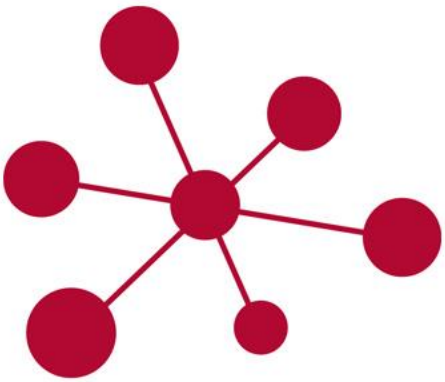

public interest
ADVOCACY CENTRE

# Submission to The Law Council of Australia: 'The Justice Project'

**13 October 2017**

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# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact on disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

PIAC is funded from a variety of sources. Core funding is provided by the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government for its Energy and Water Consumers Advocacy Program and from private law firm Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, donations and recovery of costs in legal actions.

## PIAC's work on access to justice issues

As indicated above, PIAC's work covers a wide range of issues that fall within the broader theme of access to justice. This includes specific engagement in or projects about issues facing a number of the thirteen groups that the Law Council of Australia has identified in its Consultation Papers as experiencing impediments in access to justice.

In this submission, we will provide short responses to the consultation papers regarding:

b) People with disabilities
g) Prisoners and detainees, and
k) Asylum seekers.

We will also provide a longer response regarding the issues facing people experiencing homelessness (group e) on page 4 of the Introduction and Consultation Questions), given our particular expertise in this area.

Finally, while we undertake a range of work regarding Aboriginal and Torres Strait Islander peoples (group a)), we acknowledge the range of issues already covered in that Consultation Paper as well as defer to the expertise of Aboriginal Legal Services on these issues.

# 1. People with Disabilities

PIAC welcomes the acknowledgment in the Law Council's August 2017 Consultation Paper that people with disabilities are vulnerable to a broad range of legal problems, including discrimination.

In the period 2015-2016, the highest number of discrimination complaints received at the federal level by the Australian Human Rights Commission **(**AHRC) was for disability discrimination (37%).[1] This is also reflected at the state level where disability discrimination (27%) was the most common complaint made to the Anti-Discrimination Board of NSW in the same period.[2]

However, we note that relatively little attention has been given in the Consultation Paper to the specific legal issues that people with disabilities face in making use of legal mechanisms designed to protect them from disability discrimination.

PIAC has extensive experience in representing clients with disabilities in discrimination claims made under the *Anti-Discrimination Act 1997* (NSW) (ADA) and the *Disability Discrimination Act 1992* (Cth) **(**DDA). The following four issues have been raised by our clients as specific issues of concern that impede access to justice for people with disabilities in the discrimination space. We will then address one final issue, not directly related to the ADA or DDA, but which nevertheless represents an impediment to access to justice for some people with a disability: exclusion from serving as jurors.

## 1.1 Weak protections and processes under Disability Discrimination Act

PIAC notes that, despite the AHRC finalising 94% of disability discrimination complaints in 2015-2016, our clients have reported significant dissatisfaction with the ability of the *Disability Discrimination Act 1992* (Cth) and its associated processes to adequately address their legal needs in relation to discrimination.

In the period 2015-2016, under half of disability discrimination complaints (49%)[3] made to the AHRC proceeded to conciliation. In the same period, the AHRC terminated 24% of finalised disability discrimination complaints, 85% of which the AHRC found had 'no reasonable prospect of conciliation'.[4]

These low numbers of matters being conciliated is reflective of the fact respondents can, and often do, simply ignore discrimination complaints, with the AHRC sometimes reluctant to use its power under section 46PF of the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA) to make conciliation compulsory for a respondent party. This leaves people with disabilities in an invidious position. As outlined further below, this is because the financial barriers for complainants to initiate court proceedings in the Federal Courts are a significant barrier to individuals progressing their complaints when their matters are terminated by the AHRC.

1 Australian Human Rights Commission, '2015-2016 Complaint Statistics' (2016) 1.
2 Anti-Discrimination Board of NSW, 'Annual Report 2015-16' (2016) 18.
3 Australian Human Rights Commission, '2015-2016 Complaint Statistics' (2016) 21.
4 Ibid.

PIAC notes with concern that Commonwealth Parliament recently granted the AHRC broader powers to terminate complaints through the *Human Rights Legislation Amendment Act 2017*. Section 46PF of the AHRCA now requires the AHRC to carry out an initial assessment of the complaint and consider whether to terminate it prior to commencing an inquiry. Furthermore, section 46PH introduces mandatory and discretionary termination grounds, which expand the scope of grounds on which they may terminate complaints. These changes make it less likely that complainants will be able to adequately meet their legal needs through the conciliation process, especially if they are unable to access legal advice prior to lodging a complaint.

## 1.2 Problems reported re conciliation processes

As noted above, disability discrimination complaints are the most commonly-made complaints to both the AHRC and ADB, reflecting the importance of this avenue of legal redress to people with a disability across Australia, and in NSW. However, as with other groups who use discrimination-related processes, people with a disability have reported to PIAC that they experience difficulties in utilising these options.

Some of these issues are related to inherent limitations of a complaints-based system, where access to justice depends on people who have been discriminated against taking action against individuals and/or organisations, such as employers, who are generally more economically powerful than they are, and who therefore have more ability to pay for legal advice and assistance. In the case of people with disability, this existing power imbalance can be compounded by lower levels of legal literacy (as identified in the consultation paper).[5]

This underscores the importance of AHRC and ADB processes being clear, through the use of plain English and the avoidance of legal jargon, in order to make the proceedings more accessible, and for participants to understand their role and rights within the conciliation process.

People with disability also often require support and adjustments to enable them to participate in the proceedings on an equal basis to respondents. Unfortunately, PIAC is aware of some instances where such adjustments are not forthcoming, leaving people with a disability at a disadvantage. For example, one of PIAC's clients reported that a conciliator would not allow her to bring more than one support person to a conciliation conference, on the basis that it would 'make the numbers uneven', and thereby be unfair to the respondent.

Increased provision of support and adjustments for people with disabilities in conciliations would therefore contribute to greater access to justice for people with disabilities who experience discrimination.

## 1.3 Cost for individuals

PIAC notes that under the DDA and ADA schemes, it is individuals that bear the costs of making complaints, even when the discrimination is systemic or wide-reaching. Community Legal

[5] Law Council of Australia, 'The Justice Project: People with Disability Consultation Paper' (August 2017) 24.

Centres such as PIAC receive far more requests from clients than we have capacity to assist, and grants of legal aid are rarely available for disability discrimination complaints.

The costs involved in successfully pursuing discrimination complaints may involve the cost of legal representation, the cost of providing expert evidence to substantiate complaints, and court costs, including the risk of paying the costs of the other party should a Federal Court application be unsuccessful. While cost-capping orders are technically available in the Federal Courts, such caps are rarely awarded, and may still leave individuals thousands of dollars out of pocket.

## 1.4 Failure to monitor compliance with disability standards

The DDA is supplemented by a series of Disability Standards that provide more detail on rights and responsibilities for people with a disability. Disability Standards have so far been developed and are binding in relation to public transport, education, and access to premises.

Standards are regulations set by the Attorney-General under the DDA, and a breach of the Standards is also a breach of the DDA. However, while a goal of the Standards is to assist persons and organisations to understand their rights and comply with their responsibilities under the DDA, compliance with the standards, including by public sector agencies, is weak, and it remains up to individuals to complain about persistent breaches of the standards.

For example, the *Disability Standards for Accessible Public Transport 2002* (Standards) were developed to enable public transport operators and providers to remove discrimination from public transport services. Part 27.1 of the Standards provides that 'General information about transport services must be accessible to all passengers'. Part 27.4 of the Standards provides that 'All passengers must be given the same level of access to information on their whereabouts during a public transport journey'. According to Schedule 1 of the Standards, for travel on buses, Transport for NSW was required to achieve full compliance with these standards by 31 December 2007. With respect to bus stops, Transport for NSW was required to have achieved 55% compliance by 31 December 2012, and will be required to achieve 90% compliance by 31 December 2017. In spite of these requirements, the majority of buses and bus-stops in NSW are practically inaccessible to people with vision-related disabilities.

## 1.5 Exclusion from serving as jurors

Article 13 of CRPD provides that 'State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others…in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings…'[6]

The *National Disability Strategy* outlined that an area for future action was to

> Ensure people with disability have every opportunity to be active participants in the civic life of the community—as jurors, board members and elected representatives.[7]

6 *UN Convention on the Rights of Persons with Disabilities,* Article 13.
7 *National Disability Strategy 2010 – 2020,* at 41.

The provisions relating to eligibility of jurors varies across Australia. However, people who are deaf or blind are often excluded from jury service as the presence of an interpreter in the jury room would not comply with relevant jury legislation.

In 2006, the NSW Law Reform Commission (NSW LRC) report, *Blind or deaf jurors*[8] recommended that the *Jury Act 1977* (NSW) be amended 'to reflect that people who are blind or deaf should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone'.[9]

The NSW LRC recommended that the *Jury Act 1977* (NSW) be amended to reflect that:

- People who are blind or deaf should have the right to claim exemption from jury service;
- The Court should have power to stand aside a blind or deaf person summoned for jury duty if it appears to the Court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge the duties of a juror in the circumstances of the trial for which that person is summoned. This power should be exercisable on the Court's own motion or on application by the Sheriff;
- Interpreters and stenographers allowed by the trial judge to assist the deaf or blind juror should swear an oath faithfully to interpret or transcribe the proceedings or jury deliberations, and should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements pertaining to the secrecy of jury deliberations;
- Offences be created, in similar terms to those arising under s 68A and 68B of the Act, in relation to the soliciting by third parties of interpreters or stenographers for the provision of information about the jury deliberations, and in relation to the disclosure of information by such interpreters or stenographers about the jury deliberations.[10]

The NSW LRC also recommended that

- The Sheriff should develop guidelines for the provision of reasonable adjustments, including sign language interpreters and other aids for use by deaf or blind jurors during the trial and deliberation.
- A blind or deaf person receiving a notice of inclusion on the jury roll or a jury summons should be required to complete a form either claiming exemption from jury duty or notifying the Sheriff of the reasonable adjustments required by that person to participate as a juror.
- All relevant personnel, including judicial officers and court staff, should be given the opportunity to participate in professional awareness activities that focus on practical measures to facilitate the inclusion of blind or deaf persons as jurors. The Judicial Commission should develop supporting materials and procedural guidelines as part of this process.[11]

In October 2016, the need for state-based legislative change to enable people with disability to participate as jurors was highlighted through the case of *Lyons v State of Queensland* [2016] HCA

8 NSW Law Reform Commission, *Blind or deaf jurors,* Report 114 (September 2006), available at http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-114.pdf (accessed 13 February 2017).
9 Ibid, at ix.
10 Ibid, at ix.
11 Ibid, at x.

38.[12] In this case, the appellant, Ms Lyons, was a profoundly deaf person who had been excluded from jury service because she required the services of an Auslan interpreter. Ms Lyons alleged that this constituted unlawful discrimination contrary to the *Anti-Discrimination Act 1991* (QLD) by the State of Queensland.

However, the Court held that, absent specific legislative provision, Queensland law did not permit an Auslan interpreter to be present during jury deliberations, and that the appellant was therefore not qualified to serve as a juror and the Deputy Registrar was required to exclude her from the jury panel.

Each state and territory jurisdiction's relevant jury legislation differs in the specific provisions regarding eligibility of jurors. This indicates the need for harmonised legislative change across Australia.

At a federal level, the Australian Law Reform Commission recommended in August 2014 (at Recommendations 7-12 to 7-15) that the *Federal Court of Australia Act 1976* (Cth) be amended to provide that:

- a person is qualified to serve on a jury if the person can be supported to understand retain, use and weigh information and communicate the person's decisions to the other members of the jury and to the court;
- the trial judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations;
- a communication assistant be required to swear an oath or affirm to faithfully communicate the proceedings or jury deliberations; and
- a communication assistant be permitted in the jury room during deliberations without breaching jury secrecy principles.[13]

12 *Lyons v State of Queensland* [2016] HCA 38 available at http://eresources.hcourt.gov.au/downloadPdf/2016/HCA/38 (accessed 13 February 2017).

13 ALRC, *Equality, Disability and Capacity in Commonwealth Laws*, above n 97, at 19 (Recommendation 7-13) – (Recommendation 7-15).

# 2. Homeless Persons

In 2004, PIAC established the Homeless Persons' Legal Service (HPLS). Since that time, HPLS has provided legal assistance to more than 5,900 people who are homeless or at risk of homelessness, on over 11,000 occasions. HPLS provides free legal advice at 15 legal advice clinics based at homelessness services and welfare agencies throughout inner Sydney, outer western Sydney and the Hunter.

In 2016, HPLS helped over 759 people with a range of civil and criminal law matters. Of these, at least 25 per cent displayed some form of mental illness or self-identified as having a mental illness.

## 2.1 Law that obstruct access to justice for people who experience homelessness

The nature of homelessness is such that the law has a disproportionate impact on those who experience homelessness. In many cases the operation of the law may directly contribute to a person becoming homeless (e.g. the operation of social security eligibility laws regarding eligibility and tenancy law). In other situations, the law may operate in a manner that reinforces a person's homelessness or presents as a barrier for that person to exit homelessness (e.g. public space laws, fines). Several of these are referred to in the Consultation Paper. Further details are provided below.

### 2.1.1 Public space laws and minor criminal offences

Minor criminal offences and public space/public order offences contribute to homelessness as they often introduce homeless individuals to the criminal justice system.[14] These offences include petty theft, public nuisance, offensive behaviour, drinking alcohol in public, public drunkenness, public urination, failure to follow a direction of a police officer and begging. Several of these offences criminalise behaviours in public places which would not be offences if undertaken within a person's home.[15] Offences such as begging essentially criminalise behaviour that is a product of desperate poverty. In NSW, begging is an offence under the following legislative instruments:

- *Major Events Act 2009* (NSW) s 41(1)(f) and (g);
- *Centennial Park and Moore Park Trust Regulations 2009* (NSW) reg 13(1)(a);
- *Parramatta Park Trust Regulation 2012* (NSW) reg 10(1)(a);
- *Royal Botanic Gardens and Domain Trust Regulation 2013* (NSW) reg 55; and
- *Sydney Olympic Park Authority Regulation 2012* (NSW) regs 4(k) and (l).

In NSW, several pieces of legislation enable police officers to require people to 'move on' if they are identified as engaging in inappropriate behaviour or making people feel unsafe, or obstructing people or traffic (*Law Enforcement (Powers and Responsibilities) Act 2002*, s 197). Such public order requirements are enforced through 'warnings, directions to move on, fines and in some

14 Walsh, Tamara (2011), 'Legal Conceptions of 'Home' and 'Homelessness'', Chapter One in *Homelessness and the Law*, Federation Press, 2011, 21.

15 Goldie, C. (2006), 'Criminalising people in Public Space in Australia and Canada', 19(1) *Parity* 43–5.

cases detention', although it has been argued that there is little evidence to indicate that such legislation actually contributes to reduced crime or increased safety.[16]

The *Sydney Public Reserves (Public Safety) Act 2017* was rushed through the NSW Parliament in August 2017 to address the encampment of homeless people in Martin Place. This has expanded police powers to remove homeless people from Martin Place, and potentially other declared public reserve spaces in the City of Sydney.

The consequence for homeless people of infringements issued for 'moving on' or other public nuisance activities is the accumulation of significant debt in the form of fines and infringement notices. In NSW, this can result in the loss of driving licenses and vehicle registration, thus limiting access to work, education and training. For people experiencing homelessness, fines, penalty notices and infringement notices are some of the most commonly reported legal problems to PIAC's HPLS, with people commonly having accumulated debts of several thousands of dollars from 'on the spot' fines or infringements for public nuisance, public transport, or parking fines when sleeping in vehicles.

In 2008, the NSW Government recognised the difficulty faced by people who are homeless or in difficult financial circumstances in relation to fines and penalty notices, and introduced reforms to the administration and enforcement of court fines and penalty notices, particularly for vulnerable groups of people (*Fines Further Amendment Act 2008*). These reforms are outlined below.

### 2.1.2 Social security law

Social security law can operate in ways that can both place a person at high risk of homelessness and also perpetuate homelessness. Australia's social security system places a strong emphasis on 'mutual obligation' which requires recipients of many government social security payments to undertake activities such as job search, retraining, engaging in community work or undertaking carer roles. A failure to undertake any required activities that may be detailed in an 'activity test agreement' can result in payments being suspended for a period of time. During this period, an individual will be without any income, leaving them vulnerable to losing accommodation, or unable to exit homelessness.[17]

For people who are homeless, fulfilling requirements under an 'activity test agreement' can be particularly difficult, given that for many people who are homeless they are also dealing with difficulties such as mental illness or addictions. In addition, the lack of stable accommodation presents a particular challenge as it will mean a high likelihood of the person failing to receive correspondence from Centrelink or their Job Network provider, which may result in them failing to adhere to particular requirements in their activity test agreement. According to Walsh, people experiencing homelessness are more likely than other payment recipients to commit participation failures.[18]

16 Goldie, C, 2003, 'Rights versus welfare: fostering community and legal activism in support of people facing homelessness', 28(3) *Alternative Law Journal* 132–5.

17 Walsh, Tamara (2011), 'Legal Conceptions of 'Home' and 'Homelessness'', Chapter One in *Homelessness and the Law*, Federation Press, 2011, 21.

18 Ibid 107.

### 2.1.3 Housing and Tenancy law

There are many ways in which tenancy and housing law can result in a person becoming homeless. Tenancy terminations and evictions, being listed in a tenancy database, and inadequate protections in particular types of accommodation such as boarding houses, rooming houses and caravan parks can all operate to place a person at risk of homelessness.

According to Walsh, eviction is one of the most common precipitating events that lead to homelessness.[19] For many people facing eviction, the landlord may be acting with appropriate cause, such as unpaid rent or damage to property. In the case of unpaid rent, there may be opportunity to repay outstanding rent arrears in order to avoid eviction. However, in NSW, as in most States and Territories, landlords have the power to terminate a periodic tenancy without grounds or reason (*Residential Tenancies Act 2010* (NSW), s 85). In some circumstances landlords exercise this power in a manner that is unreasonable or may use it as a retaliatory measure where tenants have made complaints.[20]

For people seeking to rent accommodation through a private landlord or a real estate agent, their previous history of renting properties may be included on a residential tenancy database. These are electronic databases established by private companies which includes information provided by real estate agents regarding tenants' rental history. This information is shared with subscribed real estate agents to enable them to assess prospective tenants. In some cases, the information contained on a database in respect of a particular tenant may refer to a situation where the tenant was in dispute with a landlord even though the situation has since resolved, or where the tenant was taking action to enforce her/his rights. Gaining access to the information on a database for a particular tenant, or correcting information that is not accurate, can be extremely difficult. However, the information can seriously affect the ability of a prospective tenant to secure stable accommodation, placing them at risk of homelessness.[21]

### 2.1.4 Domestic violence, women and children, and immigration

Domestic and family violence is one of the main reasons why women and children in Australia become homeless.[22] In 2014-15, 20.1 per cent of people seeking assistance from specialist homelessness services in NSW did so for reasons relating to domestic or family violence.[23] There is considerable evidence that for many women who experience domestic violence, there is also associated relationship breakdown, family law disputes, serious debt and financial crisis, and tenancy and housing difficulties. This combination of legal problems place women at high risk of housing crisis and homelessness. In addition, many women who experience domestic violence experience trauma that manifests in anxiety and depression, low confidence, despondency and disempowerment.

19 Ibid 65.

20 Ibid 66.

21 Ibid 67-68.

22 Australian Housing and Urban Research Institute (AHURI) (2011), *Homelessness prevention for women and children who have experienced domestic and family violence: innovations in policy and practice*, AHURI Positioning Paper No. 140, June 2011.

23 Australian Institute of Health and Welfare (AIHW) 2015, *Specialist homelessness services report 2014-2015*, Table NSW CLIENTS.14: Clients, by main reasons for seeking assistance, 2014–15, adjusted for non-response.

A particularly complex scenario that requires specialist advice arises when there is an intersection between violence and abuse, the risk of homelessness and immigration visa requirements. While a range of services and resources are provided to women and children experiencing violence, some benefit payments may depend on visa status. More importantly, depending on the category of her visa and her circumstances, a woman who ceases to reside with her partner may no longer meet the conditions of her visa and may therefore become liable for deportation.

For women who arrive with partners on a Temporary Protection Visa or a Section 457 Temporary Visa, or as a future spouse on a Prospective Marriage Visa (Subclass 300), the status of the relationship is essential to her ability to stay in Australia. Women in these situations who are forced to separate due to domestic violence face severe disadvantage including extreme poverty and significant barriers to accessing entitlements. These women, together with their children, are at high risk of homelessness and often feel forced to endure their domestic abuse out of fear of becoming homeless.

> *TR arrived in Australia with her husband on a Temporary Protection Visa. Soon after they settled in rural New South Wales she became pregnant. After the birth of her son, her husband developed a serious gambling problem and accrued significant debts. He became violent and abusive. After she sought help from the local police she was given assistance to relocate with her son to a women's refuge in Sydney. However, because she does not have her own visa as she arrived on her husband's visa, she is unable to receive any Centrelink social security payments, or able to access Medicare for either herself or her child.*
>
> - ***PIAC Women's Consumer Consultation Participant***

## 2.2 Incidence of legal problems for people who are homeless or at risk of homelessness – the phenomenon of 'clustering'

Between 2010 and 2016, PIAC's HPLS provided assistance to 3,874 people who were experiencing homelessness or at risk of homelessness. Of these:

- 661 people sought assistance for credit and debt problems, 45 per cent of whom had more than one legal problem;
- 789 people sought assistance for tenancy problems, 33 per cent of whom had more than one legal problem;
- 120 people sought assistance for both tenancy and credit and debt problems during this period.

It is estimated that at least 25 per cent of the people who sought assistance from HPLS clinics for assistance with their credit/debt or tenancy legal issues have some form of mental illness. As service users may be reluctant to disclose this information to HPLS, this figure is almost certainly a significant underestimation of the incidence of mental illness amongst HPLS service users.

The casework statistics of PIAC's HPLS indicate that for homeless people, the so-called 'everyday legal problems' of credit, debt, tenancy and money-related problems are often experienced in clusters, making the need for early intervention in the form of legal advice and advocacy critical for their resolution.

PIAC notes that research into legal needs in Australia and the UK indicates that for many people, these so-called "everyday" legal problems are often experienced in clusters, and tend to remain

unresolved without access to early legal assistance or advice or financial counselling advocacy. Results from quantitative legal needs surveys conducted in the United Kingdom and Australia suggest that debt-related legal problems are one of the most commonly experienced legal problems in the community, and the nature in which consumer experience multiple debt and tenancy problems together, combined with other legal problems, indicate significant complexity for the individuals involved.[24]

These problems are more likely to be experienced by individuals who are socially/economically disadvantaged, including lone parents, people with a disability, people in disadvantaged housing, people on low incomes, and people with lower levels of education.[25] The studies also indicate that debt-related legal problems are often not experienced in isolation, but cluster with other types of legal problems, and particularly other debt and housing problems.[26] According to Pleasence, each time a person experiences a legal problem, including debt-related problems, their vulnerability to experiencing further problems increases.[27] There is also evidence to suggest that people who seek some form of advice for their money-related problems are more likely to succeed in resolving these matters without having court proceedings issued against them.[28]

In research undertaken by the Victorian Department of Justice in 2007 with 90 adult clients of financial counselors, a total of 91 per cent of participants reported having multiple debts. This included:

- 57 per cent of participants reported experiencing five or more debts.
- 79 per cent of participants reporting that they had at least one credit card debt, with 53 per cent of participants reporting multiple credit card debts and 53 per cent reporting having at least one utility/telco bill related debt.

Of the 451 civil consumer debts that participants reported, 63 per cent were for amounts of less than $5,000. Over 80 per cent of participants reported at least two indicators of socio-economic disadvantage. This accounted for over 86 per cent of the reported debts.[29]

## 2.3 Multiple everyday problems require personal advocacy

In addition to the evidence that tenancy and minor debt problems often cluster together, particularly for people who experience social and/or economic disadvantages, there is significant evidence about the value of advocacy assistance in debt and tenancy matters. Where advocacy assistance can be provided, individuals are more likely to have the matter resolved, and more

24 Genn, Hazel (1999), *Paths to Justice – What people do and think about going to law*, Hart Publishing, Oxford, 1999; Pleasence, Pascoe, Buck, Alexy, Balmer, Nigel, O'Grady, Aoife, Genn, Hazel and Smith, Marisol (2004), *Causes of Action: Civil Law and Social Justice*, The Final Report of the First LSRC Survey of Justiciable Problems, Legal Services Commission, United Kingdom, 2004; Coumarelos, C, Zhigang, Wei, and Zhou, Albert (2006), *Justice Made to Measure – NSW Legal Needs Survey in Disadvantaged Areas, Access to Justice and Legal Needs*, Volume 3, Law and Justice Foundation of New South Wales, March, 2006; Coumarelos, C, Macourt, D, People, J, MacDonald, HM, Wei, Z, Iriana, R & Ramsey, S (2012), *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney, 63-65, 86-87.

25 Pleasence et al, 2004, above n 24, 25-27; Coumarelos et al, 2006, above n 24, 84, 300; Coumarelos et al, 2012, above n 24, 71-72.

26 Coumarelos et al, 2006, above n 24, 75-78; Pleasence at al, 2004, above n 24, 35, 40-42; Coumarelos et al, 2012, above n 24, 63-65, 86-89.

27 Pleasence et al, 2004, above n 24, 107.

28 Genn, 1999, above n 24, 124-125, 161.

29 Schetzer, Louis (2007), *Drowning in Debt – The experiences of people who seek assistance from financial counsellors*, Department of Justice, Victoria, December 2007, 25-29.

likely to have the matter resolved in their favour, than if they sought to resolve their problems themselves through self-help facilities and resources.

According to a Telephone Survey of 450 Victorian Magistrates Court Consumer Default Debtors conducted in 2007, 68.1 per cent of default debtors reported that they did not seek advice or assistance to resolve their matter, and debtors in this group were more likely to resolve their matter either by recourse to full payment, applying for bankruptcy, or a payment plan that was difficult for them to meet. These participants indicated that they believed they had very few workable options available to them.[30]

However, for those participants that did seek external advice and assistance, the most useful assistance that was identified were lawyers or financial counsellors. They participants indicated that these assistance providers were able to access a broader range of options than those who relied on self-help remedies, including debt waiver, access to hardship arrangements and more affordable instalment arrangements. Several participants reported that a lawyer or financial counsellor was better able to negotiate a complex system, and that creditors were more likely to take their advocate seriously.[31] This is consistent with findings from legal needs studies conducted in NSW.[32] For those participants who indicated that they suffered some form of mental illness such as anxiety and depression, they reported that their lawyer or financial counsellor played a crucial role in alleviating their anxiety and empowering them not to be vulnerable to financial exploitation.[33]

PIAC submits that there is a particular need for specialist face-to-face legal assistance services and financial counselling services for women experiencing homelessness and people with lived experience of mental illness and homelessness. This is based on evidence obtained through HPLS casework and PIAC's consumer consultations undertaken with these groups over the last three years, which is documented below.

## 2.4 Women who experience homelessness

It is the experience of PIAC's HPLS that women who experience family violence and are at risk of homelessness tend to experience related legal problems including family law issues, tenancy problems and credit and debt problems. Casework statistics from HPLS indicate that women made up 32 per cent of 3,874 people who sought assistance from HPLS clinics in the period 2010-2016.

However, women made up more than 35 per cent of people presenting with a credit and debt problem, and more than 40 per cent of people presenting with a tenancy problem. Notably, women made up more than 45 per cent of people presenting with both problems. These women were more likely than men to present with a credit and debt problem, a tenancy problem and a family law problem. In addition, women were more likely to present with multiple legal problems.

In 2015, PIAC decided to further explore the issue of women and homelessness, with a particular focus on the associated legal needs for those women who are in housing crisis and homelessness. This project involved undertaking in-depth consultations with 23 women who had

30 Schetzer, Louis (2008), *Courting Debt – The legal needs of people facing civil consumer debt problems*, Department of Justice, Victoria, Civil law Policy, July 2008, 92-94.

31 Ibid 89-90, 92-94.

32 See Coumarelos et al, 2012, above n 24, 129, 142.

33 Schetzer 2008, above n 30, 91.

recent experience of homelessness, some of whom continued to be without safe, stable accommodation.

By far the most common legal problem experienced by women who participated in this consultation was domestic violence, with 18 of the 23 women consulted reporting recent experience of domestic violence, and 12 of these women saying it was the major reason for them becoming homeless and triggering an assortment of other legal problems. This is consistent with data from the Australian Institute of Health and Welfare that indicates that domestic violence is the main reason women and children leave their homes in Australia, and the most common reason provided by women for seeking assistance from specialist homelessness services.[34]

17 of these women who experienced domestic violence also experienced other family law problems stemming from the breakdown of their relationship, usually involving disputes about children or matrimonial property.

Eighteen women reported that they had experienced a tenancy or housing problem in the previous two years. Fourteen of these women said that they also experienced family violence. For several women, the tenancy problem arose as a direct consequence of the domestic violence and relationship breakdown with their spouse.

> *I have got a major issue with Department of Housing. I was living in Department of Housing house for about eight years, that was the house my ex-partner absolutely demolished. He did $7,000 worth of damage, controlled my finances and did not pay the rent. It made me look like a bad tenant… Department of Housing were my biggest headache. They would not listen... I could not be a part of any domestic violence programs because they are all funded by FACS and if you are not seen as a suitable housing tenant you are not able to access any of their programs.*
>
> - ***PIAC Women's Consumer Consultation Participant***

The relationship between domestic violence and housing or tenancy issues was identified and discussed in detail in the final report of the Victorian Royal Commission into Family Violence.[35] It has also featured in the casework of PIAC's HPLS, which has provided assistance to women who are forced out of the family home due to domestic violence, and then subsequently are held responsible for unpaid rent and damage to the unit caused by their violent ex-partner. This can make it more difficult for these women to secure social housing in the future, as they may be assessed as an "unfit tenant" due to the actions of their ex-partner.

34 AIHW 2015, above n 23.

35 Royal Commission into Family Violence (RCFV) (2016), 'Financial security', Chapter Twenty-One in Volume Four, *Royal Commission into Family Violence: Report and recommendations*, Victorian Government Printer, March 2016, 113-114.

***HPLS Case Study***

*Family violence forced R to flee to a women's refuge with her 2 year-old child. Her violent ex-partner stayed in her public housing unit. He refused to pay the rent and damaged the unit, which resulted in R being assessed as an unfit tenant, because of an outstanding rental debt of approximately $13,000. She was unable to secure other social housing until the debt had been paid.*

*R also had personal loan and credit card debts as a result of borrowing money to pay for crisis motel accommodation until a place in a refuge became available.*

***HPLS Case Study***

*S is a 41-year-old Aboriginal woman. In 2009, she lived in social housing in the Inner West with her son and daughter aged 19 and 20, and her newborn baby girl. In late 2009, due to family violence, S took her baby and moved in with relatives in Castle Hill. After she left the premises her ex-partner damaged the premises, which Housing NSW estimated to be about $9,000 worth of damage. S was told by Housing NSW that because she was the tenant, they would be held responsible for the repair costs. S refused to pay the repair costs, as the damage was the result of criminal activity with which she had no involvement and was not even present. Housing NSW listed her as a former unsatisfactory tenant and would not accept her application for priority housing until she agreed to enter a payment plan.*

Seventeen women reported that they had experienced a problem in relation to outstanding loans or debts. Twelve of the women who experienced domestic violence also experienced legal problems relating to outstanding loans or debts. Consistent with other studies, several women reported how their ex-partner had left them with debts or bills that were in joint names or in their sole names, and for which they were now responsible. This had left them in a situation of financial crisis that presented a significant barrier for them to exit homelessness, either through the private rental market, or accessing temporary accommodation.

> *For many domestic violence victims, their ex-partner leaves them with a crap load of debt and then you go into a crisis place and they expect your whole world to change in two months or three months and be out the door.*
>
> - ***PIAC Women's Consumer Consultation Participant***
>
> *Because my partner put all the bills in my name. After I find out I think "Oh my God, I've got a lot of debt". Also, my partner used my phone. But the bill came out when I was in hospital.*
>
> - ***PIAC Women's Consumer Consultation Participant***
>
> *I have some money problems. I don't get any money from my husband and I only have Centrelink which is not enough for me and my son, and also to pay bills.*
>
> - ***PIAC Women's Consumer Consultation Participant***

The co-occurrence of money and debt problems with domestic violence has also featured in PIAC's HPLS case work.

***HPLS Case Study***

*M escaped from a violent, abusive relationship. She had significant credit card debt from a joint card with her ex-partner. She had a total debt of $12,000, including $6,000 from the credit card. M was assaulted by her partner and suffered significant physical and emotional. HPLS helped M apply for victim's compensation. She received an award of $9,600 that allowed her to repay most of her debts and re-establish her life.*

***HPLS Case Study***

*H was facing substantial, multiple debts after ending a relationship with her abusive ex-partner. She had been threatened with legal action in respect of an outstanding overdraft account that was in her and her ex-partner's names. She was also facing fines for overdue DVDs that her ex-partner had borrowed, as well as several parking penalties. As she was suffering from ongoing trauma and depression following her domestic violence, she had been unable to obtain employment, and had fallen into substantial arrears with her repayments. With the assistance of HPLS lawyers, she was able to apply under hardship provisions for the overdraft debt, library fine and parking fine to be waived.*

Fourteen of these women said that they also experienced a housing or tenancy problem. The clustering of domestic violence, housing/tenancy problems and debt/money problems was a common feature amongst participants in the interviews.

> *There was so many people he owed money to and I was receiving threats to say that people were going to follow me to work. That is why they moved me all the way into the city. I was getting all these messages saying they knew that I was working from my house and people were going to follow me from my house.*
>
> - ***PIAC Women's Consumer Consultation Participant***
>
> *I was in the process of applying for bankruptcy. During my depression and after I was made redundant from my job, I did rake up quite a big credit card bill. Also, I had a huge battle with Telstra and I rang them every day for four months, constant complaints, and the bill has come to about $6,000…*
>
> - ***PIAC Women's Consumer Consultation Participant***

The adverse effects of domestic violence on women's financial security were identified by the Australian Domestic and Family Violence Clearinghouse in 2011. Major areas of concern included debts, bills, banking and accommodation.[36] The negative financial impacts of violence and the incidence of money-related legal problems among victims of violence were also observed by the Victorian Women's Legal Service Stepping Stones project.[37]

Six women who were interviewed in this project said that their money or debt problem was the first legal issue they experienced, triggered the onset of other legal problems, and contributed to them becoming homeless.

36 Braaf, Rochelle and Meyering, Barrett (2011), *Seeking Security: Promoting women's economic wellbeing following domestic violence*, Australian Domestic and Family Violence Clearinghouse, March 2011, 6-7.

37 Women's Legal Service Victoria (2015), *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, September 2015, 16.

Ten women experienced the combination of legal problems of domestic violence, family law problems, tenancy and housing. This was in addition to their situation of being homeless, and often combined with experiences of anxiety and depression, and the pressing demand to ensure stability and security for young children.

The experiences recounted by the women who participated in this consultation exemplify how the confluence of legal problems for women particularly in the context of family violence, serve to place women at high risk of housing crisis and homelessness. Overwhelmingly, domestic violence was the most common legal issue that places women at risk of homelessness. However, given the economically disadvantaged position of women in society, the onset of debt and financial problems is also a significant legal issue that places women at high risk of housing crisis and homelessness.

For women who enter homelessness as a result of domestic violence, there is also often deep-rooted trauma that manifests in symptoms of anxiety, depression, low confidence, despondency and disempowerment. For women in these circumstances to navigate the homeless service system, identify services that can assist, and initiate applications for social housing, can be daunting, intimidating and distressing. These feelings are often amplified where children are also involved, with these women indicating the difficulties and stress associated with ensuring safety and stability for their children in a highly unstable environment.

A multitude of stresses and barriers confront women who have become homeless, particularly those who have experienced domestic violence, and those who are caring for children. One can appreciate that seeking legal assistance for the assorted legal issues arising from their experience may be considered by the woman to be a lower priority than securing stable, safe accommodation. However, as previous studies have disclosed, and as confirmed by this consultation project, the effect of related tenancy and housing legal problems and debt and financial legal problems can compound the difficulties faced by these women and make it even more difficult to secure stable, long-term accommodation.

For women in these situations, there is an enormous need for reliable, competent, committed support services.

## 2.5 People who are homeless or at risk of homelessness living with mental illness

Of the 661 people who presented with credit and debt problems or tenancy problems at HPLS clinics between 2010 and 2016, 25 per cent volunteered information that they had a mental illness. Of those that presented with multiple credit/debt/tenancy problems, 33 per cent said that they had a mental illness. As this was information that was volunteered by the individuals themselves, it is almost certain that the actual figure of people presenting with these problems and also living with mental illness is much higher.

The incidence of credit/debt and tenancy problems for people with mental illness was identified in the 2007 Victorian study of clients of financial counsellors which found that 38 per cent of participants reported suffering from mental illness such as anxiety or depression. Most of these participants recounted how their financial problems either caused or exacerbated their stress and

anxiety, with many reporting that their anxiety and stress made them feel embarrassed and ashamed of their predicament, and reluctant to seek assistance.[38]

The relationship of mental illness to debt problems, both as a contributor and a symptom, was highlighted by the UK Legal Services Research Centre (LSRC) study of 176 clients of advice agencies. In that study 89 per cent of clients interviewed reported being anxious about their money problems 'most' or 'all' of the time, and the great majority of clients believed that their health had been adversely affected by their debt problems. In their analysis of the 2004 English and Welsh Civil and Social Justice Survey (CSJS) the LSRC found that 40 percent of debt problems were reported to have led to physical or stress-related ill-health, of which slightly more than half also reportedly led to GP visits.[39] Likewise the 2006 study conducted by the UK Department for Constitutional Affairs into legal problem clusters in solicitors' and advice agencies found that many clients of debt advice agencies presented with stress, anxiety and depression related to, and being aggravated by, their debt problems.[40]

The Law and Justice Foundation of NSW also identified a vulnerability of people with mental illness to consumer debt, with a number of factors underlying this connection, including:

- Accruing debt as a result of general financial disadvantage;
- Mental illness or addiction affecting capacity to make sensible decisions about purchasing behaviour or entering into contracts;
- Vulnerability to high pressure sales tactics; and
- Vulnerability to financial exploitation and fraudulent activity.[41]

For HPLS clients living with mental illness, their reliance on the Disability Support Pension and other Centrelink payments means that they are extremely vulnerable to financial stress and debt, particularly if their payments are cancelled or they are subject to breaches from Centrelink. These clients often face considerable difficulty sustaining their social housing tenancies, particularly making rent payments or repaying outstanding housing debts. This situation is compounded by the difficulty these individuals have communicating with the NSW Department of Family and Community Services (FaCS), and delays in response or poor customer service from FaCS.

> ***HPLS Case Study***
>
> *FaCS NSW removed G from his priority position on their waiting list on the grounds that he had housing related debt. Approximately 15 years ago, G incurred a debt of $1100 after leaving a rental property. The landlord alleged that G had damaged fittings in the property, an allegation denied by G. Notwithstanding his denial, G has reduced the debt by $800 to date. He claims that if had known earlier about FaCS's position on his debt he would have discharged it earlier, and that the delay in communication has unfairly prejudiced his case. G has had trouble liaising with FaCS as he is currently homeless.*

Some HPLS clients with mental illness face considerable difficulty when negotiating with FaCS to settle their debt. The difficulties include delayed response times and ignorance of HPLS's

38 Schetzer 2007, above n 29, 29-30, 51.

39 Pleasence, Pascoe, Buck, Alexy, Balmer, Nigel , Williams, Kim (2007), *A Helping Hand: The Impact of Debt Advice on People's Lives*, Legal Services Research Centre and Department for Constitutional Affairs, United Kingdom, March, 2007, 6-7.

40 Moorhead, Richard and Robinson, Margaret (2006), *A trouble shared – legal problems clusters in solicitors' and advice agencies*, Department of Constitutional Affairs, DCA Research Series 8/06, United Kingdom, November 2006, 57.

41 Karras, Maria, McCarron, Emily, Gray, Abigail, Ardasinski, Sam (2006), *On the Edge of Justice – The Legal Needs of People with a Mental Illness in NSW*, Access to Justice and Legal Needs Volume 4, Law and Justice Foundation of New South Wales, May 2006, 79-81.

requests for review of the cases. In particular, HPLS evidence suggests that often FaCS will issue a termination notice for rental arrears without having attempted to negotiate with the tenant. On occasions, FaCS will proceed to NCAT in order to get a specific performance order that puts pressure on the tenant to comply, with the threat of having their tenancy terminated. For tenants with mental illness, the receipt of a termination notice and a hearing at NCAT can be particularly intimidating and distressing. As a result, some tenants will not attend at the hearing and orders can be made in their absence, including a termination of the tenancy.

***HPLS Case Study***

*H, a 57 year old woman, had been residing at her present FaCS home for the past 18 years, and prior to that had been residing in other Housing NSW premises. H suffers from poor physical and mental health and has been diagnosed with multiple physical and psychological medical conditions. She was the victim of child abuse that included neglect and maltreatment.*

*In 2003, an arrangement was made whereby any payments H owed to FaCS would be deducted from her Disability Support Pension and paid directly by Centrelink to FaCS. This arrangement occurred without incident until 2012.*

*In November 2012, Centrelink wrote to H informing her that FaCS had contacted Centrelink and requested an increase of $31.90 per fortnight in the deduction from her pension. Centrelink failed to increase the deductions from H's DSP and continued to pay the lesser amount.*

*In January 2013, H received a phone call from FaCS stating the she was in arrears. H instructed Centrelink to stop making payments to FaCS. The next day, a representative from FaCS visited H at her home and provided her with statements for her water account and rent account for the period June 2012 to January 2013. In late February 2013, H attended a FaCS Housing Office and offered to pay $230 per fortnight for her rent, water and arrears until the arrears were paid. FaCS refused the offer and told her that a Notice of Termination was being sent to her. She received it in the mail when she returned home that day.*

*H entered a new agreement with FaCS, that authorised FaCS to deduct $221.20 per fortnight from H's DSP, which included $35 per fortnight in rent arrears and $10 per fortnight in water arrears. FaCS forwarded the new payment agreement to Centrelink in March 2013. On that same day, FaCS commenced proceedings in NCAT seeking an order to evict H from her residence owing to her rent arrears.*

Many HPLS clients with mental illness living in social housing have been classified as unsatisfactory former tenants either due to breach of their tenancy agreement for rental arrears or due to complaints by neighbors. Because HPLS clients are often vulnerable and have complex needs (as a result of factors including mental health, intellectual disability and substance abuse issues), they are more at risk of breaches. As a result, HPLS clients with mental illness are often made homeless as a result of a termination based on breach of tenancy agreement or rental arrears. Subsequently, some of these clients continue to be homeless and unable to access social housing because they are classified as unsatisfactory former tenants and cannot fulfill the requirement to complete a six-month tenancy in the private rental market. This 'unsatisfactory former tenant' policy has a huge impact in perpetuating homelessness for people with mental illness.

People with mental illness are vulnerable to fraudulent activity, accruing significant debt, experiencing financial exploitation, negotiating poor contract conditions, or other tenancy difficulties.

Accordingly, they are a group of people with significant need for direct, face-to-face legal support, including appropriate, tailored legal information, specialist advice, and ongoing legal representation and advocacy. It is submitted that specialist legal representation for people with mental illness at NCAT is essential given the particular vulnerability of people with mental illness to civil debt and tenancy problems. Many HPLS clients are unable to advocate effectively on their own behalf in a relatively formal setting such as NCAT. However, with the advice of HPLS and other specialist support services, it is possible to achieve excellent outcomes for this client group.

It is also submitted that a specialist mental illness list at NCAT be established that provides direct and appropriate dispute resolution processes for people with mental illness facing tenancy or civil debt problems.

***HPLS Case Study***

*B is a 25 year old Aboriginal man residing in a Housing NSW property in the Mt Druitt area. He has a chronic and severe mental illness, and has been hospitalised for treatment on several occasions. B cannot read or write English but engages well with a number of support services that assist him to manage his affairs. B was referred to HPLS when FaCS Housing applied to NCAT to terminate his tenancy. FaCS alleged a number of breaches of his tenancy agreement relating to the condition of the property. B instructed us that some relatives had been to stay while during his most recent period of hospitalisation. They had now left, and he was working with a specialist tenancy support service to clean the property up. FaCS representatives were unwilling to negotiate and pursued eviction proceedings at NCAT. Following representations from B's HPLS solicitor, the application was dismissed on the basis that FaCS had not provided sufficient evidence of the alleged damage.*

## 2.6 Effective measures to address the legal needs of people who experience homelessness

### 2.6.1 Specialist legal advocacy assistance for homeless people

As indicated above, there is significant evidence about the value of advocacy assistance in debt and tenancy matters, particularly for people who are homeless or at risk of homelessness. Where advocacy assistance can be provided, individuals are more likely to have the matter resolved, and more likely to have the matter resolved in their favour, than if they sought to resolve their problems themselves through self-help facilities and resources.

According to the 2007 Telephone Survey of 450 Victorian Magistrates Court Consumer Default Debtors referred to above, of the 32 per cent of default debtors who did seek advice or assistance to resolve their matter, the most useful assistance that was identified were lawyers or financial counsellors. The participants indicated that these assistance providers were able to access a broader range of options than those who relied on self-help remedies, including debt waiver, access to hardship arrangements and more affordable instalment arrangements. Several participants reported that a lawyer or financial counsellor was better able to negotiate a complex

system, and that creditors were more likely to take their advocate seriously.[42] This is consistent with findings from legal needs studies conducted in NSW.[43] For those participants who indicated that they suffered some form of mental illness such as anxiety and depression, they reported that their lawyer or financial counsellor played a crucial role in alleviating their anxiety and empowering them not to be vulnerable to financial exploitation.[44]

The HPLS case studies referred to above also reaffirm the importance of early provision of legal advocacy advice and assistance to assist in applying for debt or fine waivers under relevant hardship programs. For HPLS clients living with mental illness, their reliance on the Disability Support Pension and other Centrelink payments means that they are extremely vulnerable to financial stress and debt, particularly if their payments are cancelled or they are subject to breaches from Centrelink. These clients often face considerable difficulty sustaining their social housing tenancies, particularly making rent payments or repaying outstanding housing debts. This situation is compounded by the difficulty these individuals have communicating with FaCS, including delays in response or poor customer service from FaCS. Some HPLS clients with mental illness face considerable difficulty when negotiating with FaCS to settle their debt. For tenants with mental illness, the receipt of a termination notice and a hearing at NCAT can be particularly intimidating and distressing. The provision of advocacy assistance through HPLS assist with early resolution of disputes involving rental debt, thus avoiding the escalation of the dispute through the issuing of termination notices or NCAT hearings.

It is also the experience of HPLS that people who are homeless or at risk of homelessness greatly benefit from legal representation at NCAT hearings. Specialist legal representation for people with mental illness at NCAT is essential given the particular vulnerability of people with mental illness to civil debt and tenancy problems. Many HPLS clients are unable to advocate effectively on their own behalf in a relatively formal setting such as NCAT. However, with the advice of HPLS and other specialist support services, it is possible to achieve excellent outcomes for this client group.

### 2.6.2 Appropriate policing for rough sleepers and homeless people in public places – the NSW Protocol for Homeless People in Public Places

The Protocol for Homeless People in Public Places (the Protocol) is a key mechanism that supports delivery of appropriate responses for people who are rough sleeping and experiencing chronic homelessness. The Protocol was originally developed in 2000, and then revised by the NSW Government in 2012 and 2014.

The Protocol has been endorsed by 12 NSW Government Departments and statutory agencies that have an operational presence in public places, or provide a service to assist homeless people. These include NSW Police, RailCorp, State Transit Authority of NSW and Sydney Harbour Foreshore Authority.

The Protocol aims to ensure that homeless people are treated respectfully and appropriately and are not discriminated against on the basis of their homeless status. It also aims to assist homeless people receive needed or requested services.

42 Ibid 89-90, 92-94.

43 See Coumarelos et al, 2012, above n 24, 129, 142.

44 Schetzer 2008, above n 30, 91.

According to the Protocol, a homeless person is not to be approached unless:

- They request assistance;
- They appear to be distressed or in need of assistance;
- An official seeks to engage with the person for the purpose of information exchange or provision of a service;
- Their behaviour threatens their safety or the safety and security of people around them;
- Their behaviour is likely to result in damage to property or have a negative impact on natural and cultural conservation of environment, including cultural heritage, water pollution and fire risks;
- They are sheltering in circumstances that place their or others' health and safety at risk;
- They are a child who appears to be under the age of 18;
- They are a young person who appears to be 16 or 17 years old who may be at risk of significant harm;
- They are a child or young person who is in the care of the Director-General of the Department of Family and Community Services or the parental responsibility of the Minister for Family and Community Services.

The Protocol is based on the principle that homeless people have the same entitlement as any member of the public to:

- Be in public places, at the same time respecting the right of local communities to live in a safe and peaceful environment;
- Participate in public activities or events; and
- Carry with them and store their own belongings.[45]

The Protocol was originally introduced in 2000, to provide a framework for relations between officials, including police, and homeless people in public places, as Sydney prepared to host the 2000 Olympics. The original Protocol was not reviewed until 2012. In 2014 the Protocol was reviewed with a commitment to further review every two years.

It is important to note that the Protocol is not binding and has no legal force. While it may assist in improving relations between public space law enforcement officials and homeless people, it is still subject to individual police/enforcement official discretion.

PIAC considers that the Protocol is an essential guideline for law enforcement and public space officers across State and local governments. It assists them to develop appropriate responses to people who are homeless in public places, minimising the prospect of inappropriate policing and law enforcement contact that could otherwise place homeless people at risk of criminal charges and custodial sentences. The Protocol provides important guidance for public space officers across government to direct homeless people to appropriate services and supports.

The effectiveness of the Protocol, however, relies on all Government departments and statutory agencies that have an operational presence in public places, as well as all local Governments, to reaffirm their commitment to implementing the Protocol and ensuring that their public space and

45 NSW Government, Family and Community Services, 'Protocol for Homeless People in Public Places', August 2014, available at <http://www.housing.nsw.gov.au/__data/assets/pdf_file/0013/330322/TheProtocol_Factsheet.PDF> (accessed 20 October 2016).

law enforcement officers receive regular training regarding appropriate policing and interaction with people who are homeless in public places.

### 2.6.3 Limiting fines for people on welfare benefits or experiencing homelessness

In 2008 the NSW Government recognised the difficulty faced by people who are homeless or in difficult financial circumstances in relation to fines and penalty notices, and introduced reforms to the administration and enforcement of court fines and penalty notices, particularly for vulnerable groups of people (*Fines Further Amendment Act 2008* (NSW)). These reforms:

- Allowed people who receive Centrelink benefits to refer a fine to the Revenue NSW (formerly the State Debt Recovery Office) early and without enforcement costs, so that they can access Time to Pay arrangements or an instalment plan;

- Made it clear that law enforcement officers may give a caution instead of a penalty notice, in appropriate circumstances. In deciding to give a person a caution the officer must have regard to the applicable guidelines relating to the giving of official cautions in respect of penalty notice offences. The matters that can be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include:
    - The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public;
    - The person is homeless;
    - The person has a mental illness or intellectual disability;
    - The person is under 18;
    - The person has a special infirmity or is in very poor physical health;
    - The offending behaviour is at the lower end of the seriousness scale for that offence;
    - The person did not knowingly or deliberately commit the offence;
    - The person is cooperative and/or complies with a request to stop the offending conduct;
    - It is otherwise reasonable, in all the circumstances of the case, to give the person a caution.
- Introduced a statutory system for the administrative review of penalty notices on certain specified grounds.[46] Factors that may be taken into consideration include if the person was suffering from a diagnosed mental health condition, cognitive impairment or homelessness which meant that she/he was unable to understand that she/he was offending and to control her/his conduct, which contributed to the offence.

- Established a two-year pilot fine mitigation scheme called Work and Development Orders (WDOs) that allowed certain disadvantaged people to clear their fine debt by undertaking unpaid work, courses or treatment, with the support of an approved organisation or registered health practitioner.

46 *Fines Act 1996* (NSW), s 24A.

After a comprehensive evaluation that found that WDOs reduced reoffending in the fine enforcement system and the broader criminal justice system, and engaged people in appropriate treatment or activities such as mental health, drug and alcohol treatment, the WDO scheme was made permanent in 2011.

The WDO scheme enables eligible people who are experiencing significant hardship to reduce their fine debt through voluntary participation in unpaid work, courses, treatment, programs and other activities.[47]

A WDO can be made in relation to all or part of an unpaid fine if a fine enforcement order has been made in respect to the person who has been fined, and that person is eligible for a WDO because she/he:

- has a mental illness,
- has an intellectual disability or cognitive impairment,
- is homeless,
- is experiencing acute economic hardship, or
- has a serious addiction to drugs, alcohol or volatile substances.[48]

A person will be deemed to be in acute economic hardship if s/he is in receipt of the following benefits

- Newstart Allowance
- Sickness Allowance
- Age Pension;
- Department of Veterans' Affairs benefits
- Youth Allowance
- Parenting Payment
- Disability Support Pension
- Carer Payment
- ABSTUDY
- AUSTUDY

The Commissioner of Fines Administration at Revenue NSW can make a WDO after she/he has made either a penalty fine enforcement order or a court fine enforcement order.

Participation in the WDO scheme requires the support of an approved WDO sponsor. Not-for-profit organisations, government agencies and health practitioners can apply to the Department of Justice to become a WDO sponsor.

A number of eligible activities can be undertaken under a WDO, to reduce fine debt:

- unpaid voluntary work for or on behalf of an approved organisation reduces debt by $30 an hour, up to the $1,000 maximum per month;
- undertaking financial counselling, other counselling or participating in educational, vocational or life skills courses reduces debt by $50 an hour ($350 for a full day), again up

47 *Fines Act 1996* (NSW), s 99A.

48 *Fines Act 1996* (NSW), s 99B(1).

to the $1,000 maximum per month; and
- full compliance with a mentoring program, drug or alcohol treatment or medical/ mental health treatment (in accordance with a treatment plan) reduces debt up to $1,000 per month. Partial compliance may result in proportionally less debt reduction.

Benefits of WDOs

According to a 2015 survey of WDO sponsor organisations, 93% of organisations indicated that the WDO scheme was effective in enabling 'vulnerable people to resolve their outstanding NSW fines by undertaking activities that benefit them and the community.'[49] Sponsors were also very positive about the outcomes of the scheme for their clients who had participated:

- 95% said the scheme had helped reduce the level of stress and anxiety their clients felt about their fines debt;
- 87% reported the scheme had enabled clients to address the factors that made it hard for them to pay or manage their debts in the first place.[50]

A 2011 evaluation of the pilot WDO program found that WDO clients were unlikely to receive another fine or penalty, with over 80% of WDO clients to that time not receiving another fine or penalty notice enforcement order since having their WDO approved.[51] The evaluation also identified other benefits of the WDO scheme including:

- WDOs provide an incentive for clients to engage with services and/or treatment programs;
- WDOs provide psychological benefits for clients by alleviating the stress, anxiety, despair and shame that many people facing significant fine and penalty notice debt experience;
- Improved self-esteem, agency and self-efficacy of WDO participants;
- WDOs provide participants with an incentive to work leading to employment or increased employment opportunities;
- Significant savings to the NSW Government in terms of the cost of enforcement processes for disadvantaged individuals who have no realistic process of ever being able to repay their penalty notice debt.[52]

Postpone enforcement of Fines/Write-off fines

The Commissioner of Fines Administration at the Revenue NSW can also postpone enforcement of an overdue fine if they are satisfied that a person is facing serious financial, medical or domestic problems. A person can apply to the Commissioner to have enforcement of an overdue fine postponed.[53] If successful, the OSR will stop further enforcement action on the overdue fine for five years. The Commissioner can also write off an amount owing under an unpaid enforcement order where a person is incapable of making a payment or where continued enforcement is unfair or otherwise unjust.[54]

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49 INCA Consulting (2015), *Evaluation of the Work and Development Order Scheme: Qualitative Component*, Final Report, NSW Department of Justice, May 2015,12.

50 Ibid 14.

51 NSW Attorney General and Justice (2011), *A fairer fine system for disadvantaged people – An evaluation of time to pay, cautions, internal review and the work and development order scheme*, May 2011, 41-2.

52 Ibid 42-48.

53 NSW Office of State Revenue State Debt Recovery (2017), How to Apply to Postpone an Overdue Fine, <http://www.sdro.nsw.gov.au/lib/docs/forms/sfs_eo_002.pdf> (12 June 2017).

54 NSW Finance Services and Innovation (2016), Guidelines for Writing Off Fines, 20 December 2016, <http://www.sdro.nsw.gov.au/lib/docs/misc/guidelines_for_writing_off_fines.pdf> (12 June 2017).

### 2.6.4 Specialist courts and therapeutic court-based initiatives available for homeless people

Specialist court initiatives seek to address the underlying causes of offending for people who face particular disadvantages, including homelessness, substance addiction, mental illness or significant financial hardship. These initiatives seek to engage other community services to enable specific sentencing options to be tailored to the particular needs of defendants when they come in contact with the criminal justice system. The overarching aim is to administer a range of alternative sentencing options and more suitable diversionary strategies to address the underlying causes of offending. These initiatives are also able to develop appropriate sentencing alternatives to the imposition of fines on financially disadvantaged individuals who present before the court. Examples of effective specialist courts that have been established in NSW and Victoria include:

- The Neighbourhood Justice Centre
- The Court Integrated Services Program[55]
- The Enforcement Review Program (Victoria).[56]

Specialist therapeutic court initiatives are specifically established to address the needs of other vulnerable groups (e.g. people suffering from substance addiction). Although these specialist court initiatives do not directly target homeless people, it is important to note that many of the defendants who are eligible for these specialist initiatives, also frequently experience chronic housing needs. In NSW, three such initiatives are:

- The Magistrates Early Referral into Treatment (MERIT)
- The NSW Drug Court.

Magistrates Early Referral into Treatment

The Magistrates Early Referral into Treatment (MERIT) program is a three-month pre-plea diversion scheme based in NSW local courts. The program gives offenders the opportunity to address their underlying drug problems, by voluntarily working towards rehabilitation as part of the bail process. At the end of the program, the magistrate obtains a report detailing the participant's progress, whether the participant undertook treatment and whether treatment was effective. It may also contain recommendations for future treatment, which can assist the court to impose further ongoing treatment in sentencing.[57] The aim of the MERIT program is to reduce criminal offending associated with drug use. The program is designed to allow defendants to focus on treating drug and related health problems independently from their legal matter.

Successful participation in the program may favourably impact the outcome of the defendant's impending court case, as it indicates a willingness and capacity for rehabilitation, and magistrates may take such factors into account on sentence. On the other hand, failure to complete the program does not necessarily adversely affect their sentence (as this would penalise the defendant for entering into a voluntary treatment program in the first place). Rather, failure to

55 Victorian Auditor-General (2011), *Problem-Solving Approaches to Justice*, Victorian Auditor-General's Report, April 2011, Victorian Government, 32-33, 37.

56 Magistrates' Court of Victoria, Enforcement Review Program (ERP) (2017), <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/enforcement-review-program-erp> (12 June 2017).

57 Lulham, R (2009), *The Magistrates Early Referral into Treatment Program*, Crime and Justice Bulletin No 131, NSW Bureau of Crime Statistics and Research, 2.

complete MERIT gives insight into the likelihood of success of a future court-mandated rehabilitation program, enabling the final sentence to be better tailored to the defendants needs.

The following HPLS case studies demonstrate the benefits the MERIT program can bring to homeless persons:

***HPLS Case Study***

*AW had become homeless after losing his full-time job because of a heroin addiction. He was facing charges for larceny for property worth approximately $30,000. He had made a number of previous attempts to access the MERIT program without success. He was sentenced to ten months imprisonment with a non-parole period of four months. The matter went to the District Court on appeal.*

*While on bail for the larceny offence AW was apprehended and charged with goods in custody. HPLS liaised with MERIT and this time AW was assessed as suitable. He committed to completing the MERIT program and received a glowing report at the conclusion of the treatment. As a consequence, the presiding judge placed him on a suspended sentence for the larceny offence. With respect to the goods in custody charges, the client received a positive pre-sentence report because of his participation in the MERIT program and was ordered to complete a period of community service and pay a fine.*

*Without the MERIT program AW would have received custodial sentences for both offences. He would not have received treatment for his heroin addiction and his downward spiral into chronic homelessness would likely have continued on his release from custody. Access to the MERIT program meant that he was able to address his drug addiction and face a future where he could realistically seek employment and rebuild ties with his children.*

***HPLS Case Study***

*NT was charged with stealing a number of LCD screens. He was sentenced in the Local Court to 10 months' imprisonment. He appealed to the District Court on the ground of severity and commenced the MERIT program.*

*NT had not completed the program when the appeal was heard, but the Judge imposed a suspended sentence instead of full-time custody and he completed the MERIT program.*

*Prior to the appeal, NT committed further offences. When these matters came before the Magistrate, she ordered a Pre-Sentence Report from Probation and Parole. Due to the fact that he had completed the MERIT program, he was found to be eligible for a community service order and was sentenced to community service.*

A 2009 NSW Bureau of Crime Statistics and Research (BOCSAR) evaluation of MERIT found that participants had a 12 per cent reduced offending rate, when compared with a similar group of non-participants.[58]

At present, MERIT is restricted to adult offenders with demonstrable problems with illicit drugs, though in a limited number of locations. MERIT is also available to offenders with alcohol problems.

<u>NSW Drug Court</u>

The NSW Drug Court has proven to be an effective means of diverting chronic, drug dependent offenders away from the criminal justice system, into rehabilitative treatment. A 2008 BOCSAR

58 Ibid 1.

evaluation found the Court was more cost effective and more successful at lowering the rate of recidivism than prison. A distinct benefit of the Court is that it has the flexibility to allow for relapse as part of the recovery process.[59]

To be eligible to be referred to the Drug Court, applicants must reside in appropriate accommodation. The accommodation is not deemed suitable if it is occupied, or frequented by people who appear to abuse drugs and alcohol or who reasonably appear to engage in criminal activity. Thus the Court may exclude homeless people, who do not, by definition, reside in stable accommodation. PIAC notes that in 2011 a Shared Access Operating Agreement was signed between the Drug Court of NSW and Housing NSW to provide housing and support to participants of the Drug Court Program in Western Sydney (effective until 2013).

In order to access the Court, the offender's usual place of residence must be within nominated local government areas. It is noted that many parts of the Sydney metropolitan area and regional NSW are not covered by the jurisdiction of the Drug Court. In addition, referrals to the Drug Court are not available for Children's Court matters.

Despite the high incidence of drug dependency among homeless people, they are often ineligible for referral to the Drug Court, as it requires stable residency, residency within the court's catchment area, or because they suffer from a mental condition that prevents participation. Homeless people, by definition, have no stable accommodation, and frequently suffer mental illnesses. Additionally, there are currently no places available for women.

59 Don Weatherburn, Craig Jones, Lucy Snowball and Jiuzhao Hua (2008), *The NSW Drug Court: A Re-evaluation of its Effectiveness – Crime and Justice Bulletin No. 121* (NSW Bureau of Crime Statistics and Research, 2008).

# 3. Prisoners and Detainees

PIAC has a long history of working with prisoners and detainees. This work has predominantly been in New South Wales.

PIAC has represented a number of families in coronial inquests specifically related to deaths in Corrective Services custody.[60] PIAC has also contributed to the development of coronial law reform, predominantly relating to inquests regarding deaths in custody.

PIAC has represented individuals who have suffered false imprisonment, and assault and battery, in Corrective Services and Juvenile Justice custody, in claims against both these organisations. PIAC has also represented the family members of individuals who passed away in custody in nervous shock claims, and an individual in a personal injury claim following failure to provide him with proper medical treatment. PIAC represented the First People's Disability Network at the Royal Commission into the Protection and Detention of Young People in the Northern Territory.

PIAC is currently running a project addressing the health needs of prisoners in Corrective Services custody. PIAC is taking referrals from other legal services and organisations, as well as prisoners' self-referrals, of complaints regarding prisoners' health needs, and attempting to resolve these complaints through advocacy. Finally, PIAC often works with prisoners and detainees when running strategic litigation on their behalf in civil matters, which are often unrelated to their imprisonment.

In this submission, we focus on access to justice for prisoners and detainees in NSW.

## 3.1 The provision of civil and family law advice in NSW to prisoners and detainees

PIAC agrees with the Law Council's position in its consultation paper that appropriate, accessible and targeted services are the most effective way to ensure access to justice for prisoners and detainees.

The Law Council's Consultation Paper has identified that access to advice regarding civil and family law issues is of particular importance for prisoners, and is a gap in the current provision of advice and legal assistance to prisoners and detainees.

In New South Wales, as noted in the Law Council's Consultation Paper, there is a dedicated service provided by Legal Aid NSW to prisoners, which provides independent advice and assistance in matters like bail, appeals, legal aid, parole, classification and other prison issues, as

[60] This has included the family of Michael Nolan, who died of a self-inflicted injury at the Metropolitan Remand and Reception Centre in 2013; the family of Tracy-Lee Brannigan, who died of a heroin overdose while being held in Dillwynia Correctional Centre; the siblings of Mark Holcroft, who died after suffering a heart attack in the back of a prison van, which was being driven from near Bathurst to Wagga Wagga; two members of Tut Nyal's family, a man who died while imprisoned in Long Bay gaol; and the family of Scott Simpson, who committed suicide in Long Bay gaol after spending the two years prior to his death in isolation.

well as advice and assistance in other areas of prisoners' lives such as family law and civil law (including fines, debt, housing) to help them rehabilitate after release.

Community Legal Centres (CLCs) in NSW also provide legal advice and assistance to prisoners, often through in-person outreach to Correctional Centres. The Law Council's Consultation Paper has identified the Legal Education and Advice in Prison for Women (LEAP) program, established by Women's Legal Services NSW, Wirringa Baiaya and Hawkesbury Nepean Community Legal Centre, as one example of this. Other CLCs in NSW also provide outreach services to Correctional Centres in NSW. In addition, the Aboriginal Legal Service provides outreach services to some detention facilities, including to Juvenile Justice facilities in NSW, but this is predominantly in the areas of criminal and family law.

PIAC recommends that priority one of the Law Council's 'Possible Priorities for Discussion', that 'Investment in increasing the capacity of legal assistance providers: in particular, increasing their capacity to provide greater civil and family law services in order to help address the cycle of disadvantage that often leads people to criminality, imprisonment and recidivism', should be implemented.

As identified in the Law Council's Consultation Paper, providing an outreach service to prisoners is often very costly, given the long distances services often have to travel and issues around access such as lockdowns.

Nevertheless, PIAC is of the opinion that the provision of legal advice to prisoners in-person wherever possible is best practice. This is because of the low literacy levels of prisoners, which may impact on their ability to properly understand relevant paperwork if it has not been provided to the lawyer advising them, the relationship of trust that is able to be built in person, and the sensitivity of some family and civil law issues which make audio visual links and telephone advice services inappropriate.

In addition, if an advice service is provided by a legal service that is located close to where the prisoners or detainee is located or resides when not in custody, that service can provide ongoing support once the individual leaves custody, as well as appropriate referrals to non-legal services in the relevant area.

Accordingly, it is important that Community Legal Centres and the Aboriginal Legal Service in particular, as well as Legal Aid, are funded appropriately in order to provide dedicated services to prisoners and detainees.

This reflects recommendation 21.4 of the Productivity Commission in its Access to Justice Report:

> RECOMMENDATION 21.4
>
> To address the more pressing gaps in services, the Australian, State and Territory Governments should provide additional funding for civil legal assistance services in order to:
>
> - better align the means test used by legal aid commissions with that of other measures of disadvantage

- maintain existing frontline services that have a demonstrated benefit to the community
- allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding.

The Commission estimates the total annual cost of these measures to the Australian, State and Territory Governments will be around $200 million. Where funding is directed to civil legal assistance it should not be diverted to criminal legal assistance.

## 3.2 The provision of Community Legal Education (CLE)

In 2012 – 2014, PIAC coordinated a pilot of the Legal Literacy Project, which aimed to establish a legal education program in NSW Correctional Centres by integrating legal education into existing educational programs offered to prisoners by the Adult Education and Vocational Training Institute (AEVTI).

AEVTI was a Registered Training Organisation within CSNSW and provides prisoners with nationally recognised training courses in Language, Literacy, Numeracy and English for Speakers of Other Languages (ESOL). These courses (with the exception of ESOL) were available in every correctional centre in NSW and are designed to give people knowledge and skills for working and engaging with the community.

During the pilot, AEVTI teachers worked alongside lawyers from Legal Aid NSW and CLCs to develop and deliver a course that combined legal education and language, literacy and numeracy skills. The program also integrated and complemented existing legal resources available to prisoners. The pilot delivered classes to women at Silverwater Correctional centre over the course of a year, and received positive feedback from the women involved. The pilot also connected the women prisoners involved with relevant CLCs.

Following the pilot, a dedicated teacher was appointed to create course content, which was then utilised by teachers in Corrective Services NSW facilities.

In 2016, Corrective Services NSW announced that most of the education and training for prisoners would be outsourced. Only the Intensive Learning Centres, which are located at Mid North Coast Correctional Centre, South Coast Correctional Centre, Wellington Correctional Centre and Lithgow Correctional Centre, retain Corrective Services NSW staff. Education and training is now provided in Corrective services facilities in NSW by BSI Learning, a private education provider.[61]

Accordingly, it is unclear whether any of the course content developed as part of the Legal Literacy project will be used on an ongoing basis, and it is unlikely that it will be used on an ongoing basis by BSI Learning.

The model of delivering Community Legal Education through literacy classes was thought to provide an opportunity for prisoners and/or detainees to improve their literacy while learning about relevant legal issues. Moreover, the model utilised Corrective Services staff in an efficient

[61] Corrective Services NSW, Better Prisons, http://www.correctiveservices.justice.nsw.gov.au/better-prisons Accessed 10 October 2017.

way and meant that extra staff were not needed to supervise the delivery of CLE, as existing AEVTI staff were present while lawyers were delivering the relevant classes.

In NSW, the provision of CLE to prisoners and detainees is provided by CLCs and by Legal Aid NSW, but does not occur on a regular basis in all correctional centres throughout NSW.

PIAC considers that delivery of CLE is an important part of access to justice for prisoners and detainees. The Productivity Commission, in its report on Access to Justice, notes that

> Information and early advice can also help people to acquire the knowledge and skills to enable them to prevent legal problems from occurring or cases from escalating and giving rise to legal problems that are more expensive to solve.[62]

PIAC is also part of a working group that assists to maintain the Prisoners Legal Portal in NSW. The Legal Information Portal is an intranet site for NSW prisoners about the law, legal systems and legal problems. The Portal was installed on the offender computer network and rolled out across correctional centres in NSW. The Portal is an important resource for prisoners in order to be able to access legal information, and information about appropriate services that may be able to assist them with a particular problem.

PIAC recommends that legal information, through dedicated CLE sessions, as well as through other means such as a prisoner intranet, be provided to prisoners and detainees in regular and accessible formats and means.

## 3.3 The growth of the NSW prison population

The population of prisoners and detainees in New South Wales has grown by more than 15% in the past two years.[63] This is despite the fact that crime in NSW has decreased in the past ten years.[64] The NSW Correctional system has been designed to accommodate 11,000 prisoners. At June 2017, it held 13,092, not counting individuals held in police cells. As at June 2017, the growth in the prison population was slowing, although the NSW Bureau of Statistics and Research predicts that the NSW prison population will reach 13,400 by June 2018.[65]

The increase in prisoner numbers has meant that access to education, programs and even to legal advice on occasion has been impacted.

This is because there are a limited number of Audio Visual Link up suites, and so an increase in prisoner numbers, particularly of those prisoners on remand, means access to AVL suites is also limited. An increase in prisoner and detainee numbers can also effect the number of lockdowns

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62 Productivity Commission, *Access to Justice*, p866.

63 Matthew Clayton, 'NSW Prison Numbers grow 15pc in two years to reach record high, amid overcrowding concerns' ABC, < http://www.abc.net.au/news/2017-01-30/nsw-prison-numbers-reach-record-highs/8224288> accessed 10 October 2017.

64 Matthew Clayton, 'NSW Prison Numbers grow 15pc in two years to reach record high, amid overcrowding concerns' ABC, < http://www.abc.net.au/news/2017-01-30/nsw-prison-numbers-reach-record-highs/8224288> accessed 10 October 2017.

65 Bureau of Crime Statistics and Research, NSW Custody Statistics: Quarterly Update June 2017, < http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2017/mr-NSW-Custody-Statistics-Quarterly-update-June-2017.aspx> Accessed 10 October 2017.

that occur, which means in-person visits may be cancelled, and the ability of correctional centres to manage legal visits in person and by AVL is compromised.

In response to the growth in the NSW prison population, the NSW Government has announced the biggest ever expansion of infrastructure for the state's prison system, to occur over the next four years. $3.8 billion is being spent on new beds, announced in the 2016/17 state budget, to be located in new facilities built on the grounds of existing correctional centres, plus the re-opening or conversion of facilities at Berrima, Unanderra (Wollongong) and Mary Wade (Lidcombe). Berrima and the Illawarra Reintegration Centre at Unanderra have already opened.[66]

The Law Council, at page 24 of the Consultation Paper, has identified 'law and order policies' as one of laws, policies and practices that impact on prisoners and detainees. The increase in the infrastructure of the prison system in NSW, rather than measures to attempt to reduce the prison population numbers, could be seen as evidence of this particular approach playing out in NSW.

[66] Corrective Services NSW, 'New Prisons' < http://www.correctiveservices.justice.nsw.gov.au/new-prisons> Accessed 10 October 2017.

# 4. Asylum Seekers

PIAC acknowledges and broadly supports the summary of issues and key areas of concern made in the Justice Project's consultation paper on barriers to justice for asylum seekers.

At PIAC, our Asylum Seeker Health Rights Project is working to urgently improve access to medical and mental health care for people in Australian immigration detention centres.

We are of the view that it is uncontroversial to provide for reasonable access to health services in our immigration detention centres. The courts have recognised a prisoner's right to such care in our jails for over 100 years. In every state and territory, legislation clearly states that a prisoner is entitled to the same level of health care as a person living in the Australian community.

For example, a maximum-security prisoner in Victoria has the right, guaranteed under the *Corrections Act 1986* (Vic), to reasonable medical care and treatment. If they have a mental illness, they have a specific right to reasonable access to special mental health care and treatment.

An asylum seeker in an Australian immigration detention centre has no such rights under the *Migration Regulations 1996* (Cth). The courts have described the lack of regulatory framework regarding immigration detention conditions as a "legislative vacuum."[67]

In addition to the comments made by the Law Council of Australia, we submit that:

1. The removal of the Commonwealth-funded Immigration Advice and Application Assistance Scheme (IAAAS) has not only seriously limited the capacity of an asylum seeker to obtain legal advice and representation about their immigration case, but it has also created a major barrier for an immigration lawyer to refer potential civil claims to organisations like PIAC.

   Under the IAAAS-scheme, from an early stage, an immigration lawyer could triage any other legal problems identified outside the scope of the asylum seeker's immigration case to an appropriate service-provider. Now, as a result of the removal of the scheme, asylum seekers are often unaware of their entitlements to file complaints about lack of access to reasonable health care or their right to file proceedings in certain instances. An asylum seeker's civil case may be further impacted upon by the expiration of a limitations period.

2. Lack of access to adequate medical and especially mental health services in immigration detention further exacerbates existing barriers to justice. Namely, an unwell asylum seeker population (without legal assistance) faces additional challenges to properly understanding the legal requirements to prepare their asylum case; preparing their claims in full; and receiving a fair hearing and just outcome or decision.

   As noted in the consultation paper at 27, the Kaldor Centre states that given their experiences with "trauma, a lack of support networks, poor health, language and cultural

[67] *Mastipour v Secretary, Department of Immigration and Multicultural & Indigenous Affairs* [2004] FCAC 93 per Finn J at [2]

barriers, asylum seekers are not likely to articulate their claims in a coherent way, nor to build up enough trust with decision-makers to share personal details".

We routinely encounter clients with deteriorating medical and mental health conditions throughout the course of immigration proceedings. These clients face further disadvantage to obtaining a favourable outcome from the court, tribunal or Minister, in these circumstances.