

# ACCESS TO JUSTICE AND LEGAL NEEDS

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

## STAGE 1: PUBLIC CONSULTATIONS

Louis Schetzer and Judith Henderson

August 2003



LAW AND JUSTICE  
FOUNDATION

OF NEW  
SOUTH WALES

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# Preface

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

The Foundation's priority during 2002–2004 is the Access to Justice and Legal Needs Project, which will investigate the access to justice and legal needs of economically and socially disadvantaged people in New South Wales.

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

The project comprises three stages, as outlined in the Terms of Reference. A significant component of the first stage involved an extensive consultation process, which included inviting submissions from interested agencies and individuals, conducting a series of roundtable consultation forums, individual consultations with key stakeholder organisations and individuals, and attending relevant conferences, workshops and forums.

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*July 2003*

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<sup>1</sup> *Law and Justice Foundation Act 2000 (NSW)*, s. 5(1).

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# Executive Summary

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This report summarises the responses and input received by the Law and Justice Foundation of NSW during the consultation process conducted as part of Stage 1 of the Access to Justice and Legal Needs Project.

During the consultation process, the Foundation received submissions from 28 organisations and four individuals. In addition to these written and oral submissions, the Foundation received a range of other material including copies of articles written for journals, submissions to similar previous inquiries and published reports. These were either expressly referred to in submissions or in consultations, or supplied to the Foundation as a submission on behalf of an organisation. The Foundation conducted seven roundtable forums for legal and community organisations and a number of consultations with selected individuals.

The Foundation held a one-day Access to Justice workshop attended by 44 invited participants from various socially and economically disadvantaged groups, community organisations, legal service providers, professional bodies, legal and social researchers, administrators and policy makers. Staff of the Foundation also attended and participated in eight conferences or forums relating to Access to Justice and Legal Needs.

The Foundation has aimed to record as fully as possible the substance of the responses received in this consultation stage. Consequently, although not strictly part of the brief for Stage 1, for completeness the report includes some recommendations proffered by participants in the consultation process, as well as areas identified by participants in need of further in depth research and analysis. It should be noted that the Foundation has not undertaken any evaluation of the accuracy of the responses received.

The consultation process identified a number of groups as being economically or socially disadvantaged in terms of their ability to access the law and justice. These were:

- people with disabilities, including
  - intellectual disabilities
  - physical disabilities
  - sensory disabilities, including hearing disability, vision disability, deafblind, and/or speech disability
  - psychiatric disabilities/mental illness
  - acquired disabilities
- people from culturally and/or linguistically diverse backgrounds
- Indigenous Australians
- children and young people
- older people
- people living in remote, rural and regional areas
- people with low levels of education and literacy
- gay, lesbian and transgendered people
- women
- people living in institutions (i.e. prisoners, people detained in immigration detention centres, psychiatric institutions and people released from institutions)
- people on low incomes
- homeless people
- men without legal representation for family law or domestic violence matters
- people who face multiple disadvantages.

## Obtaining legal assistance

### **Barriers for people who are socially and economically disadvantaged**

Many of the barriers identified by contributors are relevant to all disadvantaged groups in the community. These included:

- the high cost of legal services
- inadequate funding for legal aid service providers
- restrictive funding policy for legal aid
- restrictive legal aid eligibility guidelines
- poor coordination of legal aid services
- unavailability of legal aid services due to service providers having a conflict of interests
- tax deductibility of legal expenses for companies and businesses
- limitations with pro bono legal service provision
- changes to civil liability laws which restrict accessibility to lawyers
- inaccessibility of legal information websites and helplines.

Specific barriers to obtaining legal assistance which relate to particular disadvantaged groups as identified by contributors are as listed below:

#### *People with disabilities*

- fear of retribution
- communication difficulties with legal practitioners
- poorly resourced specialist services
- lack of knowledge of available options for legal assistance

- lack of autonomy to make decisions to seek legal assistance
- lack of awareness that action may have been taken against them
- reliance on others to access legal assistance.

For people with an intellectual disability:

- lack of financial resources
- lack of awareness that legal advice or representation may be necessary
- difficulties in communicating with legal practitioners
- lack of understanding by legal service providers as to the nature of intellectual disability
- negative stereotypes of people with an intellectual disability
- lawyers failure to acknowledge the capacity of their intellectually disabled client to give instructions
- fear of retribution.

For people with a physical disability, physical access to legal advisers

For people with sensory disabilities:

- lack of access to AUSLAN interpreters
- inaccessibility of many legal information websites.

For people with psychiatric disabilities, communication barriers

For people with acquired disabilities, issues of prejudice, low self-esteem, fear of discrimination and retribution, and communication problems

People with multiple disabilities were identified as being particularly vulnerable, with few specialist legal services available to assist such people.

*People from culturally and/or linguistically diverse backgrounds*

- difficulties in accessing interpreter services and translated legal information material
- lack of funding and services for legal representation in Immigration matters
- lack of knowledge about the availability of legal service providers, or lack of trust in the services which are available
- lack of awareness and sensitivity to the needs of diverse cultures and newly emerging ethnic communities amongst service providers
- lack of availability of female interpreters for issues confronted by CALD women.

*Indigenous Australians*

- long-term distrust of the legal system
- formality of the legal system and its services
- lack of cultural awareness, sensitivity and compassion among legal service providers
- lack of Indigenous personnel in organisations which provide legal services
- intimidation in approaching legal services
- lack of services for Indigenous people in Civil and Family Law
- lack of services for issues specific to Indigenous women and children.

*Children and young people*

- lack of specialist legal services for young people
- lack of awareness of rights and legal entitlements

- reliance on adults to mediate their access to legal services
- fear of being disbelieved or not taken seriously by service providers
- most solicitors lack skills in dealing with children and young people
- intimidating and formal atmosphere of many legal services
- lack of information strategies which specifically target children and young people.

### *Elderly people*

- physical incapacity
- dependency on others
- diminished self-confidence
- lack of skills in accessing legal information websites or helplines
- lack of specialist legal services.

### *People in rural, regional and remote areas*

- lack of access to services due to remoteness and physical distance
- lack of available legal services
- lower levels of literacy and numeracy
- difficulties in accessing legal information websites
- difficulties of privacy and confidentiality in smaller rural communities
- conservative attitudes.

### *People with low levels of education and literacy*

- complexity of the legal system
- ignorance of the availability of legal aid
- inability to recognise a problem as a legal problem

- ignorance of sources of legal information
- ignorance of rights
- inability to assess legal options
- inability to access information on legal information websites.

### Women

- insufficient availability of legal aid for Civil and Family Law matters
- insufficient legal aid grants for Family Law
- insufficient number of private solicitors willing to undertake legal aid Family Law work, particularly in rural and regional areas.

### People living in institutions

- lack of access to legal information websites and telephone helplines
- lack of quality legal services available to prisoners
- lack of services to assist with day-to-day prisoners' rights issues
- lack of legal services to assist detainees in Immigration detention.

### People on low incomes

The most significant identified barrier to obtaining legal assistance for people on low incomes related to the high cost of legal services. The operation of legal aid means test guidelines was considered to be a major factor in denying access to legal assistance for people on low incomes (including part-time employees, self-employed people and low paid full time employees) who could not otherwise afford the services of a private solicitor.

People on low incomes were seen as disadvantaged in terms of the level of legal assistance they could access, when opposed to litigants with significantly more resources.

### Homeless people

- non-availability of legal aid for minor civil matters
- fear of the legal system, and a belief that their problems will just ‘go away’
- lack of ability to identify their issue as a legal issue
- lack of specialist legal services which understand the issues confronting homeless people
- vulnerability to harassment and discrimination
- low levels of literacy
- limited access to online information or telephone helplines.

### Men

It was reported that men who are respondents in child support matters or Apprehended Violence Order applications are often unable to secure legal aid for representation, and are therefore disadvantaged in the proceedings.

## **Mechanisms and innovations to assist disadvantaged people**

The following services were identified by contributors as enhancing access to legal assistance for disadvantaged people:

- Legal Aid NSW, with its main office and 19 regional offices in metropolitan and country areas across NSW, specialist services and advice clinics
- Community legal centres — 19 community legal centres providing generalist services to local geographic catchment areas (including 11 centres in rural and regional areas), and 18 specialist community legal centres delivering services either on particular areas of law or to a particular disadvantaged group

- Eleven publicly funded Tenancy Advice services
- Local Courts and Chamber Magistrates' service
- LawAccess NSW telephone advice and referral service and legal information services
- Private legal profession pro bono services and 'no-win no-fee' contingency arrangements
- Online legal information websites and email advice services.

Specific services relating to particular disadvantaged groups were identified as follows:

*People with disabilities*

- Disability Discrimination Legal Centre
- HIV/AIDS Legal Centre
- Intellectual Disability Rights Service
- Public Interest Advocacy Centre
- Legal Aid NSW Mental Health Advocacy Service and Video Conferencing Scheme
- NSW Local Courts Flexible Service Delivery Policy and outreach services.

*People from culturally and/or linguistically diverse backgrounds*

- Immigration Advice and Rights Service
- Refugee Advice and Casework Service
- Specific community legal education projects undertaken by community legal centres targeting particular small language groups and newly emerging communities

- Legal Aid NSW Administrative Law service
- Local Courts outreach services

### *Indigenous Australians*

- Six Aboriginal Legal Services with 23 branches across NSW
- Wirringa Baiya Aboriginal Women's Legal Centre
- Three Aboriginal Tenancy Advice Services
- Legal Aid NSW Veterans Advocacy Service to Indigenous communities in Moree, Kempsey and Coffs Harbour
- Legal Aid NSW targeted programs to enhance access for Indigenous people
- Chamber Magistrates services in Aboriginal Community Health Centres.

### *Children and young people*

- Targeted legal services for young people provided by the Marrickville Legal Centre, Macquarie Legal Centre and the Shopfront Youth Legal Centre
- National Children's and Youth Law Centre
- Legal Aid NSW Children's Legal Service and Legal Aid Hotline
- Local Courts outreach services to youth centres.

### *Elderly people*

- The Aged-Care Rights Service
- Legal Aid NSW Veterans Advocacy Service
- Local Courts outreach services to aged care facilities.

*People in rural, regional and remote areas*

- Eleven generalist community legal centres in rural and regional locations across NSW
- Nine regional offices of Legal Aid NSW are in rural and regional locations across NSW
- Legal Aid NSW outreach programs, including the Video Conferencing Scheme, the Veteran's Advocacy Service outreaches, and the Women on Wheels outreach program
- Four Tenancy Advice Services in rural NSW
- Local Court outreach services and Chamber Magistrates' telephone services
- Online legal information and email advice services.

*Women*

- Women's Legal Resource Centre
- Domestic Violence Advocacy Service
- Wirringa Baiya Aboriginal Women's Legal Centre
- Legal Aid NSW Women's Domestic Violence Court Assistance Scheme and the Women on Wheels rural outreach project.

*People living in institutions*

- Legal Aid NSW Prisoners Advice Service and Video Conferencing Scheme
- Local Courts outreach services to prisoners and patients in psychiatric institutions.

### *People on low incomes*

Services provided by community legal centres, Legal Aid NSW, tenancy advice services, pro bono programs and Chamber Magistrates are available to many people on low incomes.

### *Homeless people*

The Legal Counselling and Referral Centre operating as part of the work of the Rough Edges ministry at St. John's Anglican Church in Darlinghurst, provides legal assistance to homeless people in inner city Sydney and the Kings Cross/Darlinghurst areas.

## Effective participation in the legal system

### **Barriers for people who are socially and economically disadvantaged**

Many of the barriers identified by contributors as relevant to all disadvantaged groups in the community included:

- court procedures which involve formality of court processes, intimidating courtroom atmosphere and delays
- risks of cost orders if unsuccessful
- limited remedies available through the civil justice system
- problems associated with increased numbers of self represented litigants
- legislative changes in NSW regarding tortious liability and the law of negligence which may restrict the access of disadvantaged people to courts for compensation for injuries caused by another's negligence
- tribunal processes and delays

- inappropriateness of some alternative dispute resolution mechanisms which have been incorporated in courts' and tribunal processes, for some particular types of litigation, and for some types of litigants
- challenges to authority of the courts to resolve particular disputes.

Specific barriers to effective participation in the legal system relating to particular disadvantaged groups as identified by contributors are as follows:

### *People with disabilities*

- accessibility of court premises and processes
- issues of formality and the adversarial nature of judicial proceedings
- the operation of the rules of evidence
- negative perceptions of players in the justice system of people with disabilities
- the lack of people with disabilities who perform significant functions within the justice system
- for people with hearing or vision related disabilities, difficulties in accessing information at court, or participating fully in proceedings
- difficulties in communication in court based ADR processes.

### *People from culturally and/or linguistically diverse backgrounds*

- difficulties with the availability of interpreters
- lack of cultural sensitivity with diversionary programs and mediation/conciliation
- lack of rights to legal representation in Migration matters in Review Tribunals
- restrictive processes involved with the review of Migration matters.

### *Indigenous Australians*

- communication difficulties
- formality of court processes and cross examination techniques
- time limitation issues for people who are members of the stolen generation
- perceptions by Indigenous people of bias in some tribunal jurisdictions
- perception of discrimination by police in exercising discretion to refer young Indigenous people to diversion programs
- lack of accessibility in processes for the Anti Discrimination Board and the Human Rights and Equal Opportunity Commission, for matters involving discrimination complaints.

### *Children and young people*

- delays and lengthy proceedings
- inappropriate legal procedures, cross examination and rules of evidence
- stereotypical views of young people held by some court officers
- lack of skills of magistrates in dealing with children and young people
- lack of information available to young people about what they can expect when they go to court
- lack of legal capacity to initiate proceedings
- lack of awareness of specialist tribunals
- power imbalances in mediation and conciliation processes.

### *Elderly people*

Physical access issues, poor audibility and courtroom environments were the main barriers for effective participation in the legal system identified for elderly people.

*People in rural, regional and remote areas*

- lack of access to courts
- limited circuit hearings by courts and tribunals
- lack of sentencing and bail options due to fewer available services.

*People with low levels of education and literacy*

- complexity of court processes
- requirements in some jurisdictions for written applications and correspondence.

*Women*

- rules of evidence and cross examination techniques in court hearings where women appear as witnesses for sexual assault charges
- perceived reluctance by police to initiate applications for Apprehended Violence Orders in domestic violence situations
- perceived problematic attitude of magistrates to domestic violence situations
- inappropriateness of Family Court based mediation and conciliation in cases involving domestic violence.

*People living in institutions and people released from institutions*

Identified barriers to effective participation in the legal system for people living in or released from institutions included distrust and low expectations of the system's capacity to provide redress for wrongs or recognition of rights.

### *People on low incomes*

- costs of litigation
- risk of adverse costs order
- cost of court fees, experts' reports, transcript costs, etc.
- power imbalance in relation to opposing litigants who are more wealthy
- inability to afford advocacy assistance for ADR processes.

### *Homeless people*

The principal barrier to effective participation in the legal system identified for homeless people was lack of confidence in the legal system that their rights will be respected.

## **Mechanisms and innovations to assist disadvantaged people**

The following services and initiatives were identified by contributors as enhancing effective participation in the legal system for disadvantaged people:

- plain language legislation clarifying the jurisdiction of the Local Court
- case management systems to reduce delays in court waiting lists
- complaints clearance project for the Anti-Discrimination Board
- the Court Support Scheme
- the Federal Magistrates' Service
- programs to assist self represented litigants
- plain English and online application forms for Court actions
- non-adversarial, informal processes of many tribunals.

Specific services and initiatives which assist particular disadvantaged groups as identified by contributors are as follows:

*People with disabilities*

- the NSW Attorney General's Department Disability Strategic Plan, which seeks to improve access to court procedures, physical access to courts and communication processes
- support persons and advocates who attend court with people with intellectual disabilities
- the Court Liaison Nursing Service, which assists with the appropriate assessment and support of people with psychiatric disability through the court process
- the Parramatta Drug Court and the Magistrates Early Referral Into Treatment program for people who suffer substance addiction.

*People from culturally and/or linguistically diverse backgrounds*

- agreements with the Community Relations Commission to facilitate fee-free access to interpreters at Local Courts
- the Interpreters and the Law training program, which aims to improve the quality of interpreter services
- pro bono assistance programs in the Federal Court for refugee and migration judicial review cases
- a review of the recommendation of the 1994 *Quarter Way to Equal* Report<sup>1</sup> which documents the particular experiences, difficulties and needs of women from CALD backgrounds when trying to access the legal system to end domestic violence in their lives.

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<sup>1</sup> Women's Legal Resource Centre, *Quarter Way to Equal: A report on barriers to access to legal services for migrant women*, Sydney, 1994.

### Indigenous Australians

- the Aboriginal Client Services Program within Local Courts, which aims to provide responsive service delivery to Aboriginal service users
- the Aboriginal English project which seeks to identify and respond to communication barriers for Aboriginal people in court settings
- the Circle Sentencing pilot in Nowra
- the NSW Attorney General's Department Aboriginal Justice Plan, which will seek to address the over-representation of Indigenous people in the criminal justice system
- the employment of Indigenous staff as Court officials and Court liaison officers.

### Children and young people

- diversionary programs for young offenders provided by *the Young Offenders Act 1997*
- family group conferences under the *Children (Care and Protection) Act 1997*
- the Children's Court and tribunals which are less formal in their processes.

### People in rural, regional and remote areas

It was identified that visits and circuit hearings by courts and tribunals enhance participation in the legal system by people in rural, regional and remote areas.

### Women

- the review by the NSW Attorney General's Department Violence Against Women Specialist Unit of the *Heroines of Fortitude* report in relation to women's experiences in the courtroom in sexual assault cases
- the Apprehended Violence Order Scheme.

### Homeless people

It was identified that organisations which provide personnel to attend court with people who are homeless to support them through the court process, assist their participation in the legal system.

## Obtaining assistance from non-legal, advocacy and complaint handling bodies

### **Barriers for people who are socially and economically disadvantaged**

Barriers to obtaining assistance from non-legal bodies which are relevant to all disadvantaged groups in the community, as identified by contributors, included:

- lack of resources and skills in community agencies
- reduction and outsourcing of Family mediation services
- lack of confidence in industry based complaint-handling bodies
- lack of awareness of industry based complaint-handling bodies.

Specific identified barriers to obtaining assistance from non-legal bodies for particular disadvantaged groups as identified by contributors are as follows:

### *People with disabilities*

- perceived low standards of service from non-legal disability services
- fear of withdrawal of service if a person with a disability complains about that service
- lack of support services and lack of resources for existing services for people with disabilities
- difficulties with physical accessibility to services
- power imbalances, prejudice of mediators, and difficulties in effective communication in ADR processes such as mediation
- prejudicial attitudes from police or government authorities towards people with disabilities.

### *People from culturally and/or linguistically diverse backgrounds*

- lack of community workers and services for newly emerging CALD groups
- denial of access to many community services for people applying for Temporary Protection Visas
- lack of cultural sensitivity of some mediation and conciliation processes
- difficulties in effective communication in ADR processes
- lack of translated information about community dispute resolution mechanisms.

### *Indigenous Australians*

- inappropriate referrals from community organisations
- cultural inappropriateness of many non-legal community organisations

- cultural inappropriateness of some ADR processes
- lack of confidence and trust in government authorities and the police
- confusion about processes within different Government authorities and complaint handling bodies.

### Children and young people

- lack of trust and confidence in community organisations and some personal support networks
- numerous and inappropriate referrals from community agencies
- unfriendly or intimidating atmosphere within community organisations
- prejudicial attitudes towards young people from some community agencies
- lack of transport to access services
- lack of quality and consistency of service in community organisations
- lack of resources for community organisations
- lack of youth specific services
- power imbalances within ADR processes such as mediation or conciliation
- lack of trust and confidence in government authorities and the police
- lack of knowledge of complaints systems and complaint handling bodies
- fear of retribution if complaints are made.

### Elderly people

- lack of advocacy services for elderly people
- difficulties associated with ADR processes, including low self-esteem, passivity, limited negotiation skills, dependency on others and power imbalances in negotiation.

### *People in rural, regional and remote areas*

- lack of quality advice and advocacy services in rural and remote areas
- lack of support services in rural areas
- lack of non-adversarial conflict resolution services in rural areas
- difficulties associated with ADR processes, including stereotyping of rural people, lack of confidentiality and privacy in rural areas, difficulties in finding neutral mediators, cultural differences, power imbalances in negotiation and lack of awareness of conflict resolution services
- difficulties in accessing free toll 1800 number for some complaint handling bodies.

### *People with low levels of education and literacy*

- difficulties in accessing information in accessible formats from libraries
- lack of information in accessible formats about complaint handling bodies
- processes of complaint handling bodies which require written complaints.

### *Gay, lesbian and transgender people*

Issues of bias and power imbalances in negotiation in ADR processes were identified as barriers for gay, lesbian and transgender people.

### *Women*

In relation to ADR processes, issues of gender bias, stereotyping of women, aggressive negotiation styles, lack of easy access to dispute resolution centres and lack of information about dispute resolution processes were all identified as barriers for women.

*People living in institutions and people released from institutions*

- perceived lack of independence of available complaint handling services for prisoners
- lack of non-legal advocacy support services for prisoners and ex-prisoners
- lack of disability support services for prisoners who are intellectually disabled.

*People on low incomes*

In relation to ADR processes, issues of power imbalances in negotiation, lack of economic bargaining power in negotiation and lack of familiarity with dispute resolution processes were identified barriers for people on low incomes. Low-income people who have restricted use telephones are not able to access complaint-handling services through free call 1800 numbers.

*Homeless people*

Prejudicial attitudes of service providers towards homeless people was identified as a barrier to accessing non-legal advocacy and support.

*Men*

The withdrawal of counselling services for parents post separation was identified as presenting a barrier for men in accessing non-legal support.

## **Mechanisms and innovations to assist disadvantaged people**

The following services and initiatives were identified by contributors as enhancing access to non-legal assistance for disadvantaged people:

- community organisations and workers, including social workers, citizen's advocacy and settlement workers, tenancy advocates, other community based advocacy organisations and Migrant Resource Centres
- libraries
- Community Justice Centres
- early intervention counselling in family disputes
- the Public Trustee NSW
- the Government Access Program, based in Local Courts
- Victims Services (for victims of crime)
- industry based complaint handling bodies, which can assist for resolving disputes about insurance companies, investment products, telecommunications services, energy, water, credit unions, banks and insurance brokers.

### *People with disabilities*

- peak bodies such as People with Disabilities
- the Illawarra Disability Trust Criminal Justice Program
- the Public Trustees NSW.

### *People from culturally and/or linguistically diverse backgrounds*

- ADR processes which are sufficiently flexible to accommodate diversities in culture

- Victims Services' information programs which target victims of crime from non-English speaking backgrounds
- Energy and Water Ombudsman information programs targeting people from non-English speaking backgrounds.

### Indigenous Australians

- Aboriginal Community Justice Groups
- ADR processes which are sufficiently flexible to accommodate the particular needs of Indigenous people, and which overcome some of the inappropriateness of the formal justice system
- police
- Victims of Crime Bureau Aboriginal Project Officer.

### Children and young people

- youth workers, schoolteachers, school counsellors, social workers and parents.
- ADR processes which are flexible, more informal, emphasise direct communication and less costly
- police youth liaison officers and Police and Community Youth Clubs
- Ombudsman's office Youth Liaison Officer, and youth advocate positions within Government departments
- visitors' schemes for Juvenile Justice Centres and Department of Community Services institutions.

### Elderly people

- ADR processes which are flexible, more informal, emphasise direct communication and less costly
- the Public Trustee NSW
- Centrelink services.

### *People in rural, regional and remote areas*

- ADR processes which are flexible, more informal, timely, and cheap
- Victims Services' officers who are available in rural and regional areas
- Victims Services 1800 numbers and online applications and information
- locally based Victims Services counsellors
- branches of the Public Trustee NSW in rural and regional areas
- free 1800 numbers for Government departments, ombudsman offices and industry complaint bodies.

### *Gay, lesbian and transgender people*

ADR processes were identified as mechanisms which may offer lesbians and gay men the possibility of avoiding many of the problems that they perceive exist with the formal justice system. In addition, the privacy afforded by many ADR processes was identified as an attractive feature for members of sexual minorities.

### *Women*

ADR processes such as mediation were identified as being attractive to women, as they provide a less formal way of resolving disputes and also provide a method of dialogue.

The Local Courts Domestic Violence project, which seeks to ensure victims receive appropriate support and referrals, was also identified as a valuable service.

### *People living in institutions*

Organisations and charities such as St. Vincent de Paul, which undertake prison visits, were identified as services which can provide some non-legal support for prisoners, as were teachers, educators and counsellors who visit prisons.

### People on low incomes

ADR services were identified as often being the only practical dispute resolution option for people on low incomes.

The Public Trustee NSW was also identified as providing services for people on low incomes.

### Homeless people

The importance of consultative, case management communication strategies across professions was identified as an important model of service provision for homeless people, so that issues of housing, health, drug dependency and employment can be addressed in a cohesive manner.

## Participation in law reform

### **Barriers for people who are socially and economically disadvantaged**

Barriers to law reform common to several disadvantaged groups as identified by contributors included:

- vilification and marginalisation of advocacy bodies
- lack of funding, skills and resources for grass roots advocacy
- emphasis of funding bodies on casework delivery
- threats of competitive tendering
- prevailing political climate forcing reactive advocacy
- the role of the media in framing social opinion
- the formality, language and lack of public participation in formal inquiries, Royal Commissions and Special Inquiries
- rising levels of disillusionment and frustration with political processes.

Specific barriers to participation in law reform processes for particular disadvantaged groups as identified by contributors are as follows:

*People with disabilities*

- inaccessible formats, both printed and online, of reports and discussion papers
- use of formalised language in discussion papers and reports
- lack of physical access and hearing assistance at law reform hearings and public forums
- difficulties in communication and preparing submissions for people with intellectual disability.

*People from culturally and/or linguistically diverse backgrounds*

- formalised language in discussion papers, reports and hearings
- lack of access to translated material.

*Indigenous Australians*

Lack of adequate consultation with Indigenous communities was identified as a significant barrier for Indigenous Australians participating in law reform processes.

*Children and young people*

The political marginalisation of children and young people and the absence of a national advocate for children's rights were identified as barriers to effective participation in law reform processes for children and young people.

### *People in rural, regional and remote areas*

Physical distance, and the location of many law reform commission inquiries, parliamentary inquiries and special commissions of inquiry in city locations, were significant barriers identified for people in rural, regional and remote locations participating in law reform processes.

### *People with low levels of education and literacy*

Use of formalised language in discussion papers, reports and hearings was identified as a barrier for people with low levels of education and literacy participating in law reform processes.

### *Gay, lesbian and transgender people*

The reliance on mediation, and the consequential reduced possibility of achieving change through litigation was identified as a barrier for people in sexual minorities seeking to achieve changes in the law.

### *Women*

Inadequate funding for women's organisations was identified as a barrier for women participating in law reform processes.

### *People living in institutions and people released from institutions*

Sensationalised media reporting of prison issues was identified as a barrier for prisoners and ex-prisoners effectively participating in systemic reform.

### *People on low incomes*

Business and corporate incentive to settle claims by people on low incomes which may involve adverse publicity, was identified as a barrier to effective law reform for such people.

## **Mechanisms and innovations to assist disadvantaged people**

The following services and mechanisms were identified by contributors as enhancing access to law reform processes:

- community organisations carrying out their advocacy role
- law reform advocacy of community legal centres on behalf of their communities
- advocacy training programs to assist individuals and community organisations become more effective law reform advocates
- public participation and consultation strategies undertaken by law reform commissions
- targeted consultation strategies carried out by law reform commissions for particular disadvantaged groups, including people of sexual minorities, women, children and young people, and people with disabilities
- specific programs initiated by consumer and industry bodies which seek to represent and advocate on behalf of customers and consumers.

### *People with disabilities*

Mechanisms which assist people with disabilities participate in law reform processes as identified by contributors included:

- provision of reports and discussion papers by the NSW Law Reform Commission in alternative formats, accessible to people with sight impairments and people with intellectual disability
- specific consultation strategies by the NSW Law Reform Commission, for people with various disabilities, including specific focus groups, individual consultation meetings, and representation on advisory committees

- use of disability networks to undertake public consultations
- presentation of online materials in accessible formats.

### *People from culturally and/or linguistically diverse backgrounds*

The Refugee Council of Australia has developed a kit to assist individuals and community organisations become more effective law reform advocates on issues relating to refugees and asylum seekers.

### *Indigenous Australians*

Consultation with Indigenous organisations and representative bodies, such as the Aboriginal Justice Advisory Council, as well as Indigenous representation on advisory committees were identified strategies employed by law reform commissions to encourage effective participation by Indigenous people in their processes.

### *Children and young people*

Youth advocacy bodies and organisations such as the Youth Justice Coalition, were identified as avenues by which the views of young people and children can be presented to law reform commissions and parliamentary inquiries.

Particular law reform commission inquiries occasionally produce issues papers and reports specifically aimed at children and young people, as well as undertaking consultation strategies targeting children and young people.

### *People in rural, regional and remote areas*

Law reform commissions indicated their preparedness to accept verbal submissions by telephone, as well as undertaking public consultation forums in rural and regional areas, to enhance access for people in those areas.

# Access to Justice and Legal Needs Project: Terms of Reference

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## Project Aim

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

## Objectives

The project will examine the ability of disadvantaged people to:

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

This will involve both qualitative and quantitative investigations into:

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

## **Project Outline**

The project will be carried out in three stages.

### Stage 1

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

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

Stage 1 will include:

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

### Stage 2

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

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

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

### Stage 3

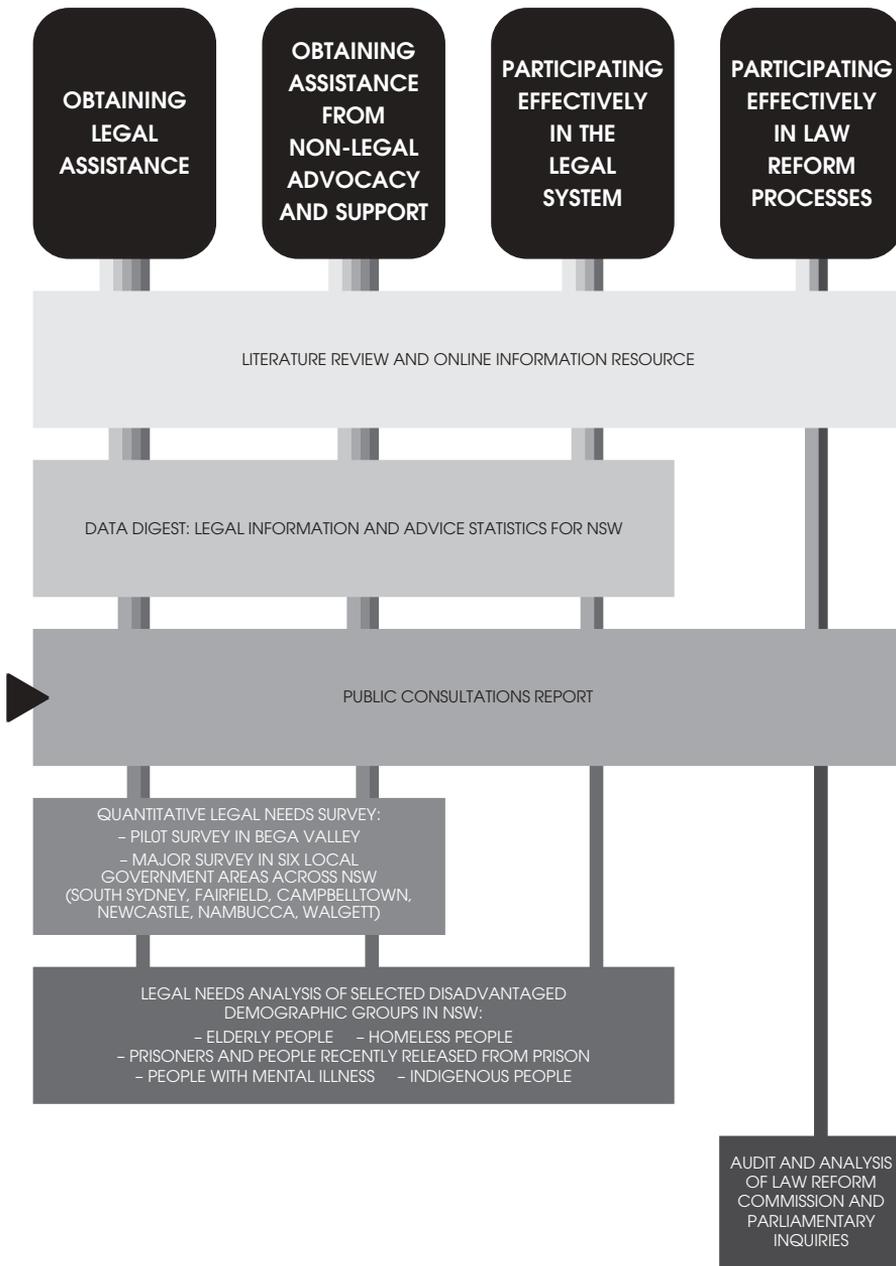
The third stage, undertaking a statewide general population survey of legal needs, will depend upon the results of a feasibility study assessing the usefulness and resource implications of carrying out such a survey.

## **Output and Outcomes**

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

1. A statement on the particular access to justice and legal needs of socially and economically disadvantaged people in New South Wales.
2. Reports detailing the access to justice and legal needs of different groups of disadvantaged people, including papers from workshops, forums, conferences and consultations.
3. A database/online information resource of literature and studies on access to justice and legal needs for disadvantaged people.
4. Reliable community needs assessment models to facilitate the measure of access to justice and legal needs of disadvantaged people.

## Project Overview



# Introduction

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This report summarises the responses and input received by the Law and Justice Foundation of NSW during the consultation process conducted as part of Stage 1 of the Access to Justice and Legal Needs Project.

The diversity of organisations participating in the consultation process has been vital in identifying the views of the wider community on the priorities for improving access to justice.

The consultation process commenced in July 2002, with the publication and distribution of the project's Terms of Reference (TOR), which included the aim, objectives and outline of the Foundation's Access to Justice and Legal Needs project, and a call for submissions on issues relevant to the project's TOR. Advertisements calling for submissions were placed in the *Sydney Morning Herald*, the *Law Society Journal*, the *Daily Telegraph*, and *NCOSS News* (Newsletter for the New South Wales Council of Social Services). The TOR were also made available on the Foundation's website (<http://www.lawfoundation.net.au/access>). The advertised closing for date for submissions was 30 September 2002. This was subsequently extended to 30 November 2002.

In August the Foundation published a background paper<sup>1</sup> providing further details regarding the project's TOR, and the issues to be examined. The background paper aimed to encourage further debate and interest in the project, as well as assist those individuals and organisations intending to

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<sup>1</sup> Schetzer, L., Mullins, J., and Buonamano, R., Access to Justice and Legal Needs – A project to identify legal needs and barriers for disadvantaged people in NSW – Background Paper, Law and Justice Foundation of NSW, August 2002, <http://www.lawfoundation.net.au/access/background.html>

make a submission or be involved in subsequent stages of the project. It also provided:

- a discussion of the terms ‘access to justice’ and ‘legal needs’ in the context of the project
- an initial identification of some disadvantaged groups whose access to justice and legal needs were relevant to the project, and
- a brief discussion of studies and research literature on access to justice and legal needs issues.

The Foundation received submissions from a total of 28 organisations and four individuals. These are listed in Appendix 1.

In addition to these written and oral submissions, the Foundation also received a range of other material including copies of articles written for journals, submissions to similar previous inquiries and published reports. These were either expressly referred to in submissions or in consultations, or supplied to the Foundation as a submission on behalf of an organisation. Where relevant this material has been quoted in this report. The additional material provided with each submission is also detailed in Appendix 1.

The Foundation also conducted seven roundtable forums for legal and community organisations and a number of consultations with selected individuals. Details of these are listed in Appendix 1.

On 10 July 2002, the Foundation, together with the University of New South Wales Social Justice Project, hosted a one-day Access to Justice workshop. The workshop was attended by 44 invited participants, including people from various socially and economically disadvantaged groups, community organisations, legal service providers, professional bodies, legal and social researchers, administrators and policy makers. The aims of the workshop 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 papers presented at the workshop and the input from participants in the various workshop working groups have also been considered as part of the consultation process for this stage of the project. An outline of the workshop agenda together with a list of the participants is provided in Appendix 2.

Staff of the Foundation also participated in eight conferences or forums relating to Access to Justice and Legal Needs. These are also listed in Appendix 1. In two of these, the Foundation participated in workshops which were directly relevant to the Access to Justice and Legal Needs Project. These conferences and forums provided further opportunities for the Foundation to receive input for stage 1, and were selected on the basis of providing opportunities to consult with relevant legal and community organisations.

The outcomes of these forums, together with the papers from the conferences/forums have been considered as part of the consultation process. It should be noted that the list of conferences attended does not represent an exhaustive list of conferences and forums which were conducted during this period which may have been relevant to the project's TOR.

## **Scope of the report**

The Foundation has aimed to record as fully as possible the substance of the responses received in this consultation stage, either through written or oral submissions, input received via roundtable forums, or conferences and workshops in which the Foundation was invited to participate.

We have endeavoured to report the perceptions of contributors, some of which will be subjective perceptions of what are potentially, verifiable objective facts. No independent evaluation of these perceptions has been conducted for the purposes of this stage of the overall project. Rather, the intent of this report is to ensure that all voices are heard, and does not discuss whether the contributions are accurate, nor does it endorse the views and judgements expressed by the participants.

Where particular reports and references are quoted in the report, it is in the context of them having been referred to by submissions or participants in the consultation process. The report does not reflect a comprehensive literature review of access to justice and legal needs issues.

A number of submissions and consultation participants made reference to the Background Paper,<sup>2</sup> either endorsing or providing more detail regarding the issues raised in it. The report therefore incorporates material contained in the Background Paper, particularly in terms of identification of disadvantaged groups, and the barriers they face in terms of access to justice issues.

## **Structure of the report**

Chapter one details the particular groups within the community, as identified through the consultations, who face disadvantage in accessing various elements of the legal system. Consideration is also given to ‘multiple disadvantage’—those people who may fall into a number of different groups

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<sup>2</sup> Ibid.

facing barriers in accessing justice. There is a brief discussion of why these groups are disadvantaged in accessing justice and an outline of their particular legal needs. The barriers they face are discussed in more detail in the following chapters.

Chapters two to five cover each of the key areas outlined in the terms of reference, that is, the ability of disadvantaged people to:

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

Each chapter commences with a discussion of the particular barriers faced by disadvantaged groups in the community in respect of each of these elements of the justice system. The existing features and services which endeavour to overcome some of these barriers are then explored, together with some recent innovations which have either been piloted or implemented. Proposals for further innovations and solutions are also presented.

The final chapter considers areas of further research on the issues discussed in the preceding chapters.

# 1. Who is Disadvantaged in Seeking Access to Justice?

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- 1.1 This chapter details the groups within the community, as identified through the consultation process, who face disadvantage in accessing various elements of the legal system. For each group there is a brief discussion of the reported reasons why people in that group are disadvantaged in accessing justice and a description of their particular legal needs. The barriers they face are discussed in more detail in the following chapters.
- 1.2 In its Background Paper,<sup>1</sup> the Foundation listed a number of groups who have previously been identified as being economically or socially disadvantaged in terms of their ability to access the law and justice. These were:
- people with disabilities, including
    - intellectual disabilities
    - physical disabilities (i.e. physical impairment resulting in either a limitation on activities or on social participation, or both)
    - sensory disabilities, including hearing disability (deafness, hearing impairment, hearing loss), vision disability (blindness, vision impairment, visual handicap not corrected by glasses/contact lenses), deafblind, and/or speech disability

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<sup>1</sup> Schetzer, L., Mullins, J. and Buonamano, R., Access to Justice and Legal Needs – A project to identify legal needs and barriers for disadvantaged people in NSW – Background Paper, Law and Justice Foundation of NSW, August 2002, <http://www.lawfoundation.net.au/access/background.html>

- psychiatric disabilities/mental illness (i.e. anxiety disorders, psychoses, personality disorders, depression, stress, affective disorders)
- acquired disabilities (i.e. substance addictions, acquired permanent/chronic health conditions or injuries)
- people from culturally and/or linguistically diverse backgrounds
- Indigenous Australians
- children and young people
- older people
- people living in remote, rural and regional areas
- people living in disadvantaged urban environments
- people with low levels of education and lower levels of literacy
- gay, lesbian and transgendered people
- women
- people living in institutions, including:
  - prisoners
  - young people in juvenile corrective institutions
  - people detained in immigration detention centres
  - nursing home residents
  - psychiatric institutions
  - people released from institutions
- people without income, social security recipients and other people on low incomes.

1.3 The consultation process also identified these groups as suffering particular disadvantage in obtaining access to justice. In addition, a number of other groups were identified:

- homeless people
- men who can't obtain legal representation for family law or domestic violence matters
- people who face multiple disadvantage factors.

1.4 Some submissions associated disadvantage with particular individual characteristics or skill deficiencies which present as barriers common to a number of disadvantaged groups. These included issues such as lack of access to a computer, lack of knowledge about the legal system or support services, and unrealistic expectations.

[People who suffer disadvantage] ..... their response to encounters with the legal system may be inhibited by a lack of knowledge about the legal system, fear of excessive costs, inadequate information about the support services that are available and the inability of those support services to provide a comprehensive and timely response. Other factors such as geographic isolation, communication difficulties, and/or unrealistic expectations may also play a part. The services and processes in place to deal with these problems can potentially address most of these issues but they are not adequately resourced and supported to do so.<sup>2</sup>

1.5 The list of groups identified in the Foundation's Background Paper, and in the submissions and consultations as outlined below, do not represent exhaustive lists. The Foundation continues to accept further submissions and information regarding other groups who face disadvantage in accessing legal assistance and effective participation in the legal system.

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<sup>2</sup> Submission from North and North West Community Legal Service Inc.

## People with disabilities

### People with an intellectual disability

- 1.6 Several submissions referred to the disadvantage faced by people with intellectual disabilities in the legal system, emphasising their over-representation within the criminal justice system (and particularly within the prison system) as cause for particular concern.
- 1.7 *The Framework Report*,<sup>3</sup> prepared by the Intellectual Disability Rights Service and NSW Council for Intellectual Disability has highlighted many of the issues faced by people with intellectual disability within the criminal justice system.

People with intellectual disabilities face a wide range of legal problems, especially including:

- Problems with the criminal justice system as alleged offenders, victims and witnesses.
- Problems reflecting their vulnerability, physical mistreatment, financial exploitation, and inappropriate decisions being made on their behalf.<sup>4</sup>

In our society, many people automatically link people who have an intellectual disability with criminal activity. A number of explanations for this have been identified:

- The person with an intellectual disability may be more easily caught in the act or left “holding the bag”.

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<sup>3</sup> Simpson, J., Martin, M. and Green, J., *The Framework report – Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and those at risk of offending*, NSW Council for Intellectual Disability, July 2001, referred to in the roundtable with community and non-government organisations, 16 October 2002.

<sup>4</sup> Submission from New South Wales Council for Intellectual Disability.

- The person with an intellectual disability may be susceptible to being exploited as an accomplice by others.
- Intellectual disability may be associated with other organic disorders that result in impulsive and unpredictable behaviour.
- The harmless intentions of the person with an intellectual disability may be misunderstood.
- The person with an intellectual disability may express sexuality in ways regarded as naïve and socially unacceptable.
- The person with a moderate intellectual disability may be goaded by others into an uncharacteristic act of violence.
- Some people with an intellectual disability have behaviour disorders associated with aggressive behaviour.
- The person may be vulnerable to pressure to “confess” to a suspected crime.
- The person may be less able to explain apparently incriminating circumstances satisfactorily.<sup>5</sup>

1.8 The prevalence of people with an intellectual disability as victims of crime, or as witnesses to crime, was noted:

People with an intellectual disability are more likely to be victims of crime than other members of society.<sup>6</sup>

Women with intellectual disability and mental illness are particularly susceptible to sexual assault.<sup>7</sup>

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<sup>5</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, Access to Justice – the way forward, 12–14 July 2002.

<sup>6</sup> Ibid.

<sup>7</sup> French, P., *Access to Justice for People with Disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

People with an intellectual disability may come into contact with the criminal justice system as either offenders, victims of crime or witnesses to crime. In each case, issues of identification and communication are of primary significance.<sup>8</sup>

- 1.9 Submissions also identified negative community attitudes as a significant barrier confronting people with intellectual disabilities in accessing legal redress.

People with intellectual disabilities may be seen as inherently criminal or unreliable in what they say rather than being treated on their merits. They are often treated as lesser people with lesser rights.<sup>9</sup>

This will be dealt with more fully in subsequent chapters.

- 1.10 Other issues identified for people with intellectual disabilities included:

- a greater likelihood of parents with intellectual disabilities having their children removed by court order<sup>10</sup>
- over-representation of young people with intellectual disabilities in the care and juvenile justice systems and who need expert assistance.<sup>11</sup>

### *People with a physical disability*

- 1.11 The Background Paper identified accessibility, finance and discrimination as key legal issues for people with physical disabilities. One submission stated that people with chronic ill health, people on life support equipment and people in electric wheelchairs often have high-energy needs, and this may increase the likelihood of conflict with energy service providers.<sup>12</sup>

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<sup>8</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, Access to Justice – the way forward, 12–14 July 2002.

<sup>9</sup> Submission from New South Wales Council for Intellectual Disability.

<sup>10</sup> NSW Commission for Children and Young People, *Inquiry into Children with No-one to turn to*, 2001, <http://www.kids.nsw.gov.au/files/inquiryreportchap3.pdf>, referred to in the submission from the NSW Commission for Children and Young People.

<sup>11</sup> Submission from Youth Action and Policy Association; Submission from Youth Justice Coalition.

<sup>12</sup> Submission from Energy and Water Ombudsman NSW.

People with sensory disabilities

1.12 Submissions endorsed the issues identified in the Background Paper regarding people with a range of sensory disabilities.<sup>13</sup> These were:

- discrimination
- social security problems
- accessibility of appropriate information and legal interpreter services.

People with psychiatric disabilities

1.13 Several submissions noted that people with mental illness and psychiatric disabilities face similar issues of over-representation within the criminal justice system as people with intellectual disabilities, whether offenders/suspects or victims.<sup>14</sup> In terms of being over-represented as victims of crime, the Executive Officer of People with Disabilities, Philip French stated:

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, for the population of homeless people in some parts of Sydney, approximately 80% are people with disability, people with mental illness, brain injury and so forth. The street culture is pretty violent and people with disability get beaten up very often in those environments.<sup>15</sup>

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<sup>13</sup> Submission from People with Disabilities.

<sup>14</sup> Submission from People with Disabilities; Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>15</sup> French, P., *Access to Justice for People with Disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- 1.14 Consultation participants also reported that self-represented litigants with mental illnesses sometimes constitute obsessive litigants, initiating litigation concerning psychosis-related delusions. This can consume significant court time and resources.<sup>16</sup>
- 1.15 Young people with mental illnesses were reported as being over-represented in the care and juvenile justice systems.<sup>17</sup>

*People with an acquired disability*

- 1.16 Submissions and roundtable participants identified that many people suffering from certain acquired disabilities, particularly those relating to some form of substance abuse (e.g. drug addiction) or caused by substance abuse (e.g. alcohol related brain damage) can face criminal, discrimination and also social security issues. Despite this, they are often perceived as being part of the ‘undeserving disadvantaged’.<sup>18</sup>
- 1.17 Young people with drug and alcohol problems were reported as being over-represented in the care and juvenile justice systems, and in need of expert assistance.<sup>19</sup>

## People from culturally and linguistically diverse (CALD) backgrounds

- 1.18 Submissions were generally of the view that people from CALD backgrounds face significant barriers seeking access to the law and justice.

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<sup>16</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>17</sup> Submission from Youth Action and Policy Association; Submission from Youth Justice Coalition.

<sup>18</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>19</sup> Submission from Youth Justice Coalition.

While these barriers will be dealt with more fully in subsequent chapters, they can be summarised as follows:

- language barriers and a lack of interpreters and translated materials
- low literacy
- high levels of literacy required for dealing with the legal system
- racism
- lack of awareness of services and procedures
- lack of understanding of legal system and processes
- lack of access to computers and computer literacy
- fear of authority, particularly for immigrants from war torn countries
- lack of personal services.<sup>20</sup>

1.19 Roundtable participants noted that different ethnic groups have different needs, views and expectations, according to the country from where they have come.<sup>21</sup>

## Indigenous Australians

1.20 The disadvantaged position of Indigenous Australians in relation to accessing the legal system was detailed in the Foundation's Background Paper. This disadvantage was also identified in several submissions and roundtable consultations, and has been a common theme in previous access to justice reports and inquiries:

Many reports have concluded that Indigenous people become, whether defendant or victim, victimised within the system; the outcomes of high incarceration rates mark this out.<sup>22</sup>

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<sup>20</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>21</sup> Ibid.

<sup>22</sup> Submission from Coalition of Aboriginal Legal Services.

- 1.21 Indigenous women and children were commonly identified as suffering special disadvantage. Submissions noted the over-representation of Indigenous children and young people in both the care and juvenile justice systems.<sup>23</sup>
- 1.22 Elderly Indigenous people were also identified as facing particular issues of disadvantage, with few culturally appropriate services available to assist them. Elderly Indigenous people were seen as vulnerable to violence, sexual assault and abuse from their families.<sup>24</sup>

## Children and young people

- 1.23 The disadvantaged position of children and young people, was according to several submissions, a direct result of their age and social, economic and cultural marginalisation. According to the Youth Action and Policy Association (YAPA) and the Youth Justice Coalition (YJC):

Children and young people are generally acknowledged to be a distinct sector of our society on the basis of their age. They are a marginal group. This is due to their lack of direct access to the powers and benefits that exist in the economic, social and political spheres of society. To some extent this merely reflects the fact that they go through developmental stages in the transition to adulthood. Their age renders them, to varying degrees, dependent on adults to satisfy their needs and interests. However, the marginalisation of young people is also the result of the neglect and failure to provide guarantees and mechanisms for access to those benefits and powers. This is particularly so with respect to the legal system, and to governmental policy and decision-making processes.<sup>25</sup>

- 1.24 The Youth Justice Coalition identified the following areas of legal need for children and young people:

- criminal law
- victims of crime

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<sup>23</sup> Submission from Youth Action and Policy Association; Submission from Youth Justice Coalition.

<sup>24</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>25</sup> Submission from Youth Justice Coalition.

- tenancy, including matters before the Residential Tenancy Tribunal
- appeals to the Social Security Appeals Tribunal
- Austudy disputes
- family law
- civil claims, including debts arising from uninsured motor vehicle accidents
- consumer complaints, including matters before the Consumer Claims Tribunal
- employment
- discrimination
- immigration
- complaints to the
  - Community Services Commission
  - Health Care Complaints Commission
  - Commonwealth Ombudsman
  - State Ombudsman.<sup>26</sup>

1.25 The NSW Commission for Children and Young People's Inquiry into the best means of assisting children and young people with no-one to turn to, raised the following major areas of concern about the access of children and young people to justice:

- 'breaching' of young people by Centrelink
- discriminatory treatment by police, especially with the introduction of new police powers in public spaces.

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<sup>26</sup> Youth Justice Coalition, Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process, December, 1996, provided as part of the submission from the Youth Justice Coalition.

1.26 Submissions also identified particular groups of children and young people who suffer more acute disadvantage. These include those children and young people:

- who have suffered abuse, neglect or family breakdown
- with disabilities, mental illness, intellectual disability, or drug and alcohol problems
- from non-English speaking backgrounds, especially those from refugee and asylum seeker families
- who are Indigenous
- who are in care
- who are in juvenile detention
- who are homeless.<sup>27</sup>

1.27 The YJC reported that it has files going back to 1979 detailing a history of inquiries and reports documenting legal needs and demands for advocacy for children and young people.<sup>28</sup> The YJC stated that the recommendations of these reports and inquiries have been overlooked and their content to a large extent ignored.<sup>29</sup>

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<sup>27</sup> Submission from Youth Action and Policy Association; Submission from Youth Justice Coalition.

<sup>28</sup> *Kids Courts and Cops*, NCOSS, 1985; *Legal Aid Needs of Youth*, Ian O'Connor and Clare Tilbury Commonwealth Attorney-General's Department, 1986; *Our Homeless Children*, Brian Burdekin, Human Rights and Equal Opportunity Commission, 1989; *Report of the National Legal Aid Advisory Council Legal Aid for the Australian Community*, 1990; NSW Standing Committee on Social Issues Report on Juvenile Justice, 1992; NSW Government Green and White Papers on Juvenile Justice 1992 and 1993; Systems Abuse Report, NSW Child Protection Council, 1994; *Nobody Listens*, Youth Justice Coalition, 1994; National Children's and Youth Law Centre report on national consultations with young people and children's and youth advocates 1994; Inquiry into Children's Advocacy Parliament of NSW Standing Committee on Social Issues, September, 1996; *Seen and Heard Priority for Children in the Legal Process* HREOC and ALRC, September 1997; The Royal Commission into Aboriginal Deaths in Custody Reports.

<sup>29</sup> Submission from Youth Justice Coalition.

## Elderly people

1.28 The vulnerability of elderly people in financial matters, estate planning, and situations involving dependency upon family members was identified through the consultation process. According to the submission from Centrelink, the disadvantaged position of elderly people in accessing justice and legal redress is characterised by the following issues:

- the rights of grandparents in having access to their grandchildren
- difficulties for Indigenous older people living in a community where they have been in violent family relationships, and continued community beliefs/values create an ongoing risk
- legal needs associated with bereavement
- estate planning
- financial decisions
- Centrelink entitlements.<sup>30</sup>

1.29 Other issues raised through the consultations as relevant to the legal needs of elderly people included:

- vulnerability to financial and other abuse, including pressure to sign over property or change wills to leave assets and/or give large financial gifts to their carers<sup>31</sup>
- fear of retribution from their carers by elderly people in residential aged care if they raise issues of concern<sup>32</sup>

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<sup>30</sup> Submission from Centrelink.

<sup>31</sup> Ibid.

<sup>32</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

- lack of knowledge and information on issues of substitute decision making, including the implications of a power of attorney and enduring power of attorney<sup>33</sup>
- fear of violence and crime, particularly relating to alcohol<sup>34</sup>
- loss of confidence to make complaints or seek redress, associated with loss of independence.<sup>35</sup>

## People in rural, regional and remote areas

1.30 Submissions and consultations agreed with the Foundation's Background Paper, which identified that people in rural, regional and remote areas face problems in terms of accessibility to legal services, courts, tribunals, and appropriate intermediaries and early intervention services, as well as limited access to internet based services. Legal issues which were specifically identified as being common in rural and regional areas included:

- Telecommunication related issues<sup>36</sup>
- Debt and financial issues, including foreclosures for farmers.<sup>37</sup>

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<sup>33</sup> Submission from Centrelink.

<sup>34</sup> Submission from Nolene Baker.

<sup>35</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>36</sup> Submission from Communications Law Centre.

<sup>37</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

## People with low levels of education and literacy

- 1.31 People with low levels of education and literacy were identified as being disadvantaged in accessing legal assistance and participating in the legal system, due to ignorance of legal processes and services, poor communication skills and inability to access legal information.<sup>38</sup>

## Women

- 1.32 The NSW Department for Women submission noted that the Australian Law Reform Commission inquiry *Equality before the law – justice for women*<sup>39</sup> examined the disadvantage women experience with respect to the legal system. The Commission was concerned with systemic discrimination and how it operates to affect equal opportunity and status for women, notably in the areas of gender-based violence, including domestic violence and sexual assault, and family law.<sup>40</sup>
- 1.33 The Department’s submission goes on to state that many of the disadvantages experienced by women that were identified in the ALRC inquiry still exist today:

Notwithstanding changes to both law and practice .... the detrimental impact on women in these areas of the law remains substantively unchanged. Indeed, in the area of family law, it has been argued that the impact of the reforms embodied in the Family Law Reform Act 1995 has been detrimental to women, by creating “greater scope for an abusive non-resident parent to harass or interfere in the life of the child’s primary caregiver by challenging her decisions and choices”.<sup>41</sup>

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<sup>38</sup> Submission from the NSW Court Support Scheme; Submission from the North and North West Community Legal Service Inc.

<sup>39</sup> *Equality before the Law: Justice for Women*, Australian Law Reform Commission Report No. 69, 1994.

<sup>40</sup> Submission from the NSW Department for Women.

<sup>41</sup> Ibid.

## People living in institutions and people released from institutions

### Prisoners

1.34 Consultation participants identified several areas where prisoners were disadvantaged in accessing legal advice, assistance or representation.<sup>42</sup> Specific areas of concern included:

- prisoners as victims of crime, particularly in relation to sexual assault within prisons
- complaint procedures within prisons
- prisoners as parents maintaining contact with their children, either as a result of Family Law proceedings, or due to the operation of the *Children's (Care and Protection) Act*<sup>43</sup>
- prisoners with immigration issues, including visa cancellations, deportation orders, spouse visas and protection visas<sup>44</sup>
- specific disadvantages faced by prisoners with an intellectual disability, mental illness or substance abuse problem, given the over-representation of such people within prisons<sup>45</sup>
- special needs associated with an ageing prison population (due to increased sentences and higher rates of recidivism).<sup>46</sup>

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<sup>42</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>43</sup> Ibid.

<sup>44</sup> Submission from Immigration Advice and Rights Centre.

<sup>45</sup> Submission from People with Disabilities; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>46</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

### Immigration Detention Centre detainees

- 1.35 The position of people in detention in immigration centres was identified as one of disadvantage, as detainees face complex immigration issues and decisions often have to be made within strict time limits or the opportunity is lost.<sup>47</sup>

### People in institutional care

- 1.36 People with Disabilities noted that people in institutional care have similar issues to those of prisoners:

We note the reference to people living in institutions, and their particular legal needs and the common lack of rights or access to legal recourse. People with disability living in institutional care face similar barriers, which can result in abuse where there are a lack of safeguards and an inability to communicate or access advocacy.<sup>48</sup>

### People released from institutions

- 1.37 Consultation participants also submitted that disadvantage does not cease upon release from prison or other institutions. They reported that the needs of this group have not been adequately researched.<sup>49</sup>

## People on low incomes

- 1.38 Not surprisingly, people facing economic disadvantage, due to having no income, a low income, or being in receipt of social security benefits, were commonly identified as being disadvantaged in accessing legal services and the legal system.

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<sup>47</sup> Submission from Immigration Advice and Rights Centre.

<sup>48</sup> Submission from People with Disabilities.

<sup>49</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

- 1.39 Given the often prohibitive cost of private legal services, poverty and lack of financial resources was considered as one of the most significant barriers in accessing justice. In addition, it was reported that such people often suffer a multitude of problems, many of which are non-legal, which can discourage them from seeking legal assistance.

People in poverty who lack services often have legal needs on top of other needs. Even if services could meet the legal needs, the client may not return because their legal needs get subsumed by other needs—accommodation, mental health. Unless other needs are met, legal needs will not be met.<sup>50</sup>

- 1.40 The NSW Energy and Water Ombudsman further noted that people on low incomes are commonly faced with restriction to or disconnection from the supply of electricity, gas or water services which are essential to health and to maintaining a minimum standard of living. It noted that loss of these essential services tends to deepen social disadvantage, as it can force the customer to leave their home (while incurring additional expenses), contribute to poor health and worsening educational outcomes, and accentuate other legal problems.<sup>51</sup>

## Homeless people

- 1.41 The disadvantaged position of homeless people in relation to accessing legal services and the legal system was also identified in the consultation process.<sup>52</sup>
- 1.42 The Legal Counselling and Referral Centre (LCRC), operating out of St. John's Church in Darlinghurst, Inner Sydney, was specifically established in response to the issues relating to homeless people and their interaction

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<sup>50</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>51</sup> Submission from Energy and Water Ombudsman of NSW.

<sup>52</sup> Submission from the Inner West Tenancy Advice Service; Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

with the law and legal system. In their submission, the service details some of the particular issues which impact on the legal needs of homeless people:

### **Relationship issues**

Over time these clients have often developed inappropriate relationship skills. Case histories reveal abuse as children followed by violence as the client's first choice in resolving differences later in life. These clients present either with Apprehended Violence Orders taken out against them or seeking to take out such orders to protect themselves.

### **Housing issues**

A Department of Housing flat of their own is the 'dream' for most clients coming to the LCRC. The reality is often a room in a boarding house, a room in a refuge or shared accommodation at a hostel. As boarders these clients have little or no rights or privacy. Often they will be the victims of landlords, finding themselves and their belongings on the footpath.

### **Living 'rough'**

For many clients, the reality is living on the streets, sleeping during the day when it is safe to do so and wandering the streets at night. Regular meals are obtained from the various food vans operating in the city and in Darlinghurst. But living 'rough' often places the clients at risk of assault. Tempers flare and blows are struck. Criminal charges will follow for one set of clients while the other seeks recourse in claims made to the Victims Compensation Tribunal.

### **Mismanaging available funds**

Many of the clients coming to the LCRC are easy targets for people selling 'attractive' ways of life - the mobile phone companies who take advantage of those who can least afford contracts. The accumulation of fines, arrears on contract repayments, Centrelink repayments and repayments to pawn brokers mean these clients need someone to advocate on their behalf

- to negotiate and implement a system of payment by instalments or
- to reduce amounts being unfairly claimed by creditors.

### **Poor health**

Many LCRC clients have mental health issues or chronic health complaints making them eligible for the disability support benefit. The chances of these clients obtaining employment are often negligible, so that they are confronted as well with boredom and lack of self-esteem. .... this boredom can lead the client to begin or to increase their drug and alcohol use, only

compounding the health issues and adding to the likelihood of the clients coming to the attention of the law enforcement bodies.

**Drug and alcohol dependence**

Most of the criminal charges faced by the clients coming to the LCRC arise out of a drug or alcohol problem.<sup>53</sup>

- 1.43 The LCRC also noted that issues of mental illness, intellectual disability and drug and alcohol dependency are often associated with homelessness, and present further issues of disadvantage.<sup>54</sup>

## Men in Family Law proceedings

- 1.44 While not commonly identified by submission and consultations, some contributors drew attention to the position of men in child support matters or who are respondents to applications for Apprehended Violence Orders, who are unable to secure legal representation.<sup>55</sup>

## People facing multiple disadvantage

- 1.45 Several of the submissions noted that there are particular issues for people with multiple disadvantages. Concern was expressed that the needs and issues confronted by such people are often missed or neglected by specific inquiries into particular disadvantaged groups.<sup>56</sup>

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<sup>53</sup> Submission from Legal Counselling and Referral Centre.

<sup>54</sup> Ibid.

<sup>55</sup> Submission from Court Support Scheme; Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>56</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

1.46 Analysis of access to justice needs resulting from additional disadvantage should be undertaken when considering the needs of a particular group. Specific groups identified as needing further legal needs research included:

- young people from culturally and/or linguistically diverse backgrounds
- young people with disabilities
- people with intellectual disability or mental illness within the prison system
- prisoners who are elderly
- Indigenous people with disabilities
- Indigenous gays, lesbians and transgender people
- Indigenous young people in juvenile detention centres<sup>57</sup>
- people with disabilities from a culturally and/or linguistically diverse background<sup>58</sup>
- people with disabilities who are gay, lesbian or transgender.<sup>59</sup>

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<sup>57</sup> Ibid.

<sup>58</sup> Submission from People with Disabilities.

<sup>59</sup> Ibid.

## 2. Obtaining Legal Assistance

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- 2.1 This chapter covers issues of access to legal assistance raised through the consultation process. The first section looks at barriers in existing mechanisms which confront disadvantaged groups. Services which endeavour to overcome barriers, together with some recent innovations which have either been piloted or implemented, are then reviewed. Finally, suggestions for possible solutions are canvassed.
- 2.2 For the purposes of this project, we have defined ‘legal assistance’ in a broad manner, to encompass the following general areas:
- *Legal information* — information available in pamphlets, frequently asked questions, Internet sites, videos, tapes, pre-written oral information delivered via helplines, legal textbooks, legislation, case law and on-line interactive information.
  - *Legal advice* — the application of legal knowledge to the particular circumstances of a consumer’s problem, either by phone, email or face-to face, where the consumer receives advice that is targeted to their particular needs and issues.
  - *Initial legal assistance* — situations where a legal professional is engaged to advocate or negotiate a matter without having to lodge formal court documents or initiate litigation.
  - *Legal representation* — including drafting formal documents, representing parties in commercial dealings, preparation and lodgement of legal documents, court applications, representation in interlocutory proceedings, court and tribunal hearings.<sup>1</sup>

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<sup>1</sup> Schetzer, L., Mullins, J., and Buonamano, R., *Access to Justice and Legal Needs – A project to identify legal needs and barriers for disadvantaged people in NSW – Background Paper*, Law and Justice Foundation of NSW, August 2002, pp. 8–9, <http://www.lawfoundation.net.au/access/background.html>

## Barriers in existing mechanisms

### General

- 2.3 Many of the barriers identified in the consultation process are relevant to all disadvantaged groups in the community. These include:
- the high cost of legal services
  - inadequate funding for legal aid service providers
  - restrictive funding policy for legal aid
  - restrictive legal aid eligibility guidelines
  - poor coordination of legal aid services
  - unavailability of legal aid services due to service providers having a conflict of interests
  - tax deductibility of legal expenses for companies and businesses
  - limitations with pro bono legal service provision
  - changes to civil liability laws which restrict accessibility to lawyers.

### *Cost of legal services*

- 2.4 Several submissions noted the high cost of solicitors' fees as being the most obvious barrier for disadvantaged people accessing legal assistance. Comments received included perceptions of the justice system being 'out of my price range',<sup>2</sup> solicitors overcharging for their services (particularly routine services), and solicitors being evasive about giving estimates of

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<sup>2</sup> Submission from Adam Johnston.

their fees.<sup>3</sup> This high cost of legal fees was also noted in some roundtable consultations.<sup>4</sup>

2.5 The Law Society of NSW discussion paper on National Competition Policy<sup>5</sup> noted that the legal system is most effective in serving the needs of the advantaged and those with money and knowledge, and least effective in addressing the needs of the disadvantaged (including non-English speakers, those without money, Indigenous people and people with disabilities).<sup>6</sup>

2.6 The discussion paper concluded that a market solution to the provision of legal services may not result in greater access for disadvantaged people:

.... there is a sense that the competitive reform process is interacting with broader social changes to create some (perhaps) unanticipated effects. Competitive reform seems to be delivering enhanced services to some sectors (notably the business sector, and particularly larger and middle-sized business). It has also triggered market-development initiatives such as advertising, class actions and contingency fees, together with more aggressive commercial marketing. These, coupled with the march of society, have led to increasing needs for legal services. Overlaid on this is increased complexity and litigiousness, and a perceived widening social and economic gap between the 'haves' and 'have-nots'. Reduced support for publicly funded services, coupled with the market reforms, is perceived to have left a substantial service gap. It remains to be seen whether a market solution will emerge to fill this gap as a result of innovation and perception of opportunity, or whether this gap will widen, leading to increased inequity.<sup>7</sup>

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<sup>3</sup> Submission from Peter Fosterbunch, Legal Access Services Pty. Ltd.

<sup>4</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Alternative Approaches to Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>5</sup> The Law Society of NSW, *National Competition Policy – A discussion paper*, March 2002, referred to in consultations with the Law Society of NSW.

<sup>6</sup> *Ibid.*, pp. 27–28.

<sup>7</sup> *Ibid.*, pp.31–32.

Lack of resources

- 2.7 The decline of public funding in real terms for legal aid since the mid-1990s was identified in consultations with the Law Society of NSW as causing significant barriers for disadvantaged people in accessing legal assistance. The Society referred to its 1998 Access to Justice Report,<sup>8</sup> which observed:

Funding for legal aid in New South Wales is in a perilous state. Recent rapid and significant reduction in funding from the Commonwealth Government has meant that many services are no longer available to those in the community most at risk and most in need.<sup>9</sup>

- 2.8 The Society's discussion paper on National Competition Policy further noted:

Consistent reduction of funding to legal aid reduces the capacity of the disadvantaged to access legal services. This has increased opportunities for pro bono work but the effect of the uptake of such work has provided opportunities for governments to further decrease legal aid funding.<sup>10</sup>

- 2.9 The Australian Law Reform Commission (ALRC) report *Managing Justice*<sup>11</sup> reported that the failure to maintain funding levels for legal aid resulted in a noticeable exit from legal aid work by private solicitors. A National Legal Aid survey of 260 private firms who do legal aid family law work showed:

52 per cent of firms surveyed did less legal aid work in 1998/99 than they had done in 1994/95 and many firms reported that they no longer did any legal aid work at all.<sup>12</sup>

This creates further difficulties for disadvantaged people seeking to obtain legal assistance and representation.

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<sup>8</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW.

<sup>9</sup> *Ibid*, p.61.

<sup>10</sup> The Law Society of NSW, *National Competition Policy – A discussion paper*, March 2002, p. 31, referred to in consultations with the Law Society of NSW.

<sup>11</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, referred to by the Commonwealth Attorney-General's Department.

<sup>12</sup> *Ibid*, Paragraph 5.113.

2.10 The Law Society's Access to Justice Report noted that the reduction in public funding for legal aid has coincided with significant growth in demand for legal aid services:

Research undertaken by the New South Wales Legal Aid Commission has also found that it is not able to meet the demands for its legal advice service.

The growth [in demand] for legal aid services is driven by a number of external factors including:

- the growth in population
- the growth in legislation and in particular the introduction of increasingly strict laws on victimless crimes (including minor drug offences)
- a focus on strict law and order policies
- the effect of the decision in *Dietrich - v - R* (1992)177 CLR 292
- the effect of the decision in *Re K* (1994) FLC 92-461.<sup>13</sup>

2.11 The NSW Family Law Committee reported that inadequate funding for legal aid impacts negatively on the quality of legal representation provided to legally aided clients who consult with private solicitors for Family Law matters. The inadequacy of legal aid grants for private practitioners in Family Law matters in particular, limits the pre-court preparation solicitors can undertake for their legally aided clients' matters.<sup>14</sup>

2.12 In addition to the reduction in funding for legal aid, a number of submissions referred to 'chronic under-funding' of community legal centres (CLCs), limiting their ability to respond at an adequate level.

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<sup>13</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, p. 58, referred to in consultations with the Law Society of NSW.

<sup>14</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

Because of their limited resources CLCs have to limit the support they can give to clients. The N&NWCLS [North and North West Community Legal Service], for example, cannot provide representation in Court and after receiving initial advice from us, clients are often left with little option but to represent themselves in Court. Representation through Legal Aid is severely limited both in terms of scope and resources and the increasing reluctance of solicitors to take this kind of work on.<sup>15</sup>

2.13 Contributions from the community legal centre network strongly argued that the effect of such under-resourcing directly impacted on the right to access legal services:

Where a client is unable to access Legal Aid or where a CLC is unable to fully support a client through the entire legal process the client is severely disadvantaged. This is simply a resourcing issue and for people suffering disadvantage there is still not in place a system that offers a full legal service from information through to representation for all. The ideal of national equity is far from being met in the current environment.<sup>16</sup>

Advice only services are usually inadequate, as people need ongoing support and often they are expected to follow-up after advice without that support.<sup>17</sup>

2.14 The ALRC *Managing Justice* Inquiry provided details as to how such lack of legal representation can cause significant difficulties for litigants:

The Commission's research indicates that where parties have representation they are more likely to attempt, and to be successful in, negotiations to resolve the matter. The converse is that unrepresented litigants are less likely to resolve their dispute through negotiation and more likely to have the matter dismissed or discontinued, or to withdraw or have a default judgment entered against them.<sup>18</sup>

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<sup>15</sup> Submission from North and North West Community Legal Service.

<sup>16</sup> Ibid.

<sup>17</sup> *Access to Justice – Whatever happened to the revolution*, Workshop at the National Community Legal Centres Conference, Melbourne, 3 September 2002.

<sup>18</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.119, referred to by the Commonwealth Attorney-General's Department.

2.15 Community legal centres argued that inadequate resourcing has caused an emphasis on the provision of advice only services. This has limited their ability not only to provide ongoing assistance and representation to disadvantaged people, but also to undertake community legal education and community development:

Chronic under funding of CLCs and an unwillingness by State and Federal Governments to sort out their respective responsibilities for resourcing these services means that the full potential of community legal services is not being realised in the community. Because of the inadequate funding and the demand for individual 'advices', CLCs can sometimes be 'trapped' into emphasising this aspect of their service to the detriment of targeted legal education, community involvement and law reform.<sup>19</sup>

CLCs have been forced to reduce their educative role because they do not have enough resources and there is such a high demand for casework.<sup>20</sup>

2.16 It was stated by some community organisations that this has led to situations where community service providers and many disadvantaged community members are unaware of the existence of community legal centres in their local areas to assist with legal problems.<sup>21</sup>

2.17 Submissions referred to the following issues in relation to resourcing of community legal centres and legal aid:

- community legal centres are few in number and have limited hours of operation<sup>22</sup>
- understaffing of community legal centres<sup>23</sup>
- delays in getting appointments at community legal centres for advice sessions discourages people from seeking assistance

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<sup>19</sup> Submission from North and North West Community Legal Service.

<sup>20</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>21</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>22</sup> Submission from Court Support Scheme.

<sup>23</sup> Submission from Inner West Tenancy Advice Service.

- legal aid workers are overworked and often forced to take on an unmanageable caseload, which impacts on the quality of service provided<sup>24</sup>
- the funding of ‘pilot’ schemes and services presents problems as there is no guarantee or security of ongoing funding, and the schemes have to devote some of their scarce pilot resources into looking for ongoing funding. If these services are unable to secure such funding, the problem arises that an organisation has created an expectation of service, and then must close or cut back its services.<sup>25</sup>

### *Funding policy for legal aid*

- 2.18 A number of submissions commented that the Federal Government’s view that its funding responsibilities should be limited solely to federal matters, had negative effects on disadvantaged people.<sup>26</sup>
- 2.19 The effect of this shift in policy in 1996 was the withdrawal of \$120 million of Commonwealth funding over six years. The expectation was that the States and Territories would assume an increased responsibility for funding legal aid in matters arising under State and Territory law. Such State funding was not forthcoming, forcing legal aid commissions to adopt stricter eligibility guidelines for legal aid for State matters.<sup>27</sup>

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<sup>24</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>25</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>26</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.55, referred to by the Commonwealth Attorney-General’s Department; Law Society of NSW, *Access to Justice – Final Report*, December 1998, p.66, referred to in consultations with the Law Society of NSW; Submission from North and North West Community Legal Service Inc.

<sup>27</sup> *Inquiry into the Australian Legal Aid System*, Reports 1–3, Senate Legal and Constitutional References Committee, June 1998.

2.20 The issue featured in the keynote address by Justice Ronald Sackville to the Access to Justice and Legal Needs Workshop:

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. 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 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.<sup>28</sup>

Legal aid eligibility guidelines

2.21 Many submissions commented that restricted eligibility guidelines for legal aid often left people without access to legal assistance or representation. The effect of funding reductions to legal aid has resulted in even tighter guidelines. According to the Law Society of NSW:

The application of the means test by the Legal Aid Commission and the changes to funding guidelines by the Commission in order to spread the available funds now means that people who would have been eligible for legal aid several years ago would now no longer be able to obtain legal aid .....[the means test] has failed to keep pace with inflation and increases in the benchmarks such as the Henderson Poverty Line.<sup>29</sup>

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<sup>28</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>29</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, p.59, referred to in consultations with the Law Society of NSW.

2.22 The submission from Legal Aid NSW acknowledged that the operation of legal aid guidelines can lead to difficulties:

Clients often present to the Commission seeking help for a range of problems, both legal and non-legal. Whilst the Commission endeavours, where possible, to deal with a client's problems in a holistic way, some of the matters for which the person needs help may not be legally aidable. As a result, whilst some of the clients' matters can be taken on by the Commission, clients may need to be referred elsewhere for help with their other non-legally aidable problems. Unless this process is managed well, clients can become confused and may feel that the legal system has failed to deal with them as a 'whole person'.<sup>30</sup>

2.23 Legal Aid NSW goes on to explain how the guidelines are determined, indicating the lack of control the Commission has over the process in relation to Commonwealth matters:

In Commonwealth Law matters, the Commission delivers services under a purchaser provider agreement with the Commonwealth. Eligibility for legal aid is determined by guidelines determined by the Commonwealth Government. As such, the Commission has little control in the eligibility of aid in such matters, and therefore the services it can provide. With regard to State Law matters, the Commission determines guidelines, either through the Board of the Commission or through the Practice Directors. This process has at times been noted as resulting in delays in updating policies to reflect changes in the law or the case management of matters in a particular jurisdiction.<sup>31</sup>

2.24 The ALRC spelled out the problems associated with eligibility guidelines centrally determined by the Commonwealth Attorney-General's Department:

Prescriptive Commonwealth guidelines can limit [Legal Aid] commissions' flexibility, their potential for innovation and their responsiveness to local conditions. They can also be a recipe for the delivery of legal aid services to become moribund due to the slowness and difficulty in obtaining some level of national consensus about changing established guidelines once they are in

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<sup>30</sup> Submission from Legal Aid NSW.

<sup>31</sup> *Ibid.*

place. In State matters priorities and guidelines are set by the legal aid commissions themselves. This is valuable in deflecting community concerns about bias.<sup>32</sup>

2.25 Submissions from Legal Aid NSW and the Australian Plaintiff Lawyers Association (APLA) stated that eligibility guidelines impact significantly on disadvantaged people in the area of civil claims:

Areas where there is a lot of demand for assistance from disadvantaged people, which the LAC does not meet due to restrictions in our guidelines, include:

- Migration, particularly refugee matters
- Employment matters, particularly unfair dismissal, unfair contract, underpayment etc
- Motor vehicle accident, property disputes, particularly where there is an insurer acting for the other party
- Small debts under \$3000, particularly arising from credit card payments, utilities debts, mobile phone and other telco services.<sup>33</sup>

Poor coordination of services

2.26 Participants in community legal centre consultations identified that there are too many overlapping services between legal aid service providers, due to a lack of coordination and networking.<sup>34</sup>

2.27 Related to this was the phenomenon of inappropriate referrals to community legal centres, contributing to what has become known as the ‘referral roundabout’, where consumers may be referred endlessly from one organisation to another, eventually giving up seeking assistance.<sup>35</sup>

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<sup>32</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.58, referred to by the Commonwealth Attorney-General’s Department.

<sup>33</sup> Submission from Legal Aid NSW.

<sup>34</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>35</sup> *Ibid.*

2.28 This problem was also identified by the ALRC in its *Managing Justice* Inquiry, and considered to be associated with unbundling of services. ‘Unbundling’ refers to the situation where some limited legal assistance may be available for certain aspects of a case for a client, but the client may be forced to utilise the services of additional organisations, or self help alternatives for other aspects (e.g. completing application forms, drafting affidavits, and so on).

A further problem associated with unbundling, which can reflect a lack of coordination of services, is that clients seeking assistance from public legal service agencies often experience a legal advice ‘roundabout’, as they are referred from one CLC or legal aid office to another. Each agency counts the referral as a service, but no substantial assistance is ever provided.<sup>36</sup>

2.29 Chamber Magistrates also reported receiving inappropriate referrals, increasing the demand on their resources. The Chamber Magistrates were of the view that other bodies and agencies such as local councils, should provide more advice and assistance, rather than passing difficult complaints onto them.<sup>37</sup>

### *Conflict of interests*

2.30 Participants in roundtable consultations expressed concern about the situation where one party to a dispute has received prior assistance from an inhouse legal aid lawyer, and the conflict of interest rules may prevent a later arriving party from obtaining ‘one-off’ advice, or assistance from a different inhouse legal aid solicitor in an area of law unrelated to that of the dispute. In such circumstances the client must look elsewhere or may be denied assistance.<sup>38</sup>

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<sup>36</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.196, referred to by the Commonwealth Attorney-General’s Department.

<sup>37</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>38</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003; Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January, 2000, Paragraph 5.180, referred to by the Commonwealth Attorney-General’s Department.

- 2.31 The ALRC noted that the incidence of conflict of interest is high in Legal Aid Commissions because of the number of employed solicitors within the ‘firm’ and the diversity of practice areas. Unbundling increases the risk of conflict as many more clients are assisted. It also reported that in family law cases, conflict of interest may be manufactured by disaffected and manipulative litigants who seek advice from a range of different sources in order to ‘conflict out’ the other party.<sup>39</sup>
- 2.32 The problems associated with potential conflicts of interests were also reported by Chamber Magistrates:

Chamber Magistrates may be called upon to provide information or advice to both sides in a dispute where neither is represented. In some cases, the Chamber Magistrate may then (sitting as Registrar) also sit in judgment on the matter. This can give rise to a perception of bias.<sup>40</sup>

### Operation of tax laws

- 2.33 The ALRC reported that it had received concerns that current tax laws produce unfair or undesirable consequences, by reducing the economic cost of litigation for companies and operating effectively as a public subsidy of legal assistance to business taxpayers. Many submissions to the Senate Legal and Constitutional References Committee on Legal Aid<sup>41</sup> argued against tax deductions for legal expenses because:

- it is an unfair subsidy, available only to one type of user of legal services
- unlike a grant of legal aid, tax deductions are not subject to means or merits tests, and may subsidise frivolous or oppressive litigation

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<sup>39</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January, 2000, Paragraphs 5.181– 5.182, referred to by the Commonwealth Attorney-General’s Department.

<sup>40</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>41</sup> *Inquiry into the Australian Legal Aid System*, Reports 1–3, Senate Legal and Constitutional References Committee, June 1998.

- tax deductions may encourage businesses to litigate by reducing the incentive to avoid or settle litigation
- the availability of a deduction to one side in a dispute lowers the real cost of litigation to that party, which can be exploited as a tactical advantage
- it distorts the market for legal services in various ways; for example, by inflating the sums businesses are willing to pay for legal services, thereby raising the ‘market price’ for legal services.<sup>42</sup>

### *Pro bono services*

2.34 Participants in the National Pro Bono Workshop identified a number of areas of concern in relation to the availability of pro bono legal services for disadvantaged people:

- perceptions that law firms lack expertise in the areas of poverty or welfare related law
- some experienced lawyers not feeling comfortable about doing pro bono cases
- many law firms face conflict of interests with commercial or Government clients, which prevent them from undertaking public interest pro bono cases
- inadequate supervision for young lawyers doing pro bono work in areas in which their supervisors lack expertise.<sup>43</sup>

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<sup>42</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.35, referred to by the Commonwealth Attorney-General’s Department.

<sup>43</sup> *Overcoming Barriers - A National Pro Bono Workshop*, Sydney, 15 August 2002.

*Recent legislative changes dealing with Civil Law claims*

- 2.35 Several submissions and consultations referred to the recent legislative changes in New South Wales in response to what has been described as the ‘civil liability crisis’. These submissions argued that many of these changes served to create barriers for disadvantaged people seeking to obtain legal assistance.
- 2.36 According to the Australian Plaintiff Lawyers Association (APLA), Section 198J of the *Legal Profession Practice Act 1987* (NSW), which came into effect in 2002, presents barriers for people to be properly represented in actions involving a claim for damages.<sup>44</sup> Section 198J states:
- (1) A solicitor or barrister must not provide legal services on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
  - (2) A fact is “provable” only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
- 2.37 Under Section 198L, the provision of legal services without reasonable prospect of success is capable of being professional misconduct or unsatisfactory professional conduct. Section 198M empowers the Court to award costs against a solicitor or barrister who acts in a claim for damages without reasonable prospects of success.<sup>45</sup> It was submitted that these provisions will result in some solicitors deciding not to act for clients in particularly deserving, albeit difficult cases, which may involve important questions of law which need to be tested. This was identified as a potentially significant issue for prospective disadvantaged clients.<sup>46</sup>

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<sup>44</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>45</sup> Goudkamp, T., Goudkamp, J., An Outline of the *Civil Liability Act 2002*, *Law Society Journal*, August 2002 referred to by Dennis Bluth of Abbott Tout Solicitors.

<sup>46</sup> Submission from Dennis Bluth, Abbott Tout Solicitors.

2.38 APLA referred to the effect of the *Civil Liability Act 2002* (NSW), which amended the *Legal Profession Practice Act 1987* (NSW) to limit the legal costs recoverable by plaintiffs and defendants on claims under \$100 000. In particular, APLA believes that there is a discrepancy between the amount that can be recovered by the plaintiff and that which is recoverable by the defendant. According to APLA:

This cap on legal costs for small claims will therefore apply inequitably as between plaintiffs and defendants. It restricts the ability of disadvantaged groups to access justice. It allows one side to the litigation to be more prepared than the other and employ time wasting mechanisms to draw out litigation. Defendants, knowing of the cost restrictions on a plaintiff may deliberately prolong and complicate proceedings so that the cap is exceeded.<sup>47</sup>

2.39 APLA submits that there are other problems which arise from caps on legal costs, including:

- lower quality and availability of legal representation for injured people
- poorly prepared cases clogging up the court system.<sup>48</sup>

2.40 APLA and the Law Council of Australia submitted that restrictions placed on the ability of solicitors to advertise the availability of ‘no-win, no-fee’ legal costs arrangements make it difficult for many disadvantaged people to get access to legal advice and assistance which they otherwise may not be able to afford.<sup>49</sup>

### Websites and helplines

2.41 The ALRC observed in its *Managing Justice* report that access to information about the legal system has been considerably enhanced through

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<sup>47</sup> Submission from Australian Plaintiff Lawyers Association.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid; Abbott, T., President, Law Council of Australia, *Courts and the Public*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, Access to Justice – the way forward, 12–14 July 2002.

the proliferation of legal websites. However, the ALRC reported that such online legal information is not always easy to access or utilise.<sup>50</sup>

- 2.42 Roundtable participants reported that many legal information websites are piecemeal, stating that there was a real need for quality control and consistency. Concern was expressed that the information on some legal websites 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.<sup>51</sup>

- 2.43 Participants expressed concern 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.<sup>52</sup>
- 2.44 Participants stated that disadvantaged people often want a more personal interaction or relationship with their advice provider. Participants felt that mechanisms that fail to provide a more personal relationship can in many cases fail to meet the clients' needs.<sup>53</sup>

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<sup>50</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.171, referred to by the Commonwealth Attorney-General's Department.

<sup>51</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>52</sup> Submission from Court Support Scheme; Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>53</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

### Other barriers

- 2.45 Other issues identified in the consultation process included:
- poor communication skills of lawyers, resulting in clients feeling that they are not being listened to
  - legal service providers who do not understand the specific needs of disadvantaged people
  - legal service providers who are unable to provide a holistic service which is able to assist with other related problems which are not legal in nature<sup>54</sup>
  - ineffective distribution strategies for community legal education publications, as people will not seek out such information unless they have a current need.<sup>55</sup>

### **People with disabilities**

- 2.46 Particular barriers identified for people with disabilities in obtaining legal assistance covered issues such as fear of retribution, poorly resourced specialist services, lack of knowledge of available options for legal assistance, lack of autonomy to make decisions to seek legal assistance, and lack of awareness that action may have been taken against them.
- 2.47 The National Alternative Dispute Resolution Advisory Council (NADRAC) discussion paper<sup>56</sup> expressed concern that generally, people with disabilities suffer from a lack of information which inhibits their ability to seek legal assistance:

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<sup>54</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>55</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>56</sup> *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, National Alternative Dispute Resolution Advisory Council, Canberra, November, 1997, referred to by the Commonwealth Attorney-General's Department.

People with disabilities may lack knowledge of their rights or the range of available dispute resolution processes. In addition, they may not understand that action has been taken against them or that they are entitled to seek redress for it. Others may have only limited personal autonomy/authority to make their own decisions or even to be consulted about the decisions made for them. Some may even be involved as parties in a dispute without their consent or knowledge.<sup>57</sup>

2.48 The NADRAC discussion paper also raised the issue of communication difficulties, particularly with lawyers, barristers and dispute resolvers:

[People with disabilities] ..... may lack the confidence, experience or skill to communicate with potential advisers or advocates effectively. Unless lawyers and other spokespersons are sensitised to the needs, requirements, strengths and weaknesses of people with disabilities, they will not be good advocates for those people.<sup>58</sup>

2.49 People with Disabilities (PWD) referred to barriers such as fear of retribution, lack of alternatives, and lack of legislative protection against retribution:

Retribution, and the fear of retribution or withdrawal of service, are constantly raised with PWD as a barrier to people with disability exercising their rights. The parlous state of funding and service provision for many people, and the lack of alternatives or choices for people, act as a major disincentive to acting on complaints about services in particular. This is clearly the case for personal care or other essential services. There is a lack of legislation to protect complainants from retribution by government or non-government service providers. There is also little ability or will to highlight and punish such activity.<sup>59</sup>

2.50 PWD also stated that people with disabilities often lack specialist legal services which can assist them, noting that a general Disability Rights Legal Service would build the capacity of the legal profession to meet the broad legal needs of this group.<sup>60</sup> In addition, they stated that the limited

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<sup>57</sup> Ibid, paragraph 6.40.

<sup>58</sup> Ibid, paragraph 6.47.

<sup>59</sup> Submission from People with Disabilities.

<sup>60</sup> Ibid.

availability of legal aid for civil matters has adversely affected the capacity of people with disabilities to bring action under key pieces of legislation such as the *Disability Discrimination Act 1992*.<sup>61</sup>

2.51 People with disabilities who are also members of other disadvantaged groups were identified as facing particular barriers in accessing legal assistance. For example:

- Children and young people with disabilities will be more reliant on a carer or other adult to obtain legal advice. This can cause problems if the interests of the carer and the young person conflict.<sup>62</sup>
- Lack of home care support for people with disabilities in rural and regional areas results in people being fearful of complaining regarding the inadequate services they are getting, as there are no alternative sources of assistance.<sup>63</sup>

### *People with an intellectual disability*

2.52 The main barriers identified in the consultation process for people with an intellectual disability seeking to obtain legal assistance were:

- lack of financial resources to pay for legal services
- lack of awareness that legal advice or representation may be necessary
- difficulties in communicating with legal practitioners
- lack of understanding by many legal service providers as to the nature of, and how to identify intellectual disability

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<sup>61</sup> French, P., *Access to Justice for People with Disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>62</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>63</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

- negative stereotypes of people with an intellectual disability held by some lawyers, judicial officers and court workers which are also prevalent in the wider community
- ethical issues for lawyers who have a client with an intellectual disability, particularly in relation to the capacity of the client to give instructions, and the lawyer's willingness to follow these instructions<sup>64</sup>
- fear of retribution from those who may be the subject of complaint.<sup>65</sup>

2.53 It was also noted that families and others who care about people with intellectual disabilities often do not pursue redress on their behalf due to factors such as fear of retribution and being accustomed to negative societal perceptions of people with intellectual disabilities.<sup>66</sup>

2.54 Submissions referred to difficulties associated with inadequate resourcing for the existing specialist legal services for people with intellectual disability. For example, the limited capacity of the Intellectual Disability Rights Service to provide assistance beyond referrals, or to provide legal assistance to the large number of people with intellectual disabilities within the prison system.<sup>67</sup>

2.55 The NSW Council for Intellectual Disability expressed concerns over the level of resourcing to the Guardianship Tribunal, the Public Guardian, and the Community Services Commission.<sup>68</sup>

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<sup>64</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002; Submission from the NSW Council for Intellectual Disability.

<sup>65</sup> Submission from NSW Council for Intellectual Disability.

<sup>66</sup> Ibid.

<sup>67</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>68</sup> Submission from NSW Council for Intellectual Disability.

- 2.56 Concern was expressed that while information specifically targeting people with intellectual disability was important and useful for people with a mild intellectual disability, people with a more severe intellectual disability are totally reliant on carers to identify legal issues and initiate contact with legal service providers.<sup>69</sup>

*People with a physical disability*

- 2.57 The main barriers identified in the consultation process for people with physical disabilities in accessing legal assistance were related to physical access to advisers.<sup>70</sup>
- 2.58 It was submitted that the current and proposed changes to tort law in New South Wales, combined with changes and limits to accessing legal aid, also act as barriers to the legal system for people who need legal advocacy to resolve complaints, or who need to seek compensation for injury or disability acquired through negligence or accident. According to PWD:

The media has focussed on large compensation payouts with little understanding of the cost structures and lifelong expenses faced by people who acquire disability through such injury.<sup>71</sup>

- 2.59 It was also noted that people in wheelchairs who are the victims of taxi rorts are often afraid to even seek assistance or advice, because they are concerned that any action taken will result in them not being able to get a disabled taxi again in the future. Such fears of retribution were seen as barriers to seeking assistance for other issues of discrimination as well.<sup>72</sup>

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<sup>69</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>70</sup> National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, Canberra, November 1997, paragraph 6.48, referred to by the Commonwealth Attorney-General's Department.

<sup>71</sup> Submission from People with Disabilities.

<sup>72</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

*People with sensory disabilities*

- 2.60 Lack of access to AUSLAN interpreters to facilitate obtaining legal advice and representation was seen as the main issue for people who are deaf or hearing impaired. There are few AUSLAN interpreters, particularly in rural and regional areas.<sup>73</sup>
- 2.61 Some legal information websites are not accessible to people with impaired vision. While Federal and State Governments have been working towards making their websites more accessible to people with disabilities, it was generally believed that other legal information websites are still deficient in this regard.<sup>74</sup>

*People with psychiatric disabilities*

- 2.62 Legal Aid NSW indicated that it was anecdotally aware that people suffering from mental illness and psychiatric disabilities experience difficulties in accessing legal aid services, particularly legal aid services provided by the private legal profession.<sup>75</sup>

*People who have acquired disabilities*

- 2.63 People who have acquired disabilities as a result of substance abuse (eg. drug addiction, alcohol related brain damage) were identified as facing societal prejudice, as they are often seen as ‘undeserving’. This can impact on self-esteem, resulting in a failure to pursue avenues for legal assistance.
- 2.64 It was submitted that many private legal practitioners have a limited understanding of the particular issues and needs faced by people with addictions. In addition, several roundtable participants considered that

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<sup>73</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>74</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>75</sup> Submission from Legal Aid NSW.

web based legal information is often not readily accessible for people with acquired disabilities who are homeless.<sup>76</sup>

- 2.65 Roundtable participants particularly referred to drug users, who are often unwilling to go through with a formal complaint process because they are worried about discrimination, not being believed, or being treated unfairly.

There are a lot of calls received from people particularly who have been dismissed from the workplace when their employer has found out that they have been on methadone. They are unwilling to go through a formal complaint process as they don't want the whole world to know and perhaps this will stop them from getting a job elsewhere.<sup>77</sup>

- 2.66 Roundtable participants stated that to some extent, people who acquire physical disabilities through accidents (whether work or motor vehicle) also suffer some prejudice on the basis that they may be perceived as being partially responsible for the disability, though not to the same extent as those who acquire disability through substance abuse and addiction.<sup>78</sup>

- 2.67 Other participants reported barriers which included problems with communication and lack of appropriate specialist legal services.<sup>79</sup>

- 2.68 PWD submitted that current and proposed changes to tort law in New South Wales will present barriers to accessing legal assistance for people who need to seek compensation for injury or disability acquired through negligence or accident.<sup>80</sup>

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<sup>76</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Submission from People with Disabilities.

### People with multiple disabilities

- 2.69 People with multiple disabilities were reported as often falling through the gaps between various specialist services. For example, people with mental illness who also have substance abuse problems. It was reported that in such circumstances, drug assistance services will not assist someone with a mental illness, while mental health crisis services will not assist drug addicts.<sup>81</sup>

### **People from culturally and/or linguistically diverse (CALD) backgrounds**

#### Access to interpreters and translated materials

- 2.70 Many submissions and consultation participants identified access to interpreters as a basic threshold issue for people from CALD backgrounds seeking legal assistance. The availability of interpreters at no charge was seen as a valued and important policy by community legal centres and Chamber Magistrates.<sup>82</sup> There were, however, a number of concerns expressed about the provision of interpreters, and these issues were identified as obstructions to obtaining legal assistance.
- 2.71 Community legal centres expressed concern about the processes involved in arranging interpreter services for their clients. The current system involves the Commonwealth funding interpreter services for Commonwealth law matters, and the State funding interpreter services for State law matters. According to the submission from Macquarie Legal Centre, this system requires individuals and service providers to ascertain the appropriate jurisdiction, in order to access the appropriate interpreter service. This was considered difficult in situations where a client presents

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<sup>81</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>82</sup> Submission from the Macquarie Legal Centre; Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

with more than one issue, or where the distinction between Commonwealth and State matters is blurred, such as in Family Law matters with associated domestic violence. In addition, it was submitted that even ascertaining the type of matter may be difficult if the client is distressed and has difficulties communicating in English.<sup>83</sup>

2.72 Particular issues were raised in relation to the Community Relations Commission (CRC), which provides funded interpreter services for initial preliminary interviews, or for matters relating to NSW State law, and the Telephone Interpreter Service (TIS), which provides funded interpreter services for Commonwealth matters.

2.73 Community Legal Centre contributors reported that the CRC requires the service provider to specify either that they know the area of State law for which the client requires assistance, or that they are conducting a 'preliminary interview' to ascertain the appropriate jurisdiction. Problems identified with this system included:

- Clients sometimes do not know how to describe their legal problem or what the relevant area of law is. It is often difficult to categorise a client's legal problem before an initial interview with an interpreter is conducted.
- The distinctions drawn between Commonwealth and State matters are sometimes subtle, particularly in Family Law matters.
- Often when booking requests specify 'preliminary interview', CRC staff contact the service provider asking them to obtain further information from the client to help determine the area of law before the interview takes place. This fails to acknowledge that interpreters are often needed to obtain this additional information.<sup>84</sup>

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<sup>83</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>84</sup> Submission from Macquarie Legal Centre.

- 2.74 Problems were also identified by Macquarie Legal Centre with the quota system used by the CRC, as it does not guarantee access to free interpreter services on a particular day. Under the quota system, services are required to book interpreters. If the quota for free interpreter services for that day are already filled, then the agency making the booking either must pay for the service, or arrange the booking for another day. The system works on a first come, first serve basis. If interpreters for a particular language are not available on a particular day, then the booking must be made on a day that they are available. The only exception to this is a 'life and death' emergency.<sup>85</sup>
- 2.75 Several problems were identified by contributors with the Commonwealth's Telephone Interpreter Service (TIS):
- TIS interpreters can only be booked for day time face-to-face appointments (whereas CRC interpreters can also be booked for evening appointments). Clients with Commonwealth matters who can only access an evening service will be disadvantaged, as they will be forced to rely on a telephone interpreter. This is particularly difficult for lengthy interviews.
  - Bookings can only be made four weeks in advance. Community Legal Centres usually require longer than four weeks, making it more difficult to offer services to clients with Commonwealth law matters.
  - CRC pays higher rates to its interpreters than TIS, which may adversely affect the quality of interpreters available for Commonwealth Law matters.
  - TIS interpreters are also arranged on a quota system, similar to that used by the CRC. Consequently, it states that the problems it identified with the CRC quota system also apply to TIS.<sup>86</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

- Although all community legal centres are eligible for exemption to fees for use of Commonwealth TIS interpreters, not all centres have been aware that to gain access to the free service, individual centres must formally request exemption, which, once granted, will last for two years. At the end of their two-year period, TIS will assess their eligibility depending on their circumstances, resources and other competing applications at that time.<sup>87</sup> Accordingly, there appears no guarantee that community legal centres will continue to have fee-free access to Commonwealth TIS interpreters after the expiry of their respective two-year arrangements.
- There is no access to free interpreters for community legal information resources or for community legal education sessions.<sup>88</sup>

2.76 It was also reported that access to interpreters in small country towns and remote areas is not good, particularly for some smaller and newer language groups. The lack of availability of face-to-face interpreters meant that there was a greater reliance on telephone interpreters, with the associated problems of delay and remoteness.<sup>89</sup>

2.77 Other problems identified with access to interpreters include:

- Due to lack of access to interpreters, some legal service providers rely on the children or friends of non-English speaking parents, to interpret in interviews. This can cause problems with privacy and confidentiality. In addition, these interpreters are not usually trained, and may not be able to communicate legal concepts in the language concerned.<sup>90</sup>

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<sup>87</sup> Email Communication from DIMIA to National Association of Community Legal Centres, 7 January 2003.

<sup>88</sup> Communication from National Association of Community Legal Centres, 31 January 2003.

<sup>89</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>90</sup> Submission from Macquarie Legal Centre.

- The pro bono schemes provided by private solicitors usually do not cover the additional fees associated with interpreters and, as these schemes do not have access to free interpreter services through the CRC or TIS, it becomes difficult for non-English speaking clients to access legal assistance through such schemes.<sup>91</sup>
- Police in exercising their discretion as to whether an interpreter may be required for a record of interview, are occasionally unwilling to arrange an interpreter for CALD suspects.<sup>92</sup>
- Chamber Magistrates reported that in small claims matters, the applicant must provide an accredited interpreter if required, and that the cost of the interpreter must be met by the individuals involved. This can prove prohibitive. Also, when assisting non-English speaking people with claim forms, Chamber Magistrates often have the person write it out in their own language, and rely on a friend or family member with them to translate it into English. In these circumstances, the Chamber Magistrate has no way of verifying the accuracy of the translation.<sup>93</sup>

2.78 Related to the issue of interpreters is the issue of access to translation of documents and correspondence. Community legal centres reported that they usually do not have access to free document translation services for the translation of documents such as letters of advice to non-English speaking clients in preparation for court proceedings. These clients are often not in a position to pay for such translating services themselves.

For example, we have recently drafted a letter of advice to an Arabic-speaking client who is in immigration detention, which would have cost \$400 to have translated. As this example demonstrates, the cost of paying for document translation services is prohibitive. We have had to rely primarily

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<sup>91</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

<sup>92</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>93</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

on oral advice and communication for NESB clients where this issue arises, and on pro bono document translation by individuals who are not always accredited interpreters.<sup>94</sup>

2.79 In terms of access to translated community legal information materials, several problem areas were identified:

- many legal information websites are not available in other languages<sup>95</sup>
- there will always be some groups that are not considered large enough for service providers to translate information for them
- there are many individuals whose level of literacy in their first language is not sufficient for them to use written language publications
- multi-lingual materials are often placed in mainstream services that are not well used by people from diverse cultures and language groups
- newly-emerging communities are likely to seek information from informal networks such as family, friends and other people in their communities (and are not used to seeking advice outside their communities).<sup>96</sup>

### *Access to legal assistance for Immigration matters*

2.80 Legal Aid NSW reported that it cannot meet demand for assistance in migration, particularly refugee matters, due to the restrictions in their guidelines.<sup>97</sup>

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<sup>94</sup> Submission from the Public Interest Advocacy Centre.

<sup>95</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>96</sup> Submission from Macquarie Legal Centre.

<sup>97</sup> Submission from Legal Aid NSW.

2.81 The Immigration and Advice and Rights Centre (IARC) also expressed concern over the lack of funding for providing general immigration advice and assistance for disadvantaged members of the community.<sup>98</sup>

2.82 Given the limited opportunities for accessing funded legal assistance for migration or refugee matters, people who have legal needs in these areas often need to seek the assistance of registered migration agents. IARC commented on the lack of migration agents who can assist those on low incomes:

... there are in general very few registered migration agents in Australia and New South Wales and even fewer non-fee-charging agents who could assist those on low incomes. A search of the Migration Agents Registration Authority's (MARA) registry of agents shows that in Western Sydney, an area with a high population of immigrants, there are only one or two non-fee-charging agents in suburbs such as Liverpool, Bankstown, Campbelltown, and even the densely-populated area of Parramatta. Many of these non-profit agents work for cultural associations established by the various ethnic communities and only provide services to members of their own community.<sup>99</sup>

2.83 IARC observed that the number of non-profit registered migration agents is decreasing.<sup>100</sup> According to IARC, a major reason for this is the increasing cost of registration, which presents a significant barrier for the registration of community based, non-fee charging migration agents.<sup>101</sup>

2.84 IARC also stated that the lack of non-fee charging migration agents in rural and regional areas caused particular problems for CALD people in those areas:

We are currently not aware of any non-charging migration agents in rural and regional New South Wales, outside the Sydney/Wollongong/Newcastle area. The kinds of migration problems in remote areas are those that require skilled advice... the kinds of immigration advice that could appropriately be

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<sup>98</sup> Submission from the Immigration Advice and Rights Centre.

<sup>99</sup> Ibid.

<sup>100</sup> Migration Agents Registration Authority 2000 and 2001 Annual Reports.

<sup>101</sup> Submission from the Immigration and Advice Rights Centre.

provided by community based agents in these areas quite often relate to partner visas, including domestic violence issues, and thus any support could make a substantial difference to a person in need.<sup>102</sup>

2.85 It was noted by participants in the National Pro Bono Workshop that there are limitations on the pro bono services available for migration matters, given that many of the large pro bono schemes of the major law firms are not accessible due to conflict of interest issues for those firms, who also act for the Federal Government.<sup>103</sup>

Lack of knowledge or trust of services

2.86 The ALRC report *Multiculturalism and the Law*<sup>104</sup> identified in 1992 that a general lack of knowledge of the law among migrants was a major barrier to accessing legal assistance. Participants in roundtable consultations also commented on this. In particular:

- a lack of knowledge about the role of Chamber Magistrates in NSW Local Courts<sup>105</sup>
- a lack of knowledge about the availability of legal aid and community legal centres
- a lack of knowledge about the availability of interpreters, especially as the information indicating their availability is often in English.<sup>106</sup>

2.87 Community organisations reported that some people from culturally diverse backgrounds have a perception that publicly funded legal services are of lower quality, or that they will report their matters to the Government.<sup>107</sup>

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<sup>102</sup> Ibid.

<sup>103</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

<sup>104</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57, Canberra, 1992.

<sup>105</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>106</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>107</sup> Ibid.

2.88 Community organisations also reported that a low sense of entitlement in relation to rights and legal services, as well as general unfamiliarity with the legal system, were not uncommon among people from culturally diverse backgrounds. It was noted that distrust of lawyers, fear of delays, fear of costs, distrust of legal aid services and the differing availability of specialised services all created barriers for accessing legal assistance for people from culturally diverse backgrounds.

Some groups come from countries where there are few entitlements and the legal system is often used against them.<sup>108</sup>

*Lack of cultural diversity awareness amongst service providers*

2.89 Several participants in roundtable consultations and submissions noted that many service providers lacked cultural awareness and sensitivity, particularly across a diversity of cultures, and for smaller, newly-emerging cultural groups.<sup>109</sup> This was also noted as a deficiency in services provided by the private legal profession.<sup>110</sup>

2.90 Submissions and consultations stated that some ethnic groups are not catered for in terms of legal information strategies, and that without specially designed strategies, their access to information and services will be limited.

2.91 It was reported that different ethnic groups have different needs, views and expectations, according to the country from where they have come, and there is a greater need for understanding from the legal system and its various players and practitioners, and sensitivity to their particular needs.<sup>111</sup>

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<sup>108</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>109</sup> Ibid.

<sup>110</sup> Submission from Legal Aid NSW; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>111</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Submission from Macquarie Legal Centre.

Dealing with many different ethnic groups is really difficult because they are so different and as far as the law is concerned they also have different views on what they expect from the system, depending on where they come from.<sup>112</sup>

2.92 It was also reported that people in newly-emerging ethnic groups (eg. Afghan communities in SW Sydney) often do not have established networks or community organisations which can assist them. These groups tend to rely on informal networks such as their families and friends, rather than through formal networks and structures.<sup>113</sup>

### CALD women

2.93 Several of the barriers and issues identified above were specifically identified as being relevant to women from CALD backgrounds in the Women's Legal Resource Centre report *Quarter Way to Equal*.<sup>114</sup>

2.94 Both the ALRC report *Multiculturalism and the Law* and the *Quarter Way to Equal* Report identified that women from CALD backgrounds were disadvantaged by a general lack of knowledge about the legal system, laws and available remedies, the cost of legal aid and the limited availability of legal aid. Domestic violence and Family Law were identified as two major areas of legal need for women.<sup>115</sup> At the time of writing, the NSW Attorney General's Department was in the process of reviewing the recommendations from that report.

2.95 The Department for Women expressed concern at the lack of availability of female interpreters for women from CALD backgrounds. Female interpreters were seen as essential given that such women often present with matters relating to Family Law, domestic violence or sexual assault,

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<sup>112</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>113</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November, 2002.

<sup>114</sup> Women's Legal Resource Centre, *Quarter way to equal: a report on barriers to access to legal services for migrant women*, Sydney, 1994.

<sup>115</sup> Submission from NSW Department for Women.

and may feel constrained from speaking freely to a male interpreter. Difficulties in obtaining interpreters for Family Law matters (as identified in the section above on interpreters), and the lack of culturally sensitive published legal information for CALD women were also identified as barriers to access.<sup>116</sup>

## **Indigenous Australians**

- 2.96 According to several submissions and consultations, the creation of specific services targeting the legal needs of Indigenous people has not overcome a number of the barriers confronting Indigenous people seeking legal assistance. Submissions particularly identified the difficulties faced by Indigenous people in accessing legal assistance for Civil and Family Law matters and the barriers faced by Indigenous women and children in obtaining legal assistance.
- 2.97 General barriers confronting Indigenous people accessing legal aid services, identified by Legal Aid NSW include:
- a reluctance of Indigenous communities to involve outsiders in matters which they consider private and which would require them to ‘hang out their dirty laundry’, in front of strangers
  - a lack of awareness by Indigenous people of the scope and ability of the law to resolve certain types of problems
  - the limited ability of the law and traditional legal approaches to resolve problems that in many cases involve not just legal, but also significant political, historical and cultural issues
  - the reliance on documentary evidence to substantiate legal claims and its reluctance to accept or rely on anecdotal or oral evidence by Aboriginal people

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<sup>116</sup> Ibid.

- long-term distrust of and previous negative experiences with the legal system
- formality of the legal system and its services
- lack of cultural awareness, sensitivity and compassion among justice system staff and legal service providers
- lack of confidence in confidentiality, support and empathy in accessing NSW Legal Aid's services
- lack of Aboriginal personnel
- lack of relationship between the local Legal Aid office and the local community (ies)
- intimidation in approaching legal services
- lack of awareness of the services of Legal Aid NSW
- the need to book Legal Aid's services
- location of legal aid offices
- lack of public transport to Legal Aid's offices.<sup>117</sup>

### *Civil and Family Law issues*

2.98 Legal Aid NSW identified that Indigenous people face significant barriers in seeking assistance for Civil and Family Law matters.

In recent years, however, the Commission has become increasingly concerned about the overwhelming levels of unmet legal need in Aboriginal communities, particularly in the civil and family law areas. Whilst most Aboriginal people are aware of the services that are available for criminal matters, either through Aboriginal Legal Services or the Legal Aid Commission, few are aware of the scope of the law and the range of services available for other problems, particularly in the consumer, housing and Family Law areas.<sup>118</sup>

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<sup>117</sup> Submission from Legal Aid NSW.

<sup>118</sup> Ibid.

2.99 Submissions reported a perception that Aboriginal Legal Services mainly do Criminal Law work, and are not in a position to assist with free civil legal advice and representation. This was seen to particularly impact on Indigenous women's and children's ability to seek legal assistance.<sup>119</sup>

2.100 Legal Aid NSW reported that as some Indigenous people have to rely on private solicitors, or non-Indigenous legal service providers for Civil Law assistance, they often encounter a reluctance by legal practitioners to become involved in inter-community disputes, particularly involving individuals against Indigenous organisations. According to Legal Aid NSW, the reasons for this stem from:

- a reluctance to make judgments of Indigenous people which might be interpreted as racist
- a reluctance to be seen to be taking sides in a dispute or to be aligning themselves with a particular faction of the Indigenous community, for fear of getting their fingers burnt
- a tendency by some lawyers and other justice system professionals to dismiss Indigenous disputes as private matters or cultural in origin.<sup>120</sup>

2.101 The following Civil Law areas where Indigenous people find it difficult to access legal assistance were identified:

- Native Title claims contested by governments, as the expense involved in fighting these matters through the courts is enormous and acts as a strong disincentive<sup>121</sup>

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<sup>119</sup> Submission from Women's Legal Resource Centre; *Discrimination ... have you got all day? – Indigenous women, discrimination and complaints processes in NSW*, Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women's Legal Centre, December 2001, referred to by the Public Interest Advocacy Centre.

<sup>120</sup> Submission from Legal Ad NSW.

<sup>121</sup> Monica Morgan, Yorta Yorta Aboriginal Co-operative, Global Alliance for Justice Education Conference, 9–11 December, 2002.

- Intellectual property and cultural heritage issues, due to a lack of Indigenous services focusing on these areas.<sup>122</sup>

### *Indigenous women and children*

2.102 The Women's Legal Resource Centre submitted that Indigenous women and children are at a special disadvantage, given the emphasis of Aboriginal Legal Services on Criminal Law:

The Aboriginal Legal Services are seen as "men's services" and generally only provide assistance in criminal matters. While no one would suggest that they are not fulfilling a vital function, extra funding has to be made available to Violence Prevention Units in rural areas. These units provide legal assistance to Aboriginal women and children with special emphasis on issues of child abuse and domestic violence. They are currently funded at low levels and cannot provide the area with the services they deserve, for example, we operate a centre at Walgett and we have been asked to extend our service to Lightning Ridge, Brewarrina, Collenabri, Bourke and other surrounding areas, without extra funding we are unable to do this.<sup>123</sup>

2.103 Other issues identified as presenting barriers for Indigenous women seeking legal assistance include:

- lack of knowledge of available services
- feelings of shame that can arise from having to disclose information of a very personal nature (e.g. sexual assault)
- inadequate access to legal services in rural and remote communities.<sup>124</sup>

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<sup>122</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>123</sup> Submission from Women's Legal Resource Centre.

<sup>124</sup> *Ibid.*

### Cultural awareness issues

2.104 Participants in roundtable consultations identified a lack of cultural awareness, sensitivity or appropriateness as presenting barriers for Indigenous people accessing legal assistance. In particular:

- Indigenous people will be discouraged from seeking further assistance if they receive numerous and/or inappropriate referrals to other organisations<sup>125</sup>
- lack of awareness of the need to be sensitive to the cultural issues and needs for each Indigenous community, rather than treating Indigenous people as an homogenous group
- lack of appropriate legal services for elderly Indigenous people.<sup>126</sup>

## **Children and young people**

2.105 It was recognised by many contributors that children and young people are a largely disenfranchised group, and among the least ‘rights-conscious’ members of society. Roundtable participants stated that children and young people are often reliant on adults mediating their access to legal information or advice, whether it be parents, youth workers or teachers, and are less able to access the services themselves..<sup>127</sup>

2.106 Several submissions identified a fundamental lack of awareness of rights as the main barrier obstructing access to legal assistance for children and young people. Combined with a feeling that they will not be believed, or that their issues will not be taken seriously, and a lack of access to specialist

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<sup>125</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>126</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>127</sup> Alternatives to Traditional Approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

advocates and legal practitioners, children and young people are confronted with significant barriers in obtaining legal assistance.

Children and young people are generally not aware that they have rights, let alone know what they are. Not being aware of one's rights or how to exercise them seriously disadvantages young people and means that they are unlikely to access justice through the legal system, until it accesses them.<sup>128</sup>

Children are less able to access the legal system than adults are. They are less likely to make complaints or seek legal advice. This may be because they do not know how to seek advice or because they are not familiar with the procedures that are open to them. The legal system is confusing especially for children.<sup>129</sup>

2.107 The Youth Justice Coalition (YJC) reported that young people acknowledge that they do not know enough about the legal system, and that this impacts on their ability to access services.<sup>130</sup> In YJC research which revealed a high incidence of alleged unfair treatment by police, very few of the young people interviewed were aware of their rights to make formal complaints, or where to seek assistance. The research also noted that where young people have been interviewed by police without a legal representative, and admit to guilt, resulting in a police caution or referral to a youth justice conference, the process may amount to an erosion of procedural safeguards.<sup>131</sup>

2.108 Many submissions expressed concern over a perceived lack of adequate specialist legal services for children and young people and the apparent failures of successive governments to follow recommendations from previous reports and inquiries for such services to be established and adequately resourced.<sup>132</sup>

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<sup>128</sup> Submission from Youth Action and Policy Association.

<sup>129</sup> Submission from Australian Plaintiff Lawyers Association.

<sup>130</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>131</sup> Turner, S., *Young People's Experiences of the Young Offenders Act*, Youth Justice Coalition, July 1992, referred to by the Youth Justice Coalition.

<sup>132</sup> Submission from the Youth Justice Coalition.

Services such as Marrickville Legal Centre continue to experience demand for advocacy in relation to children's experiences in the public and private school education systems and other civil matters. In NSW there is a paucity of legal services targeting their services to under 18-year-olds for such matters. In NSW community legal centres, Marrickville Legal Centre and Macarthur Legal Centre are the only legal centres which dedicate either a full-time or part-time solicitor position to providing targeted legal services to under-18 year-olds. The Shopfront Youth Legal Centre provides targeted services to under-25 year-olds.<sup>133</sup>

2.109 Restricted access to legal representation for young people was identified in two particular areas:

- Cuts to legal aid in the late 1990s resulted in the imposition of limits on the availability of funding of separate representatives for children in the Family Court
- There is no provision for pre or post court advice or advocacy in relation to dealing with the Department of Community Services (although children appearing in the care jurisdiction of the Children's Court are provided with a legal aid solicitor).<sup>134</sup>

2.110 The perceived lack of services specifically catering to the needs of children and young people was seen as a major obstruction to obtaining legal assistance. Service delivery issues identified included:

- the lack of skills that solicitors have in dealing with children and young people, particularly in rural and regional areas<sup>135</sup>
- problems with the physical accessibility of services, in terms of transport (given that children and young people do not drive)

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from Youth Justice Coalition.

- the intimidating, unfriendly and unapproachable atmosphere of solicitors' offices and legal services

Even when they know about services, and often regardless of the severity of their circumstances, children and young people can be very reluctant to approach them. Firstly, a service may be in an 'unfriendly' place, a 'scary' place, or in a place that is too public.<sup>136</sup>

- the public visibility of many legal services
- not knowing how to make an appointment or having to wait for an appointment.

Their [young people's] decision to seek help is usually made after much consideration and significant efforts to solve the problem themselves, perhaps with the aid of friends. It is frequently an act of desperation which, when met with a three week delay in getting an appointment, simply confirms that their problem is unsolvable and that no one, particularly no adult, can help them.

Some children and young people reported in our consultation that they felt too daunted to approach a service located in an intimidating or unfriendly environment, such as office blocks, even if they had overcome the first hurdle of actually finding out about the services. They felt intimidated by staff who were professionally dressed and therefore in their eyes appeared unapproachable. They were also put off by needing to make an appointment (often well in advance) having to complete excessive paperwork and only being able to get help during standard office hours or at particular times of the day.<sup>137</sup>

2.111 The following problems were identified for children and young people who have to rely on the services of private solicitors:

- Some members of the private profession are reluctant to take on children and young people's cases because of the perceived lack of financial gain<sup>138</sup>

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<sup>136</sup> NSW Commission for Children and Young People, *Inquiry into Children with No-one to turn to*, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People

<sup>137</sup> *Ibid.*

<sup>138</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from Youth Justice Coalition.

- There are only a limited number of solicitors in northern NSW and the South Coast who are qualified to undertake separate representative work for children in the Family Court.<sup>139</sup>

2.112 The YJC submitted that there is a lack of community legal education strategies specifically targeted to children and young people.<sup>140</sup>

2.113 Children and young people with other disadvantages were identified as facing particular difficulties in obtaining legal assistance. For example:

- Those with disabilities often have to work through a carer to obtain legal advice. In some circumstances the interests of the carer and those of the young person are not the same.<sup>141</sup>
- Homeless young people, who are often more concerned with health, accommodation, safety and survival issues, may place a low priority on seeking legal assistance for their legal problems.<sup>142</sup>

2.114 APLA submitted that the effect of the *Civil Liability Act 2002* (NSW), to limit the legal costs recoverable by plaintiffs and defendants on claims under \$100 000, will adversely affect those groups who do not have large damages claims, such as people not in the workforce. Young people are more likely to have smaller claims for compensation and therefore are more likely to be caught by the costs threshold.<sup>143</sup>

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<sup>139</sup> Submission from Legal Aid NSW.

<sup>140</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from Youth Justice Coalition.

<sup>141</sup> Ibid.

<sup>142</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>143</sup> Submission from Australian Plaintiff Lawyers Association.

## Elderly people

2.115 The particular vulnerability of elderly people in dealing with conflict is a major factor in the difficulties they experience in accessing legal assistance. According to the National Alternative Dispute Resolution Advisory Council (NADRAC):

A great majority of conflicts in which elderly adults are involved are tolerated, avoided, or suppressed. Even when they do become actively involved elderly people have difficulties recognising their inability to cope with conflict. As a consequence, they are frequently reluctant openly to discuss their dispute, downplay it or deny its existence. They tolerate discomfort, and regard it as a personal achievement to manage their problems silently, which further adds to their powerlessness.<sup>144</sup>

2.116 NADRAC stated that obtaining access to advice or information can be particularly difficult for elderly people. Physical incapacity, dependency on others, diminished self-confidence, and a lack of skills in accessing information by computer or telephone helplines were all identified as impacting on the ability of elderly people to obtain legal information and advice.<sup>145</sup>

2.117 Web based legal information and advice services were seen as particularly problematic for elderly people. Issues identified by the Human Rights and Equal Opportunity Commission in its inquiry into the Accessibility of Electronic Commerce and New Service and Information Technologies for Older Australians and People with a Disability included:

- the cost of access to computers and Internet connection
- limited access to public facilities for people who cannot afford their own equipment
- inaccessibility of many web pages to people with vision impairments, slower connections and older equipment

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<sup>144</sup> *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, Canberra, November 1997, National Alternative Dispute Resolution Advisory Council, paragraph 5.82, referred to by the Commonwealth Attorney-General's Department.

<sup>145</sup> *Ibid*, paragraph 5.88.

➤ concerns regarding privacy and security of Internet communications.<sup>146</sup>

2.118 Centrelink submitted that there is a lack of specialist advocacy services available to assist older people in need.<sup>147</sup>

2.119 Centrelink also submitted that older people from CALD backgrounds who were the victims of ongoing abuse within the family were seen to be particularly vulnerable, as they have a reluctance to seek outside assistance for cultural reasons.<sup>148</sup>

2.120 APLA submitted that the effect of the *Civil Liability Act 2002* (NSW), to limit the legal costs recoverable by plaintiffs and defendants on claims under \$100 000, will adversely affect elderly people on pensions, because they are likely to have smaller claims for compensation.<sup>149</sup>

## People in rural, regional and remote areas

2.121 Several submissions and roundtable participants identified a range of factors operating as barriers to people in rural, regional and remote areas of NSW to obtaining legal assistance. These included remoteness, isolation and physical distance from services, often exacerbated by limited access to affordable and regular public transport.<sup>150</sup> In addition, issues of education and awareness levels, confidentiality, lack of available legal services and

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<sup>146</sup> *Accessibility of Electronic Commerce and New Service and Information Technologies for Older Australians and People with a Disability*, Report of the Human Rights and Equal Opportunity Commission, March, 2000, referred to by the Commonwealth Attorney-General's Department.

<sup>147</sup> Submission from Centrelink.

<sup>148</sup> Ibid.

<sup>149</sup> Submission from Australian Plaintiff Lawyers Association.

<sup>150</sup> Submission from NSW Department for Women; Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002; Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January, 2000, Paragraph 5.76, referred to by the Commonwealth Attorney-General's Department.

cultural issues were identified. Women, children and young people and people from CALD backgrounds in rural, regional and remote areas were all identified as being particularly disadvantaged.

2.122 Some of the inherent disadvantages which were identified for people in rural, regional and remote areas included:

- lower levels of literacy and numeracy
- difficulties in accessing legal information websites due to longer download times
- difficulties of privacy and confidentiality in smaller rural communities
- confusion over legal entitlements and rights due to the fact much television and radio coverage comes from other States
- conservative attitudes which make people reluctant to pursue their rights.<sup>151</sup>

### *Lack of services*

2.123 Several submissions noted the lack of both publicly funded legal aid services, and private solicitors in rural and remote areas. Surveys conducted by the Law Society of NSW indicate a drift of services away from rural areas to the city in the past three years.<sup>152</sup> In addition, practitioners remaining in rural areas are now unwilling to take on legal aid work, particularly in Family Law, due to the insufficient grants of legal aid. This results in fewer available options for legal advice and representation, as well as accentuating the likelihood of conflict of interest issues for those

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<sup>151</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote Areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>152</sup> The Law Society of NSW, *National Competition Policy – A discussion paper*, March 2002, p. 22, referred to in consultations with the Law Society of NSW.

practitioners who do continue to do legal aid work.<sup>153</sup> This was also acknowledged as an issue by Legal Aid NSW:

The Commission is aware that in a number of regional and rural areas, many private practitioners are declining to undertake legal aid work particularly in the area of Family Law. This causes problems in areas where, even if there is a legal aid office able to represent one party, there may be no private practitioner or other service prepared to act for the opposing party.

The areas with minimal coverage include the:

- Far North Coast
- South Coast
- Far West (West of Dubbo)
- South West (and Riverina Area).<sup>154</sup>

2.124 Some participants in the National Pro Bono Workshop stated that the diminishing number of private solicitors in rural and regional areas has also resulted in a reduction in the pro bono service opportunities for disadvantaged people in those areas.<sup>155</sup>

2.125 APLA expressed concerns that the impact of recent legislative changes on people in rural and regional areas will be particularly adverse:

Costs restrictions, coupled with the increased legislative intervention in the area of compensation claims, mean that bringing a claim is much more complex. The more legislative intervention that occurs in an area, the more technical and expensive litigation will become. Smaller legal firms will find it difficult to gain the knowledge and experience required for these types of claims. As the claims become more complex lawyers will need to be specialised in the field in order to take these cases on. It will become unprofitable for small practices to take on personal injury matters as they will not be cost effective to run as part of a broader and unspecialised practice. Injured people will be forced to go to larger legal firms in the city, that are able to efficiently deal with this sort of litigation. Less regional law firms will take on these matters, leaving a gap in the services available to rural people in need of legal representation.<sup>156</sup>

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<sup>153</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

<sup>154</sup> Submission from Legal Aid NSW.

<sup>155</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

<sup>156</sup> Submission from the Australian Plaintiff Lawyers Association.

2.126 People in rural and regional areas also face difficulties in accessing the services of Legal Aid NSW and community legal centres, particularly in the area of Civil Law.

For example, there is no in-house Civil Law service North of the Commission's Head Office to Newcastle. There is only a small community legal centre in Wyong, and so the Northern Beaches and Central Coast have minimal access to Civil Law services. A similar situation exists in: North of Coffs Harbour to the Queensland Border (two community legal centres based in Lismore and Armidale); South of Wollongong to the Victorian Border (there is only a small community legal centre based in Nowra); and West of Parramatta (there are only three small community legal centres in Katoomba, Dubbo and Broken Hill).<sup>157</sup>

2.127 The lack of community legal centres in rural and remote areas providing legal assistance was also noted as a significant barrier:

Another barrier to access noted in rural and remote areas arises because of the paucity of services offered. Most rural/remote population centres are served only by one CLC, which covers a vast region. In relationship disputes only one party can access the services of the CLC and the other is excluded due to a 'conflict of interest'. The second party is then left with no local or even regionally based support, as unlike people in major population centres they cannot be assisted by another CLC that is still within a reasonable distance of the client.<sup>158</sup>

While free legal information and advice is provided by the Legal Aid Commission and community legal centres, including a range of specialist statewide services, these are located in metropolitan and a few regional centres. While community legal centres generally provide outreach services, the extent of these is necessarily limited by the resources available to the individual centre and access may be difficult for women living in rural and remote locations, particularly if they do not have access to a telephone.<sup>159</sup>

2.128 A number of disadvantaged groups in rural, regional and remote areas were identified as facing particular hardship in obtaining legal assistance as a result of the lack of legal services:

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<sup>157</sup> Submission from Legal Aid NSW.

<sup>158</sup> Submission from North and North West Community Legal Service Inc.

<sup>159</sup> Submission from the Women's Legal Resource Centre.

- women in need of Family Law services (see section on Women below)<sup>160</sup>
- children and young people (see section on Children and young people above)<sup>161</sup>
- CALD women in need of non-charging migration agents (see section on people from CALD backgrounds above)<sup>162</sup>
- CALD people from smaller language groups in need of interpreters (see section on people from CALD backgrounds above).<sup>163</sup>

The needs of these groups are discussed in more detail elsewhere in this report.

### Attitudinal barriers

2.129 Several roundtable participants indicated that disadvantaged people in rural and remote areas are often reluctant to seek legal assistance for complaints against services, particularly home care support, due to the lack of alternative sources for such assistance.<sup>164</sup> According to Barry Fowler of the Broken Hill Centre for Community, there is a culture of disempowerment, where people feel that they cannot change their circumstances and don't want to rock the boat:

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<sup>160</sup> Submission from Women's Legal Resource Centre, Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.79, referred to by the Commonwealth Attorney-General's Department.

<sup>161</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>162</sup> Submission from the Immigration Advice and Rights Centre.

<sup>163</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>164</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

The other thing I think is country cultural values are different. People tend to be very, very conservative. My guess is that it reinforces the view that you cannot change things unless you have plenty of money.<sup>165</sup>

2.130 The North and North West Community Legal Service based in Armidale also commented on the mind-set and lack of knowledge about the legal system which is prevalent in rural and remote areas:

Funding bodies often do not appreciate the realities of geographic disadvantage, for example, including the complete absence of public transport and the mind-set of those who live in remote communities. As noted above people who suffer disadvantage sometimes don't have even sufficient knowledge about the legal system to know how to engage with it or even what the point of doing so is. Their first encounter is likely to be one that has been initiated by another (Police, RTA [Road Traffic Authority], Debt Collector, etc) and their initial reaction is not one of seeking advice from within the system that is attacking them. Thus there is prevarication and when they finally address the issue by seeking support and advice the situation is sometimes beyond the resources and expertise of community legal centres.<sup>166</sup>

### Legal information services

2.131 In terms of access to legal information resources, for people in rural and remote locations, two issues were identified:

- Difficulty for people without transport in accessing written community legal information distributed to libraries<sup>167</sup>
- lack of funding for Internet support services, which can assist people who do not have access to other services.<sup>168</sup>

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<sup>165</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>166</sup> Submission from North and North West Community Legal Service Inc.

<sup>167</sup> Submission from the NSW Department for Women.

<sup>168</sup> Submission from the Communications Law Centre.

## People with low levels of education and literacy

2.132 The complexity of the legal system was seen to be a major barrier for people who have limited education or have low literacy. Identified difficulties included:

- ignorance of the availability of legal aid
- inability to recognise a problem as a legal problem
- ignorance of sources of relevant information
- ignorance of their rights to obtain redress
- inability to assess the options open to them.<sup>169</sup>

2.133 Unbundled services (see paragraph 2.28 above) are usually available for clients who do not qualify for a grant of legal aid, and who have sufficient skills to select, comprehend and utilise the limited assistance provided. However, according to the ALRC unbundling can really only work for educated, articulate litigants in routine matters.<sup>170</sup>

2.134 It was also noted that legal information websites are mostly inaccessible for people with lower levels of literacy.<sup>171</sup>

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<sup>169</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003; *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, Canberra, November 1997, National Alternative Dispute Resolution Advisory Council, paragraph 9.23, referred to by the Commonwealth Attorney-General's Department.

<sup>170</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January, 2000, Paragraph 5.177, referred to by the Commonwealth Attorney-General's Department.

<sup>171</sup> Funston, R., Legal Aid NSW, *Accessible and Equitable Information and Advice*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

## Women

2.135 The Women’s Legal Resource Centre (WLRC) submitted that a decline in the availability of legal aid for Civil and Family Law matters together with a reduction in legal aid grants for that work, and the consequent reduction in the number of private solicitors willing to take on such legal aid work, has restricted the ability of women to obtain legal assistance, particularly in rural and regional areas:

Most recently the Law On Line and National Pro Bono consultant Reports show the level of access to justice and legal needs is not being met at a rural level, with women and children being denied help and assistance. More recently, at a state level, we have met with LawAccess and they have again confirmed the lack of legal services, particularly in Family Law, where justice is denied to women and children particularly in rural areas.<sup>172</sup>

2.136 The WLRC also reported that large numbers of women are unable to gain access to legal advice via their general advice line:

An indication of the unmet need was again made clear to us when an audit was done of our general advice line. This audit by the phone company showed that for every call that was answered 24 tried and didn’t get through.<sup>173</sup>

2.137 The National Women’s Justice Coalition submitted that difficulties in obtaining legal assistance for domestic violence matters was a major problem. Their understanding of the policy for Apprehended Violence Orders is:

Legal Aid Commission policy for Apprehended Violence Orders (AVOs) in domestic violence determines that clients will not get legal aid for AVO applications unless they have an intimate relationship with the perpetrator (this excludes housemates and adult/child applications).<sup>174</sup>

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<sup>172</sup> Submission from Women’s Legal Resource Centre.

<sup>173</sup> Ibid.

<sup>174</sup> Submission from the National Women’s Justice Coalition.

2.138 Community legal centres submitted that remoteness and lack of services acted as a significant barrier for women who experience domestic violence:

Women who experience domestic violence on farms often cannot access legal advice and assistance, due to issues of remoteness and lack of services. Domestic violence liaison officers are only available a few hours per month in many rural areas.<sup>175</sup>

2.139 The NSW Department for Women noted that barriers of lack of knowledge about the legal system, cost, and unavailability of legal aid were all factors which impacted adversely on women:

Women's disadvantage in relation to the operation of the law is compounded by a general lack of knowledge about the legal system, laws and available remedies and by the cost of legal advice and representation and limited availability of legal aid in recent years. These factors impact particularly strongly on Aboriginal women, refugee women and migrant women from non-English speaking countries, and women from other disadvantaged communities.<sup>176</sup>

2.140 The ALRC report *Multiculturalism and the Law*<sup>177</sup> and the *Quarter Way to Equal Report*<sup>178</sup> both identified that women from CALD backgrounds were disadvantaged by a general lack of knowledge about the legal system, laws and available remedies, cost of legal aid and the limited availability of legal aid. Domestic violence and family law were identified by the Department for Women as two major areas of legal need for these women covered in these reports.<sup>179</sup>

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<sup>175</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>176</sup> Submission from NSW Department for Women.

<sup>177</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57, Canberra, 1992.

<sup>178</sup> Women's Legal Resource Centre, *Quarter Way to Equal: A report on barriers to access to legal services for migrant women*, Sydney, 1994.

<sup>179</sup> Submission from the NSW Department for Women.

- 2.141 At home parents who are not in paid employment are more likely to be women, and so they were also identified as being potentially disadvantaged by the effect of the *Civil Liability Act 2002* (NSW), which limits the legal costs recoverable by plaintiffs and defendants on claims under \$100 000.<sup>180</sup>
- 2.142 Legal Aid NSW has observed that demand for representation of parents, particularly mothers, in care and protection matters has significantly increased following the introduction of *the Children's and Young Persons (Care and Protection) Act 1998*.<sup>181</sup>

## People living in institutions

### Prisoners

- 2.143 Participants in the roundtable consultation with non-government and community organisations detailed some of the issues confronted by prisoners in attempting to access legal assistance:
- confusion about the role and services provided by the Legal Aid NSW Prisoners' Legal Service
  - inability to access legal advice telephone lines from within prison
  - lack of access to web based legal information while in prison
  - insufficient time with legal practitioners prior to going to court, and a consequent feeling of lack of quality of services available to prisoners.<sup>182</sup>
- 2.144 Limitations of the Prisoners' Legal Service were identified in relation to a lack of assistance with day-to-day violations of prisoners' rights, such as

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<sup>180</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>181</sup> Submission from Legal Aid NSW.

<sup>182</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

being moved to other prisons without prior warning to the prisoner or his/her family, loss of visits, loss of privileges, or reclassification issues.<sup>183</sup>

2.145 It was also submitted that prisoners encounter difficulties in obtaining legal assistance regarding immigration issues:

There are no organisations funded to provide free migration services in prison. If a prisoner is unable to pay a private migration agent they are limited to obtaining advice by phone from organisations such as IARC. Many prisoners find themselves in situations where they must act for themselves in seeking review of a cancellation or deportation order.<sup>184</sup>

### Immigration detention centre detainees

2.146 The submission from IARC stated that detainees in Immigration Detention Centres may face complex immigration issues, and decisions often need to be made within strict time limits. Detainees who cannot afford to engage a fee-charging migration agent to advise them in detention face considerable difficulties in obtaining legal assistance. There is no service that is funded to provide immigration advice and assistance at Villawood. IARC assists detainees through the telephone advice service, but does not have the resources to provide advice in-person at Villawood.<sup>185</sup>

### People in institutional care

2.147 People with Disabilities submitted that people in institutional care face similar barriers to prisoners:

We note the reference to people living in institutions, and their particular legal needs and the common lack of rights or access to legal recourse. People with disability living in institutional care face similar barriers, which can result in abuse where there are a lack of safeguards and an inability to communicate or access advocacy.<sup>186</sup>

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<sup>183</sup> Ibid.

<sup>184</sup> Submission from the Immigration Advice and Rights Centre.

<sup>185</sup> Ibid.

<sup>186</sup> Submission from People with Disabilities.

## **People on low incomes**

- 2.148 Submissions and consultations observed that many socially disadvantaged groups in the community are often economically disadvantaged as well. The financial barriers confronting these people in obtaining quality legal representation was seen by many roundtable participants as a fundamental access to justice issue.<sup>187</sup>
- 2.149 It was the belief of several contributors that due to tightened legal aid means test guidelines, many low and middle income earners were unable to secure legal representation. This was because they were ineligible for legal aid under the Commission's means test, and also unable to afford the services of a private solicitor. This group, often referred to as 'the working poor' were seen as being greatly disadvantaged, particularly in contested Family Law proceedings which involve drafting court documents and attendance at conferences and court hearings.<sup>188</sup>
- 2.150 Legal Aid NSW acknowledged that the most significant barrier to accessing its Criminal Law services is the means test, which can serve to deny legal aid to many people earning low incomes who cannot afford to pay a private lawyer. It acknowledged that the means test, which determines legal aid eligibility, can operate inflexibly.

If a person is not in custody and earning a wage, it is very unlikely that the person will be eligible for aid (unless their income is very low and they have a large family). Similarly, a person not in custody, and not receiving social security, is unlikely to be eligible for legal aid. The cost of an appeal in the Court of Criminal Appeal or High Court will often be beyond middle income earners.

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<sup>187</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>188</sup> Submission from Macquarie Legal Centre; Submission from Court Support Scheme; Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002; Law and Justice Foundation of NSW roundtable with NSW Law Society Regional Law Society Presidents, 24 October, 2002.

The Commission's means test also does not contain mechanisms to reflect the varying costs of living and property prices across NSW. For example, there is only one set maximum for the cost of rental (allowed to be deducted from assessable income) which does not reflect the varying costs of rental across the State. It is also possible in albeit rare circumstances that an applicant for legal aid and a financially associated person both receiving a social security benefit, and living in extremely cheap accommodation, may not be eligible for legal aid under the means test based on their income.<sup>189</sup>

2.151 In its submission, Macquarie Legal Centre indicated that for clients who were in either full-time work, part-time work or self-employed (approximately 39.2 per cent of their total number of clients), the Centre could provide initial legal advice, but were not able to provide representation as they would be outside their practice guidelines. These people were usually unable to afford the services of a private solicitor, but were often still ineligible for legal aid.<sup>190</sup>

2.152 One roundtable participant noted that people on social security or low incomes, who either rely on legal aid funded lawyers, or who struggle to pay for the services of a private lawyer, will be severely disadvantaged when opposing litigants with significantly more resources (whether it be the Office of Director of Public Prosecutions, Government or large companies). Their opponent will almost certainly engage the services of more experienced, more proficient legal counsel, and have resources to engage in lengthy litigation.<sup>191</sup>

2.153 In its discussion paper, NADRAC reported that disparities in economic wealth may mean that one participant in a dispute has access to legal or other professional advice and the other does not. If they elect to proceed, those who are unrepresented may be placed at a significant disadvantage and the outcome may not be fair to the weaker participant. NADRAC also stated that lack of financial resources may preclude the proper exploration

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<sup>189</sup> Submission from Legal Aid NSW.

<sup>190</sup> Submission from Macquarie Legal Centre.

<sup>191</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

of appropriate options for the resolution of a dispute, causing further disadvantage to the financially weaker party.

Even if a disputant is convinced of the strength of his or her complaint, the cost of being represented in ADR proceedings may be sufficient to discourage them from proceeding. As distinct from the formal justice system, where the losing party generally pays the costs of both parties, in ADR, in the absence of specific arrangement in the settlement agreement, each participant is responsible for their own costs.<sup>192</sup>

2.154 APLA submitted that people on low incomes will be disadvantaged by the effect of the *Civil Liability Act 2002* (NSW), to limit the legal costs recoverable by plaintiffs and defendants on claims under \$100 000.<sup>193</sup> According to APLA, such people who rely on private solicitors who offer ‘no-win no-fee’ services, will find it difficult to obtain legal assistance to pursue claims of less than \$100 000. In addition, restrictions on solicitors advertising ‘no-win no-fee’ arrangements will make it more difficult for such people to be aware of the availability of such arrangements.<sup>194</sup>

## Homeless people

2.155 The Legal Counselling and Referral Centre (LCRC) identified several barriers obstructing the ability of homeless people to obtain legal assistance, including:

- non-availability of legal aid for minor civil matters which could be resolved by negotiation
- fear of the legal system, and a belief that their problems will just ‘go away’
- lack of ability to identify their issue as a legal issue

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<sup>192</sup> National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, Canberra, November 1997, paragraph 9.20, referred to by the Commonwealth Attorney-General’s Department.

<sup>193</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>194</sup> *Ibid.*

- lack of lawyers and legal services with specific skills to listen and understand the issues confronting homeless people (who may also be suffering from other problems such as substance abuse, addiction, or mental illness)
- vulnerability to harassment and discrimination, particularly from law enforcement officers
- low levels of literacy, causing difficulty in understanding community legal information material
- little or no access to online information or telephone helplines.<sup>195</sup>

2.156 It was also observed that homeless people are often overwhelmed by issues of urgency, including health, accommodation, and hunger, which result in seeking assistance for their legal needs being relegated to a lower priority.<sup>196</sup>

## Men

2.157 One submission and one consultation drew attention to the inability of men in child support matters or who are respondents to applications for Apprehended Violence Orders, to secure legal representation.<sup>197</sup> It was stated that legal aid is not available to provide representation in such matters, and unless the respondent is able to afford to pay for legal representation, they will be unrepresented and therefore disadvantaged in the proceedings.

Unrepresented men trying to deal with issues such as child support, Family Law and Apprehended Violence Orders lack court support ..... the problem is compounded by the fact that the laws involved can often be complex (for example, child support legislation) and the issues involve strong emotions. What is needed is a support group that could explain the system, assist with court processes and provide services such as anger management.<sup>198</sup>

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<sup>195</sup> Submission from the Legal Counselling and Referral Centre.

<sup>196</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>197</sup> Submission from Court Support Scheme; Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>198</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

## Mechanisms and innovations to assist disadvantaged people

2.158 This section focuses on the services, strategies and recent innovations to assist disadvantaged people obtain legal assistance and overcome the barriers to access, which were highlighted in the consultation process. It does not canvass all available services, and only focuses on those which were mentioned in submissions and consultations.

### **General**

2.159 Publicly funded legal aid services endeavour to provide greater access to legal assistance for disadvantaged people. In particular, the NSW Legal Aid Commission, the 37 community legal centres and the six Aboriginal Legal Services which operate in NSW, provide legal services for disadvantaged people. The services of these agencies are described in the following section.

### *Legal Aid NSW*

2.160 Legal Aid NSW is the largest legal aid agency in Australia, comprising a head office in Sydney, 19 regional offices in metropolitan and country centres across NSW and a number of specialist services and advice clinics. It was established under the *Legal Aid Commission Act 1979* as an independent authority to provide legal aid to disadvantaged persons throughout NSW. Its corporate vision is 'To ensure that the socially and economically disadvantaged can understand, protect and enforce their legal rights and interests'. Programs and services provided and/or funded through the Commission include:

- duty lawyer service in every local court in NSW
- Prisoners' legal service
- Children's legal service (criminal and care matters)

- Child support services for paying and carer parents
- Alternative dispute resolution service including Family Law conferencing, Family Law mediation and Civil Law pro bono mediation
- family litigation
- Civil law services representing people in civil claims and court actions
- Mental health advocacy service
- Veterans' advocacy service
- Administrative law service particularly for immigration and refugee matters
- Legal aid help-line providing information, advice and referral services
- Website with legal information on an extensive range of issues (<http://www.legalaid.nsw.gov.au>)
- Community education and publications (including Divorce classes)
- Community Legal Centres Funding Program
- Women's Domestic Violence Court Assistance Scheme Program
- Client assessment and referral services for clients with socio-legal needs.<sup>199</sup>

2.161 In 2001/2002, Legal Aid NSW provided 319 099 client services to people in NSW. Advice and information services made up almost half (156 394) of the services provided. Legal Aid NSW also contracts work to the private profession, by providing grants of legal aid to undertake work in Criminal, Civil and Family law, in accordance with the Commission's eligibility guidelines and means test. In 2001/2002, Legal Aid NSW received 20 588 applications for grants, and managed 31 458 duty lawyer appearances conducted by private practitioners.<sup>200</sup>

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<sup>199</sup> Submission from Legal Aid NSW.

<sup>200</sup> Legal Aid NSW *Annual Report* 2001–2002.

*Community legal centres*

2.162 There are 37 community legal centres which deliver legal services to their respective local communities. The work of community legal centres includes activities such as legal advice and representation, outreach services, community legal education, community development activities, law reform activities and other initiatives. Community legal centres do not duplicate the work of NSW Legal Aid, or do work that is deemed core legal aid work.<sup>201</sup>

2.163 In 2001, community legal centres provided 81 264 information and advice sessions.<sup>202</sup> Many community legal centres offer advice services outside of normal business hours to enhance accessibility.

2.164 Several contributors noted the importance of community development and community education in the work of community legal centres:

Where CLCs are involved in their communities and capable of providing targeted community legal education as an 'early intervention' technique they become more effective.<sup>203</sup>

2.165 Nineteen community legal centres provide generalist services which deliver services to a local geographic catchment area. Eight of these operate in the Sydney metropolitan areas and 11 operate in rural, regional and remote areas of New South Wales. These 11 centres also undertake outreach services to the surrounding regions. The importance of face-to face outreach services undertaken by all community legal centres was noted.<sup>204</sup>

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<sup>201</sup> Funston, R., *Legal Aid NSW, Accessible and Equitable Information and Advice*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>202</sup> Statistics from the Community Legal Centre National Information Statistics Scheme provided to the Law and Justice Foundation of NSW in December 2002.

<sup>203</sup> Submission from North and North West Community Legal Service Inc.

<sup>204</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

2.166 Eighteen legal centres provide specialist services delivering services either on particular areas of law or to a particular disadvantaged group. The 18 specialist legal centres in NSW are:

- The Aged-Care Rights service
- Arts Law Centre
- Communications Law Centre
- Consumer Credit Legal Centre
- Disability Discrimination Legal Centre
- Domestic Violence Advocacy Service
- Environmental Defenders Office
- HIV/AIDS Legal Centre
- Immigration Advice and Rights Centre
- Intellectual Disability Rights Service
- National Children's and Youth Law Centre
- Public Interest Advocacy Centre
- Refugee Advice and Casework Service
- Tenants' Union NSW
- Welfare Rights Centre
- Wirringa Baiya Aboriginal Women's Legal Centre
- Women's Legal Resources Centre
- The NSW Working Women's Centre.

#### Tenancy Advice services

2.167 There are 11 publicly funded tenancy advice services in NSW, providing advice, advocacy and legal information services to private and public housing tenants on various tenancy related issues. Four of these centres

are located in metropolitan Sydney (Bondi Junction, Chatswood, Campsie and Harris Park). The seven remaining services are located in rural, regional and remote areas of New South Wales. Three of these are designated as Aboriginal tenancy advice services.

*Local Courts and Chamber Magistrates service*

2.168 NSW is the only State to provide a free, non-means tested legal information and assistance service through the Chamber Magistrate service. The service is available at all full time Local Courts and provides:

- information about legal processes and court procedures
- information about the options available to assist anyone with a legal problem and the possible consequences of taking a particular course of action
- assistance with document preparation (to initiate or progress a court process)
- assistance to take out an apprehended or personal violence order
- referral to an appropriate legal advisory service and to support/advocacy services.<sup>205</sup>

2.169 Thirty-five Local Courts in NSW provide outreach services at 51 external locations. Outreach services were initially established to meet the needs of communities that were physically isolated or remote. The NSW Attorney General's Department submission makes the comment that the environment of the court itself can deter many people from seeking assistance or using court services, and that outreach services can assist those people as well.<sup>206</sup>

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<sup>205</sup> Submission from the NSW Attorney General's Department.

<sup>206</sup> Ibid.

### LawAccess NSW

2.170 A new development in the area of legal service delivery to disadvantaged people in NSW has been the establishment of LawAccess NSW in 2002. LawAccess NSW is a free service providing a single point of access to legal and related assistance services in New South Wales. It merges the services formerly provided by the Legal Aid Commission HelpLine and the Law Society of NSW Community Assistance Department. Its priority target audience is those people who are traditionally disadvantaged in access to legal services due to distance from local services or disability. Its main aim is to assist service users to find the information and services that are best able to assist with legal problems and questions. Its main functions are to:

- provide legal information, referral and advice
- develop and distribute legal information resources
- work with other legal assistance services in NSW to streamline the provision of services to service users.<sup>207</sup>

2.171 LawAccess NSW provides a telephone advice and referral service (including TTY facilities for people with hearing or speech impairments). From April 2002 until December 2002, LawAccess NSW recorded 46 186 advice sessions.<sup>208</sup>

2.172 The LawAccess service has two additional legal information strategies:

- **Law Talks:** By ringing the main number at any time of the day or night service users can listen to recorded legal information talks on over 30 legal topics

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<sup>207</sup> Funston, R., Legal Aid NSW, *Accessible and Equitable Information and Advice*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003, see also <http://www.lawaccess.nsw.gov.au>

<sup>208</sup> Data provided by LawAccess NSW to Law and Justice Foundation of NSW in January 2003.

- LawAccess Online: This service enables users to search the website for information or an organisation that may be able to help with a legal problem, at any time of the day or night on [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)

2.173 Some participants in the community legal centres consultation roundtable reported feedback from their clients that they had encountered long delays and difficulties getting through to LawAccess. In addition, concerns were expressed about inappropriate referrals back to community legal centres who had previously referred people to LawAccess. Particular concerns were also expressed regarding the appropriateness of LawAccess for Indigenous people because of these issues.<sup>209</sup> Several roundtable participants also expressed the view that such helplines and website strategies cannot replace direct advice services.<sup>210</sup>

We've had people try to contact LawAccess and have been unable to get through. People we have referred to LawAccess have reported experiencing long delays and being kept on hold, and they aren't prepared to keep holding.<sup>211</sup>

2.174 LawAccess NSW have advised that for the 12 months ending 30 April 2003, the average time service users waited in the telephone queue before speaking to an operator was 1 minute 35 seconds, and 89 per cent of inquirers were answered within five minutes. LawAccess also advised that they have received reports from Telstra that since 1 March 2002, there have not been any unsuccessful calls to the standard 1300 number or the TTY 1300 number.<sup>212</sup>

2.175 To improve service delivery to Indigenous people, LawAccess has been working with the Aboriginal Justice Advisory Council to develop appropriate strategies to target Koori communities.<sup>213</sup>

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<sup>209</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Data provided by LawAccess in June 2003.

<sup>213</sup> Submission from the NSW Attorney General's Department.

2.176 To facilitate the referral process and reduce the incidence of inappropriate referrals, LawAccess advised that it 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 so that they can follow up why it happened and put remedies in place to address this.<sup>214</sup>

*Pro bono services*

2.177 The growing significance of pro bono services by the private legal profession was noted by many submissions and roundtable participants, as was the important role of the Public Interest Law Clearing House in acting as an access point for pro bono services.<sup>215</sup>

2.178 While the important role of pro bono services was noted, it was also stated that pro bono legal services cannot present as a substitute for legal aid. As Justice Sackville commented at the Access to Justice and Legal Needs Workshop:

Recent reports have pointed to the contribution made by pro bono legal services in meeting certain kinds of legal needs. While the precise contributions made by voluntary service providers within the profession are 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.<sup>216</sup>

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<sup>214</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>215</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>216</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

2.179 The Commonwealth Attorney-General's Department referred to the recently established National Pro Bono Resource Centre as an initiative which will facilitate the provision of pro bono legal assistance to disadvantaged people. The key objectives underlying the Centre's establishment are:

- to promote pro bono work throughout the legal profession
- to assist and support pro bono service providers
- to make available resources and information to pro bono providers
- to promote pro bono law to community organisations and the general public.<sup>217</sup>

2.180 Related to the availability of pro bono services from the private profession, is the availability of various fee arrangements such as contingency fee arrangements and 'no-win no-fee' arrangements.

Contingency fees, delayed billing arrangements and litigation lending provide financial assistance to those who can not otherwise afford legal services. These arrangements involve risk assessment by the lawyer. In some instances, there is little likelihood the claim will be unsuccessful and the returns more than compensate the lawyer's risk. Contingency arrangements cover a variety of agreements between the lawyer and the client. Under 'no-win no-fee' agreements, the lawyer receives a fee only if the client has a successful outcome. The fee agreed comprises a fixed sum or, more commonly, a fixed sum and a percentage uplift of the usual fee.

In all such arrangements the litigant carries the risk of having to pay the costs of the other party if the claim is unsuccessful, and is responsible for paying disbursements incurred by their lawyer. Some lawyers arrange litigation loans for clients with a bank, usually for the purposes of disbursements only.<sup>218</sup>

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<sup>217</sup> Report of the National Pro Bono Task Force to the Commonwealth Attorney-General, 14 June 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>218</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraphs 5.21, 5.23, referred to by the Commonwealth Attorney-General's Department.

2.181 According to APLA, the availability of ‘no-win no-fee’ and similar type arrangements help to make legal services more accessible for disadvantaged people:

The use of ‘no-win, no-fee’ arrangements simply enables people to get initial legal advice that they otherwise may not be able to afford... If ‘no-win, no-fee’ agreements are banned or otherwise restricted, the ability of disadvantaged people to access the legal system will be significantly reduced. Many financially disadvantaged people will simply be unable to obtain legal advice.<sup>219</sup>

2.182 APLA also states that advertising of legal services has a significant impact on the ability of people to access pro bono legal services.

People who are not familiar with the law can find approaching a solicitor daunting and confusing. Legal practitioners usually have quite specialised practices. Legal advertising allows consumers to contact a legal practitioner who specialises in the relevant area of the law for them. This means that consumers will obtain more efficient and less expensive legal services.<sup>220</sup>

### Online services

2.183 The expanding volume of legal information available on the Internet is a significant source of legal assistance for many groups within the community, including individual consumers, intermediaries, community workers, and the legal profession. As the ALRC has observed:

CLCs, LACs and other such organisations have Internet home pages which provide legal information assistance as well as information on their areas of practice, office locations and contact details. Law societies, law firms and ADR organisations also provide legal information, usually by publishing papers, journals or newsletters.<sup>221</sup>

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<sup>219</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>220</sup> Ibid.

<sup>221</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraphs 5.169, referred to by the Commonwealth Attorney-General’s Department.

- 2.184 Many participants saw such online services as beneficial in overcoming delays in obtaining advice in relatively straightforward matters, augmenting and enhancing the capability of community based advice service providers, providing greater confidentiality for people in rural and remote areas, and being more accessible to people with physical disabilities.<sup>222</sup>
- 2.185 Concerns were also expressed that such websites and email services were often difficult to navigate, ineffective or of limited use for people with low levels of literacy, CALD people (unless material in other languages is available), people with vision impairments, and those who are unfamiliar with such new technology. In addition, some expressed the view that email advice services are more likely to be accessed by middle income earners and not the most disadvantaged in society.<sup>223</sup>
- 2.186 One source of legal assistance which does not have a high profile, but of which the Foundation was made aware during the consultation process, was the national email/telephone advice service provided by Legal Access Services Ltd. (<http://www.legalaccess.com.au>). The service includes:
- online legal information
  - an email and telephone advice service where clients of partner organisations (eg. AAMI, NSW Farmers Association) can receive free advice from private lawyers who have agreed to participate in the scheme as part of their pro bono contributions. For individuals and families, the service can provide advice and information on issues such as traffic prosecutions, personal injuries, consumer disputes, neighbour disputes, matrimonial problems and employment

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<sup>222</sup> Law Society of NSW, *National Competition Policy – a discussion paper*, March 2002, p. 33, referred to in consultations with the Law Society of NSW; Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>223</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

difficulties. For small businesses the service can provide advice and information on company law, business structures, leases, trade practices, debt recovery, resolving business disputes and protecting business assets.<sup>224</sup>

### Other services

2.187 Legal information and education services are also provided by a number of Government Departments and Government organisations. As an example, Public Trustees NSW provides what it describes as ‘legal educative services’:

...namely advising and assisting the public (and indeed, solicitors, accountants and members of government) on trustee and executor issues. As applied to disadvantaged people these services may not be otherwise readily available to those not in a position to pay for them.<sup>225</sup>

2.188 Trade Union members can also access free legal advice, information and often representation on a range of matters, by virtue of their membership.<sup>226</sup>

2.189 Other organisations, such as courts and libraries which provide some services, were not highlighted by submissions or in consultations.

## **People with disabilities**

### Community legal centres

2.190 There are several community legal centres specifically designated to provide legal assistance for people with disabilities:

- Disability Discrimination Legal Centre (dealing only with discrimination related legal matters for people with various disabilities)

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<sup>224</sup> Submission from Peter Fosterbunch, Legal Access Services Pty. Ltd.

<sup>225</sup> Submission from the Public Trustee NSW.

<sup>226</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- HIV/AIDS Legal Centre (only available for people suffering from HIV/AIDS)
- Intellectual Disability Rights Service (only available for people with an intellectual disability).

2.191 In addition, the Public Interest Advocacy Centre will often undertake test case and public interest litigation on behalf of people with disabilities.

### *Legal Aid NSW*

2.192 The Legal Aid NSW Mental Health Advocacy Service (MHAS) provides advice and representation to people who have a mental illness. Most of these services are provided at institutions throughout the state. Lawyers from the Commission's in-house Civil Law sections complement the services provided by the MHAS.<sup>227</sup>

2.193 Legal Aid NSW is also piloting a Video Conferencing Scheme. This initiative uses video conferencing facilities to undertake tasks related to legal representation that previously required face-to-face attendance. Potentially such facilities could also be used to provide legal advice and information to people with physical disabilities who cannot get to an office.<sup>228</sup>

### *Courts*

2.194 The NSW Local Courts' outreach services to Health and Neighbourhood Centres can assist people with a range of disabilities, who may feel more comfortable in an alternative venue, or being assisted by specialist services with whom they have familiarity.<sup>229</sup>

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<sup>227</sup> Funston, R., *Legal Aid NSW, Accessible and Equitable Information and Advice*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>228</sup> Ibid.

<sup>229</sup> Submission from the NSW Attorney General's Department.

2.195 NSW Local Courts have also been implementing a Flexible Service Delivery Policy to ensure that all courts are aware of potential barriers to access and take steps to address those barriers. Groups targeted have included those with a sensory disability, those with schizophrenia or other mental illnesses, and those with physical disabilities that impede access. The process has involved consultations with disability groups, and people with disabilities training local court staff to become aware of potential access problems. Some Chamber Magistrates have commented that one of the benefits has been gaining a better understanding of the difficulties faced by people with disabilities in accessing the legal system. Because the process will involve training all Local Court staff, it is not expected to be completed for several years.<sup>230</sup>

### Other

2.196 It was also noted that the following organisations provide a range of legal information material (both online and in pamphlet form) for people with various disabilities:

- Human Rights and Equal Opportunity Commission
- NSW Anti-Discrimination Board
- The Guardianship Tribunal
- The Public Guardian.<sup>231</sup>

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<sup>230</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>231</sup> Submission from the Council for Intellectual Disability.

## **People from culturally and linguistically diverse backgrounds**

### *Community legal centres*

- 2.197 Many community legal centres report high proportions of their service users coming from CALD backgrounds. In 2001, of those clients who reported their country of birth, 37 per cent were born in countries other than Australia.<sup>232</sup> According to the 2001 Australian Bureau of Statistics Census, 29.5 per cent of people in NSW were born in countries other than Australia.<sup>233</sup>
- 2.198 The Immigration Advice and Rights Centre (IARC) provides immigration advice services and ongoing legal representation to clients. The centre's advice services include:
- drop-in evening sessions at Parramatta and Surry Hills. At these services volunteer registered migration agents provide face-to-face advice and assistance to clients
  - a telephone advice service.

As well as giving advice to individuals, the service assists community workers, lawyers, migration agents and other advisers who handle immigration cases. In 2001, the Centre advised over 4000 people regarding immigration issues through the drop-in and telephone advice services.<sup>234</sup>

- 2.199 In addition, IARC runs training courses for migration agents which meet the "sound knowledge" requirements for registration as a migration agent as well as running seminars on immigration issues for migration agents, community workers and ethnic communities. IARC publishes a quarterly

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<sup>232</sup> Statistics from the Community Legal Centre National Information Statistics Scheme provided to the Law and Justice Foundation of NSW in December, 2002.

<sup>233</sup> Australian Bureau of Statistics, 2001 Census Basic Community Profile and Snapshot, 2001.

<sup>234</sup> Submission from the Immigration Advice and Rights Centre.

newsletter highlighting the most recent developments in immigration law and the *Immigration Kit*, a practical reference for community workers.<sup>235</sup>

2.200 The Refugee Advice and Casework Service (RACS) specialises in providing legal assistance to asylum seekers applying for refugee status. Their services include full application assistance, face-to-face advice, telephone advice and referrals. They assist asylum seekers in the community and in immigration detention.

2.201 Community legal centres have been involved in a number of projects which have sought new ways to provide legal information to people from CALD backgrounds, particularly small language groups and newly-emerging communities. These projects have been characterised by significant input at all stages from the language communities concerned. Some examples of these projects include:

- *Focus on Women* — A project with Arabic, Filipino and Pacific Islander women in the Macarthur area, conducted by the Macarthur Legal Centre and the Macarthur Migrant Resource Centre. Focus groups were conducted with seventy-eight women on their experiences with credit and debt issues, including how they obtained information and how they preferred information to be provided to them. The main findings were that the women had low levels of awareness of consumer finance and where to get legal help. The participants presented ideas for information dissemination.
- *Kurdish radio project* — In 1997 Macquarie Legal Centre and the Immigrant Women's Speakout conducted a legal education project with Kurdish women in western Sydney. The Kurdish women chose radio plays as a preferred means of information dissemination. A series of eight short plays were produced in Kurmanci and Sornai on domestic violence, immigration, divorce, separation, financial and

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<sup>235</sup> Ibid.

property settlement. The plays were aired on SBS radio as well as being compiled on cassettes and distributed to community organisations.

- *Ethiopian women's Information Group* — The Macquarie Legal Centre designed a project to train Ethiopian women as legal resource people for their community and to produce a legal information manual. The topics covered were legal help, immigration, social security, domestic violence, housing, consumer rights, employment and work and youth. Material on each of these topics was collated into a manual and presented in both English and Amharic.<sup>236</sup>

### Legal Aid NSW

- 2.202 Legal Aid NSW reports that in 2001/2002, 13.9 per cent of its clients were from CALD backgrounds, with 2.9 per cent requiring the services of an interpreter.<sup>237</sup>
- 2.203 Legal Aid NSW provides a specific Administrative Law service which deals particularly with immigration and refugee matters.<sup>238</sup>

### Local Courts

- 2.204 The Local Courts' outreach services to Health and Neighbourhood Centres can also assist people from CALD backgrounds, who may feel more comfortable in an alternative venue.<sup>239</sup>

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<sup>236</sup> Submission from Macquarie Legal Centre.

<sup>237</sup> Legal Aid NSW *Annual Report 2001/2002*.

<sup>238</sup> Submission from Legal Aid NSW.

<sup>239</sup> Submission from the NSW Attorney General's Department.

### LawAccess NSW

- 2.205 The newly established LawAccess service is working with the NSW Community Relations Commission to explore ways of implementing a multilingual telephone service at a statewide level. LawAccess also provides access to legal information in languages other than English via its website.<sup>240</sup>
- 2.206 The availability of published legal information pamphlets in community languages was seen as an important source of information.<sup>241</sup>

## **Indigenous Australians**

### Aboriginal Legal Services

2.207 There are six Aboriginal Legal Services in NSW:

- South Eastern Aboriginal Legal Service — based in Nowra, with branches in Canberra and Moruya
- Wiradjuri Aboriginal Legal Service — based in Wagga Wagga, with branches in Griffith and Cowra
- Kamilaroi Aboriginal Legal Service — based in Armidale, with branches in Moree and Tamworth
- Many Rivers Aboriginal Legal Service — based in Grafton, with branches in Newcastle, Taree, Lismore, Coffs Harbour and Kempsey
- Western Aboriginal Legal Service — based in Dubbo, with branches in Bourke, Broken Hill and Walgett
- Sydney Regional Aboriginal Corporation Legal Service — based in Sydney CBD with branches in Blacktown, Liverpool and Wollongong.

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<sup>240</sup> Ibid.

<sup>241</sup> Submission from the Macquarie Legal Centre.

### Community legal centres

2.208 The Wirringa Baiya Aboriginal Women's Legal Centre provides free legal advice and information to Indigenous women who live in NSW. The Centre's main focus is women and children who are, or have been, victims of violence. The Centre's other activities are community legal education, professional training to people in contact with Indigenous women, lobbying for legal reform, and providing access to culturally appropriate resources and information.

2.209 The Women's Legal Resources Centre has undertaken a number of outreach programmes in Aboriginal Communities through its Indigenous Women's Programme. It also auspices a Violence Prevention Unit in Walgett.<sup>242</sup>

### Tenancy advice services

2.210 There are three Aboriginal Tenancy Advice Services, providing advice, advocacy and legal information services to private and public housing tenants who are Aboriginal on various tenancy related issues:

- Northern NSW Aboriginal Tenancy Advice Service (TAS)— based in South Grafton
- Southern NSW Aboriginal TAS—'Murramia'—based in Bateman's Bay
- Western NSW Aboriginal TAS—'Gunya'—based in Dubbo.

### Legal Aid NSW

2.211 In 2001/2002, 2.9 per cent of Legal Aid NSW clients were Indigenous.<sup>243</sup> Legal Aid NSW has undertaken a range of initiatives aimed at improving and expanding the provision of legal services to Indigenous people in NSW.

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<sup>242</sup> Submission from the Women's Legal Resources Centre.

<sup>243</sup> Legal Aid NSW *Annual Report 2001/2002*.

These include the provision of additional resources to Aboriginal Legal Services in criminal matters, the establishment of outreach Civil Law advice services in Sydney, Wollongong, the Central and Far North Coast, and a Family Law funding pilot, which will allow three (3) Aboriginal Legal Services in NSW to provide Family Law services. The impetus for these initiatives has come from a range of sources, from local community consultations to executive level discussions.<sup>244</sup>

2.212 The Legal Aid NSW Veterans Advocacy Service has established relationships with Indigenous communities through the Aboriginal and Torres Strait Islander Veterans Association (ATSIVA) in Moree, Kempsey and Coffs Harbour.<sup>245</sup>

2.213 Legal Aid NSW has recently initiated a number of additional projects to improve access to legal assistance for Indigenous people:

- *ATSIFAM (Aboriginal & Torres Strait Islander Family Mediation)* — a new mediation program for Aboriginal families. The service has been piloted in areas where there is a large Aboriginal population and lack of Aboriginal services.
- *Memorandum of Understanding (MOU) with Aboriginal Legal Services* — NSW Legal Aid has commenced a process to develop a twelve-month pilot MOU with the Sydney Regional Aboriginal Corporation Legal Service, Western Aboriginal Legal Service and the Kamilaroi Aboriginal Legal Service for these Offices to provide Family Law advice and, where appropriate, representation (including primary dispute resolution) in those matters that are consistent with the Commonwealth guidelines for Family Law matters.
- *Aboriginal Justice Plan* — in order to facilitate greater use of NSW Legal Aid's Civil and Family Law services by Indigenous people, it has developed an Aboriginal Justice Plan that focuses on three main areas:

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<sup>244</sup> Submission from Legal Aid NSW.

<sup>245</sup> Ibid.

- Awareness — recruiting more Aboriginal staff and providing Aboriginal staff support mechanisms and training for non-Aboriginal frontline staff on Aboriginal issues.
- Access — An integrated range of service delivery strategies, aimed at expanding the focus of service delivery beyond criminal matters to Family and Civil Law matters, and from individual casework to systemic issues.
- Partnerships — strengthening of partnerships between NSW Legal Aid, the Coalition of Aboriginal Legal Services and the NSW Aboriginal Justice Advisory Council.<sup>246</sup>

### Courts

2.214 The Family Court of Australia has attempted to develop appropriate services for Indigenous people by employing an Indigenous Consultant. According to the Family Law Pathways Advisory Group (FLPAG) report *Out of the Maze*, referred to by the Commonwealth Attorney-General Department's submission, this makes the Family Court more likely to attract Indigenous clients, and provides a useful model for how other service providers might proceed.<sup>247</sup>

2.215 Local Court Clerks and Chamber Magistrates (sometimes in collaboration with Aboriginal Specialists) provide registry and Chamber services at venues such as Land Councils and Aboriginal Community Health Centres.<sup>248</sup>

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<sup>246</sup> Ibid.

<sup>247</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>248</sup> Submission from the NSW Attorney General's Department.

Other

2.216 Participants in the consultation roundtable with community and non-government organisations commented that using the ‘Koori grapevine’ was seen as a highly effective way of getting information about available legal services to Indigenous people.<sup>249</sup>

## Children and young people

Community legal centres

2.217 The Youth Justice Coalition (YJC) stated in its submission that because community legal centres offer a comprehensive advocacy service and often work closely with youth workers, they are seen as highly effective advocates for children and young people, particularly in situations where there is no family, or a family is unable or inappropriate to act as an advocate for the child.<sup>250</sup>

2.218 Only Marrickville Legal Centre and Macarthur Legal Centre dedicate either a full-time or part-time solicitor position to providing targeted legal services to under-18 year-olds. The Shopfront Youth Legal Centre based in Darlinghurst, a collaborative project between Freehills Solicitors, Mission Australia and the Salvation Army, also provides targeted services to under-25 year-olds, particularly those who are homeless in the inner city.<sup>251</sup>

2.219 The National Children’s and Youth Law Centre (NCYLC), based at the University of NSW in Randwick, provides a limited public interest casework service for children and young people across Australia. In

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<sup>249</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>250</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>251</sup> Submission from the Youth Justice Coalition.

addition, the NCYLC auspices the Lawstuff website (<http://www.lawstuff.org.au>), a national legal information website for children and young people, incorporating the LawMail email advice service.

### Legal Aid NSW

2.220 Legal Aid NSW provides a Children's Legal Service, which provides:

- representation for young people in the metropolitan children's care and criminal courts
- a visiting advice service to young people in Juvenile Justice detention centres
- the Legal Aid Hotline for under 18s.<sup>252</sup>

In 2001/2002, 9 per cent of Legal Aid NSW's clients were under 18.<sup>253</sup>

2.221 In its submission, the Youth Action and Policy Association (YAPA) describes the Children's Legal Service as follows:

The LAC CLS is a positive model of legal service provision to young people, in particular because:

- it is adequately (though not generously) resourced
- its existence as a specialist unit allows solicitors to develop expertise in representing children and young people
- court representation is universal and is available to all young people (not means-tested) making it easier for young people to access
- the Hotline operates at night and weekends, which is often when young people need it
- the Juvenile Justice visiting service reaches some of the most needy young people, namely those in detention.<sup>254</sup>

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<sup>252</sup> Submission from the Youth Action and Policy Association.

<sup>253</sup> Legal Aid NSW *Annual Report 2001/2002*.

<sup>254</sup> Submission from the Youth Action and Policy Association.

- 2.222 The YJC also stated that in the experience of its members the legal aid needs of children in relation to criminal matters has seen some improvements since the establishment of the Children's Legal Service.<sup>255</sup>
- 2.223 The Legal Aid Hotline for Under 18s was established in 1998, in response to the *Young Offenders Act 1997*. 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. This specialised service is therefore able to reach young people in crisis, who would ordinarily not be able to access legal services. The Hotline is available 24 hours a day on weekends and public holidays.<sup>256</sup> It has been seen as an important strategy in reducing the likelihood of young people making inappropriate admissions under the *Young Offenders Act*.<sup>257</sup>
- 2.224 In addition, Legal Aid NSW produces legal information materials specifically for young people. The best example of this is the *Get Street Smart* publication:

This is a pocket size booklet, which 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. The fourth edition of the booklet was launched in April 2002 after additional consultation with police. It includes new information on searches by sniffer dogs and on forensic samples.<sup>258</sup>

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<sup>255</sup> Submission from the Youth Justice Coalition.

<sup>256</sup> Submission from Legal Aid NSW.

<sup>257</sup> Barga, J., Department of Juvenile Justice, *Alternatives to traditional approaches in civil and criminal law*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>258</sup> Submission from Legal Aid NSW.

### Courts

2.225 The Local Courts provide outreach services to Youth Centres.<sup>259</sup>

## **Elderly people**

### Community legal centres

2.226 The Aged-Care Rights Service provides legal assistance for residents of Commonwealth funded nursing homes and hostels in NSW. It also advocates for residents of retirement villages and serviced apartments. It offers a telephone information service, and also conducts workshops for service providers and staff as well as residents.

### Legal Aid NSW

2.227 Legal Aid NSW provides a Veterans Advocacy Service, which provides legal assistance in veteran's affairs cases and veterans' pension applications. The service has established relationships with the Vietnam Veteran Associations, RSL Associations and with Indigenous communities in Moree, Kempsey and Coffs Harbour. Current advice and information services exist in Newcastle, Wollongong, Nowra, Bateman's Bay and Coffs Harbour.<sup>260</sup>

### Courts

2.228 NSW Local Courts provide ad hoc outreach services on request for frail aged people in aged care facilities.<sup>261</sup>

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<sup>259</sup> Submission from the NSW Attorney General's Department.

<sup>260</sup> Funston, R., Legal Aid NSW, *Accessible and Equitable Information and Advice*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>261</sup> Submission from the NSW Attorney General's Department.

Other

2.229 In addition to legal aid, federal funding is provided directly to the Returned and Services League (RSL), Legacy and Vietnam Veterans' associations to assist people making applications for veterans' pensions. Many veterans also seek assistance from private advocates who work on a contingency basis.<sup>262</sup>

**People in rural, regional and remote areas**

Community legal centres

2.230 NSW has the following community legal centres in rural and regional areas:

- Albury – Wodonga Community Legal Centre Albury Office
- Shoalcoast Community Legal Centre — based in Nowra
- Illawarra Community Legal Centre — based outside of Wollongong
- Community Legal Service for Western NSW — based in Dubbo
- Far West Community Legal Centre — based in Broken Hill
- Blue Mountains Community Legal Centre — based in Katoomba
- Central Coast Community Legal Centre — based in Wyong
- Hunter Community Legal Centre — based in Newcastle
- University of Newcastle Community Legal Centre
- North and North West Community Legal Centre — based in Armidale
- Northern Rivers Community Legal Centre — based in Lismore.

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<sup>262</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.141, referred to by the Commonwealth Attorney-General's Department.

2.231 The North and North West Community Legal Centre provides a useful example of the range of services available from community legal centres in rural and regional areas:

We are based in Armidale and conduct an extensive outreach service covering the New England and Gwydir electorates of New South Wales. Once a fortnight our solicitors visit Gunnedah, Moree, Narrabri, Tamworth, Inverell and Glen Innes. We also provide phone appointments for people in rural and remote areas who cannot travel to one of the centres we visit. We cover over 10 per cent of rural and regional NSW, serving a population of approximately 161,000.

The N&NWCLS provides advice, information and education about legal matters and the legal process. We also undertake limited casework for those who have least access to the legal system and who would be disadvantaged by unaided contact with it. In our outreach work we provide face-to-face legal advice to clients in population centres that have no other free local legal services. For clients in remote localities or those with urgent matters we provide telephone advice and information. We work closely with the communities we visit through their inter-agency meetings and Libraries. With two solicitors trained in mediation techniques we provide alternative dispute resolution to avoid prolonged litigation for our clients. We respond to requests for community legal education by providing seminars, workshops and small group training on legal matters and process. Where we cannot provide advice or sufficient information we provide comprehensive referral advice and assist clients to find the appropriate agency to answer their query. The areas of law we cover include family, civil, limited criminal, debt, consumer and welfare rights. We provide an 1800 number so that people throughout the region can contact us at no cost to themselves.<sup>263</sup>

### *Legal Aid NSW*

2.232 Legal Aid NSW has 19 regional offices. The catchment areas for each office have been developed according to exigencies such as the location of Local Courts and whether the service offered is linked to a court (for example, Civil Law services are not dependant on where courts are located).

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<sup>263</sup> Submission from the North and North West Community Legal Service Inc.

The Commission tries to facilitate as far as possible equitable access to legal aid services across NSW by for example ensuring every regional office has a service delivery plan that identifies gaps in services and proposals to fill them. Most regional offices also conduct some form of outreach service, either face to face or by telephone.<sup>264</sup>

2.233 Legal Aid NSW reports that in 2001/2002, 12.1 per cent of its clients came from non-urban areas.<sup>265</sup>

2.234 The Video Conferencing Scheme being piloted by NSW Legal Aid mentioned above (paragraph 2.193) is considered a potentially useful strategy to provide legal advice and information to people in rural and remote areas who cannot physically get to an office where advice is provided.<sup>266</sup>

2.235 The Legal Aid NSW Veteran's Advocacy Service provides advice and information services in Newcastle, Wollongong, Nowra, Bateman's Bay and Coff's Harbour.<sup>267</sup>

2.236 Legal Aid NSW, in partnership with the Department for Women, conducted the Women on Wheels (WOW) outreach program. This project provides rural outreach to isolated women in the North and North East of New South Wales. The WOW bus carries women representing a range of organisations to towns that have little access to free information and legal advice. Legal Aid lawyers promoted the services to local communities and encouraged local practitioners along the way to undertake more legal aid work. Presentations to Aboriginal communities are particularly well attended.<sup>268</sup>

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<sup>264</sup> Submission from Legal Aid NSW.

<sup>265</sup> Legal Aid NSW *Annual Report* 2001/2002.

<sup>266</sup> Submission from Legal Aid NSW.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

### Tenancy advice services

2.237 Apart from the three Aboriginal Tenancy Advice Services mentioned earlier, there are four other Tenancy Advice Services in rural NSW, providing advice, advocacy and legal information services to private and public housing tenants in rural, regional and remote areas on various tenancy related issues. These are:

- The Central Coast TAS in Wyong
- The Mid Coast TAS in Port Macquarie
- The South Western TAS in Orange
- The Western Region TAS also in Orange.

### Courts

2.238 The Local Courts outreach services (see paragraph 2.169) aim to meet the needs of communities that are physically isolated or remote. In addition, to meet the needs of clients who have difficulty physically accessing a Local Court because of distance, all NSW Local Courts offer Chamber Magistrates services by telephone.<sup>269</sup>

### Online services

2.239 Submissions acknowledged that the availability of email legal advice and information services can provide a significant source of services to people in rural and remote areas who find it difficult to physically access legal assistance. Services such as the LawMail email advice service for young people (accessed via <http://www.lawstuff.org.au>) were seen as important sources of legal assistance for young people in rural and remote areas. Likewise, the Communications Law Centre email legal advice and information service Oznetlaw (<http://www.oznetlaw.net.au>) has been identified as a significant legal assistance service for people in rural and

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<sup>269</sup> Submission from the NSW Attorney General's Department.

remote areas. Oznetlaw was designed to help people across Australia to solve legal problems associated with the use of the Internet and e-commerce. It consists of a legal information website supported by a legal advice service. Topics cover 40 categories of Internet activity. In its first year of operation, 50per cent of inquiries received by the Communications Law Centre via the Oznetlaw website were from regional areas.<sup>270</sup>

2.240 The previously mentioned Legal Access Services (<http://www.legalaccess.com.au>) email legal advice service provides a valuable service to people in rural and remote areas. As members of the NSW Farmers Association are entitled to free use of the service, it provides another option for legal assistance for people in rural and remote areas.<sup>271</sup>

## Women

### *Community legal centres*

2.241 The following community legal centres are specifically designated for providing legal assistance to women in NSW:

- Women's Legal Resource Centre (WLRC) provides services to disadvantaged women and children. WLRC target clients are CALD women, Indigenous women and children, women with disabilities and victims of sexual assault and Domestic Violence. The centre operates metropolitan, rural, Indigenous and TTY telephone advice line sessions. WLRC also conducts face-to-face advice clinics through outreaches in eight locations throughout Western Sydney and rural outreaches throughout NSW. WLRC's work with Indigenous women and children is informed through the Indigenous Women's Programme and the Walgett Violence Prevention Unit,

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<sup>270</sup> Submission from the Communications Law Centre.

<sup>271</sup> Submission from Peter Fosterbunch, Legal Access Services Pty. Ltd.

which it auspices. In 2001/2002, WLRC had over 12,500 client contacts.<sup>272</sup>

- Domestic Violence Advocacy Service (DVAS) is a free legal service for women, which provides legal advice, information and referral to women regarding domestic violence issues. Subject to availability, DVAS is able to represent women applying for Apprehended Violence Orders.<sup>273</sup>
- Wirringa Baiya Aboriginal Women's Legal Centre provides free legal advice and information to Indigenous women who live in NSW (see paragraph 2.208 for more details about the work of Wirringa Baiya Aboriginal Women's Legal Centre).

### Legal Aid NSW

2.242 In 2001/2002, 46.4 per cent of Legal Aid NSW clients were women.<sup>274</sup> In addition, NSW Legal Aid provides the following services particularly targeting women:

- The Women's Domestic Violence Court Assistance Scheme
- The Women on Wheels rural outreach project (see paragraph 2.236).<sup>275</sup>

## **People living in institutions**

### Legal Aid NSW

2.243 Legal Aid NSW provides a Prisoners Advice Service, which provides a range of services to prisoners in NSW. The Service visits NSW jails and

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<sup>272</sup> Submission from the Women's Legal Resources Centre.

<sup>273</sup> At the time of writing, DVAS and WLRC announced that they were merging.

<sup>274</sup> NSW Legal Aid *Annual Report* 2001/2002.

<sup>275</sup> Submission from NSW Legal Aid.

provides free and confidential legal advice and minor assistance in matters such as:

- bail
- legal aid
- appeals
- classification and other prison issues
- representation at parole hearings, life sentence determinations and segregation matters.<sup>276</sup>

2.244 The Video Conferencing Scheme being piloted by NSW Legal Aid mentioned above (paragraph 2.193) is also considered a potentially useful strategy to provide legal advice and information to people in institutions.<sup>277</sup>

### Courts

2.245 Local Courts provide ad hoc outreach services on request for clients who are institutionalised, including prisoners, scheduled patients in psychiatric hospitals and frail aged people in aged care facilities.<sup>278</sup>

## **People on low incomes**

2.246 Generally speaking, the services provided by community legal centres, Legal Aid NSW, tenancy advice services, pro bono programs from the private legal profession and the services provided by Chamber Magistrates at Local Courts are accessible to and utilised by people on no income, low incomes or on social security. As an example of the service users of community legal centres, Macquarie Legal Centre reported that according to their casework statistics for the 10 years up to 30 June 2002, of those

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<sup>276</sup> Ibid, see also <http://www.legalaid.nsw.gov.au>.

<sup>277</sup> Ibid.

<sup>278</sup> Submission from the NSW Attorney General's Department.

who supplied details of their employment status, 39.2 per cent were in either full-time work, part-time work or self employed. A further 37.3 per cent were social security recipients.<sup>279</sup>

2.247 In 2001/2002, 51.1 per cent of NSW Legal Aid clients were in receipt of Commonwealth Benefits.<sup>280</sup>

2.248 The availability of ‘no-win no-fee’ arrangements was seen by APLA as an important option for low income people or social security recipients to be able to access legal services from the private profession.<sup>281</sup>

## **Homeless people**

2.249 The LCRC operating as part of the work of the Rough Edges ministry at St. John’s Anglican Church in Darlinghurst, provides legal assistance to homeless people in inner city Sydney and the Kings Cross/Darlinghurst areas. It began operation in March 1995 with the aim of helping clients identify and resolve issues in their lives which were causing distress. Where legal issues are raised the clients were referred to Legal Aid, to community legal centres or to pro bono services. Where other issues were raised, the clients were referred to relationship or financial counsellors, to the Department of Housing, to job placement agencies or to other appropriate agencies. In response to increased difficulties in obtaining legal aid for certain types of matters and increased complexity of matters coming into the centre, the LCRC increased its level of service to homeless people in the inner city. It now takes on casework, and works in close cooperation with the Inner City Legal Centre. The LCRC is staffed by volunteer solicitors and operates on Monday evenings. It is currently considering increasing its hours of operation.<sup>282</sup>

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<sup>279</sup> Submission from Macquarie Legal Centre.

<sup>280</sup> Legal Aid NSW *Annual Report 2001/2002*.

<sup>281</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>282</sup> Submission from the Legal Counselling and Referral Centre.

2.250 In the past the LCRC have conducted legal information seminars for its clients on laws relating to public space and police move on powers. In particular, the LCRC conducted a series of evening sessions prior to the Sydney Olympics, explaining the laws which would be in place during that time.<sup>283</sup>

## Suggestions to improve access to legal assistance

2.251 This section reports recommendations and suggestions made throughout the consultation process to improve access to legal assistance for disadvantaged people. While it does not include the recommendations made in the ALRC *Managing Justice* Report, the reference made to that report by the Commonwealth Attorney-General's Department indicate the general relevance of the report to this process.

### General

#### Community Legal Centres

2.252 The important role of community legal centres was advocated by a number of submissions and roundtable participants.<sup>284</sup> As Justice Sackville stated at the Law and Justice Foundation of NSW Access to Justice workshop in

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<sup>283</sup> Ibid.

<sup>284</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW; Submission from the Inner West Tenancy Advice Service; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002; Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

July, in suggesting the inherent limitations on the ability of courts to resolve disputes, and that governments are not necessarily committed to the principle of effective access to the courts,

If these observations are right, it would seem that the time has come to recognise that many of the most promising pathways to justice lie 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”. Perhaps access to justice has got much less to do with lawyers and courts than most of us have realised.<sup>285</sup>

2.253 Likewise, the North and North West Community Legal Service Inc. described what it saw as the important role of community legal centres:

Where CLCs are involved in their communities and capable of providing targeted community legal education as an ‘early intervention’ technique they become more effective. Community legal services are also more effective where they can offer a full service to clients including representation in Court where necessary.<sup>286</sup>

2.254 Many submissions and roundtable participants emphasised the need to provide more resources to community legal centres to enhance their capacity to provide a range of services: casework, community legal education, community development, preventative education, and law reform advocacy. Particular mention was made of the need to channel more into preventative legal education, and education with a ‘rights’ focus (as opposed to a ‘self-help’ focus). Community legal centres, particularly those in rural and regional areas, were seen as under resourced to provide the services needed in their respective communities, whether local or a specific disadvantaged group.<sup>287</sup>

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<sup>285</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>286</sup> Submission from the North and North West Community Legal Service Inc.

<sup>287</sup> Ibid; Submission from the NSW Council for Intellectual Disability; Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW; Submission from the Inner West Tenancy Advice Service; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002; Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

*Pro bono services*

2.255 The report of the National Pro Bono Task Force referred to by the submission from the Commonwealth Attorney-General's Department, recommended a number of strategies to facilitate the provision of quality pro bono legal services to disadvantaged people, including:

- producing a best practice handbook for managing pro bono law
- developing national professional practice standards for pro bono legal services.<sup>288</sup>

2.256 Other suggestions made by contributors to facilitate delivery of pro bono services include:

- the Law Society establish an aspirational pro bono target (calculated on an employer basis) for the legal profession of ten hours per solicitor or 1 per cent of billable time per annum<sup>289</sup>
- the National Pro Bono Resource Centre co-ordinate training for law firms in areas of poverty-related law and identification of relevant expertise for specific areas of poverty-related law
- the National Pro Bono Resource Centre inform all relevant bodies of the available pro bono services and any other new activities being initiated.<sup>290</sup>

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<sup>288</sup> Report of the National Pro Bono Task Force to the Commonwealth Attorney-General, 14 June 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>289</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW.

<sup>290</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

### *Legal Expenses Insurance*

- 2.257 Several organisations suggested that legal expenses insurance is a way to improve access for people in the community ineligible for legal aid funding, and who are deprived of access to the legal system due to the costs associated with engaging private solicitors and conducting litigation.<sup>291</sup>
- 2.258 However, it was acknowledged that legal expenses insurance would be predominantly supported by middle income people and by small businesses, and would not address the needs of people who would normally receive legal aid. According to the Law Society of NSW, it could therefore never relieve governments of the ultimate responsibility for providing mainstream legal aid services.<sup>292</sup>
- 2.259 The Law and Justice Foundation of NSW has previously concluded that if legal expenses insurance is to enhance access to justice for low to middle income earners, it must provide a broad, general coverage at an affordable cost, and remain commercially viable. Commercial viability requires bulk savings and risk spreading.<sup>293</sup> The Law Society has also suggested:

One aspect that might encourage an increase in the take up rate would be to exempt legal expense insurance from Fringe Benefits Tax if it were paid by an employer as part of an employment/salary package.<sup>294</sup>

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<sup>291</sup> Submission from Peter Fosterbunch, Legal Access Services Pty. Ltd; Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW; Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January, 2000, Paragraphs 5.27 – 5.32, referred to by the Commonwealth Attorney-General’s Department.

<sup>292</sup> Law Society of NSW, *Access to Justice – Final Report*, referred to in consultations with the Law Society of NSW.

<sup>293</sup> *Legal expense insurance – an experiment in access to justice*, Law Foundation of NSW, September 1999.

<sup>294</sup> Law Society of NSW, *Access to Justice – Final Report*, referred to in consultations with the Law Society of NSW.

Online and email services

- 2.260 Two submissions advocated the need for more funding to provide comprehensive email legal advice services where assistance is provided by private law firms through their pro bono programs. Such email based services would be particularly useful for people in rural and remote areas.<sup>295</sup>
- 2.261 As greater reliance is placed on online facilities to deliver legal services, roundtable participants stated that there is a growing need for publicly accessible, supportive and private environments which allow people to explore these online alternatives. Some participants expressed the view that at the present time, public libraries do not offer such an environment.<sup>296</sup>

Community development

- 2.262 Many roundtable participants affirmed the role of community development in delivering legal services, expressing that there needs to be greater support for initiatives which encourage community involvement in the identification of legal needs and the provision of appropriate legal assistance.

There is room for legal services 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.<sup>297</sup>

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<sup>295</sup> Submission from Peter Fosterbunch, Legal Access Services Pty. Ltd; Submission from the Communications Law Centre.

<sup>296</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>297</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

2.263 To achieve this, some participants saw a need for legal services to employ non-legal staff, and provide a range of other support services, including youth advocacy, financial counselling, social workers and psychologists.

Such multi-function and multi-skilled services encouraged individuals and groups from the community to maintain long-term and perhaps life-long relationships with the services to the extent that there are inevitably a greater number of reasons for needing to consult them.<sup>298</sup>

### *Other recommendations*

2.264 Other suggestions to improve access to legal assistance for disadvantaged people included:

- enhancement of ADR processes by providing support/legal advice/advocacy at mediation<sup>299</sup>
- increased use of contingency fees to enable actions to become more accessible.<sup>300</sup>

## **People with disabilities**

2.265 People with Disabilities (PWD) recommended the establishment of a Disability Rights Legal Service to enhance the capacity of the legal profession to meet the broad legal needs of people with disability. PWD submits that the absence of such a service contributes to the difficulty faced by many people with disability in obtaining appropriately skilled legal advocacy.<sup>301</sup>

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<sup>298</sup> Ibid.

<sup>299</sup> Access to Legal Advice Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>300</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>301</sup> Submission from People with Disabilities.

- 2.266 PWD also suggests that there is need for people with disability to have access to skilled industrial relations legal advocacy which can advocate for alternative risk assessment strategies where people with disability may face loss of service as a consequence of occupational health and safety actions.<sup>302</sup>
- 2.267 The FLPAG recommended additional Family Law services for people with acute mental illness, intellectual disability, or substance addiction. Such people are becoming increasingly involved in the Family Law system, and often require more support to have their needs heard.<sup>303</sup>
- 2.268 The FLPAG recommended that professionals and service providers receive training and assistance to provide specialist services to people with intellectual disability and mental illness.<sup>304</sup> Likewise, roundtable participants also recommended that professionals and service providers receive training to provide services to people with addictions.<sup>305</sup>

### **People from culturally and linguistically diverse backgrounds**

- 2.269 Recommendations to improve the availability of interpreters and translation services were a feature of several submissions. In particular, Macquarie Legal Centre provided two options for improving the current system of interpreter provision:

Replace the exemption policies which were designed to give non-profit services and low-income clients access to free interpreters, with a funding program so that non-profit services can pay for interpreters.

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<sup>302</sup> Ibid.

<sup>303</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>304</sup> Ibid.

<sup>305</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

‘One stop shop’ interpreter service. The current system is fragmented and leads to difficulties for services and clients. Such a service could be jointly funded by the state and federal governments but operated as one organisation.<sup>306</sup>

2.270 Macquarie Legal Centre also recommended that governments commit resources to information strategies to communities not catered for by translated information. Multi-lingual community workers, religious and community leaders, ethnic media and Migrant Resource Centres were commonly seen as important avenues through which translated legal information could be disseminated to non-English speaking communities.<sup>307</sup>

2.271 The FLPAG recommended a range of strategies to make legal assistance for Family Law matters more accessible for people from CALD backgrounds.

Submissions and consultations highlighted the need for appropriate, culturally sensitive services (for example, for Muslim families), wider use of interpreters (including provision of an interpreter for each partner in Family Law cases that involve violence) and improved access to legal aid and family violence services. Provision of written information in languages other than English; community education through ethnic radio, press and outreach activities; cross-cultural awareness as part of training for service providers; multilingual telephone help lines; and employment of bilingual staff are all suggested ways of improving access.<sup>308</sup>

## **Indigenous Australians**

2.272 The need for culturally appropriate services which employ Indigenous people was commonly recognised as a key ingredient in improving the accessibility of legal assistance to Indigenous people.<sup>309</sup> The FLPAG also

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<sup>306</sup> Submission from the Macquarie Legal Centre.

<sup>307</sup> Ibid; Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>308</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General’s Department.

<sup>309</sup> Submission from the NSW Department for Women.

recognised that the most effective programs were those which are developed, owned and implemented by local Indigenous communities themselves.<sup>310</sup>

2.273 The YJC submitted that given the high number of Indigenous children in the juvenile justice system and the care and protection system, funding for advocacy services for these children should be a high priority.<sup>311</sup>

### **Children and young people**

2.274 The need for increased funding to specialist children's and young people's legal services was a key recommendation from a number of submissions, to facilitate improved accessibility to all forms of legal assistance for children and young people.<sup>312</sup> It was also recommended that legal service providers need to work closely with specialist non-legal youth advocates to ensure the delivery of relevant, understandable, quality legal services.<sup>313</sup>

2.275 The National Women's Justice Coalition has also recommended that the NSW Government fund a state-wide Children's Legal Advocacy Service and a Network of Children's Advocates as recommended by the Parliament of NSW Legislative Council Standing Committee on Social Issues Inquiry into Children's Advocacy in 1996.<sup>314</sup>

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<sup>310</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>311</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>312</sup> Submission from the Youth Action and Policy Association; Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition; Submission from the National Women's Justice Coalition.

<sup>313</sup> Submission from Youth Action and Policy Association.

<sup>314</sup> Submission from the National Women's Justice Coalition.

- 2.276 NSW Legal Aid indicated that it will seek funding to enable the Hotline for Under 18s to expand its hours of operation to 24 hours, 7 days a week.<sup>315</sup>
- 2.277 Several submissions noted the need to tailor distribution of legal information to the specific needs of children and young people by utilising the channels which children and young people use everyday (eg. schools, Internet). This is particularly important given that children will most likely only be aware of their need for legal information and assistance at the time a situation arises, or when they have suffered the consequences of their or another's act.<sup>316</sup> The NSW Commission for Children and Young People emphasised that it was important to consult with children and young people in designing effective information and support networks.<sup>317</sup>
- 2.278 FLPAG stated that there was a need for a specialist service to assist children in Family Law litigation, and to ensure that they are given opportunities at each stage of the process to be heard and to receive explanations about what is happening. FLPAG also noted the importance of providing age-appropriate information, and the important role which parents and other significant family members can play in providing legal information.<sup>318</sup>
- 2.279 The YJC recommended that all data collection systems include appropriate fields for collecting data about children and young people. This data could then form the basis for informed policy decisions, service evaluation and strategic planning.<sup>319</sup>

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<sup>315</sup> Submission from Legal Aid NSW.

<sup>316</sup> Submission from the NSW Commission for Children and Young People; Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>317</sup> Submission from the NSW Commission for Children and Young People.

<sup>318</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>319</sup> *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

## Elderly people

2.280 Appropriate promotion of legal services to elderly people was seen as a vital strategy in improving their access to legal assistance:

Promotion of Legal Services needs to be undertaken which is user friendly to older people. For example advertisements on radio & television, pamphlets which have larger print to assist people with visual difficulties. Written material needs to be targeted within the community and available at agencies which older people access such as Medical Centres, Centrelink and public libraries. The multicultural ageing population should also be targeted directly through advertisements in community papers and regular representation from a legal practitioner on ethnic and community radio stations.<sup>320</sup>

## People in rural, regional and remote areas

2.281 The diminishing number of private practitioners in rural and regional areas prompted recommendations from numerous submissions:

- increase legal aid funding to address the lack of private solicitors in rural areas accepting work in Family Law<sup>321</sup>
- develop closer relationships between NSW Legal Aid and private practitioners in regional and rural areas, to ensure that they continue to conduct legal aid work<sup>322</sup>
- develop local, community-based contact points for pro bono legal services in rural and regional areas.<sup>323</sup>

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<sup>320</sup> Submission from Centrelink.

<sup>321</sup> Submission from the National Women's Justice Coalition.

<sup>322</sup> Submission from Legal Aid NSW.

<sup>323</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

## **People living in institutions and people released from institutions**

2.282 Roundtable participants expressed the need to establish independent advocacy services within prisons, particularly for people with an intellectual disability or psychiatric illness, as well as specialist legal advocacy services for ex-prisoners.<sup>324</sup>

## **Women**

2.283 Increased funding for legal aid service providers to offer adequate services in Family Law, family violence and various civil matters was identified as the most important strategy to improve access to legal assistance for women.

Increased funding to Legal Aid is urgently needed to address the lack of private solicitors accepting work in Family Law due to low rates of payment, particularly in rural areas.

Increased funding for CLCs - 60per cent of the clients of CLCs across NSW are women. CLCs deal with a high level of family violence issues, child contact and residency, divorce and child support, tenancy, employment and other Civil Law matters.

The Government should ensure that legal aid funding is available for all Apprehended Domestic Violence Order matters and reverse recent changes in Legal Aid Commission policy for Apprehended Violence Orders (AVOs) in domestic violence which determines that clients will not get legal aid for AVO applications unless they have an intimate relationship with the perpetrator (this excludes housemates and adult/child applications).<sup>325</sup>

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<sup>324</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>325</sup> Submission from the National Women's Justice Coalition.

## Homeless people

2.284 The LCRC suggested a number of strategies to improve access to legal assistance for homeless people:

- development of appropriate community legal education programmes for homeless people. e.g. information sessions at local centres such as Rough Edges or the Wayside Chapel, which provide other services for homeless people
- establishment of additional legal assistance centres for homeless people in the inner city, with adequate resources to give sufficient time in interviewing homeless people with legal issues, so that a trust relationship can be developed with the service provider
- adequate access to lawyers for homeless people who are arrested.<sup>326</sup>

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<sup>326</sup> Submission from the Legal Counselling and Referral Centre.

# 3. Effective Participation in the Legal System

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- 3.1 This chapter looks at the issue of effective participation in the legal system through access to courts, tribunals and court-based alternative dispute resolution (ADR) processes. The first part looks at the perceived weaknesses of the court/tribunal/ADR systems which present barriers to disadvantaged groups within the community. The mechanisms which have been implemented to address these issues are then explored. Finally, proposals from contributors for further innovations and solutions are discussed.
- 3.2 For the purposes of this project, the issues which are dealt with under the title ‘effective participation in the legal system’ include:
- court structures, litigation procedures, court hearing procedures and rules of evidence
  - tribunal procedures and evidentiary rules
  - formal court-based alternative dispute resolution mechanisms, such as mediation, pre-trial conferences, and pre-trial conciliation.

## Barriers in existing mechanisms

### **General**

#### *Court procedures*

- 3.3 Several submissions and roundtable participants expressed concerns about the formality of court processes and the court environment, which present significant barriers to participation for disadvantaged people. Adjectives

such as ‘intimidating’, ‘scary’, ‘frightening’, and ‘overwhelming’ were used to describe courts.<sup>1</sup>

- 3.4 Some roundtable participants expressed concerns about the detrimental impact of the adversarial system on particular disadvantaged groups, including issues such as court procedures and the admissibility of evidence.<sup>2</sup>
- 3.5 Several submissions expressed concern about delays with matters listed in court awaiting hearing or final resolution, and the resulting emotional and material costs to litigants. The effect of such delays was seen to negatively impact on a litigant’s expectation or preparedness to pursue matters through the courts.<sup>3</sup> According to the Law Society of NSW Family Law Committee, inadequate resourcing for Family Court services was seen as a major cause of delays in processes in Family Court proceedings, increasing costs for litigants.<sup>4</sup>
- 3.6 Many of these issues of formality of procedures and delays were recognised by Justice Sackville in his address to the Access to Justice Workshop. He also recognised the limited capacity for courts to address some of these concerns:

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<sup>1</sup> Submission from the Court Support Scheme; Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.209, referred to by the Commonwealth Attorney-General’s Department.

<sup>2</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>3</sup> Submission from Peter Fosterbunch, Legal Access Services Pty. Ltd.; Submission from the NSW Attorney General’s Department; Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>4</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

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 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”, 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.<sup>5</sup>

### Costs of litigation

- 3.7 The Law Society of NSW *Access to Justice* Report stated that the cost of calling expert evidence represents a significant barrier for disadvantaged people.<sup>6</sup>
- 3.8 Several roundtable participants commented that the risk of having a costs order made against an unsuccessful litigant presents a significant disincentive for disadvantaged people to pursue civil claims, particularly those which may be test cases or cases of public interest.<sup>7</sup>

### Limited remedies from litigation

- 3.9 Some roundtable participants expressed concern regarding the limited remedies available through the civil justice system, and the disincentive this causes for particular groups of people to seek redress through the courts.

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<sup>5</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>6</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, p. 38, referred to in consultations with the Law Society of NSW.

<sup>7</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

They stated that for many disadvantaged people, the major priority is seeking some form of acknowledgment of loss or pain and suffering, rather than financial compensation, and that available remedies through litigation fail to adequately take this into account.<sup>8</sup>

3.10 There was recognition by some roundtable participants that in the criminal jurisdiction, sentencing options are not equally available. Examples given included:

- alternatives to full-time custody, such as periodic detention or home detention, are often not available in rural areas
- home detention is not available to those who are homeless or do not have telephone connections
- community service options are not available in some rural areas.<sup>9</sup>

### *Self-represented litigants*

3.11 The Law Society of NSW paper *Self Represented Litigants*, stated that there is a widespread perception that the number of self-represented litigants is growing. Identified factors contributing to this growth include:

- cuts to legal aid funding, with associated changes to income and asset thresholds which determine eligibility, and the introduction of priority areas and guidelines
- the high cost of litigation combined with the strict criteria for provision of legal aid and the unavailability of speculative and contingency fee arrangements

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<sup>8</sup> Ibid.

<sup>9</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- simplification of some court procedures, the increasing informality of tribunal hearings and the consequent trend away from legal representation.<sup>10</sup>

3.12 According to the Australian Law Reform Commission (ALRC) *Managing Justice* report:

- 41 per cent of Family Court cases involved at least one self-represented litigant, with 44 per cent of respondents in cases involving children being self represented
- 18 per cent of Federal Court cases involved at least one self-represented litigant, with 31 per cent of applicants in migration cases being self-represented
- 33 per cent of Administrative Appeals Tribunal cases involved at least one self-represented litigant, and 71 per cent of applicants in the social welfare jurisdiction and 10 per cent of applicants in the veterans' affairs jurisdiction were without representation.<sup>11</sup>

3.13 The Law Society of NSW also reported increases in the numbers of self-represented litigants in the Local Courts and the District Court.<sup>12</sup>

3.14 The ALRC *Managing Justice* Report stated that self-represented litigants often find court processes, premises and registry procedures confusing and intimidating.<sup>13</sup> The report noted that self-represented litigants cause a number of problems for courts, including:

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<sup>10</sup> Law Society of NSW, *Self-Represented Litigants - Position paper*, 21 May 2002, referred to in consultations with the Law Society of NSW.

<sup>11</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.7, referred to by the Commonwealth Attorney-General's Department.

<sup>12</sup> Law Society of NSW, *Self represented litigants - the Law Society's Role*, November 2001, referred to in consultations with the Law Society of NSW.

<sup>13</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.209, referred to by the Commonwealth Attorney-General's Department.

- slower litigation
- lower likelihood of settlement
- increased costs to the other party and also to the court/tribunal<sup>14</sup>
- difficulty in maintaining the perception of impartiality, if only one party is self-represented, given that judicial intervention may be necessary to ensure all relevant evidence is heard
- difficulty to control the parties, where both parties are self-represented, as the case may be disorganised and wrongly construed, there may be petty quarrels over irrelevant points, or even harassment or violence.<sup>15</sup>

3.15 Justice Sackville stated that as courts adopt practices to assist unrepresented litigants, there has been an increase in the number of ‘querulous’ unrepresented litigants – i.e. those who become involved in ill-founded and lengthy legal battles for redress of their grievances and seek not just compensation and reparation, but also vindication and retribution. He saw this as causing considerable problems for the civil justice system:

In consequence, many courts are required to devote substantial time and resources to claims that are frequently not merely baseless, but have a disruptive effect on the civil justice system. Unless the courts themselves are prepared to tackle the problem perhaps by challenging some long-held assumptions about the sanctity of facilitating access to the justice system for all litigants the problem will get worse.<sup>16</sup>

### *Recent legislative changes dealing with Civil Law claims*

3.16 The Australian Plaintiff Lawyers Association (APLA) stated that recent and proposed legislative changes in NSW regarding tortious liability and the law of negligence may seriously restrict access to the courts for

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<sup>14</sup> Ibid Paragraph 5.9.

<sup>15</sup> Ibid Paragraph 5.152.

<sup>16</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

compensation by disadvantaged people who have been injured as a result of the negligence of another. Some of the changes arising from the *Civil Liability Act 2002* (NSW) which have caused particular concern include:

- placing thresholds on damages for pain and suffering, and physical impairment
- increase of the discount rate that applies to damages for future loss
- capping economic loss and general damages (i.e. imposing an artificial, arbitrary maximum amount of compensation available to injured people when they suffer an injury)
- restricting voluntary care claims for friends or relatives who provide care to the injured person.<sup>17</sup>

3.17 APLA raised concerns about the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) in terms of accessibility to the courts for seeking compensation for negligent acts. The main areas of concern were:

- changes to the definitions of causation and duty of care, which APLA fears will lead to increased uncertainty in the law
- removal of duty of care if a risk warning was given to a person engaging in a ‘recreational activity’
- imposition of a lower standard of care for ‘professionals’ than the standard owed by other members of the community
- reduction to entitlement to damages for nervous shock and less favourable treatment of mental illness compared to physical illness
- a public or other authority is not liable for a failure to exercise any function or prohibit or regulate an activity if it could not have been required to exercise the function. According to APLA, as Acts of Parliament usually only empower authorities to act but do not compel them to do so, no action will lie against them

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<sup>17</sup> Submission from the Australian Plaintiff Lawyers Association.

- reduction of damages by 25 per cent if intoxication in any way contributed to the plaintiff's injury, whether insignificantly or otherwise. The definition of intoxication covers people who are affected by prescribed drugs
- removal of liability for injury which arises out of conduct carried out in self-defence, even if the conduct was an unreasonable response to the threat
- non payment of damages if the person was, *on the balance of probabilities*, committing a serious offence at the time of their injury
- altering the limitation periods to 3 years from discoverability with a 12-year limitation period running from the time of the act or omission claimed to have resulted in injury.<sup>18</sup>

3.18 APLA also pointed out other legislative changes in the last four years that have curtailed the ability of injured people to access the courts, including:

- *Workers Compensation* — In 2001, the NSW Government enacted major changes to WorkCover which effectively abolished common law claims. In order to have any common law rights in a workers' compensation claim in NSW a plaintiff needs to satisfy a 15 per cent whole person impairment threshold.
- *Motor Accidents* — The *Motor Accidents Compensation Act* was enacted in 1999. According to APLA, this Act restricted the rights of injured people to claim compensation for injuries sustained as a result of motor vehicle accidents. For motor accident claims the plaintiff must have a whole person impairment of more than 10 per cent in order to receive damages for pain and suffering.<sup>19</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

### Tribunals

- 3.19 The emergence and proliferation of tribunals as alternative hearing forums was subject to criticism from several contributors. In particular:
- the restriction of legal representation at several tribunals (e.g. tenancy and small claims)<sup>20</sup>
  - the lack of rules of evidence and procedure in some tribunals<sup>21</sup>
  - lack of accessibility, efficiency and quality of decision making in some tribunals.<sup>22</sup>
- 3.20 Some roundtable participants on the other hand considered the exclusion of legal practitioners in the informal hearings of tribunals to be beneficial to litigants. However, 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 e.g. a bank or government department, is represented by someone who may not be a lawyer but have skills in that field. The rules of court then work against the client because repeat respondents know the processes and milk it.<sup>23</sup>

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<sup>20</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002; Law and Justice Foundation of NSW roundtable with NSW Law Society Regional Law Societies' Presidents, 24 October 2002.

<sup>21</sup> Submission from the Inner West Tenancy Advice Service.

<sup>22</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, p.29, referred to in consultations with the Law Society of NSW.

<sup>23</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

3.21 Specific concerns were raised by the community legal centre sector regarding the processes of the Human Rights and Equal Opportunity Commission (HREOC) and the NSW Anti-Discrimination Board (ADB). In particular, concerns were expressed regarding the delays in considering complaints, and confusion over the differing jurisdictions of each and the differing grounds for complaint.<sup>24</sup>

### *Alternative Dispute Resolution (ADR)*

3.22 The incorporation of ADR mechanisms into court and tribunal processes was seen by several roundtable participants as presenting difficulties:

- The effectiveness of these mechanisms is largely determined by the interest and willingness of the participants to participate in processes. This may, however, involve significant time and effort on their part. ADR processes are undermined if participants do not enter into the processes willingly
- The complexity of many civil cases is unsuited to some ADR processes
- Court-based ADR processes are often under-resourced, which impacts on their effectiveness
- Conciliation and mediation in discrimination cases raises expectations for applicants about early resolution, but may be perceived as causing further delays in resolution.<sup>25</sup>

### *The role of the judiciary*

3.23 In the Access to Justice workshop, Justice Sackville stated that recent challenges to the authority of courts to resolve disputes has raised concerns

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<sup>24</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>25</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

that one should not assume that Governments consider effective access to the courts as an inviolable principle. In particular, he referred to limitations on judicial decision making, as exemplified by restriction of judicial review of migration decisions, and the recent experiments with mandatory sentencing, which were seen as restricting effective participation in the legal system, by limiting the courts' ability to dispense individualised justice.<sup>26</sup>

- 3.24 The NSW Law Society's Family Law Committee stated that access to Family Law outcomes in the Local Court has diminished in recent years, due to a gradual de-skilling of magistrates in Family Law. Committee members indicated that previously magistrates had a workable knowledge of Family Law which facilitated resolution of minor Family Law matters in Local Courts. This was particularly useful in rural and regional areas.<sup>27</sup>

### **People with disabilities**

- 3.25 Particular barriers identified for people with disabilities in participating effectively in the legal system included:
- accessibility of court premises and processes
  - issues of formality and the adversarial nature of judicial proceedings
  - the operation of the rules of evidence
  - negative perceptions of players in the justice system of people with disabilities
  - the lack of people with disabilities who perform significant functions within the justice system (i.e. judges, judges' associates, jury members).

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<sup>26</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>27</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

- 3.26 The NADRAC discussion paper expressed concerns that people with disabilities may be disadvantaged by confronting their protagonists in a closed environment in the course of ADR proceedings. It also expressed concerns that people with disabilities may encounter difficulties with the processes adopted in mediation and conciliation:

Mediation and conciliation (commonly used in disability discrimination legislation, including the Commonwealth Disability Discrimination Act) require parties to be able to communicate verbally in a group - to be able to hear and observe and understand other people's communications and to participate effectively in those verbal transactions themselves. Participation may also require participants to read printed material before or during the process.

For some people with disabilities, some or all of these things may be extremely difficult if not impossible. In the absence of a signer for example, deaf people may encounter great difficulties: even where a signer is present, the negotiation process may be very constrained.

In mediation, participants need to be able to negotiate for themselves or with the assistance of an advocate. This requires that they have the capacity to know what they want and to communicate this, and the reason they want it, to the other participant (or to their advocate), the capacity to listen to the other person's claims and requirements, and the capacity to develop options and to make appropriate concessions and to commit themselves to an agreement or to decide to disagree.<sup>28</sup>

### *People with an intellectual disability*

- 3.27 The most commonly identified barrier to effective participation in the legal system for people with an intellectual disability was the intimidating and alienating atmosphere of the courtroom. The sense of alienation experienced was identified as impacting on their ability to give evidence in court. According to some roundtable participants, this can result in them being perceived as being unreliable witnesses.

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<sup>28</sup> National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, Canberra, November 1997, paragraphs 6.54-6.57, referred to by the Commonwealth Attorney-General's Department.

Going to court is a nerve-racking experience for most people, particularly when they are charged with an offence. Many people find court buildings, courtrooms and judges intimidating, and have difficulty understanding and following courtroom procedures and conventions. For people with an intellectual disability who must appear in court, oftentimes charged with a criminal offence, the experience can range from bewildering to terrifying.<sup>29</sup>

I think there are fundamental problems with the mainstream court system as far as people with intellectual disabilities are concerned. The formal intimidating atmosphere of the courtroom is overwhelming. If people either do not want to go there in the first place or they are going to feel alienated, their capacity to give evidence or reliable evidence is affected as they may be overwhelmed by the situation.<sup>30</sup>

3.28 Several roundtable participants considered that the removal of the right for accused persons in a criminal trial to give evidence by way of unsworn statement was particularly problematic for people with an intellectual disability. The current position is that for an accused person to give evidence in a trial, s/he must give sworn evidence and be subject to cross-examination.<sup>31</sup> Participants stated that people with an intellectual disability may have difficulty understanding the consequences of taking an oath. They may become flustered during cross-examination, and the cross-examiner's questioning technique may emphasise the person's disability.<sup>32</sup>

3.29 Other identified barriers for people with an intellectual disability included:

- a person with an undetected intellectual disability may undergo a trial of which s/he has little or no understanding
- a person with an intellectual disability may not understand that they must turn up at court at a certain time and that there are consequences of not doing so; they may not even understand why they have to go to court

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<sup>29</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12-14 July 2002.

<sup>30</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>31</sup> *Ibid.*

<sup>32</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12-14 July 2002.

- a person with an intellectual disability may not be able to give adequate instructions to their legal representative<sup>33</sup>
- judges, juries, magistrates and lawyers seldom have a good understanding of intellectual disability and the difficulties in communication faced by people with intellectual disability. Some may even have negative perceptions about people with intellectual disability.<sup>34</sup>

3.30 Community legal centre contributors raised the issue of negative perceptions in relation to actions involving parents with intellectual disability. For example, participants commented on the negative attitude of the Children's Court towards parents with an intellectual disability in relation to issues about wardship/removal and placing children as wards of the Minister. They stated that once children have been removed from parents with an intellectual disability, it is very difficult to get them back.<sup>35</sup>

3.31 Some roundtable participants commented on the limited application and effectiveness of diversionary schemes in criminal law for people with an intellectual disability. Young people with an intellectual disability receiving police cautions often do not understand the caution, may not realise that they have committed a criminal offence, and will not understand the implications if they re-offend.<sup>36</sup> Youth justice conferencing was seen as having very limited value for people with an intellectual disability, both as victims and offenders.

What worries me in conferencing for... people with intellectual 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.<sup>37</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid; Submission from the NSW Council for Intellectual Disability.

<sup>35</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>36</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>37</sup> Ibid.

- 3.32 The Executive Officer of People with Disabilities (PWD), Phillip French, stated that people with severe intellectual disability are usually not able to bring their own legal actions, and consequently, are denied the opportunity to participate in court processes unless a third party can gain standing to bring the action on their behalf.<sup>38</sup>
- 3.33 APLA raised concerns about recent legislation which provides that where the operator of a recreational activity warns of a risk then the operator is not liable if that risk eventuates. The operator does not need to prove that the person was capable of receiving or understanding the warning. According to APLA, if a disabled person is accompanied by a person with legal capacity, the disabled person is bound by the risk warning, even if the risk is not communicated to the incapable person.<sup>39</sup>
- 3.34 Some disability advocates expressed concern regarding the ability of people with intellectual disability to effectively participate in ADR, due to the difficulties in identifying and articulating their own interests in an ADR setting, and the likely scenario that there will not be an equal power base between the participants.<sup>40</sup>

### *People with a physical disability*

- 3.35 Issues of physical accessibility were considered by many contributors to be the main barriers to effective participation in the legal system for people with physical disabilities and mobility problems. NSW Chamber Magistrates reported that 30–40 per cent of courthouses in NSW, particularly those in rural areas, presented accessibility difficulties for people with physical disabilities.<sup>41</sup>

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<sup>38</sup> French, P., *Access to Justice for people with disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>39</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>40</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>41</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

3.36 Physical accessibility issues were also raised as a barrier preventing people with a physical disability from participating in the legal system by as a member of the jury. The inaccessibility of jury boxes for people in wheelchairs was raised as an issue.<sup>42</sup>

3.37 One submission stated that the issues of physical accessibility to courthouses have also served to exclude people with physical disabilities from positions within the justice system, whether as judges associates, tip staffs, clerks of courts, registrars, magistrates and judges.<sup>43</sup> According to Phillip French of PWD, the failure of people with physical disabilities to see themselves reflected in the justice system is in itself a barrier to effective participation.<sup>44</sup>

#### *People with sensory disabilities*

3.38 The limited ability of people with hearing impairments, deaf people, deaf blind people and blind and vision impaired people to participate effectively in court proceedings was noted in the consultation process:

- people with visual disabilities are unable to read information or signage in Local Courts
- people with hearing disabilities face difficulties with oral evidence<sup>45</sup>
- continued resistance by the legal profession and the court system to accommodate blind and deaf jurors (note the NSW Law Reform Commission is currently inquiring into this issue)<sup>46</sup>

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<sup>42</sup> French, P., *Access to justice for people with disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>43</sup> Submission from Adam Johnston.

<sup>44</sup> French, P., *Access to justice for people with disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>45</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>46</sup> French, P., *Access to justice for people with disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- difficulties for members of the general public who are hearing impaired to hear proceedings from the public galleries in courts.<sup>47</sup>

3.39 The Family Law Pathways Advisory Group (FLPAG) stated that deaf people are disadvantaged from participating in Family Law proceedings due to difficulties in obtaining interpreter services and the cost of obtaining those services.<sup>48</sup>

3.40 APLA stated that recent legislation which limits the liability of operators of recreational activity if they warn of a risk, may present problems for blind people who are unable to read warning signs. According to APLA, under the legislation, there is no duty on the operators to ensure that blind people are adequately warned before they are taken to have accepted the risks of the activity.<sup>49</sup>

3.41 The NADRAC discussion paper stated that people who are deaf are often unable to fully participate in mediation and conciliation conferences:

It is reported that, where they attend conciliation conferences, some deaf people find them very difficult. They are easily confused and may have difficulty in lip-reading (if they are able to do so at all), and in interpreting the behaviour of other participants. Where they do not attend the proceedings, they may feel excluded.<sup>50</sup>

3.42 Some roundtable participants stated that people with hearing impairments have limited ability to fully participate in diversionary mechanisms such as youth justice conferencing.<sup>51</sup>

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<sup>47</sup> Submission from Nolene Baker.

<sup>48</sup> *Out of the Maze – Pathways to the Future for Families experiencing separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>49</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>50</sup> National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper, Canberra, November 1997, paragraph 6.58, referred to by the Commonwealth Attorney-General's Department.

<sup>51</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

*People with psychiatric disabilities*

- 3.43 Several Chamber Magistrates expressed concern about the ability of people with mental illnesses to participate in formal court processes and environments, stating that they can feel agitated or uncomfortable in such circumstances.<sup>52</sup>
- 3.44 APLA commented that recent amendments which have shortened the limitation period within which a person can bring a civil claim for negligence, may impact on people with mental illness. They assert that such people should have the benefit of a longer period within which to commence legal action, as they may be unable to make decisions with legal implications while they suffer the disability.<sup>53</sup>

*People who have acquired disabilities*

- 3.45 Several roundtable participants reported that people who have acquired brain injury, and people who suffer from substance addictions, perceive that they will not be believed when they give evidence in court, or that they will not be treated fairly in court. This was said to significantly limit their confidence and ability to participate in court and tribunal processes.<sup>54</sup>
- 3.46 APLA stated that recent and proposed legislative changes in NSW regarding tortious liability and the law of negligence will act as barriers to the legal system for people who seek compensation for injury or disability acquired through negligence or accident. Some of the changes arising from the *Civil Liability Act 2002* (NSW) which cause particular concern in this regard have already been referred to in paragraphs 3.16–3.18.<sup>55</sup>

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<sup>52</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>53</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>54</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>55</sup> Submission from the Australian Plaintiff Lawyers Association.

- 3.47 APLA said that the *Civil Liability Amendment (Personal Responsibility) Act 2002* in particular, may impact on people who suffer from substance addiction. The Act presumes a contribution on behalf of the injured person towards their own injury of no less than 25 per cent, if the injured person's intoxication contributed in any way to the injury. This means that the injured person will have their damages reduced by at least 25 per cent, regardless of the facts of the case. According to APLA, this will prevent people in the community who choose to drink alcohol and take recreational drugs from having their claims assessed on their merits.<sup>56</sup>

## **People from culturally and/or linguistically diverse backgrounds**

### *Interpreters*

- 3.48 Roundtable participants identified the lack of availability of interpreters in some languages as a key barrier for people with limited English language skills. It was reported that this often caused court or tribunal hearings to be delayed or postponed to a date when an appropriate interpreter would be available.<sup>57</sup>
- 3.49 The reported difficulties associated with the dual system of arranging interpreters identified in paragraph 2.71 were also identified by community legal centre contributors as relevant to inhibiting effective participation in the legal system. The availability of funded interpreters supplied by the State Community Relations Commissions only being available for state matters, while Commonwealth-funded interpreters are only available for Commonwealth matters, causes particular problems for domestic violence

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<sup>56</sup> Ibid.

<sup>57</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>58</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

matters. It was reported by several community legal centres that it is harder to get interpreters for family related domestic violence matters due to confusion over whether it is a Commonwealth or a State matter.<sup>58</sup>

3.50 Difficulties in speaking and understanding English were identified by Chamber Magistrates as substantial barriers to self-representation in the legal process.<sup>59</sup>

3.51 Community legal centre roundtable participants reported that in some tribunals, and conciliation meetings, matters sometimes proceed before an interpreter arrives because the conciliator believes that the matter is simple and can be resolved without an interpreter present. This was seen as inhibiting effective participation by the CALD party.

Tenancy Tribunal conciliations will often go ahead without waiting for the interpreter to arrive, because the conciliator thinks that the matter is simple. The CALD person is bamboozled and can't even get an explanation in their own language.<sup>60</sup>

### Cultural issues

3.52 Some roundtable participants expressed concerns regarding the lack of cultural sensitivity in some criminal law diversionary programs, which inhibit effective participation for CALD people. One roundtable participant recounted a situation involving the Drug Court to illustrate 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. The woman in the case that I know about 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. The magistrate threw the book at her. She got a much

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<sup>59</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>60</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

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.<sup>61</sup>

- 3.53 Some roundtable participants stated that conciliation and mediation in discrimination matters may be inappropriate in some circumstances, as victims may be reluctant to negotiate with the perpetrator.<sup>62</sup> The NADRAC discussion paper noted:

Resolution of a dispute by way of mediation or conciliation may also signal a willingness to make concessions, where in fact, concessions are not appropriate and should not be made. Notable in this regard, are disputes with respect to race and discrimination.<sup>63</sup>

### *Tribunal processes in Migration matters*

- 3.54 The Immigration Advice and Rights Centre (IARC) submission expressed concerns about the lack of a right to legal representation in Migration matters in Review Tribunals (Migration Review Tribunal, Refugee Review Tribunal and Administrative Appeals Tribunal). The submission noted that, while the Review Tribunals are, in general, helpful to unrepresented applicants, the ability of unrepresented disadvantaged people to participate effectively in tribunal processes is hampered by the complexity of the immigration legislation. One example mentioned by IARC is in relation to review of visa refusals and cancellations for people who have not met 'the character test'.

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<sup>61</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>62</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>63</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 4.51, referred to by the Commonwealth Attorney-General's Department.

Most visa applicants are required to pass “the character test” to be granted a visa. Even permanent residents of Australia who have been resident in Australia for many years can have their visa cancelled on character grounds. This could include a substantial criminal record (more than 12 months imprisonment) or general conduct such as breaches of Immigration Law. Decisions to refuse or cancel a visa on character grounds can be reviewed in the Administrative Appeals Tribunal. In our experience, people who are not represented before the Tribunal face considerable difficulty in presenting their case effectively, particularly if they face other social disadvantages such as being of non-English speaking background or being illiterate. The consequences of being unsuccessful are severe, particularly in cases of cancellation because of criminal conduct. In these cases an unsuccessful applicant has a life-long ban on returning to Australia.<sup>64</sup>

3.55 Other areas of concern identified by IARC regarding the processes involved with the review of Migration matters include:

- *Onus of proof* - It is up to the visa holder to satisfy the Department that they pass the character test, rather than it being up to the Minister to prove that the visa holder does not pass the character test. According to IARC, the reversal of the usual onus of proof means that the applicant must present her/his case well to be successful.
- *Minister’s powers* - The minister, acting personally, can refuse the visa after the AAT has overturned the decision. In doing so, the *Migration Act* gives him the power to ignore the rules of natural justice which would normally apply to administrative decisions. The only review option left available is judicial review by the Federal Court or the High Court.
- *Time limits* - An applicant in Australia must lodge the review within 9 days of being notified of a decision to cancel a visa.
- *Abolition of class actions* - The legislation prevents the commencement of ‘class actions’ in migration matters unless the Federal Court directs that it is desirable for the efficient conduct of proceedings or the applicants are in the same family unit. For

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<sup>64</sup> Submission from the Immigration Advice and Rights Centre.

financially disadvantaged applicants a class action was a method of participating in a test case without having to bear the full costs of the proceedings.<sup>65</sup>

- 3.56 The effect of privative clauses in the *Migration Act*, particularly in relation to the ability of applicants to have decisions by the Refugee Review Tribunal further reviewed was cause for comment from two judicial figures during the consultation process. According to Justice Margaret Stone of the Federal Court of Australia, section 474 of the *Migration Act* effectively states that a decision of the RRT is final and conclusive and cannot be reviewed by a court.<sup>66</sup> Justice Sackville expressed the following:

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.<sup>67</sup>

### CALD women

- 3.57 The submission from the NSW Attorney General's Department noted that a number of the barriers and issues for women from CALD backgrounds effectively participating in court, tribunal and ADR processes had previously been identified in the Women's Legal Resource Centre report *Quarter Way to Equal*.<sup>68</sup> The report documented the particular experiences, difficulties and needs of women from CALD backgrounds when trying to access the legal system to end domestic violence in their lives. It provided a list of 53 recommendations which aimed to break down structural barriers and address the legal access and service provision needs of migrant and

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<sup>65</sup> Ibid.

<sup>66</sup> Justice Margaret Stone, Federal Court of Australia, Global Alliance for Justice Education Conference, 9-11 December, 2002

<sup>67</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>68</sup> Women's Legal Resource Centre, *Quarter way to equal: a report on barriers to access to legal services for migrant women*, Sydney, 1994.

refugee women. Many of these have been identified above. At the time of writing, the NSW Attorney General's Department was in the process of reviewing the recommendations from that report.

## Indigenous Australians

- 3.58 The NSW Attorney General's Department stated that there is a significant amount of evidence to suggest that communication with Aboriginal people in courts and other legal settings is limited because of a lack of understanding, and indeed misunderstanding, on the part of non Aboriginal judicial officers and legal practitioners, particularly in regard to Aboriginal English and the non verbal aspects of Aboriginal communication.<sup>69</sup>
- 3.59 The NSW Department of Women's submission referred to its 1996 report documenting women's experiences in the courtroom, *Heroines of Fortitude*. The Department reported that this report found that Indigenous women were ten times more likely than non-Indigenous women to be complainants in domestic violence and sexual assault matters. The report concluded that Indigenous women seemed to experience greater distress during the court process than non-Indigenous women.

The longest cross-examination by the Defence in the entire study, five hours and 20 minutes, was of an Aboriginal woman (average time two hours). One hearing involving an Aboriginal woman was interrupted 12 times during cross-examination because of her distress. In other hearings, complainants dry-retched, claimed to feel nauseous in the witness box, were unable to answer questions or had to take regular breaks.

Language barriers and the use of jargon present particular difficulties for Aboriginal women. Aboriginal women experience shame in giving evidence about the essential elements of the offence such as when they are compelled to talk about their sexual organs. In one hearing where the complainant had difficulties describing her vagina or saying the word "vagina", the Crown Prosecutor asked a total of 34 questions about sexual organs.

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<sup>69</sup> Submission from the NSW Attorney General's Department.

Aboriginal women were asked far more questions about lying than non-Aboriginal women. In two separate cases, Aboriginal women complainants were asked 70 questions and 29 questions respectively by the Defence on whether they were lying or making the story up, in contrast to an average of seven questions directed to complainants generally.<sup>70</sup>

- 3.60 Both the Public Interest Advocacy Centre (PIAC) and the APLA stated that time limitation issues represent major barriers for Indigenous people who are part of the stolen generations. PIAC commented that it has acted for Indigenous victims of forcible removal policies who have been thwarted in their attempts to have the courts hear their grievances.<sup>71</sup>
- 3.61 Some community sector roundtable participants commented that it was difficult for Indigenous people to participate effectively in the Native Title Tribunal, due to perceptions that the Tribunal appears to represent the interests of farmers, pastoralists, and the Government.<sup>72</sup>
- 3.62 Several roundtable participants expressed concerns regarding the ability of Indigenous people, particularly young people, to participate in criminal diversionary programs. In particular, participants commented that police powers and discretion are not used impartially, stating that Indigenous young people are less likely to receive police cautions, and are under-represented in referrals to Youth Justice Conferences. They also stated that Indigenous people are more likely to be subjected to police exercising their move-on powers, to receive on-the-spot fines (particularly in rural areas), and to be over policed generally.<sup>73</sup>

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<sup>70</sup> Submission from the NSW Department for Women.

<sup>71</sup> Submission from the Public Interest Advocacy Centre; Submission from the Australian Plaintiff Lawyers Association.

<sup>72</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>73</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

3.63 The PIAC study of the accessibility of discrimination and complaints processes for Indigenous women in NSW (*'Discrimination .... have you got all day?'*) identified a number of barriers to effective participation in the hearing process, including:

- lack of knowledge about discrimination laws, who to complaint to, and how the system works
- confusion about the role of the Anti-Discrimination Board (ADB) and the Human Rights and Equal Opportunity Commission (HREOC)
- lack of culturally relevant information about the ADB and HREOC, and lack of outreach services of Indigenous workers
- the lack of face-to-face contact with the ADB and HREOC once a complaint had been initiated
- literacy and the written nature of the complaints process
- powerlessness and lack of faith in the system to seriously investigate complaints, or provide a satisfactory resolution
- delay in resolution of complaints, due to the mediation and conciliation process
- costs of complaints processes, including lodging fees and costs of seeking assistance
- the cultural inappropriateness of the discrimination complaints model
- difficulties in proving their complaint.<sup>74</sup>

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<sup>74</sup> *Discrimination ... have you got all day? – Indigenous women, discrimination and complaints processes in NSW*, Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women's Legal Centre, December 2001, referred to in consultations with the Public Interest Advocacy Centre.

3.64 Roundtable participants also observed that Indigenous people are often intimidated to not pursue their rights in discrimination matters because of fear of having to negotiate with the perpetrator through the conciliation process.<sup>75</sup>

### **Children and young people**

3.65 The Youth Justice Coalition (YJC) identified several barriers for children and young people participating effectively in court hearings:

- delays and lengthy proceedings
- inappropriate legal procedures and rules of evidence which do not accommodate children's particular circumstances
- racist and stereotypical views held by some court officers, resulting in discrimination against particular groups of young people
- lack of skills of magistrates in dealing with children and young people, particularly in rural areas
- cross-examination techniques used by some barristers which can amount to abuse
- lack of information available to young people about what they can expect when they go to court, and what legal support is available (particularly for Indigenous young people).<sup>76</sup>

3.66 In relation to civil proceedings, the YJC submitted that children face barriers to their participation in court processes by virtue of them lacking legal capacity due to their infancy. This denies them the opportunity to initiate or participate directly in legal proceedings. As an example, the YJC noted

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<sup>75</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>76</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

that children are often only able to act through an adult agent known as a ‘tutor’, ‘next friend’ or ‘guardian ad litem’.<sup>77</sup>

- 3.67 APLA submitted that recent legislative changes which limit the time limitations period within which actions for negligence can be brought may unfairly impact upon injured children who, by virtue of their legal incapacity, may not be able to bring proceedings until they are 18.<sup>78</sup>

Those children who are in the care of a parent or guardian will have their limitation period run against them, even in situations where the parent or guardian is not acting in the best interests of the child. The Act only allows an extension where the parent/guardian acted ‘irrationally’. Allowing an extension only in those cases where the parent acted ‘irrationally’ in not commencing proceedings on behalf of the child will see unjust results.<sup>79</sup>

- 3.68 APLA further submitted that as many injured children must wait until they have reached maturity before their injuries can be determined, their legal actions must be delayed accordingly. They stated that a longer limitation period is particularly important for children who have been sexually abused, as the nature of child sexual abuse means that the abuse is often not reported and the extent of the damage caused to victims may not be evident for many years.<sup>80</sup>

- 3.69 Other areas identified by APLA where the recent legislative changes in civil liability may impact upon children and young people include:

- *Thresholds on damages* – As young people are more likely to be unemployed or low-income earners, they may be unable to claim compensation for lost earnings. Accordingly, they may not reach the threshold for non-economic loss, making it difficult for them to obtain compensation for their pain, suffering and the loss of enjoyment of life they have suffered as a result of the injury.

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<sup>77</sup> Submission from the Youth Justice Coalition.

<sup>78</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

- *Limitation of claims arising from recreational activity* –Under the proposal, if a child is accompanied by a person with legal capacity, the child is bound by any risk warning provided by the activity operator, even if the risk is not communicated to the child.<sup>81</sup>

- 3.70 In Criminal Law matters, concern was expressed about the outcomes received by young people in relation to bail and sentences. It was observed that there are increasing numbers of young people who are refused bail or who can't meet their bail conditions and are remanded in custody without having faced court.<sup>82</sup> Several roundtable participants also expressed concerns about the lack of diversionary options available for young people in the Children's Court in rural and regional areas, and the increased likelihood of young people receiving a custodial sentence in rural areas.<sup>83</sup>
- 3.71 As stated in paragraph 3.62, roundtable participants expressed concerns about the inability of many Indigenous young people to participate in criminal diversionary programs, due to inappropriate exercise of police discretion.<sup>84</sup>
- 3.72 In relation to effective participation in Tribunal hearings, the Youth Action and Policy Association (YAPA) submitted that for disadvantaged young people, tribunals such as those dealing with Centrelink issues, tenancy issues or discrimination issues present many access problems. These include:

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<sup>81</sup> Ibid.

<sup>82</sup> Bagen, J., Department of Juvenile Justice, *Alternatives to traditional approaches in civil and criminal law*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>83</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>84</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- lack of awareness amongst many young people of the existence of relevant tribunals and their legal rights in relation to the issues dealt with by these tribunals
- perception amongst young people that their concerns would not be believed or taken seriously by the tribunal
- lack of access to advocates to assist them to participate effectively at tribunal hearings.<sup>85</sup>

3.73 NADRAC stated that significant power imbalances may arise in ADR processes in child protection matters, where the child, the parent or parents, family relatives, the foster parents and staff from community organisations and the Department of Children's Services may all be involved.<sup>86</sup>

3.74 Where children are the victims of abuse and violence, NADRAC recognised that this can impact on the ability of the child to participate effectively in the process. Accordingly, it has advised that ADR is inappropriate in such circumstances, particularly where the parents dispute that the child is being abused.<sup>87</sup>

Any ADR process which involves a formal meeting of the child with the perpetrator of such violence will be a harrowing experience for the child, and will significantly increase their disempowerment and anxiety. Rather than trying to achieve an outcome, the child may seek not to pursue, or to discontinue proceedings, without a fair resolution having been achieved.<sup>88</sup>

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<sup>85</sup> Submission from the Youth Action and Policy Association.

<sup>86</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 5.66, referred to by the Commonwealth Attorney-General's Department.

<sup>87</sup> *Ibid*, paragraphs 5.64 and 5.68.

<sup>88</sup> *Ibid*, paragraph 5.65.

## Elderly people

- 3.75 APLA submitted that the recent legislative changes to civil liability laws regarding thresholds on damages, referred to in paragraph 3.69, will impact on elderly people. Because elderly people are more likely to be unemployed or low income earners, and have less likely future earning potential, it will be more difficult for them to reach the threshold for non-economic loss.

The elderly in particular suffer as a result of thresholds on damages for pain and suffering, as damages for pain and suffering take into account their likely future period of such suffering. With shorter life expectancies than younger people, their pain and suffering is consequently discounted. In such cases, the elderly may not be deemed to be over the threshold, yet debilitating injuries may blight the remaining years that they have to live. Not being an income earner, their claim for compensation is thus thwarted.<sup>89</sup>

- 3.76 One submission noted that many elderly people struggle to participate effectively in court hearings due to being unable to properly hear the proceedings.<sup>90</sup>

## People in rural, regional and remote areas

- 3.77 Lack of access to courts was the most commonly identified barrier for effective participation in court processes for people in rural and regional areas. Community legal centre workers reported that in some regional areas, court sittings take place only once every six months.<sup>91</sup> The Law Society of NSW Family Law Committee reported that the Family Court circuits to rural and regional areas, including for interim hearings, have been significantly reduced, limiting access in these areas. The Committee reported that approximately six or seven Family Court registries have been closed across Australia in rural and regional areas in recent years.<sup>92</sup>

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<sup>89</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>90</sup> Submission from Nolene Baker.

<sup>91</sup> *Access to Justice – Whatever happened to the revolution*, Workshop at the National Community Legal Centres Conference, Melbourne, 3 September 2002.

<sup>92</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

- 3.78 Both Legal Aid NSW and the Law Society of NSW expressed concerns that Local Courts in rural areas are conducting fewer Family Law matters and becoming primarily criminal courts, and that magistrates are increasingly referring Family Law matters to the nearest Family Court. This often involves substantial travel for litigants.<sup>93</sup> Legal Aid NSW further noted that as access to Local Courts declines, the ability of people in rural and regional areas to effectively participate in the legal system and attend hearings becomes directly affected by their ability to access affordable and regular public transport.<sup>94</sup>
- 3.79 In its *Managing Justice* Report, the ALRC commented that litigants in rural and regional areas have far less access to quality experts who can provide advice, reports and evidence in court hearings.<sup>95</sup>
- 3.80 Several roundtable participants stated that outcomes in Criminal Law proceedings are more limited in rural and regional areas, with bail hearings more likely to result in the defendant being placed in custody, due to the lack of bail hostels. They also noted that the lack of diversionary programs in rural and regional areas makes custodial sentences more likely.<sup>96</sup> Over policing of certain groups in rural and regional areas (e.g. Indigenous people, young people), and greater use of on-the-spot fines powers were also areas of concern.<sup>97</sup>
- 3.81 Concern was expressed about the infrequent visits by tribunals to rural and regional areas. This was seen as entrenching the level of ignorance of

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<sup>93</sup> Submission from Legal Aid NSW; Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

<sup>94</sup> Submission from Legal Aid NSW.

<sup>95</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.80, referred to by the Commonwealth Attorney-General's Department.

<sup>96</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>97</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

options and opportunities to address certain legal issues, as many disadvantaged rural people continue to be unaware of the existence of those tribunals.<sup>98</sup>

### **People with low levels of education and literacy**

- 3.82 Chamber Magistrates commented that people with limited education and poor English literacy face substantial barriers to self-representation because of the complexity of legal processes.<sup>99</sup>
- 3.83 Community legal centre roundtable participants stated that many tribunal procedures require written applications and correspondence, and these present barriers for people with low levels of literacy. This was particularly noted in relation to the NSW ADB and HREOC.<sup>100</sup>
- 3.84 APLA commented that recent legislative changes in NSW limiting the liability of operators of recreational activities, where they warn of a risk, may adversely impact on people with low levels of literacy. People who are unable to read such warnings will be prevented from seeking compensation for injuries sustained as a result of negligence.<sup>101</sup>

### **Women**

- 3.85 The most commonly reported barriers for women to effective participation in court processes were as witnesses in sexual assault cases, domestic violence applications and in Family Law proceedings. The NSW

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<sup>98</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote Areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>99</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>100</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>101</sup> Submission from the Australian Plaintiff Lawyers Association.

Department for Women reported that for a victim of sexual assault, appearing as a witness in a court hearing can be particularly harrowing.

A sexual assault victim not only has to describe in considerable detail, and thus relive, a painful and quite possibly frightening experience, but because of the pivotal nature of the issue of consent, the victim is likely to be intensively cross-examined in relation to her own behaviour and motivation for making the complaint. Such intense scrutiny may make the victim feel that it is she who is on trial.<sup>102</sup>

3.86 The NSW Department for Women quoted findings from the *Heroines of Fortitude* report in relation to women's experiences in the courtroom in sexual assault cases:

- In 65 per cent of trials there were, on average, two interruptions to evidence because of the distress suffered by complainants.
- 52 per cent of complainants were accused of making false reports based on ulterior motives, such as vengeance or applications in Family Court proceedings.
- 59 per cent were questioned about drinking on the day of the offence.
- 57 per cent of complainants were questioned about behaving in a sexually provocative manner; 42 per cent were asked about the way they were dressed at the time and 22 per cent were cross-examined about their responsibility for the offence.
- 43 per cent of complainants were asked about why they were in the location where contact with the accused was made. 82 per cent were cross-examined about lying. More than two-thirds were questioned about lack of resistance to sexual assault.
- In 40 per cent of trials, judges gave the old-style corroboration warning that it is dangerous to convict on the complainant's evidence alone, despite changes to sexual assault legislation in 1981 that no longer requires such a warning to be given.

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<sup>102</sup> Submission from the NSW Department for Women.

- Evidence related to sexual reputation was raised in 12 per cent of trials, despite such evidence being inadmissible. Matters related to sexual experience (which is only to be admitted in strictly defined circumstances) was admitted in 84 per cent of the instances in which it was raised, and in 35 per cent of these cases without prior application having been made, without challenge by either counsel and without justification by the judge.<sup>103</sup>

3.87 The Department also quoted the Bureau of Crime Research and Statistics and the Australian Bureau of Statistics figures to support its assertion that women who report sexual assault matters and go through a court hearing are unlikely to receive the satisfaction of securing a conviction:

The Bureau of Crime Statistics and Research found in 1996 that only 18.3 percent of sexual assault cases over a six-month period resulted in a conviction, while a further 33.6 percent were finalised by a guilty plea. 27.3 percent ended in acquittal and 14.5 percent were no-billed. The Australian Bureau of Statistics in its 1996 Women's Safety Australia report found that only 22 percent of incidents reported to the police resulted in charges being laid.<sup>104</sup>

3.88 According to the Department, the findings from *Heroines of Fortitude* demonstrate the obstacles women face in the courtroom in relation to sexual assault cases.<sup>105</sup>

3.89 The Department for Women also identified several problems in relation to the Apprehended Violence Order (AVO) Scheme as a means of protection for women in domestic violence situations:

- Police inaction - in almost three-quarters of the breaches reported to police, they took no action. There is a perceived reluctance by the police to intervene because of Family Court contact orders, or reluctance by the Department of Community Services to intervene in child protection cases when a matter is before the Family Court.<sup>106</sup>

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

➤ **Problematic attitude amongst magistrates:**

Sixty-six percent of magistrates who responded to a 1999 survey disagreed that they should be sensitive to the needs of protected persons in domestic violence cases. Nineteen percent thought that domestic violence matters are best worked out privately between the parties, and more than one third agreed that this could sometimes be the case, while 54 percent agreed with the statement that “it takes two to tango”. Forty percent agreed with the process of deferring final Domestic AVOs where Family Court proceedings are in place and the great majority of magistrates believed that the application for a Domestic AVO was used as a tactic in later Family Court proceedings. Against this, a review of the *Family Law Reform Act 1995* (Cth) found that most Family Court judges considered there to be few instances of tactical domestic violence allegations.<sup>107</sup>

3.90 The inappropriateness of Family Court based ADR processes such as mediation and conciliation for women who have been in domestic violence situations was identified by the Women’s Legal Resource Centre (WLRC), the NSW Department of Women, and by NADRAC:

The pressure for women in Family Court proceedings to undergo mediation, may increase the danger to women and children in Family Court proceedings. The Family Court’s policy on mediation recognises its inappropriateness in situations of domestic violence, however the very dynamics of relationships characterised by domestic violence may lead to women not disclosing the existence of domestic violence for fear of antagonising their partner. Furthermore, the Department has been advised that women are pressured to undergo mediation where a grant of legal aid is provided, even where domestic violence is present and has been disclosed, despite a Family Court policy that mediation is inappropriate.<sup>108</sup>

3.91 WLRC also submitted that the growing emphasis on mediation is resulting in many intractable cases with serious issues which need to come before a court and be adequately prepared and presented, being diverted away from court. It submitted that this is of particular concern in children’s matters under the *Family Law Act*.<sup>109</sup>

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Submission from the Women’s Legal Resources Centre.

- 3.92 APLA submitted that women will be disadvantaged by recent legislative changes to introduce thresholds on damages, as women are more likely to be stay at home parents, and therefore unable to claim for compensation for lost earnings.<sup>110</sup>
- 3.93 The NSW Attorney General's Department noted that several of the barriers and issues in relation to women from CALD backgrounds effectively participating in court, tribunal and ADR processes had previously been identified in the Women's Legal Resource Centre report *Quarter Way to Equal*<sup>111</sup> in 1994. At the time of writing, the NSW Attorney General's Department was in the process of reviewing the recommendations from that report.<sup>112</sup>

### **People living in institutions and people released from institutions**

- 3.94 Several roundtable participants commented that prisoners face distinct barriers in participating in the legal system. In particular:
- prisoners are not able to claim compensation for criminal injuries within prison, unless they are for serious sexual assaults
  - prisoners and ex-prisoners are often distrustful of the legal system and have very low expectations as to what the system can provide them in terms of redress for wrongs, or recognition of rights.<sup>113</sup>
- 3.95 APLA submitted that people serving a term of imprisonment may be disadvantaged by legislative changes to restrict the time limitations period within which civil claims can be brought.<sup>114</sup>

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<sup>110</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>111</sup> Women's Legal Resource Centre, *Quarter way to equal: a report on barriers to access to legal services for migrant women*, Sydney, 1994.

<sup>112</sup> Submission from the NSW Attorney General's Department.

<sup>113</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>114</sup> Submission from the Australian Plaintiff Lawyers Association.

## People on low incomes

3.96 The most common barriers identified for social security recipients and low-income earners to effective participation in courts, tribunals and ADR processes, related to the cost of litigation. Particular issues identified included:

- the rising and uncertain costs of litigation appear to have led to increased self-representation by ‘middle-income’ parties in circumstances where other forms of contingent assistance (eg. speculative and contingency fee arrangements and the like) are unavailable or inappropriate<sup>115</sup>
- the risks of an adverse costs order in various jurisdictions, and particularly in the Federal Magistrates’ Service, for discrimination complaints which have not been successfully conciliated at HREOC<sup>116</sup>
- the prohibitive costs of fees and disbursements, such as court lodgement fees, experts’ reports, counsels’ fees, transcript costs, appeal books, and so on.<sup>117</sup>
- differences in legal resources available to litigants; where an individual litigant is in dispute with a corporation, a government agency or merely another more wealthy individual, s/he is likely to be in a position of disadvantage in the litigation process by reason of not being able to sustain the same amount of costs or losses as the opposing party.<sup>118</sup>

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<sup>115</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.8, referred to by the Commonwealth Attorney-General’s Department.

<sup>116</sup> Submission from the Public Interest Advocacy Centre; Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>117</sup> Submission from the Public Interest Advocacy Centre.

<sup>118</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- 3.97 APLA submitted that people on social security and low incomes may be disadvantaged by recent legislative changes which have introduced thresholds on damages.<sup>119</sup>
- 3.98 The NADRAC discussion paper stated that, notwithstanding the cost advantages of ADR, it is not cost free, and legal advice and representation in ADR processes is often desirable. This presents problems for people who have low incomes.

Even if a disputant is convinced of the strength of his or her complaint, the cost of being represented in ADR proceedings may be sufficient to discourage them from proceeding. As distinct from the formal justice system, where the losing party generally pays the costs of both parties, in ADR, in the absence of a specific arrangement in the settlement agreement, each participant is responsible for their own costs.<sup>120</sup>

## Homeless people

- 3.99 The Legal Counselling and Referral Centre (LCRC) submitted that a major barrier for homeless people in effectively participating in court, tribunal or ADR processes is a lack of confidence in the legal system and a lack of confidence that their rights will be respected and recognised.

To these clients being homeless and out of work equate with a lack of respect for them and for their legal rights.<sup>121</sup>

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<sup>119</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>120</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 9.20, referred to by the Commonwealth Attorney-General's Department.

<sup>121</sup> Submission from the Legal Counselling and Referral Centre.

## Mechanisms and innovations to assist disadvantaged people

### General

3.100 The NSW Attorney General's Department reported a number of recent initiatives which have facilitated more effective participation in the legal system by disadvantaged people. These include:

- A package of legislation that sets out the jurisdiction of the Local Court in plain language, provides a quick and simple method of commencing matters in the Local Court, and clarifies and consolidates the law relating to summary hearing procedures, committal inquiries, appeal, review, contempt and immunity.<sup>122</sup>
- Innovative management and processing solutions, together with improved technology, to reduce delays in court waiting lists.
- A complaints-clearance project in the Anti-Discrimination Board to reduce the number of unallocated cases for investigation and conciliation. The project will result in complaints being allocated more quickly.<sup>123</sup>

3.101 Many courts have recognised the need to reduce delays in litigation processes, and have developed systems of case management and judicial intervention or activism in the management of cases by judicial officers.<sup>124</sup> A specific form of case management has been introduced in the Federal

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<sup>122</sup> Repeal of the *Justices Act 1902* (NSW) - This Act was replaced by a package of legislation *the Crimes (Local Courts Repeal and Review) Act 2001* (NSW); the *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW); and the *Justices Legislation Repeal and Amendment Act 2001* (NSW).

<sup>123</sup> Submission from the NSW Attorney General's Department.

<sup>124</sup> Justice Ronald Sackville, *From Access to Justice to Managing Justice: The Transformation of the Judicial Role*, Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12-14 July 2002.

Court, called the Individual Docket System (IDS). This involves the same judge dealing with a case from beginning to end. This has the benefit of the docket judge knowing the case and being able to manage and tailor processes for the particular case. The Court's annual reports indicate that there has been a continuing improvement in case duration since the introduction of IDS.<sup>125</sup> An in depth study of the Federal Court's Individual Docket System was undertaken by the Law and Justice Foundation of NSW in 2002.<sup>126</sup>

3.102 The role of the Court Support Scheme in facilitating more effective participation from disadvantaged people in court processes was recognised by a number of contributors. The Court Support Scheme was established in 1982 to provide a community link with the court system. It is staffed by 45 active working volunteers, who work approximately 4000 hours annually. The volunteers assist anybody affected by the court system within court precincts, including offenders, victims, family of participants, and witnesses. They provide confidential support and information to people before, during and after court appearances. The Scheme mostly operates in the Sydney metropolitan area, servicing 17 metropolitan local courts. Last year they gave assistance to an estimated 35 000 individuals. According to its submission, the Scheme receives minimal funding, and faces difficulty in meeting its overhead costs (administration, office overheads, communication, transport, insurance for volunteers, and so on). It reported that due to inadequate resourcing, it cannot provide services to all Local Courts, or in rural and regional areas.<sup>127</sup>

3.103 The Scheme reports that people who are not eligible for legal aid and cannot afford a private solicitor are the most common users of their service. The assistance they provide includes:

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<sup>125</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraphs 7.4–7.10, referred to by the Commonwealth Attorney-General's Department.

<sup>126</sup> Sage, C., Wright, T., Morris, C., *Case Management Reform: A Study of the Federal Court's Individual Docket System*, Law and Justice Foundation of NSW, June 2002.

<sup>127</sup> Submission from the Court Support Scheme.

- information about court procedures and services
- information about where people can get legal advice
- making referrals to community and government agencies
- contacting other services at court
- information about where people can get language assistance
- providing help filling out court forms and legal aid applications
- supporting victims/witnesses and their families, including providing personal and emotional support
- identifying and assisting in overcoming deficiencies in court operations and delivery of services that adversely affect people attending court.<sup>128</sup>

3.104 The Commonwealth Attorney-General's Department submitted that the establishment of the Federal Magistrates' Service improved the accessibility of Federal Courts.<sup>129</sup>

3.105 The ALRC noted in its *Managing Justice* Report that many courts have initiated programs to assist unrepresented litigants. These include court orientation and referral services, and information on websites. The homepages of many courts and tribunals provide procedural information, application forms and, in some instances, details of how to make an application, describing hearing processes, contact details and addresses. Courts and tribunals also provide brochures, videos and tape recordings, all of which provide step-by-step instructions for parties. The Family Court also runs information sessions on court services and processes and the impact of parental separation on children.<sup>130</sup>

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<sup>128</sup> Submission from the Court Support Scheme.

<sup>129</sup> Submission from Commonwealth Attorney-General's Department.

<sup>130</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.210, referred to by the Commonwealth Attorney-General's Department.

3.106 The Law Society of NSW Family Law Committee noted that the development of plain English and online forms have greatly improved access to court processes for disadvantaged people. However, the Committee also noted that this has caused some problems:

It raises expectations about getting the outcomes they are seeking, where in fact, the outcomes are just as inaccessible given the complexity of the court processes. Plain English forms may have improved access to the system, but access to outcomes is even more difficult than before because of resourcing issues. In addition, more people are making applications, and this is causing delays, and increased numbers of unrepresented litigants.<sup>131</sup>

3.107 Submissions and roundtable participants recognised the important role of mediation, conciliation and other ADR mechanisms in the court system, as important developments which assist civil litigants to resolve their disputes while avoiding the expense, time and emotional strain associated with contested hearings.<sup>132</sup> The NADRAC discussion paper commented that ADR processes are often praised for their accessibility, their lack of formality, and their ability to give the participants greater control over the content of their dispute.<sup>133</sup>

3.108 Roundtable participants also noted that the manner in which tribunals often deviated from the formal, adversarial model of court litigation, made it easier for disadvantaged people to participate in their processes. In particular, the fact that tribunals usually will not award a costs order against the unsuccessful party, and allow community workers to act as advocates for disadvantaged applicants, enhances their accessibility for disadvantaged people.<sup>134</sup>

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<sup>131</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

<sup>132</sup> Submission from Legal Access Services Pty Ltd Peter Fosterbunch; Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>133</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, referred to by the Commonwealth Attorney-General's Department.

<sup>134</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

## **People with disabilities**

3.109 The NSW Attorney General's Department has developed a Disability Strategic Plan (DSP), with the aim of enhancing access to the Department's services and facilities. Several aspects of the DSP seek to facilitate more effective participation in the legal system for people with disabilities including:

- improving access to court procedures
- staff training in disability awareness
- providing a variety of communication provisions to people with disabilities, whether they require AUSLAN interpreters, documents in alternative formats or plain English, or the option to use their own speech output technology to give evidence in court.<sup>135</sup>

### *People with an intellectual disability*

3.110 The NSW Attorney General's Department reported that the recently enacted *Bail Amendment (Repeat Offenders) Act 2002* (NSW) requires the court to consider the circumstances of a person with an intellectual disability in considering bail.<sup>136</sup>

3.111 The NSW Attorney General's Department reported that in August 2000 the Anti-Discrimination Board hosted a forum for advocacy and support organisations working with people with intellectual disabilities. The forum discussed how the Board's services, particularly the complaints service, could be better adapted to suit people with intellectual disabilities.<sup>137</sup>

3.112 Roundtable participants reported that providing support persons to attend court hearings with people with intellectual disability assisted them in participating more effectively in the processes.<sup>138</sup>

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<sup>135</sup> Submission from the NSW Attorney General's Department.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

*People with a physical disability*

3.113 According to NSW Attorney General's Department, its DSP places a strong emphasis on physical access to the court premises. Whenever maintenance work is carried out on a courthouse, physical access provisions are integrated into the specifications. A priority for access provision has been placed on regional courthouses where juries are convened so that people with physical disabilities will have the opportunity to participate in juries.<sup>139</sup>

*People with sensory disabilities*

3.114 People with Disabilities welcomed the NSW Law Reform Commission inquiry into the exclusion of people who are deaf and blind from jury service.<sup>140</sup>

*People with psychiatric disabilities*

3.115 The NSW Attorney General's Department advised that Local Courts, in liaison with the NSW Health Department (Corrections Health), have established the Court Liaison Nursing Service to ensure that clients with a psychiatric disability are appropriately assessed and supported through the court process. This service currently operates at Newcastle, Central, Parramatta, Wollongong, Penrith, Sutherland, Liverpool and Lismore Local Courts. A registered psychiatric nurse with an understanding of court procedures is located at each court and is able to:

- provide background information about a person's involvement with mental health services
- filter referrals (to ensure that they are appropriate)

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<sup>139</sup> Submission from the NSW Attorney General's Department.

<sup>140</sup> French, P., *Access to Justice for people with disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- conduct assessments, and provide advice to court staff and/or other agencies
- help educate court and other staff about mental health issues and the needs of people with a mental illness.<sup>141</sup>

3.116 The program is designed to facilitate earlier assessment of people with psychiatric disabilities who appear before the court and ensure that more appropriate sentencing decisions are made. Positive outcomes include:

- increased compliance with bail requirements
- reduction in the pressure on acute hospital services due to a reduced number of court-ordered in-patient assessments.<sup>142</sup>

#### *People who have acquired disabilities*

3.117 The NSW Attorney General's Department reported that the establishment of the Parramatta Adult Drug Court has been an important development for people who suffer from substance addiction. The Department's Crime Prevention Division has implemented the Magistrates Early Referral Into Treatment (MERIT) program in eight areas: South-West Sydney, Mid-West Sydney, Hunter region, Greater Murray, Macquarie, the Central Coast, Northern Rivers and Illawarra regions. The program is designed for less serious repeat offenders facing drug-related charges who show potential for treatment and rehabilitation, and provides assistance such as counselling, methadone and detoxification.<sup>143</sup>

3.118 Some roundtable participants expressed concerns about the operation of the Drug Court, indicating that when the court adopts a punitive response, it assumes that individuals who come before it are equally positioned and

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<sup>141</sup> Submission from the NSW Attorney General's Department.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

have given informed consent to its processes. This is not always the case for members of some particular disadvantaged groups.<sup>144</sup>

### **People from culturally and linguistically diverse backgrounds**

3.119 The NSW Attorney General's Department reported that Local Courts have negotiated a memorandum of understanding with the Community Relations Commission to ensure that the following categories of clients from a non-English background have access to interpreter services on a fee exempt basis:

- all criminal defendants (adult and juvenile)
- parents/guardians of young people for both criminal and care matters
- all defence witnesses
- all applicants for apprehended violence orders
- all Chamber Magistrate interviews (except for civil matters).<sup>145</sup>

3.120 Another memorandum of understanding between the NSW Attorney General's Department, the Community Relations Commission and NSW Police is under development which will introduce new procedures to prompt Police to identify interpreter needs and make direct bookings for court appearances. These arrangements will help to ensure that defendants who have had bail refused by Police do not spend any longer than necessary in custody because an interpreter is not available at their first appearance date.<sup>146</sup>

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<sup>144</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>145</sup> Submission from the NSW Attorney General's Department.

<sup>146</sup> Ibid.

- 3.121 The Department also referred to the Interpreters and the Law training program, which aims to improve the skills of interpreters and the quality of interpreter services provided to the New South Wales court system and to ensure that the recipient party can understand and effectively participate in court proceedings. The program commenced in October 2000. To date 384 interpreters from 53 language groups, including AUSLAN, have successfully completed the training program.<sup>147</sup>
- 3.122 The ALRC reported that the Federal Court has facilitated, through the bar associations and the Department of Immigration Multicultural and Indigenous Affairs, arrangements for pro bono assistance for refugee and migration judicial review cases.<sup>148</sup>
- 3.123 As stated in paragraphs 3.57 and 3.93, the 1994 Women's Legal Resource Centre report *Quarter Way to Equal*<sup>149</sup> documents the particular experiences, difficulties and needs of women from CALD backgrounds when trying to access the legal system to end domestic violence in their lives. The Violence Against Women Specialist Unit (VAWSU) has undertaken to review the Report, to assess what progress has been made on the recommendations. The review is examining whether there has been any enhancement of migrant and refugee women's access to legal services and what prevention strategies have been established to address violence against women.<sup>150</sup>

## **Indigenous Australians**

- 3.124 The NSW Attorney General's Department's submission referred to the Aboriginal Client Service Program within Local Courts, which aims to

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<sup>147</sup> Ibid.

<sup>148</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000, Paragraph 5.210, referred to by the Commonwealth Attorney-General's Department.

<sup>149</sup> Women's Legal Resource Centre, *Quarter way to equal: a report on barriers to access to legal services for migrant women*, Sydney, 1994.

<sup>150</sup> Submission from the NSW Attorney General's Department.

provide targeted and responsive service delivery to Aboriginal service users. The specific program objectives are to:

- provide an improved and more coordinated service to Aboriginal people attending the Local Court
- improve linkages and establish effective communication between Local Courts and the Aboriginal communities they serve
- improve community awareness and understanding of Local Court processes, procedures and services.

A significant component of the program was the creation of fifteen Aboriginal Client Service Specialist positions based at courts in the following areas which have large Aboriginal communities and/or have a high proportion of Aboriginal people appearing at Court: Bateman's Bay, Bourke, Broken Hill, Campbelltown, Condobolin, Dubbo, Lismore, Moree, Mt DrUITT, Nowra, Penrith, Taree, Toronto, Wagga, and Walgett.<sup>151</sup>

3.125 The Aboriginal English project initiated by the NSW Attorney General's Department focuses on Aboriginal defendants and witnesses in courts and other legal settings. The objectives of the project are to:

- identify the communication barriers for Aboriginal people
- identify non verbal cultural barriers to effective communication
- identify specific linguistic barriers to effective communication for Aboriginal people
- develop a set of proposals to improve Aboriginal communication in court and legal settings, including possible legislative changes, procedural or administrative changes, training for judicial officers and legal professionals, and development of resources for Aboriginal communities and legal professionals to assist in communication.<sup>152</sup>

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<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

3.126 The piloting of Circle Sentencing in Nowra in 2002 was identified by a number of submissions and participants as a positive initiative aiming to empower those who are most affected by crime by involving community members in the decision about what happens to offenders.<sup>153</sup> Circle courts operate on the understanding that the underlying causes of crime are often broader than a single incident and that there is a need for the active participation of the whole community to reduce crime.

Empowering the Aboriginal community in the sentencing process is one of the fundamental aims of circle sentencing. Additionally, having communities punish their own members ensures punishments are seen as real community sanctions, not a continuation of an oppressive colonial system.<sup>154</sup>

3.127 According to the NSW Attorney General's Department submission, Circle Courts adopt particular procedures for matters coming before it. Each person introduces him or herself and explains why s/he is there. The facts of the case are then presented to the circle by the crown and the defence is then allowed to comment. The discussion that follows in the circle focuses on:

- the extent of similar crimes in the community
- the underlying causes of such crime
- the impact of these crimes on community and family life
- the impact of the offence on the victim
- what can be done in the community to prevent this type of behaviour
- what must be done to heal the victim
- what must be done to heal the offender
- what will constitute the sentence plan
- who will be responsible for carrying out the sentence plan

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<sup>153</sup> Bagen, J., Department of Juvenile Justice, *Alternatives to traditional approaches in civil and criminal law*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>154</sup> Submission from the NSW Attorney General's Department.

- who will support the offender to ensure that the sentence plan is completed
- what support can be provided for the victim.

This discussion usually takes from 2-3 hours and in all cases the offender must address the circle. The victim is encouraged to make a statement of the impact of the crime on him/her. The format of the circle encourages free discussion and allows for the participation of the victim and offender in that discussion. At the end of the circle goals are set for the offender such as curfew, work programs, abstention from alcohol, and anger management programs. The circle is then adjourned and the court reconvened and the sentence is passed. Members of the circle often meet several months later and hear from the support group about the offender's progress. If the offender does not meet the conditions a regular court deals with it.

The circle encourages openness and honesty from its participants and is able to get a full picture of the offence, the offender, the victim and the circumstances that may have led to the crime.<sup>155</sup>

3.128 The value of circle sentencing was encapsulated by a case study recounted by one roundtable participant:

There was a situation where a man had been picked up 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. 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, but he needed medical treatment. This 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.<sup>156</sup>

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<sup>155</sup> Ibid.

<sup>156</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- 3.129 The NSW Coalition of Aboriginal Legal Services (COALS) sounded a note of caution about circle sentencing, indicating that further studies need to be undertaken in relation to the successful outcomes of a circle sentencing proceeding before their success in the NSW context is proven.<sup>157</sup>
- 3.130 The NSW Attorney General's Department will shortly develop the NSW Aboriginal Justice Plan, which will address identified shortcomings in the implementation of the recommendations from the Royal Commission into Aboriginal Deaths in Custody. The Justice Plan will include jurisdictional targets for reducing the rate of over-representation of Indigenous people in the criminal justice system, as well as methods of service delivery and strategies for monitoring and evaluation.<sup>158</sup>
- 3.131 The Family Law Pathways Advisory Group report emphasised the importance of employing Indigenous staff as a key ingredient in improving participation in the court system for Indigenous people. It stated that the experience of the Family Court in developing appropriate services for Aboriginal and Torres Strait Islander communities through consultation provides a model for how other service providers in the system might proceed.

The programs are to ensure that, if an Indigenous person chooses or is required to attend the Family Court, there are no barriers to their accessing the services on the same terms as other members of the Australian community.<sup>159</sup>

## Children and young people

- 3.132 Many submissions and roundtable participants stated that the establishment of diversionary schemes for young offenders under *the Young Offenders Act 1997* (NSW) was an important development for children and young

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<sup>157</sup> Submission from the Coalition of Aboriginal Legal Services.

<sup>158</sup> Submission from the NSW Attorney General's Department.

<sup>159</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

people in the legal system. A key identified feature of the *Young Offenders Act* is the youth justice conferencing scheme, which seeks to bring together the victim(s), the offender(s) and other interested parties to work towards a mutual resolution outcome, using restorative justice principles. The NSW Department of Juvenile Justice conducts approximately 1200-1500 youth justice conferences a year. The Director of Youth Justice Conferencing within the Department of Juvenile Justice, Ms. Jenny Bargaen, outlined the scheme at the Access to Justice workshop:

For children between 10 and 18 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. 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.

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, and 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.

Conferences are facilitated by youth justice conference convenors, who are community people who are not government employees. Seventeen conference administrators recruit and 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.<sup>160</sup>

3.133 The Youth Action and Policy Association (YAPA) stated that restorative justice conferencing provided a positive model for participation of young people in the legal system because:

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<sup>160</sup> Bargaen, J., Department of Juvenile Justice, *Alternatives to traditional approaches in civil and criminal law*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

- it is an appropriate response to juvenile offending, which is usually related to either the transition of adolescence and/or to factors of disadvantage in the young person's life, and is more able to recognise and sometimes address these factors than court
- the format of a conference, while very confronting to most young people, is more accessible and relevant than the format of court, as young people have the opportunity (and some support) to speak for themselves
- conferences are better able to cater to the individual needs of each young person
- family members are incorporated into both the process and the outcome where possible and appropriate.<sup>161</sup>

3.134 Several roundtable participants were also positive about youth justice conferencing, as it:

- provides an opportunity for young offenders to be involved in the decision making process
- has the ability to involve community members, which can have the effect of minimising or eliminating the demonisation of young people.<sup>162</sup>

3.135 However, several concerns were expressed by some roundtable participants regarding aspects of the *Young Offenders Act 1997*. In particular, some participants were critical of the way in which police exercise their discretion under the Act, and particularly the seemingly discriminate application of cautions. They indicated that there was an apparent lack of accountability of police for how they exercise their discretion in such matters.<sup>163</sup>

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<sup>161</sup> Submission from the Youth Action and Policy Association.

<sup>162</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>163</sup> Ibid.

3.136 The Youth Justice Coalition (YJC) referred to the report *Young People's Experiences of the Young Offenders Act*,<sup>164</sup> which expressed concerns as to whether young people were given sufficient information about diversionary options available and the consequences of withholding consent. It stated that young people often feel pressured into consenting to diversion programs (for example, to avoid a court appearance). The research findings indicated a disregard for procedural safeguards for young people, including the presumption of innocence, the right to be informed promptly and directly of the charges, the right to silence, the right to access legal assistance and the right to the presence of a responsible adult. The report stated that proceeding to caution or conference where the procedure for obtaining the admissions of guilt does not comply with the Act (i.e. no adult present, legal advice not obtained) amounted to an erosion of procedural safeguards.<sup>165</sup>

3.137 The report indicated that review and accountability measures under the *Young Offenders Act* are not adequate:

For example, the right not to proceed with a caution or a conference is fundamental to the accountability of the discretion exercised by the police to proceed by way of caution or conference. However, 36% of young people being referred for a caution were not told that they had an alternative and 23% of young people referred for conference were not told that they had an alternative.

Further, the responses from Youth Liaison Officers indicate that police probably do not explain this alternative to young people. The effectiveness of this form of information in leading to the exercise of rights is called into question by this research.

The promises and inducements reported by young people indicate that guidelines as well as review mechanisms are necessary for the police in order to make for accountable exercise of discretion.<sup>166</sup>

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<sup>164</sup> Turner, S., *Young People's Experiences of the Young Offenders Act*, Youth Justice Coalition, July 2002, referred to by the Youth Justice Coalition.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

- 3.138 The research also reported that some young people who had attended youth justice conferences under the Act had received outcome plans with penalties which were more severe than the penalties which a court would have imposed.<sup>167</sup>
- 3.139 It was pointed out that the *Children (Care and Protection) Act 1997* (NSW) makes provisions for the use of family group conferences in developing outcomes for child protection matters. This was considered a worthwhile initiative to allow more effective participation of young people in these matters. However, these provisions have yet to be put into practice in NSW.<sup>168</sup>
- 3.140 Many roundtable participants noted that jurisdictions in which there was less formality, and where the strict rules of evidence do not apply, were more likely to encourage effective participation of children and young people. The Children's Court and the Residential Tenancy Tribunal were cited as positive examples.<sup>169</sup>

### **People in rural, regional and remote areas**

- 3.141 It was stated during the consultation process that visits and circuit hearings to rural and remote areas by Tribunals enhances effective participation by people in those areas.<sup>170</sup>

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<sup>167</sup> Ibid.

<sup>168</sup> Barga, J., Department of Juvenile Justice, *Alternatives to traditional approaches in civil and criminal law*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>169</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>170</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote Areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

## Women

3.142 In recognition of the issues raised by the *Heroines of Fortitude* report published by the NSW Department for Women, the Violence Against Women Specialist Unit of the NSW Attorney General's Department has commissioned a Status Report to:

- review the recommendations, raised from the report and the subsequent revised recommendations and implementation plan
- outline the continuing needs of women complainants of sexual assault.<sup>171</sup>

3.143 The NSW Department for Women submitted that the Apprehended Violence Order (AVO) Scheme has been shown to be an effective means of protection for women in domestic violence situations. In support it quoted from a 1997 evaluation of the scheme by the NSW Bureau of Crime Statistics and Research, which reported that more than 90 per cent of people who had been awarded an AVO felt that they had benefited from it.<sup>172</sup>

3.144 The NADRAC discussion paper stated that mediation and conciliation hearings may be an effective way to resolve disputes involving discrimination, as the process of negotiation and confrontation may encourage the victim to feel that their pain and powerlessness has been afforded recognition.<sup>173</sup>

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<sup>171</sup> Submission from the NSW Attorney General's Department.

<sup>172</sup> Submission from the NSW Department for Women; L. Trimboli and R. Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme*, NSW Bureau of Crime Statistics and Research 1997.

<sup>173</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 3.22, 3.23 and 3.48, referred to by the Commonwealth Attorney-General's Department.

## Homeless people

- 3.145 The Legal Counselling and Referral Centre submitted that centres such as Rough Edges and the Wayside Chapel, play a vital role for homeless people who have to attend court, as they provide support people during the court process.<sup>174</sup>

## Suggestions to facilitate more effective participation

### General

#### *Court processes and procedures*

- 3.146 While most submissions recognised the need for courts and tribunals to reduce delays and, where possible, to simplify procedures, Justice Sackville sounded a note of caution about the capacity of the legal system to embrace wide-ranging changes:

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.

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.<sup>175</sup>

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<sup>174</sup> Submission from the Legal Counselling and Referral Centre.

<sup>175</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

3.147 The Law Society of NSW *Access to Justice* Report recommended that a docket case management system be introduced into superior courts in NSW, in which each judge has responsibility for the management of a specified list of cases (assigned by the Chief Justice, list judge or head of division), from when the process is initiated through to the determination of the matter, including the supervision of divergence of each case into ADR or other dispute resolution techniques.<sup>176</sup>

3.148 Mr. Tony Abbott of the Law Council of Australia has suggested that the development of case management schemes should also consider the implications for the litigants themselves:

It may also be ventured that proper case management would require an appreciation of matters such as the level of legal costs, and stress and time implications for the parties, which are occasioned by various case management alternatives. These are just as relevant measures of the desirability of a particular case management order as Court time and the rate of progress through the Court System.<sup>177</sup>

3.149 The Law Society of NSW *Access to Justice* Report made a number of additional recommendations in relation to court jurisdictions and processes, with a view to enhancing efficiency and accessibility. These included:

- The creation of a single superior trial court by unifying the Supreme and District Courts. This would create a more efficient and effective superior trial court that would deliver increased flexibility in the way the court manages its caseload, reduce the public's confusion about the current two-tier system, rationalise administration and generate cost savings by streamlining procedures and practices.

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<sup>176</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW.

<sup>177</sup> Abbott, T., President Law Council of Australia, *Courts and the Public*, Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12-14 July 2002.

- Increasing the jurisdiction of the Local Court from \$40 000 to \$100 000 (with appropriate allocation of resources to support the court's additional workload and education and training of judicial staff), to capitalise on the features of the Local Court, namely its accessibility and its relative simplicity.
- Using the administrative divisions of the Local Courts to carry out its current judicial responsibilities, in addition to delivering a range of other public services, such as registry and shop front services for government agencies.
- Providing access to simplified ADR procedures in the Local Court, and extending the mediation/arbitration function of the Local Court to provide basic procedural advice to unrepresented litigants.
- Making greater use of Intranet and Internet links between the courts/tribunals and between the courts/tribunals and legal practitioners, to reduce litigation costs, eliminate unnecessary (and expensive) formal appearances and save time through electronic lodgement of case materials. Greater use of other telecommunications vehicles such as telephone, video conferencing, teleconferencing and email for direct communication between parties and the Courts would simplify procedures such as callovers which can be handled without the need for parties to attend the Court.<sup>178</sup>

3.150 Some submissions recommended additional resources for court support schemes. The NSW Court Support Scheme indicated that it needed more resources and support so that it could expand its services into rural and regional areas. It also indicated that it needed financial support for its volunteers, so that they would not be out of pocket for their travel expenses.<sup>179</sup>

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<sup>178</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW.

<sup>179</sup> Submission from the Court Support Scheme.

3.151 The Court Support Scheme suggested that changes to the physical layout of courts would assist in making them less intimidating environments.<sup>180</sup>

3.152 NSW Chamber Magistrates indicated that Local Courts needed more resources so that sufficient time and attention could be given to all disputes coming before them, without leading to delays in court lists.

One of the main things sought by parties in the local court was a fair hearing of their dispute. For many, this amounted to a feeling that sufficient time is spent on their matter for justice to be done. The disparity between court resources spent on high profile cases and on an individual's Local Court matter led to a perception that their treatment was unfair. The bottom line was that to remove delays and improve public confidence in the legal system, more money needed to be invested, both in the courts themselves and in the legal aid budget.<sup>181</sup>

3.153 Community roundtable participants expressed a need for re-education programs for judges.<sup>182</sup>

### Unrepresented litigants

3.154 Both the Law Council of Australia and the Law Society of NSW strongly asserted the need for increased funding for legal aid for legal representation to address the problem of increased numbers of unrepresented litigants in court.<sup>183</sup>

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<sup>180</sup> Ibid.

<sup>181</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>182</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>183</sup> Abbott, T., President Law Council of Australia, *Courts and the Public*, Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12-14 July 2002; Law Society of NSW, *Access to Justice – Final Report*, December 1998, referred to in consultations with the Law Society of NSW; Law Society of NSW, *Self Represented Litigants – position paper*, May 2002, referred to in consultations with the Law Society of NSW.

### *Costs of litigation*

- 3.155 The Law Society of NSW recommended that in jurisdictions where the rules preclude the award of costs, there should be provision for fees to be remitted in appropriate circumstances (e.g. where the applicant is the recipient of legal aid or pro bono, or the resulting order demonstrates unfair or inappropriate conduct by the government).<sup>184</sup>
- 3.156 Some participants in the National Pro Bono Workshop recommended the establishment of disbursement funds and the expansion of court fee waiver schemes, which would assist in removing some of the financial barriers to initiating litigation.<sup>185</sup>

### *Limitation periods*

- 3.157 APLA recommended that limitations periods for civil claims relating to injury and death should be lengthened to at least six years.<sup>186</sup>

### *Restorative Justice processes*

- 3.158 Several roundtable participants recommended that restorative justice options also be available for adult offenders, particularly young adult offenders.<sup>187</sup>
- 3.159 Several participants stated that restorative justice principles have a place in civil claims, where monetary damages may not be the desired outcome.

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<sup>184</sup> Law Society of NSW, *Access to Justice – Final Report*, referred to in consultations with the Law Society of NSW.

<sup>185</sup> *Overcoming Barriers - A National Pro Bono Workshop*, Sydney, 15 August 2002.

<sup>186</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>187</sup> Bargen, J., Department of Juvenile Justice, *Alternatives to traditional approaches in civil and criminal law*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

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 - a clear example is the situation of the Stolen Generation.<sup>188</sup>

- 3.160 Roundtable participants cautiously advocated greater use of alternative processes using restorative justice principles, but indicated that such schemes needed adequate reliable funding, to allow for expansion and incentives for success.<sup>189</sup>

### Tribunals

- 3.161 The Inner West Tenancy Advice Service recommended increased funding for Tenants' Advocates to attend Residential Tenancy Tribunal hearings, to facilitate participation in tribunal hearings by tenants.<sup>190</sup>
- 3.162 Roundtable participants recommended the establishment of an independent advocacy service to take a proactive stance on human rights/discrimination issues, and initiate complaints to HREOC on behalf of disadvantaged people.<sup>191</sup>

### **People with disabilities**

- 3.163 Several roundtable participants commented on the importance of education for lawyers, judges and magistrates covering issues facing people with intellectual disability, and particularly how such issues can effect offending behaviour, or manner, responses and performance in court.<sup>192</sup>

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<sup>188</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>189</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>190</sup> Submission from the Inner West Tenancy Advice Service.

<sup>191</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>192</sup> Ibid.

- 3.164 It was recommended that being able to lead expert evidence as to the effect of intellectual disability on offending behaviour, and also to assist in the consideration of sentence, would assist courts to make more informed decisions.<sup>193</sup>
- 3.165 APLA recommended that limitation periods for civil claims relating to negligently caused latent diseases should only begin once the plaintiff is aware that they have the injury and that they may have legal rights against the defendant.<sup>194</sup>

### **People from culturally and linguistically diverse backgrounds**

- 3.166 Community legal centre participants recommended that access to interpreters be available for CALD people at every stage of proceedings, including at the initial advice stage.<sup>195</sup>

### **Indigenous Australians**

#### *Aboriginal Court Days*

- 3.167 The Coalition of Aboriginal Legal Services (COALS) reported that a number of options are being explored around Australia for diversionary systems to the usual court practices for Indigenous people. One such alternative positively reported is the 'Aboriginal Court Day'. Such a scheme has been piloted in South Australia at the Port Adelaide Magistrates' Court, and has become known as the 'Nunga Court'. The initiative involves Aboriginal offenders being listed for sentence on a particular day. The

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<sup>193</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12-14 July 2002.

<sup>194</sup> Submission from the Australian Plaintiff Lawyers Association.

<sup>195</sup> *Access to Justice – Whatever happened to the revolution*, Workshop at the National Community Legal Centres Conference, Melbourne, 3 September 2002.

Court continues to operate in its capacity as a Magistrates' Court, but allows active input into the sentencing process by Indigenous people. Proponents argue that the process provides for a number of benefits to the Indigenous offender, the Indigenous community, and for the community at large.<sup>196</sup> The aims of the Nunga Court are:

- more efficient rationalisation of resources available to Aboriginal people within the justice system in the context of developing culturally appropriate support and optimal outcomes for Indigenous offenders
- community ownership of the court proceedings
- increased compliance with the courts' orders with the aim of reducing recidivism and avoiding the cycle of re-offending.<sup>197</sup>

3.168 COALS describes the procedures of the Nunga Court as follows:

Nunga court only deals with Aboriginal people who plead guilty to an offence. The Magistrate sits off the bench, more at eye level with the offender. An Aboriginal justice officer or a senior Aboriginal person sits beside the Magistrate to advise on cultural and community matters. The offender sits at the bar table with his/her lawyer and may have a relative sitting with him/her.

The court is conducted in a less formal atmosphere than would be seen in a Magistrate's court. The role of the Magistrate becomes far more inquisitorial, in that not only is more time given to the matter but also the court seeks to elicit further responses from the family as well as the offender about the nature and context of the matter. More weight is given in that sense to the first hand account provided to the Magistrate directly rather than as might normally occur either in a Magistrate's court hearing through the direct plea by the lawyer or in the calling of evidence in the traditional way.

The role played by Indigenous people within the Nunga court is one in which they have very important input to the process. While this input leaves the role of the Magistrate intact in that it is the Magistrate who will determine the specific sentence, the Indigenous community is able to provide a more full and emotive account of the general background of the accused and in that sense facilitate a deeper insight into the needs of the prisoner and what would be appropriate to decrease the likelihood of re-offending.

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<sup>196</sup> Submission from the Coalition of Aboriginal Legal Services.

<sup>197</sup> Aboriginal Justice Inter-Departmental Committee 1999:9.

In the Nunga court the Magistrate speaks directly to the offender, and seeks to engage the offender in a dialogue. The lawyer may or may not participate at this time, however it is clear that the primary relationship is between the Magistrate and the offender. Evidence or information will then be taken from family members who may be accompanying the offender, and again there is a dialogue about the nature of the incident. After this has occurred the Magistrate will turn to the Indigenous Elders who are sitting on the bench or to the Aboriginal Justice Officer to elicit their views about the background and nature of the incident as well as the information that has been obtained from the offender.<sup>198</sup>

3.169 Three areas of success with the Nunga Court were identified by COALS:

- higher rate of attendance of Indigenous people at court
- lower recidivist rate
- removal of barriers between Indigenous people and the legal system—the rearrangement of the courtroom assists in making all those involved feel more comfortable in the process. In addition, the involvement of Indigenous Elders and the community in the sentencing process helps to facilitate a feeling of trust in the legal system and the outcome.<sup>199</sup>

3.170 While COALS offered considerable support for the operation of the Nunga Court, it expressed concerns about some aspects of its operations, and made recommendations to address these:

- There is no training being offered to Aboriginal Elders nor a coherent selection process or plan. This leaves the Nunga Court open to a criticism that where there is insufficient input from Aboriginal people, it is mere tokenism. There is a need for a clear description and guidelines about the role of Aboriginal Elders, the expectations and method of participation.

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<sup>198</sup> Submission from the Coalition of Aboriginal Legal Services.

<sup>199</sup> *Ibid.*

- The power of the court is retained with the judicial officer. The role of Aboriginal Elders is limited to providing general information about background and perhaps some direct discussion with an offender. The court would benefit from a structure that allowed and encouraged the Aboriginal Elders to directly suggest options of sentence and also the particular type of sentence.
- There are concerns that the current process is undermining the rights and liberties of Indigenous offenders. Without clear guidelines, and given the particular way that the court focuses primarily on a relationship between Magistrate and an offender (circumventing the lawyer in one sense) it may be suggested that the due process within the system is being attacked.
- Because of the nature of the process, Aboriginal clients may give inappropriate responses to the court which are not in their best interests.
- Criticism may arise that the Magistrate is being given information 'behind closed doors'. Current legal systems rely on the openness and transparency of a process to ensure accountability. Where a Magistrate takes information privately or in a way which is not open to challenge by an offender (or indeed the prosecution) then it may well be said that justice is not being done. It is suggested that whatever role the Elders play this must be one in which the information provided to the Magistrate is given in open court and is in this way accountable.<sup>200</sup>

3.171 In spite of these concerns, COALS commented that providing a scheme such as the Nunga Court in NSW could provide an alternative to circle sentencing. By providing such alternatives which can be mutually inclusive, different processes can be employed, depending on the nature of the crime, the perspective of the victim and the role that may be taken by families and the general community.

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<sup>200</sup> Ibid.

Through the active involvement and participation of the Indigenous community there is an opportunity to engender a truly legal pluralist court system that can allow the distribution of power to Indigenous people in the sentencing process.<sup>201</sup>

### Customary law

3.172 Some roundtable participants noted that the incorporation of Indigenous customary law into the Australian legal system would assist in enhancing more effective participation in the system for Indigenous people.<sup>202</sup> The Family Law Pathways Advisory Group (FLPAG) noted this in relation to the operation of the *Family Law Act* in particular:

At present the Family Law Act does not explicitly recognise child-rearing obligations or parenting responsibilities of family members other than parents. Meaningful consideration needs to be given to amending the *Family Law Act* to incorporate Indigenous child-rearing practices. The *Family Law Act* needs to offer guidance as to the importance placed on a child's cultural identity. This is imperative when determining the best interests of Indigenous children.<sup>203</sup>

3.173 The FLPAG report also stated that as an alternative to Family Law litigation, a new pathway of Indigenous Family Law conferencing needs to be developed, based on the principles used in circle sentencing in the criminal jurisdiction. When litigation is appropriate, the community obligations of Indigenous peoples should be fully considered in arriving at residence and custody decisions.<sup>204</sup>

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<sup>201</sup> Ibid.

<sup>202</sup> *Access to Justice – Whatever happened to the revolution*, Workshop at the National Community Legal Centres Conference, Melbourne, 3 September 2002.

<sup>203</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>204</sup> Ibid.

### Limitation periods

3.174 PIAC submitted that state governments should legislate to remove strict time limits where there is good reason to do so, in particular,

- where there has been a violation of human rights (in some cases as a consequence of government policies)
- where legislation is in the public interest
- where a major factor preventing the substantive hearing of such cases is the time limitations factor.

It said that the clearest example of such circumstances is in relation to claims from the members of the Stolen Generations.<sup>205</sup>

### Tribunals

3.175 In its study of the accessibility of discrimination and complaints processes for Indigenous women in NSW (*'Discrimination ..... have you got all day?'*), PIAC and the Wirringa Baiya Aboriginal Women's Legal Centre made a number of recommendations to facilitate Indigenous participation in discrimination matters. These included recommendations for the Anti-Discrimination Board and the Human Rights and Equal Opportunity Commission to:

- increase the numbers of Indigenous staff, both women and men, available to handle complaints
- expand their programs of visits to urban and rural Indigenous communities to explain and promote their services
- establish offices of staff based in regional centres throughout NSW to provide services for Indigenous people

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<sup>205</sup> Submission from the Public Interest Advocacy Centre.

- produce 'Koori friendly' information about their services
- take steps to reduce the time taken to deal with complaints
- provide more information about where people can get help with making written complaints, and actively offer alternatives to written complaints such as recording an oral statement
- publish statistics on the number and nature of complaints made by Indigenous men and women

Other recommendations included:

- the Federal Court and Federal Magistrates' Service publicise their policy of no fees for people on low incomes making discrimination claims
- the Federal Government pass legislation so that a person complaining about discrimination in the Federal Magistrates Service cannot be made to pay the legal costs of the other side if they lose.<sup>206</sup>

## **Children and young people**

3.176 Two important general principles which were identified in the consultation process, which should underly initiatives to enhance the ability of children and young people to participate in the legal system were:

- the importance of concentrating on strategies which aim to divert children and young people away from the formal court process<sup>207</sup>
- the need for appropriate consultation with children and young people as to what type of reforms are needed.<sup>208</sup>

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<sup>206</sup> *Discrimination ... have you got all day? – Indigenous women, discrimination and complaints processes in NSW*, Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women's Legal Centre, December, 2001, referred to in consultations with the Public Interets Advocacy Centre.

<sup>207</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>208</sup> Submission from the NSW Commission for Children and Young People.

- 3.177 Several submissions and roundtable participants recommended that all courts, tribunals and complaints bodies adapt their procedures to suit the needs of children and young people. Particular issues where greater consideration needs to be given included time frames, delays, and the formality of proceedings.<sup>209</sup>
- 3.178 The Youth Justice Coalition (YJC) recommended that courts, complaints and appeals procedures should fast track children's and young people's matters to ensure that children are able to participate in the proceedings on their terms. In addition, the YJC recommended that Court Support Schemes be resourced to provide services in Children's Courts, so that children and young people are properly informed and supported throughout the court process.<sup>210</sup>
- 3.179 The National Women's Justice Coalition (NWJC) recommended the funding of a pilot for a designated Children's District and Local Court for matters involving children who are victims of personal violence offences (such as child sexual assault and assault). This would include specialist court staff and an independent expert interviewer who would interview the child and assist the court with the child's evidence.<sup>211</sup>
- 3.180 A statutory review process for children in care that is administered by an independent authority, was recommended by several roundtable participants.<sup>212</sup> The Queensland Children Services Tribunal was identified as a possible model for such an authority. The Children Services Tribunal is an independent body that answers directly to the Queensland Attorney-

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<sup>209</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996.

<sup>210</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>211</sup> Submission from the National Women's Justice Coalition.

<sup>212</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

General and the Queensland Minister for Justice. It is quite separate from other government bodies such as the Department of Families or the Commission for Children and Young People. The Tribunal gives children and young people the right to have their say on decisions about them in an informal and less structured way than a court. The Tribunal can review some decisions made by the Department of Families or the Commission for Children and Young People. Children, parents, and foster carers can apply to the Tribunal to review a decision. A preliminary conference is held first to discuss the decision being reviewed. If the matter is not resolved at this conference, then a hearing is set down at which time the Tribunal will make a decision.<sup>213</sup>

### **People in rural, regional and remote areas**

3.181 The Law Society of NSW *Access to Justice* Report commented on the importance of court services and court sittings in remote communities, particularly at a time when rural communities are enduring the withdrawal of a wide range of government and commercial services.<sup>214</sup>

3.182 The FLPAG canvassed the following possible solutions to improve court services in rural and remote areas:

- using local courts to manage Family Law disputes
- expanding the number of Family Court of Australia or Federal Magistrates Service outlets
- providing financial support for families to attend metropolitan or regional centres.<sup>215</sup>

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<sup>213</sup> Submission from the Queensland Children Services Tribunal.

<sup>214</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, p.25, referred to in consultations with the Law Society of NSW.

<sup>215</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

3.183 Consultations with people from rural areas identified the importance of people at the local level to increase the awareness of tribunals, so that people know about their services, and feel empowered to access them.<sup>216</sup>

### **People with low levels of education and literacy**

3.184 Chamber Magistrates suggested two strategies to assist people with low levels of education and literacy to participate more effectively in court:

- providing advocates to assist unrepresented litigants with literacy problems
- introducing Chamber Magistrate positions in higher courts to assist unrepresented litigants with pre-court procedures.<sup>217</sup>

### **Women**

3.185 The National Women's Justice Coalition made three recommendations to enhance women's participation in the legal system:

- consideration of gender equity in judicial appointments
- additional funding and expansion of the Women's Domestic Violence Court Assistance Program throughout NSW
- increased funding for the NSW Anti-Discrimination Board, given that sex discrimination is the overwhelming type of complaint made to the ADB, particularly sexual harassment in places of employment and pregnancy related discrimination.<sup>218</sup>

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<sup>216</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote Areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>217</sup> Law and Justice Foundation of NSW roundtable with NSW Chamber Magistrates, 23 September 2002.

<sup>218</sup> Submission from the National Women's Justice Coalition.

## People on low incomes

3.186 Several contributors expressed concerns regarding the fact that the Federal Magistrates Service, which now hears discrimination matters, is a costs jurisdiction. PIAC submitted that when operating in its ‘discrimination jurisdiction’, the Federal Magistrates Service should be a ‘no-costs’ jurisdiction, so that low income people are not disadvantaged.

A ‘no costs’ jurisdiction for discrimination matters (where each party pays their own legal costs regardless of which party succeeds) would be consistent with the objective of providing an accessible avenue of redress. While complainants would still have to cover the costs of their own legal representation (unless they were granted Legal Aid or could secure pro bono services), they would at least not have the additional costs risk deterring them from enforcing their rights. Providing a ‘no costs’ jurisdiction in the Federal Magistrates’ Service would provide complainants with a choice of jurisdictions, one a ‘costs’ jurisdiction (the Federal Court) and the other a ‘no costs’ jurisdiction (the Federal Magistrates’ Service).<sup>219</sup>

3.187 Some roundtable participants advocated imbalanced costs rules, where complainants in discrimination matters do not get costs awarded against them if unsuccessful, but would receive a costs order in their favour if they were successful.<sup>220</sup>

3.188 Some roundtable participants advocated that the Legal Aid Commission introduce a cost-indemnity legal aid grant that would be available in cases which 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.<sup>221</sup>

3.189 The Law Society of NSW suggested the development of Contingency Legal Aid Funding, which would meet the legal costs of eligible litigants,

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<sup>219</sup> Submission from the Public Interest Advocacy Centre.

<sup>220</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>221</sup> Ibid.

including the other side's lawyer's fees if they lose their case. However, if such litigants win, they must agree to pay into the fund a proportion of damages recovered. The administrators of the fund would assess the merits of a case in a manner similar to the assessment of cases under the current legal aid system.<sup>222</sup>

3.190 The Law Society of NSW also considered that the Government must take action to allow litigants to recover their costs when the court makes an error in law or the prosecution brings a case which is ultimately found to have no proper basis.<sup>223</sup>

3.191 Some roundtable participants advocated that litigants should make greater use of the right to apply for a cost ruling at the outset, as exists, for example, in the Federal Court. This would limit the amount of costs that might be ordered against the unsuccessful party.<sup>224</sup>

## Homeless people

3.192 The Legal Counselling and Referral Centre (LCRC) stated that there is a need to ensure that homeless people receive respect and understanding without judgment from all people involved in the conduct of court and tribunal hearings.<sup>225</sup>

3.193 The LCRC submitted that reducing delays in having court matters dealt with was important to ensure the attendance of homeless people at court, and would free up scarce resources of support services, allowing them to provide other services to homeless people.

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<sup>222</sup> Law Society of NSW, *Access to Justice – Final Report*, December 1998, p.67, referred to in consultations with the Law Society of NSW.

<sup>223</sup> *Ibid*, p. 38.

<sup>224</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>225</sup> Submission from the Legal Counselling and Referral Centre.

The clients have difficulty understanding and accepting the failure of the police to have their briefs of evidence finalised, leading inevitably to numerous adjournments. The stress on the clients of having matters unresolved, of having to turn up again in four weeks time, increases the likelihood of these clients not turning up at all. Centres such as Rough Edges and the Wayside Chapel will continue to provide personnel to sit with these clients at court, waiting for the matter to be mentioned. However, by reducing the number of mentions, the valuable resources of these centres would be released for other activities.<sup>226</sup>

3.194 The LCRC also recommended utilising creative alternatives to sentencing for homeless people, such as:

- Community Service Orders, which can provide opportunities for people to learn new skills and provide them with the opportunity to carry out meaningful work
- orders for counselling or rehabilitation, which provide important alternatives to prison.<sup>227</sup>

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<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

## 4. Obtaining Assistance from Non-Legal, Advocacy and Complaint-Handling Bodies

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- 4.1 This chapter explores the issues of accessing assistance from non-legal advocacy and support, which were identified through the consultation process, as well as issues relating to government and industry-based complaint bodies. It considers barriers for disadvantaged people, mechanisms and innovations which enhance access, and suggested solutions to further enhance the accessibility of these advocacy and support options.
- 4.2 For the purposes of this project, non-legal advocacy and support, and complaint-handling bodies includes:
- at the most informal level, assistance from family members, friends and acquaintances
  - general support, including assistance or referral in relation to a legal problem from community workers such as social workers, welfare workers, health workers, libraries, financial counsellors, psychological counsellors and other community workers
  - community based mediation and alternative dispute resolution (ADR) services
  - non-legal advice and assistance provided by government authorities or institutions (e.g. police), non-government organisations and professional associations

- government and industry-based complaint bodies including State and Commonwealth Ombudsman's offices, and bodies such as the Australian Industry Banking Ombudsman, the Telecommunications Industry Ombudsman, the Australian Competition and Consumer Commission, and the Insurance Complaints Scheme.<sup>1</sup>

## Barriers in existing mechanisms

### General

#### *Lack of resources for community agencies*

- 4.3 Several roundtable participants identified lack of funding and staff knowledge as key factors inhibiting the effective provision of services. There were numerous criticisms of the demands placed on non-government organisations as a result of government funding requirements:

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 to get staff who can be confident that they'll have a job in three years time without having to do ten funding applications.<sup>2</sup>

- 4.4 Roundtable participants reported a large staff turnover in the community sector, making it difficult to keep all community workers up to date. They

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<sup>1</sup> Schetzer, L., Mullins, J. and Buanamano, R., *Access to Justice and Legal Needs – A project to identify legal needs and barriers for disadvantaged people in NSW- Background Paper*, Law and Justice Foundation of NSW, August 2002, pp. 11–12, <http://www.lawfoundation.net.au/access/background.html>

<sup>2</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

commented that most community organisations do not have a training budget to pay for courses, and their staff are already over-stretched, working excess hours.<sup>3</sup>

- 4.5 Several participants stated that community workers did not know to whom to refer people, partly as a result of high turnover and lack of training. Many expressed a need for more of an interagency approach to referrals, and more awareness of what other agencies exist. However, others commented that this has been tried many times in the past and has not worked.

Lack of resourcing and current tendering models discourage agencies working together. For example, funding based on units of service delivery to individuals has removed community development and interlinking components of funding.<sup>4</sup>

### *Outsourcing of Family Court Counselling Services*

- 4.6 The Law Society of NSW Family Law Committee commented that Family Court based mediation services have been drastically reduced, resulting in increased numbers of applications with the court, and less likelihood of early resolution. It reported that the Family Court Voluntary Counselling service used to provide a widely respected, vital service which enabled parties to resolve their issues at an early stage, but that being outsourced has effectively dismantled it. Previously the services were court based, with expertly trained staff, familiar with the issues. The Committee stated that the outsourced services are not appropriately trained to deal with the issues, and often find themselves unable to deal with the situations presenting to them. According to the Committee, this is resulting in more people lodging applications with the court, as matters are no longer able to be resolved at an early stage.<sup>5</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>5</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

*Complaint-handling bodies*

- 4.7 Some roundtable participants from community legal centres stated that many industry-based complaint bodies appear to work on an inquisitorial model, which, while making complaint procedures simple and fast, results in people placing themselves outside the legal framework. The participants expressed concern that complainants do not necessarily have an assurance that these complaint-handling bodies will handle their complaint thoroughly and appropriately, as well as concerns about the public accountability and transparency of these bodies.<sup>6</sup>
- 4.8 The Telecommunications Industry Ombudsman (TIO) Consumer Consultative Forum noted that the level of awareness of industry codes amongst consumers and caseworkers was very low. The Ombudsman acknowledged chronic non-compliance by carriers with the Complaint-Handling Code's requirement that they tell customers about the TIO when they fail to reach a resolution to a customer complaint. He conceded that the TIO could probably better communicate the limits to its jurisdiction better.<sup>7</sup>
- 4.9 Several participants in the TIO Forum commented that internal complaint-handling processes of telecommunication companies were inadequate for individual consumers calling about their own service.<sup>8</sup>
- 4.10 The Energy and Water Ombudsman of NSW (EWON) commented in its submission that the main source of information about EWON is the information printed on utility notices and brochures. Customers who are not connected to the network, such as LPG gas users or residents in residential parks do not receive these notices and will have more difficulty in identifying sources of assistance.<sup>9</sup>

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<sup>6</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>7</sup> Telecommunications Industry Ombudsman Consumer Consultative Forum, 5 November 2002.

<sup>8</sup> Ibid.

<sup>9</sup> Submission from the Energy and Water Ombudsman of NSW.

## People with disabilities

### Community services

4.11 The NSW Law Reform Commission Review of the *Disability Services Act* (DSA), found:

- the DSA has largely failed to achieve equality of access to mainstream services provided by State and Local Government, and also non-government organisations
- at least 30 per cent of non-government disability services and 86 per cent of the Department of Community Services disability services do not conform with the requirements of the DSA
- there is widespread community dissatisfaction with Disability Services Standards as a measure of quality. Concerns were also raised about the effectiveness of self-assessment by services against these Standards, and the need for independent review of service compliance with quality indicators.<sup>10</sup>

4.12 People with Disabilities (PWD) stated that it is constantly receiving reports that the fear of retribution or withdrawal of service acts as a barrier to people with disability exercising their rights. PWD submitted that the parlous state of funding and the lack of alternatives for people discourages them making complaints about services. This particularly relates to personal care or other essential services. According to PWD, there is a lack of legislation to protect complainants from retribution by government or non-government service providers, and a lack of ability or will to highlight and punish such activity.<sup>11</sup>

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<sup>10</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>11</sup> Submission from People with Disabilities.

- 4.13 The Youth Justice Coalition (YJC) submitted that there is a distinct lack of independent advocacy for children with disabilities in the Australian health care system when decisions are made about their treatment.<sup>12</sup>

ADR services

- 4.14 The National Alternative Dispute Resolution Advisory Council (NADRAC) discussion paper stated that access to many dispute resolution services can be highly problematic if not impossible for many people with disabilities. Disputes may be multi-faceted and involve several jurisdictions and different regulatory systems, each of which may incorporate quite different approaches to the issues. This can be confusing and intimidating for people with disabilities. In addition, the thought of confronting one's protagonist in a closed environment in the course of ADR proceedings may be intimidating for some people with disabilities.<sup>13</sup>
- 4.15 The NADRAC discussion paper stated that in the eyes of the non-disabled, the persuasiveness of a story can be substantially diminished if it is delivered with the aid of a signboard, or with a stutter; or by someone whose physical appearance prompts discomfiture or repugnance in others. This can limit their ability to participate in ADR processes.<sup>14</sup>
- 4.16 The NADRAC discussion paper stated that social attitudes to disability affect the self-image and self-esteem of many people with disabilities, and it may be difficult for them to feel entitled to assert their own needs and interests in ADR processes. It stated that there are particular issues arising from the social response to hidden disabilities such as epilepsy and intellectual disability, which may result in a power imbalance in dispute resolution.

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<sup>12</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>13</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 6.38–6.44, referred to by the Commonwealth Attorney-General's Department.

<sup>14</sup> *Ibid*, paragraph 6.61.

- 4.17 The NADRAC discussion paper also referred to situations where a person with a disability is in conflict with someone upon whom they are dependent to some degree for their care and support. In this sort of situation, it stated that it may be extremely difficult for the person with the disability to assert himself or herself sufficiently to take any action for redress. Even if they do, the caregiver is likely to have a power advantage in any dispute resolution proceedings that may ensue.<sup>15</sup>
- 4.18 The discussion paper pointed out that mediation and conciliation require parties to be able to communicate verbally in a group - to be able to hear and observe and understand other people's communications and to participate effectively in those verbal transactions themselves. Participation may also require participants to read printed material before or during the process. For some people with disabilities, these things may be extremely difficult if not impossible.<sup>16</sup>

### *People with an intellectual disability*

- 4.19 The NSW Council for Intellectual Disability stated that there was a fundamental lack of support services for people with an intellectual disability to prevent such people becoming perpetrators or victims of crime.

People with an intellectual disability often lack the support and supervision they need to help them lead lawful and constructive lives.<sup>17</sup>

- 4.20 Several community roundtable participants stated that mechanisms such as the Community Services Commission, Community advocacy groups, the Intellectual Disability Rights Service and People with Disabilities NSW are all limited in scope and resources.<sup>18</sup>

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<sup>15</sup> Ibid, paragraphs 6.63 and 6.65.

<sup>16</sup> Ibid, paragraphs 6.54–6.55.

<sup>17</sup> Submission from the NSW Council for Intellectual Disability.

<sup>18</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

- 4.21 CLC roundtable participants raised the issue that some services make decisions which exclude people with an intellectual disability from the legal process, and discourage people from pursuing their legal options.

They think they are making the right decision for the client, but do so in a patronising way. Community Health Centres are often not helpful in encouraging clients to pursue their legal options. For example, a person with an intellectual disability was removed to a group home when evicted from a Department of Housing flat, when they could have challenged the eviction. The Mental Health Team, Department of Community Services and the Department of Housing made the decision together. The Department of Housing got the other workers on side to make that decision because they didn't want the person as a client any more. Some services exhibit prejudice and disbelief that people with an intellectual disability, or mental health problem, or drug dependency can maintain a tenancy, or look after their children.<sup>19</sup>

- 4.22 The NSW Council for Intellectual Disability submitted that inaccurate and devaluing community attitudes towards people with an intellectual disability can often result in them having difficulty in being believed by government authorities such as the police, or being seen as inherently criminal or unreliable in what they say.<sup>20</sup> According to Phillip French of People with Disabilities (PWD):

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.<sup>21</sup>

- 4.23 This was also noted in roundtable discussions, where some participants commented that people with intellectual disabilities are often looked upon as people with lesser rights, which causes fear in approaching organisations

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<sup>19</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>20</sup> Submission from the NSW Council for Intellectual Disability.

<sup>21</sup> French, P., *Access to Justice for people with disabilities*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

for assistance, because they are scared that people will think that what they are saying is not reliable.<sup>22</sup> According to one contributor, the vulnerability of people with an intellectual disability and the myths surrounding the sexual assault of people with an intellectual disability (i.e. they lie about being sexually assaulted, they are not credible witnesses, or that they are promiscuous) decrease the likelihood of crimes being reported and any reports being acted upon.<sup>23</sup>

- 4.24 The NADRAC discussion paper stated that people with an intellectual disability may be disadvantaged in mediation processes, as a participant needs to be able to negotiate for himself or herself, or with the assistance of an advocate. This requires that they have
- the capacity to know what they want and to communicate this, and the reason they want it, to the other participant (or to their advocate)
  - the capacity to listen to the other person's claims and requirements
  - the capacity to develop options and to make appropriate concessions and to commit themselves to an agreement or to decide to disagree.<sup>24</sup>

### *People with a physical disability*

- 4.25 The NADRAC discussion paper stated that because of physical pain and/or lack of motivation, strength, and energy, a person with a physical disability or condition may be unable to travel any distance, or to talk or sit for any length of time. Accordingly, they may have difficulties in physically accessing advisers and dispute resolution services.<sup>25</sup>

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<sup>22</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>23</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002.

<sup>24</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 6.38–6.44, paragraph 6.57, referred to by the Commonwealth Attorney-General's Department.

<sup>25</sup> *Ibid*, paragraph 6.48.

## **People from culturally and/or linguistically diverse backgrounds**

### *Community services*

- 4.26 Several community legal centre roundtable participants stated that the lack of community workers in newly emerging CALD groups limits the services available to those people:

In the Afghan community, and in other newly emerging CALD groups, there are very few community workers. These groups tend to operate through family networks. They are not well established in the community, and consequently have fewer services available to them.<sup>26</sup>

- 4.27 Community sector roundtable participants expressed concern that newly-arrived refugees, asylum seekers and those applying for Temporary Protection Visas were being denied access to community organisations such as Migrant Resource Centres, which they said are not being permitted under their service agreements to provide assistance to TPV applicants or asylum seekers.<sup>27</sup>

### *ADR services*

- 4.28 The NADRAC discussion paper listed a number of barriers to access ADR services such as mediation and conciliation for CALD people. It stated that mediation may not be culturally neutral, and that notwithstanding the significant advantages of mediation for members of cultural minorities, systemic procedural bias may still exist. It indicated that there may be many elements of standard ADR processes that do not coincide with the cultural practices of minority groups. In terms of the negotiating process in mediation or conciliation, the way in which the participants interact with each other may also be very much culturally influenced.<sup>28</sup>

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<sup>26</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>27</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October, 2002.

<sup>28</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 4.30–4.32, referred to by the Commonwealth Attorney-General's Department.

- 4.29 The NADRAC discussion paper cautioned that unless specifically countered, actual bias at the individual level may be a problem in ADR proceedings involving members of cultural minorities. Additionally, the informality of ADR proceedings may make the display of prejudice by dispute resolution providers more likely. Perceived bias may also be relevant. In an inter-cultural dispute a member of a cultural minority may presume an understanding between a mediator and a participant who are both members of the same cultural group which can be destructive even if unfounded.<sup>29</sup>
- 4.30 The NADRAC discussion paper noted that ADR processes like mediation rely on the participants negotiating their own solution and that effective communication is an essential factor. Accordingly, there is a need for appropriately skilled interpreters. If this does not happen the opportunity for the participants to be heard may be seriously impaired. When an interpreter is used, the process can be very time-consuming and other parties can often become impatient. Even where language difficulties are overcome, cultural barriers may impede communication and prevent fair outcomes. There may also be more subtle communication problems arising from different cultural responses to different situations.<sup>30</sup>
- 4.31 The NADRAC discussion paper further stated that even where participants in ADR processes such as mediation do have the services of a good interpreter, the fact that they are unable to speak directly on their own behalf may make them appear vulnerable and at a disadvantage and may encourage prejudicial views. Low self-esteem and feelings of inferiority may also be problems when a member of a cultural minority group is negotiating directly with an ‘old Australian’.<sup>31</sup>

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<sup>29</sup> Ibid, paragraphs 4.33–4.34.

<sup>30</sup> Ibid, paragraphs 4.37 and 4.40.

<sup>31</sup> Ibid, paragraph 4.44.

4.32 The NADRAC discussion paper also stated that CALD people may not seek recourse to available dispute resolution mechanisms due to lack of accurate advice or translated information about the availability of ADR procedures such as counselling and mediation.<sup>32</sup>

## **Indigenous Australians**

### Community services

4.33 Several roundtable participants raised the following concerns:

- difficulty in accessing libraries for Indigenous people in some areas<sup>33</sup>
- cultural inappropriateness of many organisations winning tenders to deliver services to Indigenous people.<sup>34</sup>

4.34 Several roundtable participants commented on the discouraging and disempowering effect on many Indigenous people of numerous, and often inappropriate referrals between agencies to handle particular complaints.<sup>35</sup>

### ADR services

4.35 The NADRAC discussion paper indicated a number of cultural considerations with mediation and conciliation processes which may present difficulties for Indigenous people. The need for ADR processes to be flexible to take account of these issues is discussed below in paragraph 4.155.<sup>36</sup>

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<sup>32</sup> Ibid, paragraphs 4.47–4.48.

<sup>33</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>34</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>35</sup> Ibid.

<sup>36</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 4.69, referred to by the Commonwealth Attorney-General's Department.

Government bodies/police

- 4.36 One contributor identified that the reluctance of many Indigenous women to report violence perpetrated by their partners/family to police or other organisations, because they do not want their men to be imprisoned. The criminal justice system is often not able to respond to the needs of Indigenous women in such matters.<sup>37</sup>

Complaint-handling bodies

- 4.37 The Public Interest Advocacy Centre (PIAC) study into Indigenous women and discrimination and complaint services in NSW reported that without appropriate and adequate support, Indigenous women found it difficult to access bodies such as the Ombudsman or Industrial Relations Commission for information or advice. It reported that Indigenous women found these processes frightening and difficult to navigate, saying that they needed help to get through to them, both on a practical and an emotional level.<sup>38</sup>
- 4.38 Participants in one consultation roundtable identified the issue of Indigenous people's distrust of complaint-handling bodies which investigate their own service, e.g. police and the perceived lack of independence.<sup>39</sup>

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<sup>37</sup> Cleonie Quayle, Tranby College, Global Alliance for Justice Education Conference, 9–11 December 2002.

<sup>38</sup> *'Discrimination ... have you got all day?'* – Indigenous women, discrimination and complaints processes in NSW, Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women's Legal Centre, December 2001, referred to in consultations with the Public Interest Advocacy Centre.

<sup>39</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

## Children and young people

### *Personal support networks*

- 4.39 The NSW Commission for Children and Young People Inquiry into the best means of assisting children and young people with no-one to turn to ('The CCYP Inquiry') identified that young people who lack supportive relationships, whether they be family, friends, teachers or counsellors, are disadvantaged in seeking assistance. During their inquiry children and young people continually identified 'not being judged' as a key basis for deciding whom to approach for help, and a major factor in forming positive relationships. Also, one of the main reasons why young people may be unwilling to seek help from school counsellors is that they are concerned that their personal problems will not remain confidential. It may also stop them from visiting community-based services. This is a vital concern of children and young people in smaller rural communities and may deter them from approaching mental health, drug and alcohol and sexual health services, even the local doctor.<sup>40</sup>

"I don't feel real comfortable about telling other people my problems. I'm too worried they'll turn their backs on me." (Boy, 14, Young)

"You don't let people know what's going on. It upsets them. If you tell them, they might go and tell other people...." (Boy, 15, Inverell)

"I've got people I could talk to but I wouldn't talk to any of 'em. I'd just keep it to myself. You don't let no-one know your problems." (Boy, 16, Inverell)<sup>41</sup>

- 4.40 The CCYP Inquiry found that when children or young people want to go to their parents for help but feel their intentions or their problem could be misunderstood or misinterpreted, the relationship can falter. Where children

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<sup>40</sup> NSW Commission for Children and Young People, Inquiry into Children with No-one to turn to, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

<sup>41</sup> Ibid.

fear that their parents may judge them, or that their parents will not treat their concerns confidentially, they may decide to stop using their most significant help-giving source.<sup>42</sup>

### Community services

- 4.41 The CCYP Inquiry reported that children and young people often comment on the experience of being ‘bounced’ between different welfare agencies, none of whom are able or appear willing to assist them. It can take numerous approaches to several different sources of informal and formal help before a child or young person gets the assistance they need. Some may find this process too daunting and give up before they get adequate help.<sup>43</sup>
- 4.42 The CCYP Inquiry also reported that children and young people may be reluctant to approach services for assistance because
- a service may appear to be an ‘unfriendly’ place, a ‘scary’ place, or in a place that is too public
  - the young person may live too far away from a service to be able to get to it without adult help
  - not knowing how to make an appointment and having to wait for an appointment
  - the attitudes of service providers may be a significant barrier. For instance young people may be treated harshly or unfairly by those providing the service or have negative experiences at other services
  - children and young people may feel that they cannot relate to a service worker (for example, because of the worker’s age or the way they dress). They may be uncomfortable talking to someone they do not know or do not trust, and may fear the opinions of others if they are discovered getting help.<sup>44</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

4.43 The Commission reported that children and young people in general, and vulnerable children in particular, do not currently come to the attention of the service system until problems are severe, and the support needed is of a crisis nature, expensive and often too late to be effective.

Because they are working at full capacity, they [services] are most likely to see those clients who are able to find the service themselves (or have been referred to it) rather than those who are not able to do so of their own accord but whose need for help may be greater. Without additional resources and staff, services felt that they were unable to reach the most vulnerable and high-risk children and families in their community.<sup>45</sup>

4.44 The CCYP Inquiry also identified the following problems for non-legal support services for children and young people:

- quality and consistency of service, due to difficulties in recruitment and retention of quality staff
- lack of recurrent funding, or short-term funding arrangements for services
- high staff turnover due to burnout
- specialisation of services causing a fragmented service system
- lack of appropriate services to which to refer a child or young person, particularly in rural and remote areas where there are fewer specialist services.<sup>46</sup>

4.45 The Youth Justice Coalition (YJC) also stated that many non-legal support services which are available for children and young people are under resourced and unable to provide a comprehensive service.<sup>47</sup>

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Submission from the Youth Justice Coalition.

### ADR services

- 4.46 The NADRAC discussion paper stated that in ADR processes, children and young people may be disadvantaged by significant power imbalances which can arise where a number of participants are involved in a dispute. For example, child protection disputes can involve the child, the parent or parents, family relatives, the foster parents and staff from two or more community care and government agencies. Despite legislative protections it has been argued that families are not given sufficient voice in the decision-making processes. According to some, child protection staff still retain the greater control over the outcomes of the process. A complicating factor in these disputes is that there is not necessarily an identity of interests between children and their families.<sup>48</sup>
- 4.47 The NADRAC discussion paper stated that there are likely to be significant power imbalances in ADR processes with other conflicts involving adults and children. Large age discrepancies can give rise to cultural differences in communication styles. These differences will further increase the power imbalance and impede both the communication and the negotiations between the participants.<sup>49</sup> The paper stated that teenagers may experience problems trying to negotiate, when they endeavour to handle their family, welfare, employment, accommodation and consumer disputes. They can be exploited because their level of articulateness is not fully developed and they generally lack experience in managing disputes.<sup>50</sup>
- 4.48 The NADRAC discussion paper stated that, because children need protection and support, mediators often fall into the trap of believing they know what is best for the child, or in thinking that the parent or parents know what is best for their child. Frequently children are only consulted after most of the decisions have been made. Instead of explaining to the

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<sup>48</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 5.66, referred to by the Commonwealth Attorney-General's Department.

<sup>49</sup> *Ibid* paragraph 5.67.

<sup>50</sup> *Ibid*, paragraphs 5.71–5.72.

child, in a way in which they can understand, what decisions are going to be made which will affect them, who will be making the decisions, who the decision maker will be talking to, and when the decisions will be made, some dispute resolution practitioners assume children will not want to be involved.<sup>51</sup>

- 4.49 The NADRAC discussion paper commented that even where it is recognised that the views of the child need to be taken into consideration in mediation and ADR, it is often presumed by dispute resolvers that children will not be able to comprehend the issues involved. If a child makes a choice or a decision, there is a strong tendency for it to be assumed they are not mature enough to make such a decision, particularly when the child's decision does not accord with the views of the dispute resolver or other involved adults. What is concerning about such presumptions is that it is 'maturity' which is the criterion used in assessing to what degree their views will be 'heard' in the ADR process.<sup>52</sup>
- 4.50 The NADRAC discussion paper noted that often disputes between parents and teenagers arise because the family is highly dysfunctional, and this can create serious barriers to effective participation in ADR. Even when the family is not dysfunctional, parents and adolescents may have very divergent perceptions of their conflict and how the conflict can be resolved. These divergent views can cause significant difficulties.<sup>53</sup>
- 4.51 The NADRAC discussion paper stated that forms of negative stereotyping of young people can also cause difficulties for young people participating in mediation processes. Examples of such stereotyping include young people being seen as angry, not making an effort to find work, generally only conforming with the ideas and actions of their peers and not taking appropriate advice.<sup>54</sup>

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<sup>51</sup> Ibid, paragraphs 5.59 and 5.61.

<sup>52</sup> Ibid, paragraph 5.62.

<sup>53</sup> Ibid, paragraph 5.70.

<sup>54</sup> Ibid, paragraph 5.73.

### Government bodies/police

- 4.52 The CCYP Inquiry discovered that teenaged young people display a fear, dislike and antagonism of police, arising from experiences or perceptions of having been victimised and harassed. The Commission found that young people's comments suggest that a punitive dynamic underscores many day-to-day interactions between police and young people, particularly high risk young people who tend to spend more time in public spaces.<sup>55</sup>
- 4.53 The Commission recognised that as well as building distrust between the police and young people, unfair treatment by police officers impacts on young people's future relationships with other services. Children and young people have told the Commission that a bad experience with one service is likely to discourage them from approaching others for assistance, contributing to a belief that no-one wants to help them. In this sense, police activity may have an unintended and unforeseen effect on the capacity of other service providers to offer help to vulnerable children and young people.<sup>56</sup>

### Complaint-handling bodies

- 4.54 The NADRAC discussion paper stated that children often do not know where to complain, what process they can use, nor are they able to settle or withdraw their complaint. In fact, children generally are not given the opportunity or the information to be able to make meaningful decisions about the matters which affect them.<sup>57</sup>

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<sup>55</sup> NSW Commission for Children and Young People, Inquiry into Children with No-one to turn to, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

<sup>56</sup> Ibid.

<sup>57</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 5.58, referred to by the Commonwealth Attorney-General's Department.

- 4.55 The CCYP Inquiry also stated that the major barrier for children and young people accessing advocacy assistance is their lack of knowledge about formal complaints systems.<sup>58</sup> Several contributors identified the fundamental lack of knowledge and the dependency on others as significant barriers for children and young people seeking to access complaint-handling bodies.<sup>59</sup> It was recognised by many contributors that children and young people are a largely disenfranchised group, and among the least ‘rights-conscious’ members of society. They are often reliant on adults mediating their access to legal information or advice, whether it be parents, youth workers or teachers. It is rare for a child to access legal or non-legal assistance on their own initiative.<sup>60</sup>
- 4.56 The Youth Action and Policy Association (YAPA) submitted that one of the consequences of children and young people having a limited understanding of their rights is that they feel powerless to respond or complain when something unfair happens to them. According to YAPA, when young people believe that adults have unfairly treated them, many think that they will not be taken seriously or even believed if they complain about what has happened to them. The vast majority are unaware of formal complaints systems and this is a major obstacle to redressing unfair treatment by government services. In any case, most young people are reluctant to complain, formally or otherwise, because they do not feel confident that it will change anything for the better. Some fear it will only make things worse.<sup>61</sup>

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<sup>58</sup> NSW Commission for Children and Young People, *Inquiry into Children with No-one to turn to*, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

<sup>59</sup> Submission from the Youth Action and Policy Association.

<sup>60</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, *Access to Justice Roundtable Proceedings of a Workshop July 2002*, Law and Justice Foundation of NSW, April 2003.

<sup>61</sup> Submission from the Youth Action and Policy Association.

4.57 Fear of the system and potential retribution were also identified as barriers to accessing complaint-handling bodies for children and young people in the submissions from YAPA and the YJC:

The evidence of numerous reports shows that many young people experience harassment and other unfair treatment by NSW police officers; for some this is a regular occurrence, however, young people generally do not complain to the Ombudsman because they think:

- they won't be believed
- that their complaint won't be taken seriously
- they fear further harassment if they complain.<sup>62</sup>

Children in residential care are reluctant to complain about their situation for fear of retribution, or being picked on. It is clearly no use having a system in place if the potential consumers are too scared to use it.<sup>63</sup>

## Elderly people

### Community services

4.58 Centrelink stated there were limited advocacy services available for older people in need and identified a range of issues relating to nominee arrangements and substitute decision making in relation to older people:

- the process of lodging forms to initiate nominee arrangements may be difficult, and processes for cancelling or amending nominee arrangements may not be understood
- there may be difficulties in obtaining customers' signed agreement to nominee arrangements if they are mentally capable but physically unable to sign
- the nominees themselves may not understand Centrelink's requirements or subsequent requests for information.<sup>64</sup>

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<sup>62</sup> Ibid.

<sup>63</sup> Submission from the Youth Justice Coalition.

<sup>64</sup> Submission from Centrelink.

### ADR services

4.59 The NADRAC discussion paper mentioned several factors which present problems for elderly people to participate in ADR processes such as mediation and conciliation. These include:

- *Sense of loss of purpose and low self-esteem amongst elderly people* — Elderly adults, more than at any other time in the life cycle, face a number of losses which include losses in their roles relating to retirement, loss of physical functioning and independence, and death of friends, relatives and spouses. These losses often lead to an erosion of an elderly adult's social identity and self-esteem. Their reaction to their losses, as well as the actual loss of identity and self esteem, may reduce their capacity to participate effectively in ADR because they feel unable to negotiate and often do not have the experience or the skills.<sup>65</sup>
- *Passivity* — A great majority of conflicts in which elderly adults are involved are tolerated, avoided, or suppressed. Even when they do become actively involved elderly people may have difficulties recognising their inability to cope with conflict. As a consequence, they are frequently reluctant to discuss their dispute, downplay it or deny its existence. They will often tolerate discomfort, and regard it as a personal achievement to manage their problems silently, which further adds to their powerlessness.<sup>66</sup>
- *Limited negotiation skills* — The capacity of elderly adults to argue for their own interests or to agree to a particular outcome depends on the extent to which they have the requisite competencies. If they have lost those competencies, they will be unable to articulate their difficulties or negotiate a resolution. Even when they have an

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<sup>65</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 5.81, referred to by the Commonwealth Attorney-General's Department.

<sup>66</sup> *Ibid*, paragraph 5.82.

advocate who represents their interests and does not fall into the trap of believing they know what is best, without those competencies, elderly adults may feel overwhelmed and powerless, and frequently are unable to continue.<sup>67</sup>

- *Stereotyping of elderly people* — Community stereotyping of elderly adults may prevent them from being ‘heard’ in ADR. This is compounded by the attitudes many hold about themselves. For example, some elderly adults do not see themselves as the kind of people who could have a legitimate claim to anything better.<sup>68</sup>
- *Dependency and abuse* — Where frail, elderly adults are in nursing homes, for example, and are in conflict with the management of the nursing home, or, their doctor, they may not have sufficient strength to face those with whom they are in conflict. In these circumstances the barriers may be so great as to prevent resolution of the dispute.<sup>69</sup>

### Government organisations/police

- 4.60 Community sector participants in roundtable consultations stated that elderly people from CALD backgrounds who are victims of ongoing abuse within the family are reluctant to access legal/police assistance for cultural reasons.<sup>70</sup>

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<sup>67</sup> Ibid paragraph 5.83.

<sup>68</sup> Ibid, paragraph 5.79.

<sup>69</sup> Ibid, paragraph 5.84.

<sup>70</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

## People in rural, regional and remote areas

### Community services

4.61 Particular difficulties for people in rural, regional and remote areas accessing non-legal advocacy and support services identified through the consultation process included:

- difficulty in recruiting experienced social workers, teachers, nurses and doctors
- lack of support networks for community workers<sup>71</sup>
- lack of quality advice and advocacy services in rural and remote areas
- conflicts of interest for non-legal support services<sup>72</sup>
- lack of appropriate specialist services to which to refer children/young people<sup>73</sup>
- lack of resources to access Internet and email based non-legal support services.<sup>74</sup>

### ADR services

4.62 The Commonwealth Attorney-General's Family Law Pathways Advisory Group (FLPAG) commented that people in rural and regional areas suffer from a shortage of non-adversarial services (counselling, mediation and contact services), and the added emotional and financial strain of having

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<sup>71</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote Areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>72</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

<sup>73</sup> NSW Commission for Children and Young People, Inquiry into Children with No-one to turn to, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

<sup>74</sup> *In the Loop research project*, Communications Law Centre, May 2001, provided as part of the submission from the Communications Law Centre.

to travel long distances to access services. Pathways were seen as being very limited, often starting with police and magistrates' courts as the first contact points because of violence in the family.<sup>75</sup>

4.63 The NADRAC discussion paper identified the following barriers for people in rural, regional and remote areas accessing ADR processes:

- *Stereotyping*
- *Confidentiality, and privacy* — One of the attractions of ADR processes such as mediation for many people is the comparative privacy. In small rural communities this element may be lacking as it is inevitable that many disputes will be public knowledge well before measures are taken to redress them.
- *Neutrality* — The neutrality of the third party dispute resolver is regarded as an important element of ADR proceedings such as mediation and conciliation. The smallness of a rural community may mean that a dispute resolution service provider may be known to all the parties to a dispute and may have social and other contacts with the disputants in other contexts.
- *Cultural difference* — ADR often needs to be tailored to accommodate a cultural appreciation of the close-knit nature of small geographically remote communities.
- *Power Imbalance* — People in rural communities may also be involved in a range of disputes where there is a significant power imbalance between the participants and significant attitudinal differences involving livelihood or lifestyle. Unless dispute resolvers address these power imbalances, they may encourage outcomes which are unlikely to satisfy the needs and the expectations of less powerful participants.

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<sup>75</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

- *Lack of Knowledge* — Ignorance of the services available, the non-accessibility of such services in view of their central location in a town or community, or, in the worst case, the non-existence of appropriate services, are all factors which may prevent the delivery of fair and appropriate dispute resolution services to people in rural and remote locations.
- *Lack of services* — In rural and remote areas, the demand for dispute resolution services with respect to particular types of disputes will be much lower than in high-density population centres. The range of disputes handled by a single dispute resolver may also be high. As a result, dispute resolvers may need to exhibit great adaptability and to possess high levels of experience. In rural and remote areas, it may be difficult, however, to find highly skilled dispute resolution service providers.<sup>76</sup>

### *Complaint-handling bodies*

- 4.64 The consultation process revealed that people in rural, regional and remote areas encounter difficulties in accessing complaint-handling bodies, as some areas cannot access 1800 numbers because telephone lines are directed via another state (e.g. Broken Hill and surrounding areas).<sup>77</sup>

## **People with low levels of education and literacy**

### *Community services*

- 4.65 Several roundtable participants stated that libraries are of limited use for people with poor literacy: ‘the law is in words and libraries are full of words’.<sup>78</sup>

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<sup>76</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 8.29–8.47, referred to by the Commonwealth Attorney-General’s Department.

<sup>77</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote Areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>78</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

### Complaint-handling bodies

- 4.66 EWON stated that people with literacy, language or numeracy difficulties may have problems reading and understanding energy bills. This may prevent them from identifying billing irregularities or errors and thus prevent complaining to either the provider or an external scheme.<sup>79</sup>
- 4.67 Community legal centre roundtable participants commented that having to lodge complaints in writing to the State Ombudsman's Offices presents a barrier for people with low English literacy skills<sup>80</sup>

## **Gay, lesbian and transgender people**

- 4.68 The NADRAC discussion paper stated that bias (both actual and perceived) together with power imbalance were the most significant barriers for lesbians and gay men in ADR and mediation processes:<sup>81</sup>

Power imbalance may be a difficult issue where homophobia creates an advantage for a heterosexual disputant. Power imbalances between heterosexuals and members of sexual minorities may, moreover, be difficult to detect.<sup>82</sup>

## **Women**

- 4.69 The particular barriers identified by NADRAC for women in relation to ADR processes and directly attributed to gender bias include:
- Individual attitudes to gender, and gendered bias against women – these may be just as likely in ADR dispute resolvers as they are within the formal justice system. Perceptions of bias may also be a barrier.

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<sup>79</sup> Submission from the Energy and Water Ombudsman of NSW.

<sup>80</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>81</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 7.18 and 7.21, referred to by the Commonwealth Attorney-General's Department.

<sup>82</sup> *Ibid.*, paragraphs 7.22–7.24.

- Stereotyping of women by ADR service providers can occur. This may involve expectations of women to be passive, compliant, uncompetitive and caring. If a woman does not comply with this image, and is assertive and competitive in pursuing her interests, she may be disadvantaged in the ADR process.
- ADR processes make demands upon their users - for instance requiring them to meet with the person with whom they are in dispute to assert their needs in relation to that person and to negotiate an agreement. Formal negotiation conceived as a context in which conflict and competition are important, may not be a comfortable place for some women.
- For women in caring roles it may not be possible to spare the time for protracted attempts to resolve disputes. Factors such as the location of a dispute resolution centre, its hours of operation and its proximity to main transport routes may create substantial physical and mental impediments for many carers. The inadequacy of waiting rooms and child-care facilities may also represent a significant barrier.
- In cases involving discrimination and sexual harassment, the person who is the subject of such treatment may not be able to negotiate effectively. ADR processes are often inappropriate in such circumstances.
- In ADR, the participant with the greater resources who can hire a lawyer, afford to wait and to raise more issues will have an advantage over other participants. In terms of earning capacity, this participant is more likely than not to be male.
- A lack of information about the process itself also has the capacity to place a party at a disadvantage. In most cases, access to information is closely related to the amount of money available to obtain professional advice. As a result, women are more likely to be disadvantaged in this regard than men. They may be unable to afford professional advice, or where there are young children, to obtain physical access to professional advice.

- Important areas of anti-discrimination law may remain undeveloped because many disputes are dealt with through conciliation.<sup>83</sup>

## **People living in institutions and people released from institutions**

4.70 Participants in roundtable consultations with community organisations identified a number of issues faced by prisoners in attempting to access non-legal assistance:

- the Official Visitors' Scheme is seen by prisoners as part of Corrective Services and is therefore perceived as lacking independence
- the Inspector General is also seen as part of Corrective Services and is therefore perceived as lacking independence
- non-government organisations generally only provide personal services and usually do not provide advocacy support
- there is no independent advocacy or support service to assist prisoners in relation to the problems associated with inappropriate prisoner reclassification
- advocacy groups such as Justice Action have only restricted access to NSW prisons
- there is a high proportion of the prison population who are intellectually disabled; however, only two disability units exist (Goulburn, Long Bay), and they can only handle small numbers. Also they only assist people who have identified as having an intellectual disability, yet most prisoners with an intellectual disability remain in the mainstream, as they are not identified, or do not want to be identified because of fear of harassment.<sup>84</sup>

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<sup>83</sup> Ibid, paragraph 3.27–3.64.

<sup>84</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

4.71 The Law Society of NSW submitted that there is a lack of support and advocacy services for prisoners and ex-prisoners. The Society has made numerous representations to Government about prison conditions, sentencing options (particularly for vulnerable people), the scope and quality of rehabilitative schemes (particularly for young people and those with a drug addiction), prisoner's access to family and friends, and remand conditions.<sup>85</sup>

## **People on low incomes**

### *ADR services*

4.72 NADRAC highlighted economic bargaining power as a significant factor limiting effective participation in ADR processes. It stated that where there are socioeconomic disparities between the parties to a dispute, there is also likely to be power imbalances between them as a direct result of the superior bargaining power enjoyed by the financially stronger party. For that party, for example, delays may not be critical, any number of issues may be able to be raised, and professional advice and assistance may be readily sought and obtained.<sup>86</sup>

4.73 The NADRAC discussion paper stated that power imbalances may be exacerbated where economically more vulnerable members of society have low self-esteem and relatedly poor presentation skills. Although ADR is generally regarded as an empowering process, low self-esteem may mean that some participants have a defeatist attitude, particularly if they are in dispute with a large corporation or government agency.<sup>87</sup>

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<sup>85</sup> Submission from the Law Society of NSW.

<sup>86</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 9.12, referred to by the Commonwealth Attorney-General's Department.

<sup>87</sup> *Ibid*, paragraph 9.18.

- 4.74 The discussion paper further commented that in many disputes, problems of power imbalance will be further compounded by the fact that the participant who is stronger financially, may be a ‘repeat player’. Those representing them may have done so on many occasions. As a result, the stronger party may not only be familiar with the mediation process, but also with the mediator.<sup>88</sup> The other participants in the proceedings may perceive this familiarity and construe it as bias. Such a perception, even if groundless, can be damaging to the trust between the participants and the third party which is an important element of ADR.<sup>89</sup>
- 4.75 The NADRAC discussion paper commented that to avoid adverse publicity, such as where issues of occupational health and safety or product liability are involved, considerable pressure may be imposed upon a socio-economically weaker party to enter into mediation. For financial reasons, the weaker party may have no real choice in the matter, and may enter a process in which they are at a considerable disadvantage. Sometimes, large businesses may be prepared to offer significant economic incentives to induce a disputant into accepting the private settlement of such a matter.<sup>90</sup>

### Complaint-handling bodies

- 4.76 EWON stated that accessibility for low-income people is an important benchmark for ombudsman schemes. While the provision of 1800 numbers to contact such schemes for assistance improves such accessibility, EWON stated that those low-income customers who have restricted use telephones are not able to access services through free call 1800 numbers.<sup>91</sup>

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<sup>88</sup> Ibid, paragraph 9.15.

<sup>89</sup> Ibid, paragraph 9.35.

<sup>90</sup> Ibid, paragraph 9.29.

<sup>91</sup> Submission from the Energy and Water Ombudsman of NSW.

## **Homeless people**

- 4.77 Several community legal centre roundtable participants noted the reluctance of some non-legal service providers to provide assistance for homeless people who may be perceived as an unattractive client group.<sup>92</sup>

## **Men**

- 4.78 The NSW Law Society Family Law Committee stated that counselling services for parents post separation and the Parenting after Separation programs have been cut, and this has particularly affected men who have separated from their spouse.<sup>93</sup>

## Mechanisms and innovations to assist disadvantaged people

### **General**

- 4.79 Non-legal advocacy and support is available from both government and non-government sources. These types of service are often dependent on volunteers to provide or complement the services offered. Such services include Community Justice Centres, the Public Trustee, complaint-handling bodies and Ombudsman's offices.

### *Community services*

- 4.80 Several roundtable participants suggested that peer education was one way to increase understanding of the law and legal system. The NSW Attorney

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<sup>92</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>93</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

General's Department Violence Against Women Unit 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. Some legal issues will also be covered.<sup>94</sup>

- 4.81 The Inner West Tenants Advice Service identified Migrant Resource Centres, well-informed community workers, social workers, ethnic specific workers, citizens' advocacy and settlement workers as important sources of assistance for disadvantaged people.<sup>95</sup>
- 4.82 Roundtable participants identified community-based advocacy bodies and complaint kits as effective sources of assistance which can help untangle the procedural issues.<sup>96</sup>
- 4.83 Roundtable participants also identified that in some tribunals, 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 between tenants and landlords, real estate agents and government departments.<sup>97</sup>
- 4.84 Participants noted the role that libraries can play in increasing access, by providing a reliable, neutral source of legal information. They referred to the services provided by the Legal Information Access Centre (LIAC) network, and the role of librarians to help guide people through available legal information.<sup>98</sup>

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<sup>94</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>95</sup> Submission from the Inner West Tenants Advice Service.

<sup>96</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>97</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>98</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

*ADR services*

- 4.85 Community Justice Centres (CJCs) have been operating a mediation and conflict management service in NSW since 1980. The statewide service is divided into four regional areas - Northern, Southern, Sydney and Western. The program is committed to providing a free, equitable and local service, and offers a variety of alternative dispute settlement services, including mediation, facilitation, conflict management and pre-mediation. Within the pre-mediation process CJCs are able to analyse the conflict presented and identify what services can be offered and/or what other services may be required.<sup>99</sup>
- 4.86 According to the Department, CJCs ensure that:
- mediators are selected to reflect the demographics of the communities the centre serves, e.g., within the Bankstown mediator panel there are over 14 community languages spoken
  - their pamphlets are available in 20 languages and are available on their website
  - interpreters are provided if required
  - a TTY is available in the Sydney centre for clients who may be deaf or have speech impairments
  - toll free telephone access is available State-wide
  - outreach venues are available for mediation sessions for clients who cannot attend the centres in their own region
  - technologically assisted mediation is available to people who are geographically disadvantaged or may be unable to travel.<sup>100</sup>

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<sup>99</sup> Submission from the NSW Attorney General's Department.

<sup>100</sup> Ibid.

- 4.87 CJs have established working parties to identify the particular needs of certain disadvantaged groups (CALD people, Indigenous people and people with a psychiatric illness) and to implement processes to assist in ensuring better access to their services.<sup>101</sup>
- 4.88 In 2002, 7161 CJC files were opened and of those 2729 went to mediation.
- 4 per cent of the matters received were from Indigenous Australians
  - 12 per cent were identified as CALD and 6 per cent of these reported English as their preferred language
  - 11 per cent identified as being on some form of government benefit
  - 265 of the files opened were regarding young people aged under 20.<sup>102</sup>
- 4.89 Members of the NSW Law Society Family Law Committee identified that early intervention counselling for family disputes, which was formerly court based, is now available through other organisations such as Centacare.<sup>103</sup>
- 4.90 The NADRAC discussion paper stated that ADR processes such as mediation are often praised for their accessibility, their lack of formality, and their ability to give the participants greater control over the content of their dispute. Cost and time considerations persuade many to opt for ADR over the formal justice system.<sup>104</sup> A number of the barriers for specific groups which were identified during the consultations are discussed earlier in this chapter.

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

<sup>104</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, referred to by the Commonwealth Attorney-General's Department.

*Government organisations/police*

- 4.91 The Public Trustee NSW reported that it provides services to disadvantaged people in respect of three identifiable areas of the law, namely Wills, Estates and Trusts. Approximately 10 000 free wills are made with them each year appointing the Public Trustee as executor or co-executor. Approximately 12 per cent are made by clients with assets of less than \$50 000, and 40 per cent of estates have values of less than \$50 000.<sup>105</sup>
- 4.92 The NSW Attorney General's Department advised that the Local Courts are the host agency for the statewide Government Access Program in 20 locations across NSW. This program aims to improve access to government services and provide information through the establishment of 'one-stop shops' for residents in small rural towns. A key role for Government Access Centres is to assist individuals to 'navigate' government services by:
- identifying the appropriate Federal/state/local government agency
  - confirming eligibility criteria
  - assisting people to complete forms/apply for services
  - providing referrals and specific contact details within those agencies.<sup>106</sup>
- 4.93 The Coroner's Court has received funding to establish a counselling and support program for their clients, in recognition of the grief, anxiety, stress and unfamiliarity of coronial procedures experienced by people whose personal circumstances bring them into contact with the coronial system. The service provides counselling, information and ongoing support, and operates in a liaison role to improve communication between the Coroner and family or friends of the deceased.<sup>107</sup>

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<sup>105</sup> Submission from the Public Trustee NSW.

<sup>106</sup> Submission from the NSW Attorney General's Department.

<sup>107</sup> *Ibid.*

- 4.94 Victims Services offer a range of services to support victims of crime, including:
- the 1800 Victims Support Line, available 24 hours a day, 7 days a week
  - the Victims Services and the Victims of Crime websites
  - plain English documents that provide information about the entitlements and services available for victims of crime
  - free counselling under the Approved Counselling Scheme for Victims of violent crime.<sup>108</sup>
- 4.95 Victims Services hosts a number of interagency forums to provide an opportunity for the exchange of information between government and non-government agencies on issues affecting victims of crime. In addition, the Charter of Victims Rights sets out how victims of crime should be assisted by NSW Government Departments and includes rights to be treated with courtesy, compassion and respect and rights to a range of information regarding the criminal justice system.<sup>109</sup>

### Complaint-handling bodies

- 4.96 The increased control of the private sector over utilities and services which were traditionally public, has resulted in the development of industry-based complaint schemes which seek to address concerns in an efficient, inexpensive and informal manner. These include schemes for resolving disputes about insurance companies, investment products, telecommunication services, energy, water, credit unions, insurance brokers and mortgage originators and brokers. Several contributors noted that some complaint bodies can provide useful options in terms of resolving

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

complaints, and assisting in negotiation to resolve simple matters.<sup>110</sup>  
According to Justice Sackville:

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. 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.... 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.<sup>111</sup>

4.97 EWON is an independent dispute resolution scheme for customers of electricity and gas providers and some water providers in NSW. During the 2001/02 financial year, EWON received 4908 complaints. Of these complaints, approximately 30 per cent were from customers who were experiencing difficulty in paying their utility accounts, and who may have been disconnected or facing impending disconnection of supply.<sup>112</sup>

4.98 EWON argued that ombudsman schemes play an important role within the broader justice system by providing an avenue of access to justice by offering redress not available from the Courts and in cases which might not be considered by the Courts. In matters where litigation may be possible but expensive, ombudsman schemes offer an accessible alternative. EWON stated that many Industry Ombudsman schemes also offer an independent forum for resolution of complaints where the customer has been unable to resolve their complaint directly with their provider through an internal complaints mechanism.<sup>113</sup>

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<sup>110</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002; Neave, C., *Some individual perspectives on access to justice*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002.

<sup>111</sup> Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>112</sup> Submission from the Energy and Water Ombudsman of NSW.

<sup>113</sup> *Ibid.*

4.99 EWON referred to the Federal Government “Benchmarks for Industry Based Customer Dispute Resolution Schemes”, which outlines six principles that have been adopted by Industry Ombudsman Schemes. The first principle is accessibility: that the scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers. In keeping with this principle, most of the industry-based complaint schemes

- impose no charge for a complaint to be investigated and resolved
- operate as informally as possible, with many complaints lodged by (free call) telephone
- are designed to be used by customers without representation. Often customers may choose to nominate an advocate to act on their behalf, such as a friend or family member, or a professional advocate such as a community worker or solicitor.<sup>114</sup>

## **People with disabilities**

### *Community services*

4.100 People with Disabilities NSW advised that it is available to represent and promote discussion and consideration of the interests of people with all types of disability.<sup>115</sup>

4.101 The Illawarra Disability Trust Criminal Justice Program has implemented a number of initiatives in response to the issues identified by the NSW Law Reform Commission inquiry into people with intellectual disabilities and the criminal justice system. These include:

- training of Illawarra Police in identifying and communicating with people with an intellectual disability

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<sup>114</sup> Ibid.

<sup>115</sup> Submission from People with Disabilities.

- establishment of a roster of trained volunteers with experience in working with people with an intellectual disability
- the IDAC service, which provides support for people with an intellectual disability who attend court
- the IDEAL service, which is a 24 hour emergency support for people with an intellectual disability who become involved with the police
- training and community awareness.<sup>116</sup>

### ADR services

4.102 According to the NADRAC discussion paper, the overriding advantage of ADR for people with disabilities is its adaptability and its related potential to accommodate their special needs. The consensual nature of ADR is also a very important where ongoing relationships are involved. In addition, the comparative cheapness of ADR may be a consideration for people with disabilities.<sup>117</sup>

### Government organisations/police

4.103 The Public Trustee, in administering estates and trusts, advised that it is available to meet some needs for people with disabilities. It holds funds to assist people with intellectual, psychiatric, acquired or physical disabilities. Staff are available to visit clients in their homes or other accommodation, where physical disability has affected their mobility.<sup>118</sup>

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<sup>116</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002.

<sup>117</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 6.37, referred to by the Commonwealth Attorney-General's Department.

<sup>118</sup> Submission from the Public Trustee NSW.

4.104 The *National Relay Service (NRS) or TTY* (teletypewriter for people who are deaf or have a speech impairment) has information on specific services available to victims of crime with disabilities. Interpreters for the deaf are also available.<sup>119</sup>

## **People from culturally and/or linguistically diverse backgrounds**

### *ADR services*

4.105 The NADRAC discussion paper stated that for many members of minority cultural groups, ADR processes are often more flexible, cheaper, and potentially more culturally sensitive, than the formal justice system. Because ADR processes are often not fettered by the substantive, procedural and evidentiary rules of the formal justice system, considerable modifications can be made to practices and procedures in order to accommodate diversities of culture. For example, it is open to the participants to choose their own mediators (or co-mediators) and to select a venue for the mediation or other ADR process to take place. Likewise, where there are taboos regarding the sorts of matters that can appropriately be discussed in the presence of men or women, mediators and conciliators can be either male or female.<sup>120</sup>

4.106 NADRAC stated that culture plays an important role in determining an individual's understanding of what constitutes a dispute. It also stated that it is important to note who has the power to label an incident or interchange 'a dispute' and when this happens. According to NADRAC, the formal justice system determines the definition of a dispute to the exclusion of

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<sup>119</sup> Submission from the Energy and Water Ombudsman of NSW; Submission from the NSW Attorney General's Department.

<sup>120</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 4.26, referred to by the Commonwealth Attorney-General's Department.

other people's definitions or their ways of resolving disputes. In contrast, ADR can accommodate disputes which may lie beyond the scope of the formal justice system.<sup>121</sup>

### *Government organisations/police*

- 4.107 Several submissions identified the value of interpreting services, the Telephone Interpreter Service in particular, to assist access. Information on telephone interpreter assistance for victims of violent crime is available in English, Arabic, Chinese, Croatian, Farsi, Greek, Hungarian, Italian, Japanese, Korean, Macedonian, Polish, Portuguese, Russian, Serbian, Spanish, Thai, Turkish and Vietnamese.<sup>122</sup>
- 4.108 Victims Services is currently undertaking a coordinated strategy to increase the awareness of victims of crime from non-English speaking backgrounds about their services and entitlements. The strategy includes holding targeted information forums, contact and advertising with ethnic media, the distribution of information to Migrant Resource Centres and other relevant services, and the training and development of staff.<sup>123</sup>
- 4.109 Of the 425 Victims Services counsellors, 85 are able to provide counselling services to victims of crime in languages other than English. Additionally, Victims Services pays for the cost of an interpreter for approved counselling sessions, and some 2000 hours of interpreting were used during 2000/2001.<sup>124</sup>

### *Complaint-handling bodies*

- 4.110 EWON advised that it has undertaken targeted community awareness-raising activities for several CALD communities (Chinese, Vietnamese, Arabic and Italian).<sup>125</sup>

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<sup>121</sup> Ibid, paragraph 4.26.

<sup>122</sup> Submission from the NSW Attorney General's Department.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Submission from the Energy and Water Ombudsman of NSW.

## Indigenous Australians

### ADR services

- 4.111 Aboriginal Community Justice Groups are representative groups of local Aboriginal people who come together to examine crime and offending problems in their communities and develop ways to solve those problems. Community Justice Groups work on a large number of local issues in cooperation with police, courts, probation service, juvenile justice as well as developing crime prevention programs and activities. Groups work from the premise that local Aboriginal people know their own communities and problems best and that more Aboriginal people want to take part in problem solving. Founded on the basis that local community problems are best solved by local community developed solutions, Community Justice Groups recognise that each Aboriginal community is different, so they may look different and do different things in each community.<sup>126</sup>
- 4.112 NADRAC noted that for many Indigenous people, ADR processes such as mediation may overcome some of the discomfort and inappropriateness within the formal justice system felt by Indigenous people.

Its [ADR's] encouragement of ongoing relationships may also be an important element in a small close-knit Indigenous community, where people will have to continue to live closely together, or where relations with a mining company will continue.

It has also been said that mediation is a dispute resolution tool which in many respects complements traditional Indigenous Australian dispute resolution processes. Many Indigenous people state that they had their own practices of mediation in traditional society and today they mediate all the time in community disputes in the accepted style and convention of their particular community. There appears to be comfort in a process which fits more readily into traditional dispute resolution processes than the alien nature of processes inherent in our British system of justice.<sup>127</sup>

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<sup>126</sup> Submission from the NSW Attorney General's Department.

<sup>127</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 4.66–4.68, referred to by the Commonwealth Attorney-General's Department.

- 4.113 NADRAC also commented that ADR processes allow people to ‘define’ their own disputes. This may be particularly useful where disputes between members of Indigenous communities are not justiciable (e.g. quarrels about customary law). In these situations, ADR can provide a dispute resolution forum which would not otherwise be available.<sup>128</sup>

#### *Government organisations/police*

- 4.114 Some roundtable participants acknowledged the role played by some police in rural and regional areas to make efforts to work positively with Aboriginal young people.

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.<sup>129</sup>

- 4.115 The Victims of Crime Bureau has appointed an Aboriginal Project Officer who works in consultation with Aboriginal communities and organisations to develop strategies to improve services to assist Aboriginal victims of crime.<sup>130</sup>

### **Children and young people**

#### *Personal support networks and community services*

- 4.116 The Youth Justice Coalition (YJC) submitted that on the basis of their research, young people seek legal advice from many non-legal services, including youth workers, police, school teachers, parents, school counsellors and social workers, and that these people are often the first point of contact for children and young people seeking legal advice.<sup>131</sup>

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<sup>128</sup> Ibid, paragraph 4.57.

<sup>129</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003

<sup>130</sup> Submission from the NSW Attorney General’s Department.

<sup>131</sup> Submission from the Youth Justice Coalition.

4.117 The Youth Action and Policy Association (YAPA) submitted that the youth sector is essential to young people's access to justice. It stated that youth workers are well positioned to address much of the social disadvantage that contributes to barriers to access to justice, especially given their role as:

- educators of disadvantaged young people
- advocates in many legal and administrative settings
- gatekeepers to specialist services, including legal services.<sup>132</sup>

4.118 The NSW Commission for Children and Young People (CCYP) noted the importance of services which engage in street or outreach work so that children and young people do not have to search to find them. This reflects the fact that children and young people have preferred ways of getting help, which may, for instance, depend on cultural differences. In the latter case employing staff from different cultural backgrounds helps services to be as responsive as possible. The inquiry also stated that some services provide children and young people with a 24-hour emergency contact number to enhance access.<sup>133</sup>

4.119 The CCYP reported a number of strategies for improving access to information and services in places where children and young people frequent as part of their daily lives:

- having information about the Ombudsman in the secondary schools' Legal Studies curriculum
- community education targeted at specific groups such as youth workers
- improving accessibility through the use of common 1800 numbers to direct young people's complaints to the most appropriate body

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<sup>132</sup> Submission from the Youth Action and Policy Association.

<sup>133</sup> NSW Commission for Children and Young People, Inquiry into Children with No-one to turn to, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

- using websites of youth-friendly organisations, such as Reach Out! or Kids Help Line.<sup>134</sup>

4.120 The State Network of Young People in Care (SNYPIC) is a consumer advocacy service for young people in care. SNYPIC is comprised of young people who have themselves been in care and have direct experience of state care and protection services. SNYPIC plays a role in co-ordination, policy development, network development and peer advocacy at a service and state level for children and young people in the care system.<sup>135</sup>

#### *ADR services*

4.121 The NADRAC discussion paper stated that ADR processes are likely to be preferred to the formal justice system where children and young people are involved, given the alienating and intimidating environment of a courtroom. For young people, ADR processes offer greater flexibility, lack of formality, emphasis on direct communication, less cost, speed and consequent reduction of the trauma associated with a power or rights contests. Because of the developmental aspects of adolescence ADR may provide a workable process for assisting parents and their teenage children negotiate resolutions to their ongoing conflicts during the transition from childhood to adulthood.<sup>136</sup>

#### *Government organisations/police*

4.122 The CCYP has found that in emergency situations, children under 12 years would often seek assistance from the police. It reported that some of the at risk young people it interviewed described how police officers, particularly those in Youth Liaison or Police and Community Youth Club

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 5.47–5.49, 5.51, referred to by the Commonwealth Attorney-General’s Department.

(PCYC) roles, were successfully building relationships with them and helping them to make positive changes in their lives. The Commission commended the development of the Police Youth Policy Statement (2001).<sup>137</sup>

4.123 The YJC reported that a number of government departments have appointed specific children's positions to advocate on behalf of children. However, the roles of these positions are restricted to complaints procedures and community education. The Ombudsman's Office has recently appointed a Youth Liaison Officer to deal with children's complaints about government departments. Similarly, the NSW Community Services Commission has appointed a children's liaison officer to develop specific strategies for children's complaints procedures.<sup>138</sup>

4.124 YAPA advised of the recent appointment of the NSW Child Advocate, as part of the NSW Child Protection Council. However as the advocate himself admits, the office is under resourced, has limited powers and therefore limited capacity to act on behalf of children.<sup>139</sup>

4.125 Visitor schemes for Juvenile Justice Centres and Department of Community Services (DOCS) institutions provide avenues for children and young people in institutional care to seek assistance and to formally complain about their situation. The number of official visitors to DOCS funded services has been increased to try and cover the enormous number of people in some form of residential care.<sup>140</sup>

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<sup>137</sup> NSW Commission for Children and Young People, Inquiry into Children with No-one to turn to, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

<sup>138</sup> Submission from the Youth Justice Coalition.

<sup>139</sup> Submission from the Youth Action and Policy Association.

<sup>140</sup> Ibid.

## Elderly people

### ADR services

4.126 The NADRAC discussion paper stated that ADR processes are very attractive to elderly adults because of their flexibility, lack of formality, low cost, emphasis on direct communication, speed and its consequent reduction of the trauma associated with a power or rights contests. They may also be preferred by people in situations of long-term dependence. ADR allows for greater control and ‘ownership’ of the conduct of the proceedings and of the outcomes. Such control can be very empowering for elderly adults who may feel marginalised by society as well as excluded from their families.<sup>141</sup>

### Government organisations/police

4.127 The Public Trustee NSW provides several services to elderly people, including wills and Power of Attorney drafting. Staff are available to visit clients in their homes or other accommodation such as retirement villages, hostels or nursing homes, where frailty or other circumstances have affected their mobility.<sup>142</sup>

4.128 Centrelink provides various services to elderly people and is constantly building community and business sector partnerships to expand these services. In particular, Centrelink provides:

- support services for older people needing legal assistance as a result of a bereavement and changed personal circumstances
- counselling from social workers

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<sup>141</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 5.47, 5.48 and 5.50, referred to by the Commonwealth Attorney-General’s Department.

<sup>142</sup> Submission from the Public Trustee NSW.

- referrals to other support services such as Community Information Services, Legal Aid, Welfare Rights, Public Trustee
- nominee arrangements for customers approaching or reaching retirement age, which assist older people address income support and related matters
- the Centrelink Financial Information Services (FIS) conducts seminars on Estate Planning and Wills, Enduring Power of Attorney, Administration, and Making Wishes Known
- FIS also assists people who have lost a partner and need help to understand and/or reorganise their financial affairs.<sup>143</sup>

## People in rural, regional and remote areas

### ADR services

4.129 The NADRAC discussion paper stated that because ADR processes are potentially cheap, quick, and may assist the maintenance of ongoing relationships, they may be very significant in a small rural community where it may be necessary for disputants to continue to confront each other on a daily basis. If there are the resources available to send ADR service providers to disputants in a rural or remote location, this represents a huge advance on the service which can be provided by the formal justice system. The flexibility of ADR might also mean that other accommodation could be made, for example, arranging a mediation to take place at a time and date that takes account of seasonal work schedules.<sup>144</sup>

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<sup>143</sup> Submission from Centrelink.

<sup>144</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 8.21, 8.24 and 8.25, referred to by the Commonwealth Attorney-General's Department.

*Government organisations/police*

4.130 There are a number of victims of crime services available for people in rural and regional areas, including:

- Three specialist Victims Services officers to assist victims of crime in rural and regional areas. The officers have been appointed to cover regions in the state's far west (based in Dubbo), southeast (Bateman's Bay) and north coast (Port Macquarie). The officers organise the delivery of information, link support and referral services, and raise awareness of services and resources available for victims of crime in these areas.
- Locally based service providers - Victims Services currently has contracts with almost 400 counsellors based throughout the state. Counselling sessions for victims of violent crime are provided at no cost to the client by social workers, psychologists, or psychiatrists in the client's local area.
- Victims Services has two 1800 phone numbers that enable victims of crime in rural and remote areas to obtain telephone counselling, support, information, referrals and access to Victims Services. In addition, Victims Services provides online applications for counselling, and a wide range of information and brochures on the agency and its services on its website.
- Forums and information sessions for service providers throughout NSW.<sup>145</sup>

4.131 The Public Trustee has eight branches in rural and regional areas in NSW, as well as one branch to cater for matters emanating from country areas not directly serviced by a branch. All Clerks of the Local Court act as agents for the Public Trustee.<sup>146</sup>

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<sup>145</sup> Submission from the NSW Attorney General's Department.

<sup>146</sup> Submission from the Public Trustee NSW.

- 4.132 Free 1800 numbers provided by many organisations are useful for people in rural and remote areas.<sup>147</sup>

### Complaint-handling bodies

- 4.133 EWON reported that it has undertaken targeted community awareness raising activities for people living in rural areas. During 2001/02, over one-third of the complaints received by EWON came from customers in rural areas.<sup>148</sup>

## ***Gay, lesbian and transgender people***

### ADR services

- 4.134 The NADRAC discussion paper stated that ADR processes offer lesbians and gay men the possibility of avoiding the problems that they perceive exist with the formal justice system.

There are indicators that lesbians and gay men may be experiencing problems with the formal justice system. Attitudes may be prejudiced; rules may be discriminatory; laws may not provide for gay and lesbian relationships or may distort or misrepresent their experiences. Through the use of ADR, homophobia may be avoided. There may be the possibility of choice of mediator, and an individual mediator (or co-mediators) with appropriate understandings and attitudes may be selected.<sup>149</sup>

- 4.135 The NADRAC discussion paper stated that privacy may also be an attractive feature of ADR for members of sexual minorities. If a dispute leads to litigation it may become difficult for those lesbians and gay men who

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<sup>147</sup> Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in Rural and Remote Areas*, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>148</sup> Submission from the Energy and Water Ombudsman of NSW.

<sup>149</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraphs 7.12–7.13, referred to by the Commonwealth Attorney-General's Department.

wish to do so, to conceal their sexuality. The pressures on their time and the financial and emotional strain of litigation may mean that employers, workmates and family members, for example, might find out what is occurring. Some cases, such as discrimination matters, also frequently receive attention from the press. ADR mechanisms offer the possibility of a private, confidential dispute resolution process. The participants are not required to come out to anyone except the mediator. If mediation, conciliation or another ADR process succeeds, the dispute may be resolved quickly and cheaply. There will be less delay and expense than what would be involved in the court process, with a consequent reduction in stress.<sup>150</sup>

## **Women**

### *ADR services*

- 4.136 The NADRAC discussion paper stated that women may choose mediation because it provides a less formal way of resolving disputes, and also provides dialogue. ADR may seem to provide an attractive option to the formal justice system, which has been criticised for systemic bias against women, both in terms of its outcomes and its procedures. The non-adversarial nature of ADR techniques is often seen as an advantage in disputes characterised as ‘interpersonal disputes’ or disputes involving ‘ongoing family relationships’.<sup>151</sup>

### *Government organisations/police*

- 4.137 The Local Courts Domestic Violence project, initiated in response to the growth in the number of apprehended violence cases over the past decade, recognises the particular needs of victims of violence in seeking to obtain an Apprehended Violence Order. This project seeks to ensure that victims

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<sup>150</sup> Ibid, paragraph 7.15.

<sup>151</sup> Ibid, paragraphs 3.21 and 3.23.

of domestic violence receive appropriate support and referrals to agencies that can assist with immediate financial, housing, crisis counselling and child protection issues.<sup>152</sup>

## **People living in institutions**

4.138 The NSW Law Reform Commission advised that charities which undertake prison visits, such as St. Vincent de Paul, can provide some support to prisoners with an intellectual disability. Teachers, educators and counsellors visiting prisons can also provide support for prisoners with an intellectual disability.<sup>153</sup>

## **People on low incomes**

### *ADR services*

4.139 The comparative cheapness of ADR may make it the only practical dispute resolution option for those of limited financial means.<sup>154</sup>

### *Government organisations/police*

4.140 The Public Trustee NSW advised that its services are focused towards people on low incomes, particularly in relation to the administration of small estates.<sup>155</sup>

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<sup>152</sup> Submission from the NSW Attorney General's department

<sup>153</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>154</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 9.08, referred to by the Commonwealth Attorney-General's Department.

<sup>155</sup> Submission from the Public Trustee NSW.

## Homeless people

4.141 The Legal Counselling and Referral Centre (LCRC) stated that to fully address the needs of homeless people, it is essential to work in tandem with other non-legal advocates, so that issues of housing, health, drug dependency and employment can be addressed in a cohesive and supportive fashion. The LCRC works in cooperation with the other community services offered by St John's Darlinghurst, the local community legal centre, duty solicitors at the local courts, the local doctors, drug and alcohol counsellors, and the local job placement agency. The LCRC recognises that underlying the legal need is a myriad of issues which require the input and expertise of other professionals.<sup>156</sup>

## Suggestions to improve access to non-legal advocacy and support

### General

#### *Community services*

4.142 Many roundtable participants emphasised the importance of community organisations having both legal and non-legal staff, in order to provide a broad range of services which are cohesive and coordinated. The LCRC also supported this model, recommending that such services be established in areas where there are high levels of unemployment, mental health issues and drug and alcohol dependency.<sup>157</sup>

There are, of course, numerous cases of legal services employing non-legal staff, commonly social workers, financial counsellors, youth workers and psychologists. As well, there are also cases of community organisations

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<sup>156</sup> Submission from the Legal Counselling and Referral Centre.

<sup>157</sup> *Ibid.*

employing lawyers to assist in their particular legal matters. 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. Such multi-function and multi-skilled services encourage individuals and groups from the community to maintain long-term and perhaps life-long relationships with the services to the extent that there are inevitably a greater number of reasons for needing to consult them.<sup>158</sup>

4.143 Provision of adequate funding and resources was identified by several submissions as necessary to achieve such integration. In particular, it was reported that funding was needed to

- provide support services at a local level
- increase advocacy support for disadvantaged people
- provide legal outreach in community organisations
- allow legal services to network and coordinate with other community organisations
- provide more services which can help in preventing legal needs.<sup>159</sup>

4.144 The growth of information and assistance services via the Internet and email has highlighted the need for services to assist disadvantaged groups, particularly those in regional and remote areas who are experiencing the Internet and its capabilities for the first time. The Communications Law Centre submitted that these people need services that educate them in the technology and the regulatory structures and laws that apply to this domain.<sup>160</sup>

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<sup>158</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>159</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>160</sup> Submission from the Communications Law Centre.

4.145 Several roundtable participants identified the need for training of intermediaries and community workers as an important avenue to improve the ability of disadvantaged people to access legal information from non-legal support services. It was identified that such training needs to:

- be skills based
- be relevant and targeted to the issues being confronted by a particular community
- mesh legal and social issues together
- be backed up by an ongoing relationship between the organisations providing the training and the community workers receiving the training
- be both practical and educative, requiring collaboration between professional trainers and legal practitioners.<sup>161</sup>

4.146 Participants in the National Pro Bono Workshop recommended:

- the development of partnerships with service providers in other sectors (eg. health service providers)
- the development of a pro bono expert witness register
- the collection of sources/information regarding organisations working with professional bodies, with a view to developing a protocol regarding pro bono services.<sup>162</sup>

### ADR services

4.147 NADRAC stated that there is a need for standards to enhance the quality of ADR practice, to facilitate consumer education about ADR, to build consumer confidence in ADR services, to improve the credibility of ADR

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<sup>161</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>162</sup> Overcoming Barriers - A National Pro Bono Workshop, Sydney, 15 August 2002.

and to build capacity and coherence of the ADR field. NADRAC recommends that ADR service providers adopt and comply with an appropriate code of practice. The NADRAC Report to the Commonwealth Attorney-General stated that standards are needed to address the following issues in particular:

- ensuring informed and effective participation by parties, particularly those groups who may find it difficult to articulate their needs and interests
- identification of which disputes are appropriate for ADR
- accessibility of ADR processes
- fairness in procedure of ADR processes
- termination of the ADR process
- maintenance of confidentiality
- ensuring appropriate level of practitioner competence amongst ADR service providers
- ensuring the quality of ADR processes and to develop processes for compliance and complaints.<sup>163</sup>

#### Government organisations/police

4.148 The North and North West Community Legal Service Inc. recommended that general education about the legal system, while providing an enhanced background level of information, needs to be supported with ‘just in time’ information and education provided by government instrumentalities

When Government instrumentalities (e.g. Police) initiate legal action (in the broadest sense) they do not, as a rule, provide information to the person which could assist them in seeking ‘just in time’ legal education, information or advice. It is left to the individual to seek out assistance and given the

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<sup>163</sup> National Alternative Dispute Resolution Advisory Council, *Report to the Attorney-General – A framework for ADR standards*, April 2001, referred to by the Commonwealth Attorney-General’s Department.

reluctance of many to engage with the system they do not obtain assistance in a timely manner. Placing an obligation on government instrumentalities and those who initiate legal processes to also provide information on support services could act as a form of 'just in time' assistance.<sup>164</sup>

4.149 The Law Society of NSW Family Law Committee strongly recommended the re-establishment and resourcing of the Family Court Voluntary Counselling Service, and the return of adequate resourcing for the Parenting After Separation program.<sup>165</sup>

### *Complaint-handling bodies*

4.150 The Australian Banking Industry Ombudsman, Colin Neave has recommended a number of improvements to complaint-handling systems, including:

- having criteria for decision making which refers to the law, industry practice and fairness
- developing a capacity to demonstrate that they are independent
- providing for maximum accessibility, particularly for disadvantaged groups
- being efficient and effective
- having the confidence of the industry and consumer advocacy groups
- publicising their services widely.<sup>166</sup>

4.151 As many industry and government complaint schemes endeavour to enhance their accessibility by telephone free call numbers, the need to ensure unrestricted access to such numbers was identified by the Energy and Water Ombudsman of NSW:

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<sup>164</sup> Submission from the North and NorthWest Community Legal Service Inc.

<sup>165</sup> Law and Justice Foundation of NSW roundtable with NSW Law Society Family Law Committee, 9 October 2002.

<sup>166</sup> Neave, C., *Some individual perspectives on access to justice*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002.

It is difficult to see the justification for denying restricted use customers access to free call numbers, particularly the free call numbers of organisations like EWON, which offer assistance with problems relating to essential services. There is clearly no financial issue for Telstra, since the organisation with a free call number pays for the call in any case, not the customer.

Perhaps at the very least, the list of numbers which can be rung from a restricted use phone could be expanded beyond 000. The list could include the free call numbers of services which offer assistance to low income customers. These numbers could be approved by the relevant Telstra advisory committee and advised to customers with restricted use phones.<sup>167</sup>

## People with disabilities

4.152 The need for general advocacy support services for people with intellectual disability was identified by several contributors, with two areas mentioned in particular:

- Specialised support needs to be available to parents with an intellectual disability to help them rear their children through childhood and adolescence.<sup>168</sup>
- Qualified support workers need to be available when police are interviewing a suspect or offender who has an intellectual disability. Ideally, it would be very beneficial for both a support worker and a legally trained person to be available to assist a person with an intellectual disability during the police interview.<sup>169</sup>

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<sup>167</sup> Submission from the Energy and Water Ombudsman NSW.

<sup>168</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>169</sup> Cocks, K., *Justice for All or Just for Some?*, 20<sup>th</sup> Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002.

## **People from culturally and/or linguistically diverse backgrounds**

4.153 Some roundtable participants saw it as important to have people from a similar cultural background deliver information to their respective community members (e.g. bilingual health workers, religious leaders, community settlement workers, community leaders). This means that it is important to provide training to ethnic community workers. The ethnic media was also mentioned as a good avenue by which to disseminate information. Migrant Resource Centres were noted as an important way to access non-English speaking communities. However, several participants said that these organisations were often over-stretched due to lack of resources.<sup>170</sup>

## **Indigenous Australians**

### *Community services*

4.154 The Commonwealth's Family Law Pathways Advisory Group (FLPAG) saw the importance of programs and initiatives being developed by local Indigenous communities as an essential ingredient for improved non-legal services to Indigenous people. FLPAG also identified the importance of cultural appropriateness, cross-cultural education, wider availability of interpreters in Indigenous languages and the employment of Indigenous staff in community organisations.

In working with Indigenous people, best practice occurs when programs and initiatives are developed, owned and implemented by local Indigenous communities.

In the self-help pathway, support for family and community decision-making would be improved by the provision of culturally appropriate information.

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<sup>170</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

In the supported pathway, services would be made more culturally appropriate through the employment of Indigenous staff, cross-cultural education and wider availability of interpreters. Consideration of new services and interventions tailored specifically for Indigenous families (for example narrative therapy and Indigenous Family Law conferencing) needs to be ongoing.<sup>171</sup>

### ADR services

4.155 The NADRAC discussion paper commented that ADR processes should be flexible to cater to the particular cultural considerations which may arise in disputes involving Indigenous Australians. Issues which need to be considered in developing such flexibility include:

- The importance of community empowerment, as opposed to individual empowerment.
- The importance of fair mindedness in the mediator, as opposed to neutrality. In many Indigenous Australian societies, neutrality of the mediator is not possible. Rather, it may be imperative for the mediator to be known and respected by the participants to the dispute. Traditionally, respected members of the community play roles in conflict resolution and are considered to have the capacity to treat people fairly and impartially.
- Confidentiality or the privatisation of disputes is rarely possible because of close-bonded living arrangements. In Aboriginal communities there are cultural and practical reasons for families and others interested in a conflict to be aware of negotiations and the outcomes of any mediation session. Those who stand in a kinship relationship to a disputant may be obliged to exert pressure on the disputant to resolve a dispute. Further, the outcome of the mediation and its terms may require many, if not all, community members to be made aware of it.

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<sup>171</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

- While generally it is preferable for a dispute resolution process to be entered into voluntarily, it is not uncommon, in some Indigenous Australian communities, for disputants to be required, pressured or directed by family members, Elders and bodies such as the community council, to attend at mediation, resolve a dispute and conform to their obligations and duties.<sup>172</sup>

## Children and young people

### Community services

4.156 YAPA strongly advocated for well resourced integrated services for young people. In particular, YAPA believes that young people's access to justice is best served by a mix of:

- well resourced legal services, including legal aid, community legal services and Aboriginal legal services, especially children's and youth legal services
- specialist non-legal youth advocates
- enhancements to the existing advocacy work of youth workers.

YAPA recommended greater availability of advocacy services (legal and non-legal) to assist and support young people to complain about their grievances.<sup>173</sup>

4.157 In noting the relationship between children's advocacy and resolving individual and systemic issues affecting young people, including the health, education and juvenile justice systems, the YJC recommended the establishment of a Children's Advocacy Network throughout NSW, based in non-government agencies where there is a high children and youth population, and a level of disadvantage.<sup>174</sup>

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<sup>172</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 4.69.

<sup>173</sup> Submission from the Youth Action and Policy Association.

<sup>174</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

4.158 The YJC submitted that as youth workers, school counsellors and social workers are often the first points of contact for children and young people seeking legal advice, they need a good grounding in legal education. Experienced and skilled youth and welfare workers are able to identify legal needs, advocate for young people and refer to legal services where necessary.

Significant and on-going community legal education is required to develop and maintain these skills. Community legal centre solicitors do their best to provide community legal education to workers in the field but with limited resources they can't reach out to everyone.<sup>175</sup>

4.159 The NSW Commission for Children and Young People (CCYP) stated that services need to build better relationships and use more effective communication with children and young people:

It is important to develop effective ways to communicate with children and young people. The Inquiry into children and young people with no-one to turn to has shown that kids seek help from people they know and trust, that they value confidentiality very highly, and that they are most likely to seek help through everyday activities, rather than through formal "services".

Children, like adults, generally only retain information if it is relevant to their situation when they receive it. The best way to design effective information and support networks, and to identify priorities for law and systemic reform, is to consult directly with children and young people.<sup>176</sup>

4.160 The CCYP has previously made several recommendations to improve access to non-legal advocacy and support for children and young people. These include:

- introducing a degree of informality into formal services, so that they become more friendly, approachable, easier to find, and focused on building relationships
- giving priority to promoting and sustaining long-term relationships in terms of funding and capacity building

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<sup>175</sup> Ibid.

<sup>176</sup> Submission from the NSW Commission for Children and Young People.

- communities building a service system on a pathways framework, across sectors and disciplines, based on intervening early in problems and sustaining appropriate solutions. This involves adopting an interagency approach to service delivery, recognising the most likely avenues taken by young people to access information, and providing long-term funding to services based on a relationship model of service provision.
- creating flexible services staffed by responsive workers, prepared to listen to and take time with children, respect their confidentiality and be able to provide swift and accurate referrals
- investing in research and evaluation, particularly in relation to pathways and early intervention points.<sup>177</sup>

4.161 Recommendations from roundtable participants included:

- using the education system to provide information about the legal system to children and young people
- peer mentoring of legal issues with children and young people. Effective peer mentoring has been carried out with young people in areas such as safe sex, accommodation, lobbying and advocacy. Mentors would need to be supported and possibly paid.<sup>178</sup>

*Government organisations/police*

4.162 The YJC stated that children and young people are reluctant to be identified in proceedings involving complaints against the police. It was suggested that government agencies should develop a system where children and young people could lodge a complaint which can be pursued by an advocate on their behalf without identifying the complainant.<sup>179</sup>

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<sup>177</sup> NSW Commission for Children and Young People, Inquiry into Children with No-one to turn to, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

<sup>178</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>179</sup> Submission from the Youth Justice Coalition.

- 4.163 FLPAG recommended that support for children who are affected by Family Law processes should include relevant and child friendly information, direct services such as counselling, or debriefing about the process, and representation.<sup>180</sup>
- 4.164 Several roundtable participants suggested the development of alternative performance indicators for police that recognise and reward police for not charging alleged young offenders. This might involve envisaging a reduction in arrests, or creative alternatives to arresting offenders, as a measure of performance.<sup>181</sup>

### Complaint-handling bodies

- 4.165 YAPA, the YJC and the NSW Commission for Children and Young People all submitted that one of the major challenges for institutions, departments and agencies is to develop mechanisms by which children and young people can participate in decision making and be heard in processes that directly affect them. All three organisations recommended that consideration be given to complaint-handling bodies adapting their procedures to suit children's needs, including time frames, circumstances and vulnerability.<sup>182</sup>

It is important that complaint-handling bodies continue to work on making their role known to young people and insuring that they are as easily accessible as possible.

It lies also in recognising that kids need problems to be solved quickly, locally, with some adult help and with as little fuss as possible.<sup>183</sup>

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<sup>180</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>181</sup> Alternatives to traditional approaches in Criminal Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>182</sup> *Ibid*; Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition; Submission from the NSW Commission for Children and Young People.

<sup>183</sup> NSW Commission for Children and Young People, Inquiry into Children with No-one to turn to, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the NSW Commission for Children and Young People.

4.166 In relation to the accessibility of the NSW Ombudsman complaints scheme to young people, YAPA also recommended that:

- the Ombudsman investigate complaints from young people directly, rather than the current situation where the Ombudsman oversees police investigating complaints
- greater resources be directed for the Ombudsman to conduct systemic research and advocacy, to complement its existing investigative function.<sup>184</sup>

### **Elderly people**

4.167 Centrelink identified the need for a strong public awareness campaign informing of the changes in the Domestic Violence legislation, in order to enable community services to better assist elderly service users who may be the victims of abuse.<sup>185</sup>

4.168 Centrelink also noted the importance of building a peer support network (including representatives from the Domestic Violence Prevention Unit, Police, Adult Guardian, and Elder Abuse Prevention Services) to liaise, advocate, follow-up and intervene in cases of elder abuse.<sup>186</sup>

### **People in rural, regional and remote areas**

4.169 FLPAG identified the need for expanded dispute resolution services in rural and regional areas. In addition it emphasised the importance of local organisations networking with other services, to assist in better service delivery for people in rural and remote locations.<sup>187</sup>

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<sup>184</sup> Submission from the Youth Action and Policy Association.

<sup>185</sup> Submission from Centrelink.

<sup>186</sup> Ibid.

<sup>187</sup> *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group, July 2001, referred to by the Commonwealth Attorney-General's Department.

### **People with low levels of education and literacy**

- 4.170 Roundtable participants emphasised the need to provide legal training and information to community workers, to improve service delivery to those with low levels of literacy.<sup>188</sup>

### **People living in institutions and people released from institutions**

- 4.171 Roundtable participants stated that there was a need for independent advocacy within prison and a greater resource commitment for post-release support.<sup>189</sup>

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<sup>188</sup> Access to Legal Information Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>189</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

## 5. Participation in Law Reform

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- 5.1 This chapter looks at the accessibility of mechanisms to review and reform the legal system to disadvantaged people. The first part looks at the weaknesses and barriers in existing law reform processes which restrict the ability of disadvantaged groups within the community to effectively participate in these processes, as reported by the consultation process. The mechanisms which have been implemented to address these issues are then explored. Finally, suggested proposals for further initiatives which may enhance access to these processes for disadvantaged people are discussed.
- 5.2 For the purposes of this project, the processes which are dealt with under the title ‘participation in law reform’ include:
- advocacy and consultation undertaken by non-government and community organisations on behalf of disadvantaged groups
  - consultation by law reform commissions and parliamentary committees, including calls for submissions, public hearings/ inquiries, focus group consultations, and so on
  - consultation by professional and industry bodies such as the NSW Law Society and the Bar Association acting in their policy capacity
  - advocacy undertaken by individuals.

## Barriers in existing mechanisms

### General

#### *Capacity of peak, non-Government and community organisations to undertake advocacy*

5.3 The role of community-based advocacy organisations, CLCs and other non-government organisations in undertaking law reform initiatives on behalf of disadvantaged communities was identified by several contributors as an important avenue through which disadvantaged people could participate in systemic and law reform processes. However, several limitations in the efforts of such groups were identified by contributors:

- vilification and marginalisation of advocacy bodies. Rather than being seen as being part of civic democracy, they are now often viewed by Government and the media as ‘the usual suspects’, ‘bleeding hearts’ or ‘slaves to political correctness’, and their views are subsequently given less weight
- some funding agencies have a culture that is over-sensitive to external criticism<sup>1</sup>
- reluctance to encourage and resource effective grass roots advocacy for political reasons<sup>2</sup>
- reflection of the priorities and motivations of the staff of those organisations, rather than their client communities
- adoption of an insular approach to lobbying by some non-government organisations (often only ‘preaching to the converted’)<sup>3</sup>

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<sup>1</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>2</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

<sup>3</sup> Submission from Adam Johnston.

- lack of resources and lack of skills limiting the ability of individuals and community agencies to undertake law reform and lobbying work.<sup>4</sup>

5.4 Submissions and consultations reported that community legal centres and other community organisations face significant challenges in maintaining law reform advocacy and lobbying work as a key ingredient of their service delivery. These challenges include:

- the limited impact of solely lodging submissions to inquiries
- inadequate resources in the face of increased demand for casework services and administrative accountability
- greater emphasis by governments and funding bodies on casework delivery to clients
- the threat of output-based funding formulae
- the threat of competitive tendering and contracting for community legal centre services and community based services
- the threat of community legal centres being forced to regionalise or amalgamate
- the prevailing political climate forcing reactive advocacy rather than being proactive on behalf of disadvantaged communities.<sup>5</sup>

Funding cuts to community organisations make it difficult for such organisations to keep up with issues, to intervene in law reform processes, and also to undertake lobbying activities. Inevitably, service provision takes priority over law reform activities for such groups. Increased demand for casework services can swamp organisations with limited resources, and limit their ability to undertake law reform work.

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<sup>4</sup> Submission from the Inner West Tenancy Advice Service; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>5</sup> Schetzer, L., "Community Legal Centres and the future of law reform", *Alternative Law Journal*, Vol. 23, No. 5, October 1998, pp. 254–7, referred to in consultations with community legal centres; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

For some groups, their funding is conditional on those groups not doing public interest type advocacy, confining those groups solely to casework/service delivery functions (eg. Environmental Defenders Office, Refugee Advice and Casework Service). Case mix service agreements have also caused resourcing difficulties for organisations, making it difficult for them to devote resources to law reform type work.<sup>6</sup>

5.5 In a similar vein, Megan Mitchell, Director of the Australian Council of Social Services (ACOSS) identified a number of tensions within the current program and policy environment which impact on the capacity of organisations to undertake systemic and law reform advocacy. These include:

- unequal power relations in contractual relations with government
- limited alternative avenues for advocacy and strategic dialogue with governments
- the twin, often conflicting agendas of: accountability, outsourcing and competition on the one hand; and community development and capacity building on the other
- limits and capacities of the skill base of the sector (especially in balancing advocacy against the management and accountability roles)
- a range of viability problems that take up time and resources
- the impact of policies that add to the level of demand, especially at the crisis end
- a focus on the individual and local, rather than the structural/systemic, which can lead to patchy, short-term, unsustainable responses.<sup>7</sup>

The community sector has been increasingly exposed to 'market' like conditions in the form of competition and contestability, and partnerships with governments are generally expressed in contractual terms. This has led to a greater inclination by governments to control and command the activities of organisations, including the nature, level and veracity of any advocacy work. The funding relationship is often crucial to an organisation's survival and so compliance with the conditions imposed on them is more likely than not.<sup>8</sup>

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<sup>6</sup> Consultation with Dr. Patricia Randal, Public Interest Advocacy Centre, 16 August 2002.

<sup>7</sup> Mitchell, M., *Clamping down? Restrictions from funders*, NCOSS Advocacy! Conference, 12 March 2003.

<sup>8</sup> Ibid.

5.6 A national study of community sector peak bodies undertaken by the University of Wollongong sought to assess whether peak bodies were systematically being excluded from policy making, and being defunded, because of their advocacy work. The research involved a survey of 142 peak organisations nationally, with a further 89 interviews with peak executives and senior government officers. Some of the findings of the study include:

- more than half of the government-funded peaks claimed to have received funding cut threats from government, and 10 organisations were totally defunded. Nearly 40 per cent of reasons given for threats or funding loss were due to the peaks' political activity
- of the 48 national peaks surveyed and interviewed and 9 others that agreed to an interview, 9 were totally defunded, and 10 were partially defunded, due mainly to their political activity and changes in funding guidelines
- the surveyed peaks' relations with government were largely negative, with less than 20 per cent of them claiming to have an amicable relationship, and nearly 8 per cent of them whose relationship had completely broken down
- 30 per cent of the surveyed peaks said that government perceives them to be 'too critical of government policies', and nearly 18 per cent said that government perceives them to be either 'too radical' or simply 'rabble rousers'
- nine of the national peaks surveyed (two representing the non-English-speaking background sector, two Indigenous peoples peaks, one youth peak, two housing peaks and two specialist consumer peaks) thought that they did not have an amicable relationship with government, and two said that their relationship had completely broken down
- one each of the peaks for non-English speaking background people, Indigenous people, young people, and a housing peak had been totally defunded

- of the 37 state-wide peaks in New South Wales, only 6 (16 per cent) claimed to have an amicable relationship with the State Government, and three (8 per cent) said their relationship had completely broken down
- some NSW state peaks expressed concern that the introduction of tendering in some sector areas, as well as threats of defunding and bureaucratic interference, is a means of reducing advocacy that challenges government by choosing more complaint organisations as funding partners.<sup>9</sup>

5.7 ACOSS also observed that the Federal Government's response to the findings of the Charities Definitions Inquiry may adversely impact upon the capacity of some non-government-funded organisations to undertake advocacy work.

Disturbingly, and in contravention of the Inquiry's recommendations, the Government is proposing a definition of charity that excludes organisations with 'a dominant purpose of changing government policy'. At first reading, this would appear to be a deliberately provocative attack on the advocacy capacity of the non-government sector.<sup>10</sup>

### *The role of the media*

5.8 The role of the media in framing social opinion was identified by several contributors as a significant barrier for disadvantaged people in undertaking law reform. In particular, the role of the media in propagating certain issues was considered a significant obstruction.

The media whips up the law and order agenda; it sensationalises issues, and this is difficult for disadvantaged people and small NGOs to counter. It is easy to get sensational media interest, but much harder to get the type of media interest that is needed. The media is only interested in pursuing issues

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<sup>9</sup> Melville, R., University of Wollongong, School of Social Change, Media and Communication, Arts Faculty, *Delegitimizing the Voice of Peaks – challenges to the advocacy and public policy roles of community-sector peak bodies*, NCOSS Advocacy! Conference, 12 March 2003.

<sup>10</sup> Mitchell, M., *Clamping down? Restrictions from funders*, NCOSS Advocacy! Conference, 12 March 2003.

relevant to disadvantaged people if they can interview a punter, which puts pressure on organisations to ask their service users if they are willing to be interviewed. People may be unwilling to access these services in the future out of a fear of being asked to do this. They should be able to access services without having to think that they will need to field media interest.<sup>11</sup>

5.9 The Australian Law Reform Commission (ALRC) stated that while consultations to ascertain public opinion are a vital ingredient in undertaking law reform initiatives, the role of the media in misinforming the public is problematic.

Public opinion is not always the preferred basis for social action, since the public is sometimes inadequately informed or misinformed about issues surrounding a particular area of law or contentious public policy. On the other hand, it is an important function of a law reform agency to ensure, through the public consultation process, that recommendations for reform are not too far out of step with popular conceptions of morality.<sup>12</sup>

### *Inquiry and commission processes*

5.10 Contributors stated that the level of public participation, involvement and consultation in formal inquiries often varied, with some ‘public’ inquiries being public in name only. Problems noted included:

- processes which are inaccessible for non-lawyers
- a tendency not to use plain language
- inadequate consultation with stakeholders
- limited accessibility to the venues.<sup>13</sup>

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<sup>11</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>12</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>13</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

- 5.11 The ALRC commented that effective public consultation strategies for law reform inquiries are often constrained by lack of time and financial resources. Effective consultations require substantial effort in terms of disseminating information to the community so that community members can provide comment and feedback, particularly if such a consultation is undertaken nationally. It also noted that some stakeholder groups are, by their nature, difficult to consult with.<sup>14</sup>
- 5.12 The ALRC stated that some inquiries do not lend themselves to broad consultation with the general community because their subject matter is specialised, technical or narrow. For example, the ALRC's report on the *Judiciary Act 1903* (Cth), which was tabled in Parliament in 2001,<sup>15</sup> involved many meetings conducted with experts in the field during the course of the inquiry. According to the ALRC, public meetings would not have been useful in grappling with this technical area of 'lawyers' law'.<sup>16</sup>
- 5.13 Several submissions stated that other forms of inquiries such as Royal Commissions, Judicial Inquiries and Special Inquiries provide an opportunity for the community to have input. However, they also noted the processes and procedures in such inquiries often present considerable barriers for disadvantaged people to participate effectively.
- 5.14 One recent example in NSW was the Special Commission of Inquiry established by the NSW Government into the Glenbrook train accident. The Blue Mountains Community Legal Centre (BMCLC) conducted an evaluation of the effects of this process on the victims of the accident. This study aimed to look at the needs of victims of severe trauma when faced with a legal inquiry of this sort and to evaluate the adequacy of services offered by assessing the inquiry's responsiveness to those needs.<sup>17</sup>

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<sup>14</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>15</sup> *Review of the Judiciary Act 1903*, ALRC Discussion Paper 64, Australian Law Reform Commission, December 2000.

<sup>16</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>17</sup> ... *Such a long way – The effects of the Legal Process on the victims of the Glenbrook train accident*, Blue Mountains Community Legal Centre Inc, September 2000, provided by the Blue Mountains Community Legal Centre.

5.15 Some of the issues identified by the evaluation included:

- lack of access to legal representation at the inquiry and lack of awareness of the inquiry
- inappropriate venue to facilitate community participation
- lack of support for the victims
- the inappropriateness of adversarial proceedings for such an inquiry.<sup>18</sup>

*Individual disempowerment*

5.16 The Public Interest Advocacy Centre (PIAC) submitted that rising levels of disillusionment and frustration with political processes is resulting in a perception for many people that the opportunity to participate in political decision making seems increasingly remote. It stated that the development of policy and law is seemingly the preserve of senior public servants, professional lobbyists and expert consultants.<sup>19</sup>

5.17 The Legal Counselling and Referral Centre (LCRC) submitted that for many disadvantaged people, seeking to change the law is of secondary importance to getting their basic access to justice needs met.

Those who are disadvantaged by the system will not participate in law reform until they see their needs for access to justice are being recognised and met. There is a level of distrust among disadvantaged people that everyone is 'out to get them', that despite fine words and intentions, they will continue to be without adequate housing and employment, with poor nutrition and shown little respect by the law enforcement officers, by landlords and by those in authority or with power.<sup>20</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Consultation with Dr. Patricia Ranald, Public Interest Advocacy Centre, 16 August 2002.

<sup>20</sup> Submission from the Legal Counselling and Referral Centre.

- 5.18 EWON submitted that for disadvantaged people, engaging in law reform activities in utilities issues is extremely difficult, due to the highly complex and technical nature of the regulatory issues which impact upon consumers.<sup>21</sup>

### **People with disabilities**

- 5.19 The NSW Law Reform Commission identified commonly used procedures within the law reform process which present difficulties for people with disabilities:

- the presentation of reports in a book form often makes them inaccessible for people with physical or sensory disabilities
- the use of formalised language in discussion papers, background papers, terms of reference and in hearings present barriers to people with an intellectual disability
- limited physical access to some law reform hearings and public forums, particularly those held in rural areas presents difficulties for people with physical disabilities<sup>22</sup>
- the submission process may be particularly difficult for people with an intellectual disability, whose communication skills, such as reading, writing, speaking, comprehending and listening, may be impaired.<sup>23</sup>

- 5.20 The Australian Law Reform Commission (ALRC) acknowledged that some of its processes present problems for people with disabilities:

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<sup>21</sup> Submission from the Energy and Water Ombudsman of NSW.

<sup>22</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>23</sup> NSW Law Reform Commission Research Report 3, *People with an Intellectual Disability and the Criminal Justice System: Consultation*, paragraph 1.10, provided by the NSW Law Reform Commission.

- many of the ALRC past reports which are online are only accessible in a PDF format, limiting accessibility for people with vision impairments
- the expense of arranging AUSLAN interpreters for deaf people at public forums has limited the extent to which ALRC can provide them
- while the ALRC has worked with the Human Rights and Equal Opportunity Commission (HREOC) to utilise and link in to disability networks nationally, it acknowledges that it is difficult to engage people with disabilities who are outside these networks.<sup>24</sup>

5.21 The NADRAC discussion paper states that disputes involving people with disabilities may involve issues of general public interest and importance. The confidential nature of alternative dispute resolution may hide such matters from public concern and limit the development of legal precedent to address such issues.<sup>25</sup>

### **People from culturally and/or linguistically diverse backgrounds**

5.22 The NSW Law Reform Commission identified that formalised language in discussion papers, background papers, terms of reference and in hearings present barriers to people with limited language skills.<sup>26</sup> The Commission stated that people from a non-English speaking background who also have an intellectual disability will find communication doubly difficult.<sup>27</sup>

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<sup>24</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>25</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 6.66, referred to by the Commonwealth Attorney-General's Department.

<sup>26</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>27</sup> NSW Law Reform Commission Research Report 3, *People with an Intellectual Disability and the Criminal Justice System: Consultation*, paragraph 1.10, provided by the NSW Law Reform Commission.

5.23 The Commission stated that participants from CALD backgrounds may encounter particular difficulties in being involved in special inquiries, Royal Commissions and Judicial Inquiries.<sup>28</sup> The evaluation of the effects the Glenbrook Special Commission of Inquiry said that one family, for whom English is their second language, encountered particular difficulties understanding the proceedings.<sup>29</sup>

### **Indigenous Australians**

5.24 The ALRC includes an Indigenous person on the relevant advisory committee for particular inquiries. However, it noted that finding such a person is often difficult, and the processes of the advisory committee may diminish that person's real involvement.<sup>30</sup>

5.25 In its *Managing Justice* Inquiry,<sup>31</sup> which primarily focused on court and tribunal processes rather than issues of access to courts and tribunals, the ALRC mainly conducted consultations with courts, rather than with disadvantaged communities themselves. Accordingly, while some issues relating to Indigenous people arose during the inquiry, there was no strategy to consult with Indigenous communities or groups, and no targeted consultation with Indigenous stakeholders.<sup>32</sup>

### **Children and young people**

5.26 Several submissions and roundtable participants mentioned that children and young people have a marginal role in law reform and development

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<sup>28</sup> Ibid.

<sup>29</sup> ... *Such a long way – The effects of the Legal Process on the victims of the Glenbrook train accident*, Blue Mountains Community Legal Centre Inc, September 2000, provided by the Blue Mountains Community Legal Centre.

<sup>30</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>31</sup> Australian Law Reform Commission, *Report No. 89 – Managing Justice – A review of the federal civil justice system*, January 2000.

<sup>32</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

processes. This is largely attributable to their political marginalisation, and that they are not viewed as a vital constituency by politicians.<sup>33</sup>

Young people have only marginal access to the law - in its making, enforcement, and adjudication. They are disenfranchised until 18 years old; they are rarely consulted or informed about the laws that will affect them, or their perspectives sought to evaluate the impact of laws; they have little opportunity to participate in legal forums; and they rarely enforce their rights or remedy abuses, including those of the system itself, against them.<sup>34</sup>

5.27 The absence of an effective national advocate for children's rights was also seen by the Youth Justice Coalition (YJC) as a major barrier in the ability of children and young people to participate in law reform processes.<sup>35</sup>

## People in rural, regional and remote areas

5.28 Locating law reform commission inquiries, parliamentary inquiries, and special commissions of inquiry in city locations presents access barriers to people in rural, regional and remote areas. The evaluation of the Glenbrook Special Commission of Inquiry stated

Locating the Inquiry in the Supreme Court building meant that those most directly affected by the Inquiry had the furthest to travel. This presented a number of problems to those families of the deceased and other interested members of the local Blue Mountains community attending the Inquiry. It is probable that other people injured in the accident and some members of the local community were also deterred from attending the Inquiry because of the amount of time involved in travel and/or the stress and trauma this travel entailed.<sup>36</sup>

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<sup>33</sup> Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>34</sup> Submission from the Youth Action and Policy Association; Submission from the Youth Justice Coalition.

<sup>35</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>36</sup> ... *Such a long way – The effects of the Legal Process on the victims of the Glenbrook train accident*, Blue Mountains Community Legal Centre Inc, September 2000, provided by the Blue Mountains Community Legal Centre.

## People with low levels of education and literacy

- 5.29 The NSW Law Reform Commission identified that the use of formalised language in discussion papers, background papers, terms of reference and hearings presents barriers to people with limited education levels or limited literacy skills.<sup>37</sup>
- 5.30 The evaluation of the Glenbrook Special Commission of Inquiry observed that the formal procedures adopted in special commissions of inquiry present particular difficulties for people with low levels of education.<sup>38</sup>

## Gay, lesbian and transgender people

- 5.31 The NADRAC discussion paper stated that although the confidential nature of mediation may benefit lesbians and gay men who wish to protect themselves by concealing their sexuality, a high level of reliance on mediation to resolve disputes generally reduces the possibility of achieving change through litigation.<sup>39</sup>

## Women

- 5.32 The National Women's Justice Coalition stated that participation by women in legislative policy and political decision making is limited by the following factors:
- inadequate funding for women's organisations
  - government control of outcomes from 'community consultations'

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<sup>37</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>38</sup> ... *Such a long way – The effects of the Legal Process on the victims of the Glenbrook train accident*, Blue Mountains Community Legal Centre Inc, September 2000, provided by the Blue Mountains Community Legal Centre.

<sup>39</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 7.32, referred to by the Commonwealth Attorney-General's Department.

- lack of participation by Australia's varied cultural and linguistic populations
- insufficient access to decision-makers.<sup>40</sup>

### **People living in institutions and people released from institutions**

- 5.33 Roundtable participants reported that sensationalised media attention on prison issues served to obstruct prison reform. Media stories concerning prisoners are often inaccurate, sensational, or hostile, and this serves to create an unreceptive community and political environment to prison reform issues.<sup>41</sup>

### **People on low incomes**

- 5.34 The NADRAC discussion paper stated that in consumer law and product liability matters, businesses motivated by a desire to avoid adverse publicity, may offer excessive economic incentives to financially disadvantaged people to encourage ADR settlement. Settlement of product liability claims could impede development in the law, or suppress information about public health risks.<sup>42</sup>
- 5.35 Financially disadvantaged people who have a vital interest in judicial inquiries, royal commissions or special commission of inquiries, may be disadvantaged in participating in the processes of such inquiries, by virtue of the expense associated with attending hearings. This was observed in the evaluation of the Glenbrook Special Commission of Inquiry:

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<sup>40</sup> Submission from the National Women's Justice Coalition.

<sup>41</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>42</sup> National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution – Discussion Paper*, Canberra, November 1997, paragraph 9.32, referred to by the Commonwealth Attorney-General's Department.

All families experienced some difficulty in attending the hearing because of the distance they had to travel and the expenses they incurred in order to attend. These expenses included loss of income, child minding, travel and food. Sometimes the lack of funds was prohibitive and some family members were put in the position of not being able to attend proceedings. Neither the families of the deceased or the injured were aware of the opportunity for financial assistance from the Office of Special Assistance during the first part of the Inquiry.<sup>43</sup>

## Existing mechanisms to assist disadvantaged people

### General

#### Advocacy by individuals and community organisations

- 5.36 Using political and law reform forums to achieve lasting change in laws and procedures was identified in one submission as an important avenue which is, from a cost perspective, more accessible for disadvantaged people.

..... one accepts the notion that formal litigation is not a realistic option, in considering how I might solve any legal or para-legal problem. Indeed it could be argued, that any issue [that] is seen as legal can also be viewed from an administrative or political context.

The formal justice system is out of my price range and, there are an ever-growing range of administrative, consultative and political forums in which one may seek redress.<sup>44</sup>

- 5.37 ACOSS director Megan Mitchell asserts that the advocacy functions of community organisations ensure that government is advised as to what is

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<sup>43</sup> ... *Such a long way – The effects of the Legal Process on the victims of the Glenbrook train accident*, Blue Mountains Community Legal Centre Inc, September 2000, provided by the Blue Mountains Community Legal Centre.

<sup>44</sup> Submission from Adam Johnston.

happening on the ground, including the impact of policies and programs. They also have a role in monitoring and policy development.

In the end it is this knowledge, capacity and connection that is most valuable in the advocacy role and will bring greatest influence to bear on the community and on government. When the sector brings this knowledge together and presents cogent arguments for reform that go to the structural causes of disadvantage it is most effective in achieving change. To do this it needs to build and support platforms for strategic dialogue at all levels. The size and significance of the sector helps to legitimise the arguments for this in the eyes of the public and of government.

It is the ongoing process of **participative** democracy, underpinned by strong advocacy, that allows issues for the least well off and the least powerful to emerge and be addressed.<sup>45</sup>

- 5.38 Several community legal centres and community organisations noted that they are involved in various law reform activities on behalf of their respective disadvantaged communities.<sup>46</sup> Some roundtable participants made the comment that it was impossible on a philosophical level to do casework and not also do systemic advocacy. In terms of overcoming the limitations placed on organisations undertaking advocacy by virtue of restrictive clauses in their funding agreements, some community workers indicated that they do extra work, work in their own time and prepare submissions as private individuals rather than on behalf of their organisations, so that such advocacy work can still be undertaken.<sup>47</sup>

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<sup>45</sup> Mitchell, M., *Clamping down? Restrictions from funders*, NCOSS Advocacy! Conference, 12 March 2003.

<sup>46</sup> Submission from the Immigration Advice and Rights Centre; Submission from the North and North West Community Legal Service Inc; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>47</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

### Staff development

- 5.39 To assist individuals and community organisations to participate in effective advocacy, PIAC has developed an advocacy-training program for community organisations. The program seeks to provide skills and practical knowledge as to how the political and legal systems work and where one can intervene to effect change, so that community and consumer representatives can be effective advocates.<sup>48</sup> It is supplemented by the *Working the System* booklet,<sup>49</sup> which aims to equip people with the knowledge and skills to be involved in, and to influence, society's governance.
- 5.40 PIAC provides a training program called *Effective Advocacy Skills and Strategies*, to complement the *Working the System* course. The course is aimed at community workers, activists and campaigners who want to be more active and effective in their advocacy, and who want to pick up some key skills and strategies, such as easy lobbying tips, identifying their skills as a negotiator and getting their story in the media.<sup>50</sup> PIAC also offers a series of short courses on particular issues and strategies related to systemic advocacy.

### Law Reform Commissions

- 5.41 The NSW Attorney General's Department submitted that the processes of the NSW Law Reform Commission allow community members to participate in law reform initiatives. While the Commission only investigates and reports on projects referred to it by the Attorney General, under the Community Law Reform Program members of the community are invited to suggest areas where they believe law reform is required. If a preliminary investigation indicates there is a case for taking up the matter, a background paper is prepared and forwarded to the Attorney General, who then decides whether the matter is appropriate for a detailed inquiry.<sup>51</sup>

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<sup>48</sup> Consultation with Dr. Patricia Ranald, Public Interest Advocacy Centre, 16 August 2002.

<sup>49</sup> Duffy, D., *Working the System – A guide for citizens, consumers and communities*, Public Interest Advocacy Centre, Sydney, 1996, referred to in consultations with the Public Interest Advocacy Centre.

<sup>50</sup> <http://www.piac.asn.au/training/Public.html>

<sup>51</sup> Submission from the NSW Attorney General's Department.

5.42 An integral part of the Commission's research and review of legislation is consultation with interest groups and the community at large. This is often what sets the Commission apart from other agencies that undertake reviews of specific laws.<sup>52</sup>

5.43 The ALRC has also adopted processes which aim to involve the community in its inquiries:

- When it receives a reference, it establishes an advisory committee comprising 15–20 experts from a range of relevant areas and disciplines. These groups meet 2–4 times during an inquiry to provide guidance.
- The ALRC carries out consultations via a three-staged publication strategy:
  - Publication of an introductory issues paper
  - Publication of a discussion paper distributed for further comment and consultation
  - Publication of the final report to be submitted to the Commonwealth Attorney-General.<sup>53</sup>
- The ALRC undertakes targeted consultations and forums with people in the community in between each of these stages.<sup>54</sup>

5.44 The ALRC submits that this staged approach of consultation allows continued public participation as proposals are being developed.

A principal advantage of this staged approach is that it calls forth comment and reaction while ideas are in the process of formulation and before they have crystallised into unshakeable recommendations. Moreover, once

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<sup>52</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002.

<sup>53</sup> It is important to note that not every ALRC inquiry will use all three stages of the publication strategy. This will depend upon the nature of the inquiry.

<sup>54</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

proposals have been formulated and published in a Discussion Paper, the public will have a further opportunity to consider the practicality of concrete reform proposals and to make further submissions.<sup>55</sup>

- 5.45 The ALRC puts out a call for submissions at the same time as the distribution of the introductory issues/consultation paper through media releases, radio interviews, and via its website. The timing of such calls for submissions and corresponding media activity is aimed at maximising public interest, and promoting public forums to be held. The ALRC accepts both written and oral submissions.<sup>56</sup>
- 5.46 In selecting venues for its consultation forums, the ALRC targets particular areas where it considers the most interest will be, and endeavours to select the most convenient and accessible venues available.<sup>57</sup>
- 5.47 In advertising the forums, and also in seeking submissions, the ALRC endeavours to tap into existing networks involved in the particular area which is the subject of the reference, and to utilise existing network resources.<sup>58</sup>
- 5.48 The ALRC provided an example of its consultation processes by outlining the most important components of the public consultation program for its *Inquiry into the Protection of Human Genetic Information*:<sup>59</sup>

A 22-member Advisory Committee has met twice, and the Working Group on Law Enforcement and Evidence, has met once. Public meetings have been held in every state and territory capital as well as in many large regional centres, including Newcastle, Wollongong, Byron Bay, Townsville, Cairns and Alice Springs. More than 140 submissions have been received from individuals and organisations. Approximately 90 targeted consultations with

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<sup>55</sup> Opeskin, B., *Engaging the public – community participation in the genetic information inquiry*, Reform, Issue 80 2002, Australian Law Reform Commission, pp. 53–8, referred to in consultations with the Australian Law Reform Commission.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> *Protection of Human Genetic Information*, ALRC Discussion Paper 66, Australian Law Reform Commission, September 2002.

relevant professionals, organisations, and community groups have been undertaken, involving many hundreds of people. The ALRC has printed 3000 copies of the Issues Paper, 9000 genetics brochures, and 45 000 postcards, which have been widely distributed. In addition, the work of the inquiry has been discussed in at least 130 newspaper articles around Australia, as well as in more than 40 radio interviews and four television interviews. Members and staff have also contributed articles to journals and magazines, delivered conference and seminar papers, and spoken to community organisations and educational institutions.<sup>60</sup>

### Consumer and industry bodies

5.49 EWON identified a number of their programs which seek to engage utility consumers in policy and law reform activities:

- The Electricity Supply (General) Regulation 2001 requires that retailers establish Customer Councils. However, these Councils operate only to advise the company on internal policies and procedures, and to date they have not become actively involved in law reform activities.
- The Utility Consumers Advocacy Program (UCAP) is a discrete policy unit at the PIAC. UCAP plays a key role in advocating on behalf of customers through the law reform process, and has developed the specialist knowledge necessary to participate effectively. In practice UCAP represents the interests of low-income customers.
- Ombudsman schemes such as EWON identify systemic issues in need of law reform and raise them with providers, policy makers and regulators.<sup>61</sup>

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<sup>60</sup> Opeskin, B., *Engaging the public – community participation in the genetic information inquiry*, Reform, Issue 80 2002, Australian Law Reform Commission, pp. 53–8, referred to in consultations with the Australian Law Reform Commission.

<sup>61</sup> Submission from the Energy and Water Ombudsman of NSW.

## People with disabilities

5.50 The NSW Law Reform Commission has incorporated various strategies to ensure people with disabilities are able to participate in its consultation processes, from inclusion on reference groups to attendance at consultations and provision of documents in alternative formats. Examples include:

➤ *The NSW Law Reform Commission Review of the Anti-Discrimination Act 1977 (NSW)*

The Commission prepared a detailed Discussion Paper and also summaries of this paper. It was also placed on audiocassette tape, which was available for borrowing from either the Commission or the Royal Blind Society of NSW. Copies of the paper were available on computer disk. The Commission advertised the option of converting either summaries of the paper, or the whole paper, to Braille.

➤ *Inquiry into People with an Intellectual Disability and the Criminal Justice System*

The Commission sought professional assistance to overcome some of the barriers confronting people with intellectual disability, to be able to consult as widely as possible and to include people who would otherwise not have had a chance to be heard. It adopted specific strategies to seek ideas from people with less familiarity with the law reform process and/or with communication and other difficulties, and for people with an intellectual disability (e.g. allowing extra time for interviews, providing reassurance to the person, encouraging them to ask questions, taking frequent breaks, using simple language and asking open-ended questions). The Commission conducted a series of small group consultations with people with an intellectual disability in Sydney and rural areas, facilitated with the assistance of the Intellectual Disability Rights Service. Plain English material was provided. Professional consultants who were familiar with communication and other difficulties faced by some people with an intellectual disability led the discussions.<sup>62</sup>

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<sup>62</sup> Submission from NSW Law Reform Commission.

➤ *Review of the Disability Services Act 1993 (NSW) and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*

Key features of the Commission's consultation process were:

- contracting out two consultation exercises which focused on people with an intellectual disability. This included a consultation with 8 children who also had a physical disability, and 7 people from culturally and linguistically diverse backgrounds with an intellectual disability.
- consultations with a total of 12 young people in care.
- metropolitan and regional consultations at venues which were wheelchair accessible, and had hearing loops available.
- conducting a total of 20 small focus groups and 7 one-to-one interviews with people with the following disabilities: autism, intellectual disability, physical disability, blind, deaf/hearing impaired, acquired brain injury and psychiatric. They included people from culturally and linguistically diverse backgrounds, and also Indigenous people.
- convening a reference group with representatives from major disability organisations in NSW. This provided valuable insights into appropriate consultation methodologies and other issues relevant to the review.

The review emphasised the need to have consultation papers in different formats. New technology and the availability of websites for data storage have significantly improved accessibility in this regard.<sup>63</sup>

5.51 The ALRC advised that it has a broad commitment to inclusion of, and participation by people with disabilities. Reporting in compliance with

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<sup>63</sup> *Review of the Disability Services Act 1993 (NSW) and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*, Research Report 9, NSW Law Reform Commission, May 1999, provided by the NSW Law Reform Commission.

the Commonwealth Disability Strategy has helped the ALRC to focus its approach to working with people with a disability, and enhancing existing practices and procedures. In particular:

- Providing access to materials on compact disc in Word format as well as from the ALRC website.
- Staff fielding public inquiries have been advised of the ALRC's ability to provide materials in alternative formats. The ALRC advertises this in conjunction with the release of new consultation papers. Further practices for informing the public will be developed following development of guidelines for producing materials in Braille and on audiocassette.
- Giving particular consideration to the needs of people with a disability when organising consultation meetings. Wherever possible, venues with wheelchair access are hired, and sound loops provided. Details of accessibility are featured in advertisements for the public hearings.
- ALRC reports on its website in PDF (portable document format) which are less accessible to people with visual disability are being converted to ASCII format, to enhance access for visually impaired users.<sup>64</sup>

5.52 In its inquiry into the *Commonwealth Disability Services Act*,<sup>65</sup> the ALRC prepared a shorter format of the consultation paper which endeavoured to introduce the issues in plain language. The Commission advertised its availability in Braille, computer disk and audiotape and provided a research survey for completion, which was also available on tape. The public forums were advertised in a targeted manner, particularly through targeted disability networks. For this inquiry the ALRC engaged a consultant with expertise

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<sup>64</sup> Australian Law Reform Commission *Annual Report 2001/02*.

<sup>65</sup> *Commonwealth disability services legislation: the Commonwealth's Disability Services Program and the Commonwealth Rehabilitation Service: review of legislation administered by the Department of Human Services and Health*, 1995, ALRC Discussion Paper 60, Australian Law Reform Commission, 1995.

in engaging with disability groups to run the focus groups. The focus groups included mixes of people with different disabilities, CALD people with disabilities, and Indigenous people with disabilities.<sup>66</sup>

5.53 In its *Inquiry into the Protection of Human Genetic Information*,<sup>67</sup> the ALRC is working closely with HREOC to link with disability networks nationally, to seek assistance in setting up consultation meetings.<sup>68</sup>

### **People from culturally and/or linguistically diverse backgrounds**

5.54 The Refugee Council of Australia has developed a kit which aims to provide essential information to assist individuals and community organisations become more effective advocates for systemic and law reform issues related to refugees and asylum seekers.<sup>69</sup> It contains:

- information about refugees and asylum seekers and the refugee status determination process
- useful hints for those working with refugees and asylum seekers and for those wishing to engage in advocacy
- guidance about complaint mechanisms
- an annotated list of organisations working in the sector
- inter-agency groups that people can join to get more information and to link up with those who are working in the sector.<sup>70</sup>

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<sup>66</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>67</sup> *Protection of Human Genetic Information*, ALRC Discussion Paper 66, Australian Law Reform Commission, September 2002.

<sup>68</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>69</sup> Piper, M., *The Refugee Council and Advocacy*, NCOSS Advocacy! Conference, 12 March 2003.

<sup>70</sup> [http://www.refugeecouncil.org.au/html/current\\_issues/](http://www.refugeecouncil.org.au/html/current_issues/)

## Indigenous Australians

- 5.55 The NSW Law Reform Commission regularly consults with the Aboriginal Justice Advisory Council as to appropriate methods of consultation with Indigenous communities. In addition, the Commission has regularly requested advice from the Aboriginal community for references (e.g. *Sentencing of Aboriginal Offenders*<sup>71</sup>). When reviewing the *Adoption Act* they sought advice from many Aboriginal adoptees (young, adult and adoptive parents) and also from the Aboriginal community, taking into account the sensitivities the issue holds for the community.<sup>72</sup>
- 5.56 In conducting its inquiries, the ALRC often includes an Indigenous person on the relevant advisory committee. It also seeks to consult with relevant Indigenous peak organisations as to appropriate consultation strategies with Indigenous communities.<sup>73</sup>

## Children and young people

- 5.57 The Youth Justice Coalition (YJC) has been active since the late 1980s as an unfunded lobby group which monitors policy and legislative reform, and advocates for the rights and needs of children and young people, particularly those involved in the criminal justice or welfare systems. The YJC is comprised of members from a diverse range of occupations and interests, including academics, lawyers, policy workers, and youth workers. The YJC is involved in law and policy reform and in the promotion of public discussion and awareness of juvenile justice and social justice matters. The YJC has lobbied government and undertaken media work on a range of criminal justice issues affecting young people, such as the development of the youth justice conferencing model and the introduction

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<sup>71</sup> *Sentencing Aboriginal Offenders*, Report 96 (2000), NSW Law Reform Commission.

<sup>72</sup> Consultation with Peter Hennessy, Executive Director, NSW Law Reform Commission, 6 September 2002; Submission from the NSW Attorney General's Department.

<sup>73</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

of the *Young Offender's Act 1997* (NSW). YJC members have also served on the Juvenile Justice Advisory Council since its inception.<sup>74</sup>

- 5.58 In its *Inquiry into Children and the Legal Process*,<sup>75</sup> the ALRC produced a separate edition of the issues paper aimed at children and young people, which included cartoons, and introduced the issues in simpler language. Young people, including those from CALD backgrounds, were included as part of a reference group. This group was largely Sydney based. The ALRC also conducted targeted public forums for young people as part of the Inquiry, and undertook a quantitative research survey of young people.<sup>76</sup>

### **People in rural, regional and remote areas**

- 5.59 The NSW Law Reform Commission notifies all stakeholders that it is willing to accept verbal submissions over the phone, to ensure the inclusion of people in rural and remote areas.<sup>77</sup>
- 5.60 The ALRC has conducted public consultation forums in rural and regional areas for several of its inquiries, including the *Inquiry into the Protection of Human Genetic Information*, *Inquiry into Children and the Legal Process*, and the *Inquiry into Women and the Law*.<sup>78</sup>

### **Gay, lesbian and transgender people**

- 5.61 In conducting its review of the *Property Relations Act*, the NSW Law Reform Commission undertook specific consultations with the gay and lesbian communities to ensure that their issues were addressed.<sup>79</sup>

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<sup>74</sup> Submission from the Youth Justice Coalition.

<sup>75</sup> *Seen and Heard: priority for children in the legal process*, ALRC Report 84, Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, September 1997.

<sup>76</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>77</sup> Submission from the NSW Attorney General's Department.

<sup>78</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>79</sup> Submission from the NSW Attorney General's Department.

## Women

- 5.62 The ALRC has conducted targeted public consultation forums for women for several of its inquiries, including the *Inquiry into the Protection of Human Genetic Information*, *Inquiry into Children and the Legal Process*, and the *Inquiry into Women and the Law*.<sup>80</sup>

## Suggestions to facilitate more effective participation by disadvantaged people

### General

- 5.63 Submissions from community organisations, including community legal centres, emphasised the importance of involvement in law reform and community development work in addition to providing casework services, and that governments should take responsibility for accepting the advocacy role of community organisations. The need for additional funding and resources to allow more effective law reform advocacy was commonly identified.<sup>81</sup>
- 5.64 It was also suggested that in a climate of fiscal restraint, with a pressure to undertake more casework services, it may be appropriate for community legal centres to confine their casework role to those matters which have an impact beyond the individual client. This may entail specialising in areas where demand for casework services regularly appears, so that such cases become the basis of reports and submissions. It may also entail prioritising test cases and cases which are in the wider public interest.<sup>82</sup>

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<sup>80</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

<sup>81</sup> Submission from the Immigration Advice and Rights Centre; Submission from the Inner West Tenancy Advice Service; Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002; Law and Justice Foundation of NSW roundtable with community legal centres at the NSW Combined Community Legal Centres Groups State Conference, 25 November 2002.

<sup>82</sup> Schetzer, L., "Community Legal Centres and the future of law reform", *Alternative Law Journal*, Vol. 23, No. 5, October 1998, pp. 254–257, referred to in consultations with community legal centres.

5.65 Community organisations also recognised the need to become more sophisticated in their law reform and systemic advocacy strategies on behalf of their constituent communities. It was recommended that organisations should develop more sophisticated media strategies, be more sophisticated in meeting with politicians and decision-makers, and be prepared to advocate constructive solutions rather than presenting ambit claims for reform.<sup>83</sup>

5.66 The director of the Social Justice Project at the University of NSW, Professor Julian Disney suggested three areas where community organisations can be more effective and participatory with their systemic advocacy:

- identify networks and alliances in other countries which work on similar issues at an international level
- assist economically disadvantaged people in obtaining greater income and asset security to enhance their ability to participate in systemic reform
- prioritise the taxation system as an area in need of change, as it is a key driving force in other policy areas.<sup>84</sup>

5.67 The NSW Law Reform Commission's review of *the Disability Services Act 1993* (NSW) and *the Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) involved consultation with diverse interest groups within a comparatively short time frame. An evaluation of this consultation strategy identified the following highly valued features and suggestions for change, both for matters involving people with disabilities, and also for matters involving disadvantaged groups generally:

- availability of telephone contact
- use of a person with a disability as a facilitator

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<sup>83</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>84</sup> Disney, J., Systemic and Strategic Advocacy, NCOSS Advocacy! Conference, 12 March 2003.

- use of consultation focus groups and personal consultations
- inclusion of people with developmental disabilities and disabled children in the consultation process
- use of one-to-one discussions in the presence of an advocate for people who have communication difficulties
- making papers available in various formats
- establishment of a reference group of key stakeholders and representatives of the disadvantaged group concerned
- provision of issues papers in a youth friendly format
- improved advertising of seminars
- more plain English advice on the submission process
- more time to prepare submissions
- more information on submission preparation at seminars
- consideration of transport needs of disabled people attending seminars (e.g. taxis cannot be rebooked because seminars are running overtime)
- publicising projects in disability specific magazines, on ethnic television stations and on noticeboards in human services departments, neighbourhood centres, libraries and on other websites
- publishing issues papers in plain English and translating them into community languages, which can be passed onto people from non-English speaking backgrounds
- presenting issues papers in a visual format by pictures, video and disc
- printing issues papers in Braille
- providing adequate time for discussion in seminars and focus groups, to allow all major issues of concern to be dealt with
- conducting more seminars in the outer regions of Sydney, and in rural and regional areas

- using less formal environments for seminars
- conducting separate seminars for people with disabilities and their carers, and for service providers, as mixed audiences could hinder the focus on individual issues of concern
- having facilitators ensure that excessively vocal people do not dominate the discussion
- conducting more focus groups with people from CALD backgrounds.<sup>85</sup>

5.68 The ALRC stated that three key principles underly open and participatory processes in law reform:

- *Confidentiality* – Despite the importance of openness and transparency, it is vital to respect the confidentiality of those who wish to provide information to an inquiry without the fear of public exposure.
- *Flexibility* – The ALRC allows multiple channels of approach. Some submissions may be lengthy written submissions which address every point raised in an inquiry. Other submissions provide the text of detailed published articles, or a university thesis. At the other end of the spectrum, many submissions identify a single concern through a brief handwritten note, a phone call, or a few emailed dot points.
- *Utilising existing networks* - In inquiries that affect individuals or consumers in a direct way, it is sometimes difficult to get the law reform message out to those affected, and to solicit adequate feedback at a grassroots level. The ALRC seeks to utilise existing networks within the broader community, and thereby taps into the experiences of many individuals who might not otherwise be embraced by the public consultation program.<sup>86</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> Opeskin, B., *Engaging the public – community participation in the genetic information inquiry*, Reform, Issue 80 2002, Australian Law Reform Commission, pp. 53–8, referred to in consultations with the Australian Law Reform Commission.

5.69 The ALRC acknowledged that the following initiatives would enhance community participation in their processes:

- more extensive advertising of their inquiries
- allowing more time to have a greater number of focus group meetings
- allowing more time to have a greater number of information sessions
- allowing more time to follow through with specialist networks.<sup>87</sup>

5.70 Dr. Rose Melville, of the School of Social Science, Media and Communication, University of Wollongong, suggests the following as processes which can enhance the role of peak organisations in facilitating involvement of disadvantaged people in policy and reform processes:

- Remove the responsibility for funding peak organisations from specific departments and ministers, to a statutory input. This would include legislative guidelines on funding, collaboration, and an overseeing-arbitration committee comprising all political party-members of the Federal Senate and community representatives.
- Replace the new public management ideologies of efficiency and effectiveness with a “public service culture” operating from a premise of the “public good” with non-party partisanship at its core.

Contracts and new forms of public-sector employment practices have steadily eroded core public service values and principles of good governance practice. The rise of executive dominance of policy-making in recent years and the simultaneous devaluing of the policy advice of the public service have damaged the effective working of the public service. An independent public service based on notions of the “public interest” is essential for the Westminster style of liberal democratic government to work effectively. The establishment and maintenance of extra-parliamentary institutions

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<sup>87</sup> Consultation with the Australian Law Reform Commission, 13 December 2002.

and processes, such as government consultative councils, plays an important part in protecting the rights of disadvantaged citizens in the policy-making process.<sup>88</sup>

- Consider alternative modes of operation for peak organisations, including seeking non-government funding, and also developing closer, cooperative and collaborative relations with the government bureaucracies responsible for funding peaks.<sup>89</sup>

5.71 The evaluation of the Glenbrook Special Commission of Inquiry identified a number of areas where the Inquiry could have enhanced the ability of the community to participate in its processes. These are of relevance to inquiries of a similar nature:

- Hold inquiries in geographic proximity to the community most closely concerned. This would give the whole community greater access to the inquiry process.
- Provide representation to the wider public. This would mean that the Legal Representatives Office (LRO) should have represented organisations such as the Blue Mountains Transport Users and Commuters Association.
- Widely advertise for submissions from the public. Although submissions from the public were called for this was not widely known by the local community.
- Provide specific opportunities for all clients to meet with the LRO before the inquiry begins.
- Use plain English in all communications from the LRO and Special Commission of Inquiry.

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<sup>88</sup> Melville, R., University of Wollongong, School of Social Change, Media and Communication, Arts Faculty, *Delegitimizing the Voice of Peaks – challenges to the advocacy and public policy roles of community-sector peak bodies*, NCOSS Advocacy! Conference, 12 March 2003.

<sup>89</sup> Ibid.

- Hold question and answer forums in the community concerned before and after the inquiry thereby making the legal process more accessible to the local community. They would be able to raise concerns and make suggestions about the inquiry process that would give the inquiry greater positive impact on the local community, as well as making the inquiry process a public one.
- Educate the public regarding inquiries in order for them to better understand the inquiry process and their rights and responsibilities in relation to this process.
- Provide written information to those attending an inquiry. A short written statement posted outside the inquiry outlining the proposed proceedings for the day would be an effective way of keeping the public up to date. The public would also be well served by being informed about proceedings for several days ahead allowing them to make decisions as to how they can best allocate the time available to them to attend.
- Provide feedback to the community as to changes resulting from the Inquiry process. It is important that the public know the effects that an inquiry has on the community.<sup>90</sup>

## **Children and young people**

5.72 The YJC submitted that the appointment, and adequate resourcing, of a National Commissioner for Children would enhance the ability of children and young people to participate in systemic and law reform advocacy at a national level.

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<sup>90</sup> ... *Such a long way – The effects of the Legal Process on the victims of the Glenbrook train accident*, Blue Mountains Community Legal Centre Inc, September 2000, provided by the Blue Mountains Community Legal Centre.

We recognise that a Commissioner would be able to provide an advocacy and monitoring role which would promote and protect the interests of children, but are concerned that if such a position was not properly resourced both in terms of finances and legal powers it would only be able to do so in a very tokenistic way.<sup>91</sup>

- 5.73 The NSW Commission for Children and Young People emphasised that the best strategy to identify priorities for law and systemic reform for children and young people is to consult directly with them.<sup>92</sup>

## Women

- 5.74 The National Women's Justice Coalition recommended an increase in funding to women's organisations to increase participation by women in systemic and law reform, legislative policy making and political decision making.<sup>93</sup>

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<sup>91</sup> Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, December 1996, provided as part of the submission from the Youth Justice Coalition.

<sup>92</sup> Submission from the NSW Commission for Children and Young People.

<sup>93</sup> Submission from the National Women's Justice Coalition.

## 6. Suggested Areas for Further Research

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- 6.1 This chapter considers suggested areas of further research on the issues discussed in the preceding chapters. While participants and contributors were not specifically requested to provide recommendations or suggestions for issues relating to access to justice which are in need of further research, several submissions and roundtable participants took the opportunities presented in the consultation processes to express views on such issues.
- 6.2 The suggestions received can be categorised into four main areas:
- issues relating to particular disadvantaged groups
  - issues relating to accessing particular legal aid services
  - issues relating to court processes, and ADR processes
  - issues relating to the accessibility of law reform processes.

### Issues for disadvantaged groups

#### **Indigenous Australians**

- 6.3 The NSW Attorney General's Department indicated that the barriers to Aboriginal communication in NSW Courts and legal settings has not been fully examined, and that options for improved communication strategies for Indigenous litigants have yet to be fully explored.<sup>1</sup>

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<sup>1</sup> Submission from the NSW Attorney General's Department.

## **Children and young people**

- 6.4 The NSW Commission for Children and Young People has reported a need to research pathways and intervention points for vulnerable children who come into contact with the service system, to provide a substantive basis for more informed policy, funding and service delivery.

Mapping the pathway of a vulnerable child, young person or family through the service system at a regional level would assist in identifying exactly what services are available, which services might be available through alternative means (eg. phone-based or video link-up services), or gaps that cannot be addressed. In each case, regional mapping would bring together the information needed by frontline workers to make appropriate and timely referrals, something they may currently lack.<sup>2</sup>

## **People living in institutions**

- 6.5 Community roundtable participants indicated that there has been very little independent research into the legal needs of prisoners, particularly of a qualitative nature. Most research into prisoners' legal needs is undertaken by the Department of Corrective Services, and is mainly statistically based. They reported that there is very little independent qualitative based research into prisoners' needs, as there is very little opportunity for independent researchers to get access to current prisoners within the NSW prison system.<sup>3</sup>

## **Homeless people**

- 6.6 The Legal Counselling and Referral Centre noted in their submission that there remains a lack of awareness and understanding on the part of the legal profession of the particular needs, barriers and issues which confront

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<sup>2</sup> NSW Commission for Children and Young People, *Inquiry into Children with No-one to turn to*, 2001, <http://www.kids.nsw.gov.au/files>, referred to by the submission from the NSW Commission for Children and Young People.

<sup>3</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

homeless people.<sup>4</sup> Further research into these issues would assist in developing more specialist centres to provide legal assistance to homeless people. An understanding of the related mental health, substance abuse, communication and lifestyle issues, as well as the particular legal issues which confront homeless people, will contribute to more effective service delivery to this significantly disadvantaged group in the community.

### **People facing multiple disadvantage**

- 6.7 As indicated in paragraph 1.46, contributors reported that research into the legal needs of people who face multiple disadvantages is lacking. Multi-disadvantaged groups considered to be in need of further research include:
- young people from culturally and/or linguistically diverse backgrounds
  - young people with disabilities
  - people with intellectual disability or mental illness within the prison system
  - prisoners who are elderly
  - Indigenous people with disabilities
  - Indigenous gays, lesbians and transgender people
  - Indigenous young people in juvenile detention centres<sup>5</sup>
  - people with disabilities from a culturally and/or linguistically diverse background<sup>6</sup>
  - people with disabilities who are gay, lesbian or transgender.<sup>7</sup>

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<sup>4</sup> Submission from the Legal Counselling and Referral Centre.

<sup>5</sup> Law and Justice Foundation of NSW roundtable with community and non-government organisations, 16 October 2002.

<sup>6</sup> Submission from People with Disabilities.

<sup>7</sup> Ibid.

## Issues relating to accessing services

### **Legal aid services**

- 6.8 During the consultation process it was recommended that a detailed study mapping out changes in legal aid services over the last thirty years, including changes in funding, changes in guidelines for eligibility, and changes in services provided should be undertaken.

### **Legal needs assessment**

- 6.9 It was suggested during the consultation process that a study of examples of community-based models of legal needs assessment, where there has been significant community participation in the needs identification methodology, would be a useful research initiative.<sup>8</sup>

### **Pro bono services**

- 6.10 The National Pro Bono Task Force identified the following areas of need for further research into pro bono service provision:
- research into the nature and scope of clients' pro bono needs
  - mapping of client pathways to accessing pro bono legal services.

The aims of such research would be to

- enable the supply of pro bono services to be aligned more closely with demand for those services

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<sup>8</sup> Consultation with Mr. Gordon Renouf, Director, National Pro Bono Resource Centre, 19 September 2002.

- gain a better understanding of the pathways clients utilise to obtain pro bono assistance, and the perceived problems in gaining access, so that steps can be taken to maximise access
- encourage community agencies, who are often the first port-of-call for clients, to think carefully and creatively about how pro bono services can most effectively meet client needs.<sup>9</sup>

### **Unrepresented litigants**

- 6.11 The Law Council of Australia believes that priority should be given to developing research focusing on the effect of unrepresented litigants on service delivery. The aim of such research would be to identify the increase in the cost of running a legal practice, the consequent impact on the profession's ability to provide legal aid and pro bono services, and the consequences of these changes on the growth in the number of litigants in person, and on cost shifting to the Courts.<sup>10</sup>

### **Issues relating to court processes and ADR processes**

- 6.12 The Law Council of Australia believes that further research should be undertaken into case management programs in Australian courts, and specifically as to whether, in what areas, and by how much, case management reduces court costs and time, and litigants' costs. The research should focus on strategies which reduce case costs, and also on issues such as parties' satisfaction with particular forms of case management.

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<sup>9</sup> Report of the National Pro Bono Task Force to the Commonwealth Attorney-General, 14 June 2001, referred to by the Commonwealth Attorney-General's Department.

<sup>10</sup> Abbott, T., President Law Council of Australia, *Courts and the Public*, Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002.

This may require research based on methods such as exit survey questionnaires, and will be particularly relevant to topics such as compulsory or Court-ordered settlement conferences.<sup>11</sup>

Although Judges may be correct when they “get a feel” as to the correct time to order mediation or pressure one or more parties to consider settlement, and although some lawyers are now advocating pre-issue settlement conferences, the most important person to ask about the benefits of this and other case management practices is the client who seeks justice and the client who is paying.<sup>12</sup>

- 6.13 At the AIJA Access to Justice Conference, Justice Sackville noted the evaluation conducted by the Law and Justice Foundation of NSW of the Federal Court’s case management system, the Individual Docket Scheme, stating that the study makes an important contribution to understanding the attributes and drawbacks of the scheme. However, he stated that there is still a need for research to investigate whether the scheme achieves one of its stated objectives, namely a material reduction in costs and improved disposition rates in the Federal Court.<sup>13</sup>
- 6.14 Several roundtable participants stated that there is a need for research into the sustainability of alternative dispute resolution mechanisms, particularly in the case of court referral arrangements. Such research should consider 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 availability of mediators and conciliators.<sup>14</sup>

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Justice Ronald Sackville, *From Access to Justice to Managing Justice: The Transformation of the Judicial Role*, Australian Institute of Judicial Administration Annual Conference, *Access to Justice – the way forward*, 12–14 July 2002.

<sup>14</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003.

## Issues relating to the accessibility of law reform processes

- 6.15 The New South Wales Council of Social Service recommended research in the form of an analysis or audit of Law Reform Commission and parliamentary inquiries over the last ten years to investigate the inclusiveness of their processes for disadvantaged groups or individuals. Such research could investigate the extent to which individuals or non-government organisations participated or made submissions, the use of specialist focus groups for such inquiries, and the methods of direct consultation with particular disadvantaged groups that were utilised in those inquiries. The research could also explore the extent to which the terms of reference and background issues papers were made available in alternative formats, to encourage a greater level of participation by disadvantaged individuals.<sup>15</sup>

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<sup>15</sup> Consultation with Mr. Alan Kirkland, Director, New South Wales Council of Social Service (NCOSS), 5 July 2002.

# Appendix 1

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## List of Submissions, Consultations and Conferences Attended

Submissions were received from the following organisations and individuals:

- Peter Foster-Bunch, Legal Access Services Pty Ltd
- Legal Counselling and Referral Centre, St John's Anglican Church Darlinghurst
- Nolene Baker
- Alan Doyle, Court Support Scheme (Verbal submission)
- New South Wales Law Reform Commission — the following reports were provided by the Commission as part of its submission:
  - NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Consultation*, Research Report 3, Sydney, February 1993
  - NSW Law Reform Commission, *Review of the Disability Services Act 1993 (NSW) and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*, Research Report 9, Sydney, May 1999
  - NSW Law Reform Commission, *Evaluation of the NSW Law Reform Commission's consultation processes in the review of the DSA and CAMA*, Sydney, February 2000
- NSW Council for Intellectual Disability
- Immigration Advice and Rights Centre
- Adam Johnston

- North and North West Community Legal Service Inc
- Communications Law Centre — The following report was provided by the Centre as part of its submission:
  - Communications Law Centre, *In the Loop research project*, May 2001
- Public Trustee New South Wales
- Macquarie Legal Centre
- Energy and Water Ombudsman New South Wales
- People with Disabilities
- Women’s Legal Resource Centre
- Department for Women
- Public Interest Advocacy Centre — the following materials were provided by the centre as part of its submission:
  - Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women’s Legal Centre, *Discrimination ... have you got all day? – Indigenous women, discrimination and complaints processes in NSW*, Sydney, December, 2001
  - Duffy, D., *Working the System – A guide for citizens, consumers and communities*, Public Interest Advocacy Centre, Sydney, 1996
- Australian Plaintiff Lawyers Association
- Youth Action and Policy Association of NSW
- Youth Justice Coalition — the following materials and reports were provided by the Coalition as part of its submission:
  - Youth Justice Coalition, *Kids and the Maze – Submission to the ALRC/HREOC Inquiry into Children and the Legal Process*, Sydney, December 1996
  - Turner, S., *Young People’s Experiences of the Young Offenders Act*, Youth Justice Coalition, Sydney, July 1992
- National Women’s Justice Coalition

- Dennis Bluth, Abbott Tout, Solicitors
- Law Society of NSW
- NSW Attorney General's Department
- Commonwealth Attorney-General's Department — the following materials were provided as part of the Department's submission:
  - Australian Law Reform Commission, *Managing Justice – A review of the federal civil justice system*, Report No. 89, Canberra, 2000
  - Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, Report to the Commonwealth Attorney-General, Canberra, July 2001
  - Human Rights and Equal Opportunity Commission, *Accessibility of Electronic Commerce and New Service and Information Technologies for Older Australians and People with a Disability*, Report, Sydney, March 2000
  - National Alternative Dispute Resolution Advisory Council, *Report to the Attorney General – A framework for ADR standards*, Canberra, April 2001
  - National Alternative Dispute Resolution Advisory Council and Commonwealth Attorney-General's Department, *A fair say – Managing Differences in Mediation and Conciliation – A guide for all involved*, 1999
  - National Pro Bono Task Force, *Report to the Commonwealth Attorney-General*, Canberra, 14 June 2001
- Inner West Tenants Advice Service
- NSW Commission for Children & Young People — the following report was provided by the Commission as part of its submission:
  - New South Wales Commission for Children and Young People, *Inquiry into Children with No-one to turn to*, 2001, <http://www.kids.nsw.gov.au/files>

- Blue Mountains Community Legal Centre — the following report was provided by the centre as its submission:
  - Blue Mountains Community Legal Centre Inc, ... *Such a long way – The effects of the Legal Process on the victims of the Glenbrook train accident*, Sydney, September 2000
- Centrelink
- Coalition of Aboriginal Legal Services
- Queensland Children Services Tribunal
- NSW Legal Aid Commission

Consultations were conducted with the following individuals on behalf of their respective organisations:

- Ms. Janet Loughman, Chairperson, New South Wales Combined Community Legal Centres Group, 29 April 2002
- Ms. Rugmini Venkatraman, Regional Violence Prevention Specialist, NSW Attorney General's Department, 13 May 2002
- Ms. Donna Bain, Manager, Policy and Research, Law Society of New South Wales, 31 May 2002

As a result of this consultation and subsequent roundtable consultation meetings with Law Society of NSW Committees, the Society provided and referred to the following reports for consideration in this process:

- Law Society of New South Wales, *Access to Justice – Final Report*, Sydney, December 1998
- Law Society of New South Wales, *National Competition Policy – A discussion paper*, Sydney, March 2002
- Law Society of New South Wales, *Self-Represented Litigants – position paper*, Sydney, May 2002.

- Mr. Mark Burdack, Director, LawAccess, 25 June 2002
- Ms. Brigid Inder, Director, New South Wales Combined Community Legal Centres Group, 26 June 2002
- Mr. Phil O'Donoghue, Deputy Director, Australian Council of Social Service, 2 July 2002
- Mr. Alan Kirkland, Director, New South Wales Council for Social Service, 5 July 2002
- Mr. James McDougall, Director, National Association of Community Legal Centres, 8 July 2002
- Dr. Patricia Ranald, Principal Policy Officer, Public Interest Advocacy Centre, 16 August 2002
- Ms. Julia Harraksin, Co-ordinator, Disability Strategic Plan, NSW Attorney-General's Department, 19 August 2002
- Mr. Brendan Thomas, Executive Officer, Aboriginal Justice Advisory Council, 26 August 2002
- Mr. Tony Westmore, Director, Indigenous Law Centre, 28 August 2002
- Mr. Peter Hennessy, Executive Director, New South Wales Law Reform Commission, 6 September 2002
- Ms. Andrea Durback (Director), Mr. Simon Moran (Principal Solicitor), Ms. Alexis Goodstone (Solicitor) and Ms. Sandra Stevenson (Solicitor, Public Interest Law Clearing House), Public Interest Advocacy Centre, 9 September 2002
- Mr. Gordon Renouf, Director, National Pro Bono Resource Centre, 11 September 2002
- Ms. Lani Blackman, Manager, Policy and Secretariat, Australian Law Reform Commission, 13 December 2002

As a result of this consultation, the Commission provided and referred to the following reports and materials for consideration in this process:

- Australian Law Reform Commission, *Multiculturalism and the law*, Report No. 57, Canberra, 1992
- Australian Law Reform Commission, *Equality before the Law: Justice for Women* Report No. 69, Canberra, 1994
- Australian Law Reform Commission, *Seen and Heard: Priority for children in the legal process*, Report No. 84, Canberra, 1997
- Australian Law Reform Commission, *Managing Justice – A review of the federal civil justice system*, Report No. 89, Canberra, 2000
- Opeskin, B., *Engaging the public – community participation in the genetic information inquiry*, Australian Law Reform Commission, Reform, Issue 80 2002, Sydney

The following roundtable consultation meetings were conducted as part of this stage of the project:

- National Association of Community Legal Centres (as part of the National Community Legal Centres Conference), 3 September 2002
- New South Wales Chamber Magistrates, 23 September 2002
- Law Society of NSW Family Law Committee, 9 October 2002
- NCOSS Federation of non-government associations, 16 October 2002
- Law Society of NSW Regional Presidents, 24 October 2002
- Law Society of NSW Law and Litigation Committee, 29 October 2002
- NSW Combined Community Legal Centres (as part of the NSW CCLCG State Conference), 27 November 2002

Participating organisations in the abovementioned roundtable consultations for NCOSS Federation of non-government associations and the NSW Combined Community Legal Centres included:

- Canterbury Bankstown Migrant Resource Centre
- CRC Justice Support
- People With Disabilities
- NSW Council on Intellectual Disability
- Tranby College
- Association of Children's Welfare Agencies
- Mental Health Co-ordinating Council
- NSW Users & Aids Association
- Multicultural Disability Advocacy Association of NSW
- Domestic Violence Advocacy Service
- Kingsford Legal Centre
- Marrickville Community Legal Centre
- Macquarie Legal Centre
- Warringa Baiya Aboriginal Women's Legal Centre
- Albury-Wodonga Community Legal Service
- Environment Defenders Office
- Inner West Tenants Advice Service
- Shoalcoast Community Legal Centre
- Redfern Legal Centre
- North and North West Community Legal Centre
- Blue Mountains Community Legal Centre
- Hunter Community Legal Centre
- Disability Discrimination Legal Centre
- Arts Law Centre of Australia

Relevant conferences and forums attended as part of the consultation strategy:

- Australian Institute of Judicial Administration Annual Conference, Access to Justice — The Way Forward, Brisbane, 12–14 July 2002
- NCOSS Scales of Justice Conference, Sydney, 24–25 July 2002
- Overcoming Barriers — A National Pro Bono Workshop, Sydney, 15 August 2002
- NCOSS Forum: The State We're In, Sydney, 21 August 2002
- National Community Legal Centres Conference, Melbourne, 2–4 September 2002
- Telecommunications Industry Ombudsman Consumer Consultative Forum, Sydney, 5 November 2002
- Global Alliance for Justice Education Conference, Sydney, 9–11 December 2002
- NCOSS Advocacy! Conference, Sydney, 12 March 2003

# Appendix 2

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## Law and Justice Foundation of NSW Access to Justice Workshop NSW Parliament House, 10 July 2002

### Workshop Program

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**9.00–9.25**     *Introduction*

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*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 Workshop*

*Louis Schetzer, Senior Project Manager, Law and  
Justice Foundation of NSW*

*The Law Foundation's Legal Needs Project*

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**9.25–9.45**     *Opening Address*

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*Justice Ronald Sackville, Federal Court of Australia*

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**10.00–11.00**     *Perspectives from the Community*

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*CHAIR: Julian Disney, Director, Social Justice Project*

*Joanne Selfe, Indigenous Consultant*

*Barry Fowler, Centre for Community, Outback NSW*

*Philip French, Director, People with Disabilities*

**11.00–12.00**    *Options for Reform*

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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*

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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*

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

General Feedback and Discussion

*Julian Disney, Director, Social Justice Project*

Summary of issues

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## Workshop Participants

Hawa Arya	Law and Justice Foundation of NSW
Jenny Bargaen	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, Outback 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
Louis 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 3

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## Abbreviations

ACOSS	Australian Council of Social Services
ADB	Anti-Discrimination Board
ADR	Alternative Dispute Resolution
ALRC	Australian Law Reform Commission
APLA	Australian Plaintiff Lawyers Association
ATSIVA	Aboriginal and Torres Strait Islander Veterans Advocacy Service
ATSIFAM	Aboriginal and Torres Strait Islander Family Mediation
AVO	Apprehended Violence Orders
BMCLC	Blue Mountains Community Legal Centre
CALD	Culturally and/or linguistically diverse
CCYP	Commission for Children and Young People
CJC	Community Justice Centre
CLC	Community legal centre
COALS	Coalition of Aboriginal Legal Services
CRC	Community Relations Commission
DOCS	Department of Community Services
DSP	Disability Strategic Plan

DVAS	Domestic Violence Advocacy Service
EWON	Energy and Water Ombudsman of NSW
FLPAG	Family Law Pathways Advisory Group
HREOC	Human Rights and Equal Opportunity Commission
IARC	Immigration Advice and Rights Centre
LAC	Legal Aid Commission
LCRC	Legal Counselling and Referral Centre
LIAC	Legal Information Access Centre
LRO	Legal Representatives Office
MERIT	Magistrates Early Referral Into Treatment
MHAS	Mental Health Advocacy Service
NADRAC	National Alternative Dispute Resolution Advisory Council
N&NWCLS	North and North West Community Legal Service
NCOSS	New South Wales Council of Social Services
NCYLC	National Children's and Youth Law Centre
NWJC	National Women's Justice Coalition
NSWLRC	New South Wales Law Reform Commission
PCYC	Police and Community Youth Club
PIAC	Public Interest Advocacy Centre
PWD	People with Disabilities
RACS	Refugee Advice and Casework Service
SNYPIC	State Network for Young People in Care

TAS	Tenancy Advice Service
TIO	Telecommunications Industry Ombudsman
TIS	Telephone Interpreter Service
TTY	Teletypewriter
TOR	Terms of Reference
UCAP	Utility Consumers Advocacy Program
VAS	Veteran's Advocacy Service
VAWSU	Violence Against Women Specialist Unit
WLRC	Women's Legal Resource Centre
WOW	Women on Wheels
YAPA	Youth Action and Policy Association
YJC	Youth Justice Coalition

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Australian Law Reform Commission, *Review of the Judiciary Act 1903*, Discussion Paper No. 64, Canberra, 2000.

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Fowler, B., Manager Broken Hill Community Inc., *Access to Justice in rural and remote areas*, Law and Justice Foundation of NSW Access to Justice Workshop, Sydney, 10 July 2002.

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Funston, R., Legal Aid NSW, *Accessible and Equitable Information and Advice*, Law and Justice Foundation of NSW Access to Justice Workshop, Sydney, 10 July 2002.

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- Law Society of New South Wales, *National Competition Policy — A discussion paper*, Sydney, March 2002.
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- National Pro Bono Task Force, *Report to the Commonwealth Attorney-General*, Canberra, 14 June 2001.

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### *Legal Information*

Email Law: a Planning Guide for Delivery of Free Legal Assistance via  
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# The Law and Justice Foundation of New South Wales

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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 34 year history of improving access to justice for the people of NSW. Its 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

## **Strategies for 2001–2003**

- Identify legal and access to justice needs, particularly of socially and economically disadvantaged people
- Conduct rigorous, independent research to inform policy development
- Contribute to the availability of understandable legal information
- Support projects and organisations that improve access to justice