QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

Achievable initiatives to improve civil law services in Queensland

SUBMISSION TO THE HON KERRY SHINE MP ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

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INTRODUCTION

Existing free and low cost legal services for the disadvantaged cannot meet community demand for advice and assistance in civil law:

- Legal Aid Queensland has cut back on providing civil law assistance since 1992 and now only provides limited aid in several discrete areas
- not enough is known about the need for legal services and how best to service it
- the Civil Law Legal Aid Scheme (CLLAS) is under-utilised and cannot be fully utilised until disincentives in providing speculative fee services are removed
- community legal centres are overburdened, and
- improvements to date in pro bono coordination cannot sufficiently fill the breach.

At the present time, there is little progress towards strengthening the civil justice system to improve the provision of civil law services in Queensland – for marginalised and disadvantaged groups and for sections within the State, such as people in regional, rural and remote communities. In such circumstances, it is difficult for the community to have confidence that the civil justice system is for all Queenslanders, not just those with sufficient wealth to access it.

This paper begins with background information and then makes suggestions for reform of the civil justice system, particularly how some improvements are possible with minimal new funding and how available funding can be maximised with:

1. a revamped policy approach
2. sufficient data collection, research and knowledge development
3. more community participation
4. better communication between stakeholders and coordination of effort
5. targeted casework
6. development of existing services
7. improved funding coordination, and
8. some new initiatives.

SUMMARY OF PROPOSED QUEENSLAND GOVERNMENT ACTIONS WITH ESTIMATED COSTINGS

We recognise that governments perceive demands for greater funding for legal services as unrealistic and are reluctant to commit the significant more funding the system actually needs. So this part of the paper summarises the affordable and practical actions, discussed throughout the paper, which the Queensland Government can pursue to improve civil law services in Queensland.

BUDGET SUBMISSION

1. That the Department of Justice and Attorney-General prepare a Budget Submission to boost spending for civil law services and increase the CLC funding program as outlined below and explained in this submission from and including the 2007-08 financial year.

FUNDING CASEWORK AND INNOVATION

2. That two new self-sustaining funds - a Civil Law Fund and an Environmental Law Fund - be established to address the need to support civil law casework.

Cost: $6m one off seed funding

a) A Civil Law Fund established by the State Government, with contributions from philanthropic organisations, successful litigants and reinvested interest to be used for civil cases (when ineligible for CLLAS or LAQ), and which can act to rectify hardship (such as assisting defendants in civil disputes in the interests of justice). We suggest that this fund should be established with an amount of $5m.

b) An Environmental Law Fund established by the State Government, with contributions by philanthropic organisations, contributions from successful litigants and reinvested interest to fund important public interest environmental cases. We suggest that this fund should be established with an amount of $1m.

FUNDING SERVICES

3. That funding be increased for community legal centres (CLCs) through the State CLC funding program and for Legal Aid Queensland (LAQ) to maintain and develop civil law services.

Cost: $1,875,000 annual recurrent funding

a) new funds to expand ATSI civil law services – a State Government contribution of $200,000 annually

b) additional funds under the CLC funding program for existing CLCs to improve funding consistency and adequacy of staff conditions – an extra $1m annually

c) additional funds under the CLC funding program for a new Consumer Law Centre - $75,000 annually (total cost $200,000 shared with other funders – the Queensland Office of Fair Trading and the Commonwealth Attorney-General's Department)

d) additional funds under the CLC funding program for the Homeless Persons' Legal Clinic - $150,000 annually

e) additional funds under the CLC funding program for pro bono coordination through QPILCH - $200,000 annually, and

f) an extra $250,000 discretionary funding annually for Legal Aid Queensland.

COORDINATION OF FUNDING AND SERVICES

4. That in reviewing LPITAF, the Department of Justice and Attorney-General ensure that:
   - it is used for legal projects
   - funding for CLCs is coordinated with other funding sources
   - grants are provided on the basis of demonstrable need
   - that it focus on supporting legal projects that are evidence based and develop and/or provide quality practical legal services
   - where appropriate funded projects are conducted in collaborative partnerships with universities
   - some funds be accessible anytime, not just annually
   - where possible draw out private sector funding, and
   - it is used to encourage and fund mechanisms to coordinate the provision of free and low cost legal services.

5. Current accountability reporting should be reviewed, simplified and be appropriate for the sector.

6. That the Minister and Department of Justice and Attorney-General more actively support CLCs in applying for funds from available sources.

7. That the Department of Justice and Attorney-General review current infrastructure and resource constraints to increasing service delivery by CLCs and identify possible funding sources to upgrade and provide more resources and improve infrastructure to meet these needs on an as needed basis.

RETHINKING POLICY, NEW RESEARCH AND PARTICIPATION

8. That the Department of Justice and Attorney-General conduct a review of legal aid and community legal centre policy in consultation with stakeholders and the community in order to identify what approaches will better respond to problems experienced by people needing free and low costs legal services, and what works best and what doesn't in service provision, with a view to improving civil law services and access to civil justice.

9. That the Department of Justice and Attorney-General (with the assistance of OESR, LAQ and CLCs) take responsibility for gathering and disseminating civil law data for research purposes.

10. That the Department of Justice and Attorney-General involve service providers and the community in undertaking research and policy and service development.

Cost: within existing departmental resources (or appropriately funded though budget submissions if larger projects, including support for participating non-government agencies).

OTHER SPECIFIC NEW INITIATIVES

11. That the following initiatives be implemented:

a) The Department of Justice and Attorney-General, in partnership with the legal profession, the community and other relevant government departments:
   - prepare consolidated costs legislation

- reform the rules relating to class actions in line with the Federal Court procedure to more closely regulate and support the running of class actions in Queensland
- review speculative law services to develop incentives for lawyers to do more speculative law work
- review the operation of CLLAS to broaden its utility
- consider other forms of targeted and generalist CLAFs for implementation in Queensland and where appropriate be developed in consultation with relevant agencies
- prepare a policy to facilitate more pro bono activity in Queensland, particularly targeting corporate and government contributions, and
- review other innovative ways to deliver low cost legal services such as discrete tasking.

b) Legal Aid Queensland organise and lead a trial multi-agency approach, developing coordinated legal services for people with mental illness.

Cost: the cost of these recommendations can be absorbed within existing government and community resourcing or supported through appropriately devised budget submissions or through the use of discretionary funding recommended herein.

TOTAL COST

Casework and innovation	**$6,000,000 one off seed funding**
Services	**$1,875,000 recurrent**
First year cost	**$7,875,000**
Recurrent annual cost	**$1,875,000**

For this relatively small amount, government, in partnership with community legal centres, Legal Aid Queensland, QPILCH and the profession at large through private firms, universities and others, will contribute to the long-term viability of the civil justice system in Queensland.

BACKGROUND

Government

- In 2000-01, the Commonwealth Government spent $102M[1], and in 2001-02 $115.7M[2], on all legal aid and CLC services in Australia. In 2001-02, it spent $242.9M on its own legal services. This year, the Commonwealth Government is spending $174 million in legal fees to pay private law firms for its own legal advice[3].
- In Queensland, there are roughly 200 lawyers employed in CLCs and legal aid whereas Crown Law alone employs over 140 legal staff and departments have their own legal advisers and extensively uses the private profession to obtain legal advice.
- Accordingly, at Commonwealth and State levels, governments spend much more on their own legal services than on services for the poor.
- Over the period 2001-05, funding to Legal Aid Queensland from the Commonwealth increased by 55% from $19.9m to $30.8m; from the Queensland Government by 30% from $16.4m to $21.4m; and from interest on trust monies by 36.6% from $12.5m to $17m[4] (but almost all of this increase has gone to non-civil law services); totalling with other grants in 2004-05 to in excess of $70m[5].
- In 2004-05, the total legal aid budget for Queensland amounts to less than $20 per person, compared to $190 per person in the UK[6].
- In the period 2001-2005, when LAQ funding overall increased by 42%, Commonwealth CLC funding increased by just 7% from $3.055m to $3.26m, while State funding increased by 63.6% from $786,000 to $1.28m, a total increase of 18.5%[7]. Other State grants of about $700,000 and small project and non-recurrent grants from other sources augmented this.
- In contrast, state funding to Victorian CLCs increased by 140% from 1999 to 2006 from just over $2m to $5.75m.[8]
- Federal funding for Queensland CLCs represents 63% while the State contribution is 37% of funding.
- From 1991 to 2004, Commonwealth CLC funding grew at twice the rate of State funding. The large 2004-05 leap in State funding has not been sufficient to make up the shortfall in funding over the previous decade.
- QAILS estimates that State CLC funding needs to increase by $1.785m per year to bring Queensland into line with Commonwealth CLC funding recommended by NACLC.[9]

Corporations

- In 2000-01, Australian corporations claimed $700m[10] in legal costs deductions amounting to a $250m loss in tax revenue, 2.5 times the amount spent on legal aid by the Commonwealth.
- Corporate Australia contributes almost nothing to the provision of legal services.

Legal Aid Queensland

- Since 1992, LAQ has withdrawn from providing civil law services except in a few limited areas determined by government priorities, such as child protection[11].
- In 2004-05, LAQ spent less than $3m on civil law services in Queensland[12], although this figure only represents referred, not in-house services. LAQ annual reports do not provide the complete picture.
- According to one report, up to 60% of all LAQ's civil law services were in relation to child protection cases. This figure has been disputed, although the actual figure is not available from LAQ annual reports.

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[1] ALRC Discussion Paper 62, Review of the Federal Justice System, 10 August 2001.
[2] Ibid.
[3] Ibid.
[4] Legal Aid Queensland Annual Reports 2001-2005.
[5] Legal Aid Queensland Annual Reports 2001-2005.
[6] ALRC Discussion Paper 62, Review of the Federal Justice System, 10 August 2001
[7] Legal Aid Queensland Annual Reports 2001-2005.
[8] Schetzer, L, *Community Legal Centres: Resilience and diversity in the face of a changing policy environment*, AltLJ Vol 31:3 September 2006 at p 162
[9] QAILS Funding Submission 2005/2007 to Hon Rod Welford MLA, November 2004.
[10] Ibid.
[11] Legal Aid Queensland, Civil Law Discussion Paper, July 2005.
[12] Legal Aid Queensland Annual Reports 2001-2005.

- From 2001 to 2005, the number of civil law applications to LAQ has increased by 25%. The percentage of those legally aided has remained stable (from 75 to 76.3%). Of civil applications assisted, there was an 18.2% increase in those assisted in house and a 28% increase in those referred to the private profession[13].
- From 2001-05, the surplus held by LAQ increased by over 55% from $14.3m in 2001 to $25.5m in 2005, having dropped from the previous year's high of $28.4m[14].
- Nonetheless, funding increases cannot accommodate demand, legal aid means and merit tests are tightening, and so fewer people are eligible for legal aid services.
- Since the early 1990s, while LAQ and CLCs have created programs and projects to respond to certain needs as required by government or funded by other sources, there have been few attempts (other than CLLAS) to find creative and innovative ways to improve funding to assist the sector do more civil law casework.

Private practitioners

- In 2002-03, private lawyers across Australia conducted about 690,000 hours of pro bono legal services. This amounted to about 23 hours annually for every solicitor, primarily falling on country practitioners[15].
- In 2006, the majority of pro bono work undertaken was in family law, crime, wills and estates, with a gap to consumer law, housing and tenancy, powers of attorney and guardianship and then domestic violence.[16]
- In 2006, most pro bono work came from existing and potential clients, family and friends (47%) while only 14% was referred from CLCs.
- Much pro bono work occurred where an existing client could no longer afford the agreed legal services and this is likely to be in family and crime.
- While the level of pro bono work is encouraging and should be acknowledged, it is by no means certain or consistent.
- Over the period, the cost of legal services and court fees has steadily increased.
- While legal aid fees for private practitioners has recently risen 3% to $95 per hour in Magistrates Court matters and to $120 per hour in the Court of Appeal, this still represents a significant reduction in fees compared to usual charging rates for privately paid legal services[17].

Community legal centres

- In 2004-05, Queensland CLCs provided more than 20,000 information services (a decrease of 18.4% from previous year); over 48,000 advice services (an increase of 16.2% from previous year) and assisted more than 2,600 new individual clients with representation services (a decrease of 22.5% from previous year).[18] [It is difficult to obtain CLSIS data over the same time period used above to show longer trends in CLC services].
- The major information types were: credit and debt; tenancy; and welfare.
- From 2003-04 to 2004-05, there was a 12% increase in environmental information provided.
- The largest advice areas were tenancy, credit and debt, and welfare.
- The major reasons cases were opened were for assistance with wills/probate; tenancy; welfare; and credit and debt.
- Queensland's 33 CLCs (funded and unfunded) provide generalist and specialist services, some on a state-wide basis.
- Many CLCs, established on the initiative of government, have not been provided with sufficient funding to make them viable services. Funding has been spread too thinly to enable them to operate effectively for their communities or without undue strain on staff and volunteers.
- Research conducted by the Institute for Sustainable Futures shows that for every dollar spent on community legal centres $100 is saved in avoidable costs to other government departments. However, in real terms funding allocated to CLCs is reducing, despite the very cost-effective service they provide to many thousands of Australians.

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[13] Legal Aid Queensland Annual Reports 2001-2005.
[14] Legal Aid Queensland Annual Reports 2001-2005
[15] ALRC Discussion Paper 62, Review of the Federal Justice System, 10 August 2001.
[16] NPBRC, QUT and QLS, Preliminary Report, *Pro Bono legal work undertaken by members of the Law Society of Queensland March - May 2006*.
[17] Legal Aid Queensland Annual Reports 2001-2005.
[18] CLSIS data September 2006.

- In 2003, the average wage for CLC managers was $42,000 per annum, compared with new lawyers in private practice earning from $55-65,000 per annum. In 2006, a newly admitted LAQ lawyer earns from $40-52,000 per annum while the wages of most coordinators/directors in community legal centres, often senior, experienced lawyers, ranges from $45-55,000 per annum[19].
- CLCs have the greatest capacity, facilitated by government funding, to do small scale casework through the development of innovative projects with pro bono partners, universities and corporate sponsors.

Indigenous legal services

- In just an eight month period in 2005-06, the southern district Indigenous legal services, with 2 dedicated civil lawyers and ad hoc support by other staff, provided over 3400 civil law advices and opened 233 civil case files in metropolitan, regional and remote areas. The casework exceeded targets by over 200% in metropolitan areas and 150% in regional areas. [As these dedicated civil law positions are new, it is not possible to provide earlier statistics for comparative purposes]

People in need of assistance

- While much work has been done in enhancing civil law advice services, the person with a problem that needs representation in prosecuting or defending a small civil claim are currently not serviced, particularly if they live in a rural or remote area.
- 4 years ago it was estimated that a gross annual income of less than $20,000 was needed to be eligible for legal aid and that a gross annual income of about $60,000 was needed to afford private legal assistance. The gap between those eligible for legal aid and those who can afford private legal services is growing[20]. A large number of people simply cannot obtain legal aid or afford legal fees.
- Over 25% of litigants in the Supreme Court and around 40% in appeals are self-represented.
- Some clients seeking the assistance of free services have inherited behaviours and attitudes as a result of chronic and generational poverty or experience mental illness that require more sensitive and intensive support.
- There may be a considerable cost in not sufficiently funding civil law services or targeting where services are most needed or how best to address the problems of people with special problems.

These statistics must be viewed in the context of an increasing Queensland population and other pressures, particularly in marginalised areas.

Population pressures

- In the period from 2001 to 2004, the population of Queensland increased by 6.2% from 3.655M to 3.882M[21].
- Many people are settling in the Moreton and Wide Bay/Burnett areas characterised by higher levels of unemployment and multiple disadvantage.
- In Queensland in 2000-01, there were 342,484 people of working age earning less than $20,000 per annum, increasing by 5.3% in 2003-04 to 361,970. I
- n the same period, the number of people earning between $20,000 and $60,000 per annum increased by 4.4% from 568,161 to 594,375.[22]
- The Productivity Commission has shown that the recent steep increase in housing affordability is the direct result of demand driven by population surges in key areas such as South-East Queensland.[23]
- Over 47% of Queenslanders live in rural, regional and remote areas. They face reduced access to lawyers; distance from assistance, reliance on telecommunications and its shortcomings, and reduced privacy.

[19] Australian Bureau of Statistics (2005). 8667.0 Legal Practices, Australia 2001-2003

[20] NSW Law Society report 1995, *Conditional Fees*, by Michael Napier Bawden quoted in Gubbay, I. 'Do companies and commercial matters have too much access to justice', Caxton legal Centre Access to Justice Conference 12 October 2001.

[21] Australian Bureau of Statistics (2005). 3218.0 Regional Population Growth, Australia 2004-05

[22] ATO Taxation Statistics 2000-01 and 2003-04: Table 13 Personal tax selected items by sex, marital status, state/territory and taxable income.

[23] Productivity Commission (2004) Inquiry into First Home Ownership.

The environment

- Queensland, particularly South-East Queensland, is Australia's fastest growing region (279 development applications in March 2005) with environmental impacts including: increasing degradation of Moreton Bay, unsustainable demands on our water resources evident in current public discussion of the water crisis, and koalas approaching extinction in the region. Volunteer community groups are unable to fully respond to this flood of development due to lack of legal aid[24].
- There is so much growth and the pressure on people so great, that we underestimate the importance of the checks and balances provided by the legal system.
- In turn, population pressures and loss of quality of life through loss of green space and pollution contribute adversely to social wellbeing and particularly impact on the marginalised.
- At the same time, we have grown so rich through growth, the benefits of this wealth should be shared by all, especially helping people to protect their legal rights and quality of life.
- The problem of global warming affects all Australians and is now acknowledged by even the most skeptical. Lawyers have a responsibility and a role in protecting the environment and the diverse species in it on behalf of people and groups who wish to act at a local level but cannot afford to. It is not just the role of lawyers to protect the interests of the wealthy, whether to protect or exploit the environment.

[24] EDO Qld media release 22 May 2006

THIS PAPER

This paper suggests how some improvements in civil justice are possible with minimal new funding and with:

1. a revamped policy approach
2. sufficient data collection, research and knowledge development
3. more community participation
4. better communication between stakeholders and coordination of effort
5. targeted casework
6. development of existing services
7. maximised funding through improved coordination, and
8. some new initiatives.

In the first part of this paper, we look at the broad impact of the policies that have developed, usually in an ad hoc and uncoordinated way, over the last decade or more and which are impeding the optimal operation of the civil justice system.

We then examine the importance of research, coordination and participation in making the most of what we have. Finally, we recommend specific new initiatives the Government could implement at minimal cost.

The Australian Legal Assistance Forum (ALAF) recently noted that under-funding has had a devastating impact on the provision of civil legal aid services, including:

- an increase in the number of litigants representing themselves
- greater pressures on judicial officers to cope with litigants in person
- increased pressure placed upon under-resourced community legal centres, and
- litigants rights being rendered nugatory because of the limitations on access to justice.

To address these problems, ALAF has proposed a new national civil legal program.[25] While the modest funding we propose will achieve significant outcomes, government must eventually confront the issue of the under-funding of civil law services generally because it results in significant injustices and could lead to a breakdown in the justice system as a whole.

This paper does not seek to benefit any particular agency. Instead, it seeks to improve the civil law system for all Queenslanders. However, the costs of not funding the necessary services must be seriously considered if the system is to work for the benefit of people in need.

1. RETHINKING POLICY

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."[26]

[25] Proposal to the National Access to Justice Pro Bono Conference, 11 and 12 August 2006.
[26] Citizens Advice Bureau, 2005 *Lord Carter of Cole's review of legal aid procurement*, www.citizensadvice.org.uk.

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 greater understanding of the civil justice system by consumers, stakeholders and policy makers and better targeting of need
- a more flexible approach to funding
- greater use of prevention measures
- 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

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.[27]

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%).[28] 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 (see later).

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

[27] NSW Law and Justice Foundation.

[28] 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.

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.

As outlined in LAQ's discussion paper for its civil law review, the current 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 preventing some areas from being assisted
C. by limiting innovation and appropriate responsiveness

A. Inequitable funding

Commonwealth and State funding is tied to their jurisdictional interests. The Commonwealth has stated that it will not revisit this issue, except to reconsider its funding of crime, which too may force a greater state commitment and consequential pressure on civil law. 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 and personal problems, but this is still largely undeveloped.

Research and law reform
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, as they are usually the first point of contact between the legal system and their community. 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.

While LAQ's first contact team also has immediate contact with clients, it is on a much broader level.

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

Advice
Currently, for many citizens, the most that is available is a 20-minute to one hour advice session by a volunteer lawyer at a community legal centre, or phone/video or interview advice service from LAQ, with limited prospect of further assistance. Many litigants in person arise from these circumstances and while the lower courts are more easily accessible, all courts present access problems for litigants. Nonetheless, CLCs and LAQ are vital low cost advice services, and CLCs are particularly cost effective because of their ability to draw on a large volunteer commitment. With minimal funding, CLCs could be assisted to provide more advice services in new ways.

Minor assistance
The greatest opportunities for improvement lie in facilitating involvement of CLCs, not just LAQ, in delivering minor assistance services. This has the potential to forestall legal problems by assisting clients with correspondence and documentation at an early stage. Generalist CLCs are hampered by a lack of specialist knowledge in a broader range of crucial areas. If access to such knowledge and skills can be arranged with appropriate resources and support, CLC staff could play a much greater role in the delivery of such services. LAQ's proposal for a brief services unit is only a part of the solution to the problem (see next section).

LAQ, which already puts the majority of its resources into representation, could increase its activity into coordination efforts and even secondments to support CLCs when needed in delivering minor assistance. LAQ is, after all, one of the largest legal practices in Queensland. This would also facilitate information and skills exchange. There is also a possible greater role for the private profession here.

Casework
In casework services, CLCs work well in collaboration with others. Recent High Court litigation[29] conducted by the Prisoners Legal Service with the assistance of Blake Dawson Waldron demonstrates the value of partnerships that could be facilitated between CLCs and the private profession and which deliver benefits to the courts and justice system. This is just one example of the partnerships that are occurring on the ground. There is much rhetoric by government on partnerships but little promotion from the highest levels and CLCs still need better access to resources to play their part.

Resourcing of innovation rather than strict adherence to the straight casework delivery model could potentially increase the full range of services provided by CLCs.

INCREASE COORDINATION BETWEEN SERVICE PROVIDERS

LAQ's recommendation for the creation of a Civil Justice Brief Services Unit within LAQ to provide minor assistance in poverty law matters could have greater community benefits if coordinated with CLCs. In QPILCH's submission to LAQ's civil law review, QPILCH suggested that some CLCs already undertake this type of work and more could be undertaken if appropriately supported, and that before establishing a new unit in LAQ, it should first consult

[29] Fardon v Attorney-General (Queensland) [2004] HCA 46.

with CLCs to find ways to work together on this initiative. A broader approach would give a more comprehensive service across Queensland. For example, many people in need of this type of assistance first contact CLCs. Instead of referring them to other services, CLCs are well placed to provide brief services but they lack the resources to do so. LAQ and pro bono firms could resource CLCs to provide minor assistance cheaply and quickly.

The failure to institute coordination mechanisms 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.

We discuss the issue of coordination in more detail in part 4 of this paper.

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.

It would also be preferable if CLCs were represented on other funding bodies such as LPITAF to ensure that the sector's position was fully presented and even to oversee LAQ's discretionary fund if it is implemented.

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.[30]

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, necessitating LAQ to develop a scheme to support lawyers in rural and remote areas.

This policy has also lead to a reduction in the number of firms willing to undertake civil law and speculative work in smaller matters at least.

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

[30] 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

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. 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 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 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 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.

INCREASE PRO BONO PARTICIPATION
While pro bono has grown to help meet civil law need in some respects, it cannot fill the breach left in the wake of LAQ's withdrawal from mainstream civil law. In many matters, the private profession may not have the capacity or expertise, it may be urgent, or may give rise to conflicts, preventing the private profession from assisting.

While government has been supportive and encouraging of QPILCH, it has not taken more active steps to facilitate pro bono.

We propose that JAG lead the way in organising secondments of government legal staff to community legal centres as a way of enhancing CLC services, acquainting government and CLC lawyers with their respective activities, and promoting a pro bono culture in the public service.

QPILCH is developing a proposal to the Queensland Law Society to establish a volunteer practicing certificate system that would give retired and other non-practicing lawyers the opportunity and protection to practice at CLCs on a volunteer basis for the public good. There are many other possible pro bono initiatives that just need support and minor resourcing to yield considerable returns and cost savings.

A COMMITMENT TO ADEQUATE AND REASONABLE FUNDING
In this paper, we have suggested a number of ways that services can be improved with relatively small and new funding. However, there needs to be an acceptance on the part of government that funding requests are not just a grab by services to feather their nests but rather are required for practical and legitimate purposes. We believe that the funding needs outlined in this paper are necessary for a coordinated and revitalised sector which will achieve a much greater return to the community.

ACTION REQUIRED
That the Department of Justice and Attorney-General conduct a review of legal aid and community legal centre policy in consultation with stakeholders and the community in order to identify what approaches will better respond to problems experienced by people needing free and low costs legal services, and what works best and what doesn't in service provision, with a view to improving civil law services and access to civil justice.

2. RESEARCH AND STATISTICS

There is a significant lack of research conducted in civil law. Frequent recommendations for it to be conducted have largely gone unheeded.[31]

[31] Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal System,* Third Report (1998) 17; Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system* (ALRC 89, 2000); National Pro Bono Task Force, *Report of the First National Pro Bono Conference*, 2001; Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004); Noone, Mary Anne, *Access to Justice Research in Australia*, AltLJ Vol 31:1 March 2006.

WHAT IS BEING DONE

Research

While Legal Aid Queensland (LAQ) has undertaken several important research projects in recent years, there has been little interest in researching unmet need and access to justice issues in any concerted or systematic way with other legal service providers. This is primarily due to a lack of funding for such research[32], particularly for large scale projects. It is also symptomatic of a sector that does not work together as much as it could to improve the system instead of acting independently. Lack of capacity outside of casework is also a reason for small scale research.

The projects that have been conducted have been funded by ARC grants as LAQ has no discretionary funds to consider or implement any innovative responses to the civil law funding crisis, and there are few funding sources to conduct short-term discrete research projects.

A recent Griffith University study[33] has looked more closely at some programs that have been developed in Queensland in response to budgetary pressures.

The study has shown that greater emphasis has been placed upon empowering citizens to use the law for themselves. While self help services are said to give options and enable clients to act for themselves without needing a lawyer, there has been limited actual measurement of the extent to which innovative services do actually empower clients.

The study found, for example, that the Western Queensland Justice Network (WQJN) demonstrated the difficulties faced when attempting to provide greater assistance to rural communities through the provision of technological services. The WQJN was set up to extend the reach of legal assistance to those in rural communities through videoconferencing. It appears that most people in rural communities have been reluctant to embrace such technology.

While the study found that investment in technology is an inadequate substitute for more extensive service provision, it also shows the importance of evaluation as part of any necessary attempts to find programs that work and should not be seen as a reason why experimentation should be overlooked. We applaud LAQ's attempts to extend its services through trialled innovative projects. Once again, however, we would like to see greater participation by other service providers in developing priorities and formulating proposals.

LAQ regularly conducts its own research, data collection and modelling to inform service delivery and improve services, but rarely proactively shares this information with CLCs in any structured way. However, for the first time over the last two years, LAQ is also to be congratulated for conducting several reviews of its activities. Unfortunately, so far, there has been little feedback to the public on the outcomes of those reviews.

Some other empirical research projects are being undertaken, but again largely in an ad hoc way. QUT, for the Queensland Law Society and the National Pro Bono Resource Centre and in part with QPILCH, are currently conducting research on the level of pro bono services being undertaken in Queensland and across Australia (the first report was published in August 2006). In addition, QPILCH is studying access to the legal system by particular disadvantaged people (the homeless and people experiencing credit and debt problems).

Statistics

The original meaning of statistics is *facts of the state*. Taxpayers pay for everything government does and so taxpayers are entitled to access statistical information held by government. Unfortunately, little data is easily and publicly accessible in this area.

The dearth of research is therefore also due to the difficulty of accessing data that is collected by all service providers but never routinely made available to outside organisations.

In preparing this submission, for example, QPILCH asked a number of State and Commonwealth agencies for data, which has been more or less forthcoming, but in no way

[32] Noone, Mary Anne, *Access to Justice Research in Australia*, AltLJ Vol 31:1 March 2006.
[33] Banks C, Hunter R and Giddings J, *Australian Innovations in Legal Aid Services: Balancing Costs and Client Needs*, Socio-Legal Research Centre, Griffith Law School, Griffith University, June 2006.

answered all the questions asked. In addition, much basic data was unavailable from published sources such as annual reports.

Governments keep a vast array of statistical information this is invaluable in developing programs. But government keeps much of it closely guarded. The Queensland Office of Economic and Statistical Review (OESR) within Queensland Treasury is the Queensland 'bureau of statistics' and primary data research and analysis agency. Much routine data is accessible from its website. But tailored or non-routinely gathered information is costly, even for government departments.

WHAT IS NEEDED
The importance of empirical research is well recognised[34], and government would see the advantages of identifying needs, monitoring trends, collecting and analysing data and having mechanisms to evaluate policies. It does so in a number of other areas. However, in the civil law area, there is little evidence of mapping and modelling to facilitate analysis and policy and program development on an on-going basis, and there is little research into best practice and innovation so that the best service delivery programs can be designed and implemented. And good data is essential so decisions are objectively rather than subjectively based.

Later in this paper, we suggest cost effective ways to coordinate and facilitate research funding. Here, we suggest that government itself has a role and responsibility to at least gather and disseminate data for research purposes. This is something that government could do within existing resources or at a relatively minor cost.

ACTION REQUIRED
That the Department of Justice and Attorney-General (with the assistance of OESR, LAQ and CLCs) take responsibility for gathering and disseminating data for research purposes and facilitating research projects to improve civil justice in Queensland.

3. PARTICIPATION

Participation in the legal system is important to develop appropriate services. Policy and decision makers need to be responsive to what people need and the people best placed to inform this process are those who are directly involved in service delivery and those experiencing legal problems. Again, government would acknowledge this need, but there is little evidence of it being incorporated into practice in this area in any systematic way.

WHAT IS BEING DONE
QPILCH, with no discretionary funds, is using employed staff and volunteers to conduct surveys of rural/regional/remote service providers, the homeless and people experiencing credit and debt problems. With QUT and a small grant from LPITAF, QPILCH is also researching the needs of litigants in person. However, these efforts will only touch the surface of community civil law access needs, and can only be done on a small scale.

We are unaware of participation by CLCs or the community in civil law policy development to any significant or structured degree. Contributions to LAQ's recent reviews have been made but with little feedback.

WHAT IS NEEDED
Steps should be taken by government to involve service providers and the community in contributing to policy and service development as outlined earlier.

For example, in reviewing speculative law services as recommended later, service providers and litigants should be consulted on barriers to this type of litigation. This is something that could be done at minimal cost.

Such research and consultation will have the additional consequence of improving Queenslanders confidence and capacity in understanding the law, their rights and how to access justice.

[34] Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system* (ALRC 89, 2000).

ACTION REQUIRED
That the Department of Justice and Attorney-General involve service providers and the community in undertaking research and policy and service development.

4. COMMUNICATION AND COORDINATION

Up until recently, there have been few attempts to facilitate communication between service providers in civil law. This position has been fuelled by poor government funding that has forced LAQ and CLCs to compete for funding, and by tied funding which forces various agencies to work in silos. There have been good ad hoc attempts to work together, but primarily these have been driven by individuals rather than a structured commitment. Services have also been hampered by a lack of information, difficulties in obtaining what is available and a failure to share the information that is available.

WHAT IS BEING DONE
There have been recent attempts to improve communication and coordination. In 2006, LAQ established the Queensland Legal Assistance Forum (QLAF) following the initiative of the Australian Legal Assistance Forum (ALAF).

ALAF is a body comprised of National Legal Aid representing the directors of all Legal Aid Commissions in Australia, the Law Council of Australia, and representatives of Aboriginal and Torres Strait Islander Legal Services and the National Association of Community Legal Centres.

ALAF's objects are:
1. To promote cooperation between service providers in the interests of clients to ensure that the legal needs of those clients are met with the best and most effective service available to address these individual needs.
2. To regularly disseminate information and promote communication amongst the service providers on issues of mutual concern to enhance the ability of those providers to address client needs.
3. To inform governments and other organisations on the needs of those clients and on issues relevant to the practical delivery of legal assistance and representation services.
4. To assist governments and other organisations in the development of policies to enhance access to justice for all Australians.

QLAF is comprised of representatives of QAILS, A&TSI Legal Service - North Queensland, A&TSI Corporation (QEA) for Legal Services, the Bar Association, the Queensland Law Society, and Legal Aid Queensland.

The goal of QLAF is to "continually improve service delivery (civil, criminal and family) to socially and economically disadvantaged people through better alignment of planning, program design and service delivery by providers of legal assistance services".

At the first meeting of QLAF in February 2006, it was decided to do a "stocktake" of civil law services to ascertain what legal services are provided, and to also identify gaps.

QLAF's role to cover all issues of legal aid interest, which includes all areas of law undertaken by LAQ and CLCs, is a mammoth task.

For this reason, also in 2006, QPILCH convened a group comprised of representatives of LAQ, ATSILS, QAILS and QPILCH to encourage communication in order to coordinate activities at a practical and local level in civil law alone. Because of the busy workload of participants, this group can only meet sporadically.

There is also a need to encourage coordination across services in specific areas in order to develop coordinated responses. While this is already occurring, it needs greater facilitation. QPILCH and QAILS are also developing their clearing house roles in order to ensure that community legal services are apprised of CLC and other legal aid service activity to reduce duplication and circulate topical legal information and have access to necessary training and skills development.

WHAT IS NEEDED
By working together, there would be a reduction in duplication and a maximising of efforts to plug the gaps in service delivery. However, it is difficult for already stretched service providers to fulfil the tasks required for effective coordination without support. Many CLCs do not have the resources to engage to any degree in the time-consuming process of developing partnerships. Accordingly, discretionary funds are needed to enable responsible CLC staff to work with colleagues while being supported in their daily jobs. As the best resourced agency, LAQ is best placed to provide supply staff for CLCs engaged in joint projects and to support coordination efforts. This also builds better relationships between LAQ and CLCs. While an additional cost, coordination will save money in the longer term.

Accordingly, government has a role in facilitating coordination by funding mechanisms that coordinate the provision of free and low cost legal services and relevant non-legal services.

For example, the Bar Association and QLS have sought funding to establish their pro bono schemes under QPILCH's umbrella to bring together and coordinate all pro bono civil law referral services. A recent application to LPITAF to fund this scheme was unsuccessful. The Bar and QLS were prepared to contribute 25% of the cost of this scheme and only $45,000 was required from government. LPITAF, a non-recurrent fund, is not the best source of funds for such a scheme. However, because it would be a grant to the QLS and Bar, there is no other funding program that would be appropriate. It is a pity that another year will pass before this initiative can be again considered for implementation. This demonstrates the need for other independent and coordinated sources of funding or a change in the LPITAF guidelines to accommodate different sorts of initiative.

Multi-agency approaches too are possible and likely to be cost-effective and therefore should be fully explored.

ACTION REQUIRED
That the Government take active steps to encourage and fund mechanisms to coordinate the provision of free and low cost legal services.

5. FUNDING CASEWORK

We appreciate that governments are reluctant to commit the significant increase in funding that the civil law system needs to operate at a functional and optimal level. As noted in ALRC report 89, the former federal Attorney-General Michael Lavarch stated that the legal system is a low priority for governments and is perceived as "open-ended, demand-driven and rising in cost."[35]

This submission shows however that, with relatively minimal funding, mostly on a one-off basis to seed self-sustaining funds as recommended below, services can be organised and implemented to deliver a greater return for the investment made, without representing a huge and open-ended new investment.

As outlined above, further gains are possible with more information and research and improvements in communication and coordination, and government can play a key role by leading effective policy development, producing legislation to support desired outcomes, removing barriers to and enhancing pro bono services, and designing prevention strategies. However, its most important role is to provide additional funding, which no other body can or will fulfil.

WHAT IS BEING DONE
In 1992, when the civil law funding crisis required LAQ to retreat from providing civil law services, the Civil Law Legal Aid Fund (CLLAS) was established to help alleviate the shortfall in funding particular services where a court or tribunal could make a costs award. Since then, and despite new challenges arising, no attempts have been made to find other innovative funding sources and few innovative programs have been developed in a cooperative and holistic way to address the gaps in legal services.

[35] Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system* (ALRC 89, 2000).

In a number of areas and in many cases, legal assistance is not available. In its recent discussion paper on civil law, LAQ stated that:

> LAQ will not, in the foreseeable future, be in a position to fund casework services in general civil law matters in the courts.[36]

Accordingly, it is necessary to think beyond the traditional approaches of funding civil law services.

WHAT IS NEEDED

As recommended in our submission to LAQ's civil law review, we propose the establishment of two new self-sustaining funds to attempt to address the need to support civil law casework, particularly in areas that are currently unserviced. The advantage of a self-sustaining fund is that it provides longevity to casework funding. A $5m allocation for casework over 10 years would be exhausted over that period. A $5m investment in a self-sustaining fund can grow through judicious management and be funding casework indefinitely. We propose:

1. A Civil Law Fund established by the State Government, with contributions from philanthropic organisations, successful litigants and reinvested interest to be used for civil cases (which are not eligible for CLLAS or LAQ) and which can act to rectify hardship (such as assisting defendants in civil disputes in the interests of justice). We suggest that this fund should be established with an amount of $5m.
2. An Environmental Law Fund established by the State Government, with contributions by philanthropic organisations, contributions from successful litigants and reinvested interest to fund important public interest environmental cases. We suggest that this fund should be established with an amount of $1M.

Two recently established civil law funds exemplify this approach:

1. The NSW Legal Aid Commission has established a small new *Legal Aid Fund*, with a first year budget of $100,000, to provide legal aid for a discrete issue - public interest human rights matters - administered by a separate committee that makes recommendations to the Legal Aid Commission.
2. The Judicial Council of California and the California Bar's Legal Services Trust Fund Commission have established the Equal Access Fund. Each year, $US10m is distributed to court-based services for low income self-represented litigants in domestic violence, guardianship, family law, landlord and tenant and general civil litigation.[37]

It is also worth noting that a lone Sydney businesswoman in 2004 established a $3.5M fund to assist young people in need. She intends that this fund will grow to $6M over the next decade.

The Queensland Government should be attracted to this idea. The Premier recently announced (subject to the sale of Energex) a $300M *Future Growth Fund* to support sustainable development of clean coal technology. We are proposing two funds that amount to just 2% of that sum to be put aside for civil law services for Queensland citizens who cannot afford basic access to a lawyer.

To be self-sustaining, the following conditions would need to apply:

- Each of these funds be overseen by an independent board comprised of representatives of LAQ, CLCs, government and other relevant interests to ensure that it is actively and efficiently managed.
- It could be placed with the *Queensland Community Foundation* (or similar), with DGR status to permit private bequests and donations to be drawn from corporate and philanthropic sectors into the provision of civil law services to augment the funds, actively promoted by government.
- Where litigation is involved, a percentage of the award and costs successfully obtained by applicants funded under the scheme could be returned to the fund (as occurs with some other CLAFs).

[36] Legal Aid Queensland, *Review of Civil Law Services – Consultation Paper*, April 2005.

[37] Judicial Council of California, Administrative Office of the Courts, *Equal Access Fund: A report to the California Legislature*, March 2005.

- A percentage of the interest earned on the fund would be retained in the fund to also increase the capital amount.
- Unlike CLLAS, these funds would be full-fee paying at rates determined by the managing committee.

By establishing funds for civil law and environmental law casework (litigation and non-litigious), based on self-sustaining principles, under the guidance of an expert panel, the funds could be put to best effect to support worthy cases - picking up people and issues which are falling through the cracks in current servicing.

In 2006, the Queensland Government introduced a new set of priorities that are of relevance to funding justice services. While health is the prime government priority at the moment, neglect of areas other than health will result in crises in these areas unless they are systematically backed up with adequate funding. The funds we are proposing require only a small comparative commitment.

Government priorities supporting a *Civil Law Fund*

"The Government recognises that responsible government requires appropriate funding policies that:

- Engage communities in government decisions and processes
- Ensure service provision is financially sustainable and that Total State Worth is at least maintained
- Strengthen government policy development and implementation to focus on future policy challenges
- Support a responsive public sector, focused on improving government service delivery.

Other areas supported by the priorities include 'strengthening services to the community' by:

- Developing and implementing strategies to support Queensland families
- Improving lives of people with disabilities
- Working with Indigenous communities to improve economic and social wellbeing, and
- Improving Queenslanders' access to affordable housing.

Also 'protecting our children and enhancing community safety' through:

- Reforming the child protection system for the wellbeing of Queensland children
- Implementing strategies which contribute to safe communities
- Addressing crime and the social and economic causes of crime
- Minimising the risk and impact of accidents, emergencies and disasters."

The law and legal services play a key role in all these issues.

The fund would be accessible to all service providers with a client who fits the criteria. Where a matter involved litigation, it would be available for any court or tribunal, irrespective of whether a costs award was possible. Also, while subject to a means test, the test should not be as stringent as LAQ's current test. There would need to be some flexibility to avoid significant injustices in other areas.

Government priorities supporting an *Environmental Law Fund*

A separate environmental fund is required because more and more, pressures on the environment are reducing the quality of life of ordinary Queenslanders and the funded services (2 EDOs) cannot cope with demand to service even the most vital environmental cases.

In addition, since 1992, Legal Aid Queensland, unlike its counterparts in NSW and New Zealand, has not granted legal aid in environmental or planning cases, including important public interest test cases[38].

Water has become a prominent issue yet government is not in a position to solve all the issues this problem raises - people, citizens, should be funded to resolve disputes and protect rights in the appropriate forums.

Two new Queensland Government priorities are:

- Managing urban growth and building Queensland's regions, and

[38] EDO Qld media release 22 May 2006.

- Protecting the environment for a sustainable future.

These clearly support the proposal for an environmental law fund. Government cannot be relied upon alone to protect the environment.

The community must be supported in participating in these laudable goals. The EDOs are a principal supporter of environmental organisations that protect the public interest for a sustainable, biodiverse environment and also assist groups and individuals, where funding permits, which seek to maintain quality of life and social amenity. Many community groups self-represent because they cannot get aid or afford help to protect the multiple pressures in their communities.

ACTION REQUIRED
That two new self-sustaining funds - a Civil Law Fund and an Environmental Law Fund - be established to address the need to support civil law casework.

6. SERVICE DEVELOPMENT

An increase in funding is also required for services, both legal aid and community legal centre, to support the frontline agencies that provide advice and assistance in important problem areas. That is, funds to address and target need with practical services must also be increased. Increased funding will also lead to the next stage in CLC development – involvement in coordination strategies, more minor assistance, project development to target and expand services, greater sophistication and skills development and greater use of partnerships and cooperative ventures.

This has been recognised by the Victorian Government in its paper *Growing Victoria Together*, and underpins the philosophy of this paper that the economic, social and environmental costs arising from the extreme and unequal impact of market and development focused policies must be addressed through partnerships involving all sectors of society.

The Victorian Government recognises the importance of the CLC sector in responding to disadvantage:

> Community Legal Centres are often at the cutting edge of service delivery, community education and law reform. They also understand the needs of disadvantaged members of the community many of whom often find it hard to cope with legal and consumer problems.[39]

This is not saying that LAQ does not have an understanding of these issues. LAQ has 13 regional offices and a diverse range of programs. Rather, the Victorian Government acknowledges the unique role of CLCs that should not be underestimated and has greater potential: flexibility in responding to problems that arise within communities; the ability to work holistically in communities that experience significant multiple disadvantage; the ability to develop and use a range of targeted responses; and the ability to draw on wider resources - private and community. This potential has not been fully realised.

WHAT IS BEING DONE
We already know that the following groups are vulnerable, requiring special attention:
- Indigenous people
- the homeless
- people with mental illness and intellectual disabilities
- prisoners and people recently released
- young people, and
- older people.

There are specific CLCs dedicated to assist particular groups in need, but these face persistent funding difficulties:
- Indigenous legal services have only two dedicated civil law lawyers to service all of Queensland.

[39] Department of Premier and Cabinet, *A Fairer Victoria: Creating Opportunity and Addressing Disadvantage*, Victorian Government, April 2005.

- Housing and homelessness legal issues are under-resourced. The Tenants Union cannot meet demand. QPILCH established the Homeless Persons' Legal Clinic and the Homeless Policy Project, employing new service models to increase services, but is not recurrently funded.
- There is chronic under-funding for services to assist with mental illness and intellectual disability issues. Most CLCs assist people with mental illness in some way, but there is little coordination of effort, and many people with mental illness and legal problems miss out on legal assistance.
- There are constant threats and challenges to protecting the rights of prisoners (the PLS has only 1.5 caseworker positions to service Queensland's burgeoning prison population).
- Broad youth justice issues are possibly the most pervasive and widespread but continue to be under-serviced. CLCs provided great benefits in such areas because they are more informal and less daunting for young people.
- The emerging need for services faced by older people are attracting enormous interest. Caxton Legal Centre's newly funded SAILS project is an example of where government has seen the advantage of using a CLC in responding to this increasing need.
- We know from research in NSW that housing and credit and debt problems are the two areas of greatest civil law need. QPILCH established the Consumer Law Advice Clinic to augment LAQ's consumer law service, which combined still cannot meet demand
- Most CLCs constantly face fiscal challenges that directly impact on service provision such as finding/keeping adequate accommodation, critical staffing to do basic tasks, maintaining a volunteer base.

All CLCs, operating with a bare minimum of funding, attempt to assist as many clients and address as many issues as they can. However, they face many challenges and receive little support or interest from government. LAQ is similarly bogged down in day to day casework, with little opportunity to routinely experiment and to work with CLCs and other providers to find the best service models. At least LAQ has adequate and stable facilities.

Pro bono coordination offers an opportunity to draw more resources from outside government, to match private resources with the needs of CLCs and to assist in responding to the needs of disadvantaged groups such as Indigenous Queenslanders and people in rural and remote areas. However, government support for pro bono facilitation and coordination, while positive has not been matched with active policies to promote it.

WHAT IS NEEDED

New recurrent State funds are required to:

1. contribute to Indigenous legal services for civil law services
2. raise the level of CLC funding to ensure consistency and adequacy of staff conditions and to ensure that all centres have basic funding for at least one solicitor and an administrator
3. establish a specialist consumer law service to both draw out private resources (student clinics and private funding) and to resource other CLCs with knowledge in this area.
4. fund coordination of the Homeless Persons' Legal Clinic
5. fund pro bono coordination through QPILCH
6. provide funds to LAQ to give it greater discretion in allocating resources to quickly respond to need for civil law services currently under-resourced.

1. It is not enough for State and Commonwealth to pass the buck on funding Indigenous civil law services. Both have an obligation to ensure that services to Indigenous Queenslanders are comprehensive and of high quality. This is a priority issue to address significant social breakdown.

2. All CLCs are under-resourced, so funding needs to enhance centre conditions for staff (bring all workers up to a decent equitable pay standard), ensure small centres have a basic complement, give them the foundation to develop new services and enable them to participate fully in coordinating their activities to ensure the sector is operating at an optimal level.

3. Credit and debt legal advice and assistance consistently rates as the service most demanded across Australia. Most other states and territories have a stand alone consumer law centre. Queensland has LAQ's one full-time position and QPILCH's part-time consumer law clinic specialising in consumer law. We have proposed to the

Federal and State Attorneys-General and Queensland Minister for Fair Trading how this centre can be cooperatively funded and also draw on the resources of the private profession.

4. The Homeless Persons' Legal Clinic is a project of QPILCH. It has operated since December 2002 and up to June 2006 has assisted 958 clients with its unique service, currently located at eight welfare agencies. For the first 2.5 years of operation, the HPLC was staffed by part-time secondees. Since, it has been funded on a non-recurrent basis by a grant from the Department of Communities. This funding is not secure and the service cannot operate as currently operated and with plans for expansion without secure consistent funding. The service would be appropriately funded from the CLC funding program. In order to attract DGR status there are plans to constitute the HPLC as a separate entity but managed and co-located with QPILCH. The HPLC has drawn more than $3m with of legal assistance from the private profession since 2002.

5. QPILCH has been funded by a LPITAF grant for the periods 2005-06 and 2006-07. LPITAF is not a recurrent program. Prior to this it existed on a part-time basis from funds provided by members and ad hoc grants. QPILCH now operates on a full-time basis and needs recurrent funding to provide the current level of services. It has drawn more than $780,000 from the private profession for pro bono legal services with only 43% of referrals costed to date. Importantly, it is currently working with several national law firms to develop quality assured systems and procedures which would be transferable to other CLCs. QPILCH is also developing a training program to assist CLC skill development. QPILCH too would be appropriately funded from the CLC funding program.

6. LAQ has limited means to develop innovative projects, respond quickly to new circumstances, or address injustices which arise outside its current priorities. It should be given a small discretionary fund with which it can address these shortcomings and also provide small infrastructure requirements its own use and CLCs, and for coordination initiatives. To ensure coordination, a representative of CLCs should be appointed to the internal LAQ board established to monitor this fund.

ACTION REQUIRED
That the Department of Justice and Attorney-General prepare a Budget Submission to boost spending for civil law services for the 2007-08 financial year and beyond as outlined in this submission as follows:

- **new funds to expand ATSI civil law services – a State Government contribution of $200,000 annually**
- **additional funds under the CLC funding program for existing CLCs to improve funding consistency and adequacy of staff conditions – an extra $1m annually**
- **additional funds under the CLC funding program for a new Consumer Law Centre - $75,000 annually (total cost $200,000 shared with other funders)**
- **additional funds under the CLC funding program for the Homeless Persons' Legal Clinic - $150,000 annually**
- **funds under the CLC funding program (instead of LPITAF) for pro bono coordination through QPILCH - $200,000 annually, and**
- **an extra $250,000 discretionary funding annually for Legal Aid Queensland to fund projects, technology needs, cost saving initiatives and other infrastructure needs and coordination for CLCs and itself.**

7. COORDINATION OF FUNDING OF LEGAL SERVICES

As a coordinated approach to service delivery is required, similarly, coordinated funding is needed.

WHAT IS BEING DONE
In Queensland, much of the work of CLCs relates to the once annual, now three yearly service agreement negotiations, constant searching and application for new funds for projects and multiple reporting requirements. Some centres have four, five or more funding sources, each with different reporting regimes. However, the outcomes these centres seek are likely to be

what all funders want, the best available services for their clients and the best outcomes for the community.

Despite intensive reporting requirements:

1. there are "persistent gaps between funding and services provided and actual needs; [and the] strategy of spreading scarce funding by giving a little to as many as possible is not always effective or appropriate".[40]
2. services are rarely evaluated to ensure they are operating effectively.

Who currently provides free and low cost legal services?
The following agencies and schemes support free and low cost legal services to the disadvantaged:

- Legal Aid Queensland
- CLCs
- ATSI legal services
- Law firms through pro bono services (some facilitated by QPILCH)
- Law firms providing speculative services, with or without the assistance of CLLAS.

Where do CLCs get funding?
CLCs obtain funds from a range of funding sources:

- Queensland Government CLC funding program (Department of Justice and Attorney-General)
- Queensland government departments such as the Department of Communities, Department of Housing
- Gambling Community Benefit Fund and Jupiters Casino Community Benefit Fund
- Legal Practitioners Interest on Trust Accounts Fund (administered by the Queensland Minister for Justice)
- Federal Government CLC funding program (Attorney-General's Department)
- Federal Government departments such as DIMA and Family and Community Services
- Private profession through QPILCH or direct assistance to the community legal sector
- Charitable bodies such as the Myer and Ian Potter Foundations
- Donations and income produced from publications.

Of note is that in the legal sector, there are few funding sources, compared with the wide availability of programs in other sectors such as health. The major source of CLC funding is the Commonwealth and State CLC funding programs administered through Legal Aid Queensland (LAQ). Major project funding is derived from LPITAF and the Gambling Community Benefit Fund.

What is happening
The result of the decision-making at government and LAQ levels is:

- some CLCs persistently miss out on funding
- most CLC staff are underpaid and often more pre-occupied with funding than service provision
- funding can be directed to less worthy projects
- a reduction in flexibility and therefore the ability to respond effectively to the needs of their client base
- competition for funding
- the non-exploitation of saving initiatives such as co-location, and
- the failure to capitalise on a wide range of unused skills available in the sector.

In relation to project funding sources:

- project grants can be sought essentially to sustain core activities
- funds are often non-recurrent so CLCs must compete every year for scarce funds
- CLCs grant shop
- CLCs can be too busy with day to day casework to effectively develop project proposals
- CLCs with projects to do may not apply because they believe they have already drawn too much from the fund or funders may feel that funding is unequally spread
- applications for funding are sometimes made simply to get funds and applications are developed hastily and inadequately to comply with funders' timing and criteria

[40] Hunter, R, *Legal Aid Congress* Brisbane October 2004 quoted in Noone, note 2.

- new centres are funded without consideration of the conditions in existing services
- there is little understanding by fund administrators of what CLCs do, how they operate or what they achieve
- projects are funded haphazardly without the benefit of a bigger picture to point to appropriate priorities
- funds are available annually or periodically and not necessarily when they are most needed.

LPITAF

Importantly, LPITAF is made up of funds from the interest earned on solicitors' trust accounts. Only $1.5m approximately annually is earmarked for the pool used to fund a broad range of projects. Applications are received and grants made annually.

We suggest that LPITAF should be earmarked only for legal projects where there is a demonstrated need to produce practical outcomes. In addition, applications that include a community legal centre as a partner should be given priority. Accordingly, projects that involved universities and others working with CLCs in developing research projects and/or practical legal services would be received more positively.

Currently under LPITAF, funds are spread too thinly to be effective for most recipients. In addition, this traditional funding source previously administered by the Law Society has been opened to broader community initiatives since moving to JAG. Once again, one of the only available funding sources for CLCs has been narrowed.

Recent LPITAF grants have involved the establishment of new services with very limited funds (without considering the travails of existing centres). LPITAF funds should be used sparingly for this purpose as the development of new centres needs a proper commitment of ongoing funding. Otherwise, the new centres will not be fully effective and they will face the same problems as other under-funded centres. Where projects funded by LPITAF prove to be successful, the CLC funding program should ideally be able to continue funding so good services are maintained. In addition, LPITAF has funded social programs that should fall under the aegis of other departments. Some projects were assisted that could be better and more cheaply obtained from pro bono contributions.

Also, in certain circumstances, there should be the ability to apply for funds from LPITAF at any time. For example, very occasionally funds are provided to CLCs for technology upgrades. This was not necessarily when needed, but centres would nonetheless get new equipment because the funds were on limited offer.

While LAQ has two representatives on the LPITAF Grants Committee, CLCs are unrepresented. CLCs, which are generally starved for funds, must compete with better funded universities and others for the scarce legal sector funding without any knowledge as to what broad policy guides its dissemination. CLCs were represented on the old Grants Committee without allegations of a conflict of interest. The representative performed an important information role while at the same time making a strong independent contribution.

GCBF and Jupiters

The Gambling Community Benefit Fund and Jupiters Community Benefit Fund are made up of a percentage of the State tax on gaming. They primarily provide non-recurrent grants for equipment, publications and infrastructure, but also assist with limited project funding for defined periods. Applications can be made quarterly, but the result is not advised until the end of the next quarter and new applications cannot be made until a previous application has been acquitted, so usually at least six months passes between applications. All community agencies can apply to these funds, so there is enormous competition.

LAQ discretionary fund

As outlined above, we propose the establishment of a discretionary fund within LAQ primarily for its purposes to respond to issues and problems in innovative ways, but also to establish necessary coordination mechanisms. However, to provide for some flexibility in responding quickly to minor CLC needs, we suggest that it also be accessible by CLCs for small equipment and infrastructure grants. To ensure coordination, a representative of CLCs should be on the LAQ group appointed to make recommendations to management regarding the use of this fund.

Other effects of haphazard funding
The effect of the current funding approach is that the sector is still largely under-resourced and consumed with grant sourcing and satisfying funder requirements rather than service delivery.

Also as a result, CLCs have difficulty in recruiting and retaining staff; in accessing experienced lawyers; preventing burnout; maintaining services in the face of increasing demand; improving services; making the most of their resources; and, looking to the future.

WHAT IS NEEDED
The following is needed as a first step to maximise the use of CLC funding:

- coordination, as far as possible, of all funding. It would be better in our view to coordinate LPITAF with other funding sources so that funds are made available where they are most needed to achieve the best outcomes. We are not suggesting that there be an agency that controls the various sources, only that there is coordination of funding such that the Minister for example could actively support applications to other sources that addressed priority needs.
- recurrent, consistent and secure funding for CLCs through the CLC program which adequately considers and delivers staff working conditions and service needs
- open development of a vision and clear guidelines for use of LPITAF and the new funds proposed in section 5 of this paper
- CLC representation on the Grants Committee of LPITAF
- access to project funds with flexibility for innovation by CLCs with a component potentially accessible when needed
- encouragement through LPITAF of partnerships between CLCs and universities and the private sector to develop proposals, conduct research and deliver services of relevance to the sector and which respond to community legal needs
- exploration of co-locating issues and costs savings through sharing and reduction of duplication
- confidence that identified community legal need will be appropriately researched and responded to with targeted funds, and
- use of LPITAF also only for the development and implementation of legal services (not counselling services or publications). The need is for practical legal services and evaluation should be a component of all funding provided.

The current funding arrangements look like this:

	Projects and innovation	**Casework**	**Centres/ Services**	**Infrastructure equipment and publications**	**Coor-dination**
State and Commonw'lth CLC programs (3-year, CLCs only)	No	No	Yes	No	No
LPITAF (annually, open)	Yes	No	No	Yes	Yes
CLLAS (anytime, all clients subject to means and merits test)	No	Yes (disburse-ments and small fee only)	No	No	No
GCBF and Jupiters (quarterly, but in practice half-yearly, all)	Yes (limited)	No	Yes (limited)	Yes	No
Charitable foundations (whole community)	Yes	No	Yes (limited)	No	No

The funding arrangements we propose would look more like this:

	Projects and innovation	Casework	Centres/Services	Infrastructure, equipment and publications	Coordination
State and Commonwealth CLC programs (3-year, CLCs only)	No	No	Yes	No	No
LPITAF (annually, open)	Yes	No	No	Yes	Yes
CLLAS (anytime, all clients subject to means and merits test)	No	Yes (disburse-ments and small fee only)	No	No	No
GCBF and Jupiters (quarterly, but in practice half-yearly, all)	Yes (limited)	No	Yes (limited)	Yes	No
Charitable foundations (whole community)	Yes	No	Yes (limited)	No	No
LAQ Discretionary (anytime, LAQ primarily, some CLC)	Yes	No	No	Yes	Yes
Civil Law Fund and Environmental Law Fund (anytime, all clients subject to means and merits test)	No	Yes (fees and disburse-ments)	No	No	No

This structure does not a panoply make, but at least it begins to better match funding with need.

EVALUATION

From time to time, there is criticism about the effectiveness of some community legal services. This is unjustified for a number of reasons. It is usually based on a lack of information. Funders who place so much store in accountability give little thought to the amount of time this takes for a service with one or two staff. It is easy for an agency with extensive resources and many staff to develop the measures and count the data that satisfy funders. It also ignores that some small centres can more easily oversee their work and know its quality and get positive feedback from clients without having the capacity to translate that into written reports or quality assurance. It overlooks the issue that massive investment in accountability measures may not really be measuring the real quality (or lack thereof) of the services provided. It also ignores the amount of community involvement that CLCs undertake, and the time taken to assist the special needs of many clients.

This is not to say that the sector is immune from criticism or cannot improve in some ways. No agency is immune from criticism. But the answer to any concerns is not to criticise from afar, but seek to work together constructively to ensure that services are as effective as possible. LAQ, for example, could provide short-term secondments and targeted training etc to assist centres with skills development. LAQ has offered access to its training program, and does provide staff on an ad hoc basis, but busy, short-staffed or regional services have little opportunity to take it up. Discretionary funds could perhaps be used for training in a more structured way.

Legal services are not like some other government services because a client can have the best quality legal service but still be unsuccessful. Outcome measures are therefore unsatisfactory on a case by case basis.

The current funding agreements require CLCs to report extensively on their work. However, such time-consuming reporting does not necessarily lead to either an insight into the quality of work done nor serve to provide data that can be of value to funders or centres alike for a range of purposes.

It can also be difficult to determine if the service is adequate and effective. For example, management committees from time to time put greater emphasis on different activities and different staff may have different approaches to their work which does not mean that they are any less effective.

LAQ, with its comparatively massive resources, has developed for itself a range of evaluation measures for outputs and cost effectiveness. Such an approach is not necessarily appropriate for CLCs. In our view, there are a range of ways to support CLCs to have confidence in the quality of their services. They just need the resources and tools to do it.

ACTION REQUIRED

1. **That in reviewing LPITAF, the Department of Justice and Attorney-General ensure that funding for CLCs is coordinated and based on demonstrable need and that it focus on supporting projects that are evidence based and where appropriate conducted in partnerships to ensure the delivery of high quality legal services.**
2. **Current accountability reporting should be reviewed, simplified and be appropriate for the sector.**

8. OTHER SPECIFIC NEW INITIATIVES

Here, we explore some other possible tentative steps to improve access to civil justice: some ways to prevent legal problems from arising; removing some barriers to accessing the courts; getting better access to assistance; and trialling new approaches.

In implementing these initiatives, we suggest that program evaluation principles should be incorporated.

8.1 AVOIDING LEGAL PROBLEMS

Wealthy clients engage lawyers to advise them how to avoid legal problems. Lower income earners do not have that luxury. Schemes and funding to involve CLCs and the private profession in giving free or low cost advice to avoid or forestall legal problems should be increased.

The development of prevention strategies first requires the collection and assessment of good quality data. Without it, appropriate programs cannot be devised and information cannot be properly targeted where it is most needed.

Community legal services are best placed (because of their location, the knowledge of local problems and the ability to draw on volunteer contributions) to provide early legal advice and to prepare information aimed at informing their communities of problems that can be avoided. But to do this, they need support. The GCBF, Jupiters and LPITAF are best suited to fund such initiatives. Consumer law issues are a clear example of where prevention strategies can be better employed through community networks to inform those most at risk. This should also occur in conjunction with multi-agency 'joined up' programs.

QAILS and QPILCH's clearing house function and improved funding coordination should ensure that prevention initiatives are not duplicative or unnecessary and that their utility is evaluated.

ACTION REQUIRED

That CLCs be supported in applying for funds from available sources to improve targeted information for the public and for other prevention programs to prevent legal problems.

8.2 REMOVING BARRIERS TO ACCESS

Under this heading, we are concerned about issues that discourage people from seeking assistance, including access to the courts, to address their legal problems in the first place.

Costs and fees

The cost of litigation is an obvious barrier to approaching the courts by the disadvantaged.

QPILCH has prepared a paper on costs and fees in public interest litigation, recommending that court costs be reviewed in cases that raise public interest issues and permit the early estimation of costs (in order to foster the selection of cheaper options for low value claims, assist in the assessment of liability and identify attitudes to settlement[41]) and the institution of a costs protection system. We attach a separate briefing paper (**ATTACHMENT A)**, which recommends consolidated costs legislation. A consolidated act and regulations could also underpin the rules facilitating settlement, incorporate appeal costs arrangements and include a court fee waiver scheme.

In addition, court fees have steadily increased over recent years to the point where many litigants have difficulty meeting the costs of commencing proceedings. Policy has stressed a user pay approach. However such a policy is inconsistent with the aim of a fair and accessible court system. The operation of a harmonious society requires operation of a court system that fulfils its broad function as an arm of government and the settler of disputes. This is in the interest of all citizens and institutions, not just litigants. Taxpayers should maintain the court system and litigants should pay according to means, the complexity of litigation involved and the value of the claims.

Class actions

In a 2002 submission, QPILCH recommended that the rules relating to representative actions be reformed in line with Federal Court rules that more closely regulate the running of class actions (**ATTACHMENT B**). As class actions potentially permit access to the courts at less cost for members of the group than for individual claimants, their use should be encouraged where appropriate.

ACTION REQUIRED

That the Department of Justice and Attorney-General prepare consolidated costs legislation and reform the rules relating to class actions in line with the Federal Court to more closely regulate the running of class actions in Queensland.

8.3 GETTING LEGAL ADVICE, ASSISTANCE AND REPRESENTATION

Where parties to disputes have different levels of representation, or no representation at all, it can be difficult to claim that our system recognises equality before the law. On the other hand, some representation may be better than no representation at all. We propose a range of ways that may improve access to legal assistance (in addition to proposals made earlier).

A review of speculative law services

Research has clearly demonstrated that the group of people in the gap between those who cannot access legal aid and those who cannot afford private legal assistance is growing. This gap roughly includes people who earn more than $20,000 and less than $60,000 annually (subject to assets etc). As the costs of legal services rise, the size of this group will increase.

People in this group and others who cannot obtain legal aid but potentially have a meritorious case, could be assisted by improved access to speculative services

As pointed out to LAQ's recent CLLAS review, the Civil Law Legal Aid Scheme has not addressed this problem to any substantial degree. Recent legislation has also made speculative casework less attractive to the private legal profession.

A review of speculative law services could consider incentives for lawyers to do more speculative law work. JAG is best placed to undertake such a review.

[41] Hodges C, Bartz S, Sherman H, *Lord Woolf's review of the civil justice system in England and Wales, 1994-1996*, APLR Vol 8 #3, May 1997.

Improving access to CLLAS
CLASS facilitates speculative legal services by paying disbursements and a small contribution to legal fees. However, CLLAS is under-utilised. In our submission to LAQ's CLLAS review, we recommended that CLLAS could be improved in a number of ways to broaden its utility. We recommended that there be a full review of CLLAS, particularly in the context of a broader assessment of speculative services and civil justice generally.[42]

Litigation funding and other forms of Conditional Legal Assistance Funds
In addition to CLLAS and the separate funds recommended earlier, other CLAFs to support specific or generalist casework could be created. For example, a fund could support representative, group or class actions, or particular issues such as consumer law or housing, or as in the NSW example referred to earlier, human rights. The CLAFs could even be administered by LAQ, where risk would be absorbed within the LAQ budget and where profits could be used to fund more risky cases or where costs awards are not available. Even CLCs could manage a fund to support test cases. In USA for example, Legal Action of Wisconsin Inc. supports the Equal Access Fund which from 1997 to 2002 was pledged more than $US1m from individual attorneys and law firms in unrestricted funds for legal services. This fund also receives funds through the workplace giving schemes of Milwaukee and Madison. A CLAF could be developed from costs orders that derive from pro bono cases. There are many possibilities.

Other Australian CLAFs provide for successful applicants to not only pay back costs (as occurs with CLLAS) but also a percentage of the award, for example, 7.5% if settled before hearing or 15% if settled at trial. This provides an incentive for civil litigants to settle. However, it does not necessarily provide an incentive to the lawyers who advise and represent them, so other incentives could be offered through a new CLAF and revised CLLAS to ensure that the interests of lawyer and client coincide.[43]

There is room for a range of different CLAFs in Queensland that have different eligibility criteria (legal aid or higher), payment schemes (i.e. full fees or disbursements only), operating fees etc to suit different needs and circumstances.

QPILCH recently made a submission to SCAG on litigation funding and suggests that the Queensland Government consider developing CLAFs as part of a broader review of speculative casework.

Broadening pro bono
Pro bono services are provided where legal aid is unavailable and where people cannot afford private services at normal rates. There is still much potential for tapping the broader legal profession in the corporate and government sectors, for tapping resources from the corporate sector and for encouraging more private firms to make a pro bono commitment.

The Report of the First National Pro Bono Taskforce identified an important role for government in encouraging and supporting but not controlling pro bono initiatives, for example:
- removing structural barriers such as filing fees and costs, streamlining practice and procedure etc
- facilitating coordination
- rewarding good professional citizenship.[44]

This paper makes recommendations for implementation of the first two of these dot points.

Government could do much more to facilitate pro bono services in Queensland. For example:
- the Attorney-General could permit and encouraged Crown Law officers to provide pro bono assistance through secondments or other support.
- facilitate coordination efforts by bringing LAQ, CLCs and pro bono providers together more frequently to develop projects and programs
- government could encourage corporations to put more into pro bono legal services by developing incentives to participate.

[42] www.qpilch.org.au.
[43] see QPILCH's CLLAS submission for coverage of a variety of Australian CLAFs at www.qpilch.org.au.
[44] National Pro Bono Task Force, *Report of the First National Pro Bono Conference*, 2001

Student clinics and other service delivery models
Student clinics draw resources from university law schools to provide direct legal services and harness the energy and enthusiasm of students. CLCs operate a number of such clinics in Queensland. QPILCH operates four. There is great scope to expand the number of clinics, but there are current infrastructure constraints that could be relieved with a small amount of funding for suitable facilities and to draw out greater university involvement. We have proposed a small infrastructure fund to address this need.

There are many opportunities to develop other innovative service delivery models.

Schemes to involve free services and the private profession in more low cost discrete services
People on low incomes cannot afford private legal services. However, they may be able to afford discrete services that assist them in specific steps in the court process. The family law jurisdiction has seen the greatest development of unbundled legal services, but there has been little exploration of such models in other areas. For example, QPILCH is exploring opportunities to develop a drafting clinic to assist litigants in person before the Court of Appeal to draft appeal documents and submissions.

ACTION REQUIRED
That the Department of Justice and Attorney-General:

- **review speculative law services to develop incentives for lawyers to do more speculative law work**
- **review the operation of CLLAS to broaden its utility**
- **consider other forms of targeted and generalist CLAFs for Queensland and where appropriate develop these in consultation with relevant agencies**
- **prepare a policy to facilitate more pro bono activity in Queensland, particularly targeting corporate and government contributions**
- **review current infrastructure constraints to increasing service delivery by CLCs and identify possible funding sources to develop clinics and upgrade and provide more infrastructure to meet these needs**
- **review other innovative ways to deliver low cost legal services such as discrete tasking.**

8.4 MULTI-AGENCY PROJECTS

A coordinated service platform involving a range of legal and non-legal service providers has the potential to focus resources and improve links and systems to address neglected or difficult problems. People with mental illness feature prominently in the criminal justice system, but are often overlooked by civil law services. Recent developments such as the Magistrates Court's special circumstance list and associated programs are showing the way for possible other strategies to steer people with mental illness away from or appropriately through the civil, criminal and family law systems.

A coordinated and holistic approach to mental health issues, involving LAQ, PLS, QAI, TASC, YAC, QPILCH's HPLC and other legal and non-legal agencies, including the courts, could devise ways to lessen the impact of the legal system on the mentally ill. Of all the relevant legal services, only LAQ has the resources to organise and lead such a trial multi-agency project.

ACTION REQUIRED
That Legal Aid Queensland organise and lead a trial multi-agency approach to mental illness.

APPENDIX A

QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

Costs in Public Interest Litigation

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.

This paper identifies the problems with current costs order regimes and proposes reform by unifying the law relating to costs in one overarching statute.

Common Law
Costs orders are discretionary. The general rule in Queensland Courts is that costs follow the event (*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.

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.
Fair Trading Act 1989, s 98	No provision regarding costs.
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.

Curiously, the UCPR does set 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 Queensland, subject to any specific provision to the contrary. Such legislation may include:

- that costs are at the discretion of the Court;
- 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 Queensland 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 the respondent public authority to pay all or some of the costs;
- expansion of costs funding, for example, as provided under the *Appeal Costs Fund Act 1973* (Qld);
- 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.

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.

Queensland Public Interest Law Clearing House Incorporated
2 May 2006

APPENDIX B

QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

Class actions

Background

- Rule 75 *Uniform Civil Procedure Rules 1999* (UCPR) provides for representative proceedings in Queensland:

  > A proceeding may be started and continued by or against one or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceedings.

- In *Carnie v Esanda Finance Corporation* (1994-1995) 182 CLR 398, the High Court gave a wide interpretation to a similar NSW rule. The High Court held that "same interest" means "a community of interest in the determination of some substantial issue of law or fact" which effectively permits use of Rule 75 as a vehicle for class actions.
- However, rule 75 of the UCPR does not establish a manageable and effective framework for handling class actions like the regime contained in the Federal Court jurisdiction.
- Part IVA of the *Federal Court of Australia Act 1976* provides for a structured regime (ss33A – 33ZJ) which permits court management of issues such as number of parties, right of members to opt out, costs, individual issues, settlement and discontinuance etc.
- In particular, s33C provides that a class action may be commenced by one or more persons as representing some or all of a class of at least seven persons that have a claim against the same person that arises out of similar or related circumstances and gives rise to a substantial common issue of law or fact.
- In *Wong and Ors v Silkfield Pty Ltd* (1999) 73 ALJR 1427, the High Court interpreted "substantial common issue of law or fact" to mean a serious rather than trivial issue.
- There are obvious advantages of a structured, court-managed class action regime as contained in Part IVA Federal Court Act over the Queensland scheme in Chapter 3 Division 4 UCPR, namely:
  - Cheaper for all parties
  - Fairer for defendant who has to defend one action rather than many
  - Fairer for the plaintiffs who can resolve common issues
  - Fairer for the community in that it benefits a broad range of people
  - Clear rules for all potential litigants to follow.

Issues

- One of the key functions of QPILCH is to maximise community benefit by focussing on public interest cases – cases that benefit a class or all citizens.
- Some public interest cases involve multiple plaintiffs.
- While it appears that the Queensland rules can be used for class actions, the rules do not facilitate management of the class action by the court or make class action requirements or procedures clear for potential litigants and the public at large.
- There has been some criticism of the Federal Court scheme. However, this criticism has largely derived from abuse in USA of class action systems there, rather than the Federal Court process itself, although there is significant complexity in the Federal Court system (see *Bright v Femcare Limited* [2001] FCA 1477 (19 October 2001)).
- There is room, nonetheless, to improve the Federal Court system and if new rules where adopted for Queensland, a scheme that more clearly spells out the requirements for all parties, such as the terms of notification of represented persons and resolution of problems associated with intermingling of issues, would be likely to reduce some problems experienced federally.

Proposal

We propose that the UCPR be amended to introduce an active class action regime in Queensland, similar to the approach of the Federal Court of Australia, which gives greater scope to the court to administer and manage a class action. Such a regime gives greater certainty to potential litigants in a class action as to the requirements for instituting, continuing and defending such proceedings.

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