal and lawyer advisers to clients presenting with debt problems.

³⁴ These ideas are ultimately derived from a paper written in the 1980s by Gerry Singsen, one time Deputy Director of the US Legal Services Corporation.

- creating and maintaining legal structures and relationships
- information about proposed laws and how they may affect the client and options they have to deal with them
- education and training of the client's staff
- various forms of propaganda, e.g., writing articles in the legal or popular press about laws which affect the client's interests
- public and private advocacy with government about existing and proposed laws
- providing legal staff to serve on boards and
- provision of 'related services', i.e., not strictly legal advice or referral.

To this analysis I would add that the law firm and the corporate client have an ongoing relationship. The firm knows the client, can anticipate its needs and can make suggestions or offer useful services.

Singsen suggests that we ought to provide an equivalent range of services to poor and excluded people. Take for example a client facing domestic violence. She may require or benefit from:

- advice about legal and related options
- negotiation about her particular problem with police, or the alleged perpetrator
- assistance and representation to obtain a court order
- assistance to groups of clients to set up domestic violence support services, or a refuge
- information for the public about weaknesses in the law that affect their rights
- advocacy to change the law or for better service to DV survivors.

So the needs of the client or client community in a particular circumstance might require legal skills of a different order to those traditionally provided. A 1998 special issue of the *Fordham Urban Law Journal* was

devoted to putting the community back in to legal services. One team of contributors make the following point:

If a community's primary housing problem is a need for quality low-income housing, the legal services office should seek out potential developers of such housing. Instead legal services office will likely maintain its anti-eviction practice because representing tenants in eviction cases is work it has always done.³⁵

If corporations and businesses can have teams of lawyers playing key roles in the facilitation of deals, why can't ordinary people?

Conclusion

In conclusion, I tentatively suggest it might be useful to investigate whether the theoretical bases on which the claim to access to justice or equal justice is made should be reformulated. It might for example be possible to go beyond the current claim of 'equality before the law',³⁶ that is, a right for all to use the legal system more or less as it is currently structured. We might argue for example that equal justice is an essential requirement of a democratic society which, to be met, requires developing ways to promote equal participation by social groups in the construction of needs, and in formulating ways of meeting those needs.

³⁵ Fordham Urban Law Journal, Special Issue: Lawyering for Poor Communities in the Twenty First Century: Seventh Annual Stein Centre Symposium on Contemporary Urban Challenges, Fordham Urban Law Journal, (1998) 4

³⁶ 'Go beyond' in the sense of adding to, fleshing out what it means or what is consistent with it. Note that to the extent that equality before the law is conceived as a right to a fair trial and a right to go to a court to right wrongs that have been suffered it is subject to the criticism of the exclusion of some people from the definition of rights articulated in this paper.

Whether or not a theory of this sort is useful, disadvantaged social groups will be better served by legal services adopting approaches which are:

- client-centred
- associationalist—meaning where decisions are made at the lowest practical level and there is genuine community and client involvement in planning, design and delivery of service provision
- community oriented rather than individualist in the services that are offered
- aware of the broad range of skills that legal services have to offer disadvantage groups should they be required in particular situations.

Inevitably there will be a blurring of the boundaries with non-legal organisations. So much the better.

PART 5

Working Group Discussions

Working Group 1

Access to Legal Information

The Distinction Between Legal Information and Legal Advice

Importance for the Community

The first point participants made was that the distinction between legal information and legal advice means absolutely nothing to ‘the punters out there’. The distinction is confusing to ‘somebody who doesn’t really know if they need information or advice, or indeed what the difference is, and quite frankly doesn’t care anyway’.

Participants generally agreed that trying to draw the information/advice distinction creates confusion, and that if we are going to draw a distinction at all we need to think of different words. For example, ‘you could say that *information* is about how the system works, but if you have a real problem and real issues and real questions to ask about your particular situation and what you need to do, then you need *advice*.’

However, participants also noted that the distinction between information and advice can be about context. For example:

It is well known that public libraries provide information. The public therefore don’t come expecting advice—they come to find information.

Other organisations provide a mix of information, advice, representation and advocacy, making drawing the line at information more difficult.

There are often expectations that an NGO will provide assistance. Centrelink is a different context again.

Importance for Intermediaries

By contrast, participants thought that the distinction between legal information and legal advice can be an important one for intermediaries for a variety of reasons. Firstly, they saw the issue of who is entitled to give legal advice as important. One participant raised the issue that the Legal Practitioners Act defines who can give legal advice. Getting indemnity insurance also impacts on who can give legal advice. Many insurance policies are very strict about this.

One way a participant suggested that a useful distinction could be drawn in a community service delivery context was between ‘practical’ and ‘legal’ advice. For example:

A lot of practical stuff like ‘what can I expect when I go to court’ is not necessarily legal advice. A youth worker who’s probably been to court a million times can probably give the young person an idea of what the court looks like, what to expect, how to go and see legal aid.

Where a person has unpaid train fines and a letter from the State Debt Recovery Office, it is not considered legal advice for a youth worker to give advice about how to negotiate with the State Debt Recovery Office about repayment. However, discussions about how to have debts written off, or what a person’s rights are, could be seen to cross into legal advice.

One participant said that predicting an outcome was also moving into the area of legal advice.

For example, a youth worker saying to a young person who has been charged with shop lifting as a first offence who is terrified of going to court because they think they are going to get locked up saying, ‘there’s no way you’ll get locked up’ was seen as providing legal advice.

Nevertheless, participants saw a blur between information and advice for youth workers in practice. Even though youth workers are not supposed to give advice, because their focus is on responding to needs, they may provide advice if necessary. Participants also noted a lack of codes, ethics etc as youth workers are very isolated.

Some community workers are fearful of being sued if ‘advice’ is given. However, participants also noted that many community workers do not realise how infrequently people actually get sued in this area. Also the law on negligent advice is ‘really slippery’—particularly in relation to the duty of care.

Particular Groups Of People

People of Non English Speaking Background

Participants raised problems with accessing translation/interpreter services for NESB women. They reported that the *Quarter Way to Equal* report set up processes for women to have better access to interpreter services but that many of these had not been acted upon.

Participants identified children of parents who do not speak English as an important group as they are often the interpreters for their parents. They may need specially developed information.

Participants saw it as important to have people from a similar cultural background deliver information, for example bilingual health workers.

Religious leaders, community settlement workers, community leaders and the ethnic media were also mentioned as good people to disseminate information.

Migrant Resource Centres were noted as an important way to access non-English speaking communities. However participants said that these were overstretched because of lack of resources.

Young people

Participants raised the issue of what to do with young people with a mix of high level needs and are therefore in crises situations, for example, ‘can’t read; have left school in Year 6; don’t seek legal help till the last minute; have a \$6000 debt and are at crisis point’.

Sources Of Legal Information

Libraries

Participants noted a need for a solid information infrastructure that provided a reliable, neutral source of legal information. The Legal Information Access Centre (LIAC) network provides this resource, and the role of librarians is to help guide people through all the legal information that is available.

Some participants pointed out that libraries are of limited use for people with poor literacy—‘the law is in words and libraries are full of words’.

Getting to libraries was seen as difficult in some areas and use of libraries is variable: ‘in some country areas indigenous people use the libraries and in some areas they don’t.’

Other participants argued that libraries are not necessarily for the middle classes—they reflect their own communities. Libraries also have lots of repeat customers, and therefore have the opportunity to build an ongoing relationship with users.

For those with literacy problems, some participants thought that the best approach was to target workers. It was pointed out that LIAC staff see part of their role as providing community workers with authoritative up-to-date legal information.

Legal web sites

There was a strong feeling among participants that the usefulness of web sites depends on how well designed they are and how much they meet user needs—for this reason user needs analysis needs to be done. Some noted that it also depended on what the expectations are about what they are going to provide. If they are properly developed they can be very useful:

A good web site that's been designed based on an analysis of user needs is good. But the one that's just whacked up because somebody thinks that's what the users want is the one that doesn't work.

Participants argued that a lot of testing needed to be done with the whole range of potential users about what was going to work:

It's in the development and a lot of them are done too quickly and are too much in the mindset of getting it done at a low cost. Quite often the person who is designing the web site has never been in the shoes of any of the range of people who might want to use it.

Participants reported that NSW government web sites are very piecemeal. They noted a need for quality control and consistency and thought that the information on some legal sites was substandard:

It's easy to fall into the trap of 'Let's think of as many links as possible, let's put up as much information as possible' but then you have links to sites that are less reliable and less up to date and less useful and that dilutes the quality of the information.

Vibewire.net was given as a good example of a youth user centred site:

They have structured it so that anyone can have a say. Interactivity is important. Sites often put barriers in place so that people can't react with them whereas Vibewire tries to make people react and get involved with the web site and write reviews. A young person might post a review and another young person might comment on it.

Legal Education: Training Intermediaries

Participants saw training as essential for non-lawyers dealing with clients who have legal problems. For example:

- Public librarians need training before they are comfortable with providing legal information
- Shopfront trains and provides resources to youth workers. They've found this to be more effective than training young people directly
- People from non-English speaking backgrounds often find it easier to receive information from a person who is of a similar cultural background. This makes training ethnic community workers important.

Participants reported a large worker turnover in the community sector, making it difficult to keep all community workers up to date. They commented that most community organisations also do not have a

training budget to pay for courses, and their staff are already overstretched working excess hours.

It was agreed that lawyers do not necessarily make the best trainers; however, legal workshops run by professional educators may also not work because educators do not have the practical legal experience and knowledge to answer participants' questions about how the theory works in the 'real world'. Participants thought that a better model might be for collaboration between a professional trainer and a lawyer to ensure that the practical content is useful while the educative model is also sound.

Participants saw a need for organisations providing intermediary training to have an ongoing relationship with community workers. Working with intermediaries over a period of time was seen as helping to build up their confidence and knowledge.

The training provided by the Macquarie Legal Centre was praised because:

- it is free
- it is held out of normal office hours
- it is backed up with printed material. This gives the intermediary something to refer back to.

Community Legal Education: Training the Community

Participants agreed that, rather than merely providing information, *skills based* training is important. For example, 'young people need training in skills to enable them to be heard, such as advocacy, negotiation and lobbying'.

The other key point was that one size does not fit all in community education. Participants saw a need to identify and target particular

communities and adapt education appropriately. For example, tenancy education and advice may be different for non-English speaking groups than for others.

It was noted that CLC's have been forced to reduce their educative role because they do not have enough resources and there is such a high demand for casework.

Participants said that general community education for adults is not usually successful unless it is based around a current and specific need:

*People need information when they have a problem,
and they don't want to know about the law until it's a
problem.*

They argued that training needs to be more holistic and mesh a social/legal rights approach, for example crime prevention and law and order on housing estates. Training often only deals with particular aspects such as law and order issues.

The school system was seen as crucial in bringing about more understanding of how the legal system works and what questions to ask, yet school often does not provide basic information about legal structures, for example, 'what is third party insurance'.

Participants thought that the peer education model was one possible way to increase understanding of the law and legal system. The NSW Attorney General's Department Violence Against Women Unit, for example, is currently running a peer education project with Tamil and Hindi Women's Groups. The aim of the project is to train groups of young women to support other women in the areas of positive and healthy relationships and self-esteem and self-image. There will also be some legal issues covered such as where to find services. They are running focus groups with young women on what should go into a training package.

There was some discussion on getting a stream of legal education through the schools, for example civics courses to promote discussion of the legal system.

Participants also mentioned that there is also a lot of peer mentoring carried out with young people in areas such as safe sex, accommodation, lobbying and advocacy. Reviews have been done of peer mentoring and how well it works. One issue raised was that mentors need to be supported and possibly paid.

There was discussion of what works in the area of public education including the use of social marketing. A participant reported that the NSW Attorney General's Department is currently running a domestic violence project using these techniques, called *It's against all the rules*. They are using local sports people, schools, postcards and stickers and the backs of buses to promote the message. Separate regional specific promotions have also been carried out including a promotion working with the aboriginal community in Western Sydney called *Let's keep our mob on track*.

Referral

Participants asked whether community workers know who to refer people to. They generally felt that this was not the case. For example, they commented that training for youth workers showed that they did not know what Legal Aid did. Participants thought that community settlement workers need more training on what legal services exist:

If you know someone you have a foot in the door for clients eg secret number for a centre. Networking is also important. Workers tend to refer to people they know. They need to know who they are referring to, especially when referring young people. They need to be able to trust the organisation they are referring to. This is also important when referring to solicitors.

Participants felt that ideally it is best to contact the referral agency and find out if they are able to help a client.

Everybody seems to be referring rather than providing services as agencies tighten up on what they will do. This creates referral merry-go-round. One strategy may be to say 'we don't know of any other place where you will get free assistance'.

Some participants saw a need for more of an interagency approach to referrals, and more awareness of what other agencies are there. However, others commented that this has been tried many times in the past and has not worked. When asked why not, they replied that lack of resourcing and current tendering models militated against agencies working together. For example, funding based on units of service delivery to individuals have removed community development and its interlinking component of funding.

Some said that people prefer to go to a particular service such as an indigenous service, but may not want to in some circumstances, and that therefore there needs to be referral choice.

A participant reported that LawAccess has implemented a system of referral agreements. These involve gathering relevant information about organisations and also inviting organisations to contact LawAccess if they do not make an appropriate referral they so that they can follow up why it happened and put remedies in place to address this.

The possibility was raised that the Law and Justice Foundation could facilitate an interagency approach to referral.

Working Group 2

Access to Legal Advice

The Legal Advice Working Group discussed issues relating to the barriers faced by disadvantaged groups in accessing legal advice. The group first identified the existing mechanisms through which legal advice is obtained. The group then considered the strengths and weaknesses of existing mechanisms in overcoming the barriers faced by disadvantaged groups. The group concluded by considering innovative solutions that could be adopted to deal with the barriers faced by disadvantaged groups.

Existing mechanisms

The group felt it important to first consider the definition of legal advice as distinct from legal information. It was noted that the distinction is a difficult one that the service user usually does not make. It was noted that non-lawyers can give legal advice, for example registered migration agents. Legal advice provided to community groups/organisations was considered important given that many disadvantaged people will go through community organisations to obtain advice. One participant noted that legal information is cheaper than legal advice and that to some extent explains why it is becoming popular. The participant felt concerned about this trend. One participant suggested that accountability is an important aspect of providing legal advice. The participant noted that ‘When you provide advice as a professional you are accountable for it and professional rules apply, there is a duty of care. The person’s rights can be affected by your advice’.

After some discussion it was agreed that ‘Legal advice involves the application of legal knowledge to the particular circumstances of the

client's problem'. The personal interface/relationship was deemed an important characteristic.

The group went on to identify the following mechanisms:

- Community Legal Centres (generalist and specialist)
- Legal aid
- Private legal profession
- Legal units within government departments
- Helplines (eg law access)
- Websites
- Aboriginal legal services
- Priests or churches
- Social workers
- Migration agents
- Law Society and Bar Association pro-bono schemes
- Industry based bodies
- Unions/professional bodies
- Talk back radio call ins
- MPs
- HREOC
- Anti-Discrimination Board
- Financial Counsellors
- Department of Fair Trading

The Barriers

What are the principal barriers to accessing justice system mechanisms for disadvantaged groups?

Costs, delays, gaps in free services and the need to use a private lawyer were the first barriers raised by the group. 'Some disadvantaged people will be too poor to use the services of a private lawyer but they will be too "rich" to qualify for legal aid'. The example of a large family on an annual income of \$30,000 was given. Another issue raised in relation to legal aid is that in family law when one party receives legal aid, it is not possible

for the other party to also be represented by a legal aid lawyer. Not all participants were aware or sure about this fact.

One participant noted that in many cases contingency payments are not an option for disadvantaged people because the amount in question will probably 'not be large enough to share'.

The group also noted social and cultural barriers such as power imbalances, unfamiliarity with the legal system and the low sense of entitlement felt by many disadvantaged people. One participant noted that some groups come from countries where there are 'few entitlements and the legal system is often used against them'. Participants noted other cultural and social barriers such as distrust of lawyers, fear of delays, fear of costs, distrust of legal aid providers, the new system for recent arrivals and the differing availability and quality of specialised services.

A lack of knowledge of the system and one's rights was considered an important barrier. It was noted that many disadvantaged people 'don't know about legal aid, don't know that they have a legal issue and don't know that they have legal redress'. The complicated nature of the legal system was considered a significant barrier. One participant noted that 'the complicated nature of the system combined with a feeling that the system works against them makes many disadvantaged people not seek advice because they feel defeated before they get there'.

Other barriers raised were geographical isolation, physical distance from services, jurisdictional gaps and physical access for people with disabilities.

It was noted that many disadvantaged people often face greater problems and are more concerned with their survival than legal problems. One participant provided the example of young homeless people 'who often have many illegalities happen to them but they feel overwhelmed by their own sense of survival, it would be too difficult for them to follow the process of chasing up an assault for example.'

What are the weaknesses of existing mechanisms in overcoming these barriers?

Several participants noted that the main weakness of existing mechanisms is that demand overwhelms supply. The duplication of services was considered particularly problematic in this context. One participant noted that services have at times been duplicated primarily for political purposes.

Participants agreed that the current emphasis on hotlines and websites ignores the fact that many disadvantaged groups are the least likely to have access to these mechanisms. It was noted that some websites are not accessible to people with disabilities but that the Federal and State governments have been working towards making their websites more accessible to people with disabilities. Although websites were seen as a good way to make information available (especially to intermediaries), participants noted that this information must be translated if it is to be accessible to people of non-English speaking backgrounds.

More generally, the participants noted that a lack of quality interpreters meant that many services were not useful to people of non-English speaking backgrounds. Participants also noted that existing mechanisms were often lacking in cultural awareness.

It was noted that people often want a more personal interaction or relationship with their advice provider. 'Often the issues are complicated and there may be a legal history'. Participants felt that mechanisms that fail to provide a more personal relationship can in many cases fail to meet the client's needs.

Strategies

Which of the existing mechanisms are working well?

- PILCH—co-ordinating pro bono schemes
- Websites are useful resources for intermediaries providing advice
- LawAccess—has reduced inappropriate referrals, and the referral merry go round. It also screens those matters in need of one off advice
- LawAccess using Telephone Interpreter service
- Outreach—providing face to face advice
- Out of hours services provided by CLCs
- Koori mail and other Indigenous publications
- Legal aid youth hotline—provides an important entry point

How effective have any recent innovations been?

- Websites augment and enhance the capability of advice service providers
- Video conferencing may be useful when you need to use interpreters, and also for young people in court proceedings
- Email advice:
 - mainly used by middle income earners
 - provides greater confidentiality, particularly in rural areas
 - need to be aware of access to technology issues
 - useful medium for people with disabilities.

What innovative solutions could be adopted to deal with these barriers?

- Remember that one size does not fit all—need to use a variety of mechanisms for people facing a range of barriers
- Can't deny the massive unmet demand for services, and the need for more funding
- Consider ADR options such as alternative parenting plans and conferencing
- Enhance ADR processes by providing support/advocacy/legal advice at the mediation stage
- Legal advice and education should embrace ADR and the mediation processes
- Educating institutions/respondents/perpetrators
- Streamlining advice provision
- Community legal education needs to get back to a rights focus so that problems/issues can be prevented in the first place.

Working Group 3

Alternatives to Traditional Approaches in Civil Law

Alternative Dispute Resolution

Participants in the working group generally saw the alternative dispute resolution (ADR) mechanisms employed in the court system to be desirable additions to conventional court litigation—they provide the means by which civil litigants may resolve their disputes while avoiding the expense, time and emotional strain associated with formal contested hearings. They thought that the use of mediation in the mainstream courts (that is, the Local, District and Supreme Courts) was not significant. In particular, the Supreme Court appeared merely to pay ‘lip-service’ to the use of mediation and neutral evaluation processes that are prescribed by legislative enactment, though these are available for the majority of civil cases. Indeed, while the Court enjoys the power to refer cases to mediation or neutral evaluation with or without the consent of the parties where it is considered appropriate, participants suggested that the complexity of many civil cases or the unwillingness of the litigants to participate in ADR placed pressure upon the Court to proceed to contested hearings.

Participants raised a systemic problem with the ADR mechanisms operating in courts and tribunals, in that sessions are often conducted without the involvement of an independent third party, such as a mediator or conciliator. In many instances courts and tribunals recommend to the parties that they discuss their dispute on their own in an attempt to reach an agreement which the court or tribunal will formalise through consent orders:

In the civil debt area, in the cities (it doesn't happen so much in outside courts), there is the situation where the debtor will come to the court, the creditor is there, and the magistrate's idea of mediation is, 'would you like to toddle off out there in the corridor and have a chat and come back'.

As one participant remarked, such a process amounts to negotiation, and certainly cannot be described as mediation. Others suspected that the prominent reason for the lack of court or tribunal appointed mediators or conciliators is the insufficiency of resources, bearing in mind the expense of providing an ADR facilitator for each matter. However, they also expressed a fear that some courts and tribunals, or their individual members, were not committed to ADR processes as a permanent feature of civil litigation, or at least did not believe that they were appropriate for many of the cases before them.

Participants saw the primary concern of the failure to provide ADR facilitators for every case as the possibility of a 'power imbalance' between the parties being manifested during these negotiation sessions. This concern was especially pertinent where an individual litigant was in dispute with a corporation or government agency, whose financial superiority and expertise might be used as tools to exert influence. In the more structured ADR jurisdictions the parties may be subject to considerable pressure to look cooperative, which may in itself lead to unreasonable or unfair agreements. An independent third party appointed by the court or tribunal can serve to restrict the use of undue influence, bullying tactics or the inappropriate use of language by one party against the other, and generally ensure that any power imbalance is minimised during the negotiations.

Participants reported that in some jurisdictions mediation staff are appointed on an *ad hoc* basis, but in others, such as the Consumer, Trader and Tenancy Tribunal, there are salaried and trained conciliators or mediators. Another method for managing power imbalances between parties during negotiations, used at the Downing Centre Local Court for

civil debt matters, is to have a financial counsellor sit in the place of an officer of the court and be available at the direction of the registrar to identify and provide support to parties that might require assistance.

Among the benefits of formal ADR mechanisms, participants noted the speed with which disputes are resolved because of time saved in avoiding contested hearings. However, they did not think that all ADR processes offer equally speedy resolutions:

One of the problems with mediation, particularly in discrimination cases, is that cases get bogged down forever, and then you can go to file in court and have more mediation there; so, the Anti-Discrimination Board is a massive problem because it has huge delays. There is a long delay before you get involved in conciliation and then the conciliation drags on. It can drag on for a long time. People have a wrong perception of what mediation is: they are waiting for a decision from the ADB or HREOC and they never get it because these bodies do not make decisions—it is really all about agreeing. In that process you need people who can advise the parties about what is the appropriate mechanism or settlement. What happens is that you have this long process, then you file in court or tribunal, and then you have another long delay there.

The effectiveness of ADR mechanisms is largely determined by the interest and willingness of the applicants or complainants to participate in processes that may involve significant time and effort on their part. One participant recounted an instance in which a case before the Human Rights and Equal Opportunity Commission (HREOC) floundered as a result of a combination of factors that lead the complainants to lose interest in pursuing their case:

There was a matter relating to the Children (Protection and Parental Responsibility) Act 1997, which is a particular piece of legislation that was brought in, and it is really strange in that it has operational areas declared in certain parts of NSW, which happen to be areas where there is a high Aboriginal population—Orange, Moree, Ballina and Canowindra. In those operational areas the police have authority to take kids home if they are 14 or under, without any evidence that they are about to commit a crime. They make some sort of assessment that the child is at risk or about to commit a crime, and they can remove the child and take them home. There was a study showing that in the first 3 months, out of 95 kids taken home 91 were Aboriginal. We began a complaint in HREOC, a representative complaint, arguing that the operation of the Act was discriminatory in effect even though the provisions perhaps weren't discriminatory. The problem was that HREOC took a long time to work out they had jurisdiction. About one and a half years later they decided they could investigate it, and by that time the Aboriginal clients were pretty sick of the whole thing, and then the police didn't cooperate in terms of evidence. It was compounded by Legal Aid: there was a long tussle about whether we would get legal aid to run proceedings, and in the end the client lost contact with us and we couldn't provide the extra financial information legal aid needed, so we didn't get the grant of legal aid, and we went to the Federal Court without an indemnity. It was a disaster. The key point being how delay affects client expectation or willingness.

There appears to be a need for research to be conducted on the question of the sustainability of ADR mechanisms, particularly in the case of court referral arrangements. Such research would investigate matters including the length of time it takes to have disputes resolved, the extent to which parties comply with the agreements and orders made, the commitment by the courts and the lack of mediators and conciliators.

The Problem of Costs

Participants said that one of the most significant barriers to access to justice in relation to the courts system is the issue of costs. This is in two senses: first, there are costs associated with running or defending an action in the courts; second, in most court jurisdictions there is the possibility of the unsuccessful litigant being ordered to pay the opposing party's legal costs.

The problem of costs can be seen in two ways. On the one hand, it may be that a person simply cannot afford to pay for legal services and associated litigation fees in order to commence or defend an action in the courts. On the other hand, when an individual litigant is in dispute with a corporation, a government agency or merely another wealthier individual, he or she is likely to be in a position of disadvantage in the litigation process because they are unable to sustain the same amount of costs or losses as the opposing party. One participant suggested that even in the high profile Stolen Generation case, in which the applicants were funded to between one-and-a-half and two million dollars, there was a substantial disparity of resources to the extent that the Commonwealth Government spent around six million dollars in defending the action.

Participants reported that while the problem of litigation costs is eased to some degree by legal aid and *pro bono* schemes, the problem of costs awards remains an issue for most people contemplating litigation. Community legal centres are often able to secure *pro bono* legal services from private solicitors and barristers for their clients. However, the risk of having costs orders made against them nonetheless has the effect of deterring many clients from pursuing their claims through court litigation. This can be considered a blind spot, which neither legal aid nor community legal assistance adequately cover. The problem is acute in public interest cases:

The issue is cost. In the type of cases we run the clients just don't want to go there because we are up against senior and junior counsel and big end of

town firms, and these firms face the same problem if they are doing it pro bono or on speculation, since the client can still lose cases.

In terms of seeking a solution to the problem of costs in the area of legal services, participants argued strongly for the Legal Aid Commission to introduce a cost-indemnity grant that would be available in cases that do not satisfy the existing criteria for legal aid grants. Such a grant would, without covering the client's actual litigation expenses, provide that client with indemnity for any order of costs made against them should they be unsuccessful. Participants noted that there are many difficulties with implementing such a proposal given the current legal aid policies and the likely political ramifications on legal aid funding.

Participants also suggested reforms at the stage of court litigation. The rules of court might be changed so as to provide courts with greater control over the proceedings. The issue is not so much a matter of how many lawyers are involved in a case as for how long they are prepared to run it. Some lawyers are well known for their abilities in drawing out the duration of cases. Since it is the time expended on a case that largely determines the extent of the legal costs incurred, participants argued that more strict case management rules and protocols would result in proceedings of lesser duration, and thus of lesser expense. Another option they raised was for litigants to make greater use of the right to apply for a cost ruling at the outset, as exists, for example, in the Federal Court. Such a ruling would limit the amount of costs that might be ordered against the unsuccessful party.

One participant suggested that, when dealing with disadvantaged people, there is a need for rules that are not fair and balanced, but instead favour the disadvantaged party:

In the case of the changeover of hearing jurisdiction from HREOC to the Federal Court, we argued that the rules on costs should be that complainants don't get adverse costs against them but if they win they

get their costs. This wasn't supported by the Commission, who argued that it should be a cost jurisdiction to encourage lawyers to represent people. They thought this would be a good idea because legal aid was not available. But what it really means is that people thinking about going to the Federal Court have to accept the possibility of handing over huge amounts of money should they lose. But why can't you have imbalanced costs rules—provided that the claims are not vexatious and outrageous—in areas like discrimination in which you invariably have a complainant against a large commercial organisation or government who can bear those costs, who get tax breaks for their litigation costs.

Tribunals, Representation & Remedies

Participants generally acknowledged that, particularly in relation to legal costs, tribunals offer an important alternative to court litigation. The Social Security Appeals Tribunal was cited as a good example of a tribunal with an efficient procedure, primarily because its review hearings are effectively uncontested. Another example given was the Victims' Compensation Tribunal. There an applicant can receive a remedy through a completely administrative paper process, one which solicitors can assist in reasonably effectively. While participants mentioned remaining problems with this forum—for example, applicants still have to report to police, which is a significant obstacle for many victims—they considered it to be a more 'human' adjudicative process for the victims of crime than could be provided by the formalism of the court system.

The lack of costs orders in many tribunals goes hand in hand with the lack of or limited rights to legal representation. While participants generally considered the exclusion of legal practitioners in the informal hearings of

tribunals to be beneficial to litigants, they were still concerned that unrepresented litigants may be in positions of disadvantage when confronted with opposing litigants or their advocates who frequently appear in tribunals and have become skilled in tribunal processes:

The problem with some other tribunals is where clients go on their own and come up against advocates who go there everyday and are incredibly skilled. Some tribunals who have the 'no lawyers rule' can work against the poorer person because the other side, for example a bank or government department, is represented by someone who may not be a lawyer but has skills in that field. The rules of court then work against the client because repeat respondents know the processes and milk it. In the case of ADB it became more rule bound to protect the applicants.

It is also the case that in some areas disadvantaged people may be able to obtain representation from skilled community advocates who may not be legally trained. For example, within the residential tenancies jurisdiction of the Consumer, Trader and Tenancy Tribunal, tenants are often represented by tenants' advocates, who are able to mitigate the actual or perceived power imbalance created by the appearance of landlords, real estate agents and government departments.

Whether or not there is scope to export any of the various tribunal models to other areas of dispute resolution depends upon many factors including the areas and complexity of law that would be operative, the extent of any potential overlap in jurisdictions and the types of remedies that would be sought by litigants. However, participants said that the ways in which tribunals generally deviated from the formal, adversarial template of court litigation made them useful models for achieving different forms of justice.

Participants said that perhaps insufficient attention had been paid to the needs of individuals litigating civil law problems. Consequently, and unlike the criminal jurisdiction in which alternative forms of dealing with offenders and resolving criminal issues have long been sought and implemented (a notable example being ‘circle sentencing’), the remedies available for civil disputes have been restricted largely to monetary forms of compensation:

The courts do not always provide justice according to the individual’s conception. In terms of creating structural change, using the courts you need to be well financed. An advantage is the seeping down of equitable remedies coming down the system, and having legislation in NSW such as the Contracts Review Act (which is not used very often) where the magistrate in the local court can make some determinations where the Act is brought up as a defence—this is not well known, but it offers further options.

It was mentioned that there is some scope under the Human Rights and Equal Opportunity Commission Act to ask the court for orders other than monetary compensation—for example, in cases where there has been discrimination as a result of a certain practice, an appropriate order might involve changing the practice rather than merely stopping the offending behaviour.

One participant raised the need to investigate the emotional, psychological and social issues which civil disputes raise, and suggested expanding the range of civil remedies to deal with these other, non-adversarial issues:

In civil matters, most of the system presumes that people want a money remedy. Certainly working in domestic violence, there was a case of a complainant making a claim against a defacto, and part of what

she wanted was a public acknowledgment that the relationship had existed. She ended up in hospital because he had beat her up. Even in the hospital interviews he lied about his relationship. She lost substantially financially out of the arrangement, and she did want some money, but the public statement and an apology was as significant to her as money. This is often the same with young people, or generally people who want to make a civil claim for some kind of compensation, they want some acknowledgment of the pain and suffering.

Participants thought that in certain types of disputes the model of restorative justice is more applicable than that of economic damages. Individuals or groups of people may desire an apology or some form of public acknowledgment of wrongs done to them in place of, or supplementary to, monetary compensation.

Legal Assistance & Community Involvement

Participants saw the access to justice barriers associated with civil law in terms of their interrelation. They said it was true that reform of the court system and improving and extending the functions of ADR mechanisms are important steps in removing the barriers faced by people with civil legal problems. However, where barriers remain in relation to access to civil legal assistance, they thought it was likely that entire sections or strata of the population would not benefit from those structural changes, and may still receive no resolution of their legal problems.

Participants identified children and young people as being among the most disadvantaged groups in relation to access to legal assistance for civil legal problems. They saw these as a large and consistently disenfranchised social group. Their vulnerability stems from the fact that they are generally considered to be in the care and under the responsibility

of other people, whether parents, carers, schools or welfare agencies. As such, their legal and access to justice needs are often considered to be subsumed within the needs of their protectors. Alternatively, it may be assumed that young people simply do not have civil legal problems, because their participation in social forms of intercourse such as commerce and employment are ignored or undervalued.

Participants said that young people were among the least rights-conscious members of society, and in particular among the most ignorant of civil laws. They thought that this remained the case notwithstanding the recent educational campaigns aimed at informing school children of laws and legal institutions, including practical information on where and how to pursue remedies for legal problems. In the experience of participants, few young people take civil law problems to lawyers. Participants raised the issue of the extent to which young people had access to the various forms of legal assistance, and which forms were more conducive to being accessed or sought out by young people. While participants saw community legal centres as the most accessible sources of legal assistance—because their assistance is free, and they have expertise in general practice, including legal issues affecting disadvantaged persons—they believed that the most common reason for young people consulting with community legal centres was still to seek advice on criminal law.

Participants saw much scope for rethinking the legal needs of this particular group, and devising novel ways of dealing with these needs. For example, one participant commented that young people were most likely to be aware of their need for legal assistance at the stage when they suffer some consequence of their own or another's acts. They thought it might be more effective to provide specific and individualised legal information and avenues for advice through those persons or institutions familiar to them, such as their school teachers or sporting clubs, rather than generally provide information to young people as a group.

Participants thought it was also important to identify and consider ways of removing barriers for young people with special needs. They saw the most vulnerable as being the homeless and children in government-organised

care. In this regard, they saw a need for more community youth advocates, especially in terms of making available legal advisers independent of the Department of Community Services and other government agencies.

At a broader level, participants argued that the key to removing barriers to accessing civil justice was to encourage greater community involvement in the identification of legal needs and the provision of appropriate legal assistance. While community legal centres play an important role in political activism and legal reform, participants saw such efforts as limited by the fact that much of their motivating force derives from the staff of those centres rather than the client communities. Similarly, they pointed out that the law reform and community education functions of community legal centres have limited impact as long as they are restricted to lodging submissions and organising one-off education sessions:

Running a policy campaign in an under-resourced area such as Campbelltown, unless you are doing it with the local council on a little local issue with community help, takes a long time, need a lot of research and huge amounts of networking. Legal centres just put in submissions; there is no follow up, no pre-submission relationship building, no pursuing the issue—that kind of policy work has minimal effect.

Participants argued that there was room for legal centres to get involved in establishing permanent or long-term relationships with their client or local communities that would transcend isolated attempts at education and policy reform. The model of community development for legal centres requires that they actively engage in identifying legal needs, consult with their communities generally or specific groups within those communities, and establish projects that involve community members and that teach them skills that may be used to undertake the policy and law reform work. The participants cited a number of examples showing different ways of operating under the community development model:

1. One outcome of the Tennant Creek Access to Services project was to deal with the common regional problem of there being no offices for such bodies as the Ombudsman, Anti-Discrimination Commissioner or consumer affairs agency: the government agreed to train and accredit the court worker in Tennant Creek to act as a portal for these organisations. Another outcome was a Tennant Creek Community Legal Centre to function both as a point of access for the legal services in the Northern Territory (whether state or national) and to promote community development by identifying one or two pressing issues and focussing on them in terms of education and reform.
2. The Top End Women's Legal Service has been a long-term programme involving the employment of people from the community, who receive on-the-job training and six-monthly formal training. These workers have gradually learnt about the legal system, as well as developed trust within the community. Although this model is perhaps peculiar to working with remote Indigenous communities, some aspects may be transferable to working with other disadvantaged groups such as young people or migrants.
3. In Lismore there has developed a complex relationship between the community legal centre and the family support service - a large organisation that provides court support for domestic violence, financial counselling and tenancy advice.

The participants recognised that there are, of course, numerous cases of legal centres employing non-legal staff, commonly social workers, financial counsellors, youth workers and psychologists. As well, there are also cases of community organisations employing lawyers to assist in their particular legal matters. They believed that both models serve to provide a broader range of support and assistance services to the community through the direct interaction and coordination of functions between the non-legal and legal advisers. Participants argued that such multi-function, multi-skilled services encouraged individuals and groups in the community to maintain long-term and perhaps life-long relationships with the services so that there are a greater number of reasons for needing to consult them.

In the end, it was acknowledged that the variety of legal problems and disputes plays an important part in directing the ways in which legal services respond to the legal needs and the most effective reforms of the justice system:

There are campaign types of access to justice issues (for example, gambling) which lead to a client group being mobilised, political pressure, education, counselling, media, government reports, and cases which put pressure on the clubs. As a result of the influences the clubs have changed to some extent. Then there are the legal issues that will never go away (for example, family law and debt), in which case you are after a dispute resolution mechanism, since there is nothing systemic about it. Then there are situations where parties need support, in which case rules can be changed to make it fairer.

Working Group 4

Alternatives to Traditional Approaches in Criminal Law

Unlike the civil jurisdiction, the criminal justice system does not offer people a choice of whether to participate or not—they are compelled to. This working group focused on alternatives to traditional approaches in criminal law. The participants defined traditional approaches loosely as the adversarial process, and a preference for custodial sentencing as penalty. They took a broad view of ‘alternatives’ that encompassed police practices, other than charging; alternative processes and alternative penalties.

The working group progressed by first identifying ‘alternative’ mechanisms that currently operate in NSW, followed by the relevant strengths and weaknesses of the various options. The group also briefly discussed strategies for improvement. There were some recurrent themes that related to discretion, greater accountability, procedural fairness and the cultural insensitivity involved in the blanket application of alternatives.

The overarching agenda of the working group was to identify issues in common. It was hoped that these points of connection might lead to joint strategies to improve the system. Due to the constitution of the group, discussion centred on young people, Indigenous people, people with disabilities and people who live in rural, regional and remote areas.

Policing—alternatives to charging

During the roundtable, there was extensive discussion about the exercise of police discretion where it falls short of charging a suspect with an offence. The options open to police were identified as: directing a person to move on,¹ and issuing warnings, cautions and on-the-spot fines. These were envisaged as alternative approaches because, to a greater or lesser extent, they have the potential to divert people away from the criminal justice system.

Discretion

However, move on powers, warnings and cautions have been known to invite and escalate conflict and have failed to be applied in a neutral way. It was suggested that police powers have not been used impartially, particularly in relation to certain groups. The working group participants noted this problem:

The data is really clear that indigenous people are least likely to benefit from cautions.

Aboriginal kids are equally likely to be dealt with by way of warning or conference but not by caution. They're more likely to go before the courts. So there's something missing there in terms of police compliance with the Act.²

I'm particularly interested in the accountability regimes that don't exist in relation to cautioning and who gets the access to it. I don't think groups are equally positioned to get the benefits of it as opposed to an arrest or summons.

¹ Under the *Summary Offences Act 1988*, NSW.

² *Young Offenders Act 1997*, NSW

While some disadvantaged groups were represented as not getting access to cautions, one participant noted that people with disabilities appear to attract them:

People with disabilities are only getting cautions—the system doesn't actually help them. Many times they do not understand the caution hence they are unaware of what they have done wrong or the potential implications if they do something again. This is particularly true for people with intellectual disabilities, but to some extent is also true for people with psychiatric disabilities.

This seemingly discriminate application of cautions by police raised many concerns for the working group. There was criticism of the Police Service's management style, which puts pressure on police officers to meet particular performance standards:

When you look at the way the police are rewarded, structurally, from the chief down to the local officer on the street—it's about arrests, it's about dispositions, it's not about how effective you were in preventing crime...

But the operational crime reviews go: where are your clear-ups? Where are your hot spots? Who are your repeat offenders? And not necessarily serious repeat offenders but who are the ones that are getting into trouble the most? Who are those who are being targeted? Come back to Aboriginal people. They're more visible.

Police officers, however, were not treated as an entirely homogenous group:

There's some coppers that really work positively with Aboriginal kids in the country. They're the only 24-

hour service in town—if they don't work positively with their communities then they'll be run out of town.

Another participant emphasised that the police service could operate differently and not deviate from its main purpose:

Their primary mission, their founding mission, is not to arrest people. It's fundamentally to prevent crime and maintain order.

The group collectively stressed that one strategy to deal with this problem would be for police management to develop alternative performance indicators that recognise and reward police for not charging alleged offenders. For example, this might involve envisaging a reduction in arrests, or creative alternatives to arresting offenders, as a measure of performance.

The participants of the group also discussed how decisions made by police can have significant repercussions for those not experiencing the benefit of more diversionary methods, particularly in an increasingly 'law and order' climate:

The police are reluctant to proceed by way of summons,³ especially for specific groups, as an alternative to charging. If more people of particular populations are charged and bail determinations have to be made for them, then with the changes to the Bail Act, more people will end up in prison on remand.

The group decided that the source of the discriminatory conduct was too much police discretion and inadequate systems of accountability:

There are very unclear principles, I think, in police practices and the law is extremely discretionary and that

³ This is the issue of a summons to appear in court, rather than arresting an alleged offender and taking them into custody. The latter requires further exercise of police or judicial discretion to determine eligibility for bail.

comes into the question of recording reasons and then who looks at the reasons. So much legislation now... you know they have to record the reasons why they proceed one way or another... but who looks at that?

A clear distinction was asserted between the limited review of the integrity of police decisions for adults and the way that decisions are required to be monitored when they relate to young people:

The Young Offenders Act has got very strict requirements about evaluation and monitoring. The three-year statutory evaluation is about to be tabled in Parliament. There is an advisory committee that looks at the data on a very regular basis.

The police have also enhanced their data collection system around the Young Offenders Act so they can drill down and identify if an aboriginal child in a particular police station was charged or put before the court by way of summons or court attendance notice. They can identify, because they must be recorded, the reasons why that child was put before the court.

The protections offered by the *Young Offenders Act* aside, there were grave concerns in relation to police practices:

The issue is how to make police more accountable for the way that they do those things and how to monitor their behaviour.

We also need to talk about the way [police] discretion is used. Maybe we also need to put up something that grabs the concept of some rationality and consistency in the system.

The Ombudsman was mentioned as a mechanism for accountability, but it was noted that the process relies upon a person's willingness to make a complaint. The complaint model, as opposed to a system of standards and monitoring activities, means that scrutiny only happens after the fact, and may not have an impact on police culture:

In my view, the Ombo has their place, but they're always after the event and some time after the event so by the time they get back to the individual or the group of officers or the individual that's been harmed, everyone has long moved on and it's very easy to say from a particular perspective, this happened or did not happen.

When the topic of discretion was examined more closely, one participant seemed to suggest that, in the hands of the police, there is comparatively less cause for concern:

Who do I prefer? The police—they work in a hierarchical system, they are subject to the command and control model. If they're told 'this is law, and you must comply with it' and they get the support from the top, then they do it. They might kick and scream to the Minister if they don't like it, but they'll do it. Magistrates—judicial discretion: 'I like this Act' or 'I don't like this Act'; 'I'll use it' or 'I won't.' I've heard that from their lips.

The same speaker raised a strategy to deal with the problem of judicial discretion: to train magistrates when they first begin judicial work, before certain mindsets become entrenched. The same, presumably, could be said for the training of new recruits to the police service, in how to exercise the discretion with which they have been empowered.

Fines

On-the-spot fines were also flagged as an area of concern, particularly for Indigenous people, young people and people in rural, regional and remote areas:

Perhaps one problem with it is that groups that are already over-policed are the ones building up the fines.

A child that builds up a significant number of unpaid fines is precluded, cannot get a driver's license until those fines are paid.

Fines will clearly have an impact that is commensurate with people's socio-economic status. A person who can afford it, will perceive a fine as an inconvenience, an annoyance. However, for someone without the financial means to pay a fine, the consequences can be very severe.

...With that build up of fines... they can't get their license. I know one fellow that's in a small place in Menindee, which is 110kms from Broken Hill... At the time it seemed like a good option to put your hand up and say 'I'll admit to this and take the discount', but the problem was he wasn't able to get that \$1000 together to get his license back. So the problem is then, he's got a transport problem. If he's going to get a job, he needs a car to get to work. And of course what happens is that that's a far bigger penalty—the penalty is not being able to get around, so in the end, it just creates another cycle...

The other problem is then the pressure is on the family, because they've got to drive him. They haven't got much money for petrol so all this tension develops and the whole thing socially—he's in a place where there's a hundred permanent residents—

I don't think there's anyone his own age—so for him to even see his mates, he doesn't even have a way of getting to see them. So in a sense, you have health problems developing....

One strategy raised in the session to break this cycle was to inform people better about their options in relation to fines:

I think what they do now, what we've told [aboriginal] people, is that you can call all your fines in—you can cut them out in community hours—they can do that. All they have to do is go to a magistrate and say, 'I want to call all my fines in'. They might only do 40 or 50 hours of community work and cut all those fines out, but a lot of people don't know they can do that...

While this course of action may provide some practical solutions for people stuck in the fine cycle, participants observed that it does nothing to redress the inequality of one person having to work off their fines and another, better off person, simply paying them off.

Perhaps a more effective measure was suggested for children that involved steering them away from being fined in the first place:

I was in Moree the other week and they were talking about it—the Aboriginal people were talking about some of the fines that their kids had already built up. It's an alternative that we didn't talk about this morning that's really impacting on young people. We're trying to bring it under the regime of the Young Offender's Act so that police will warn rather than issue an infringement notice. Or at most caution.

No one suggested that this was a viable option for adults, but it would seem there are sound policy reasons for refraining from fining children. It

was evident from the group discussion that one of these is that children are much less likely to have the financial capacity to pay fines.

Alternative Processes

The second main category of existing mechanisms discussed by the working group was alternative processes. These were considered as alternative to traditional approaches when they challenged or attenuated the adversarial system in some way. The debate centred on youth conferencing and circle sentencing. There was also some discussion of the rise of therapeutic jurisprudence, which manifests in specialist judicial bodies such as drug courts and the Mental Health Tribunal.

The group was very critical of the adversarial system, especially in the context of the criminal jurisdiction. They questioned the capacity of the system to reveal all the pertinent, not just admissible, facts of the case:

The adversarial system itself is always looked at in a binary system—whereas anyone who's actually gone through and experienced a court case will understand that neither side is arguing anything close to what either side thinks is the truth... It's a binary/zero sum thing. So if I'm prepared to say anything that doesn't help my case, by implication I'm helping the other case. So it doesn't help us to arrive at anything that's either truthful or satisfactory. I think that's really going to be the key to resolving criminal justice issues.

Another participant posed the question:

Should we be looking at opening up the whole question about whether the adversarial system is the best way to deal with crime?

A member of the working group related an anecdote about the circle sentencing trial that has been underway in Nowra since April of this year. The story was illustrative of how the limits of the adversarial system can be positively challenged by alternative processes:

There was a situation where a man had been picked up many, many times for assault and they kept sentencing him and he'd go through the whole process then he'd get out and then he'd assault again—this happened for years. Then this time, it was agreed that it would be dealt with by circle sentencing—and what came out of that process was really incredible. It turned out that this man, several years ago had acquired a head injury and he had medication but because of the effects of the medication, he didn't like to take it. So to dull the pain that he was still experiencing many years after the injury, he would drink. And he would turn around and get angry and end up assaulting someone. And through the circle sentencing process, they actually came to realise that he wasn't such a bad guy—he needed medical treatment. Sure, that's not anything new, but it draws out the fact that in courts—well it hadn't come out in years. But through this process it could because it is an intimate process where you have several different people, from different parts of this person's community, involved.

This story highlighted the issues in relation to the traditional court system and the operation of legal forms. The adversarial system maintains strict evidentiary rules that can prevent relevant evidence from being scrutinised. This was considered to be particularly troubling in the criminal jurisdiction, where there is so much at stake for individuals.

The persistence of strict procedural rules related to criminal court processes was seen to have a detrimental impact on particular people:

One really central one that comes up over and over again is the really formalised structured nature of how these things are resolved. If you don't show up on the day of your hearing, because you don't even know what goddam day it is because of the amount of medication you're taking or whatever your issue is—nobody's going to come out there and remind you—they'll just issue a warrant for your arrest.

This problem was thought to be easily and inexpensively resolved:

All it would take would be for someone to be responsible for making a phone call or at the most sending a courtesy car around to pick someone up and then it just wouldn't happen.

There would be huge savings in terms of court time, you know, for the price of a taxicab.

Issues about admissibility of evidence and court procedures, that seemed to be wedded to the adversarial system, were experienced as barriers to accessing justice by all groups represented by participants in this working group.

Youth conferencing was raised as another alternative process that resists the convention of pitting the prosecution/State against the offender, as adversaries. The conferencing scheme, which operates in the NSW Department of Juvenile Justice, brings together victim(s), offender(s) and other interested parties in an attempt to resolve the matter cooperatively.

To young offenders it's about participating in decision-making—so it's a lot more textured in terms of the issues you're thinking about. Moving away from the adversarial system but working around alternatives in the shadow of the law—in the structure of a piece of legislation that's trying to balance the needs and rights and desires of the whole range of people.

One of the strengths of youth conferencing was identified as its ability to involve community members. This can have the effect of minimising or eliminating the demonisation of young offenders:

The kids were referred to a conference and, particularly in a small town, I think that was the way to deal with it because everyone knew about it and it needed to be dealt with as a community issue...

Another person in the working group considered that restorative justice movements still rely upon adversarial constructions, where ‘community’ stands in place of the State. The traditional cohesiveness of ‘community’ was questioned, which in turn raised issues about alternatives and their ability to account for cultural nuances and sensitivities:

When you’ve got a town that’s divided on race lines and the offender’s from one race and the victim’s from another race or something... out in western Sydney where you’ve got Vietnamese who originally came across as unaccompanied refugees, as kids, and the others selling smack in the streets; the other ones that came across are running the businesses in the middle of town—to the outsiders they look like the same Vietnamese Australians, but they don’t see themselves as being part of the same community generally. They’re not likely to see the effects of the offence that’s being dealt with in the same way, so they’re not going to see the solution in the same way.

Some participants in the group wanted to highlight the problems encountered when one kind of process is thought to be appropriate for everyone.

That’s something I’d really like to see addressed in this workshop—the cultural problems with applying various alternatives to different communities.

We need to move away from a solely city focus on where and how alternatives work and how they’re monitored and how they’re evaluated and so on.

What worries me in conferencing for... people with disabilities, is that it's really reliant on the person being able to articulate or else having really good advocates who can articulate what is really happening for the person. And that the person feels safe enough that they can articulate that. You know, I'm thinking about people with intellectual disabilities who've been assaulted.

The youth conferencing scheme was defended on this score:

Now we're not there yet... but we're certainly aware that we need to work differently with people who have intellectual disabilities and physical disabilities, and who have identified mental health issues.

But there did seem to be some disagreement about whether traditional or alternative methods offer more protection for people with disabilities:

With a convenor, because they do the face-to-face, one to one, preparation for youth justice conferences, they will usually pick up that the child is not communicating... we're trying not to replicate the traditional system in ignoring it.

And,

In this circumstance, if you have a hearing impairment, you can't participate—it's too hard. There are some safeguards that we have slowly built into traditional systems—that provide reasonable adjustments for people so they can have a fair go and we need to make sure not to lose those in the alternatives.

Concerns about programs being appropriate for everyone were not only voiced in relation to conferencing, but also in connection with other

alternatives such as circle sentencing and drug courts. While each alternative may be thought of as successful in one way or another, the following cautionary tale about the drug court was given as an example of how alternative processes can fall down if they are culturally insensitive or inflexible:

South East Asian Australians particularly have much lower uptake of medicalised drug rehabilitation programs and much lower success rates when they do take them up. Why that is? I've been looking into all the research for a long time and as far as I can tell, nobody knows...

The woman in the case that I know about for sure went before the drug court and was offered a rehabilitation program and for some cultural reason, presumably to do with how she perceived herself, she refused to take up the option and the magistrate threw the book at her. You know, she got a much, much heavier sentence than you would have expected if she'd just gone through the normal legal system. The legal system seems to imagine that it's doing people a huge favour by offering an alternative resolution process and therefore if people aren't prepared to accept that huge favour then it'll blow up in their face with them not knowing what the reason was.

This punitive response indicates a propensity to work from the assumption that individuals who come before the drug court, or other alternative process, are equally positioned and have given informed consent. This example also raised concerns from the group about the rule of law, which creates the expectation that citizens will have the benefit of knowing what to expect from the legal system, that they are equipped to understand the effects of their decisions:

What are the rules if you're not complying with what you agreed to do as a result of a drug court hearing? And it becomes a double whammy for people who don't, or in some cases can't, for some logical reason, do what they've agreed to do. Should the courts have procedural rules that say 'let's go back and reconsider this and not sentence you'—all the drug courts are premised on 'if you do what you agreed to do, then you'll get out of the system; if you don't you'll be dragged further into it'.

Most, if not all, participants of the group cautiously advocated the use of alternative processes. One major reservation shared by them was the need for adequate, reliable funding, which would provide both room for expansion and incentives for success:

We need to find ways to make this money available for these other options... there needs to be acknowledgment so that agencies of the government aren't pitted against each other all the time—if we can actually reduce some of the funding then that money can be moved over here... and it's not that these people lose face or are penalised for the fact that they are spending less money.

During this discussion, alternative processes were strongly preferred over the adversarial methods, but with the caveat that they had to be appropriate and flexible, consistent and predictable, and they need to be well resourced.

Alternative Penalties

Some of the discussion in the working group was devoted to penalties that are alternative to full-time custody. These were identified as sentences like community service orders, home and periodic detention, as well as

other less familiar alternatives. The participants chose not to critique each alternative and draw out its strengths and weaknesses. Instead, this part of the agenda was dealt with more thematically than the previous sections.

Effects on community sector

One of the themes that emerged during this section was the burden that alternative penalties can place on non-government bodies. Community service order recipients were described as requiring extra time and resources, which are not funded by the Government:

The other thing too with community service orders or this move towards getting more community groups to take more responsibility and get involved. It's really putting a burden on the NGO sector because they're already under-resourced, the people are already over-worked ... And they're putting this guilt trip on you, you want to help the individual, but at the same time you're being used by the government. So you're not actually getting financially compensated.

In effect, community service orders were presented as an unfunded outsourcing of corrections.

Another theme that arose built upon the burdensome nature of alternatives, but related more specifically to social infrastructure.

Government wants the Community sector to be there as part of the infrastructure but doesn't want to fund us so it's not a problem of funding these particular events or individuals, it's a problem that some of these alternatives depend on an effective social infrastructure but the government will not invest in that social infrastructure so that it is there to do the job that's needed.

One participant who represented people from rural and regional areas commented on this strain on social infrastructures:

What happens is that you get the women's refuge which should only have women with domestic violence, what's happened is that people from Wilcannia and Menindee, they actually have to travel in to visit someone in the gaol, someone in remand. The problem is that they're taking up valuable accommodation so a woman will rock up with three or four kids—the only option in town is for them to stay at the women's refuge.

It was agreed that the money saved by not imprisoning people on community service orders should be spent on improving social infrastructure:

And that money could go into crime prevention or providing services in towns that don't have developmental and support services, perhaps setting up a pre-school or providing breakfast for kids in schools or whatever... it doesn't work that way, it all goes into the pot of Treasury: 'Yes we've saved that money thank you very much'.

Consistency

The other major theme to emerge from this part of the discussion related to consistency. While it was earlier stressed that the one-size-fits-all approach was inappropriate and had a deleterious effect on some groups, consistency at the policy level was identified as important.

In terms of sentencing options, it becomes clear that not all judicial decision-makers have the same array of choices:

Certainly in terms of alternatives to full-time custody: periodic and home detention are not available in the country.

Home detention is similarly not an available option for those who have all the signs of being the most economically disadvantaged: people without telephones and homeless people.

Sometimes, the problem with consistency was confined to a single sentencing option:

Unfortunately, some of that community work stuff, it's done like a chain gang.

Shaming them at the same time...

Other community service orders, as mentioned earlier, are served in non-government organisations where the sentenced person can have the appearance of being just another worker.

There was also criticism about decision-makers developing sentences in an *ad hoc* manner:

I read an interesting article... about a court case in WA where an Aboriginal artist, who'd been charged with a drink driving offence, was sentenced to paint 12 paintings for the City of Broome instead of going into gaol and under the title of 'Creative Sentencing'—a newspaper article—he was a very famous artist and his paintings were reported to be worth about \$4000-\$5000 each so I worked it out as being about a \$60,000 fine for a drink driving offence...

This was not a criticism of creatively determining a non-custodial sentence that was tailored to an individual, the problem identified was that this 'fine' was overly punitive and out of step with the typical range

of fines. The concern here was that some measure of equivalence was not even attempted, coupled with the exploitative overtones of the city of Broome profiting from the sentence.

Finally, at the level of criminal justice policy, the lack of consistency between different agents of the system was noted:

Yeah well how is it that [the Department of] Juvenile Justice can resist the pressure to become more punitive but the police and corrective services can't?

The capacity for the Department of Juvenile Justice to operate with the philosophy that 'rehabilitation' is a real possibility is clearly different from the way adults are dealt with by the criminal justice system.

Funding and politics

There was no shortage of criticism of the government and funding difficulties faced by non-government organisations:

Under the way the current funding system works, it's often worse if [the government] does invest in it because they usually farm these duties out to NGO's to avoid the problems with the bureaucracy, but then they impose funding requirements that essentially turn the NGO into a branch of the bureaucracy with all the same restrictions.

Every community organisation I talk with is spending two-thirds of their time applying for funding, the short funding cycles just make it almost impossible to get on with your work and get staff that are able to stay confident that they'll have a job in three years time without having to do ten funding applications.

These funding requirements seemed to participants to be particularly difficult to justify when they impact on crime prevention programs.

If you do it properly at the front end or do it better at the front end, then you save lots of money at the back end because it costs \$100,000 to keep one kid in custody for 12 months. So if we can keep 300 kids out for 12 months or four years, you must be saving something like... well do the maths.

The participants agreed that when the economic rationalist arguments fail to have any effect on government policy, it is clear that there is something else at stake:

The question for me is: how do we get the politicians to acknowledge that's what they do? They ride into an election on the back of demonising young people as 'the other', 'the enemy'; 'the ones that are causing all the trouble and we will come down hard on them'. So mandatory sentencing—all those sorts of things are part of that—how do I win an election?

Law and order politicking was identified as a significant barrier to the commitment to and success of alternative approaches, both preventative and responsive in nature.

Conclusion

By exploring and critiquing the different alternative approaches to policing, processes and penalties, the working group participants did seem to arrive at some common understandings and experiences. Certainly there was agreement about the barriers preventing access to justice. While these points of connection may not have resulted in the immediate development of joint strategies to address the problems, their ventilation may lead to future partnerships.

PART 6

Conclusion

Conclusion

The Access to Justice Roundtable was an innovative and lively forum and seemed well received by those who participated. Much of the success of the day can be attributed to the willingness of the participants to bring their knowledge and experience to the task of considering barriers to accessing justice and their concerted efforts in thinking strategically and cooperatively about ways to address those barriers.

The papers presented over the course of the day and the working groups in the afternoon met along some common themes. There were attempts to make the phrase ‘access to justice’ meaningful, to be clear about the difference between it and ‘access to courts’ and to recognise the limitations of the court system. Alternative dispute resolution mechanisms came up in many discussions as providing more avenues to justice for disadvantaged groups than the courts.

A clear message throughout the day was that ‘one size does not fit all’. Community workers, lawyers and policy makers generally agreed that, in order to improve access to justice for socially and economically disadvantaged people, local and culturally sensitive solutions based on community participation and leadership are the most successful avenues to follow.

There was also a theme throughout the day about the value of personal contact and building relationships between service providers and disadvantaged groups. This theme arose in discussions of ways to provide information that do not rely on access to phones and the Internet. The replacement of direct personal contact by these means is a problem not only for people who do not have access to telephones and the internet, but also for people who have low literacy, low English language skills, are hearing impaired or are not comfortable using new technologies. This theme was also heard in relation to helping disadvantaged people to have

a sense of their right to justice. Participants said that disadvantaged people did not believe that the legal system would be able to help them. They said that these beliefs should be challenged by service providers and advocates. They could also be helped by an emphasis on broader client-focused rather than narrowly problem-focused strategies. People also commented on the need for a central referral service that directs clients to appropriate services. LawAccess was seen as a valuable model.

Calls for more ongoing funds for legal aid and for service providers were heard throughout the day. Some speakers thought that the Legal Aid eligibility rules, which restrict grants of aid to certain areas of law, prevented access to justice for many people. Others noted that there were people who fall through the cracks by earning just over what is allowed by the means test for legal aid, but not enough to pay for legal representation. Richard Funston, however, talked about some impressive initiatives coming from the Legal Aid Commission, such as the pilot duty scheme that has been run out of the Parramatta registry of the Family Court since mid 2002. A number of speakers mentioned that resources had to be used strategically to ensure that effective service providers were employed where they are most needed and for capacity building in disadvantaged areas to reduce the risk of crime and other social problems.

Julian Disney closed the workshop with his reflections on the day and directions for the future. He began by stressing that many good ideas are not new—they may have been proposed in detail in past years and even implemented somewhere. It is important to draw on this past thinking and experience rather than just trying to re-invent the wheel. He also proposed that the highest priority should be given to devising and implementing measures which will help the most disadvantaged sectors of the community ('the bottom 10 per cent') rather than, as often happens, ending up helping those in much less dire circumstances.

Alternative dispute resolution (ADR) and complaints schemes were given some attention in these concluding remarks. Julian Disney praised these alternatives for their promise of speedy and inexpensive resolutions to disputes. He suggested that these benefits often outweighed concerns

about making the system ‘the most perfect way to deliver justice’. However, he also expressed some cautions. One was that ADR may not always reduce power imbalances sufficiently to arrive at a genuinely agreed resolution. The second was that the private nature of conciliation and mediation may sometimes impede advancement of the law and broader application of justice. By contrast, proceeding through the courts means that cases are a matter of public record and are capable of becoming precedents for future cases.

Simplicity and strategic action were key directions for the future. People should not overlook the importance of simple measures to deliver information. Professor Disney mentioned basic websites, accessible phone services and central referral points as ways that people might access information in an uncomplicated way. He felt that the access to justice movement could learn from commercial examples of accessing particular populations, especially “point-of-sale” advertising and product placement. Information and services should be provided in such a way that they are readily available when, where and for whom it is needed rather than, for example, in obscure one-off advertisements or inconvenient directories, websites and offices. Trains and buses, milk cartons and fridge magnets, for example, could all be good sites for providing information for disadvantaged groups with legal needs.

Overall, the day provided a platform for knowledge sharing, particularly in relation to the barriers to accessing justice faced by specific groups. With this in mind, the participants had the opportunity to make connections with others and develop partnerships and joint strategies or projects to address these problems.

Appendices

Appendix A Roundtable Participants

Hawa Arya	Law and Justice Foundation of NSW
Jenny Bargen	NSW Department of Juvenile Justice
Karen Bevan	Uniting Care Burnside
Simon Bronitt	Domestic Violence Prevention Council
Roberto Buonamano	Law and Justice Foundation of NSW
Julie Carrington	Law Access NSW
Julian Disney	Social Justice Project, University of NSW
Sarah Ellison	Law and Justice Foundation of NSW
Vanessa Ford	Youth Action and Policy Association
Barry Fowler	Centre for Community, Broken Hill NSW
Phillip French	People with Disabilities
Richard Funston	NSW Legal Aid Commission
Fran Gibson	Kingsford Community Legal Centre
Jason Grubisic	Youth Action and Policy Association
Julia Haraksin	NSW Attorney General's Department
Maria Karras	Law and Justice Foundation of NSW

Alan Kirkland	Council of Social Service of NSW
Rowena Lawrie	Aboriginal Justice Advisory Committee
Heather Lee	Shopfront Youth Legal Centre
Catherine Lloyd	Law and Justice Foundation of NSW
Annabel Mayo	NSW Department of Corrective Services
Elizabeth McKibbin	Legal Information Access Centre
Gabrielle McKinnon	Marrickville Community Legal Centre
Meredith McLaine	Shoal Coast Community Legal Centre
Simon Moran	Public Interest Advocacy Centre
Geoff Mulherin	Law and Justice Foundation of NSW
Mary Perkins	Shelter NSW
Julia Perry	Law and Justice Foundation of NSW
Jane Pritchard	Law Access NSW
Michael Raper	Welfare Rights Centre
Gordon Renouf	Tennant Creek Regional Legal Access Project
Justice Ronald Sackville	Federal Court of Australia
Jane Sanders	Shopfront Youth Legal Centre
Lou Schetzer	Law and Justice Foundation of NSW
Sue Scott	Law and Justice Foundation of NSW

Sylvia Scott	Elder, Eora People
Joanne Selfe	Indigenous Consultant
Michael Strutt	Consultant
Lois Towney	Western Aboriginal Legal Service
Mayom Tulba	Anglicare Migrant Services
Rugmini Venkatraman	NSW Attorney General's Department
Ann Wansbrough	Uniting Care
Frith Way	NSW Legal Aid Commission
Cheryl Webster	Anglicare Migrant Services

Appendix B

Roundtable Program

9:00–9:25

Introduction

Chair: Geoff Mulherin, Director, Law and Justice Foundation of NSW

*Sylvia Scott, Elder of the Eora People
Welcome to Country*

Julia Perry, Head of Research, Law and Justice Foundation of NSW

Purpose and structure of Roundtable

Lou Schetzer, Senior Project Manager, Law and Justice Foundation of NSW

The Law Foundation's Legal Needs Project

9:25–9:45

Opening Address

Justice Ronald Sackville, Federal Court of Australia

10:00–11:00

Perspectives from the Community

Chair: Julian Disney, Director, Social Justice Project

Joanne Selfe, Indigenous Consultant

Barry Fowler, Centre for Community, Broken Hill NSW

Philip French, Director, People with Disabilities

11:00–12:00

Options for Reform

Chair: Julia Perry, Head of Research, Law and Justice Foundation

Richard Funston, Legal Aid Commission

Accessible and equitable information and advice

Jenny Bargaen, Department of Juvenile Justice
Alternatives to traditional court approaches in civil
and criminal law

*Gordon Renouf, Tennant Creek Regional Legal
Access Project*
Holistic and preventative approaches to legal issues

1:00–2:30

Working Groups

Access to information

Access to legal advice

Alternatives to traditional approaches in civil law

Alternatives to traditional approaches in criminal law

3:00–4:00

Reflections: The Way Ahead

Chair: *Alan Kirkland, Director, Council of Social
Service of NSW*

General Feedback and Discussion

Julian Disney, Director, Social Justice Project
Summary of issues

Appendix C

The Law and Justice Foundation of New South Wales

The Law and Justice Foundation seeks to improve access to justice, particularly for socially and economically disadvantaged people. The Foundation is an independent statutory body with a long year history of improving access to justice for the people of NSW. It's staff and Board come from a range of different backgrounds such as law, research, education and the social sciences. This enables us to consider issues of access to justice from different perspectives.

The Law and Justice Foundation believes that:

- a fair and equitable justice system is essential for a democratic, civil society
- reform should, where possible, be based on sound research
- people need accurate, understandable information to have equitable access to justice
- community support agencies and NGOs play a critical role in improving access to justice for disadvantaged people.

Our strategies for 2001–2003 include:

- identifying legal and access to justice needs, particularly of socially and economically disadvantaged people
- conducting rigorous, independent research to inform policy development
- contributing to the availability of understandable legal information
- supporting projects and organisations that improve access to justice.

Other Publications in this Series

Access to Justice Series

Gateways to the Law (2001)

Unrepresented Parties & the Equal Opportunity Tribunal (2000)

Future Directions for pro bono legal services in NSW supplementary report:
proposed models (1999)

Legal Expense Insurance: an experiment in access to justice (1998)

Law and Justice Foundation Research Reports incorporating the Justice Research Centre Monograph Series

The changing face of litigation: unrepresented litigants in the Family Court of
Australia (2002)

Case Management Reform: A Study of the Federal Court's Individual Docket
System (2002)

Legal Aid for Committals (2001)

Managing Prejudicial Publicity (2001)

Legal Services in Family Law (2000)

Model Key Performance Indicators for NSW Courts (2000)

Family Law Case Profiles (1999)

Claiming under the Motor Accidents Scheme (1998)

Awards made under the Motor Accidents Act (1998)

Plaintiffs' Satisfaction with Dispute Resolution Processes (1997)

The Prototype Access to Justice Monitor Queensland (1996)

Case Management Rolling Lists in the Family Court, Sydney Registry (1996)

Conveyancing Fees in a Competitive Market (1996)

Economic Evaluation of Differential Case Management (1995)

An Implementation Evaluation of Differential Case Management (1995)

Who Settles and Why? (1994)

Compensation in an Atmosphere of Reduced Legalism (1994)

So Who does use the Court? (1993)

The Costs of Civil Litigation (1993)

The Pace of Litigation in NSW (1991)

Role of Conciliation (1990)

Legal Information

Email law: a planning guide for delivery of free legal assistance via email (2001)

Best practice guidelines (2001)