Improving access through translating principles into practice: Submission in response to the Attorney General's report, A Strategic Framework for Access to Justice in the Federal Civil Justice System

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Infrastructure and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on access to justice

PIAC has a long history of working to achieve access to justice for marginalised and disadvantaged clients. PIAC has pursued this goal by developing and piloting models for unmet legal need, exploring and promoting innovative ways of funding and progressing public interest law and identifying, challenging and preventing systemic barriers to access to justice.

PIAC has been instrumental in the development of several Community Legal Centres (CLCs) to address unmet legal need, including the Communications Law Centre in 1987 and the National Children's and Youth Legal Centre, which became a separate entity based at the University of NSW in 1993.

In 1992, PIAC, together with the Law Society and the Private Bar, established the Public Interest Law Clearing House (PILCH). This was the first formal scheme to provide access to *pro bono* legal assistance from the private legal profession in Australia. PILCH links individuals and not-for-profit organisations with legal and other professional advisors to address issues of concern in the community.

PIAC'S Indigenous Justice Program (IJP) was initiated in 2001 as a response to the unmet need of Indigenous people for access to civil law advice and representation. With financial support from law firm, Allens Arthur Robinson, the IJP has assisted clients in relation to stolen wages claims, claims against police, race discrimination claims and a wide range of other civil matters.

In 2004, PIAC, in partnership with PILCH established the Homeless Persons' Legal Service (HPLS), which utilises lawyers from PILCH members to deliver services to people in the Sydney and Parramatta area who are homeless or at risk of homelessness. HPLS operates nine legal clinics based at agencies that provide other services to homeless people and provides legal information, referral, advice and in some cases, ongoing casework, in a large range of areas of law.[1] It is currently piloting a street outreach and recently piloted an outreach service to young Aboriginal people in detention who are at risk of homelessness on release. A further clinic is scheduled to open early in 2010. HPLS also conducts policy and advocacy work on issues arising from the legal services and its liaison work.

In 2008, PIAC launched the Mental Health Legal Services (MHLS) Project, a two-year initiative funded by Legal Aid NSW and PIAC that aims to explore the unmet legal needs of people in NSW who are mentally ill, initiate sustainable, effective processes to meet those legal needs and systematically identify and respond to the barriers to justice facing people in NSW who are mentally ill. In early 2009, PIAC received funding from the NSW Public Purpose Fund with support from the NSW Attorney General, and from the Federal Attorney General to enable the establishment of four service delivery pilots that aim to improve access to justice for people with mental illness in NSW. The MHLS Project is also piloting community legal education training for consumers, their carers and advocates, and continuing legal education training for legal and related professionals on providing effective services to people with mental illness.

PIAC has also written papers and contributed to the debate about access to justice including making submissions to the Standing Committee of Attorneys-General (SCAG) on litigation funding in Australia[2], the National Alternative Dispute Resolution Advisory Council (NADRAC) Inquiry into Alternative Dispute Resolution in the Civil Justice System[3], the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice[4] and Australia's Judicial System[5].

Introductory Remarks

As the Attorney-General's Department Taskforce acknowledges in the first chapter of its report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*[6] (the Taskforce Report) there have been a number of recent inquiries and reviews concerning access to justice and the funding programs of legal aid, CLCs and other community-based legal services providers.

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1 The clinics are hosted and supported by Edward Eagar Lodge, Matthew Talbot, Newtown Mission, Newtown Neighbourhood Centre, Norman Andrews House, Parramatta Mission, The Salvation Army Streetlevel Mission, The Station, Wayside Chapel and the Women's And Girls' Emergency Centre. The PILCH members that provide lawyers to staff the clinics are Allens Arthur Robinson, Baker & McKenzie, Corrs Chambers Westgarth, Deacons, DLA Phillips Fox, HWL Ebsworths, Gilbert + Tobin, Henry Davis York, Legal Aid NSW and Minter Ellison.

2 Simon Moran and Gordon Renouf (CHOICE), *Litigation funding - consumer protection and access to justice* (2006) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2006091_20060913.html> at 15 October 2009.

3 Alexis Goodstone, *Alternative Dispute Resolution in the Civil Justice System* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009052_20090522.html> at 15 October 2009.

4 Alexis Goodstone, Robin Banks, Chris Hartley and Vavaa Mawuli, *Justice – not a matter of charity: Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009050_20090520.html> at 15 October 2009.

5 Alexis Goodstone, *Inquiry into Australia's Judicial System and the Role of Judges* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/PIAC%20Submission%20Judicial%20Inquiry-1.pdf> at 15 October 2009.

6 Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce Attorney-General's Department* (2009) 6.

PIAC refers in particular to the Senate Legal and Constitutional Affairs Committee's Inquiry into Legal Aid and Access to Justice (the 2004 Inquiry), the final report of which was tabled in Federal Parliament on 8 June 2004 (the 2004 Senate Access to Justice Report).[7] The Inquiry considered, among other things, funding and other issues relating to legal aid, CLCs and Indigenous legal services and made 63 recommendations.

The Senate Committee had previously conducted an inquiry into the legal aid system in Australia, presenting reports in March 1997[8] (the First Report), June 1997[9] (the Second Report) and June 1998[10] (the Third Report). These earlier reports and the submissions made to the Senate Committee are referred to frequently in the 2004 Senate Access to Justice Report.

PIAC, the National Association of Community Legal Centres (NACLC), a number of the state peak bodies for CLCs and many individual CLCs made extensive submissions to the 2004 Inquiry. PIAC's views remain the same as those expressed then, except that current funding is even more inadequate as it has not kept pace with the increased costs of running existing services and as the need for services has increased. The 2004 Senate Access to Justice Report made many important recommendations that still have not been implemented.

The Inquiry into Access of Indigenous Australians to Legal Services, conducted by the Commonwealth Parliamentary Joint Committee of Public Accounts and Audit, resulted in a report tabled in Commonwealth Parliament on 22 June 2005.[11] That report included 17 recommendations on the provision of legal services for Aboriginals and Torres Strait Islanders, many of which remain unimplemented. The need for additional specialist resources for Aboriginal and Torres Strait Islander legal services is critical and should be one of the highest priorities for the Australian Government.

Another important review of access to justice was the Commonwealth Parliament's Standing Committee on Legal and Constitutional Affairs inquiry that tabled its report, *Report of the Inquiry into Older People and the Law*[12], in 2007. There were many important recommendations contained in that report, in particular recommendations 38 and 39:

> The Committee recommends that the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.

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7 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004) <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/contents.htm> at 26 November 2009.

8 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Australian Legal Aid System: first report* (1997).

9 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Australian Legal Aid System: second report* (1997) <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1996-99/legalaid/report/contents.htm> at 26 November 2009.

10 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Australian Legal Aid System: third report* (1998) <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1996-99/legal/report/contents.htm> at 26 November 2009.

11 Joint Committee on Public Accounts and Audit, Parliament of Australia, *Report 403: Access of Indigenous Australians to Law and Justice Services* (2005) <http://www.aph.gov.au/house/committee/jpaa/atsis/report.htm> at 19 November 2009.

12 House of Representatives Standing Committee of Legal and Constitutional Affairs, Parliament of Australia, *Older people and the law* (2007) <http://www.aph.gov.au/house/committee/laca/olderpeople/report.htm> at 19 November 2009.

> The Committee recommends that the Australian Government provide funding to Community Legal Centres to expand their community education role, with a specific focus on older people.[13]

PIAC also refers the Taskforce to the paper published by National Legal Aid (NLA), *A New National Policy for Legal Aid in Australia*.[14] PIAC supports the policy position and practical proposals put forward by National Legal Aid in that document, which refers to legal aid in a broad sense, including CLCs and other community legal service providers as well as government legal aid agencies.

Three critical points made in the NLA policy paper are the need for the Australian Government to change Commonwealth legal aid policy to end the current division of state/territory and Commonwealth responsibilities in legal aid, the need to significantly increase funding for civil law legal aid and the need for the Commonwealth to increase its funding overall and return to a more equitable matching by the Commonwealth of its funding with state/territory funding.

PIAC submits that the first priority for the Taskforce, and for the Commonwealth Government, should be to have regard to earlier inquiries and reports and to take steps to implement those recommendations that have, to date, not been implemented.

Recommendation:

1. *That the first priority of the Taskforce should be to review the earlier inquiries and reports about access to justice and take steps to implement those recommendations that have, to date, not been implemented. These outstanding recommendations should be incorporated into the final Taskforce Report.*

Chapter 5 – A strategic framework for access to justice

Response to recommendation 5.1

PIAC agrees generally with the proposal that an external body should conduct a review of the efficiency of courts and tribunals, including identifying 'relevant measures and data requirements necessary for ongoing monitoring of the justice system'.[15]

Recommendation 5.1 refers only to a review of the 'efficiency' of courts and tribunals. While accepting that 'efficiency' may be one relevant consideration when assessing the work of courts and tribunals, PIAC submits that there are other, more fundamental measures that should be included in any review and measurement of courts and tribunals including equity, accessibility and perceptions that justice has been achieved. PIAC further submits that the Australian Law Reform Commission would be better equipped than the Productivity Commission to conduct such a broad ranging inquiry that considers equity, perceptions of justice and accessibility alongside efficiency.

One particular aspect of the way in which courts operate—as distinct generally from tribunals—is the listing of multiple matters on a single day (particularly in the lower courts) and requiring all parties, and their legal representatives (if they have them) to be available at court until their matter is called on. This is a significant inefficiency that adds to the costs incurred by the parties by increasing the unproductive time spent by

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13 Ibid xxii.

14 National Legal Aid, *A New National Policy for Legal Aid in Australia* (2007) <http://www.nla.aust.net.au/category.php?id=11> at 19 November 2009.

15 Commonwealth Attorney-General's Department, above n 6, 73.

their legal representative waiting at court. It also creates broader negative impacts on dispute resolution. These include delays (sometimes of weeks or months) in getting to the substance of the issue in dispute. This can make the positions of parties more intractable and alienate disadvantaged participants through their perception that they and their legal problem are not a priority. There is also a cost to the parties of having to take time away from work, education or other activities without any progress being achieved. This in turn may lead to parties deciding to withdraw from the process or giving up legal rights simply to get the matter over and done with.

Recommendation:

2. *That the review of data requirements proposed in recommendation 5.1 be conducted by the Australian Law Reform Commission with a broad mandate to consider measurements relating to accessibility, justice and equity as well as efficiency.*

Response to recommendation 5.2

PIAC refers to the comments made above in response to recommendation 5.1

Response to recommendation 5.3

PIAC agrees with the suggestion that it would sensible for the Strategic Framework proposed in the Taskforce Report to apply to state as well as federal courts and tribunals and the proposal contained in recommendation 5.3 that the Attorney-General should initiate a review into the interrelationship between the state and federal justice system, but would like the opportunity to comment on any detailed proposals that may be made to implement this recommendation.

Chapter 6 – Information about the law

Response to recommendation 6.1

While not entirely clear from the discussion in the Taskforce Report, it appears that the *no wrong number, no wrong door approach* involves government agencies, courts and legal assistance services (including CLCs) having access to a common referral database and ensuring that everyone who makes contact who cannot be assisted is referred to the most appropriate service.[16]

In principle, PIAC supports the proposal to set up a common referral database that can be accessed by these different organisations, including legal aid and CLCs. If achievable, this would be an efficient and potentially effective way of ensuring that information on referrals is widely distributed. However, it is essential that a common referral database is regularly updated and that there is a simple feedback mechanism built into the system to ensure that as referrals are made, there is some way of evaluating the success of referrals and updating the database to reflect this information.

Furthermore, given that the Taskforce Report acknowledges that very often people seek legal advice from non-legal sources such as family, friends, community members and non-legal service providers, PIAC submits that consideration should be given to making the common referral database publicly available. It may be that it is not possible to simply make the contemplated common referral database available as it is provided to Commonwealth agencies and service providers, for example because of privacy considerations, but it should be possible to publish an edited version that still provides up-to-date and more comprehensive information and appropriate legal services to the public.

[16] Commonwealth Attorney-General's Department, above n 6, 79.

PIAC also notes and refers the Taskforce to the particular expertise of LawAccess in NSW in respect of maintaining an effective referral database and, by comparison, the ineffectiveness to date of the NSW Government's human services referral database HSNet. Both indicate the level of focused expertise necessary to provide an effective resource and the challenges of doing this comprehensively and effectively.

The other aspect of the *no wrong number, no wrong door* approach that is alluded to in the Taskforce Report is the idea that whichever agency, court, tribunal or service provider is first approached about a legal problem is required to ensure that the person is connected to the most appropriate service. Establishing a common referral database, while an important component of making this policy a reality, will not of itself ensure that people are put in touch with the right service, as no database can provide sufficient specific information to ensure that it is the right referral. Realistically, this can only be done by personal contact and often even then only through 'warm referrals'. Warm referrals involve the referring person contacting the organisation to which the referral is to be made to ensure that the consumer can and will be assisted and then having ongoing contact with the person to ensure that they have reached the most appropriate service, and that the service is, in fact, providing them with appropriate legal or other assistance. It is not sufficient to simply establish a best-practice protocol based on this approach; the Government must ensure that appropriate levels of funding and training are provided to agencies, courts and tribunals, CLCs, legal aid and other providers to enable them to make 'warm referrals' and follow up with the clients to ensure that they receive timely and appropriate information about legal issues.

Recommendations:

3. *That the Taskforce undertake a detailed analysis of whether or not a common referral database is achievable and maintainable, and the costs of doing this (both establishment and maintenance) and that such analysis be undertake in consultation with LawAccess and key community sector organisations, such as the Council of Social Services of NSW, that have experience with the NSW Government's human services referral database, HSNet.*

4. *That the proposed common referral database, if developed, be regularly updated to reflect changes to service providers as well as feedback from users about the service providers listed in the database.*

5. *That the proposed common referral database (if developed), or at least an edited version of the database, be made publicly available.*

6. *That adequate funding and training be provided to all agencies and particularly legal aid and CLCs to ensure that they have sufficient resources to comply with the* no wrong number, no wrong door *approach by conducting 'warm referrals'.*

Response to recommendation 6.2

PIAC supports this recommendation as it agrees that the *no wrong number, no wrong door* approach should apply to all levels of government, and should not be limited to Commonwealth agencies.

Response to recommendation 6.3

PIAC is of the view that in order to create an effective common database, the Attorney-General's department should establish a consultative process to ensure that agencies, CLCs, other service providers as well as courts and tribunals consolidate existing information about existing services.

Additionally, it is essential that this consultative process is not a one-off exercise: there should be an ongoing process by which these groups can provide feedback about the services that are listed on the common database to maximise its effectiveness.

PIAC notes the resource implications of this proposal and urges the Taskforce to ensure that any additional requirements on service providers to actively engage with the process and to maintain currency of information must be reflected is appropriate resourcing.

Recommendation:

7. *That the Commonwealth Attorney-General's Department establish and resource a process for ensuring of ongoing consultation with agencies, CLCs and other service providers to ensure that they can provide feedback that informs updates and amendments to the common referral database.*

Response to recommendation 6.4

PIAC strongly supports the recommendation that the Attorney-General's Department should develop strategies to increase the accessibility of information and services for groups such as homeless people, Indigenous people, young people and people with a mental illness, that are not reached by more general programs.

PIAC contends that in order to successfully develop these strategies, the Attorney-General's Department should build on the work of earlier reviews and inquiries that made specific recommendations about how to improve access to justice for identified marginalised groups.

Furthermore, any strategies should be developed based on consultation with members of these communities and community service providers that have regular contact with these communities.

Finally, PIAC submits that consideration should be given to providing funding to CLCs to test new models of service delivery, conduct evaluation during the course of such projects, and most importantly, to fund permanent programs that are proven to be effective. Too often funding is available for short-term projects to enhance access to services available in a CLC.

For example, PIAC received one year's pilot funding from the (then) Federal Department of Family, Community Services and Indigenous Affairs (FaCSIA) in 2004 to implement the Homeless Persons' Legal Service. Towards the end of the year, PIAC engaged an independent consultant to evaluate the service and that evaluation report was provided to Government. Despite the evaluation indicating that the pilot was highly successful and evidence about the particular need that homeless people have for longer-term interventions in order to develop trust in legal service providers[17], the FaCSIA rejected PIAC's application for further funding on the basis that the project was no longer a pilot.

PIAC received some additional funding from the NSW Public Purpose Fund for the pilot but was unable to secure ongoing funding during the funded period. This resulted in PIAC having to retrench one of the two staff members in the project and use its limited reserves to continue the employment of the other staff member for seven months while waiting for decisions on further funding applications. Fortunately, in June 2006 the NSW Public Purpose Fund allocated funding for the project to mid-2009, to enable the continuation of the service. It has recently confirmed a further three years' funding.

17 WestWoodSpice, *Evaluation Report: Homeless Persons' Legal Service* (2005).

Service providers working directly with disadvantaged and marginalised groups are best placed to increase access to legal information and services by members of such groups. They need sufficient short- and long-term funding, however, to achieve this.

Recommendations:

8. *That the proposal in recommendation 6.4 that the Commonwealth Attorney-General's Department develop strategies to target groups whose legal needs are not being met through general programs be amended to specify that such development should to take place in consultation with the groups affected and community service providers that already provide services to those groups.*

9. *That specific additional funding be made available within the Community Legal Services Program to enable the research and development of new responses to unmet legal needs. Such a funding program should have guidelines that ensure sufficient funding to properly pilot and evaluate new models and avoid short-term pilots that provide insufficient time to fully implement and test models. The program should also include a mechanism to review the evaluation prior to the end of the pilot and to ensure continuing funding is made available to the Community Legal Services Program where the pilot demonstrates its effectiveness in responding to unmet legal need and improving access to justice.*

Response to recommendation 6.5

While, PIAC broadly agrees that the Attorney-General's Department should work to improve access to information by Indigenous communities throughout Australia, particularly in rural and remote areas, PIAC submits that further work should be done by the Taskforce to develop (and include in the report) specific and concrete proposals that will effectively ensure improvements to access to justice for Indigenous Australians.

PIAC submits that there are a number of key issues that must be addressed by any recommendations about access to information, advice and representation by Indigenous people in Australia.

Firstly, as PIAC noted in its submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice[18], a particular barrier to accessing justice for Indigenous people is geographical remoteness. As at 30 June 2006, 43% of Indigenous people were living in regional areas and a further 25% in remote or very remote areas.[19] The challenge of accessing essential legal services is even greater in regional areas where the services are either not available or difficult to access because of infrequent service delivery or distance. There is little capacity for the private sector to expand its *pro bono* services to regional and remote communities. Further, the ability of legal services such as Aboriginal and Torres Strait Islander Legal Services (ATSILS) to retain experienced staff in regional and remote areas is a significant challenge for a variety of reasons including:

- uncompetitive salaries compared to government Legal Aid agencies (LACs) and private legal practices;
- extremely large workloads and lack of time to adequately deal with the work;
- lack of support and appropriate supervision of junior lawyers; and
- lack of potential career progression within the ATSILS.[20]

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18 Goodstone, Banks, Hartley and Mawuli, above n 4, 15.

19 Australian Bureau of Statistics, *The Health and Welfare of Aboriginal and Torres Strait Islander Peoples* (2008) 5.

20 Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Island Legal Services, Issues of Equity and Access' (2008) 32 *Crim LJ* 38, 48.

Legal outreach programs co-ordinated by LACs and efforts by the NSW Legal Assistance Forum's Working Group on Civil and Family Law Needs of Indigenous People to provide community legal education and increase awareness about the legal services available to assist people in regional and remote areas with their legal needs are important measures designed to deliver legal services to Indigenous people in their communities and thus enable them more equitable access. There is a need, however, to address the systemic issues that create barriers to accessing justice such as addressing long-term funding problems and ensuring legal services operating in regional and remote areas are well supported and adequately resourced to cater for the needs of their clients.

PIAC's and its Indigenous Justice Program have been seriously challenged in their capacity to respond to the legal needs of Aboriginal people with claims under the Aboriginal Trust Fund Repayment Scheme (AFTRS). While the AFTRS has been, in the main, a positive development by the NSW Government to pay monies held in trust by the Government for Aboriginal people between 1900 and 1969, no funding was made available to provide access to legal services. The AFTRS is a largely administrative scheme but that does not change the fact that people with claims against the AFTRS have a legal entitlement to have the monies paid to them and should have access to legal advice about what is being offered to them, on what terms and what the alternatives might be to recover the monies owed. When the AFTRS was first established in 2005, PIAC was virtually the only legal service provider in NSW systematically assisting people to register their claims. Since then, PIAC has worked with private law firms to establish the Stolen Wages Referral Scheme (now run in conjunction with PILCH) and with Legal Aid NSW and other CLCs to assist as many people as possible to both register their claims and to understand the process the AFTRS uses to deal with claims. The private law firms, PIAC and Legal Aid NSW are stretched beyond capacity to assist people. This situation is a prime example of the establishment of government of a mechanism that impacts on legal rights without any consideration being given to ensuring that individuals affected have access to legal advice and representation in the process.

Finally, as noted below in response to recommendation 11.4, there is an acute need to increase funding of ATSILS, and other organisations that provide targeted assistance to Indigenous people.

Recommendation:

10. *That the final Taskforce Report provide more detailed and specific proposals about how the Commonwealth Attorney-General's Department will ensure improvements in access to information, legal advice and representation by Indigenous communities throughout Australia.*

Response to recommendation 6.6

PIAC supports this recommendation, although it notes the importance of having a range of different avenues for improving access to interpreters, bearing in mind that not everyone who needs access to an interpreter is print literate, or computer literate.

PIAC notes that often interpreter provision does not include interpreters for people with disability, such as Auslan interpreters and interpreters for people who are deaf-blind. The Attorney-General's Department, in exploring ways to improve access to interpreters, should ensure that 'interpreters' includes Auslan interpreters and other interpreters required by people with disability.

Recommendations:

11. *That recommendation 6.6 be amended to clarify that access to interpreters must be provided in a range of ways to maximise access for all those who face language barriers in the legal system, and*

that the term 'interpreters' expressly includes Auslan interpreters and other interpreting services for people with disability.

Response to recommendation 6.7

PIAC agrees with the recognition by the Taskforce that collaboration between legal and non-legal services is vital to properly meet a person's legal and broader needs. This idea has underpinned a number of PIAC's projects.

For example, PIAC currently has a Mental Health Legal Services project to develop and pilot responses to unmet legal and related needs by people with mental illness.[21] The project commenced in 2008 with research into different models that have been developed in Australia and overseas to respond to these needs. From that research, PIAC developed four pilot service delivery programs and two training modules to focus on early intervention and prevention of legal and related problems for people with mental illness.

The four pilot service delivery models are:

- a social work support service at the Shopfront Youth Legal Centre (Shopfront) in Darlinghurst;
- a legal support service at the Multicultural Disability Advocacy Association (MDAA) in Harris Park;
- an Indigenous Men's Access to Justice (IMAJ) Worker supporting men in the Gamarada Indigenous Men's Healing Program; and
- a legal support service at the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) in Carramar.

The underlying principle that has informed the development of each of these pilots is that to be effective in achieving access to justice for people facing significant disadvantage and complex lives it is necessary to address their legal needs as part of a co-ordinated response to their broader needs.

The other underlying principle is that to be effective in terms of justice more broadly than individual legal needs, it is necessary to have the capacity to bring together the diversity of those working in individual service delivery to identify trends and systemic issues.

Each of the pilots seeks to create a more holistic approach through creating a direct service interface between legal services and other supports, such as non-legal advocacy, social work, clinical treatment and rehabilitation and community development. Many community legal centres aim to implement just such a model in their own community but have insufficient resources to employ a multi-disciplinary team and/or to afford the costs of co-location with other community service providers.

The training modules that have been developed as part of the Mental Health Legal Services project are:

- 'How to Sort Out Your (Pre)-Legal Problems', for consumers and their advocates; and
- 'How to Work With Consumers', for lawyers and other advocates.

Through these, PIAC aims to work with the staff and consumers of the pilot services and more broadly to enhance the capacity of legal and related service providers to work effectively with people with mental illnesses and for mental health consumers to get the best from legal and non-legal advocacy supports.

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21 For more about this project and its funding, see <http://piac.asn.au/system/MHLSP.html>.

That means for the first time in Australia and for a period of two years, a co-ordinated program of innovative service models will work towards improving access to justice for people who are mentally ill. While there are existing mental health legal services in the CLC sector, these have developed on a model more closely akin to other CLCs and have not had the opportunity or resourcing available to test the effectiveness of outreach models in their early development stages.

Recommendation:

12. *That, in addition to improving collaboration of services via warm referrals and uniform data collection, recommendation 6.7 be amended to include a commitment by the Commonwealth Attorney-General's Department to fund and support innovative service models that work towards improving access to justice and, where appropriate, work with the state and territory governments to ensure ongoing funding for effective programs.*

Response to recommendation 6.8

PIAC supports the proposal that the Attorney-General's Department collaborate with courts, tribunals, agencies and legal service providers to consider improving the co-ordination and availability of legal information and service through the increased use of new technologies. However, PIAC cautions that the Attorney-General's Department should be mindful that new technologies are not always accessible by everyone in the community because of disability and issues such as print literacy, computer literacy and barriers to access in remote communities.

Further, people in institutional care or detention (including prisoners) are at a significant disadvantage when considering the use of new technologies to deliver both legal information and legal services. As far as PIAC is aware, all prisoners in Australia are prevented from access to the Internet for security reasons and access via telephone to services is severely limited. Specific consideration needs to be given to ensuring that people in institutional settings are provided with legal information and services.

Recommendation:

13. *That, in considering the implementation of recommendation 6.8, specific attention be given to the legal information and service access needs of people who face access barriers to new technologies including people with limited literacy, people in remote areas where new technologies are less available and affordable, and people in institutional settings.*

Response to recommendation 6.9

PIAC strongly supports the recommendation that there should be a regular review of legislation to ensure that it is necessary, clear and effective. PIAC submits that this review should also consider whether there are sufficient resources in the community to meet the legal needs created by the legislation. It is something of an imbalance in public policy that legislative instruments are subject to regulatory impact analysis in respect of their impact in particular on business with a 'business cost calculator' provided by the Office of Best Practice Regulation[22], but that the analysis does not provide any particular focus on the impact on individuals and their legal rights (and costs to exercise those rights).

An example of where a legal aid impact assessment was conducted was at the introduction in 1992 of the *Disability Discrimination Act 1992* (Cth). Consideration was given to the increased demand for legal services for people with disabilities and a funding program was implemented, after consultation with CLCs, disability

[22] Department of Finance and Deregulation, *Business Cost Calculator* (2009) <http://www.finance.gov.au/obpr/bcc/index.html> at 11 November 2009.

organisations and legal aid providers, to fund the establishment of disability discrimination legal services in each state and territory. Unfortunately, the level of resourcing was low, with the largest of the services—the NSW Disability Discrimination Legal Centre—having funding for less than three staff. This funding level has not increased since 1993, although there was a one-off allocation last year and another this year.

By comparison, in some countries legal aid impact assessments are mandatory. For example, in Northern Ireland there is a requirement for those involved in government policy development within the court service and in other government departments to consider whether policies being developed have a potential to impact on the 'workload of the courts or a legal aid cost'.[23] The UK implemented this requirement in 2005.

Furthermore, PIAC contends that this review process should be mandatory and it should not be left up to ministers to decide whether or not they choose to regularly review legislation.

Finally, reviews of legislation should allow for community consultation and participation.

Recommendation:

14. *That the review of legislation proposed in recommendation 6.9 include consideration of whether or not there are sufficient resources in the community to meet the legal needs created by the legislation and should be a mandatory review that it undertaken, at a minimum, every ten years. These reviews should also allow for community consultation and participation.*

Response to recommendation 6.10

In PIAC's experience there are a number of reasons why legislation is not accessible to many people. While ensuring that legislation is drafted in plain English is an important step towards improving the accessibility of legislation there are other practical issues that need to be addressed. For example, often the 'law' about an area is not contained in one piece of legislation but is found in a number of different legislative instruments. Furthermore, it is not possible to simply pick up a piece of legislation and read it like a book: there are a number of established rules of statutory interpretation that will affect how legislation is interpreted about which many people have no knowledge. PIAC submits that in addition to plain English drafting, CLCs and LACs be provided with additional funding to provide community-based training or guides on important pieces of legislation.

Recommendation:

15. *That Community Legal Centres and government Legal Aid agencies be given additional funding to provide community-based training and/or develop guides on legislation that affects individual legal rights and obligations.*

Chapter 7 – Alternative Dispute Resolution

Response to recommendation 7.1

While in some cases, industry ombudsmen focus on resolving disputes between individuals and corporations, in other cases, once the complainant has made the complaint he/she has extremely limited input into the conduct of the investigation and resolution of the complaint.

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[23] *The Legal Aid Impact Test* (2008) Northern Ireland Court Service <http://www.courtsni.gov.uk/en-GB/Services/Legal+Aid/Legal+Aid+Policy/p_la_Legalaidimpacttest.htm> at 19 November 2009.

Another difficulty with industry ombudsmen can be that while the association or regulator can impose sanctions on a business for failing to comply with the recommendations of the industry ombudsmen, this is not necessarily a satisfactory outcome for a consumer as it leaves the consumer with no direct enforcement mechanism that they can activate.

The effectiveness of industry-based external dispute resolution schemes from a consumer perspective is directly related to the governance of those schemes, and ensuring that the schemes are not beholden to industry interests and agendas is critical to their effectiveness. In this regard, the Energy and Water Ombudsman in NSW is an effective scheme with appropriate governance in place.

Industry external dispute resolution schemes offer all consumers, including disadvantaged consumers, a speedy, effective and inexpensive mechanism to deal with problems they are experiencing, most of which would not be litigated, and access to many remedies that are appropriate and preferable to pursuing litigation.

More generally, PIAC refers to the comments in relation to recommendation 7.4 below and believes that similar issues may arise in relation to external dispute resolution services.

Therefore, PIAC is of the view that there are a number of limitations on the effective use of industry ombudsmen, which should be carefully considered before adopting this recommendation.

Recommendation:

16. *Before adopting recommendation 7.1 the Commonwealth Attorney-General's Department should consider in more detail the limitations of using industry ombudsmen, or alternatively that as part of the examination of the options for increasing the use of industry ombudsmen in different fields, the Department consider the limitations of the this form of external dispute resolution services and whether it is appropriate to resolving all disputes in that field. The Department should also consider in particular the importance of effective governance of industry-based Ombudsman schemes and identify key principles that should underpin any further development of such schemes.*

Response to recommendation 7.2

PIAC supports this recommendation.

Response to recommendation 7.3

PIAC supports this recommendation.

Response to recommendation 7.4

PIAC reiterates the comments it made about alternative dispute resolution (ADR) in the civil justice system in a letter to Ms Bereford-Wylie, Director, NADRAC Secretariat on 22 May 2009.[24]

PIAC agrees that the availability of ADR processes may produce better access to justice by, for example, preventing costly and traumatic litigation and promoting earlier settlement of disputes. ADR processes can, if effectively designed and resourced, occur at relatively short notice, procedures can be tailored to suit particular disputes and parties can generally exercise more control over the process. Parties may also be more likely to preserve their relationship and ADR can offer more creative solutions to disputes than most

[24] Goodstone, above n 3.

remedies arising from litigation. Further, significant cost savings can be achieved not only for the parties, but also in the justice system more broadly if reduced numbers of disputes are litigated in the courts.

While ADR can achieve the benefits identified above, PIAC considers that ADR should not be used as a substitute for other dispute resolution options simply because it is seen to be more cost effective. ADR should be used where it is appropriate for the circumstances of the case and not at the expense of fundamental rights and obligations such as the right to a fair trial and public hearing by a competent, independent and impartial tribunal: Article 14(1) of the *International Covenant on Civil and Political Rights* to which Australia is a State Party.

ADR is inappropriate if it fails to address power disparities between the parties. Power disparities between parties may be exacerbated in an informal setting. Certain types of disputes, such as between a consumer and a large corporation, are characterised by unequal bargaining power. Some consumers may 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 an organisation to pay an individual a confidential settlement rather than risk having a test case judgement made against them that would be costly if applied to a large volume of consumers.

Such settlements have a detrimental effect on other similarly affected consumers as each much take separate legal action, whereas a court determination would provide a clear precedent and would be likely to result in a change in policy or conduct without the need for further legal action. This, in turn, has consequences in terms of costs to the justice system: if further claims are lodged by similarly affected consumers, each claim has resource implications not only for the individual litigant but also for the justice system.

Any requirement to participate in ADR processes must consider these kinds of power inequalities, preferably through court oversight. Any reforms should ensure that more powerful parties cannot exploit ADR to the detriment of less powerful parties who may be afraid of incurring court costs and the ongoing stress of litigation. A court could consider the benefits of ADR in both the individual case as well as the wider social justice context.

Parties participating in ADR processes must ideally have access to independent legal advice. In court proceedings, the disadvantage experienced by unrepresented parties can at least be partially compensated for by judges and by the procedural and substantive safeguards built into the litigation process. Unfortunately, many potential litigants are unlikely to have the funds to engage a solicitor for ADR processes. PIAC notes and refers the Taskforce to the article by Associate Professor Beth Gaze and Professor Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' for a recent analysis of access to justice issues for complainants in proceedings in which ADR is the norm, access to legal representation is often limited and power imbalances are the norm rather than the exception.[25]

In contrast to court hearings, ADR processes are usually conducted in private and resolutions are confidential. Neither the reason for a dispute nor the basis upon which it is resolved need be made public. Disputes settled through ADR thus do not allow for laws to be tested and have less capacity to achieve legal precedents or significant public interest outcomes. This does not mean that there is no place for ADR. It just means that ADR will not be appropriate for every dispute or for achieving broad-based public interest outcomes.

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[25] Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW LJ*.

It is important that people do not have to choose ADR because of the inadequacies of the court system or the availability of legal assistance, but rather because of the benefits of ADR. Thus the court system must deliver a cost-effective, expeditious and fair resolution of disputes and ADR should not be viewed as a less costly and more efficient substitute. The costs and time associated with litigation continue to rise beyond the reach of many members of the community. This issue must be addressed separately, and not simply through increased reliance on ADR.

Recommendation:

17. *That before agreeing to alternative dispute resolution (ADR), unrepresented litigants should have access to independent legal advice. In addition, the Commonwealth Attorney-General's Department should ensure that funding for Community Legal Centres and government Legal Aid agencies is increased so that they are able to represent clients in ADR processes.*

Response to recommendation 7.5

PIAC supports this recommendation, subject to the comments made above in response to recommendation 7.4, about the limitations of ADR processes.

Response to recommendation 7.6

While professional bodies and the federal courts should encourage ADR processes, it should be clear that it is up to the parties to determine if ADR is appropriate and the parties should not be pushed into ADR processes by either professional bodies or the courts. Bearing in mind the limitations to ADR that PIAC has identified in its comments in response to recommendation 7.4 above, PIAC does not believe that ADR should be regarded as standard practice in the federal court system.

Recommendation:

18. *That recommendation 7.6 be amended to make it clear that while the courts, tribunals and lawyers should encourage the use of ADR processes, they are not to be regarded as standard practice in the federal justice system.*

Chapter 8 – The Courts

Response to recommendation 8.1

PIAC supports this recommendation.

Response to recommendation 8.2

PIAC supports this recommendation.

Response to recommendation 8.3

PIAC has a number of serious reservations about the recommendation that courts should be able to order that the requesting party pay for the estimated cost of discovery in advance.

Firstly, the orthodox approach is that costs follow judgment, as it is clearer at the end of proceedings the appropriate orders that should be made.

Second, many litigants, particularly those who are self-represented, legally aided or otherwise disadvantaged, simply could not afford to pay the estimated costs of discovery in advance and this could mean that for many ordinary individuals such interlocutory costs orders could force them to give up their legal rights, irrespective of the merits of the proceedings.

Third, PIAC is of the view that there is a very real risk that the other party may provide an over-inflated estimate of costs and that a court will struggle without seeing the discovered documents to assess the reasonableness of this estimate.

Finally, there is a risk that this recommendation will in practice be counter-productive: adding another layer of interlocutory disputation between the parties making the proceedings more costly, lengthy and cumbersome.

As a result, PIAC does not support this recommendation. However, if the Attorney-General's Department wishes to continue to explore this proposal PIAC recommends that this recommendation be deferred until the Australian Law Reform Commission has finalised its inquiry into the effectiveness of different cost orders as proposed in recommendation 8.2.

Recommendation:

19. That recommendation 8.3 be removed or, at the very least, not be acted on until the Australian Law Reform Commission has finalised its inquiry into the effectiveness of different cost orders.

Response to recommendation 8.4

In order to establish apprehended bias it must be shown that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[26] Thus, if a judge expresses a view about the issues or claims made in legal proceedings, it must be shown that these comments indicate that the judge would not bring an impartial mind to the case.[27] Accordingly, PIAC submits that the existing common law is already adequate and recommendation 8.4 is therefore redundant.

Recommendation:

20. That recommendation 8.4 be deleted from the Taskforce Report.

Response to recommendation 8.5

While agreeing that case-management rules should be utilised to achieve speedy resolution of matters, PIAC is concerned that this objective should not be achieved at the expense of justice. Thus, while PIAC agrees with the proposal that the Attorney-General work with the courts and the National Judicial College of Australia to ensure that judicial education includes measures aimed at enhancing the use of ADR, and case-management techniques, such education should also emphasise that ADR and case-management techniques should only be used in appropriate cases.

Response to recommendation 8.6

While PIAC agrees that the ability to use ADR and case management is one relevant consideration for the Attorney-General when making judicial appointments, there are other more fundamental criteria that

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26 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow & Hayne JJ at 344.

27 *Vakuata v Kelly* (1989) 167 CLR 568 at 570-571, 576.

should be taken into account including intellectual capacity, communication skills, integrity, independence, sound judgment, objectivity, as well as efficiency.[28]

Moreover, if the Attorney-General is minded to consider revising the criteria used for judicial appointment, PIAC recommends that the process of appointments should also be considered and regard should be have to adopting a more transparent process, such as the Judicial Appointments Commission in the United Kingdom, or the Canadian Advisory Committee on Judicial Appointments.

Response to recommendation 8.7

PIAC supports this recommendation.

Response to recommendation 8.8

PIAC generally supports recommendation 8.8 noting, however, that it is important to have mechanisms available to ensure that matters of systemic impact or public interest can be dealt with by a relevant court of record on identification of this status by one or other of the parties to the proceedings. One of the benefits of the system in anti-discrimination matters under federal law is that the applicant can choose to file in the Federal Court and can argue that the matter should be determined by that Court rather than the Federal Magistrates Court because of the complexity or systemic nature of the issues in dispute. Similarly, proceedings filed initially in the Federal Magistrates Court can be transferred to the Federal Court, including on application of one or other of the parties.

This recommendation raises similar issues as do those above in relation to increased use of ADR. While in general referral into a less formal process can be beneficial to resolving simple disputes earlier, such processes are not suitable where a matter raises issues of systemic or public interest. There is a clear societal benefit to such matters being determined by courts with higher authority as their judgments have greater precedent value and there is generally more capacity to promote public awareness of the outcome.

Recommendation:

21. *That the Taskforce give further consideration to the current arrangements in the Federal Court and the Federal Magistrates Court in respect of anti-discrimination matters and amend the recommendation accordingly.*

Response to recommendation 8.9

PIAC supports this recommendation and refers to the comments it makes in response to recommendation 11.6 below. Although PIAC notes that all of the proposals contained in recommendations 8.9 and 11.6 require adequate and increased funding to legal service providers, such as legal aid to ensure that they have sufficient resources to advise self-represented litigants about the merits of their case.

Response to recommendation 8.10

PIAC commends the Taskforce on its focus on the potential impact of costs in public interest matters. In addition to the matters identified, PIAC notes that a potential benefit of costs-limiting orders being made early in proceedings is that it can help to refine the issues in dispute as it is the interests of all parties to limit their expenditure to those matters where real and substantive disagreement exists. PIAC notes that the

[28] Judicial Appointments Commission, *Qualities and Abilities* <http://www.judicialappointments.gov.uk/application-process/112.htm> at 19 November 2009.

Federal Court already has the capacity to made costs-limiting orders under Order 62A of the *Federal Court Rules* (Cth).

As noted, Order 62A (and similar costs-limiting orders in other jurisdictions) have been used sparingly by the courts. There is nothing to suggest that this is likely to change in the future and the Taskforce should give further consider to what more could be done to encourage the judiciary to understand the benefit of such orders in promoting access to justice through enabling public interest litigation.[29] The benefit of recommendation 8.10 is the potential expansion of when such orders are made, allowing them to be made at any stage in the proceedings rather than requiring the party seeking the order to apply effectively at the first directions hearing.

In respect of the concern that changing the costs rules would result in 'a potential flood of vexatious litigation'[30], PIAC notes that such a flood is likely to be held back by the limited access to legal assistance. Most legal service providers give significant consideration to the merit of matters before they will allocate limited resources to assisting and representing litigants. By limiting the application of such rules to truly public interest matters it is highly likely that costs-limiting orders would only be available in a limited number of matters and certainly not in matters involving vexatious litigants. PIAC notes that, in contrast, there is not limit on corporate litigants obtaining tax deductions for their legal expenses not matter how frivolous or vexatious their litigation. The use of SLAPP ('strategic litigation against public participation') suits by corporate entities is, in PIAC's view, the equivalent of individual vexatious litigation and faces no particular barriers with corporations retaining their right to deduct their legal expenses from corporate profits whether or not the litigation was a necessary part of their business operations.

In respect of the argument raised that 'if a matter were truly in the public interest, then the public, not the business, should fund it', this fails to understand the way in which costs-limiting rules operate. They do not operate to require the business party to fund the costs of both parties no matter which party is successful. Rather, they operate to require both parties to bear more of their own costs. Again, the fact that businesses can offset their legal expenses as deductible business expenses is a benefit that does reduce the impact on the business as compared with the individual litigant who currently gets no such tax benefit.

A further matter not dealt with by the Taskforce is the procedures for accessing the Federal Attorney-General's Test Case Fund. PIAC, on behalf of a representative body, sought funding under this scheme and found that the process for obtaining funding was so lengthy as to make the application effectively meaningless. The decision about whether or not to grant the funding was not made until after the matter was determined. This approach to a targeted test case fund is seriously flawed and in effect means that the Fund cannot be used as a means of ensuring that important test cases get to court. A review of the rules of the Fund and its processes is needed to ensure that funding is available in a timely manner to assist litigants bringing test cases. Consideration should also be given to having the fund operate as an indemnity fund against adverse costs orders in federal proceedings in the same way that a grant of legal aid in NSW provides an indemnity against costs in state proceedings.[31]

In respect of representative proceedings in the Federal human rights jurisdiction, PIAC also commends the Taskforce for correctly identifying the barrier to such proceedings in the federal courts and the impact this can have on the likelihood of settlement in conciliation at the Australian Human Rights Commission. Amendments to legislation to enable representative proceedings as contemplated under the *Disability Discrimination Act 1992* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) are long overdue

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29 Joanna Shulman, 'Order 62A of the Federal Court Rules' (2007) 32 *Alt LJ* 75.

30 Commonwealth Attorney-General's Department, above n 6, 112.

31 *Legal Aid Commission Act 1979* (NSW) s 47.

and should be introduced as a matter of priority to enable the systemic potential of federal anti-discrimination laws to be more effectively realised.

Recommendation:

22. *That the Taskforce either undertake or recommend a review of the Commonwealth Attorney-General's Test Case Fund with a focus on the procedures for determining whether or not to grant funding for test cases and how to improve the timeliness of decisions given the time-critical nature of decisions to file proceedings. That the review also consider the potential for a grant under the fund providing a costs indemnity in federal matters similar to the indemnity provided under section 47 of the* Legal Aid Commission Act 1979 *(NSW).*
23. *That recommendation 8.10 be implemented as a matter of priority.*

Response to recommendation 8.11

PIAC strongly supports this recommendation and urges the Taskforce to prioritise the review of Part IVA of the *Federal Court of Australia Act 1976* (Cth) as the potential benefits of class actions to improve access to justice, particularly in matters involving widespread or systemic harm, need to be realised through a more effective legislative framework.

Recommendation:

24. *That recommendation 8.11 be implemented as a matter of priority and the matter referred to the Australian Law Reform Commission for inquiry.*

Response to recommendation 8.12

While PIAC accepts that vexatious litigants can cause considerable problems within the legal system both in terms of time and resources, declaring an individual a 'vexatious litigant' restricts that persons' fundamental right to justice and therefore should only be issued in extremely limited circumstances. Furthermore, there is a risk that people with disability, particularly a mental illness, are more likely to be labelled difficult or vexatious, further reinforcing their vulnerability and inability to access justice.

PIAC therefore submits that any proposal to amend legislative instruments that deal with vexatious litigants should be approached with caution. For example, PIAC submits that adopting the threshold test of 'frequently instituted proceedings' is too low. As the Federation of Community Legal Centres (Vic) noted in its recent submission to the Inquiry into Vexatious Litigants by the Victorian Parliament:

> Care must also be taken to ensure that any legislation … concerning vexatious litigants does not become a mechanism to silence unpopular causes and 'difficult' people… major social justice changes have sometimes been achieved by people who simply insist on pursuing justice over a long period and who refuse to be perturbed.[32]

Furthermore, PIAC notes that there has been a lack of substantive research conducted into vexatious litigants and proceedings[33], but notes the recently published text, *Maverick Litigants: a history of vexatious*

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32 Federal of Community Legal Centres (Vic), *Submission to Parliament of Victoria Law Reform Committee: Inquiry into Vexatious Litigants,* (2008) [3] <http://www.communitylaw.org.au/lrs.php#Access%20to%20justice> at 16 November 2009, 3.

33 Ibid. See also Victorian Law Reform Commission, *Civil Justice Review Report, Report No 14* (2008) [599] <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/LAWREFORM+-+Civil+Justice+Review%3A+Report> at 20 November 2009, 599.

litigants in Australia 1930–2008.[34] PIAC recommends that before there is any further legislative reform in this area, consideration should be given by the Taskforce to that publication and research should be undertaken into the actual extent of the problem of vexatious litigants. The research should ideally also focus on the effect of orders declaring a person vexatious both on the individual concerned and the wider court processes.

Recommendation:

25. *That recommendation 8.12 should not be adopted by the Commonwealth Attorney-General's Department until further consideration has been given to recent publications on the issue and further research has been undertaken to clarify the extent of the problem of vexatious litigants.*

Chapter 9 - Costs

Response to recommendation 9.1

PIAC is extremely concerned with the underlying premise of this recommendation, as it overlooks the fact that the judiciary is one of the three branches of government in Australia and, as such, should be funded as a part of government through the general taxation system rather than through self-funding. While there is some cost recovery through filing and sitting fees, the purpose of these is clearly not to pay for the full costs of administering the justice system in Australia and nor should it be.

Furthermore, although on its face it is accurate to assert that parties in civil litigation 'have the immediate and almost exclusive interest in the conduct and outcome of litigation'[35], this analysis fails to take account of the role of precedent in limiting the amount of future litigation needing to be conducted on similar or related issues. Parties to future similar disputes are able to avoid the burdensome costs of litigation if there is a precedent that applies to their circumstances. As such, to impose the full cost of conducting litigation on a single party in a single matter (a likely consequence where the usual 'costs follow the event' rule apples) is an unfair and inequitable burden. In recognising that there is a whole-of-community benefit in the maintenance of the rule of law[36], the Taskforce should recognise the community benefit in properly funded and resourced courts determining matters that have flow-on effects to other individuals and also to future policy and program developments, both within government and in the private for-profit and not-for-profit sectors.

PIAC is therefore extremely concerned about the proposal that the Standing Committee of Attorneys-General (SCAG) should review the issues and options for funding aspects of courts on a cost recovery basis. PIAC believes that before this review takes place more thought needs to go in to distinguishing the types of cases where cost recovery by the courts is appropriate. For example, while it may be appropriate to adopt this approach to commercial disputes, applying it to discrimination, human rights or other public interest cases—or indeed to cases involving individual litigants—will never maximise access to justice. As set out below under additional comments about costs in human rights and public interest cases, PIAC contends that these matters should not be subject to costs orders at all, let alone a requirement to pay the full costs of proceeding with a claim. PIAC submits that this proposal needs to be reconsidered before it goes to SCAG.

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34 Simon Smith, *Maverick Litigants: a history of vexatious litigants in Australia 1930-2008* (2009).

35 Commonwealth Attorney-General's Department, above n 6, 122.

36 Ibid.

Recommendation:

26. That recommendation 9.1 of the Taskforce Report be deleted.

Response to recommendation 9.2

PIAC has reservations about the proposal that long hearings (a term that is not defined in the Taskforce Report) be subject to full-cost pricing after a certain number of days or on a sliding scale for the reasons set out above in response to recommendation 9.1.

PIAC maintains that a decision about whether or not a case should proceed on the basis of full-cost pricing should remain a decision for judicial discretion. If the Attorney-General's Department is particularly concerned about the cost of overly long hearings then it should consider provide courts with more detailed guidelines as to when it should exercise the discretion to impose full cost pricing and/or provide better judicial training on the issue. However, it is not appropriate to impose full-cost pricing on all cases as it may be that there are good reasons why, notwithstanding the possibility of using ADR or case-management techniques to try to resolve the case (or at least the complexity of the case), this has not happened and the case extends for a significant period of time.

On the other hand, PIAC strongly supports the proposal that there should be a comprehensive system of fee exemptions that should apply in appropriate public interest and human rights cases. PIAC notes that currently federal courts have fixed categories of non-discretionary exemptions of fees. Some of these categories include:

- persons who have been granted legal aid under a legal aid scheme approved by law or by the Attorney-General;
- holders of Commonwealth Health Care Cards;
- pensioners;
- inmates or persons otherwise legally detained in public institutions;
- persons under the age of 18; and
- persons in receipt of a Youth Allowance, Austudy or Abstudy payment.

As well as these categories, the federal courts and tribunals have the discretion to waive fees in circumstances of financial hardship.

PIAC believes that the current system of fixed exemptions is clear and predictable and enables those with limited financial capacity to access the legal system.

However, PIAC submits that in addition to the existing categories of fixed exemptions, there should also be a category where the presumption is in favour of fee exemption for public interest cases and cases in which clients are represented by CLCs or by private solicitors on a *pro bono* basis. Finally, PIAC submits that the system of fee exemptions should not only be developed as a counter balance to the proposal to impose full-cost pricing but should be developed as part of the Attorney-General's principled approach to access to justice.

Recommendations:

27. That recommendation 9.2 be amended so that full-cost pricing for long hearings not be considered standard practice by the federal courts and only be imposed by judicial officers in limited cases.

28. That if the Commonwealth Attorney-General's Department proceeds with full-cost pricing it develop guidelines about the exercise of this discretion.

29. *That in addition to the existing categories of fixed fee exemptions there be a category for public interest and a category for cases where the party is represented by a Community Legal Centre or a private solicitor on a* pro bono *basis. In these latter categories there should be a presumption against the imposition of fees with the court retaining a discretion to impose the fee if, on evidence, the relevant party has the capacity to pay.*

Response to recommendation 9.3

PIAC does not have any comment about this recommendation.

Response to recommendation 9.4

PIAC understands that this proposal relates specifically to the provision of legal services to the Commonwealth.

However, if it is proposed that such an approach be more broadly adopted in respect of government funded legal services, such as legal aid providers, it should ensure that the rates of remuneration are increased to bring them closer to market rates so that this measure does not cut the effective rates of legal aid funding even further (see comments in relation to chapter 11 below about the current legal aid funding crisis).

Response to recommendation 9.5

PIAC does not have any comment about this recommendation.

Additional comments in relation to the issue of costs: costs in human rights and public interest cases

A significant impediment to accessing justice for many people seeking to enforce their legal rights is the risk of an adverse costs order as a result of unsuccessful litigation. In relation to the issue of costs, PIAC reiterates the comments it made to the Senate Legal and Constitutional Affairs Committee about its 2009 Inquiry into Access to Justice.[37]

In PIAC's experience, even where *pro bono* legal representation or representation on a conditional fee is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. This is especially the case in matters where there is a great disparity in resources between the applicant and respondent. However, this issue is not addressed in the chapter on costs in the Taskforce Report.

In the discrimination arena, many complainants decide not to pursue discrimination complaints beyond conciliation at the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) to the Federal Court or Federal Magistrates Court. This is because it is not uncommon in a Federal Court discrimination matter for the legal costs of a respondent to exceed $15,000 per trial day and for hearings to involve a number of days (both at the preliminary stages and in the hearing of the substantive matters). By comparison, applicants in state anti-discrimination matters are much more likely to proceed to a hearing in the Administrative Decisions Tribunal in NSW, where, in most cases, costs orders are not made.

It is PIAC's view that the human rights jurisdiction of the Federal Court should be a 'no costs' jurisdiction, where the general rule that should apply is that each party bears their own costs, with a discretionary power to award costs in extraordinary circumstances. There are strong public interest reasons why the human

37 Goodstone, Banks, Hartley and Mawuli, above n 4, 21-22.

rights jurisdiction of the Federal Court should be treated differently from its other jurisdictions in relation to costs, including the purposes of human rights legislation and the lack of access to resources faced by many applicants in human rights cases. Alternatively, the costs rule should be amended in 'public interest' cases only. Absent change in the federal human rights jurisdiction in relation to costs, many applicants with meritorious cases will fail to proceed and the realisation of rights under federal anti-discrimination law will remain limited.

Another way of alleviating the negative impact of adverse costs orders on federal human rights litigation would be to strengthen the application of Order 62A rule 1 of the *Federal Court Rules* (Cth). Order 62A provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party and party basis. An Order 62A costs order has the potential to remove uncertainty about the level of risk of an adverse costs order from the applicant's shoulders, thereby allowing them to proceed in cases where they otherwise would not be able to.

The problem with the Order is its infrequent use, due to lack of awareness by practitioners and judges, and in cases where applications have been made, the reticence of judges to make orders limiting costs. Amendments to Order 62A should be made to ensure that it becomes commonly used in human rights cases to limit costs. This could be by way of a presumption in favour of costs limiting orders in human rights cases, and/or by way of guidance to judges in exercising their costs discretion in human rights cases. At the very least, where an applicant seeks an Order 62A, there should be a presumption in favour of limiting costs in 'public interest' matters, where 'public interest' is defined broadly to include all cases that could benefit a class of disadvantaged people, even though they may benefit the applicant as well.

In June 2008, in proceedings against Virgin Blue Airlines, PIAC, acting on behalf of two people with disability, succeeded in obtaining costs caps in the two sets of proceedings being heard together in the Federal Court.

Alternatively, consideration should be given to significant reforms to the Attorney-General's Test Case Fund or the establishment of a new fund to fund public interest cases. PIAC refers to the report of the Law Council of Australia[38], the UK Civil Justice Council[39] and the Victorian Law Reform Commission[40] who have all developed comprehensive proposals and models for establishing a public interest litigation fund. PIAC notes, however, that such funds do not necessarily overcome the impact of the risk of an adverse costs order on parties with limited resources. PIAC also refers to the Taskforce to its response above in relation to recommendation 8.10 above.

Chapter 10 – Administrative Law

Response to recommendation 10.1

PIAC supports this recommendation.

Response to recommendation 10.2

PIAC supports this recommendation but submits that it should be amended to read:

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38 Law Council of Australia, *Litigation Funding*, Submission to the Standing Committee of Attorneys-General [No 1907] (2006) <http://www.lawcouncil.asn.au/library/submissions.cfm> at 23 November 2009.

39 Civil Justice Council, *Improved Access To Justice – Funding Options and Proportionate Costs* (2005) <http://www.civiljusticecouncil.gov.uk/files/improved-access-to-justice-240805.pdf> at 23 November 2009.

40 Victorian Law Reform Commission, above n 33.

That the proposed Charter of Good Administration clarify the general obligation on agencies to provide a comprehensive statement of reasons to individual for decisions affecting them, in a timely manner, independent of the merits review context. The Charter of Good Administration should also clarify that if there are any review rights available to the individual, agencies should provide information about these rights at the same time that the statement of reasons is provided to the individual.

Recommendation:

30. That recommendation 10.2 be amended to read:

That the proposed Charter of Good Administration clarify the general obligation on agencies to provide a comprehensive statement of reasons to individual for decisions affecting them, in a timely manner, independent of the merits review context. The Charter of Good Administration should also clarify that if there are any review rights available to the individual, agencies should provide information about these rights at the same time that the statement of reasons is provided to the individual.

Response to recommendation 10.3

PIAC supports this recommendation, although PIAC notes that in addition to providing adequate reasons an agency should ensure that the affected person is also provided with adequate information about their external review or appeal options from an adverse decision.

Response to recommendation 10.4

PIAC supports this recommendation.

Response to recommendation 10.5

While PIAC does not disagree with the proposal that in addition to applicants paying a filing fee, agencies be required to pay a fee that is only repaid if the agency can show compelling reasons for unsuccessfully appealing or defending the case, PIAC is not convinced this will have a significant impact on the way agencies respond to proceedings in the Administrative Appeals Tribunal (AAT).

Instead, PIAC suggests that more consideration should be given to the system of waiving application fees in appropriate cases. PIAC submits that in addition to the existing categories for waiver, the AAT should be able to waive application fees in public interest cases.

Response to recommendation 10.6

PIAC supports this proposal in principle. However, PIAC takes the view that it would be helpful to provide more specific details of what is meant by 'transparent mechanisms'. One mechanism would be to amend the *Ombudsman Act 1976* (Cth) *and* the *Administrative Appeals Tribunal Act 1975* (Cth) to build in formal reporting requirements on the responsible Minister to provide a report to the Ombudsman or the AAT within six months of the complaint, specifying the actions that have been taken by the relevant agency to address the systemic issues arising out of a complaint, and how the outcome and recommendations arising from the complaint have been communicated to staff within the agency.

Alternatively, the Commonwealth Government could establish a publicly available register of administrative decisions that summarises each complaint and the actions that the agency has taken to respond to that complaint.

Finally, while PIAC agrees that it is important that there are mechanisms to ensure that agencies report back to tribunals and the Ombudsman about the actions they have taken in response to complaints, there should also be mechanisms in place to ensure that feedback is provided to the complainant.

Recommendations:

31. *That the* Ombudsman Act 1976 *(Cth) and the* Administrative Appeals Tribunal Act 1975 *(Cth) be amended to require the responsible Minister to provide a report to the Ombudsman/Administrative Appeals Tribunal within six months of a complaint specifying:*
    - *(i) the actions that have been taken by the agency to address the systemic issues arising from the complaint; and*
    - *(ii) how the outcome and recommendations from the complaint have been communicated to staff within the agency. Alternatively, the Federal Attorney-General's Department could establish a publicly available register of administrative decisions that summarises each complaint and the actions that the agency has taken to respond to that complaint.*

32. *That the* Ombudsman Act 1976 *(Cth)* and the Administrative Appeals Tribunal Act 1975 *(Cth) be amended so that the Ombudsman and the Administrative Appeals Tribunal are required to also provide feedback to the complainant about what actions the agency has made as a result of the complaint.*

Response to recommendation 10.7

In some cases, using regular client surveys may be an effective means of identifying and addressing issues relating to primary decision-making, internal review and related processes. However, in other cases, for example if a government agency provides services to people with limited English or knowledge of the Australian legal system, other methods of obtaining feedback should be built into the 'quality assurance' process such as face-to-face or telephone interviews.

PIAC therefore supports this recommendation, but takes the view that further consideration should be given to ensure agencies use appropriate and tailored quality-assurance mechanisms.

Response to recommendation 10.8

PIAC contends that it would be better from the Administrative Review Council rather than relevant Ministers undertake the review of all government agencies to determine what particular features of each jurisdiction impose barriers to justice or might be streamlined.

Recommendation:

33. *That recommendation 10.8 be amended so that the review is conducted by the Administrative Review Council rather than relevant Ministers.*

Response to recommendation 10.9

PIAC supports this recommendation but suggests that it should also apply to other external complaints bodies such as the Federal Privacy Commissioner. Unlike the AAT, which has established case-management procedures that ensure that cases are dealt with in a timely manner, there are no such safeguards in relation to complaints to the Privacy Commissioner. In PIAC's experience, the lack of statutory timeframes that apply to privacy complaints is problematic and undermines the advantages of this review mechanism. For example, PIAC recently acted for a client who made a complaint to the Privacy Commissioner in 2005. The

matter took almost four years to be resolved and in the end, the Privacy Commissioner reached a view that the defendant had taken sufficient steps to resolve the complaint and therefore closed the matter pursuant to section 41 of the *Privacy Act 1988* (Cth). PIAC's client was extremely unhappy with this result but had no further recourse, as the Privacy Commissioner's decision was not open to appeal. Furthermore, the delays in resolving the complaint had a significantly detrimental impact on the client. The fact that this complaint went on for four years raises serious questions about the efficacy and expediency of this form of review.

Recommendation

34. That recommendation 10.9 be amended to include the development of options for more proactive case management by the Privacy Commissioner and other external decision-making bodies.

Chapter 11 – Legal Assistance

Response to recommendation 11.1 and 11.2

PIAC agrees in principle with the suggestion that a national co-ordinating body could be established to perform a variety of functions such as identifying opportunities for collaboration and co-ordination of legal assistance between government and non-government bodies and exchanging information and notes in this regard the Australian Legal Assistance Forum. PIAC doesn't see the need for the establishment of second body. Further, PIAC is extremely concerned by the suggestion that the proposed national co-ordination group would have significant decision-making power over non-government organisations as well as government legal aid providers.

PIAC strongly submits that it is not appropriate for a national co-ordination body, chaired by the Attorney-General's Department, to have the ability to determine the priorities of non-government organisations, impose common intake, referral or assessment procedures, or make these organisations subject to a common reporting framework that involves reporting to the Attorney-General. Such a proposal has the power to significantly undermine the independence of non-government organisations and should be rejected.

PIAC notes and gives particular endorsement to the views of the peak body for CLCs in Australia, the National Association of Community Legal Centres, in respect of these two recommendations.

Recommendation:

35. That recommendation 11.1 and 11.2 of the Taskforce Report be rejected and the Taskforce work with the Australian Legal Assistance Forum to develop the ideas of national co-ordination further.

Response to recommendation 11.3

PIAC broadly supports this recommendation, although PIAC submits that the Attorney-General should ensure that additional funding is channelled into this increased focus on early intervention rather than taking the funding away from other legal aid programs.

Response to recommendation 11.4

PIAC reiterates the comments it made to the Senate Legal and Constitutional Affairs Committee earlier this year about access to justice and Indigenous disadvantage.[41]

[41] Goodstone, Banks, Hartley and Mawuli, above n 4, 12-16.

There are a number of free legal services available to Indigenous people through Indigenous specific and mainstream legal aid service providers. The key legal aid service providers for Indigenous people in Australia are ATSILS, Family Violence Prevention Legal Services (FVPLSs), LACs and CLCs. However, there is an acute legal need for increased access to civil law services for Indigenous people in NSW.

ATSILS are the specialist legal aid service providers for Indigenous people nationwide. Established in the 1970s in response to the over-representation of Indigenous defendants in the criminal justice system, ATSILS remain the legal aid service provider of choice for most Indigenous people.[42] In 1991, Commonwealth funding for the services increased dramatically following the report of the Royal Commission into Aboriginal Deaths in Custody, which highlighted the continuing and critical need for criminal law services for Indigenous people. Presently, Indigenous deaths in custody continue to occur at disproportionately high rates. ATSILS struggle to adequately meet the demands for their service as a consequence of inadequate funding arrangements. ATSILS 'function in an environment of effectively static funding and increasing demand which compromises their ability to provide sufficient quality and quantity of legal services'.[43] As a result of the increasing demand for criminal law services and the inadequacy of funding, ATSILS focus the majority of their limited resources on criminal law services.[44] Priority is given to criminal matters where the accused is at risk of incarceration.[45] As a result, gaps exist in the provision of other essential legal services such as family law, child care and protection, and civil law services. Such services are not offered by ATSILS to the same extent as criminal law services, if at all.

There is disparity between the funding allocated to ATSILS as compared to LACs, the mainstream, statutory legal aid service providers. LACs operate on a significantly greater budget than ATSILS yet the day-to-day workload of ATSILS lawyers is significantly higher than that of LAC lawyers. Cunneen and Schwartz state, '[t]here is a significant lack of parity of funding between these two organisations that has severe ramifications for ATSILS capacity and therefore for adequacy of legal services for indigenous clients'.[46]

The disparity that exists between ATSILS and LACs demonstrates a systemic barrier to access to justice for Indigenous people. Indeed one of the critical challenges ATSILS and other providers of legal services to Indigenous people face is the inadequacy of funding and resources to enable the provision of vital, accessible and quality legal services to Indigenous people.

The Aboriginal Legal Service (NSW/ACT) does not offer civil law services due to funding constraints. The service closed down its family law practice at the end of June 2008 as a result of there being no increase in its Commonwealth funding arrangements. This creates gaps in the provision of vital legal services for Indigenous people that is typically met by mainstream legal aid service providers such as LACs and CLCs.

PIAC's own experiences in representing Indigenous people demonstrate the need for increased funding for essential legal services for Indigenous people. PIAC has advised and represented members of the stolen generations since 1996. PIAC's work with members of the stolen generations involves working to achieve redress for the experiences, harm and abuses suffered by them as a result of the laws, policies and practices of past governments that led to the forcible removal of Indigenous children from their families. The plight

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42 Aboriginal and Torres Strait Islander Commission, Office of Evaluation and Audit, *Evaluation of the Legal and Preventative Services Program* (2003) 3.

43 Cunneen and Schwartz, above n 20, 39.

44 Joint Committee of Public Accounts and Audit, Parliament of Australia, *Inquiry into Access of Indigenous Australians to Law and Justice Services, Report 403* (2005) 9.

45 Ibid 10.

46 Ibid 39.

of members of the stolen generations is most notably documented in *Bringing them home: Report of the National Inquiry into the Separation of Indigenous Children from their Families*.[47]

Lack of funding to litigate creates significant barriers for members of the stolen generations who wish to exercise their rights to pursue civil claims through the courts as a consequence of their experiences as wards of the state. This challenge is reflected in a letter from Neil Gillespie, the Chief Executive Officer of the Aboriginal Legal Rights Movement in South Australia to The Hon Wayne Swan, Federal Treasurer, dated 16 January 2009. Mr Gillespie notes:

> The Commonwealth Government funded the successful Trevorrow Stolen Generations Test Case for a number of years which certainly must be applauded. It is unfortunate though that since that case was decided the Commonwealth has decided NOT to fund other similar claims that have resulted from the Trevorrow decision.[48]

The late Bruce Trevorrow is the only member of the stolen generations to have successfully sued an Australian government for compensation. It was thought that this landmark decision of the Supreme Court of South Australia would pave the way for other stolen generations litigants to bring claims before the court. However, rather than the decision representing a breakthrough for members of the stolen generations, it now appears that the paucity of funding available to pursue claims will deny them access to justice.

In a similar vein, PIAC considers that it is the responsibility of government, when it creates new legal or quasi-legal rights, to consider the impact that this will have on service providers and other stakeholders providing assistance to relevant client or applicant groups. For example, in NSW, as in some other states, the Government has established an Aboriginal Trust Fund Repayment Scheme (ATFRS) to repay monies held in trust by the NSW Government from 1900 to 1968. PIAC was instrumental in lobbying the Government to return these trust monies to Indigenous owners and has made detailed submissions and representations to government on the proposed model from 2004 to date.

PIAC is appalled that no resources have been allocated by the NSW Government to assist Indigenous people to make applications to ATFRS. PIAC's Indigenous Justice Program (IJP) established a Stolen Wages Referral Scheme, by which PILCH member firms provide *pro bono* advice and representation to stolen wages claimants. This Referral Scheme continues to operate as a joint project of PIAC and PILCH. Many hundreds of claimants have been assisted through the Referral Scheme and through further collaboration with Legal Aid NSW. No additional funding has been made available for this work, which has required an enormous allocation of resources. The NSW Government should provide ongoing support and assistance to ATFRS claimants. Similarly, all governments should be mindful that people applying to various schemes and tribunals in many cases need assistance to do so or at least information about how to do so on their own. The creation of new legal or quasi-legal rights or obligations creates demand on service providers such as CLCs that do not have capacity to take on additional workloads without additional resources.

Recommendations:

36. ***That one aspect of fulfilling recommendation 11.4 be a commitment by the Commonwealth Attorney-General to rectify the funding disparity that exists between Aboriginal and Torres Strait Islander Legal Services (ATSILS) and government Legal Aid agencies so that ATSILS can deliver quality criminal and civil law services to Indigenous people.***

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47 Australian Human Rights Commission, *Bringing them home: Report of the National Inquiry into the Separations of Aboriginal and Torres Strait Islander Children From their Families* (1997).

48 Letter from Neil E Gillespie to the Hon Wayne Swan MP, Federal Treasurer, 16 January 2009, 6.

37. *That as part of recommendation 11.4 and 11.7, the Commonwealth Attorney-General's Department ensure that legal services operating in regional and remote areas are well supported and adequately resourced to cater for the needs of their clients.*

Response to recommendation 11.5

PIAC does not have any comment on this recommendation.

Response to recommendation 11.6

A lack of knowledge, of both the law and legal proceedings, may significantly disadvantaged self-represented litigants in legal proceedings. PIAC therefore supports the introduction of locating duty lawyers/advice types services at federal courts and tribunals.

For example, the Queensland Public Interest Law Clearing House (QPILCH) has been operating a similar scheme for Queensland District and Supreme Courts since 2007. Through QPILCH, solicitors from a range of firms assist self represented litigants by providing legal advice, drafting documents, promoting alternative avenues for resolution, assisting with any associated problems and, where necessary, referring cases for advice or representation. In the first year of operation the scheme assisted 86 self-represented litigants. The majority of litigants supported by this scheme are either dependent on Centrelink benefits, or have an annual income of less than $60,001.[49] Although the majority of the applicants had received legal advice prior to receiving support from the scheme, 25% of the applicants already engaged in proceedings, had not obtained any prior legal advice. The cost of legal representation appears to be the main reason why clients chose to represent themselves.[50] Schemes to assist self-represented litigants should be encouraged to avoid the potential injustices that may arise from unassisted self-representation.

Response to recommendation 11.7

PIAC supports this recommendation, but continues to emphasis that there needs to be improved access to legal assistance throughout Australia.

Further, PIAC notes the work that has been done to encourage graduating health practitioners to work in disadvantaged areas and urges the Taskforce to consider ways of enhancing opportunities for legal and other professionals to work in the CLC sector, including in regional and remote areas of Australia. One barrier that has been identified to PIAC staff by current law students is the fact that most students leave university with a significant Higher Education Contribution Scheme (HECS) debt and feel unable to afford to work in CLCs due to the lower remuneration offered. This concern is further exacerbated for CLCs in rural, regional and areas of Austrlia.

The Taskforce is urged to consider and recommend an incentive to be offered to graduating lawyers and other relevant professionals through HECS debt relief based on an amount of debt written off for each year of service in a CLC. To deal with the particular challenges of recruiting and retaining staff on regional, rural and remote areas the amount written off could be greater for work in CLCs in those areas.

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49 Queensland Public Interest Law Clearing House, *Self representation Civil Law Service Evaluation 2007 – 2008* (2008) [8] <http://www.qpilch.org.au/01_cms/details.asp?ID=357#1911> at 23 November 2009,.

50 Ibid 16.

Recommendations:

38. That the Taskforce examine existing schemes that provide relief from Higher Education Contribution Scheme debt to provide an incentive for work in particularly disadvantaged and develop a recommendation to provide such an incentive for graduates to take up employment opportunities in Community Legal Centres, including but not limited to CLCs in regional, rural and remote areas.

Chapter 12 – Building Resilience

Response to recommendation 12.1

PIAC supports this recommendation.

Response to recommendation 12.2

In addition to law degrees providing greater opportunities for undergraduates to participate in clinical legal education programs and undertake volunteer work in community organisations[51], PIAC believes that such degree courses should be restructured so that there is a greater emphasis on students becoming aware of social justice and access to justice issues as part of their degree.

While the availability of subjects that involve clinical work or internships in legal environments is to be encouraged, students should not be disadvantaged if their voluntary contribution to the community is not in a formal legal setting, such as a homeless shelter, an environmental protection organisation or similar. Exposing law students to a diversity of situations and social issues is of benefit to the development of those students and to their capacity as lawyers of the future. Encouraging involvement in community organisations in a voluntary capacity as well as placing greater emphasis on social justice, human rights and access to justice issues within formal legal training would be important and beneficial.

In addition, the Taskforce should note the development of graduate law courses, such as the 'Melbourne JD' offered by the University of Melbourne. Such courses should have the same opportunities to participate in clinical legal education and volunteer work opportunities as well as the same focus on social justice, human rights and access to justice issues.

Recommendation:

*39. That recommendation 12.2 be amended to refer to 'voluntary' rather than '*pro bono*' work and to include greater emphasis on issues of social justice and access to justice as an integral part of undergraduate and graduate law degrees.*

Response to recommendation 12.3

PIAC broadly supports this recommendation, although the success of increasing post-resolution support for litigants will depend on the funding, training and other resources that are made available to the courts and legal service providers.

Response to recommendation 12.4

PIAC supports this recommendation.

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[51] PIAC considers that the term '*pro bono*' should be replaced by 'volunteer' in recommendation 12.2 as the term *pro bono* has a specific meaning that does not generally apply to undergraduates studying law and lawyers making a personal voluntary contribution of their time to a community or Indigenous legal centre.

Response to recommendation 12.5

PIAC supports the recommendation that Australian schools should be encouraged to develop strategies for teaching young people skills for resolving conflict. Additionally, PIAC submits that education about Australia's legal and political system, protection of human rights and ethics should be added to this recommendation: these courses would not only significantly contribute to building up the resilience of individuals but would also make them better able to identify legal problems early and know how to obtain appropriate assistance and advice.

Recommendation:

40. That recommendation 12.5 be amended so that, in addition, to encouraging schools to teach young people skills for resolving conflict, young people should also be taught legal, civics, human rights and ethics education in school.

Additional Issues not addressed in the Taskforce Report

Standing

PIAC reiterates the comments it made to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice on earlier this year in respect of both standing and amicus /intervenors.[52]

Test case litigation has the capacity to create systemic change for large groups of people without the need for each person to bring a separate legal claim. This is a clear benefit in terms of both access to justice as well as in terms of reducing the costs of the justice system. In Australia, test cases that promote the public interest by creating, enforcing or clarifying legal rights must generally be brought by individuals prepared to expend significant financial resources, time and emotional energy on the proceedings. Litigation pursued by individuals may have broad-reaching effects and benefit others, however test case litigants are often almost crushed in the process. As a public interest legal practice seeking to promote access to justice, enhanced democracy, consumer protection and human rights, PIAC has also witnessed the unfortunate situation where no person is prepared to take on the enormous burden and risk of bringing a legal claim, despite significant numbers of people suffering harm.

Standing rules in a number of other jurisdictions (such as South Africa and the United States of America) reflect a more open approach that accommodates the demands for wider public participation in judicial decision-making and for greater access to justice. PIAC considers that the rules of standing should be broadened to allow a wider class of people to bring civil proceedings and, in this regard, again commends the Taskforce on its recommendation 8.10. The experience in environmental law reveals the benefits that could flow from broader standing provisions, in terms of the development of law and policy. In particular, standing rules in public interest cases should be broadened so that organisations can bring proceedings on behalf of aggrieved people or groups of people.

Amicus curiae and other intervenors

Amicus curiae interventions are a legal procedure that can be utilised to achieve access to justice without the significant cost and risk associated with being a party to litigation. An *amicus curiae*, or 'friend of the court', is a person or bystander who seeks leave to intervene in proceedings to assist the court on a point of fact or law.

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52 Goodstone, Banks, Hartley and Mawuli, above n 4, 22-24.

Public interest *amici* often seek to alert judges to the broad ramifications of the decision they will make in the context of the dispute between the parties before them. Thus their involvement in litigation may enhance the rights of people who are not parties to the proceedings.

An 'intervener' (as opposed to an *amicus curiae*) must normally have a direct financial or other interest in the outcome of the proceedings. An intervenor becomes a party to the proceedings and usually possesses the privileges and risks associated with being a party, such as the capacity to tender evidence, appeal the decision of a lower court, participate fully in the argument and be liable for costs.

PIAC has acted for various organisations that have sought leave to intervene in proceedings as *amicus curiae*. PIAC represented the NSW Combined Community Legal Centres' Group Inc and Redfern Legal Centre as *amici* in *APLA & Ors v NSW Legal Services Commissioner & the State of NSW* [2005] HCA 44. The Australian Plaintiff Lawyers Association (APLA) challenged the validity of Part 14 of the *Legal Professions Regulation 2002* (NSW), which made it an offence of professional misconduct for a legal practitioner to publish advertisements that had a connection with personal injury. The *amici* were concerned that the Regulation significantly impeded the work of CLCs, by preventing their solicitors from publishing information about civil liberties, discrimination, domestic violence, sexual assault and welfare rights (which arguably all have a connection to personal injury as it is broadly defined in the Regulation). The *amici* put submissions before the Court that highlighted the effect that the Regulation had beyond that presented by the parties.

The Supreme Courts of Canada and the United States of America, as well as the Constitutional Court of South Africa, have welcomed submissions from public interest organisations and others, and have created court rules to accommodate and facilitate the participation of *amici* in cases raising important issues of public policy. In Australia, however, the superior courts have been reticent to grant leave to *amici* or intervenors and court rules have been absent or unhelpful in encouraging the participation of third parties in public interest and public law cases.

In 1996, the Australian Law Reform Commission proposed a new framework designed to facilitate the involvement of *amici* and intervenors in litigation before the courts.

In 2002, Order 6 Rule 17 and Order 52 Rule 14AA were inserted into the *Federal Court Rules* by the *Federal Court Amendment Rules 2002 (No 2)* (Cth). In *Sharman Networks Ltd v Universal Music Australia Pty Limited* [2006] FCAFC 178 (7 December 2006), the Australian Consumers' Association Pty Ltd, Electronic Frontiers Australia Inc, and New South Wales Council for Civil Liberties Inc (CCL) made a joint application for leave to be heard in the appeals as *amici curiae*. The Full Federal Court recognised that they could make useful submissions in the public interest on the proper construction of certain provisions of the *Copyright Act 1968* (Cth). Instead of accepting their application to be heard as *amicus curia*, however, the Court said at paragraph 11:

> … we think that the new rules are intended to regulate comprehensively the practice of the Court with respect to the intervention of non-lawyer parties in proceedings, both original and appellate. We think it is only the legal practitioner who is invited by the Court to assist it, who stands outside the rule régime. Even in that case, of course, the terms on which a legal practitioner is invited to participate as *amicus curiae* should be defined by the Court in an exercise of its implied power.

And at paragraph 12:

> It would be inconsistent with the obvious intention of the rules for a non-lawyer entity to be free to seek leave to be heard as *amicus curiae* outside the comprehensive framework now provided by O 6 r 17 and O 52 r 14AA.

Considering the request as falling under Order 52 Rule 14AA, the Court then took the view that the question of whether the *amici* should have any liability for costs should be determined at the conclusion of the matter. Due to the resulting uncertainty over the potential costs of continuing, CCL did not seek to exercise the leave granted to the *amici* jointly.

The Full Federal Court's interpretation of the Rules in the *Sharman* case, and its resulting decision in relation to costs, served to discourage the intervention of CCL. This approach will thwart future interventions in the public interest and thus indirectly impact on people's access to justice in a negative way. Rather than encourage a culture of effective and useful intervention by public interest organisations, Australian case law appears to be heading the other direction.

Recommendation:

41. *That a review of standing provisions both in general, and in public interest matters, be undertaken with a view to broadening standing and improving access to standing as* amicus curiae.

Funding for Community Legal Centres

It is remarkable that in an extremely detailed report on access to justice the fundamental issue of ensuring that there is adequate funding for providers, including CLCs and government Legal Aid agencies is not directly addressed in any of the recommendations in the Taskforce Report. To address this issue, PIAC repeats the comments it recently made to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice.[53]

The Final Report of the Senate Legal and Constitutional Affairs Committee's 2004 Inquiry found that CLCs are a crucial part of providing access to justice for all Australians but noted that CLCs appeared to be facing a funding crisis.[54]

It is important to note that apart from the additional one-off funding provided to CLCs in April 2008 and again in May 2009 by the Federal Attorney-General, there has been no significant injection of new funding into the sector by the Commonwealth since 1999–2000.

The inadequacy of CLC funding and the detrimental effect on CLCs' ability to meet client demand has been noted in recent years by a variety of reputable sources, for example:

> Along with services for housing assistance and disability supported accommodation, CLCs are amongst the service providers with the highest 'turn away' rate for clients seeking assistance.[55]

> Some of the areas where people are being turned away, include those areas where the need is most acute, including ... community legal centres – where 1 in every 5 people who are eligible are being turned away.[56]

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53 Goodstone, Banks, Hartley and Mawuli, above n 4, 18-19.

54 Senate Legal and Constitutional Affairs Committee, above n 7, 218.

55 Australian Council of Social Services, *Australian Community Sector Survey Report 2007* (2007) <http://www.acoss.org.au/Publications.aspx?displayID=1&subjectID=27> at 12 May 2009.

56 Australian Labor Party, *An Australian Social Inclusion Agenda* (2007).

> The program in NSW 'is underfunded to meet the growing demand for services' and 'almost all centres are overwhelmed by demand for their services and cannot sustain their current levels of service, nor meet emerging service gaps'.[57]
>
> The comparison of funding levels confirms that community legal centres are generally poorly funded.[58]

On 11 January 2008, the National Association of Community Legal Centres (NACLC) wrote to the Federal Attorney-General providing a detailed funding submission on behalf of the Commonwealth-funded CLCs. That funding submission sought $10.3 million to address the severe shortfalls created by the previous neglect of funding for CLCs. This amount was needed to catch up with cost rises and to invest in CLC infrastructure, enabling CLCs to harness additional voluntary, *pro bono* and other funding resources.

NACLC also sought, if necessary on a staggered introduction, additional itemised increases in funding to address certain priorities: one being services for regional and rural Australia.

In its funding submission, the NACLC said:

> CLC funding has not kept pace with increased costs. CLCs have experienced an 18% reduction in funding over the last 10 years in real terms. This impacts on outcomes for clients, placing unsustainable stress on the organisations' ability to deliver service. CLCs have had to cut back on staff, service hours and other expenses that support innovation and growth of services[59].

On 18 April 2008, the Federal Attorney-General on behalf of the Australian Government announced a one-off allocation of $10 million to support the operation of the Community Legal Services Program (CLSP) for Commonwealth-funded CLCs and to help CLCs meet the increasing needs for legal assistance of the most vulnerable members of the community. While the CLC sector was grateful for this recognition and additional support, the use to which one-off funding can be put is limited.

NACLC has since that time written to the Australian Government requesting that the $10m be made recurrent funding and continuing to press for the other amounts sought in the January 2008 submission. PIAC notes the announcement on 9 May 2009 of $4 million to CLCs in another round of one-off funding.[60] Again, this is welcomed; however, it is critical that there be a move towards sustained funding increases for all CLCs, rather than one-off injections of funding that leave CLCs unable to develop ongoing responses to legal needs.

In PIAC's submission, the legal needs data presently being gathered in a number of contexts should be considered by the Australian Government and additional funding for new CLCs should be made available where the needs are demonstrated and an acceptable proposal satisfying agreed criteria is put forward.

Commonwealth 'matters'

Finally, PIAC notes the continuing problems created by the decision to quarantine Commonwealth funding to legal aid to 'commonwealth matters'. This characterisation of certain matters is unworkable and creates

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57 Legal Aid NSW, *Review of the NSW Community Legal Centres Funding Program Final Report* (2006) 5.

58 Commonweath Attorney-General's Department, *Review of Commonwealth Community Legal Services Program* (2008) 45.

59 National Association of Community Legal Centres, *Community Legal Centres Across Australia – An investment worth protecting, Funding Submission to the Commonwealth Government 2007–2010* (2008) 1.

60 The Hon Robert McClelland, Federal Attorney-General, and The Hon Bob Debus, Federal Minister for Home Affairs, 'Funding for Legal Assistance Services' (Media Release, 9 May 2009).

an artificial barriers to early resolution to problems that could be facilitated through the appropriate and speedy allocation of legal assistance.

Concluding remarks about the Taskforce Report

PIAC congratulates the Attorney-General for establishing a Taskforce to consider in a holistic and principled manner how to improve access to justice in Australia. PIAC agrees that the current approach is ad hoc and that there needs to be significant improvements to the system to ensure that all Australians have equitable and meaningful access to our justice system.

Many of the recommendations put forward in the Taskforce Report are sensible proposals that would improve access to the federal justice system. In particular, PIAC strongly supports the recommendations about public interest litigation, representative proceedings and administrative law.

However, many of the recommendations are expressed in such broad terms that they lack meaningful or measurable content. By failing to specify concrete measures that need to be taken on certain issues, for example how to improve access to legal information for disadvantaged, rural and especially Indigenous Australians, there is no clear direction in the Taskforce Report as to how these matters should be progressed. A simple, but significant way of improving the report would be for the Taskforce to review the extent to which earlier inquiries and reports into access for justice have been implemented and incorporate all outstanding recommendations into its report.

In a similar vein there are key issues such as the adequacy of funding for CLCs and legal aid—particularly at the state or territory level—and standing, *amicus curiae* and other intervenors that are not expressly addressed by the Taskforce in its report. These are core issues that need to be addressed if the Taskforce is serious about making significant improvements to access to justice in Australia. PIAC strongly urges the Taskforce to address these issues to ensure that the report is truly a holistic, principled and useful document in reforming our justice system.

Summary of recommendations

1. That the first priority of the Taskforce should be to review the earlier inquiries and reports about access to justice and take steps to implement those recommendations that have, to date, not been implemented. These outstanding recommendations should be incorporated into the final Taskforce Report.

2. That the review of data requirements proposed in recommendation 5.1 be conducted by the Australian Law Reform Commission with a broad mandate to consider measurements relating to accessibility, justice and equity as well as efficiency.

3. That the Taskforce undertake a detailed analysis of whether or not a common referral database is achievable and maintainable, and the costs of doing this (both establishment and maintenance) and that such analysis be undertake in consultation with LawAccess and key community sector organisations, such as the Council of Social Services of NSW, that have experience with the NSW Government's human services referral database, HSNet.

4. That the proposed common referral database, if developed, be regularly updated to reflect changes to service providers as well as feedback from users about the service providers listed in the database.

5. That the proposed common referral database (if developed), or at least an edited version of the database, be made publicly available.

6. That adequate funding and training be provided to all agencies and particularly legal aid and CLCs to ensure that they have sufficient resources to comply with the *no wrong number, no wrong door* approach by conducting 'warm referrals'.

7. That the Commonwealth Attorney-General's Department establish and resource a process for ensuring of ongoing consultation with agencies, CLCs and other service providers to ensure that they can provide feedback that informs updates and amendments to the common referral database.

8. That the proposal in recommendation 6.4 that the Commonwealth Attorney-General's Department develop strategies to target groups whose legal needs are not being met through general programs be amended to specify that such development should to take place in consultation with the groups affected and community service providers that already provide services to those groups.

9. That specific additional funding be made available within the Community Legal Services Program to enable the research and development of new responses to unmet legal needs. Such a funding program should have guidelines that ensure sufficient funding to properly pilot and evaluate new models and avoid short-term pilots that provide insufficient time to fully implement and test models. The program should also include a mechanism to review the evaluation prior to the end of the pilot and to ensure continuing funding is made available to the Community Legal Services Program where the pilot demonstrates its effectiveness in responding to unmet legal need and improving access to justice.

10. That the final Taskforce Report provide more detailed and specific proposals about how the Commonwealth Attorney-General's Department will ensure improvements in access to information, legal advice and representation by Indigenous communities throughout Australia.

11. That recommendation 6.6 be amended to clarify that access to interpreters must be provided in a range of ways to maximise access for all those who face language barriers in the legal system, and that the term 'interpreters' expressly includes Auslan interpreters and other interpreting services for people with disability.

12. That, in addition to improving collaboration of services via warm referrals and uniform data collection, recommendation 6.7 be amended to include a commitment by the Commonwealth Attorney-General's Department to fund and support innovative service models that work towards improving access to justice and, where appropriate, work with the state and territory governments to ensure ongoing funding for effective programs.

13. That, in considering the implementation of recommendation 6.8, specific attention be given to the legal information and service access needs of people who face access barriers to new technologies including people with limited literacy, people in remote areas where new technologies are less available and affordable, and people in institutional settings.

14. That the review of legislation proposed in recommendation 6.9 include consideration of whether or not there are sufficient resources in the community to meet the legal needs created by the legislation and should be a mandatory review that it undertaken, at a minimum, every ten years. These reviews should also allow for community consultation and participation.

15. That Community Legal Centres and government Legal Aid agencies be given additional funding to provide community-based training and/or develop guides on legislation that affects individual legal rights and obligations.

16. Before adopting recommendation 7.1 the Commonwealth Attorney-General's Department should consider in more detail the limitations of using industry ombudsmen, or alternatively that as part of the examination of the options for increasing the use of industry ombudsmen in different fields, the Department consider the limitations of the this form of external dispute resolution services and whether it is appropriate to resolving all disputes in that field. The Department should also consider in particular the importance of effective governance of industry-based Ombudsman schemes and identify key principles that should underpin any further development of such schemes.

17. That before agreeing to alternative dispute resolution (ADR), unrepresented litigants should have access to independent legal advice. In addition, the Commonwealth Attorney-General's Department should ensure that funding for Community Legal Centres and government Legal Aid agencies is increased so that they are able to represent clients in ADR processes.

18. That recommendation 7.6 be amended to make it clear that while the courts, tribunals and lawyers should encourage the use of ADR processes, they are not to be regarded as standard practice in the federal justice system.

19. That recommendation 8.3 be removed or, at the very least, not be acted on until the Australian Law Reform Commission has finalised its inquiry into the effectiveness of different cost orders.

20. That recommendation 8.4 be deleted from the Taskforce Report.

21. That the Taskforce give further consideration to the current arrangements in the Federal Court and the Federal Magistrates Court in respect of anti-discrimination matters and amend the recommendation accordingly.

22. That the Taskforce either undertake or recommend a review of the Commonwealth Attorney-General's Test Case Fund with a focus on the procedures for determining whether or not to grant funding for test cases and how to improve the timeliness of decisions given the time-critical nature of decisions to file proceedings. That the review also consider the potential for a grant under the fund providing a costs indemnity in federal matters similar to the indemnity provided under section 47 of the *Legal Aid Commission Act 1979* (NSW).

23. That recommendation 8.10 be implemented as a matter of priority.

24. That recommendation 8.11 be implemented as a matter of priority and the matter referred to the Australian Law Reform Commission for inquiry.

25. That recommendation 8.12 should not be adopted by the Commonwealth Attorney-General's Department until further consideration has been given to recent publications on the issue and further research has been undertaken to clarify the extent of the problem of vexatious litigants.

26. That recommendation 9.1 of the Taskforce Report be deleted.

27. That recommendation 9.2 be amended so that full-cost pricing for long hearings not be considered standard practice by the federal courts and only be imposed by judicial officers in limited cases.

28. That if the Commonwealth Attorney-General's Department proceeds with full-cost pricing it develop guidelines about the exercise of this discretion.

29. That in addition to the existing categories of fixed fee exemptions there be a category for public interest and a category for cases where the party is represented by a Community Legal Centre or a private solicitor on a *pro bono* basis. In these latter categories there should be a presumption against the imposition of fees with the court retaining a discretion to impose the fee if, on evidence, the relevant party has the capacity to pay.

30. That recommendation 10.2 be amended to read:

    > That the proposed Charter of Good Administration clarify the general obligation on agencies to provide a comprehensive statement of reasons to individual for decisions affecting them, in a timely manner, independent of the merits review context. The Charter of Good Administration should also clarify that if there are any review rights available to the individual, agencies should provide information about these rights at the same time that the statement of reasons is provided to the individual.

31. That the *Ombudsman Act 1976* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) be amended to require the responsible Minister to provide a report to the Ombudsman/Administrative Appeals Tribunal within six months of a complaint specifying:
    a. the actions that have been taken by the agency to address the systemic issues arising from the complaint; and
    b. how the outcome and recommendations from the complaint have been communicated to staff within the agency. Alternatively, the Federal Attorney-General's Department could establish a publicly available register of administrative decisions that summarises each complaint and the actions that the agency has taken to respond to that complaint.

32. That the *Ombudsman Act 1976* (Cth) *and the Administrative Appeals Tribunal Act 1975* (Cth) be amended so that the Ombudsman and the Administrative Appeals Tribunal are required to also provide feedback to the complainant about what actions the agency has made as a result of the complaint.

33. That recommendation 10.8 be amended so that the review is conducted by the Administrative Review Council rather than relevant Ministers.

34. That recommendation 10.9 be amended to include the development of options for more proactive case management by the Privacy Commissioner and other external decision-making bodies.

35. That recommendation 11.1 and 11.2 of the Taskforce Report be rejected and the Taskforce work with the Australian Legal Assistance Forum to develop the ideas of national co-ordination further.

36. That one aspect of fulfilling recommendation 11.4 be a commitment by the Commonwealth Attorney-General to rectify the funding disparity that exists between Aboriginal and Torres Strait Islander Legal Services (ATSILS) and government Legal Aid agencies so that ATSILS can deliver quality criminal and civil law services to Indigenous people.

37. That as part of recommendation 11.4 and 11.7, the Commonwealth Attorney-General's Department ensure that legal services operating in regional and remote areas are well supported and adequately resourced to cater for the needs of their clients.

38. That the Taskforce examine existing schemes that provide relief from Higher Education Contribution Scheme debt to provide an incentive for work in particularly disadvantaged and develop a recommendation to provide such an incentive for graduates to take up employment opportunities in Community Legal Centres, including but not limited to CLCs in regional, rural and remote areas.

39. That recommendation 12.2 be amended to refer to 'voluntary' rather than '*pro bono*' work and to include greater emphasis on issues of social justice and access to justice as an integral part of undergraduate and graduate law degrees.

40. That recommendation 12.5 be amended so that, in addition, to encouraging schools to teach young people skills for resolving conflict, young people should also be taught legal, civics, human rights and ethics education in school.

41. That a review of standing provisions both in general, and in public interest matters, be undertaken with a view to broadening standing and improving access to standing as *amicus curiae*.