

**RE-VISIONING LEGAL AID IN AN AGE OF AUSTERITY**

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**AUSTRALIA'S NEW NATIONAL PARTNERSHIP  
AGREEMENT ON LEGAL ASSISTANCE**

**MARY ANNE NOONE**

Associate Professor  
School of Law  
La Trobe University

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*This is a draft paper and comments are welcomed: [m.noone@latrobe.edu.au](mailto:m.noone@latrobe.edu.au)  
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## INTRODUCTION

In Australia on 2 July 2010, the new National Partnership Agreement on Legal Assistance Services (NPA) commenced<sup>1</sup>. The agreement between the federal and state governments was promoted by government as a break from the past. The key features of the Agreement include an increased focus on early intervention and prevention services and encouraging greater collaboration among legal and other service providers.

In this paper I detail the current legal aid system, give some context to the agreement and the detail aspects of the NPA. I then survey what changes (if any) have occurred in the Australian legal aid system during the first twelve months of the Agreement. In this context I canvas the tensions between early intervention (often alternative dispute resolution), prevention services (community legal education) and traditional legal aid casework. I conclude with some observations about matters that require research and ongoing evaluation if those concerned with access to justice, both proponents of ADR and legal aid lawyers, wish to further their objectives. Most importantly, in recognition of the complex and paradoxical nature of access to justice developments, these evaluations must be rigorous and contextualized.

## BACKGROUND – AUSTRALIAN LEGAL AID SYSTEM

In Australia there are a variety of legal aid organisations that can provide legal information, advice, assistance and legal representation for the poor and disadvantaged:<sup>2</sup>

- State based Legal Aid Commissions (LACs)<sup>3</sup>
- Community Legal Centres (both generalist and specialist)(CLCs)<sup>4</sup>
- Aboriginal and Torres Strait Islander Legal Services (ATSILS)<sup>5</sup>
- Family Violence Prevention Legal Services<sup>6</sup>

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<sup>1</sup> National Partnership Agreement on Legal Assistance Services  
[http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/Other/Legal\\_Assistance\\_Services\\_new.pdf](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/Legal_Assistance_Services_new.pdf)

<sup>2</sup> For a history of Australian legal aid system see Noone & Tomsen *Lawyers in Conflict; Australian Legal Aid Federation Press* 2006.

<sup>3</sup> National Legal Aid <http://www.nla.aust.net.au/> accessed 13/4/11

<sup>4</sup> National Association of Community Legal Centres <http://www.naclc.org.au/> accessed 13/4/11

<sup>5</sup> National Aboriginal & Torres Strait Islanders Legal Services Secretariat accessed 13/4/11:

<http://enterprise.powerup.com.au/~nailss/>

<sup>6</sup> Attorney-General's Department, Family Violence Prevention Legal Services accessed 13/4/11:

[http://www.ema.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle\\_Indigenouslawprograms\\_Familyviolencepreventionlegalservices](http://www.ema.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Indigenouslawprograms_Familyviolencepreventionlegalservices)

- Range of Commonwealth Statutory schemes.<sup>7</sup>
- University run Clinical Legal Education Programs<sup>8</sup>

There are also a large number of pro bono schemes, where the private legal profession provide services for free or at reduced rate. These can be not for profit organisations like Public Interest Law Clearinghouses or be court related schemes. These schemes remain largely uncoordinated nationally.<sup>9</sup>

Although there is some overlap in the clientele and services provided by these organisations, the chronic underfunding of legal aid necessitates the imposition by legal aid organisations of restrictive guidelines and determination of priority areas of law to receive assistance.<sup>10</sup> Most State funded legal aid expenditure occurs in criminal law whereas most Commonwealth legal aid funding is directed to providing assistance in family law and there is little funding of civil law matters<sup>11</sup>.

## LEGAL AID COMMISSIONS

State based legal aid commissions (LACs) are independent statutory bodies that receive most funds from 3 sources, both state and federal governments and Public Purpose Funds (monies generated by interest earned on solicitor's trust accounts).<sup>12</sup> In 2009/10 the amounts are:

- Commonwealth Government (\$185.8 million)
- State and Territory Governments (\$230.6 million)
- Interest, contributions and fees (\$135.4 million).

They provide services to over 0.75 million Australians a year including:

- 257,297 people advised 2007-2008 year;

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<sup>7</sup> Attorney-General's Department, Financial Assistance accessed 13/4/11:

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid\\_FinancialAssistance](http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_FinancialAssistance)

<sup>8</sup> Kingsford Legal Centre, University of NSW, *Clinical Legal Education GUIDE* 2009

<sup>9</sup> For details of various programs see National Pro Bono Resource Centre accessed 23/5/11

<http://www.nationalprobono.org.au/home.asp>

<sup>10</sup> See discussion in Ch 3 'The Adequacy of Legal Aid' in Senate Legal and Constitutional Affairs References Committee, *Access to Justice* December 2009 p 35 - 60

<sup>11</sup> Gibson F Article 13 of the Convention on the Rights of Persons With Disabilities- A right to legal aid? (2010) 15 (2) *Australian Journal of Human Rights* 123, Gibson F Extending Aid to the Unrepresented (2006) 80 *Law Institute Journal* 59, ; Hunter, R. and T. De Simone (2009). "Women, Legal Aid and Social Inclusion." *Australian Journal of Social Issues* 44(4): 379-398.

<sup>12</sup> For details of legal aid funding see Senate Legal and Constitutional Affairs References Committee, *Access to Justice* December 2009 pp35-60 .

- 380,404 duty lawyer services, including family law duty lawyer services, for the 2007-2008 year; and
- 201,203 people represented in courts/tribunals 2007-2008 year.<sup>13</sup>

As well as providing legal practitioners (both in private practice and salaried lawyers at the commissions and community legal centres) to enable people who cannot afford a lawyer to be legally represented in court proceedings (this is described as a grant of aid)<sup>14</sup> LACs provide a range of other services including;

- duty lawyer services for people appearing at court on the day without a lawyer;<sup>15</sup>
- family dispute resolution services<sup>16</sup>
- legal advice and minor assistance, including preparation of simple documents
  - For the period 2008-09, 86,498 people received legal advice related to civil law matters (31.8%) from LACs and 94,095 people received family law advice (34.59%).<sup>17</sup>
- information and referral services through telephone services and online.
  - For example, the Victoria Legal Aid's Legal Information Service answered 88,732 telephone calls in 2008/09. The LIS provides free legal information and referral service in English and other languages. There were 614,364 visits to VLA website (an increase of 70% on previous year).<sup>18</sup>
- education programs to inform the community about a range of legal issues.<sup>19</sup> Community legal education includes publications, videos, workshops and seminars<sup>20</sup>

As the funding of LACs is limited, grants of legal aid (to enable legal representation) are made according to a number of criteria. These are a means test; guidelines that detail

<sup>13</sup> National Legal Aid <http://www.nla.aust.net.au/category.php?id=1> accessed 12/5/11

<sup>14</sup> In the year 2008-2009, the eight state and territory legal aid commissions provided 14,579 grants of individual legal assistance in civil law matters (9% of all grants) and 41,195 grants in family law matters (25.95%). The previous year 2007-2008 the figures were 12,583 and 28,470 respectively. National Legal Aid Statistics

Case	Applications	Received	2008-2009

<http://www.legalaid.tas.gov.au/nla/reports/20082009/html/Case%20law.html> accessed 14/2/11.

<sup>15</sup> For examples see <http://www.legalaid.vic.gov.au/lawyeratcourt.htm> accessed 28/4/11

<sup>16</sup> For details see

[http://www.ema.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyRelationshipServicesOverviewofPrograms\\_ForFamilyRelationshipServicesPractitioners\\_FamilyDisputeResolution](http://www.ema.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ForFamilyRelationshipServicesPractitioners_FamilyDisputeResolution) accessed 4.5/11

<sup>17</sup> National Legal Aid Statistics *Legal Advice by Law Type 2008-2009*

<http://www.legalaid.tas.gov.au/nla/reports/20082009/html/Legal%20Advice.html> accessed 14/2/11.

<sup>18</sup> Victoria Legal Aid, *Fourteenth Statutory Annual Report 2008-09* p 34

<sup>19</sup> For current information on Commonwealth legal aid scheme see

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid\\_LegalAidProgram](http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_LegalAidProgram) accessed 14/2/11

<sup>20</sup> For examples see <http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=602>;

[http://www.lsc.sa.gov.au/cb\\_pages/education.php](http://www.lsc.sa.gov.au/cb_pages/education.php) and <http://www.legalaid.vic.gov.au/legalinfo.htm>

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priority areas (both law type and category of person) of assistance; and the perceived merits of the case. Whereas grants of legal aid for legal representation are subject to means and merits tests, information, minor advice and duty lawyer services are generally available to all. There is also a set of National Guidelines that relate to expenditure of Commonwealth monies.<sup>21</sup> As well each State has a further set of guidelines. These guidelines may vary from state to state.<sup>22</sup> Most LACs have to date been unable to provide legal assistance in civil law areas, including employment, social security, credit/debt, mortgage, housing and tenancy, consumer protection and older persons' issues.<sup>23</sup> This means that an individual who is involved in a civil law litigation might be eligible for legal aid assistance in one State but not in another. This raises significant issues of national inequity and access.

## COMMUNITY LEGAL CENTRES

Community Legal Centres (CLC's) are independent community based organisations funded by both State and Federal governments. They provide legal advice and advocacy to individuals and groups in the community.<sup>24</sup> This work includes individual legal advice and assistance as well as law reform, test case litigation, referrals and community legal education activities aimed at addressing systemic problems.<sup>25</sup>

A conservative estimate of the levels and types of services provided, throughout Australia is that in 2009–2010, the CLCs in the Commonwealth and State Community Legal Services Program:

- provided over 168,000 information, support and referral services
- provided more than 247,000 individual advices
- worked on over 68,000 individual cases
- concluded 2,869 community legal education projects (and worked on many more that have continued into the new year), and
- finalised 1,051 law or policy reform projects (and worked on many more that have

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<sup>21</sup> National Legal Aid Guidelines

[http://www.legalaid.vic.gov.au/rde/xbcr/handbook/FAB.guidelines\\_national\\_2010.pdf](http://www.legalaid.vic.gov.au/rde/xbcr/handbook/FAB.guidelines_national_2010.pdf) accessed 14/4/11.

<sup>22</sup> Eg see Victoria Legal Aid, *State Civil Law Guidelines* accessed 14/4/11 at

<http://www.legalaid.vic.gov.au/handbook/201.htm> accessed 14/4/11 and Legal Aid NSW, Civil Law Matters accessed 14/4/11 at

<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=758&cid=993&policyid=1&chapterid=3>.

<sup>23</sup> Senate Legal and Constitutional Affairs References Committee, *Access to Justice* December 2009 p 50

<sup>24</sup> For a history of community legal centres see Noone & Tomsen (2006) Ch 7

<sup>25</sup> Giddings J. & Noone M.A., (2004) 'Australian community legal centres move into the twenty-first century' (11) 3 *International Journal of the Legal Profession* 215

continued into the new year).<sup>26</sup>

Community legal centres principally provide legal assistance in family and civil law areas rather than crime (including areas of speciality like disability, tenancy, social security, mental health, women, prisoners). However the diversity of CLC's is such that there is variation between centres. In Victorian for example in 2009/10, 59% of individual client services were in civil law, 35% in family law and 6% in criminal law (although fines and infringements, a significant source of CLC work in Victoria, are categorized as civil law).<sup>27</sup>

Many CLCs are staffed only by 1 or 2 lawyers, with (in some cases) education, policy and administrative staff. Some are significantly larger. CLC's have been extremely successful in attracting volunteer lawyers and law and welfare students to work on a pro bono basis for the Centres and they provide an effective structure and basic resources for lawyers to be able to provide free advice for the community and particularly those most disadvantaged. It has been estimated that CLCs leverage more than \$23 million worth of free legal assistance each year.<sup>28</sup> 'The involvement of the private legal profession in the work of CLCs has strengthened the legal aid partnership in Australia. Volunteers have also made CLCs attractive to government as relatively cheap, cost-effective services.'<sup>29</sup> A 2006 report on the economic value of CLCs' work and the benefits and avoided costs accrued as a result of CLC work "found that for every \$1 spent on CLCs, the government saves a minimum of \$100 in avoided costs".<sup>30</sup>

## **ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES (ATSILS) & FAMILY VIOLENCE PREVENTION LEGAL SERVICES (FVPLS)**

As reported to the Senate Inquiry into Access to Justice,

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<sup>26</sup> National Association of Community Legal Centres Annual Report 2009/2010 < <http://www.naclc.org.au/multiattachments/2429/DocumentName/AR0910.pdf>> at 31 March 2011.

<sup>27</sup> Federation of Community Legal Centres(Victoria) Inc, *Annual Report 2009-10* p 8

<sup>28</sup> The Australian Government's social inclusion agenda: why it matters to community legal centres at 2 National Association of Community Legal Centres Discussion Paper 13 July 2009 web v rev 2 September 2009 at 3.

<sup>29</sup> Giddings J. & Noone M.A., (2004) 'Australian community legal centres move into the twenty-first century' (11) 3 *International Journal of the Legal Profession* 215 at 276

<sup>30</sup> *The Economic Value of Community Legal Centres* (Institute for Sustainable Futures, University of Technology Sydney, 2006)

Indigenous Australians ...are relatively less likely to seek help from mainstream providers due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers.<sup>31</sup>

Since the early 1970s, Australia has had a network of aboriginal legal services providing a range of legal services to indigenous communities.<sup>32</sup> ATSILS and FVPLS provide Indigenous specific services at 115 locations around the country. There are 84 ATSILS and 31 FVPLS units.<sup>33</sup> Like LACs the predominant area of work is criminal law.

A recent study of the family and civil law needs of indigenous communities revealed a general lack of community knowledge about civil and family law. The researchers comment that one of the ramifications of lack of community knowledge and of lack of availability of services is that unaddressed civil or family needs can become criminal in nature.<sup>34</sup>

Lack of accessibility to family and civil law services compromises the ability of Indigenous people to realise their full legal entitlements. Improved access to legal services for Indigenous people, particularly in relation to civil law, is likely to assist in creating the infrastructural capacity necessary for improved social conditions and for economic development.<sup>35</sup>

Schwartz and Cunneen found that "the areas of housing, discrimination, credit and debt and family/DOCS issues arose the most frequently in consultations as being the areas of highest priority for Aboriginal people across New South Wales. Matters involving employment, neighbourhood disputes, social security and education emerged in some places as causing a lot of grief to individuals, largely without satisfactory resolution. And they also identified victim's compensation, stolen wages and wills as areas of unrecognized legal need."<sup>36</sup>

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<sup>31</sup> National Pro Bono Resource Centre, Submission 49 to the Senate Legal and Constitutional Affairs Reference Committee inquiry into Access to Justice December 2009 p 137 ; see also Cunneen, C. & Schwartz M. Civil and Family Law Needs of Indigenous People in New South Wales: the Priority Areas 32 *Uni NSW Law Journal* 725 2009

<sup>32</sup> For a brief history see Noone & Tomsen *Lawyers in Conflict* pp 66-69, 212-216

<sup>33</sup> Attorney General's Department, Indigenous Law and Justice Programs [http://www.ema.gov.au/www/agd/agd.nsf/Page/Indigenous law and native titleIndigenous law programs](http://www.ema.gov.au/www/agd/agd.nsf/Page/Indigenous%20law%20and%20native%20titleIndigenous%20law%20programs) accessed 13/4/11; see Chapter 8 'The ability of Indigenous people to access justice' in Senate Legal and Constitutional Affairs References Committee, *Access to Justice* December 2009 pp 137-168

<sup>34</sup> Chris Cunneen & Melanie Schwartz, Civil and family law needs of indigenous people in new south wales: the priority areas 32 *u.n.s.w.l.j.* 725 2009 p 744; <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/68525001257471253543.pdf>

Accessed 13/4/11

<sup>35</sup> Chris Cunneen & Melanie Schwartz, Civil and family law needs of indigenous people in new south wales: the priority areas 32 *u.n.s.w.l.j.* 725 2009 p 744;

<sup>36</sup> Chris Cunneen & Melanie Schwartz, Civil and family law needs of indigenous people in new south wales: the priority areas p 15

## CONTEXT OF NATIONAL PARTNERSHIP AGREEMENT

The new National Partnership Agreement reflects a number of current government policies and influences. In this section I detail those relevant to access to justice, development of ADR and legal needs research. I do not canvass the broader political, economic and managerial aspects.<sup>37</sup>

## STRATEGIC FRAMEWORK FOR ACCESS TO JUSTICE

The Strategic Framework for Access to Justice was produced by the Commonwealth Attorney-General's department in September 2009<sup>38</sup>. This Framework provides principles for access to justice policy-making and methodology for translating the principles in practice.<sup>39</sup> The principles relate to accessibility, appropriateness, equity, efficiency and effectiveness.<sup>40</sup> The document stresses the importance of early intervention and resolution of problems and disputes and suggests the use of a triage function to ensure people are directed to the "most appropriate destination for resolution".

In relation to the courts, the Framework wants to ensure "the courts are accessible, fair, affordable and simple". The outcomes envisaged by the Framework for the courts are: "Culture change- focus on resolving the dispute; Better and earlier identification of the real issues; active case management; greater use of ADR".<sup>41</sup>

Given the thrust of the Strategic Framework for Access to Justice towards early intervention and alternative dispute resolution, little of the additional legal aid monies available under the new NPA are likely to be expended on individual legal assistance in the courts. Rather, the monies are targeted to increasing access to legal information, early legal advice and legal assistance in appropriate dispute resolution forums.

A communiqué issued by the Standing Committee of Attorneys General in November 2009, acknowledged that "[t]he mechanisms that allow people to prevent and resolve disputes ... are a key means of promoting social inclusion. Many of the issues commonly faced by

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<sup>37</sup> For some critique of the Legal Aid Policy and the Strategic Framework for Access to Justice see Hunter R & De Simone T, 'Women, Legal Aid and Social Inclusion' (2009)44 (4) *Australian Journal of Social Issues* 379

<sup>38</sup> Department, A. t. J. T. A. G. s. (2009). A Strategic Framework for Access to Justice in the Federal Civil Justice System. Canberra, Attorney General's Department.

<sup>39</sup> Ibid p 7

<sup>40</sup> Ibid p 8

<sup>41</sup> Ibid p 10 -11



people, such as family breakdown, credit and housing issues, discrimination, and exclusion from services, have a legal dimension that if not resolved can contribute to social exclusion.” The ministers discussed “access to justice in the context of the civil justice system that involves both access to effective formal dispute resolution processes, as well as a broader system that enhances the capacity of individuals to resolve disputes informally. Access to justice includes access to legal services, greater use of non-adversarial dispute resolution processes, the correction of inequalities in the justice system, and improving the justice quality of daily life.” Two key outcome of the discussions were that Ministers agreed:

- To endorse the principles of accessibility, appropriateness, equity, efficiency and effectiveness;
- The National Partnership Agreement in relation to legal aid funding will come into effect on 1 July 2010. <sup>42</sup>

## FOCUS ON ADR

In Australia, Alternative (or Appropriate) Dispute Resolution (ADR) processes are accepted “within, outside and beside the formal civil and criminal justice systems”.<sup>43</sup> Recent reviews of, and recommended reforms to, the Victorian and Federal Civil Justice systems, identify further development and utilisation of ADR processes as integral to improving access to justice in the civil justice system.<sup>44</sup> These reviews recognise that because most disputes are resolved outside of the court system, enhancing the elements that allow for every citizen to achieve “everyday justice” is a necessary part of policy and legislative attempts to ensure a just society.

Access to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve ‘everyday justice’; the justice quality of people’s social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice are

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<sup>42</sup> Communiqué Standing Committee of Attorneys-General 5 & 6 November 2009 accessed 23/5/11 [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/SCAG\\_Communicu%C3%A9\\_5\\_November\\_2009v2.pdf/\\$file/SCAG\\_Communicu%C3%A9\\_5-6November\\_2009v2.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communicu%C3%A9_5_November_2009v2.pdf/$file/SCAG_Communicu%C3%A9_5-6November_2009v2.pdf)

<sup>43</sup> King M, A.Friberg et al *Non Adversarial Justice* (2009) Federation Press ; Gutman, J. (2010). "Legal ethics in ADR practice: Has coercion become the norm?" *Australian Disputation Resolution Journal*(21).

<sup>44</sup> See Victorian Law Reform Commission (2008). Victorian Law Reform Commission Civil Justice Review: Report. Melbourne, Victorian Law Reform Commission. and National Alternative Dispute Resolution Advisory Council (2009). The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction. A Report to the Attorney General. Barton, ACT. and Victorian Parliament Law Reform Committee (2009). Inquiry Into Alternative Dispute Resolution. *Parliamentary Paper No.184, Session 2006-2009*. P 18-21; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* 2009 Sydney

dealt with as quickly and simply as possible—whether that is personally (everyday justice) informally (such as ADR, internal review) or formally (through courts, industry dispute resolution, or tribunals).<sup>45</sup>

Many nations have identified and attempted reforms to their civil justice systems.<sup>46</sup> Most notable of these is the reforms in the UK initiated by Lord Woolf through the *Access to Justice; Final Report* (1996) which identified the defects in a civil justice system as being too costly, too slow, too uncertain, too fragmented and too adversarial. Solutions to these defects were to adopt case management approaches, setting procedures and timetables and avoiding litigation wherever possible. Expansion of, increased education about and funding for ADR was linked to this last solution.<sup>47</sup>

Reforms to the civil justice systems in Australia have followed similar paths to the UK and have attempted to increase: accessibility, affordability, proportionality, timelines and the ability to get to the truth quickly and easily. In 2010, the Victorian Government passed the *Civil Procedure Act, 2010*. Section 7 (1) of this Act states:

The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.<sup>48</sup>

In 2009, National Alternative Dispute Resolution Advisory Committee delivered *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction*, which contained a number of recommendations to the Federal Government. This report informed the *Civil Dispute Resolution Act 2011 (Cth)* and the Strategic Framework.

## ACCESS TO JUSTICE RESEARCH

The Strategic Framework for Access to Justice (and hence the NPA) is impacted by recent socio-legal research in the United Kingdom, New Zealand, Netherlands, Northern Ireland, Canada, Australia and Japan reveals that justiciable events (problems for which there are a potential legal remedy<sup>49</sup>) are part of everyday life for a significant section of the population;

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<sup>45</sup> Federal Attorney General's Department (2009). A Strategic Framework for Access to Justice in the Federal Civil Justice System; Report by the Access to Justice Taskforce Attorney-General's Department. Access to Justice taskforce Attorney General's Department. Canberra, Attorney General's Department., P 4

<sup>46</sup> For a review of civil justice reforms see Genn, H. *Judging Civil Justice* (2010) Cambridge University Press

<sup>47</sup> Woolf, L. (1996). "Access to Justice: the Final Report." Retrieved 26/04/2011, from <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/overview.htm>.

<sup>48</sup> (2010). Civil Procedure Act, 2010. [47 of 2010](#). Vlc.

<sup>49</sup> 'Justiciable Event' is a term pioneered by Genn in 1999 when she shifted the focus of survey work to assessing legal need to 'problems that are legal in nature but for which a legal service is only one and perhaps not the best remedy for resolving it'. Hazel Genn (1999). *Paths to justice: what people do and think about going to law* (1999 Hart Publishing Oxford), 12.

for one-third to one-half of the population.<sup>50</sup> This body of research confirms the day to day experience of many of those involved in legal aid work. People often experience problems in clusters, there can be a 'trigger' event that causes a cascading of events that leads to further problems, most people do not seek or receive legal advice and individuals suffer from 'referral fatigue'.<sup>51</sup>

These studies identified:

how different characteristics of disadvantage, such as low income and long-term illness and disability are frequently experienced together and are frequently exacerbated by the experience of civil justice problems.<sup>52</sup>

The UK research found that people with a long-term illness or disability, lone parents, people unemployed or on a low income, and people living in temporary accommodation are most likely to experience justiciable events. The researchers conclude that 'justiciable problems appear to be an integral aspect of patterns of disadvantage, alternatively described as social exclusion'.<sup>53</sup>

Additionally there is recognition that equality before the law may be restricted by a range of factors including geographic, institutional limitations, race, class, gender biases, cultural differences as well as economic factors. The legal system does not offer substantive equality to all. In Australia, research reveals that Aboriginal and Torres Strait Islander peoples, women, people of non-English speaking background, and the disabled have been the subject of discrimination by the law.<sup>54</sup> For instance the injustice resulting from the impact of language and culture on communication issues between indigenous Australians and the legal system is well documented.<sup>55</sup>

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50 Christine Coumarelos, Zhigang Wei and Albert Zhou *Justice Made to Measure: NSW legal Needs Survey in Disadvantaged Areas*. Access to Justice and Legal Needs Sydney, (2006. Law and Justice Foundation of NSW), 3. and Ab Currie *The legal problems of everyday life* (2007 International Legal Aid Group Conference Legal Aid: A new beginning?) Antwerp, Belgium Uni of Strathclyde.

51 Pascoe Pleasence, Nigel Balmer and Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2006 2nd Edition. Norwich, Legal Services Research Centre) ,4.

52 Alexy Buck, A., N. Balmer, et al. (2005). "Social Exclusion and Civil Law: Experience of Civil justice Problems among Vulnerable Groups." *Social Policy and Administration* 39(3): 302-322.

53 Ibid ; and Currie, above n.19

54 For a summary of research and reports detailing discrimination within the justice system see Access to Justice Advisory Committee, above n 4, Ch 2; Australian Law Reform Commission, *Equality before the Law*, Report No 69 (1994); *Royal Commission into Aboriginal Deaths in Custody, National Report* (1991).

55 See various examples and references in Roland Sussex 'Intercultural communication and the language of law' (2004) 78 *Australian Law Journal* 530.

## NEW NATIONAL PARTNERSHIP AGREEMENT ON LEGAL ASSISTANCE SERVICES

On 2 July 2010, the Commonwealth Attorney-General, Robert McClelland, announced the commencement of the new National Partnership Agreement on Legal Assistance Services (NPA). Under the Agreement, some additional legal aid funding was made available in 2010-11 but equally significantly the agreement altered the previous prescriptive legal aid arrangements where the Commonwealth was principally a purchaser of family law legal services and the State based legal aid commissions had little discretion in how Commonwealth funds were expended.<sup>56</sup> Instead this new agreement gives the States and Territories' Legal Aid Commissions increased flexibility in service delivery.<sup>57</sup>

The former agreements that existed from 1997 – 2010 were criticised by most in the legal aid sector.<sup>58</sup> In 2003-04, the Senate Legal and Constitutional References Committee found that the Commonwealth/State divided was arbitrary and many legal matters did not fall neatly into either a Commonwealth or state/territory category. This arbitrary distinction “inhibited the effective servicing of legal needs; created unnecessary administration costs; and resulted in some instances, in a ‘surplus’ of funds which could not otherwise be allocated or used”.<sup>59</sup>

The NPA is a multi lateral agreement between the Commonwealth and all States and Territories and based on a standard template for National Partnership Agreements. The objective of the NPA is stated in Clause 15 :

A national system of legal assistance that is integrated, efficient and cost-effective, and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness.<sup>60</sup>

The funding provided by the Federal government, subject to the NPA, will continue to be used for Commonwealth law matters with two exceptions:

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<sup>56</sup> [http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_ThirdQuarter\\_2July2010-NationalPartnershipAgreementonLegalAssistanceServices](http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_ThirdQuarter_2July2010-NationalPartnershipAgreementonLegalAssistanceServices) accessed 9/3/11

<sup>57</sup> Noone, M. A. (2001). "State of Legal Aid." *Federal Law Review* 29.; Fleming D,(1999)' Legal aid policy under the first Howard government" Third International Legal Aid Group Conference Papers

<sup>58</sup> See National Legal Aid, *A New National Policy for Legal Aid in Australia* 2007 accessed 25/5/11  
<http://www.nla.aust.net.au/category.php?id=11>

<sup>59</sup> Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* June 2004, p 33

<sup>60</sup> *National Partnership Agreement on Legal Assistance Services*  
[http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/Other/Legal\\_Assistance\\_Services\\_new.pdf](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/Legal_Assistance_Services_new.pdf) accessed 16/5/11

- for the provision of early intervention legal education, information, advice, assistance and advocacy services, and
- legal representation of individuals whose legal problems involve a mixture of Commonwealth family law issues and State or Territory law family violence and/or child protection issues as described in the Commonwealth legal aid services priorities in Schedule A.<sup>61</sup>

These exceptions enable greater flexibility in using Commonwealth funds and goes some way to addressing the legal aid sector's concerns with the Commonwealth/state divide. They offer the opportunity to LACs to expand their services into areas of civil work that has been highlighted by the access to justice research.

The Agreement supports a "holistic approach to the delivery of services by commissions, CLCs, ATSiLs and Family Violence Prevention Legal Services". It also requires decisions regarding future legal assistance service delivery to be considered in the context of the justice sector as a whole, and to support the principles of the Australian Government's Strategic Framework for Access to Justice. (See Appendix A- Preliminaries to NPA)

The Commonwealth legal aid service priorities are set out in clause 16 of the NPA :

- a) earlier resolution of legal problems for disadvantaged Australians that, when appropriate, avoids the need for litigation
- b) more appropriate targeting of legal assistance services to people who experience, or are at risk of experiencing, social exclusion
- c) increased collaboration and cooperation between legal assistance providers themselves and with other service providers to ensure clients receive 'joined up' service provision to address legal and other problems, and
- d) strategic national response to critical challenges and pressures affecting the legal assistance sector.<sup>62</sup>

Although the NPA stresses holistic approach and collaboration between legal aid providers, the agreement is principally about the activities of LAC. Funding of the community legal centre network (200plus) is done via separate funding agreements. However the NPA does require each state and territory to establish an annual forum for improving coordination and targeting of services between legal assistance service providers as well as linking to other

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<sup>61</sup> Clause 33 NPA

<sup>62</sup> Clause 16 NPA

service providers. The forum has to include the Commonwealth, must meet at least once a year, and have links with a national advisory body to be set up by the Commonwealth.<sup>63</sup>

The NPA sends a clear message that LACS are to increase the “delivery of preventative, early intervention and dispute resolution services” and provide a “comprehensive legal information services and seamless referral for preventative and early intervention legal assistance services”.<sup>64</sup> Performance under the NPA is to be evaluated against

“the broad goals of sector reform which promote a client-centred focus and include comprehensive access to information, seamless referral improved coordination and targeting of services between legal assistance service providers and the linking of legal aid services with other service providers to ensure ‘joined up’ service delivery”.<sup>65</sup>

The performance benchmarks include a 30% increase in number of early intervention services; 25 % increase in the total number of services delivered by legal aid commissions; the number of referral arrangements identified and implemented, and the number of referrals, including warm referrals (where the initial contact was made by the referring organisation on behalf of the client) to another service.<sup>66</sup>

The NPA defines the types of service delivered by LACs and the relevant definitions are set out below:

*Dispute resolution services* means services provided by legal aid commissions, such as lawyer assisted negotiation and participation in legal aid dispute resolution programs

*Early intervention services* means legal services provided by legal aid commissions to assist people to resolve their legal problem before it escalates, such as legal advice, minor assistance and advocacy other than advocacy provided under a grant of legal assistance

*Preventative legal services* means legal services provided by legal aid commissions that inform and build individual and community resilience through community legal education, legal information and referral.<sup>67</sup>

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<sup>63</sup> Clause 25 NPA; Attorney General, *Inaugural Meeting of the National Legal Assistance Advisory Body* 17 may 2011 accessed 25.5.11

[http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/page/mediareleases\\_2011\\_secondquarter\\_17\\_may2011-inauguralmeetingofthenationallegalassistanceadvisorybody](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/page/mediareleases_2011_secondquarter_17_may2011-inauguralmeetingofthenationallegalassistanceadvisorybody)

<sup>64</sup> Clause 17 NPA

<sup>65</sup> Clause 18 NPA

<sup>66</sup> Clause 20 NPA

<sup>67</sup> Clause 14 NPA

LACs are required to provide a report to the Commonwealth every six months in relation to their responsibilities, outputs, performance benchmarks and timelines. Although nearly 12 months has past, some of the items to be reported are still being clarified so that there is a shared understanding of services delivered, consistent definitions and counting rules. Examples of the services that require more discussion are post resolution support services, advocacy and referrals.<sup>68</sup>

## LACS RESPONSE TO NPA

LACs have been engaged in preventative legal services, early intervention work and concerned about referrals since their establishment, long before the enactment of the NPA. However the additional funding pursuant to the NPA was welcomed by LACs and signing of the NPA has prompted the LACS to increase the external and internal focus on the NPA areas of priority.

For instance Victoria Legal Aid has reviewed its strategic plan in light of the NPA to better align it to their accountability framework which seeks to integrate the planning, budgeting and performance reporting. The new 2011–14 Strategic Plan priorities will include services and initiatives:

- that improve people's access to and experience of the justice system – Access and inclusion
- with a preventative focus that are delivered in conjunction with other service providers – Joined-up services
- that enhance organisational capability, to influence and respond to a changing environment – Organisational responsiveness.<sup>69</sup>

Another immediate consequence of the NPA was the redrafting of the Commonwealth Guidelines. Unlike the previous Commonwealth Agreement, the NPA does not contain guidelines for legal assistance for Commonwealth matters and so this necessitated the LACs drafting a set. National Legal Aid (NLA) Directors agreed that all legal aid commissions should attempt to adopt consistent Commonwealth Guidelines. The LACs worked together on this to ensure equity across the states and territories. The guidelines reflect the NPA priorities. A minor review of the current Commonwealth Guidelines was undertaken for

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<sup>68</sup> Legal Aid NSW, *Verbals Staff Newsletter* March 2011 issue 61  
<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/16728001301965361358.pdf>

<sup>69</sup> <http://www.legalaid.vic.gov.au/818.htm> accessed 19/5/11

consistency. A more thorough review is currently taking place. In adopting these guidelines, each legal aid commission may also impose local restrictions and priorities.<sup>70</sup>

## NPA AND PREVENTATIVE LEGAL SERVICES

*Preventative legal services* means legal services provided by legal aid commissions that inform and build individual and community resilience through community legal education, legal information and referral.<sup>71</sup>

Since the establishment of legal aid commissions in late 1970 and early 1980s, they have been engaged in community legal education and advice.<sup>72</sup> However, in the second half of the 1990s, in response to the funding cuts of 1996, many legal aid commissions significantly enhanced the provision of telephone information, advice sessions and community legal education ( now described as preventative ) in order to assist large numbers of people to avoid problems before they began.<sup>73</sup> The LACS adapted the new technologies to improve and extend their services and the impact of this increased use of available technologies was that more people have access to information and advice about legal matters. This continued a pattern in Australian legal aid providing free non-means tested legal information, advice and minor assistance. It is argued that this provision of a comprehensive range of legal services enhances and promotes citizenship.<sup>74</sup>

However in an evaluation of a number of these late 1990s innovations, Hunter, Banks and Giddings found that “very few of the case studies could be judged to be either efficient or effective in meeting their objectives and clients’ needs”. Rather they found that the focus in practice was on meeting the ‘needs of the provider than on meeting the needs of clients’. LAC’s “needed to be seen to doing something to drive the legal aid dollar further.”<sup>75</sup> The researchers concluded that innovations needed to be more client focused as well as

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<sup>70</sup> For an example of changes to Victoria Legal Aid guidelines see New Commonwealth Guidelines come into effect’ accessed 25/5/11 <http://www.legalaid.vic.gov.au/3000.htm>

<sup>71</sup> Clause 14 NPA

<sup>72</sup> Noone & Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (2006) Federation Press pp 110 - 136.

<sup>73</sup> Noone, *MA State of Legal Aid* (2000) *Federal Law Review*

<sup>74</sup> Regan, R., “Criminal Legal Aid: Does Defending Liberty Undermine Citizenship?” in Young R. & Wall, D. (Eds) *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (1996)

<sup>75</sup> Hunter, R., C. Banks, et al. (2009). *Australian Innovations in Legal Aid Services: Lessons from an Evaluation Study. Reaching Further: Innovation, Access and Quality in Legal Services A*. Buck, P. Pleasence and N. Balmer, The Stationary Office 7-26.



checking for what other services already operate in an area and how best to articulate with this service.<sup>76</sup>

Legal Aid Commissions and Community Legal Centres continue to prepare and disseminate pamphlets and printed material, online material and run many diverse community legal education programs and provide telephone information services.<sup>77</sup> The implementation of the NPA has focused LACs attention on how best to supplement existing practices. Some LACs are concerned to ensure that the lessons of the 1990's are heeded.

For instance the Legal Aid Queensland's community legal education program will be coordinated through a strategy designed to ensure the organisation responds to priority client groups and legal problems. In developing the inaugural community legal education strategy, LAQ has consulted with both internal and external stakeholders. This process is said to involve reflecting on what LAQ does well and how to improve.<sup>78</sup> The recognition of a need for a strategy is an advance on the innovation of the 1990s<sup>79</sup>.

In recent decades there has been significant growth in services "that allow or encourages a legal consumer to take personal responsibility for some or all of the activities necessary to complete a legal transaction"<sup>80</sup> such as drafting documents or doing their own advocacy in the court. However the research on a range of self help services designed to assist people resolve their own legal problems and represent themselves has shown that these services are frequently ineffective. People with a disability, indigenous people and victims of crimes are particularly at a disadvantage when faced with no alternative but self help services.<sup>81</sup> It is likely to be the case that "successful self help outcomes are most likely to be achieved by consumers who are well educated, confident and possess good language and other skills"<sup>82</sup>

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<sup>76</sup> Ibid 23

<sup>77</sup> See for example Redfern Legal Centre *Factsheets on tenancy and credit and debt* <http://www.rlc.org.au/publications/publications.html>; Victoria Legal Aid publications on credit and debt, relationship breakdown, Centrelink issues <http://www.legalaid.vic.gov.au/publications.htm>; Legal Aid Western Australia pamphlets on motor vehicle accidents, DNA testing etc. <http://www.legalaid.wa.gov.au/LegalAidServices/publications/Pages/PublicationsList.aspx>> viewed 29 March 2011.

<sup>78</sup> HEADNOTE Legal Aid Queensland Newsletter, *A new direction for community legal education* April 2011 accessed 12/5/11 <http://www.legalaid.qld.gov.au/publications/head-note/Pages/default.aspx>

<sup>79</sup> HEADNOTE Legal Aid Queensland Newsletter. April 2011 <http://www.legalaid.qld.gov.au/publications/head-note/Pages/default.aspx> accessed 12/5/11

<sup>80</sup> Jeff Giddings and Michael Robertson "Lay People, for God's Sake! Surely I should be dealing with Lawyers" Griffith Law Review (2002) Vol 11 No 2 at 436

<sup>81</sup> Jeff Giddings and Michael Robertson *Informed Litigants with Nowhere to Go* (2001) 26(4) Alt LJ 184 at 186

<sup>82</sup> Jeff Giddings and Michael Robertson "Lay People, for God's Sake! Surely I should be dealing with Lawyers" Griffith Law Review (2002) Vol 11 No 2 at 462; Lawler, M, Giddings J. & M. Robertson "'Maybe a Solicitor Needs to Know That Sort of Thing but I Don't'" User Perspectives on the Utility of Legal Self-Help Resources', in A. Buck, P. Pleasence & N. Balmer (eds), *Reaching Further: Innovation, Access and Quality in Legal Services*, The Stationary Office, 2009 .

For LACs responding to the NPA priorities, the challenge remains to develop 'preventative' services that recognise that people from significantly disadvantaged backgrounds may not speak English as their first language, may have disabilities or illness that affect their ability to find the information, may not be literate and may not have the oral and written communication skills to utilise the services. This has been confirmed by the research that found that "people with low literacy skills and/or from non-English speaking backgrounds found the information provided difficult to understand and absorb".<sup>83</sup>

## REFERRALS

Those involved in legal aid sector were concerned about the 'referral roundabout' before the commencement of the NPA. Steps in NSW, QLD and Victoria have already been taken to develop better processes between legal aid organizations and to encourage a collaborative approach to provision of legal services. The establishment of Legal Assistance Forums in these states was prompted by desire for greater collaboration and co-ordination in the delivery of legal aid services.

The Combined Community Legal Centres Group recently described the NSW Legal Assistance Forum – NLAF for short - as one of the most effective and important initiatives for the legal assistance sector in NSW in the past decade.<sup>84</sup>

The NSW Legal Assistance Forum, formed in 2005, was the initiative of Legal Aid NSW, Law and Justice Foundation and the Combined Community Legal Centres Group. Its membership includes the legal professional associations, the ATSILS and Attorney-General office.<sup>85</sup> QLAF and VLAF are similar organizations. The Victorian Legal Assistance Forum promotes collaboration and co-ordination in the delivery of legal services for socially and economically disadvantaged people in Victoria.<sup>86</sup>

Other types of forums have also developed. For instance, in 2008, Legal Aid Queensland (LAQ) undertook a strategic planning process, during which it identified a number of gaps in service delivery throughout Queensland. Due to limited funding, LAQ could not address all of these issues and determined that the best way to meet the demand would be through the

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<sup>83</sup> Hunter R, Banks C and J.Giddings (2009)'Australian Innovations in Legal Aid Services: Lessons From an Evaluation Study', in A. Buck, P. Pleasence & N. Balmer (eds), *Reaching Further: Innovation, Access and Quality in Legal Services, The Stationary Office*, 16

<sup>84</sup> Seagrove, C, *The NSW Legal Assistance Forum – a Model for Working Together* Nov 2008

<sup>85</sup> NSW Legal Assistance Forum accessed 18/5/11 <http://www.nlaf.org.au/>

<sup>86</sup>Victorian Legal Assistance Forum <http://www.vlaf.org.au>

establishment of more collaborative and cooperative working relationships with other legal service providers in rural and regional Queensland. As a result LAQ set up Regional Legal Assistance Forums throughout regional Queensland. The purpose of these forums is to assist in reducing service duplication, engender partnering relationships between services and the forums also provide feedback to the Queensland Legal Assistance Forum on the needs of disadvantaged people.<sup>87</sup>

In the regional and rural areas of Australia there is a glaring lack of legal advice or representation for people facing court proceedings. As the 2009 Senate Committee pointed out in these areas

‘there are fewer LACs, CLCs and Aboriginal legal services (ALS); there are fewer legal practitioners, including those participating in pro bono work; the cost of travel to access or provide legal services can be prohibitive; due to the smaller number of legal practitioners, there is a greater likelihood that a legal practitioner or legal service provider will have a conflict of interest; and resource allocations do not include adequate consideration of the additional costs of delivering services, including outreach programs.’

Despite efforts by CLCs and Legal Aid Commissions to provide outreach and phone line services, the tyranny of distance still remains. CLCs and Legal Aid do not yet have the resources to employ skilled expertise to utilise the technology that may be available under the National Broadband to actually offer a meaningful breakthrough in providing advice and representation to people in the country. Rapid improvements and accessibility in Skype services, video conferencing and video phones and general internet availability is the most promising way to address this issue with proper resourcing. However previous use of technology to deliver legal aid services has been problematic and the lessons from these previous initiatives must be heeded.<sup>88</sup> The regional forums have the capacity to limit the repeat of previous mistakes.

In NSW, there also exists the NSW Legal Referral Forum where participating organisations include a range of not-for-profit legal service providers such as the NSW Legal Aid Commission, the Law Society of NSW, community legal centres, Legal Information Access Centre, LawAccess NSW, pro bono organisations, courts, Aboriginal Legal Services and the Law and Justice Foundation of NSW. The forum focuses on investigating current

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<sup>87</sup> Queensland Legal Assistance Forum accessed 18/5/11 <http://qlaf.org.au/>

<sup>88</sup> R. Hunter, C. Banks & J.Giddings, 'Technology is the Answer...But What Was the Question? Experiments in the Delivery of Legal Services to Regional, Rural and Remote Clients', in P. Pleasence et al, *Transforming Lives: Law and Social Process*, The Stationary Office, 2007, .

developments and practice as well as identifying common concerns and ways of addressing these.<sup>89</sup> There have also been some specific coalitions formed of legal assistance providers delivering services in rural and regional areas. The Cooperative Legal Service Delivery Program for instance aims to build cooperative and strategic networks of key legal services and community services in NSW and organises regular meetings. This program is currently operating in nine regional areas in NSW.<sup>90</sup>

## **NPA AND DISPUTE RESOLUTION SERVICES**

*Dispute resolution services* means services provided by legal aid commissions, such as lawyer assisted negotiation and participation in legal aid dispute resolution programs

Legal aid commissions already have extensive programs of family dispute resolution. This has been the subject of evaluation most recently in 2008. Each state and territory has slightly different programs. The evaluation affirmed the positive features of LAC family dispute resolution including a sophisticated intake process that highlights family violence, highly skilled and qualified practitioners and the provision of a timely and low to no cost option for resolving family disputes for disadvantaged people.<sup>91</sup>

Given the experience of LACs in family dispute resolution, the priorities of the NPA could be interpreted to be encouraging the expansion of dispute resolution practices into other areas of the law. Clearly the increased emphasis on civil law work lends itself to these developments. However there are a number of concerns and tensions involved in this trend.

### **TENSION AROUND EXPANDED USE OF ADR**

The concerns about the expanding use of ADR of some legal aid and community legal centre lawyers were outlined in a recent submission to a public inquiry<sup>92</sup>:

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<sup>89</sup> NSW Law and Justice Foundation NSW Legal Referrals Forum accessed 30/3/11  
<http://www.lawfoundation.net.au/ljf/app/0614C6A028165EA9CA25714D0005B0A9.html>.

<sup>90</sup> Legal Aid Commission of NSW Cooperative Service Delivery Model  
<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=712> viewed 30 March 2011

<sup>91</sup> *Family dispute resolution services in legal aid commissions. Evaluation Report* KMPG December 2008 accessed 25/5/11  
[http://www.ema.gov.au/www/agd/agd.nsf/Page/Legalaid\\_Familydisputeresolutionservicesinlegalaidcommissions-EvaluationReport](http://www.ema.gov.au/www/agd/agd.nsf/Page/Legalaid_Familydisputeresolutionservicesinlegalaidcommissions-EvaluationReport)

<sup>92</sup> Law Reform Committee, Victorian Parliament see <http://www.parliament.vic.gov.au/archive/lawreform/inquiries/> accessed 9/10/10

ADR is inappropriate if it fails to address power disparities between the disputants. The resolution of civil disputes through ADR may be problematic if the matter involved a claim by a consumer against a large corporation such as a bank (or the reverse), especially if the consumer is not legally represented. This type of dispute is often characterised by unequal bargaining power and a lack of ability of consumers to negotiate any terms of their contract of relationship. It may follow that consumers accept a negotiated settlement. In order to avoid the risk of adverse costs orders and the stress of litigation, yet through doing so do not have their rights fully realised or the merits of their case properly assessed. It may also be in the interests of the corporation to pay or forego a comparatively small individual and confidential settlement rather than risk having a test case judgment made against them that would be costly if applied to a large volume of consumers.<sup>93</sup>

Since the 1980s significant concerns have been raised relating to power imbalances, the privatised nature of ADR and the ensuing lack of precedent, particularly in the United States.<sup>94</sup> This issue was taken up more recently in UK by Genn.<sup>95</sup> Many of the points raised by these early critiques are equally relevant today; the concern that the privatised nature of ADR processes inhibits the identification and scrutiny of systemic issues;<sup>96</sup> and that ADR could increase the capacity of those already advantaged (socially and legally) to enforce their rights "while denying disadvantaged defendants an equivalent shield".<sup>97</sup>

The use of Australian tribunals certainly reinforces Abel's point that those who "mobilize a legal institution often begin with a significant advantage over their adversaries"<sup>98</sup>. For instance studies that looked at the Victorian Residential Tenancies Tribunal clearly showed that tenants rarely bring their own actions and most applications are initiated by landlords or their agents.<sup>99</sup>

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93 Federation of Community Legal Centres(Vic), Submission to Law Reform Committee Inquiry into Alternative Dispute Resolution (31 March 2008) p 2

94 For classic example see Richard Abel, (Ed) *The Politics of Informal Justice Volume1* (1982) Academic Press ; Delgado R., Dunn C., Brown P., Lee H. & Hubbert D., 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) *Wisconsin Law Review* 1359; Gunning I. 'Know justice know peace: Further reflections on justice, equality and impartiality in settlement oriented and transformative mediations' (2004) 5 *Cardozo Journal of Conflict Resolution* 87; Gunning I "Diversity Issues in Mediation: Controlling Negative Cultural Myths, (1995) *Journal of Dispute Resolution* 55

95 Genn, H. *Judging Civil Justice* 2010 Cambridge University Press

96 Abel Ibid, 280

97 Ibid, 295-7

99 Ruth Alder 'In Whose Interest', (1989) 14 (5) *Legal Service Bulletin*, 209; Andrea Treble and Lucie White, 'Victoria's Residential Tenancies Tribunal - Renovate or Demolish' (1993) 18(4) *Alternative Law Journal* 163; Frances Gibson (2007). "Alternative dispute resolution in residential tenancies cases." (2007) *Australasian Dispute Resolution Journal* 18: 101- 110.

In Delgado's exploration of informalism and prejudice he also made the point that advice to rely on the formal justice system is contingent on that system being more reliably free of prejudice than the informal.<sup>100</sup>

The tensions and complexity of ADR issues discussed above<sup>101</sup> are highlighted in the practice of legal aid and community legal centre lawyers. Governments' desire to encourage settlement of disputes through mediation can run counter to the interests of the legal aid and community legal centre lawyer. These lawyers are often intent on using litigation to raise public awareness about an issue; to set a precedent concerning unjust laws or procedures; and to get a determination of 'rights' either new or defended.<sup>102</sup> They desire the empowerment of their individual client/s but also have a concern for an outcome that can impact individuals who have suffered similar loss but are unlikely or unable to assert their legal rights.<sup>103</sup>

Concerns about the appropriateness of ADR for some matters, loss of precedent, power imbalances and the privatised nature of ADR have been raised in Australia by the Access to Justice Committee, the Australian Law Reform Commission, the Victorian Law Reform Commission, the Victorian Parliament Law Reform Committee and the National Alternative Dispute Resolution Advisory Council (NADRAC).<sup>104</sup> The 2009 NADRAC report noted there may be some matters not suitable for ADR or pre-action requirements.<sup>105</sup> Recommendation 2.3 *Exceptions* states:

Legislation set out factors that may be taken into account by prospective litigants in determining the application of the [pre-action] guidelines including urgency, undue prejudice,

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100 Delgado et al above n. 5, 1359; Astor & Chinkin n.1, 42

101 For a recent Australian exploration of these issues see Mark J Rankin, 'Settlement at all cost: The high price of an inexpensive resolution?' (2009) 20 *Australasian Dispute Resolution Journal* 153 and a short summary see King et al, above n 3, 94-96

102 Scott Cummings & Deborah L Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) 36 *Fordham Urb. L.J.* 603; Jahid Hossain Bhuiyan 'Access to Justice for the Impoverished and Downtrodden segments of the People through Public Interest Litigation: a Bangladesh, India and Pakistan perspective' (2007) *Lawasia Journal* ; Rao, Mamta, *Public Interest Litigation, Legal Aid and Lok Adalats* (2004 2nd Ed. Eastern Book Company) ; Edwin Rekosh, Kyra Buchko & Vesela Terzieva, *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists* (2001 Public Interest Law Initiative Columbia Law School New York)

103 Denis Nelthorpe, 'Class Actions - the real solution' (1987) 13 *Legal Service Bulletin* 26; For a discussion of the ethical dilemmas for public interest lawyers see Shauna Marshall, 'Mission Impossible?: Ethical Community Lawyering' (2000) 7 (1) *Clinical Law Review* 147; Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 (1) *Monash University Law Review* 49

104 Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system* (Report No 89) (2000) Australian Government Publishing Service; Victoria Law Reform Commission, *Civil Justice Review: report* (2008); Victorian Parliament Law Reform Committee, *Inquiry into alternative dispute resolution and restorative justice* (2009); National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve- Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009)

105 National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve- Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009)

safety, security, the subject matter of the dispute, public interest factors and whether the dispute is essentially the same as has been previously before the same court or tribunal.<sup>106</sup>

However the report does not detail what is meant by 'subject matter of the dispute or public interest factors'. Until there is clarity about the type of matters that should not go to mediation, protocols for identification of systemic issues and procedures enabling the adjudication of important legal issues (impact litigation) the concerns of legal aid and community legal centre lawyers will remain.

The relationship between the expanding use of ADR processes and the provision of services to the poor and disadvantaged by legal aid organisations is a complex one. There are distinct advantages in some areas of law and disputes.<sup>107</sup> However the paradoxes outlined by Abel, Menkel-Meadow and others are also evident in areas that involve apparent power differentials like indigenous land claims, environmental issues, discrimination in the workplace and violence against women.<sup>108</sup> It is argued that the possibility of conciliation of disputes in these areas "may have the effect of 'cooling out' individual complainants and subverting needed systemic change".<sup>109</sup> The concern with the privatization of disputes was addressed by the Victorian Parliament Inquiry in the recommendation that

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to publish – in a de-identified form – regular case studies and reports on systemic issues and any other issues of public interest that arise as part of their ADR processes.<sup>110</sup>

In a thorough report on the Federal Civil Justice System, the Australian Law Reform Commission notes several factors that may indicate when ADR processes are unsuitable for resolving a dispute and a court adjudication is more suitable. They were:

- when a definitive or authoritative resolution of the matter is required for precedential value
- when the matter significantly affects persons or organisations who are not parties to the ADR process
- when there is a need for public sanctioning of conduct or where repetitive violations of statutes and regulations need to be dealt with collectively and uniformly;
- when parties are unable to negotiate effectively themselves or with the assistance of lawyers

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106 Ibid para 2.3, 8

107 For examples see Lucie O'Brien., *Activist ADR: community lawyers and the new civil justice a report prepared for Federation of Community Legal Centres (Vic) Inc.*(2010), 19-22

108 For example Simon Young S., 'Cross-cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons' (1999) *Australian Dispute Resolution Journal* 41; Laura Horn, L. 'Mediation of environmental conflicts' (2005) 22 *Environmental and Planning Journal* 369

109 Astor & Chinkin above n 1, 28-29

110 Ibid, 84

- in family law matters, where there is a history of family violence.<sup>111</sup>

Unfortunately the ALRC did not articulate how these principles may be put into effect. One approach might be when mediators recognize that agreements are unfair (although the available agreement for the parties), the mediators have an ethical responsibility not to be complicit in the acceptance of the injustice without taking some action.<sup>112</sup>

There has been debate and concern about power imbalance in the family law area for many years.<sup>113</sup> Recognising the tensions between the pursuit of rights and alternative dispute resolution mechanisms, LACs in their family dispute resolution have developed preferred approaches in an attempt to negate issues of power. Perhaps this experience could be replicated in other forums where similar concerns arise. Factors such as the physical environment and availability of information, advice and support prior to mediation conferences have been addressed.<sup>114</sup>

It is argued that the quality of a mediation depends in part on the resources at the disposal of the parties which allow them to make informed decisions about the law, their own needs and the extent to which they wish to depart from the law.<sup>115</sup> Despite the reduced formalities and greater flexibility of ADR processes, the process itself may be unfamiliar to a party and therefore appear complex, the physical environment may still be intimidating and any cultural or language barriers will presumably still be present. Increased access to information, legal advice and representation is one way of improving access to dispute processes.<sup>116</sup> The comprehensive report of the Victorian Parliament Inquiry into Alternative Dispute Resolution made many recommendations aimed at improving the 'appropriateness' of ADR services. These included training for ADR practitioners on cross cultural differences and power imbalances, recognition of the difficulties of people with language difficulties and limited literacy as well as the provision of information and legal advice prior to involvement in ADR.<sup>117</sup>

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111 Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system* (Report No 89) (2000) Australian Government Publishing Service para 6.62 p 414

112 Astor, & Chinkin above n1, 230

113 ADR in family law has been focus of much critical comment and evaluation. For a discussion of the literature and issues see Astor & Chinkin above, n 1, 342-358; Michael King, Arie Frieberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* 2009, 124- 137; Laurence Boulle *Mediation: Principles, Process, Practice* (2005), 332 – 348; Hilary Astor 'Some contemporary theories of power in mediation: A primer for the puzzled practitioner' (2005) 16 ADRJ 30 ADR in family law has been focus of much critical comment and evaluation.

114 KPMG Report; Dee DePorto & Jody Miller., 'Honoring the Victim's Voice' (2005) ACResolution 22

115 Astor, & Chinkin, above n 1, 27

116 Sourdin & Thorpe above n 89

<sup>117</sup> Victorian Parliament Law Reform Committee, *Inquiry into alternative dispute resolution and restorative justice* (2009)



For example around 1.5 million English-speaking Australians may have very limited literacy and numeracy skills, and an equivalent number may have skills that put them at risk in certain situations. Many of these individuals become skilled in concealing their difficulties and seek to avoid the embarrassment of disclosure. Despite this fact, until recently this barrier to access to justice has received scant attention. In Australia limited literacy can act as a barrier to justice because individuals have imperfect knowledge of the system and their effective participation in the process is hindered.<sup>118</sup> A recent study found that ADR processes present high literacy and numeracy demands for the involved parties; many ADR practitioners may not be aware of the limited literacy and numeracy skills of parties to disputes; ADR practitioners need specific training for dealing with the issue of limited literacy and numeracy for English-speaking Australians; and the literacy and numeracy demands of accessing alternative dispute resolution may prevent Australians from participating in the process.<sup>119</sup>

## RESEARCH ON ADR

In Australia, although there is a growing body of empirical research in alternative dispute resolution processes, there is still none that directly addresses the tensions between the need for precedent and ability to affect systemic change and client empowerment.<sup>120</sup> Although concerns with the effect of ADR on those with least access to justice have been articulated for over thirty years, there is little empirical evidence to either support or deny the claims. Research often fails to adequately contextualise the data collected and address broader issues of social inclusion.<sup>121</sup>

However in the context of recent empirical research on justiciable problems and research conducted by the Law and Justice Foundation (NSW) that highlights the lack of access to justice for marginalised and disadvantaged groups,<sup>122</sup> there is an imperative to be vigilant in

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118 The equity issues for those who do not speak English as their first language have been recognised and the impact of poor literacy and numeracy is often discussed as a factor in the context of criminal history and recidivism: Joy Cumming and Janice Wilson *Literacy, Numeracy and Alternative Dispute Resolution* (National Centre for Vocational Education Research, 2005); see <http://www.ncver.edu.au/research/proj/nr3L07.doc> viewed 25 October 2005.

119 Cumming and Wilson, n 131, pp 6-7.

120 For an overview of current Australian research see National Alternative Dispute Resolution Advisory Council website detailing papers from the ADR Research Forum held July 2010 accessed 3/10/10

[http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADRResearch\\_SummaryPapersfromADRResearchForum2010](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADRResearch_SummaryPapersfromADRResearchForum2010)

121 I discuss this further in Noone M.A. 'ADR, public interest law and access to justice: The need for vigilance' (2011) *Monash University Law Review* (forthcoming).

122 For details of Access to Justice and Legal Need Research Program see <http://www.lawfoundation.net.au/ljf/app/&id=54A6A9F9FFD485F0CA25746400187A24> accessed 13/10/10

assessing what is 'appropriate dispute resolution'.<sup>123</sup> Evaluations of ADR should examine contextual issues to ensure that the processes are not perpetuating systemic biases and disadvantage.

## Conclusion

The NPA utilises the rhetoric of early Australian pioneers of legal aid and community legal centres; preventative legal services, collaboration, resilience (empowerment) of clients and early intervention.<sup>124</sup> However it remains to be seen whether there is a real commitment to these priorities. Hunter's research on women's access to legal aid illustrates the difficulty for legal aid organisations (through their practices and policies) to not perpetuate social exclusion and discrimination.<sup>125</sup> Before we can make a detailed assessment of the NPA, there is a critical need for ongoing empirical evaluation and monitoring that not only provides data but looks at the quality of preventative legal services, the early interventions and ADR processes. Rigorous and contextualised evaluations of new developments must be regularly conducted and the processes reviewed. Most importantly, these evaluations must be cognisant of the complex nature of people's lives and problems (particularly for the poor and vulnerable) and the many hurdles people face in order to access justice.

Additionally, continued awareness of and engagement with the tensions surrounding the increased use of ADR is critical for those concerned to advance the interests of both legal aid and ADR. It is important to ensure that the adoption of non adversarial processes is not at the expense of the ability to assert and defend legal rights that can protect the poor, disadvantaged and vulnerable. There is significant evidence that particular groups of people suffer more than others from inequality before the law. Although it is clear that the formal justice system does not necessarily provide justice for oppressed or minority groups and that rights are often contingent, unreliable and fragile it must be acknowledged as Williams, an Afro-American legal theorist, argues "rights are easier to abandon for members of dominant groups, who have been able to depend for centuries on being the bearers of rights".<sup>126</sup> The challenge for legal aid and community legal centre lawyers is to ensure that the increased

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123 The then Victorian Attorney General was keen to use the term 'appropriate' rather than 'alternative': see R.Hulls, Second Reading Speech – Civil Procedure Bill 2010 24 June 2010; See Section 3 Civil Procedure Act 2010.

<sup>124</sup>see Noone M.A., 'the Activist Origins of Australian Community Legal Centres' in Arup & Laster (eds) *For the Public good: pro bono and the legal profession in Australia* (2001); Lucie O'Brien., *Activist ADR: community lawyers and the new civil justice a report prepared for Federation of Community Legal Centres (Vic) Inc.*(2010), 19-22

<sup>125</sup> Hunter R & De Simone T, 'Women, Legal Aid and Social Inclusion' (2009)44 (4) *Australian Journal of Social Issues* 379

<sup>126</sup> Patricia Williams, *The Alchemy of Race and Rights* (1991) as cited in Astor & Chinkin above n.1, 40 - 41

reliance on ADR by governments does not further perpetuate or exacerbate existing inequalities before the law.

## APPENDIX A

National Partnership Agreement on Legal Assistance Services

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# National Partnership Agreement on Legal Assistance Services

## PRELIMINARIES

1. This National Partnership Agreement (the Agreement) is created subject to the provisions of the *Intergovernmental Agreement on Federal Financial Relations* and should be read in conjunction with that Agreement and subsidiary schedules.

2. The Parties are committed to finding better ways to help people resolve their legal problems.

This Agreement builds on long-standing arrangements for the effective delivery of legal services to disadvantaged Australians and the wider community. Addressing social inclusion, including Indigenous disadvantage, and adopting a more holistic approach to resolving people's legal problems will improve the way services are provided. That commitment is embodied in the objectives and outcomes of this Agreement. This Agreement will be implemented consistently with the objectives and outcomes of all National Agreements and National Partnerships entered into by the Parties.

3. This Agreement is established to support a holistic approach to the reform of the delivery of legal assistance services by legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services.

4. Through the Agreement, the Commonwealth and States and Territories will improve the targeting of services for disadvantaged Australians and the wider community, realise

opportunities for using resources more effectively and efficiently between service providers and progress national reform of issues that affect legal assistance services.

5. The Parties to the Agreement recognise that decisions regarding future legal assistance service delivery must be considered in the context of the justice sector as a whole, and support the principles of the Australian Government's strategic framework for access to justice.

6. The Parties enter into this Agreement in good faith. Each party will act reasonably in their dealings with each other and will perform their respective obligations honestly and fairly and in the interests of legal assistance service users.

7. The legal aid services referred to in this Agreement are specific arrangements for the delivery of Commonwealth funded services by State and Territory legal aid commissions under the Commonwealth Legal Aid Program. The Commonwealth will maintain separate agreements for community legal centres, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services that are consistent with the objectives of this Agreement.

The jurisdictional forums proposed in clause 25 will be the key mechanism to ensure better coordination and targeting of legal assistance services.

8. This Agreement confirms the financial commitment of the Commonwealth to the provision of legal aid services for disadvantaged Australians.