QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

RESPONSE TO THE REPORT OF THE ACCESS TO JUSTICE TASKFORCE

A Strategic Framework for Access to justice in the Federal Civil Justice System

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Prepared by the Queensland Public Interest Law Clearing House Incorporated

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About QPILCH

QPILCH is an independent, not-for-profit incorporated association bringing together private law firms, barristers, law schools, legal professional associations, corporate legal units and government legal units to provide free and low cost legal services to people who cannot afford private legal assistance or obtain legal aid. QPILCH coordinates the following services:

- The **Public Interest Referral Service** facilitates legal referrals to member law firms and barristers for free legal assistance in public interest civil law cases.
- The **QLS Pro Bono Scheme** and **Bar Pro Bono Scheme** facilitate legal referrals to participating law firms and barristers for legal assistance in eligible civil law cases.
- The **Homeless Persons' Legal Clinic** (HPLC) provides free legal advice and assistance to people experiencing homelessness or at risk of homelessness.
- The **Refugee Civil Law Clinic** provides free legal advice and assistance on matters other than immigration law to refugees and asylum seekers experiencing financial hardship.
- The **Administrative Law Clinic** provides legal advice and extended minor assistance in administrative law matters.
- The **Self-Representation Civil Law Service** (SRCLS) provides free, confidential and impartial legal advice to eligible applicants without legal representation in the civil trial jurisdictions of the Brisbane Supreme and District Courts.
- The **Court of Appeal Self-Representation Civil Law Service** (CA SRCLS) provides free, confidential and impartial legal advice to eligible applicants without legal representation in the civil jurisdiction of the Queensland Court of Appeal.
- **Intellectual Property and Technology Law Clinic** provides free legal advice and assistance to people with IP and technology law questions who cannot otherwise afford legal representation.

For more information about QPILCH services, please see the QPILCH website at www.qpilch.org.au under Services.

QPILCH was established in June 2001 as an initiative of the legal profession and commenced services in January 2002.

QPILCH is a member of the *Queensland Association of Independent Legal Services*, affiliated with the *National Association of Community Legal Centres*, and is a member of the PILCH network.

Introduction

QPILCH welcomes the Taskforce's report and commends its work in bringing together many different threads and providing a factual background to the issues canvassed.

QPILCH supports the aim of the report to improve access to civil justice for disadvantaged Australians and acknowledges the difficulties faced in reaching sound conclusions because of the absence of data and the difficulties of coordinating State and Commonwealth Governments in reaching what are after all common goals.

In this submission, because QPILCH only operates state based civil law services our comments are restricted to this experience. Nonetheless, we believe this gives us a perspective that is relevant to any jurisdiction and applies equally to Commonwealth activities.

In our view, a major shortcoming of the report is that a central issue has been inadequately dealt with – the issue of resourcing the system. It is touched on in several earlier chapters and in Chapter 9: Costs, Chapter 11: Legal Assistance and Chapter12: Building Resilience. However, we argue that it should have been given more detailed attention.

We deal with this issue and make other comments under each chapter heading of Part III, using some of the findings in Part I to support or exemplify our suggestions. Our comments in relation to Chapter 5 in Part II are general only.

Chapter 5: An Access to Justice Framework

We support the **framework approach** and **recommendations 5.1, 5.2 and 5.3**.

However, because this chapter is concerned not just with the principle of efficiency in the system, but also accessibility, appropriateness and effectiveness, we comment generally as follows:

- While the principles and methodology are important statements, emphasis should be placed on having in place the right mechanisms for their implementation and these mechanisms themselves need resourcing to be effective. The report is largely silent on how change can be effected, other than recommending a review and a new unspecified coordination mechanism. We suggest some mechanisms later.
- Representatives of users and clients should be consulted on the laws, rules and processes that they must navigate to obtain the outcomes they seek. We stress the importance of obtaining the views of self-represented litigants, people from different ethnic communities and the disabled.
- Government should rely more heavily on its service providers to identify legal needs, suggest appropriate service models and implement services with adequate funding.
- While all service providers need help in gathering and analysing data to see the big picture, direct service providers are often in the best position, armed with empirical information, to develop the services their communities need.

- Particularly, self-represented litigants and their advisers should be consulted by courts and tribunals in reviewing their practices, procedures and rules.
- Implementation will not be achieved by better consultation and coordination alone - targeted funding can be an effective way to improve efficiency and effectiveness (see later). A coordinating body must have power to achieve agreed goals.
- While proportionality is important, quality legal assistance for a person who cannot obtain legal aid or afford a lawyer to claim or defend a small sum may also be in the interests of justice.
- Data collection and retrieval needs to be uniform and easy. The CLSIS system used by CLCs does not meet these requirements.
- It should not be forgotten that many people who are ineligible for legal aid may still be unable to afford representation.
- We strongly agree with recommendation 5.3. An Access to Justice Framework should remove restrictions on service providers to enable them to flexibly respond to community need. The removal of restrictions should include the removal of onerous and unnecessary reporting requirements that particularly burden under-resourced community legal services (see also the Productivity Commission's Draft Research Report – Contribution of the Not-for-Profit Sector). The review needs to be practically focussed. We agree it should be chaired by someone with clout who is willing to listen and is open to the views of all sectors. See attachment 1 which outlines some of the policy issues that we consider need consideration.
- There is still a need at all stages for the system to be flexible and available with a wide range of options to suit different users.

Chapter 6: Information about the law

The report states:

- A third of people take no action when faced with a legal event for the principal reasons of lack of knowledge, lack of capacity, disempowerment or exclusion (p17). The "high rate of inaction ... suggests … a need for interventions targeted to increasing the level of awareness and capacity to access information, advice and services" (p18).
- A US survey found that many people failed to understand the advice they were given or are too intimidated to commence action (p23).
- Many people experience referral fatigue after an incorrect or correct referral (p24), particularly the more often they are referred, and particularly when faced with difficulties in communicating with advisors.
- A majority of Australians use the Internet, "highlighting its potential utility as a way of providing legal information" (p25). However, telephone is still the main means of contact with the Commonwealth Ombudsman for example.
- While many disputes are resolved by participants on their own, "there will always be a need for external assistance and it is crucial that people who need assistance find the right assistance" (p26).

We acknowledge these findings and support **recommendations 6.1 to 6.8**, but comment as follows:

"No wrong number" is laudable but would need to be backed up with resources, including resources for community legal services. Most community legal services, which are part of the first line of contact, are not resourced to meet the existing demand, let alone a more aware population and there would be less wrong or unnecessary referrals if CLCs had the resources to properly train staff and keep contacts up to date.

We would suggest that a common referral database could be located on a single Internet portal that would link people to information and local services in a plain and easy to use format, similar to Canada's CLEONet and Minnesota's LawHelpMN. QPILCH has a useful but elementary listing of resources by area of law in its "Resources for the Public" page on our website (www.qpilch.org.au). PILCH Victoria has also developed a portal for community organisations on legal issues of relevance to them. The UK's LawWorks has an online advice service, which is also being investigated in Minnesota, supported by volunteer lawyers. Many US states have reformed their tribunal and court forms to promote easier access (with input from users). USA's probono.net and Minnesota's ProJusticeMN also provide useful resources for lawyers.

A national law portal, developed by the recommended coordinating body, with Commonwealth and state government support, would provide links on the basis of area of law and location.

We support the findings that people need easy to find legal information and there is much available information that is duplicative and inaccessible. In addition, the writers of such information need skills in plain English writing (or the ability to source plain English skills) and appropriate platforms for their dissemination. There is research available on best practice in information design. The rush to support cheaper options such as information and advice must be considered carefully. We must improve access to information and advice, but not at the expense of other service levels.

It is our experience that any 'advertising' of our services leads to an excessive demand which we have great difficulty in meeting. While the Taskforce believes greater information about the law and dispute resolution will lead to earlier resolution of matters, it will also place additional strain on existing services which will need additional funding to copy with the increase in demand.

Clearer laws are essential in terms of content and format. The public and service providers should be consulted on the means to draft laws differently so that they are accessible to lawyers and the public alike. Legislative drafters can be inflexible in drafting practice and not open to new ways of doing things. AustLII is the ideal platform for the dissemination of law to the public, yet it struggles for financial support.

Services should be located where they are most needed. Hence, in our view services such as the Homeless Persons' Legal Clinics have the best ability to reach clients because they are located where the homeless congregate, and the service is honed for that audience. Location by region should not be the only approach.

Interpreting services should be available for all legal service providers, not just Commonwealth funded ones.

Information also needs to be provided in different languages. See for example Minnesota's LawHelpMN.org's Somali language version.

Collaboration is difficult to initiate and maintain because busy practices are usually struggling to provide their basic services. As recommended later, the best way to encourage collaborative services is through targeted funding.

Chapter 7: Non-court models of dispute resolution

We support the **recommendations** in this chapter.

However, we suggest that **recommendation 7.3** should also apply to government departments.

The Report states at p54:

- There is potential to expand the use of ADR processes in cases involving SRLs, but it may also be necessary to better adapt ADR services to their needs. While there is a high success rate for simpler non‑court ADR. ADR in more complex litigation involving SRLs tends to have a lower success rate. However, surveys of SRLs suggest they were not offered the options of mediation or conciliation at any stage'. Similarly, of a sample of cases involving SRLs, only 19 per cent had attempted mediation.

- However, mediation practices need to improve. There is evidence that court based mediation takes place significantly after filing—about 76 per cent of the way through an expected full case duration. Evidence suggests that earlier action means that disputes are more likely to be finalised at mediation than for older disputes and before significant costs have been incurred (p54).

While we agree that mediation should be available early, we believe that it should be easily accessible throughout the duration of the dispute when parties are in a position to mediate. The strength of a good system is its flexibility and the availability of a wide range of options to suit different users at different times.

In relation to recommendation 7.6, the paper does not address the issue of pro bono mediation. Many people, particularly those involved in litigation, cannot afford the cost of mediation. QPILCH's self-representation service manages a pro bono mediation service. This service could be augmented if government lawyers, accredited as mediators, could participate. As volunteers, they would be covered by our PI insurance. It would be easy to ensure that government lawyers undertook the same sort of conflict checks that law firms involved undertake.

We suggest that government lawyers could easily increase the pool of mediators on a pro bono basis for people who cannot afford to share in the cost of mediation. Cost is a barrier to mediation for many self-represented litigants.

While a former Queensland Attorney-General was attracted to this idea, the government has so far not acted on it.

In short, there must ne an available mediation avenue and mediation should only occur with appropriate support and when the parties are ready.

Chapter 8: Court based dispute resolution

We support the **recommendations** in this chapter, subject to ongoing monitoring of their implementation.

We also comment as follows:

Self-represented litigants
Later in this submission, we outline the operation of our civil law self-representation service. This service provides assistance to self-represented litigants on a discrete task basis throughout the proceedings. More and more, litigants who cannot afford full representation will rely on discrete task services to navigate lengthy proceedings. A feature of this type of service is that it is difficult to have a complete understanding of the client's case. Clients can be selective in what they provide. Lawyers providing this type of service, whether in community legal centres or private practice, should be protected if they assist a client on this basis. A number of US jurisdictions have statutory protection for discrete task assistance.

We recommend that the Attorney-General's Department examine rule or statutory amendments to protect lawyers providing discrete task assistance.

In relation to **recommendation 8.9**, we suggest that independent self-representation services can also fulfil the important responsibility of advising on the merits of a case. We strongly agree that the courts should be flexible in allowing self-represented litigants to amend pleadings.

We also reiterate the suggestion that advisors to self-represented litigants should be involved in the review of court rules and forms. We believe, based on the US experience, that this will lead to benefits not just for self-represented litigants but all litigants and the courts.

Public interest litigation
The recent response to publication of PILCH Victoria's paper on costs protection orders deserves deeper analysis. The business response was that this would open the floodgates to litigation against corporations and increase their burden of costs. They argued that if the litigation is in the public interest, the community should pay. However, this account fails to consider that:

- The community already pays for corporations' litigation (even if private interest) as litigation costs are tax deductible if incurred for an operational, rather than structural, purpose.
- Corporations themselves are often the aggressor, for example in using SLAPP writs against public advocates or suing a competitor or another

company that might threaten or challenge, for example, its ability to share in resources or if government impedes what it can do.
- Some US jurisdictions have long worked under a system where the general principle is that parties to litigation pay their own costs and a number of US jurisdictions statutorily require the corporate defendant to pay the public interest plaintiff's costs irrespective of the outcome.
- Much public interest litigation seeks to clarify the law or hold defendants to account. This is in the long-term interests of everyone.

We suggest that the best approach to costs is that as far as possible the parties know what their costs obligations will be before litigation has advanced too far. We recommend the adoption in all litigation of early costs orders, including costs protection orders in public interest litigation, which identifies parties' means and responsibilities and their role in the pre-litigation processes.

We agree with **recommendation 8.10**.

We support **recommendation 8.11** and recommend extension of a structured class action regime to state courts which do not have such systems.

In relation to the section *Unmeritorious self-represented litigants* on p118, we do not fully agree with your position.

It is an acknowledged right of all litigants to appear in person before the courts. Despite this, self-represented litigants are frequently understood to:
- Cause 'problems' or be an 'issue' for the courts;
- Be disillusioned, suspicious or resentful of the legal profession; and
- Be vexatious, querulous and in pursuit of generally unmeritorious claims.

In fact, it is the experience of QPILCH's SRCLS that:
- Of those prospective litigants who are able to access legal advice prior to commencing proceedings, the majority do not, ultimately, commence the proposed proceedings;
- Of those who seek legal assistance after legal proceedings have commenced, it is just as likely that they will be a defendant or respondent as a plaintiff or applicant;
- The vast majority of self-represented litigants have an income which would preclude them from retaining a solicitor to act for the duration of civil proceedings; and
- For the majority of self-represented litigants, the inability to afford legal representation is one of the key reasons why they have 'chosen' to self-represent.

By self-representing, a litigant is likely to have greater difficulty in demonstrating the merits of their case effectively to the court. That does not mean that just because the litigant is self-representing, the matter does, in fact, lack merit.

Chapter 9: Costs

In this chapter, funding the system is seen in part as a 'cost to government'. While this is of course true, it conjures negative connotations. It would be better in our view to look at funding differently. Subsidies made to business for example are not usually seen as 'a cost to government' but rather as incentives to performance and employment creation.

While we agree that more data is needed as a first step to improve services and matters should be directed to the least costly option, we think this can best be accomplished through a better system for service funding, which we propose later.

We submit that governments need to accept that reasonable levels of funding are an unavoidable feature of a fair and equitable justice system. However, we believe that global demands are unnecessary so long as funding is targeted and innovative. Proper funding is preferable to cost recovery mechanisms that potentially raise further access barriers. Similarly, clear rules that limit time-wasting, excessive disclosure and unnecessary steps in the proceeding are more understandable to the ordinary user and are preferable to costs burdens that will unfairly penalise the poor.

Appropriate levels of funding for services can achieve benefits for the system that are currently unrecognised.

For example, in 2007-08, in 26 matters where potential plaintiffs approached QPILCH's self-representation service for assistance to commence proceedings, 19 were successful diverted (this was the first part-year of operation). While our 2008-09 evaluation has not been finalised, a similar proportion of 86 new clients who had not commenced proceedings were diverted from the system. The diversion of these cases from the system, saved the client ongoing misery and expense, costs for the courts and the other parties.

We agree that 'the justice system should deliver outcomes in the most efficient way possible' and information, advice and counselling services can the cheapest and most efficient means of avoiding and resolving disputes (p121). However, information and advice is not always enough. People are often forced into litigation and cannot get help because legal aid is mostly unavailable in civil matters.

If legal aid and CLCs were better funded, services could assist more people, saving more time and expense for the courts and other parties.

Increased fees could also lead some litigants to use more expensive options because they might as well go to the highest level if lower levels are also beyond their reach.

While there must be some proportionality between costs and outcomes, there can be an imbalance for poorer people. Many people have great difficulty navigating the small claims jurisdiction which is meant to be a cheap forum with limited legal representation. However, in Queensland, small claims in the Queensland Civil and Administrative Tribunal will soon have a jurisdiction of $25,000, while the

magistrates' courts will have a jurisdiction from $25,000 to $150,000. Negotiating a claim of $10,000, let alone $150,000 for an unrepresented litigant can be onerous and stressful. And claiming or defending such sums, without assistance, can be vital for their security and survival. A small claim, which we as lawyers might write off or pay up as not worth the effort of the litigation, for the poor may be the difference between retaining their home or paying for their children's needs.

If the cost of such litigation is seen as a cost to government (the taxpayer), then we will say it is not worth it. But if it is seen as community justice and potentially as saving money in the long run through the prevention of further loss then it is clearly worth the expense.

The report recognises this point early in the paper. However, it seems to become subsumed as the report moves towards reducing costs to government. While a person with a dispute needs access to easy options for dispute resolution, they can be deterred from proceeding because of cost or complexity.

It is our experience through the self-representation civil law service that about half of all clients are in fact defendants, being pursued by more powerful plaintiffs who believe that by threatening and commencing court proceedings, the unrepresented party will either concede and pay up in full or settle at a disadvantage. Many self-represented defendants have meritorious cases and can be successful in defending proceedings brought against them. It is legitimate to ask how many people have unnecessarily given up for fear of fighting a more powerful opponent.

Costs recovery

The report states:

> Proper pricing of services should provide some capacity for better incentives about how people resolve disputes. For example, imposition of court fees could encourage people to resolve disputes directly, or through cheaper market provided services (such as industry complaint or EDR schemes). Incentives could also operate in relation to the use of court services—for example fees that reflect the true costs of litigation currently borne by the taxpayer could encourage litigants to more fully utilise other options, such as court-based ADR. … However, it should also be noted that court fees themselves are likely to be a relatively minor cost for litigants given the private costs of litigation (including legal fees and disbursements) are often very high.

The report also states:

> Pricing a service beyond the reach of a disputant provides an inequitable barrier to justice. For a well-functioning justice system, access to the system must not be dependant on capacity to pay.
>
> This may be achieved through providing universal services or through exemptions and waivers for those who cannot afford to pay.

We agree with the suggestion that fees should properly reflect the nature of the litigation, so long as they do not act as a disincentive to the poor. Unfortunately, the high cost of litigation can be a deterrent to even those with a reasonable income. Substantial increases in court fees will merely act as a further hurdle. However, a small increase in court fees could be used to assist in funding self-representation legal services. Fees could also be on a sliding scale according to the size of the

claim, again with measures to ensure that a poor litigant with a sizable claim could obtain some exemption or reduction.

We generally support **recommendations 9.1 and 9.2** but recommend that SCAG also explore other means to increase service funding for poor litigants instead of focusing on costs recovery.

Litigation funding
SCAG called for submissions on litigation funding in 2005 but has not reported. In our submission to SCAG, we recommended the creation of small sustainable funds, managed by legal aid and CLCs and supported by legal aid and government and philanthropic funding. This would permit greater access by disadvantaged litigants. Stimulated by government funding, attracting benevolent funding in the case of CLCs, and managed locally and responsibly, assistance in a broader range of cases would ensure that fewer people with meritorious cases fell through the gaps in legal services.

The cost of litigation poses a significant deterrent to people seeking a remedy before the courts who, apart from their own legal costs, may be faced with a crippling order to pay their opponent's costs should they fail. This is particularly concerning where the applicant is pursuing litigation in the public interest, but is unable to continue due to the possibility of a costs order or a preliminary order for security for costs. Such cases raise important and often complex legal issues and must be litigated in superior courts such as the Supreme Court of Queensland.

Common Law costs
Costs orders are discretionary. The general rule in all Australian courts is that costs follow the event (see for example *Uniform Civil Procedure Rules 1999* (Qld), r 789). Courts have departed from this rule and ordered each party bear its own costs where there have been special circumstances justifying departure. Traditional exceptions focus on the conduct of the successful party which disentitles it to costs, or where the plaintiff only obtains nominal damages.

The high water mark for public interest litigants was the decision in *Oshlack v Richmond River Council* (1998) 193 CLR 72. In that case, the primary judge's decision not to award costs to the successful party was upheld by the High Court. The primary judge considered:

- the "public interest" of the matter;
- the appellant had no pecuniary interest in the outcome of the matter;
- a significant number of members of the public shared the stance of the appellant;
- the issues raised were arguable although ultimately unsuccessful; and
- the case was one of the first under new provisions relating to endangered fauna and the judgment would be helpful to the future administration of the provisions and enforcement.

Subsequent cases tend to limit *Oshlack* to its facts and consideration of "public interest" and other factors in determining costs orders is by no means settled.

Costs legislation
Many legislative instruments provide for costs orders, overriding the general rule in specific matters. Many more do not provide any such guidance. Some Queensland examples, in areas of law commonly regarded as in the "public interest", are:

Anti-Discrimination Act 1991, s 218	In relation to appeals from the Anti-Discrimination Tribunal to the Supreme Court, the court may make any order as to costs that the Court considers appropriate.
Child Protection Act 1999, s 116	Each party pay their own costs of the proceedings
Environment Protection Act 1994, s 505(10)	The Court must order a plaintiff pay costs if the court is satisfied that the proceeding was brought for obstruction or delay. Otherwise, orders as to costs are left to the court's general discretion.
Freedom of Information Act 1992, s 98	In relation to proceedings instituted by the State arising out of the performance of the functions of the Freedom of Information Commissioner, the reasonable costs of a party to the proceeding are to be paid by the State.
Guardianship and Administration Act 2000, s 165	In relation to appeals from the Guardianship and Administration Tribunal to the Supreme Court, each party bear its own costs of an appeal unless the court considers the appeal was frivolous or vexatious a party has incurred costs because the appellant defaulted in procedural requirements.
Integrated Planning Act 1997, s 4.1.23	Each party bear its own costs
Judicial Review Act 1991, s 49	Upon application of any party at any stage, the court may order that: another party indemnify the relevant applicant for its reasonable costs incurred on the standard basis from the time of the costs application each party bear its own costs of the proceedings. In making such an order, the court must have regard to certain factors, including the financial resources of the applicant, the public interest and the merit of the originating application.

Security for costs and undertaking as to damages
A further barrier to access bearing a close relationship to costs is the possibility the public interest litigant is ordered to give security for costs or, if an injunction is sought, an undertaking as to damages.

The Queensland UCPR for example sets out factors which the court must and may consider in determining whether to award an application for security for costs or undertaking as to damages. This includes consideration of the "public importance" of the matter.

Reform
In order to assess the likelihood of whether costs will be ordered, the public interest litigant must first refer to the particular legislation, and if no guidance is given, then negotiate the plethora of unsettled case law on the issue. This provides little comfort to litigants who generally will not be able to obtain a costs order until it is too late, or worse still, face an adverse costs order. Most litigation is commenced to settle a dispute. It undermines our system of justice if only wealthy litigants can safely pursue this course of action.

We suggest unifying the law on costs by introducing overarching legislation dealing with costs in each jurisdiction, subject to any specific provision to the contrary. Such legislation may include:

- that costs are at the discretion of the Court, including the power to make no order as to costs;
- identification of the particular issues the court must/may have regard in exercising their discretion, including consideration of the "public interest";
- allowing for a preliminary costs hearing in particular circumstances so that the issue can be settled from the outset;
- implementing a regime whereby legal aid agencies could issue a "costs protection certificate" to individual litigants in public interest matters which limit or extinguish the litigant's liability for costs, or even require a respondent public authority to pay all or some of the costs, and costs protection orders;
- expansion of costs funding through targeted legal litigation funds;
- provisions requiring government to implement policy setting out their position regarding the enforcement of costs orders;
- provisions regarding security for costs and undertakings as to damages
- provisions regarding making security for costs in exchange for a solicitor's lien to facilitate transfer of files when a retainer is terminated.

The benefits of reform are two-fold: first, it will simplify existing law in relation to costs orders and, second, it will provide both the courts and litigants with guidance as to when costs will be ordered, thereby reducing the risk of costs unduly fettering the commencement of otherwise meritorious legal proceedings.

Chapter 10: Administrative Law

The report states:

> In administrative law matters, departments could pay on cost per matter basis – the same way members of industry groups pay for industry ombudsman. While still paid by the taxpayer, and will fall disproportionally on some departments, might assist in getting those departments to reconsider the way they make decisions.

You add:

> … fees in administrative tribunals could encourage better practise by govt agencies if they provided incentives for better primary decision-making or communication with clients to resolve disputes before formal review is sought …"

We support the discussion and **recommendations** of this chapter, with one additional comment.

In relation to **recommendation 10.5**, we submit that government agencies could also contribute to the cost of services for self-represented litigants for the reasons outlined later.

Our referral service has assisted a number of clients in complaints against government departments. We have advised some clients that they had no prospects of success in pursuing such a claim. However, our referral service only operates in writing, so we do not have an opportunity to discuss matters with applicants face to face. In one case, the client proceeded to a tribunal unrepresented and the complaint was dismissed after a six week hearing at enormous cost to the department. Had we been able to provide a more comprehensive service in this case, given our experience in the self-representation service, we may have been able to divert this client for a more appropriate and positive outcome.

QPILCH operates an administrative law clinic which is funded for two days per week by Bond University – a one day student clinic supervised by an experienced practitioner who undertakes follow-up work on the second day. With minimal extra funds, we could employ a solicitor on a full-time basis to provide more comprehensive and direct advice.

We have suggested to the Queensland Government that departments involved in administrative law matters could pay a small stipend toward service provision. Again, departments forget that while legal services may support administrative law actions against them, we also divert cases without merit and we make the litigation process smoother by our intervention.

Contrary to the view that legal assistance draws matters out, in free services with staff and volunteer lawyers (where the lawyers are not being paid on a time or event basis), it is our experience that legal assistance has a better chance of diverting unmeritorious cases and expediting meritorious ones. Departments could pay for services, not just court or tribunal costs, on a cost per matter basis, like the industry schemes.

Chapter 11: Legal Assistance

National coordination

The report states:

> The design and funding of most aspects of the system may be better seen as an accident of history and prevailing politics rather than a deliberate system-wide approach to avoiding disputes and resolving disputes better. Evaluating the existing system is made difficult by limited statistical analysis of individual institutions and an inadequate level of comparability of data across the system or analysis about how changes to one part of the system affect other parts (p46-7).

We firmly support **recommendations 11.1 and 11.2**. However, we submit that this coordinating group should also include representatives of the National Pro Bono Resource Centre and the PILCHs.

We also suggest that the coordinating group have responsibility for making funding recommendations to the Attorney in relation to the new funding scheme we propose

later. Targeted funding is the best way to encourage innovative service models and strategic collaboration between service providers.

Coordination is not achieved solely by access to better information and discussion. It needs to have mechanisms available to it to promote cooperation and collaboration and reduce duplication.

This body needs some power and resources to actually do the things that will make a difference. It also needs independence, a clear mandate and an inclusive approach.

Accordingly, summarising other points made throughout this paper, we propose a coordinating body, supported by a secretariat, which is responsible for:

- Reviewing data collection
- In consultation with services, analysing data and undertaking research of legal need and best practice in service provision
- Making funding recommendations to the Attorney
- Consulting with participants
- Establishing with the department an information and service Internet portal
- Developing an RRR strategy
- Developing a legal aid strategy
- Developing a pro bono strategy
- Developing a clinical education strategy
- Developing a speculative law strategy
- Working with the states to reach these objectives.

Early intervention

While we support **recommendations 11.3 and 11.4**, we emphasise our earlier comments that the allocation of funds to early intervention should not be at the expense of funding more complex assistance such as self-representation assistance and representation because many people have no choice in proceeding to tribunals and the courts, and these services remain the most difficult to obtain.

In addition, our experience is that our self-representation service provides the best chance of diverting unmeritorious cases because over a number of appointments we are able to develop a relationship. Litigants are then more likely to understand the intricacies of the court system and the complexities of their case than in a 20-30 minute advice session.

From this client base involving often complex and diverse personalities in complex and difficult disputes, it is hard to see how they could have been helped to resolve their disputes earlier, again bearing in mind that approximately half are defendants in circumstances beyond their control. For example, many were involved in precipitous proceedings caused by the financial crisis. They were encouraged by their lenders and advisors to over-extend their finances.

Duty lawyers and advice services at courts

The report states:

- Courts play a vital role because they offer a hearing and determination, while informal mechanisms can result in unfair outcomes because of the private nature of the negotiation and settlement process (p30-31).
- "Matters should be directed to the least cost option that produces a fair outcome" (p34).
- A 2003 study of 500 self‑represented litigants (SRLs) found a clear relationship between the unavailability of legal aid and the number of self‑represented parties (p43).
- There is a significant and continuing shortfall in legal aid for civil law matters (p44).
- Reforms to the justice system that better facilitate the early, cost‑effective resolution of disputes would reduce the number of matters proceeding to courts and tribunals and consequently assist in relieving pressures on the legal aid system. Similarly, further streamlining court processes would also assist in reducing the quantum of legal aid funding required for those more complex cases that do require court intervention (p44).

QPILCH operates a self-representation service in the Brisbane Supreme and District Courts. We believe that this model, based on the UK Citizens Advice Bureau in the Royal Courts of Justice, provides a quality and cost effective service that is achieving positive results for clients, the courts and other parties to litigation. In January 2010, our service will soon expand to the new QCAT on a trial basis, intercepting clients involved at the first level of tribunal based dispute resolution and in limited administrative law matters.

The model is different from a duty lawyer scheme in that discrete task assistance is provided throughout the proceedings, not just at the door of the court.

The QPILCH self-representation service is independent of government and the courts and draws on the resources of the private profession in providing quality legal services. Twelve law firms provide volunteers to give discrete task assistance to litigants in person, supported by a staff solicitor and paralegal.

Like our referral service, the self-representation service is able to divert a good proportion of cases from the legal system. But it is an intensive service where we undertake meticulous assessments and prepare detailed advices. Only after 18 months of operation, we estimate the cost of assisting each client is approximately $620, positively comparable with the cost of services shown in Table 3.2 of the report.

An emphasis of this service is the diversion of clients without meritorious cases from the system. Accordingly, we will see any client in the first instance even if they have some means. However, we only go on to give full assistance to clients without means. We have successfully diverted a significant number of clients with unmeritorious cases.

We therefore propose that you amend **recommendation 11.6** so it reads:

Recommendation 11.6
The Attorney-General's Department should work with legal aid commissions, *community legal centres and pro bono services* to consider the benefits of

locating duty lawyer/advice type services at courts and tribunals where appropriate.

QPILCH services are aimed to assist people who cannot resolve their dispute through information or advice. Our services offer advice on merit, self-representation assistance or representation, the hardest assistance to obtain if you cannot afford a lawyer or obtain legal aid. While representation is the best option, the next best option 1is properly supported self-representation.

We recommend the use of properly funded self-representation services.

The report states:

> A system-wide approach can identify options for governments as to how resources might be allocated. A strategic framework should enable identified demand issues to be better addressed by available supply, and identify opportunities to modify demand for different services—for example more information and advice could reduce demand for legal aid representation (p52).

While this is true, many disputes will still go to court, people forced into it by our adversarial system, no matter the barriers, so supply side initiatives should still be improved.

Legal assistance services in regional, rural and remote Australia
We support **recommendation 11.7**, however stress the importance of funding to extend services to RRR Australia using a range of platforms.

Because Queensland is decentralised and has a less extensive regional CLC presence, small private law firms across the State could potentially fill a need. Small firms consistently are unable to provide pro bono services because of their resources.

QPILCH is running an RRR project to extend pro bono services into RRR Queensland. We have established pilot projects involving the partnering of two national law firms with two rural firms with a view to assisting the rural firms to undertake pro bono work with the support and resources of the big firms. Unfortunately, we have received non-recurrent funding for this project and cannot sustain and extend it without funding. Other national firms have indicated a willingness to help. While the pilots are developing the protocols to protect the interests of both parties, there needs to be ongoing encouragement or the busy practices will not make the necessary links to maintain the relationship and take up necessary cases.

We recommend that the government develop an RRR strategy, funded through the funding mechanism recommended below.

Funding
In our view, this should have been the most far reaching chapter of the report. We note that other bodies are examining this issue, but adequate and targeted funding is necessary for the effective operation of the system. We note the report refers to a

current review of procurement arrangements being conducted by the Attorney General. We think such a review cannot be conducted in isolation from this review.

Funding is the petrol of government. Without it nothing will work. If the petrol is dirty, motors will be inefficient or seize.

Funding can be used to establish more efficient and innovative services and more directed and focused outcomes. And if sufficient, it can permit the collection and easier use of data and ensure that services are evaluated so that money is not wasted.

Funding can be targeted to ensure that in developing services, different agencies with different skills work together to achieve the best result. For example, a CLC with experience in a particular area, which becomes aware of a certain problem, could be encouraged to work with a university with research skills and private firms with casework skills and a support agency with community development skills to develop the best response needed.

This way, government, which controls the purse strings, "can make the informed decisions on how best to use the scarce resources available to maximise access to justice" (p120). However, it is not just a lack of data that prevents the targeting of scarce resources. A different approach is needed that recognises the value of service providers on the ground and their ability to tune into local needs. Good funding policies can recognise and support this.

In our view, the main statement in this section that directing funding to "prevention and early intervention will enable more people to get the assistance they need at an early stage" is a very small part of the picture.

Much more can be done in improving supply side services using funding as the catalyst.

We propose a Commonwealth funding model to get the best out of services targeted where they are most needed.

> "The government plays a key role in the supply of justice, both directly and indirectly, through the operation of the courts, funding of legal assistance providers and establishing the legislative framework for a range of options including some forms of ADR. The level of government in this sphere suggests that this is an area where decisions can have significant influence on access to justice" (p29).

Commonwealth Community Legal Services Program Funding Reform

Background

The Commonwealth Community Legal Services Program (**CLSP**) is a Federal program which provides recurrent funding to organisations to deliver legal services to people on low incomes and those with special needs. Funding is sometimes for generalist services but also includes 10 specialist sub-programs which provide funding for assistance in specific areas of law or targets special needs groups. Funding is provided through a service agreement which is renegotiated every three

years. State Program Managers from the state legal aid commissions are responsible for the day to day administration of the CLSP and ensure compliance with the accountability requirements of the Service Agreement.

For the 2006-07 year, funding under CLSP totalled $24.7m with $22.1m allocated to 128 CLCs and the balance used for program support activities. The average annual funding to a CLC was $173,000.

CLSP is not the sole funding provided to CLCs, and significant levels of funding are provided by state government departments (state CLSP and interest on trust account funds and grants) and philanthropic sources.

The CLSP runs along side legal aid and a number of statutory and non-statutory Financial Assistance Schemes (**FAS**), which provides direct financial assistance to help people address matters involving Commonwealth law, or give rise to a special Commonwealth interest and legal aid is not available. Statutory schemes include those established by the *Administrative Appeals Tribunal Act 1975* (Cth), *Freedom of Information Act 1982* (Cth), *Human Rights and Equal Opportunity Commission Act 1986* and the *Trace Practices Act 1974* (Cth). Non-statutory schemes include the Commonwealth Public Interest and Test Cases Scheme and the Special Circumstances Scheme. Further information can be obtained from the website at http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_FinancialAssistance.

All programs are administered by the Federal Attorney-General's Civil Justice and Legal Services Group, Indigenous Justice and Legal Assistance Division. The legal aid program and the FAS come under the Legal Assistance Branch while the CLSP comes under the Indigenous and Community Legal Service Branch.

In the last two financial years, the government has provided one-off additional funding for legal assistance programs. In April 2008, the government announced an additional $10M for the CLSP to assist CLCs to manage the increasing demand for their services, with all Commonwealth funded centres receiving additional money. The funding was allocated on a needs basis, with a focus on each CLC's funding level, location and client demographics. On 9 May 2009, the government approved a further $4M grant to CLCs.

The problem with these ad hoc additional injections is that:

- money is provided although it is not necessarily requested by a CLC;
- only CLCs currently granted Commonwealth CLSP benefit from the injections;
- only Commonwealth priorities are funded;
- there is no transparency on how the funds were allocated;
- Funding injections are often dependant on the goodwill of new governments;
- Commonwealth funding is not coordinated with State funding.

A considerable portion of new government funding has gone into new services, rather than consolidating existing services, as this generates political goodwill. For the same reason, government rarely funds policy work positions.

In addition, Commonwealth CLSP funding is not matched by state governments in any uniform way. Victoria and NSW for example have traditionally been better funded by their state governments than other states. The smaller states have been considerably disadvantaged in providing legal services in their communities. The difference in state needs and resourcing is not always appreciated. The smaller states have less capacity to apply for project funding, have access to fewer funding sources, have fewer services and less access to pro bono resources.

The US experience is that governments are more amenable to funding well formulated service proposals than global funding increases.

Proposal

The original mandate of CLCs was to be independent of government. However, CLCs have become so dependent on government that they are often viewed as simply an arm of legal aid. This has impeded their ability to act independently and quickly to respond to new legal needs and to develop more innovative approaches to the problems of their communities.

As there are few alternative funding sources for CLCs, a different government funding model is needed to encourage local innovative and responsive legal services. It is proposed that there be two access points for Commonwealth funding of CLCs:

1. The existing CLSP fund, which would be augmented from time to time to consolidate existing services and continue projects that demonstrate success;
2. A new **project fund** with guidelines managed by the recommended coordinating body or a sub-committee thereof, that encourages partnerships, strong project development and includes an evaluation component. This funding scheme could be proactively managed, i.e. to implement strategic services, but must also be open to applications to permit innovative initiatives from service providers.

It is envisaged that new services or projects would apply for start up funding from the project fund. Once established and evaluated, they could then apply for recurrent funding under CLSP. Applications could be made by joint applicants or lead applicants and would be open to all free legal service providers – CLCs and ATSILS.

The project fund would be administered by a committee made of representatives of government, legal aid commissions, CLCs and PILCHs, and would coordinate with state funding mechanisms. The government must be prepared to recurrently fund projects that are shown to be effective.

This scheme could also assist in contributing to local grant schemes managed by CLCs themselves to target casework funding at a local level on a local needs basis. The advantage of such funds, seeded by government, would be that they could also seek contributions from the private and corporate sectors.

The benefits of this structure are:

1. the restoration of some funding independence;
2. an increased accessibility to funding;
3. potentially a more equitable spread of funds to smaller states;
4. better targeting of resources to where they are most needed;

5. better formulation of projects and services;
6. the coordination of funding drives, leading to efficiency gains for CLCs, more effective and creative ways of sourcing money, and hopefully an increased pool of funds;
7. the participation by CLCs in determining where at least a portion of the money goes.

Other types of service
The report does not discuss the benefits of more costly service types that may still yield important results.

Advice
We offer assistance in the form of advice to people who we believe do not have meritorious cases. We believe this is an important access to justice issue, which is often overlooked. While advice services may give people verbal or brief written advice about poor prospects, QPILCH provides a detailed written advice in plain English why we believe that their prospects are poor. We have received feedback from applicants who have sought assistance over a long period that our letter was the first to fully explain why their matter could not be progressed. We cannot quantify the value of this service but believe it does lead to people not pursuing hopeless claims. However, it is more labour intensive and therefore more costly than simple advice services because it requires detailed assessments of matters. But in the longer term, as stated previously, this approach is more likely to provide real assistance and diversion of unmeritorious cases.

This approach delivers even better results when we can also deal with clients in person such as through a self-representation service.

Litigation
While the primary focus of QPILCH's Self-Representation Civil Law Service is to provide discrete task assistance to self-represented litigants before the Supreme and District Courts at the Brisbane Courts Complex, secondary functions are to (a) encourage cheaper and timelier resolution through a pro bono mediation service and (b) to divert people without a meritorious claim away from the system. We believe all these aims are occurring successfully for people whose only avenue appears to be the court system.

While we acknowledge your point that "[t]he courts properly decide the most complex, vexed and entrenched disputes not capable of resolution by other means or where the parties need or desire an adjudicated statement of the law" (p99), in fact for many people who cannot afford a lawyer, the choice to go to court is not a voluntary one but the result of a power imbalance whereby represented parties are able to bully them with legal threats and proceedings. It is our experience that these clients can have legal merit in their claim or defence.

The most difficult thing for these litigants to find is representation, but self-representation services are clearly better than going it alone. We suggest there is a need to explore greater use of self-representation services and discrete task assistance.

Pro bono
The report is largely silent on the benefits of pro bono. Yet it has been pro bono, a significant commitment by the private legal profession, which has filled many of the gaps created by the withdrawal of government funding for civil services in the early 1990s.

However, pro bono was never intended as a substitute for civil legal aid, yet government funding for civil legal aid is minimal.

We urge government to develop a comprehensive civil legal aid strategy for the proper funding of civil law representation in appropriate cases, along with a pro bono strategy, in consultation with state governments, legal aid commissions, pro bono services and professional bodies.

Importantly, pro bono is much harder to support in the smaller states because of the size of their professions. A consistent presence of a permanent pro bono clearing house is much more likely to draw out the goodwill and resources of the private profession and the use of other potential resources such as government lawyers and students. QPILCH for example has little recurrent government funding and must rely on projects to have sufficient income to pay for basics such as rent.

The report of the first National Pro Bono Conference recognised the need for governments to play a role in facilitating pro bono by funding pro bono coordinating mechanisms, yet the Commonwealth Government has so far provided only minimal funding for this purpose.

We recommend that the Commonwealth Government allocate funds to ensure all states and territories have pro bono clearing houses and have sufficient stable funding to maintain their services.

Chapter 12: Building Resilience

A clear purpose of the report seems to be to effectively reduce the cost to government of the justice system by promoting and funding cheaper services such as information and advice in order to stem the demand for more expensive legal services.

In our view, the report does not really tackle how this can be achieved other than to suggest cost recovery and build resilience in the system and consumers to “reinforce and enhance the capacity of people to resolve disputes themselves” (p148). This is easier said than done, and the suggestions made do not appear to be anything more than general claims to social inclusion.

The reality is that many people do not have the capacity to resolve disputes easily or are on the receiving end of bullying parties, and we do after all maintain an adversarial system of justice.

The Taskforce talks about resolving the underlying issues, citing as an example the case of a person who is having a tenancy legal problem because of loss of employment. But there are also many people who have tenancy problems because of an overbearing landlord in a relationship that is typically imbalanced.

Troubles of this kind cannot always be solved by information and advice, particularly in a culture which is increasingly rights based.

We submit that the best approach is to fund well-designed mechanisms and programs that address a particular problem, alleviating constant demands on government for global funding increases. While the model we suggest relates to the funding of community legal centres, it could apply equally to legal aid funding.

We respond to the main issues you raise in this chapter as follows:

Building resilience in the justice system
We support **recommendations 12.1 and 12.2**.

We note with interest that the Commonwealth currently funds four CLCs to run clinical legal education programs.

QPILCH would be keen to access such funding. QPILCH currently run five clinics with Griffith University, the University of Queensland and Bond University, and is about to commence a sixth clinic with QUT in 2010. We emphasise the importance of problem solving, professional responsibility and quality service provision in these clinics. We also have a large student volunteer program, where 12 students per week assist in case assessment. We could not provide the level of services we do without this support.

The clinics are run on a shoe-string with small financial contributions from the universities, paying much lower rates than sessional tutoring so that the clinics can make a contribution to general operational costs.

In 2009, we were fortunate in that Bond University increased its contribution so we could employ a clinic supervisor an extra day per week to undertake follow-up work because of the demands being made on the service provided through the clinic.

If the Commonwealth can fund clinical programs in four CLCs, it should develop a clinic strategy to make such training accessible across the nation. In order to build resilience as proposed, we recommend that a national clinical program with appropriate access to funds be developed by the proposed coordinating group.

Regulating the legal profession
We note the current review. We submit that the review should also ensure that the legislation also promotes pro bono activity, protects discrete task assistance, enhances the provision of speculative legal work and preserves the volunteer contribution of retired practitioners contained in some state legislation.

Post-resolution support

Again, we commend our Self-Representation Civil Law Service to you as an example of how post-resolution support can be effectively delivered. Clients often return to seek advice on the orders they have received, complying with order, advice on appeal or 'where to from here'. We follow the outcomes from the action and regularly follow up clients to ascertain the status of their matter. We survey every client on completion of their matter. We therefore support **recommendation12.3**.

Federal Justice Roundtable

We also suggest inclusion of a person able to represent the interests of self-represented litigants. We have been advised by a US member of a court council that the involvement of a lawyer experienced in assisting self-represented litigants lead to great changes in court rules and procedures to the advantage of litigants and lawyers alike. We support **recommendation 12.4**, with this rider.

Building resilience in the community

Social inclusion

QPILCH and other PILCHs run Homeless Persons' Legal Clinics which work as very effective partnerships with private law firms, community agencies and universities to provide holistic services to the homeless. We commend this model to the Taskforce.

ATTACHMENT 1

POLICY ISSUES

Existing free and low cost legal services are funded primarily by government. Over recent years, their activities have been subject to increasing government control determined to manage the use of scarce public monies for the sector. While accountability is essential, and public funds are not bottomless, there are adverse consequences of this and other policy approaches adopted over the last decade. Service providers have become, by necessity, competitive instead of actively cooperative. They have become constrained and inward looking, focused on delivering services with ever decreasing resources. They have been hindered in their ability to respond to new demands and challenges as policies have swung with the pendulum of new managerialism.

Alan Milburn, the former UK Cabinet Office Minister, has identified the real problem for funding of community services as a:

> "vicious cycle that limits the voluntary sector's ability to deliver as the sector ends up chasing dozens of short-term funding streams, rather than investing in staff development and service improvement", thus in turn government agencies become "nervous about contracts with organisations that lack capacity. They then want voluntary organisations and charities to account for every penny, micro-managing the relationship and clawing back resources whenever they can. In turn, this keeps capacity in the sector down, preventing it from moving up."[1]

This observation applies equally to the funding of free and low cost legal services in Queensland.

While we recognise that all demands for civil law services cannot be met, existing government policies behind the various funding agreements should be revisited and thought through so that legal services can provide quality services in response to community need. The response needs to be well organised and coordinated at the practical service level so more people with legitimate and meritorious civil cases can be represented or assisted by the legal profession.

Now is the time to examine broader legal service policy to ensure:

- less fragmented service delivery
- the strengths of the diverse providers are capitalised on and valued
- a more flexible approach to funding
- encouragement of greater private profession participation in the provision of low cost legal services
- the development of concerted and coordinated multi-agency approaches and greater use of partnerships to address special needs
- encouragement of pro bono particularly from the corporate and government sectors, and
- greater community involvement in policy development.

A consideration of the issues below may enable a revamping of policy and an improvement in our responses to existing and emerging civil law needs.

JUSTICE IS NOT DIVISIBLE

[1] Citizens Advice Bureau, 2005 *Lord Carter of Cole's review of legal aid procurement*, www.citizensadvice.org.uk.

Existing policies construct legal services in silos for criminal law, family law and civil law. And from 1992, civil law clients were left to fend for themselves. While there has been some retreat from this position, there has been little consideration by government of the ramifications of its policies and how best to meet community need.

It should first be recognised that funding civil law services can have a flow on and preventative effect in other problem areas and reduce overall community costs.

As an example, we see this in QPILCH's Homeless Persons' Legal Clinic, where initial legal problems, often civil issues like debt, relate to family breakdown and crime, all compounding into homelessness. However, it is the civil issue that is the last to be addressed, as the crime and family issues take precedence. Early intervention in these civil problems may prevent other more serious problems from developing.

We are not suggesting that there is a single cause or necessarily an initiating problem, only that people under pressure are likely to have a range of problems requiring a range of interventions, and the failure to address them all can continue or exacerbate their conditions and behaviour.

NSW research shows that of people seeking assistance from free legal services in that state, almost 50% had multiple problems.[2]

Second, research conducted in 2006 showed that the main reasons given for people seeking supported accommodation in 2004-05 included: domestic violence (17%), financial difficulty (12%), family problems (9%), relationship breakdown (8%), drug/alcohol abuse (5%), and psychiatric illness (2%).[3] These problems suggest too that legal problems should not be viewed in isolation from the social background, indicating that appropriate solutions may require a coordinated and inter-disciplinary approach.

Third, some people experience chronic problems that cannot be addressed within funding imposed timeframes and from a purely legal perspective. Funding for social, youth and community workers in CLCs has benefits for referral, joined up responses and dealing with sensitive issues that usual legal services cannot address.

Fourth, the lack of legal services in civil law has resulted also in increases in self-representation in courts and tribunals, creating problems for the courts and represented litigants, particularly in increasing costs and reducing opportunities for early settlement. Lack of effective legal services for litigants in person can also mean that unmeritorious cases are not diverted from the system at the appropriate time and meritorious cases are not given sufficient attention.

Justice is not divisible, so a system that fosters criminal defence and not civil justice ignores the fact that many people experience problems across a range of legal areas that operate often simultaneously and are not mutually exclusive. Multiple problems are best dealt with in a holistic way, using partnerships and different, well-developed and practical service delivery models. Current policies are not conducive to this approach.

RELAX SERVICE PRIORITIES AND INCREASE FLEXIBILITY

Government stipulation of service priorities and funding tied to jurisdiction has reduced the effectiveness of legal services to respond to need.

[2] NSW Law and Justice Foundation.

[3] Australian Institute for Health and Welfare 27 January 2006 in 2004-05 annual national report on the Supported Assistance Program (SAAP) National Data Collection Queensland Supplement.

As outlined in LAQ's discussion paper for its civil law review, the State priorities in civil law are:

- Child protection
- Domestic violence applications
- Criminal injury compensation
- Mental health
- Workers compensation
- Inquests
- Discrimination
- Consumer protection
- Civil confiscation of proceeds of crime.

The Commonwealth priorities are:

- Payment by the Commonwealth of compensation to employees or to recipients of pensions, benefits or allowances
- A decision by the Commonwealth which affects a persons capacity to continue in their occupation
- Discrimination
- Migration
- Consumer protection
- Civil Confiscation of proceeds of crime.

LAQ reads the State priorities as hierarchical with higher priority given to matters higher up the list. LAQ argued in its civil law discussion paper that while it seems reasonable that Child Protection and Domestic Violence should have some greater priority, there does not appear to be any reason for retaining a hierarchy for other matters.

This approach, based on jurisdiction and priority, impacts in three ways:

A. by distributing funds inequitably
B. by quarantining some problems from assistance providers
C. by limiting innovation and appropriate responsiveness

A. Inequitable funding

Commonwealth and State funding is tied to their jurisdictional interests. However configured, tied funding hampers the ability of service providers to provide services fairly and effectively.

For example, except for LAQ services for Indigenous Queenslanders as part of its overall services to the community or its Cape York targeted services, only two lawyers specifically service Indigenous civil law services in Queensland as part of an holistic and culturally sensitive specialised service for Queensland's most marginalised citizens. No more Commonwealth funds are available and the Queensland Government does not provide funds to Indigenous legal services because it regards Indigenous legal services as a Commonwealth responsibility.

Another example is the requirement on LAQ to service child protection, taking up a large proportion of its civil law budget. Child protection is an important issue, but there are other areas that also need supporting. Child protection is not just a matter of protecting children but also removing the problems that create pressures within families and is therefore ripe for developing innovative multi-agency responses.

Giving greater priority to one area over another not only limits the opportunity to respond to emerging need or problems that do not clearly fall within the guidelines but may also mean

that a less important child protection case, for example, will take precedence over a more important discrimination test case.

In our submission to LAQ's civil law review, QPILCH supported LAQ's recommendation to loosen the hierarchy, but went further. We recommended that LAQ be given discretion to take on matters that the limited special circumstance clause does not permit so it can have some flexibility in how it responds to need.

Of course, government has a responsibility to ensure that issues of community concern are given appropriate attention and to determine the allocation of resources to address priority issues. However, this should not restrict services to the extent that they cannot address other pressing needs or avoid injustices. Government decisions to address specific issues should be matched by specific funding and LAQ should have discretionary funding to meet other demands.

LAQ and CLCs, properly coordinated and with appropriate levels of accountability, need to be trusted to do what they do best to meet community needs. They should be given some latitude to respond to need by removing tied funding or be given greater discretion to respond to need. At the same time as government is encouraging its services to be responsive to the community, it ties the hands of LAQ and community legal assistance providers.

B. Falling through the gaps

The tied nature of much funding to services and government priorities has meant that some areas of law are not serviced to any real degree.

The homeless have only seriously been assisted through pro bono services. Pro bono services are bombarded with applications for assistance from people who have no access to legal aid even when they comply with the LAQ means test. Defendants without funds in civil cases almost have no chance of obtaining representation through legal aid or at all. Environmental issues, largely a state responsibility, are rarely assisted. Migration law receives little LAQ assistance despite its inclusion as a Commonwealth priority. There are limited avenues to obtain state administrative law assistance. Even where LAQ has established civil law services through its own careful budget management, funding for these services is so limited that it cannot service all needs in the area.

C. Let services do what they do best

Government priorities have also reduced the effectiveness of legal services by failing to capitalise on the strengths, skills and structures of the various and different legal service providers.

Funding of discrete services has seen CLCs being required to undertake casework in specific areas also supported by LAQ such as child support (to avoid conflicts), but CLCs usually have less resources than LAQ. While we support the idea of choice in service provision and recognise the obvious need to avoid conflict, it may not work best to have CLCs as outposts of LAQ doing the same work with less resources. The private profession for example may be better equipped to do this sort of work. This is a matter for study and appropriate policy development.

In addition, the funding regime has sought to fix CLCs into the straight casework model with limited opportunity to use their ingenuity to experiment and respond to demand innovatively. There is much more that can be made of the CLC model and staff skills, beyond the unjustified fears of government about their engagement in the political process. Some larger

centres have been fortunate to employ social and welfare workers/outreach officers to more fully engage with community problems, but this is still largely undeveloped.

Even though CLCs in particular are overburdened and operating on a shoestring, they are more flexible and therefore better able to assess data and trends and develop appropriate responses than unwieldy bureaucracies. Specialist CLCs in particular are usually the first to identify the problems that befall a class or group. They also develop community relationships that make multi-agency approaches more likely. They are well placed to conduct targeted smart research and could be coordinated with university researchers and research funding to maximise that role. CLCs are also experienced at preparing CLE materials in accessible formats. But they need help an resources in doing all of this.

These important features of CLCs however are rarely encouraged by government as a source of rich information for policy development and program implementation.

Resourcing of innovation rather than strict adherence to the straight casework delivery model could potentially increase the range of services available to the public a less expense to the taxpayer.

INCREASE COORDINATION BETWEEN SERVICE PROVIDERS

The failure to institute coordination mechanisms even at a local level means that providers usually go it alone, with limited resources and limited success, lack motivation to experiment or promote new approaches, and inculcates a sausage-machine culture. This is not a criticism of the highly committed and motivated staff of the service providers referred to. Rather, it describes the result of a failure to fully recognise the commitment of staff, make the most of their contribution through enhanced coordination, and to capitalise on the skills and knowledge of people who work in the sector.

Coordination that does occur is mostly confined to ground level approaches by energetic staff in particular areas. There is no clear and concerted institutional support for coordination to occur.

The purpose of coordination is to match supply and demand and maximise the use of existing resources. Currently, there is little coordination, limited supply, duplication of effort and excessive demand.

REMOVE COMPETITION FOR FUNDING

The funding regime has complicated the relationship between LAQ and CLCs because LAQ is both partner and funding controller/coordinator, as well as being the commentator on other areas of CLC funding. In less than transparent ways, LAQ has competed with CLCs in obtaining grants to establish community services, sometimes in competition with specialist CLCs - usually without consultation or coordination of effort.

This situation has been created by funnelling CLC funding through LAQ. It would be better if CLC funding was monitored by someone with less stake in the outcome but with CLC and LAQ input on a cooperative basis and with a common purpose. This is not a criticism of LAQ staff who work well with CLCs. Rather it is a feature of the imbalanced relationship and history of competition between CLCs and LAQ.

CLCs should be represented on all relevant funding bodies to ensure that the sector's position was fully presented and to avoid duplication of services.

As one commentator notes in relation to the Victorian experience, but is equally applicable to Queensland:

> … there remain considerable tensions between CLCs and VLA [Victorian Legal Aid) who often still identify each other as competitors for funding. Ultimately the effectiveness of this network will rely on improvements in trust, goodwill and communication between all the relevant actors.[4]

RETHINK THE PREFERRED SUPPLIER SYSTEM FOR LEGAL AID

Introduction of the preferred supplier system has alienated some law firms from legal aid work, reducing the number of firms willing to act in this sphere. While the preferred supplier system has probably improved the quality of legal aid services and increased profitability for the few large suppliers in major centres, it is likely that it has impacted negatively on rural and remote areas.

If this policy was more flexible, more firms could participate in all legal aid work.

LOW LEGAL AID FEES

Low legal aid fees reduces the likelihood of firms undertaking pro bono work. If their profit margin is low, they can ill-afford to do additional work for free or low cost. For example, there is little structured pro bono work outside assistance for existing clients in family law and crime. The general view is that if you pay lawyers doing legal aid work more, fewer people will be helped by legal aid because government will not increase legal aid funding. However, more funding and increased fees might draw a greater pro bono contribution from the profession.

Not enough has been done:

- to search for incentives to encourage greater participation by the private profession in legal aid and pro bono work. For example, the Federal Government could offer tax incentives and/or GST and FBT exemptions for that part of the practice that involves legal aid and pro bono work; and
- to explore the utility of schemes to empower more people to represent themselves in appropriate forums, develop more effective discrete tasking, use telephone and video servicing, expand duty lawyer and self-representation schemes, facilitate more student clinics and ADR and work towards greater understanding of the law to reduce the demand end and pay the supply end more.

[4] Schetzer, L, *Community Legal Centres: Resilience and diversity in the face of a changing policy environment*, AltLJ Vol 31:3 September 2006 at p 163