QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

SUBMISSION
TO THE
PRODUCTIVITY COMMISSION'S INQUIRY INTO
Access to Justice Arrangements
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About QPILCH
QPILCH is an independent, not-for-profit incorporated association bringing together private law firms, barristers, law schools, legal professional associations, corporate legal units and government legal units to provide free and low cost legal services to people who cannot afford private legal assistance or obtain legal aid. QPILCH coordinates the following services:

- The **Public Interest Referral Service** facilitates legal referrals to member law firms and barristers for free legal assistance in public interest civil law cases.
- The **QLS Pro Bono Scheme** and **Bar Pro Bono Scheme** facilitate legal referrals to participating law firms and barristers for legal assistance in eligible civil law cases.
- The **Homeless Persons' Legal Clinic** (HPLC) provides free legal advice and assistance to people experiencing homelessness or at risk of homelessness.
- The **Refugee Civil Law Clinic** provides free legal advice and assistance on matters other than immigration law to refugees and asylum seekers experiencing financial hardship.
- The **Administrative Law Clinic** provides legal advice and extended minor assistance in administrative law matters.
- The **Self Representation Service** (SRS) provides free, confidential and impartial legal advice to eligible applicants without legal representation in the civil trial jurisdictions of the Brisbane Supreme and District Courts, the, the Queensland Court of Appeal and the Queensland Civil and Administrative Tribunal (QCAT).
- **Mental Health Law Practice** provides civil law assistance to people experiencing mental illness and advocacy to review Involuntary Treatment Orders before the Mental Health Review Tribunal.

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

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

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

1. INTRODUCTION AND SUMMARY

This submission follows the structure of the Issues paper, referring to particular TOR when appropriate.

We address some of the specific questions in the Issues Paper. Given the time available in which to prepare the submission and the resources available, QPILCH have been unable to examine all the issues raised, even issues with which we have some experience.

Recommendations made in this paper are highlighted.

In summary:

Importance of access to justice (Chapter 2 of the Issues Paper)
In the first part of this submission, as raised in the issues paper, we review the strengths and weaknesses of the system overall and outline some of the principles we think should underpin the legal assistance system.

Exploring legal needs (TOR 2 and 5 and Issues Paper chapter 3)
We have not looked at the question of need.

Costs and complexity (TOR 1, 3 and 4 and chapter 4 of the Issues Paper)
The issue of costs is a clear barrier to effective access, particularly to access the courts, but it is by no means the only barrier. Most clients in QPILCH's self representation service are self represented because they could not afford a lawyer. Failure to access the courts is not limited to the very poor, but is also difficult for many wage earners. The increasing cost of litigating a dispute, including the cost of legal assistance and any potential cost orders made against unsuccessful parties, creates a significant barrier to access to justice, particularly at the superior court level. The financial cost of resolving a dispute, where it can be estimated, is often not proportional to the matters at stake. It is important to implement measures that make the legal cost of resolving a dispute transparent and definitive.

The lack of simplicity and usability in the legal system affects vulnerable and disadvantaged members of society the most. Many of our clients struggle with court forms and timelines. Many of our clients also experience difficulty in understanding the law. The introduction of plain English guides and summaries of legislation may assist in alleviating this issue.

The use of technology such as video conferencing to provide legal assistance is a potentially viable alternative to face-to-face advice but it is not a substitute in all cases and still has limitations that need to be overcome. In particular, there are still technical difficulties and it may be inappropriate for marginalized groups including those living in remote communities or with poor communication skills. A major geographic constraint to access to justice is the size and capacity of the legal profession in regional areas which impairs the ability of the profession to provide pro bono legal services. Another constraint is the absence of legal 'triage' services which provide an initial legal diagnosis followed by legal information, advice and assistance. QPILCH's rural, regional and remote (RRR) project is an example of a mechanism which assists in dealing with geographic barriers to accessing the justice system.

Unmet need (Issues paper chapter 5)
We consider three areas – homelessness, mental illness and self-representation, for which services in Queensland are in various stages of development. We focus on these because we have observed the greatest level of disadvantage, and while being addressed to some degree, still have unaddressed needs, particularly in rural and regional areas. The services we offer in these areas of need are cost-effective, practical and amenable to outreach to other areas of Queensland. We have not commented separately on Indigenous legal need because we have

no services targeted at Indigenous people, although we welcome applications from Indigenous people through all of our services and liaise with Indigenous organisations to facilitate referral. Nonetheless, we recognise Indigenous need as an area of great unmet legal need.

Avenues for improving access to justice (Chapter 6 of the Issues Paper)
We examine some issues that provide opportunities for improvements in the system, such as:

- the need for greater collaboration and coordination
- eliminating excessive red tape
- innovation.

Prevention (TOR 8 and chapter 7 of the issues paper)
A focus on prevention and early intervention is a current priority of government. People need easy access to information and advice. While it is true that many people first seek assistance from family, friends, trade unions etc, they must be able to obtain quality professional information and advice when social support is not available or no longer viable. Information needs to be in a plain English form that is accessible when needed and enables people to take action. However, this is insufficient unless there is a web of appropriate services that can provide advice to a client on their specific matter when necessary (see next section). There should also be more emphasis on giving people the skills to resolve disputes themselves, but expert advice and assistance is still needed as people inevitably fall though gaps in the system.

Matching and mixing (Chapter 8 of the Issues Paper)
The best role government can play is to provide funding. It needs to use this power equitably and as a partner with service providers, encouraging best practice in service delivery and collaboration and coordination. Efficiency and effectiveness of individual services and coordinating mechanisms can be assessed through effective accountability regimes (see also the costs of accessing civil justice) and the right coordinating structures. The key is to ensure there is a sufficient range of mechanisms to suit individual needs at the right time within a coordinated infrastructure of justice. There are many examples of innovative and less expensive programs designed and run by legal aid and CLC lawyers with the assistance of firms and barristers acting pro bono that warrant understanding and support that are integral to this infrastructure.

Using informal mechanisms to best effect (TOR 8 and Chapter 9 of the Issues Paper)
We outline the ADR and ombudsman models that offer less formal means to resolve disputes as early as possible. In Queensland, there are several options available for free or low costs mediation. These of course rely on the willingness of parties to participate. It is widely accepted that if a dispute can be resolved quickly, cheaply and fairly through ADR, disputants are generally more satisfied with the outcome than if that dispute had been resolved through court process. However, while ADR is appropriate for most civil matters, it has acknowledged limitations. It is important for service providers to be cognisant of power imbalances between disputants and the impact that ADR can have on the fairness or equity of process and outcome. Greater use of ADR could be made in relation to minor disputes, disputes within and between not-for-profit organisations, and disputes involving self-represented litigants. The number of ombudsmen appears to be growing. While these services are valuable, often their decisions are not binding, they are under-resourced, or may be utilised by disputants for ulterior purposes.

Improving the accessibility of tribunals and courts (TOR 7 and Chapters 10 and 11 of the Issues Paper)
Queensland courts and tribunals are among the most advanced in Australia. Court rules were reviewed in the 1990s, leading to the introduction of the UCPR. While the rules are still difficult to navigate, they are being adapted to respond to particular needs. QPILCH's Self Representation Service, the first of its kind in Australia, was developed because QPILCH was unable to refer litigation matters at the same time that the courts sought to come to grips with the problems of self-representation. The courts have also become receptive to understanding

the perspective of self-represented litigants, resulting in changes to the rules to accommodate this perspective and to improve access without compromising impartiality.

Queensland has also seen a total revision of its tribunal system with the introduction of QCAT. While primarily a no-representation forum, QPILCH's Self Representation Service in QCAT helps parties who cannot navigate the system. The Queensland Civil and Administrative Tribunal (**QCAT**) is an example of a consolidated tribunal model. The objectives of QCAT are to resolve disputes in a way that is just, economical and quick, with a focus on reducing costs for parties and promoting alternative dispute resolution where possible. While many procedures and practices implemented by QCAT assist in giving parties access to the justice system in a way that is not bogged down in complex court rules, there are some aspects of its operation that have the ability to reduce the likelihood of parties obtaining a fair and just resolution to their dispute, including: that efficiency is given the same priority as fairness in the objects of QCAT; there are unresolved jurisdictional issues.

In approaching court practices, QPILCH sees merit in expanding the scope of model litigant rules beyond the scope of government and expanding the civil procedure rule's overarching obligations of the parties. Disclosure is a process that causes difficulties and expense, even for well resourced parties. There may be scope to consider earlier intervention in court proceedings to try and reduce the volume of documents involved in disclosure. The Queensland Courts have adopted a number of mechanisms to more intensively manage certain cases, which show that the rules while complex can also be used to aid access.

The costs of litigation are of particular concern in public interest cases, which raise important and complex legal issues and must be litigated in superior courts. An award for security for costs and the costs convention when a party applies for interim relief place further burdens on public interest litigants. Many overseas jurisdictions have specific public interest cost regimes which is something Australia should consider.

Effective and responsive legal services (TOR 8 and Chapter 12 of the Issues Paper)
These are key issues for QPILCH. The stages in addressing need - information, advice and minor assistance, referral, representation and self-representation are our focus because each stage requires effective funding. We argue that providers such as CLCs are cost-effective, flexible and responsive services. We also argue that much of the public debate misses the point about legal assistance and ideas such as vouchers would not work in our system and would be counter-productive.

Litigation funding (Chapter 13)
We have not addressed chapter 13 on litigation funding. QPILCH made a submission to SCAG in 2006 which can be accessed at
http://qpilch.org.au/_dbase_upl/SCAG%20submission%2013.09.06.pdf

Performance measurement (TOR 10 and Chapter 14 of the Issues Paper)
Outcome measurement is not effective because outcome data is difficult to collect and a client can have the best legal advice but still have a poor case. The vast amount of data that is collected, if it is used, is not always used to take decisive action.

2. AVENUES FOR DISPUTE RESOLUTION

Principles
If we are committed to the rule of law and equality before the law, then our society has to pay the costs of a system that ensures all citizens have access to it. In principle, the rule of law has no meaning if access to justice is not a pillar of our legal system.

The Issues Paper points out that just as the justice system is central to the orderly conduct of commercial dispute resolution, so all the other mechanisms for dispute resolution are central to the orderly running of civil society. Everyone, not just those who have money, should be able to participate in this system.

If a person with means can use an avenue to resolve a dispute, then so should a person without means. If a law gives a right of access, then the poor should be able to use it. And the outcome if negative, with an adverse costs order that would impact harshly on a party, should not be so disproportionate that they are deterred if they have an arguable case. The courts and tribunals have adequate powers to deal with an abuse of process.

Nonetheless, the challenges for the Commission can only be eased with access to all relevant information, which includes an understanding of how proper funding of the system can also assist savings that making the justice system not only worthwhile but economically sensible and prudent. There will be financial benefits and costs savings if all parts of the system work together.

The main thing that is needed from government is confirmation of its commitment to working with those it funds as real partners, putting aside ideology and simplistic views, to work together to achieve positive outcomes for all Australians. Views can differ but the outcomes sought can be reached through consensus, in accordance with effective policy and open determination of priorities and the allocation of resources. Open systems mean better systems.

History

As the Issues paper points out, over many years, there have been many access to justice inquiries and reviews. From the early 1990s, governments' commitment to justice and the rule of law did not stem the flow of funding to undertake civil law work out of legal aid commissions.

This issue should not be passed over lightly. One media comment stated that the failure of past reviews was because they were run by lawyers.

Since 2002, QPILCH has made 37 submissions to government, almost all at the invitation of government to contribute to a government initiated inquiry. We are not aware of any specific reforms that have been implemented as a direct result of these inquiries, or that any of our submissions have been read, let alone that our recommendations were of interest. Some inquiries have not publicly reported and some have even stalled after commencement (e.g. the SCAG inquiry into litigation funding).

No doubt, the inquiries and reviews have been motivated by good intentions - how does our justice system work? How can it be better? How can it be sustained? No stakeholder has all the answers to the problems of our legal assistance system, but much effort goes into the preparation of a submission like this, and much productive work and many good ideas have been wasted and lost.

Without understanding this history, we cannot fully understand why we are reviewing operational issues again now, including the forces that are shaping the legal assistance sector of the future. If the many questions this inquiry raises are just a distraction from the only real objective, to constrain costs, then this effort too will be wasted.

We recommend that the Productivity Commission either conduct an historical analysis or recommend an analysis of the history of the legal assistance sector and the many inquiries that have examined it over the last 20-30 years, in order to understand what we have been trying to achieve. This review should also examine and make recommendations on improving the inquiry process so that resources are not wasted in future on endless and unproductive reviews.

Misconceptions promoted by media

Coexistent with the many reviews are repeated criticisms of the existing system, backed by newspaper articles railing against the legal profession, either the 'excessive costs' lawyers charge, the incompetence and political bias of the legal assistance sector, the self-serving agenda of the legal profession, or that others can do it better than the self-interested lawyers working in legal aid commissions and CLCs. The system is not without its problems, but much of the trenchant criticism is based on ideology not fact.

The notion that Legal Aid and CLCs are 'left-wing' is simplistic and misguided. Taking action to protect individual rights and access to justice is a part of a lawyer's role and is part of our constitutional framework and commitment to equal application of the law and protection of the law. The commitment to the modern notion of human rights can be found across the political spectrum. After World War II, Churchill promoted the European Human Rights Charter, which was implemented by the Conservative Government in 1953. Protection of rights is not owned by any political perspective. Similarly, efficiency is not just the agenda of 'right wing' economic rationalists.

Seeing everything in terms of 'right' and 'left' and 'interests' is only in the mind of the ideologue who believes their view and their way is the only way. It merely makes rational discussion harder and places absolutism over receptiveness and understanding, and adherence over debate.

As outlined later, un-thought through and simplistic ideas like using vouchers make no practical or meaningful contribution to the debate because they are based on an inadequate understanding of how the system currently works. It is vital to have the full facts and to know the landscape before embarking on a debate of this kind.

Similarly, claims that Salvos Legal is a model that all CLCs should adopt are also founded on some fundamental misconceptions. Salvos Legal is an excellent model, but it is unlikely to have universal application. Salvos Legal accrues its funding by performing services for fees and channelling revenue into free services in Sydney and Brisbane. Its office in Goodna, Brisbane is making a vital contribution in an area with much need. However, Salvos Legal is unlikely to be able to replace the more than $115M of government and public purpose funded legal assistance provided in Queensland every year. This must be examined in context. For CLCs to adopt this model, they would need the backing of the large Australian welfare agencies to both seed their activities and attract corporate clients, replace existing bureaucracies with new ones and potentially compete on a large scale with the private profession, the very practices that provide the pro bono services on which the system also relies.

No society can afford full representation for all, so there is need for a mix and combination of responses, models and strategies working together, and the Salvos Legal model is only one important part of the infrastructure of justice.

The frequent criticisms and suggestions in the media are not new and have never assisted in creating or delivering practical and good services to Australians and improving the access to justice landscape.

Public/private partnerships are of great value, but should be used to extend the reach of legal assistance services, not replace them with something else.

Full potential not realised

The CLC model is a very good one, albeit one that largely runs on public monies and purpose funds. CLCs:

- marshal pro bono resources of law firms and use volunteers extensively to facilitate high quality legal services for disadvantaged people;

- marshal other resources where we can: enlisting students; lawyers outside private practice (retired practitioners, government and corporate lawyers and career-break lawyers);
- obtain philanthropic support;
- focus our services on those most in need and spend the time that severely disadvantaged people need to resolve their problems;
- go to where our clients need them and then work with social and support workers to facilitate and deepen the assistance provided to clients;
- research and survey clients' needs to ensure they are targeting and using resources effectively;
- develop innovative ideas into practical steps to continuously improve what they do;
- work with other bodies in pursuing collaborative working relationships; and
- comply with extensive accountability requirements.

With the support of government funding, CLCs coordinate the help of thousands of volunteer hours every year. They have developed specialties and services to respond to their community's needs. They work with local agencies to coordinate services. They are independent of local forces. They are unbureaucratic, flexible and responsive.

A weakness of the system is that the full potential of CLCs and PILCHs has yet to be realised.

A strength of the system is the many committed and dedicated people who work in legal aid commissions and community legal centres with a regard for the public interest as much as their own.

When funds are removed from the CLC sector, particularly from specialist provision, their clients don't just go away. They seek assistance from LAQ and other CLCs, creating pressures on those organisations. Such clients may also use other less constructive means to resolve disputes if they cannot get help from a lawyer.

While the legitimate role of government is to determine priorities, many problems have been caused by starving providers with funding or distributing it for political and other misplaced reasons. While we have to accept that budgets are not bottomless and politicians are politicians, better structures, more transparent processes and better knowledge may result in the outcomes that we all seek – more and better access to justice.

Adding value
The Productivity Commission asks how it can add value (page 3).

We note the policy objectives in the TOR are on 'constraining' costs and promoting access to justice.

The challenge for the Productivity Commission is to determine the size of the pie for the system to be viable and the distribution of the pie for it to be equitable and effective – is the funding enough and is it used wisely?

This submission mostly deals with the effectiveness of our infrastructure of justice that has been established to facilitate access to justice. The question of how funds should be distributed should not be a purely economic one. Efficiencies can be made but not at the cost of quality.

How much?
The Shorter Oxford English Dictionary defines 'constrain' as: *to compress into small compass; to contract; to confine forcibly*. This suggests that the government is asking the Commission to find ways to make savings so that future costs will either remain at current levels or contract.

However, the Commission should acknowledge the reality that constraining costs can be hard to do without reducing access (assuming that to promote access means to increase it) where:
- there is a rising and spreading population

- with a greater gap between rich and poor
- and an increasing number of people in poverty
- and an increasing number of people in long-term and inter-generational unemployment
- and increasing levels of mental illness and dislocation.

In addition, sometimes there is an extra cost to gaining greater efficiencies and achieving savings in the longer-term. The Commission should be mindful of research that suggests that for every dollar spent on CLCs, savings are made in other areas of government spending.

We acknowledge that the Commission's role is to report to the Commonwealth Government. Yet the Commonwealth is only one part of the equation. Not unlike other disputes of the federation, there have long been arguments over the respective legal assistance contributions of governments at the state and federal levels. The contributions have also fluctuated between states and territories, with some receiving a far greater contribution from both their state or territory government and the Commonwealth, impacting more severely on the ability of service providers in some states to assist their citizens. Sorting out how and how much each should pay is an issue ripe for the Productivity Commission's close examination.

To accommodate growing population and needs, the Commonwealth's global minimum allocation could be a fixed percentage of GDP or some other measure, with the state or territory's minimum contribution and Commonwealth's contribution to each jurisdiction a fixed percentage of a relevant state measure. A formula of this kind may reduce insecurity for service providers, boost productivity and reduce conflict between Commonwealth and state and territory governments.

The Productivity Commission should develop a formula for funding in the legal assistance sector in consultation with Commonwealth, state and territory governments. The percentage should reflect the current cost of the legal assistance system and additional funds to ensure it is able to make efficiencies and save costs in the longer-term.

How effective?

As part of this review, the Commission should examine ways to make the distribution of funding more effective to engender a healthy legal assistance sector.

Government priorities

Commonwealth and state governments have adopted policies that have reduced effectiveness. The policy tied funding on the basis of the respective laws of the states and Commonwealth prevented appropriate service delivery.

For example, except for LAQ services for Indigenous Queenslanders as part of its overall services to the community or its Cape York targeted services, civil law services specifically for Indigenous Queenslanders were limited. The Commonwealth could not commit more funds beyond its funding program and the Queensland Government would not provide funding because it regards Indigenous legal services as a Commonwealth responsibility, despite many civil problems relating to state law.

The current focus is on prevention and early intervention. This is important, but it fails to see the big picture. Not all problems can be solved early. In fact the system currently sees most people who are long past the early intervention stage. CLCs in particular pick people up once the problem has escalated, often as the last port of call. Many people in the court system are there as defendants. While there is much public information to help people prevent problems, it is probably not that well accessed until it is too late. A legal assistance system needs to be available at all stages and the system has to be responsive with appropriate assistance for individual needs when they are needed.

Project funding

At the end of some financial years, AGD might allocate unused departmental funding to bolster the funding of underfunded CLCs. This money is gratefully received and keeps many CLCs afloat. However, it is distributed in an ad hoc way, even to some who have no particular need or project in mind. Access to new funding is often needed to meet emergencies, exigencies and emerging issues. AGD and other allocations could be used to create a 'future fund' for CLCs and legal aid commissions to draw on when needed, using strict application guidelines and managed by a committee made up of representatives from the sector, tuned into legal needs research and existing programs.

We recommend the creation of a legal 'futures fund' for the orderly and measured distribution of project funding for CLCs and LACs so that innovative responses can be developed to address needs in a timely fashion.

Freedom within bounds

Government has a responsibility to ensure that issues of community concern are given appropriate attention and to determine the allocation of resources to address priority issues. However, there should be some leeway to permit services on the ground to address other pressing needs or avoid injustices. This should be matched by an effective accountability system that ensures that issues of priority set by government are being appropriately addressed. With clear guidelines but some degree of flexibility, innovation will in part meet client needs.

Currently, service providers are not trusted to do what they do best to meet community needs. At the same time as government is encouraging its services to be responsive to the community, it ties the hands of legal assistance providers.

Consideration should be given to giving service providers some discretion to allocate the resources they have access to, with appropriate justifications through the accountability process.

Collaboration

We recommend that the Productivity Commission look closely at the issue of coordination (discussed in more detail in chapter 6 with a recommendation for resourcing) as between parts of the sector and between governments. Focus on this issue will potentially have the greatest impact on developing efficiencies in the system.

Service providers have been developing better collaboration mechanisms in recent times, but there is a clear failure of collaboration between states/territories and Commonwealth, resulting in the failure to resolve local problems. With CLCs and legal aid commissions in the middle, governments pass the buck over who has responsibility.

CLCs are never a proper part of the negotiation process. CLCs at a state or territory level should be part of service agreement development between the states and Commonwealth, so that local problems can be ironed out.

CLCs should be part of the inter-governmental negotiations of service agreements at a state level.

Accountability

In asking if there are mechanisms in place to determine whether funds in the system are being used wisely, the Queensland Government's recent LPITAF review found there was little or no duplication in the provision of free legal services in Queensland. However, the accountability mechanisms in place are far from robust and rarely operate effectively to address waste.

In our submission, all the different parts of the system are working relatively well. However, improvements can be made, as in any system, and the issues raised above are the key issues that QPILCH believes warrant closer examination.

However, in our view, the failing of the past has been to properly use the input from the sector as evidenced by many unproductive inquiries. This is a key failure of effective economic management - to use your best asset, the people who are working to make it work better. The Commission should instead focus on the hard work, experience and achievement that have occurred over many years with limited support.

Some practical issues

There are some other basic issues we suggest the Commission should bear in mind:

- Service flexibility and independence should be maintained.
- Avoid the trend to amalgamate and create bigger institutions that lose the flexibility of smaller nimble services and increase bureaucracy rather than promote efficiency.
- Recognise that one size does not fit all in the Australian legal system. Each state and territory, rightly or wrongly, has its own legal culture, perspectives, methods, institutional make-up and rules, and its own client demands and problems. While we can all learn from each other, trying to make each state or territorial system the same will only prevent sensitive understanding, appropriate responses and innovation.

3. LEGAL NEED

We refer to the Law Survey as the best source of information available. Local knowledge should not be ignored because people working on the ground know about their community's needs and demands. Current statistical gathering is not uniform across various agencies or parts of the system and therefore is not routinely used as an aid to understanding legal need.

4. THE COSTS OF ACCESSING CIVIL JUSTICE

4.1 Financial Costs

Financial costs of civil dispute resolution are a significant barrier to access to justice, particularly at the superior court level. This applies not only to the cost of legal advice, representation and court fees, but also the final award of costs by courts or tribunals, where a party is ultimately unsuccessful.

These costs often dissuade disputants from pursuing dispute resolution. QPILCH assists in overcoming this barrier through provision of pro bono legal and referral services.

- QPILCH members provided well over $1.3 million of free legal representation in 2012-13 through its referral services.
- Over $641,120 of pro bono work was done on 142 matters referred during 2012-13, with an average cost of $4,514 for the 43 matters finalised during 2012-13.
- QPILCH members provided over $2.6 million worth of pro bono legal services in 2012-13 through the HPLC and RCLC.
- QPILCH members provided over $631,060 of free legal advice and representation in 2012-13 through the Self Representation Service.

Without pointing to specific evidence, it would appear that the financial costs of dispute resolution are increasing. This includes the financial costs of legal advice, representation and court fees. The costs associated with legal practice are also on the rise, in particular overheads

such as labour, rent and compliance. These costs are ultimately borne by the consumers of legal services.

There is no proportionality regarding the financial costs of dispute resolution to the matters at stake. Rather, financial costs of dispute resolution are proportional to the relative strength and bargaining power of the parties to the dispute.

It would be fair to say that no disputants are satisfied with the financial costs of dispute resolution. However, perspectives of satisfaction with legal expenses are likely to vary depending on the disputant and the outcome of the dispute.

Consumers cannot readily judge the expected costs and benefits of litigation. That exercise is already difficult for experienced legal practitioners. The cost/benefit analysis involves consideration of numerous variables, including the strategies and tactics that can be adopted by parties in resolving disputes. Consumer perceptions or expectations of the costs of dispute resolution are likely to be inaccurate.

Certain measures have been implemented to make the legal costs of resolving disputes transparent. More could be done, but the question is how?

4.2 Simplicity and usability

It is somewhat incongruous that the most vulnerable members of society are also those who require access to justice to enforce their oft-infringed rights. The lack of simplicity and usability in the system arguably affects these vulnerable members the most, especially those from non-English speaking and refugee backgrounds.

The civil dispute resolution system embodies principles of user friendliness in some sectors, while in some parts there is room for improvement. The entire process is unfamiliar and daunting to many, especially given that the oral tradition of courts is intimidating, given the commonly cited quote regarding those fearing public speaking more than death.

Court forms are often not simple or useable. Knowing the correct form to use is half the battle. The use of legal terminology can confuse, especially those from non-English speaking backgrounds. While these forms do contain guidance notes, a person would have to be legally trained to source and interpret the rules to which they refer.

Court timelines are very strict. Failure to lodge documents and forms in time can completely extinguish rights. And the timing of these can confuse, given the timing rules are not straight forward. ‘Clear days’ are required between dates, and the process of ‘counting’ has to be carefully undertaken to ensure that no rights are inadvertently waived. These strict timelines are somewhat unique to the legal system, and our clients are generally unfamiliar with such tight timelines and struggle to meet them.

While some parties without representation will work to understand the law and court processes, it is incumbent on public officials and lawyers to make it as comprehensible as possible and to put in place an infrastructure that makes it possible for everyone to get assistance to navigate the civil justice system. The cost of such infrastructure should be borne by the state for the benefit of those who cannot afford to access it.

Access to resources
A number of our clients highlight their lack of knowledge of the legal system as one of the key reasons they feel anxiety when interacting with it. This demonstrates a clear need for legal institutions to provide up-to date, relevant information that is easily accessible and comprehendible to users of the legal system at all levels.

- **Providing timelines**
  Registries could assist litigants to understand the complexity of court deadlines through providing a timeline of when documents need to be submitted at the time of filing court documents. This computer generated timeline could serve to alleviate the confusion regarding timelines.

- **Court forms**
  Courts should consider engaging a plain English language expert to review court forms. While this may appear burdensome and impossible for the complexity of court forms in their current state, the task is not impossible given consumer facing industries such as banks often create disclosure packs for customers in plain English which explain complex provisions.

- **Online fact sheets**
  In QPILCH's experience, the key to successfully delivering legal information and services via the Internet is to use it in conjunction with in person support. For this to be achieved in person support must be adequately resourced with internet access and the ability to use it effectively. The Internet provides an ideal way to provide up to date, relevant information as it reaches an ever growing audience and material is easily updated at a minimum of cost without requiring material to be reprinted. QPILCH generates factsheets on different areas of law and certain common legal processes such as drafting court documents and commencing legal proceedings. These factsheet are the most downloaded resources from our website. QPILCH volunteers provide these factsheets directly to clients, suggesting to us that the range of users accessing our factsheets is wider than just our client base.

- **Court websites**
  QPILCH assists many clients with proceedings in QCAT and the Supreme and District Courts. Both forums have made huge strides in improving their user friendliness through the usability and functionality of their websites. With more and more people having access to the internet, it is vital that information concerning the legal system be available online, not only that it must be easily accessible and easy to comprehend.

  The Federal Court website is an excellent example of this as it is very easy to navigate, as information is well presented with many helpful links and the website doesn't over burden the user with content. Rather, content is categorised clearly under one of six main headings (all using plain English) allowing the user to select the most relevant.

  The QCAT website is slightly more information heavy on the surface, but the information is presented in a way which users of the website can understand. Plain English is used throughout and a list of matter types that QCAT deals with is prominent, allowing the used to quickly locate the relevant information.

  A need remains to translate more information into other languages.

  As previously mentioned, one of the most intimidating factors of the legal system to our clients is the mystery that surrounds the system. Appearing in any form of judicial process is a daunting prospect for many, if not all, self represented and vulnerable litigants.

The QCAT website offers information to arm users with an understanding of what to expect on the day, including information about:

- the different proceedings (from hearing to mediation);
- what information or documentation a litigant is expected to bring; and
- tips on how to behave during hearings.

This information is invaluable to many unrepresented and vulnerable litigants and it is essential that judicial institutions such as the courts and tribunals not only provide this information in a manner that ensures it is easily understood but that they also ensure it is easily accessible and available.

Other courts and tribunals could be well served by adopting QCAT's approach to informing the public by publishing practical information online.

Importantly however, our Self Representation Service in the Courts and QCAT are on site to help people understand the information and navigate the court and tribunal processes. Our services are offered Queensland wide at a cost of $300,000 annually from Queensland's public purpose fund (LPITAF)

Drafting civil laws

Access to justice starts with participants having an understanding of the framework within which the players operate - the law itself. People who understand their legal rights and obligations will find themselves in a better position to resolve their problems and negotiate disputes. Having even a high level understanding of the law can help people recognise when they may require assistance with a legal problem, as well as enable them to use the legal system with more confidence.

Legislation, including civil law, plays a fundamental role in the system of rules that govern our society. Unfortunately, in recent times, legislation has reflected social patterns in becoming more complex as it addresses more challenging issues in the face of heavy scrutiny. However society's awareness and understanding of the law which governs it is heavily dependant on legislation being easily accessible and understood.

Legislation is its own language, with typically four years university study required to obtain a law degree to navigate and translate the often unwieldy statutes.

How could civil laws be usefully reformed?

In recent times, criticisms of the way legislation was drafted and an increased call for the use of plain English have produced noticeable changes in the drafting of legislation. This is perhaps most noticeable in the way today's legislation is structured and in the language used.[1] These changes will have made legislation easier to read but more importantly, easier to understand.

Common sense dictates that more complex issues will require more complex drafting of legislation. Insisting on the use of plain English only in legislation may lead to complex issues not being adequately addressed. However, this should not be an excuse for legislation covering the most complex areas of law to be manifestly incomprehensible and thus inaccessible to the user.

A good example of a complex area of law being governed by accessible legislation drafted in a way that makes understanding its content and effect easier for the user is the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* ("Act"). Tax reform and the introduction of the GST are by no means minor or simple legislative feats. However the Act is drafted in a manner which improves its ability to be understood by the people if affects.

[1] *How to read Legislation; A Beginner's Guide*, Parliamentary Counsel's Office of Western Australia, May 2011,p. 9.

The Act contains, at the beginning of every Chapter and Division, an explanation of the Chapter or Division titled 'What is this Chapter/Division about?' A simple dot point explanation of the Chapter or Division is given and in some instances a visual diagram is used to demonstrate how the Chapter or Division interacts or relates with the other parts of the Act. This allows the user to gain a basic understanding of what the legislation is aiming to achieve even if the actual language used in section of the legislation is difficult to comprehend.

Tax reform is an issue which affects a large portion of society; therefore it is necessary that the legislation be highly comprehendible and accessible to the community. More legislation should be drafted in this manner in order to make it more accessible to society at large especially self represented and vulnerable litigants.

The Western Australian Parliamentary Counsel's Office has produced a beginner's guide to reading legislation which is available online. The guide explains what legislation is and how it works as well as offering tips on how to read legislation and basic rules of statutory interpretation. Tools such as this are critical in making sure legislation is more accessible to the layperson.

We recommend similar guides be produced nationwide.

Do solicitors contribute to complexity?

QPILCH often assists self represented clients in QCAT matters. We have noticed a common theme in the letters our clients receive from solicitors representing the opposing party. Often these letters are drafted in complex language and threaten to seek a costs order against the addressee should they not withdraw the proceedings. Unfortunately, this all too often results in the recipient of the letter withdrawing their action because they are intimidated by the threat. In reality, costs in QCAT proceedings are only awarded in very limited circumstances. The QCAT website explains this in a clear and concise manner however this is not reflected in the letters drafted by legal practitioners.

We also assist clients who have received letters of demand or debt recovery letters from companies which have likely been drafted by solicitors. The letters often contain a formal request to the recipient to pay the outstanding amount by a certain date and threaten legal action to recover the debt should it not be paid. Often the complex language used in these letters inhibits the recipient from fully understanding the demand and the conditions surrounding its settlement.

Our volunteer lawyers inform us that there is a push within firms and within the legal industry in general towards plain language drafting. Firms are offering workshops to help lawyers at all levels communicate effectively using plain English. This, over time, will no doubt improve the ability of self represented litigants to better understand the effect of legal letters they receive. However, in order to improve access to justice for self represented and vulnerable litigants there must be a move away from skewing the law in such letters in a bid to intimidate the other party. This is especially the case if it is known to the practitioner drafting the letter that the opposing party is (or is likely to be) a self represented litigant, which is often the case in QCAT proceedings.

The QLS website informs practitioners that if there is no legal liability to pay legal costs, then it is likely to be contrary to the Australian Solicitors Conduct Rules (ASCR) to suggest that someone may be required to do so. In matters that have not progressed to the stage of a hearing, whether it is in a tribunal or a court, there is no liability on any party to pay the other party's costs. However, this is rarely, if ever, made clear to the recipient of a letter of demand. Rule 4 of the ASCR details various "fundamental ethical duties" including being honest in all dealings in the course of legal practice. Rule 34.1.1 states that you must not make any

statement which grossly exceeds the legitimate assertion of the rights or entitlements of your client and which misleads or intimidates the other person.

In our opinion, a practitioner's obligations under the ASCR do not prevent lawyers from misleading, or attempting to mislead, and deliberately seeking to intimidate recipients of letters of demand or debt recovery letters. There is discussion attributing this to the increasing outsourcing of debts and the increasing nationalisation of debt collection agencies.[2] Relationships between law firms and collection agencies have the potential to blur the boundaries between the solicitor, with professional obligations, and the collection agency client. This can cause some of the issues that solicitor's rules, such as the ASCR are designed to prevent.[3]

To assist in preventing this practice and improving access to justice for self represented and vulnerable litigants we recommend:

- nationally recognised and enforced guidelines on letters of demand be published (similar to the guidelines produced by ASIC4); and
- an avenue whereby legal centres such as QPILCH can report breaches of the guidelines to the appropriate legal services governing body.

4.3 Geographical constraints

Many people living in regional or remote areas[5] have to travel long distances to consult with legal advisors.[6] The increased use of technologies such as video conferencing and telephone services in the legal sector can assist in overcoming some geographical barriers and may increase the range of locations from which legal assistance is available.[7] However, these technologies are no substitute for face-to-face contact with legal professionals. In particular, these technologies can be an inappropriate and ineffective tool for achieving beneficial legal resolutions with marginalised groups, including those living in remote communities or those with poor communication skills. This is because these groups either do not have access to the technology, or are unable to use it effectively. Further, these technologies can be expensive to establish and maintain and are often underutilised.[8]

In 2007, QPILCH established a Self Representation Service (**the Service**) in the civil jurisdictions of the District and Supreme Courts of Queensland and the Queensland Court of Appeal. The Service later expanded into the Queensland Civil and Administrative Tribunal (**QCAT**) and a pilot program operated in the Federal Court and the Federal Circuit Court in Brisbane in 2012-2013.

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[2] 'Selling their customers out: consumer problems with debt collection outsourcing in Australia' Consumer Credit Legal Service, 2002 Melbourne, Vic.
[3] 'Selling their customers out: consumer problems with debt collection outsourcing in Australia' Consumer Credit Legal Service, 2002 Melbourne, Vic, p. 10.
[4] ASIC regulatory Guide 96: Debt Collection Guideline for Collectors and Creditors available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ACCC-ASIC_Debt_Collection_Guideline.pdf/$file/ACCC-ASIC_Debt_Collection_Guideline.pdf
[5] 3.9% of Queenslanders live in remote areas and 42.5% of Queenslanders live in regional areas (Coumarelos C, et al, *'Legal Australia-Wide Survey: legal need in Australia'* (2012) Law and Justice Foundation of New South Wales (NSW), Sydney).
[6] 21% of Queenslanders who consulted their main advisor, had to travel more than 20km and 8% of Queenslanders who consulted their main advisor, had to travel more than 40km (Coumarelos C, et al, *'Legal Australia-Wide Survey: legal need in Australia'* (2012) Law and Justice Foundation of NSW, Sydney).
[7] Coumarelos C, et al, *'Legal Australia-Wide Survey: legal need in Australia'* (2012) Law and Justice Foundation of NSW, Sydney and Forrel, S. *Video Technology and Legal Practice in Rural Communities,* Law and Justice Foundation of NSW, Paper presented at the Rural, Regional and Remote Law and Justice Conference, Aanuka Beach Resort, Coffs Harbour, 18 – 20 May 2011.
[8] Forrel, S. *Video Technology and Legal Practice in Rural Communities,* Law and Justice Foundation of NSW, Paper presented at the Rural, Regional and Remote Law and Justice Conference, Aanuka Beach Resort, Coffs Harbour, 18 – 20 May 2011.

The Service aims to assist people to understand the law, their legal rights and the perspective of the other party and present their case in the best possible manner. The discrete task assistance provided by the Service through appointments includes the provision of legal advice, including advice about commencing proceedings and complying with orders, and assistance to draft documents.

To date, telephone appointments have been offered to clients in regional Queensland and to clients who are unable to attend the QPILCH offices in the Brisbane registries. However, the provision of telephone advice can often create difficulties where a client is seeking assistance to draft and prepare documents. Each of our offices in the Brisbane registries are equipped with an additional computer screen that allows the clients to view their documents as the solicitor staffing their appointments works on them and makes suggested changes. This facility is simply not available when assisting clients via telephone appointments.

In 2012, QPILCH hoped to secure funding to establish a Service in north Queensland which used video conferencing to overcome these difficulties. It was proposed that the Service would link clients in north Queensland with solicitors in Brisbane who would be able to use the technology to assist clients to draft documents. It was also anticipated that the establishment of the National Broadband Network would overcome some of the practical difficulties clients may face in using the technology, such as slow network speed and connection. Although QPILCH did not obtain funding to expand the Service in this way, we are able to make some general observations about the extent to which video conferencing technology, in particular, may be able to overcome geographic barriers:

- From the little research that has been conducted about the effectiveness of using video conferencing to provide legal services, it appears that while video conferencing is functioning and viable alternative, it is not a substitute for face-to-face services in all cases.[9]
- The effectiveness and uptake of video conferencing technology will depend on the convenience and privacy offered by the technology compared to existing legal services, the extent to which the technology is supported by clients and host agencies in particular locations and the quality and reliability of the technology.[10]
- The use of video technology may be cheaper than legal practitioners travelling to provide face-to-face legal assistance in regional locations but the savings in travel time may not actually account for the costs involved in setting up and maintaining the technology.[11]

A pilot project using the NBN run by the Hobart Community Legal Service, the National Pro Bono Resource Centre and DLA Piper has shown there are still major challenges in using technology to provide outreach services. The main challenges were access to information from the client, requiring greater resources than normal, and developing the same level of rapport between solicitor and client using video-conferencing. Legal Service solicitors preferred using the phone to Skype to communicate with a mentor at DLA Piper because it felt “less formal” and “less of an imposition” on DLA Piper solicitors. According to the report, clients were generally happy with it as a mode of contact.[12]

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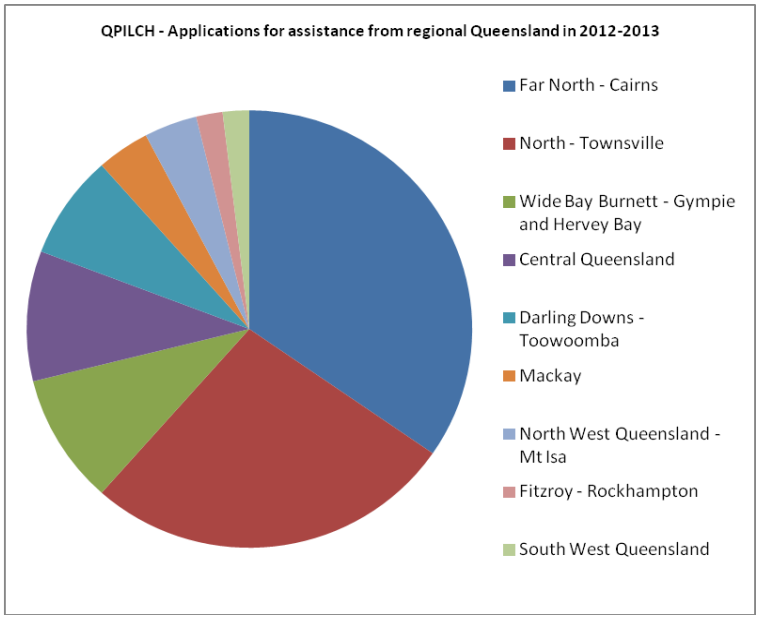
[9] Coumarelos C, et al, *‘Legal Australia-Wide Survey: legal need in Australia’* (2012) Law and Justice Foundation of NSW, Sydney and Forrel, S. *Video Technology and Legal Practice in Rural Communities,* Law and Justice Foundation of NSW, Paper presented at the Rural, Regional and Remote Law and Justice Conference, Aanuka Beach Resort, Coffs Harbour, 18 – 20 May 2011.

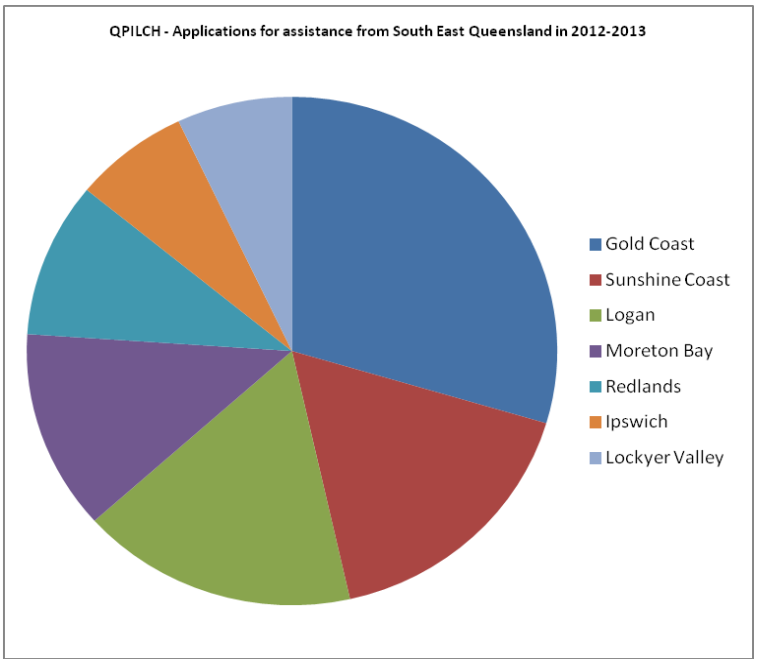
[10] Coumarelos C, et al, *‘Legal Australia-Wide Survey: legal need in Australia’* (2012) Law and Justice Foundation of NSW, Sydney and Forrel, S. *Video Technology and Legal Practice in Rural Communities,* Law and Justice Foundation of NSW, Paper presented at the Rural, Regional and Remote Law and Justice Conference, Aanuka Beach Resort, Coffs Harbour, 18 – 20 May 2011.

[11] Coumarelos C, et al, *‘Legal Australia-Wide Survey: legal need in Australia’* (2012) Law and Justice Foundation of NSW, Sydney and Forrel, S. *Video Technology and Legal Practice in Rural Communities,* Law and Justice Foundation of NSW, Paper presented at the Rural, Regional and Remote Law and Justice Conference, Aanuka Beach Resort, Coffs Harbour, 18 – 20 May 2011.

[12] NPBRC News October 2013.

In QPILCH's experience, a number of different regions throughout Queensland face geographic constraints to accessing the justice system. QPILCH's referral services assess applications for pro bono legal assistance and refer eligible clients to our member law firms and barristers for pro bono legal assistance. In the 2012-2013 financial year, QPILCH's referral services received 448 applications for assistance, of which 101 (or approximately 22.5%) were from clients in regional Queensland. A further 182 (or approximately 40.6%) of the 448 applications received during this period were from clients in South East Queensland (including the Gold Coast, Sunshine Coast and Logan but excluding Brisbane). The remaining 165 applications for assistance were from clients in Brisbane.





In the 2012-2013 financial year, QPILCH's referral services received the highest number of applications for legal assistance from clients in North and Far North Queensland and the areas in and around Logan, the Gold Coast and the Sunshine Coast. While this in itself is not necessarily indicative of the geographic constraints which clients may face in these areas, it is relevant to note that of the 170 member law firms and barristers involved in QPILCH's referral

services,[13] only 17 are based in South East Queensland (outside Brisbane) and 31 are based in regional Queensland. The size and capacity of the legal profession in regional areas is, in our view, a major barrier to accessing the justice system and more work should be done to enhance the recruitment and retention of lawyers in these areas.

In our experience, clients with disabilities, low literacy or poor communication skills and other marginalised or disadvantaged groups are also more likely to face geographic constraints to accessing the civil justice system.

A key barrier to the provision of pro bono legal services in rural, regional and remote (**RRR**) areas is often the lack of resources, capacity and expertise which prevent RRR practitioners from being able to provide pro bono legal assistance to disadvantaged people living in their communities.

In 2009, QPILCH secured funding to undertake an RRR Project which aimed to overcome this barrier by enhancing access to pro bono legal services for disadvantaged people living in RRR areas in Queensland.[14] In its early stages, the RRR Project involved the establishment of a number of partnerships between regional law firms and large metropolitan firms. The partnerships were established to allow regional law firms to work with metropolitan firms on pro bono matters and were set up in accordance with a protocol developed by QPILCH. The protocol is available on the QPILCH website at http://www.qpilch.org.au/cms/details.asp?ID=19 and deals with issues such as how to contact the partnered firm, costs, intellectual property and liability. The idea of the partnerships model is that the metropolitan firm provides support, increased capacity and resources to enhance the capacity of the regional firm to do pro bono work.

Later stages of the RRR Project involved:

- engaging more regional law firms and barristers in coordinated pro bono work;
- building links with regional organisations;
- working with regional community legal centres; and
- entrenching QPILCH's services in regional Queensland.

The QPILCH RRR Project is just one example of a mechanism which may assist in dealing with geographic barriers to accessing the justice system.

Factors including financial costs, timeliness, complexity and geographic constraints all affect accessibility to the justice system. However, another significant factor which limits accessibility is the absence of legal 'triage' services which provide an initial legal diagnosis, followed by legal information, advice or assistance, which can be given on the spot or via referral to specialist services, as appropriate.[15] QPILCH often receives applications from clients who have been referred by other legal organisations. Often these clients have been to numerous other organisations before being directed to the most appropriate service to assist them with their legal problem. Increasing the community's knowledge of generalist legal services and establishing legal triage services may assist in reducing this problem.[16]

5. IS UNMET NEED CONCENTRATED AMONG PARTICULAR GROUPS

The Law Survey has confirmed what many experienced practitioners already knew – that Indigenous legal need and the needs of people experiencing mental illness were not being

[13] These figures are for QPILCH's QLS and Bar Pro Bono Referral Service, not its Public Interest Referral Service.
[14] Funding for this service was provided from the Legal Practitioners Interest on Trust Accounts Fund (**LPITAF**).
[15] Coumarelos C, et al, *'Legal Australia-Wide Survey: legal need in Australia'* (2012) Law and Justice Foundation of New South Wales (NSW), Sydney.
[16] Coumarelos C, et al, *'Legal Australia-Wide Survey: legal need in Australia'* (2012) Law and Justice Foundation of New South Wales (NSW), Sydney.

adequately serviced. While QPILCH and other similar services have developed homeless services over the last decade, homelessness continues to be a high need, particularly outside metropolitan areas. QPILCH also identified the need to assist self-represented litigants, people from all groups who had fallen through the gaps in the available services.

5.1 Homelessness and refugees

In Queensland, the highest numbers of homeless people are in Brisbane – with 1943 in inner-city Brisbane and 4324 in the whole of Brisbane city.

Other large homeless populations exist on the Gold Coast (1426); in Cairns (2303 – including 201 sleeping rough); in Townsville (1591) and in the outback (2130). These geographical proportions have remained static in the last 5-6 years. The changes have been to the demographics of homelessness with less rough sleepers, but an increase in homelessness faced by older women, families and migrant populations. There is still however, a chronic need to prioritise services to regional Queensland, where homelessness often "begins", but where there are typically fewer services and they are less coordinated.

This has driven the HPLC to establish services in Toowoomba and Townsville and formerly, on the Gold Coast. QPILCH is currently developing a broader legal service in Townsville

A solution to address regional disadvantage currently being piloted by the HPLC is to provide a pro bono phone legal service (not just advice) to the northern area of Brisbane, where there is large unmet legal need among disadvantaged populations such as refugees, women escaping domestic violence and people with tenancies at risk. Clients of agencies supporting these populations can only access the phone legal service with their support worker, and with a structured application process.

While phone services are not suitable for complicated disputes, they are a cost-effective method to address the small civil law matters which are part of the experience of disadvantage. The HPLC expects that this model of legal service will be transferable to regional/rural areas where there are no or limited legal services.

5.2 People experiencing mental illness

In the year 2012-13 there were over 11000 hearings in the Mental Health Review Tribunal in Queensland, most of which concern involuntary treatment orders. According to our research, between 2 and 3% of people with ITOs are represented in Queensland, the lowest rate of representation in any mental health review tribunal in the country. Both NSW and Northern Territory, for example, include provisions in their Mental Health Acts making representation in their respective Tribunals mandatory. As a result 100% of patients in the Northern Territory have representation and nearly all involuntary patients in New South Wales have representation funded by the respective State and Territory governments. Those States without mandatory provisions nonetheless have better funding for mental health legal services and consequently much higher rates of participation and representation of patients in Tribunal hearings.

The importance and recognition of the fundamental right to representation is recognised in various international human rights instruments including the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care which provides in Principle 18(1) that:

> The patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint procedure or appeal. If the patient does not secure such services, a counsel shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.

In addition to the lack of representation, people with mental illness experience a high rate of civil law issues including debts, unfair contracts, problems with government agencies and housing. These issues are often a consequence of the person's illness and behaviours during a mental health episode and are often compounded by the difficulties in accessing legal services. The access issues may be a result of difficulties in communication, disorganised lives, lack of finances or lack of awareness of available services. For this reason specialist mental health legal services that address the full range of legal issues are best able to meet the legal needs of people with mental illness.

In our view systems, policies and services aimed at rights protection are both compatible and conducive to clinical and recovery oriented objectives for people with mental illness. People with mental illness are frequently seriously hampered in their clinical recovery by the burden of unresolved legal issues. Financial investment in timely legal services for people with mental illness is likely to pay significant dividends for the individual as well as for the community: legal help can ameliorate unnecessary stresses for the person (which are linked to recurrent involuntary hospital commitments) as well as help prevent unnecessary and inappropriate imprisonments for unpaid fines which is both costly and counter productive to recovery.

Accordingly, while Queensland now has two specialist mental health law services (QAI funded by LPITAF specialising in restrictive practices and forensic orders and QPILCH funded by a charitable funder and specialising in civil law and ITOs) the total funding around $200,000 to cover the entire state. They are nascent services barely touching the surface of need.

5.3 Self Represented Litigants

Since October 2007, QPILCH has conducted a Self Representation Service for self-represented litigants in the District and Supreme Courts in Queensland. The service is modelled on the Citizen's Advice Bureau operating in the Royal Courts of Justice in London.

In 2009-10, the service was extended to the Queensland Civil and Administrative Tribunal, and in 2011-12 a pilot programme was conducted in the Federal Courts in Brisbane. Earlier in 2013, JusticeNetSA commenced a pilot programme in the South Australian Supreme Court.

In the Queensland Courts, the service coordinates volunteers from fifteen partner law firms. Three afternoons a week, our partner firms send volunteer lawyers (usually from their litigation departments) to staff pre-arranged appointments with self represented parties. Outside of these appointment times, a full-time solicitor and part time paralegal assess applications for assistance, provide follow up assistance and undertake numerous administrative tasks.

The service is different from both a duty lawyer scheme and a drop in advice session offered in other Community Legal Centres. Three key points about the service's assistance are:

1. The service does not act as a party's representative or advocate;
2. Assistance is given in pre-arranged appointments; and
3. Appointments are for 45 minutes to one hour in length.

The phrase "choose to represent"[17] implies a genuine decision that has been made between competing options. Very few self represented parties would identify as "choosing" to represent themselves.

When the service closes a file, we write to a client sending them an evaluation survey that we ask them to complete. We ask clients of the Service why they are self represented: Clients can indicate more than one response. These survey results indicate that:

[17] in the Issues Paper.

- 72.7% cite the costs of representation;
- 38.2% could not obtain legal aid;
- 30.9 % thought they could handle the case themselves;
- 12.7% did not trust lawyers to represent them;
- 10.9% did not want to pay a lawyer;
- 5.5% felt that a lawyer would not be able to represent them in the best way;
- 5.5% indicated that they had sacked their lawyers;
- 3.6% said that no lawyer was willing to act for them;
- 1.8% cited time pressures;
- 1.8% cited a bad experience with lawyers previously.

Applicants to the service are overwhelmingly from low-middle income households. Fifty-eight percent of applicants in the most recent financial year received government payments from Centrelink. About four percent of applicants reported incomes of over $80,000 per annum.[18]

The extent to which QPILCH assists such clients is determined in each case. If an applicant does have sufficient means, they are provided one appointment only and referred to a private firm.

We receive a number of applications from parties who were represented at the beginning of their proceedings but have, as the proceedings continued become self represented. Usually an inability to continue to meet the costs of representation is behind this.

It is not uncommon for clients in this position to have the added disadvantage of not being able to access their documents, as they are held by their former lawyers exercising a lien to secure payment of their account.

Clients who have previously been represented also voice a frustration that their former lawyers failed to act on their instructions or were intentionally dragging out the proceedings in order to increase their fees.

Some clients approach the Service at different stages of their proceedings.

Stage	% of applicants
Prior to commencement	27.4%
Defending proceedings	13.5%
Responding to a strike out/summary judgment application	10.6%
An interlocutory step not requiring a court hearing[19]	12.1%
An interlocutory hearing[20]	11.1%
A Case Management / Supervised Case List Hearing	1.9%
Preparing for trial	4.3%
Enforcement	7.2%
Post judgment advice about appealing	12%

Clients approach the Service for assistance in a broad range of matters in the civil jurisdictions of the Supreme and District Court. These range from commercial and business disputes to nuisance and neighbour disputes, defamation and wills and estates cases.

[18] Of itself an income at even this level does not necessarily evidence an ability to afford legal representation. We routinely see client's with legal bills of over $100,000 in matters that have proceeded to a trial.
[19] Eg disclosure, amending a document, taking a step in a proceeding after a delay, sending a rule 444 letter.
[20] Bringing or responding to an application about non-compliance with the rules, a request to dispense with a signature on a request for trial date, security for costs.

Occasionally patterns emerge; the most obvious being the rise of mortgage repossession cases in 2009-10 as the 'global financial crisis' impacted.

Over a three month period, tasks that clients receive assistance with were:

Task	% of appointments
Preliminary advice about court proceedings	13.2%
Attempted diversion and detailed advice about lack of merit	11.7%
Responding to summary judgment application	10.3%
Drafting application & affidavit	8.9%
Post judgment steps for enforcement	8.8%
Advice ahead of specific hearing	5.9%
Trial preparation	5.9%
Drafting notice of appeal	4.4%
Basic appeal procedures	4.4%
Amending defective pleading	4.4%
Disclosure	4.4%
Letters to the other party about non-compliance	2.9%
Drafting statement of claim	2.9%
Drafting defence	2.9%
Drafting outline of argument	2.9%
Advice on mediation	2.9%
Drafting application for stay and appeal docs	1.6%
Drafting client statement	1.6%

Court documents filed in the Queensland Courts contain information about whether a party initiating or responding to proceedings is legally represented, or later becomes self represented. While the Queensland Court of Appeal reports on this data, the District and Supreme Courts do not include this information in their annual reports.

The Service deals with clients at all stages of litigation matters. This often gives us an opportunity to observe clients coping with the stress of being involved in long running litigation matters. In long running cases, we typically see clients who are initially very positive because they are taking steps to vindicate their legal rights, often over long-standing problems. As their matter progresses, a number of clients raise concerns about the toll on their mental and physical health. A number of clients require counselling and medication to get through their cases.

It is of course worth noting that clients of the Service have been dealing with stressful legal problems and a number of them may have some underlying mental illness. Even client's in short running cases have reported great stress.

Anecdotally, members of the legal profession offer the opinion that a self represented opposing party makes a case more difficult, and that the Judge will go out of her or his way to provide advice and explanations to the self represented party.

The trial judge has an obligation to ensure that both parties have a fair opportunity to present their case. The courts have therefore maintained that there is some obligation on the part of a trial judge to provide some assistance to a represented party. The nature of assistance to be provided by the court to a self represented litigant depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case.[21]

[21] *Abram v Bank of New Zealand* [1996] ATPR 41-507, 42-347 cited with approval by Muir JA in *The Reserve Vault P/L v Barrier Reef Arts P/L & Ors* [2012] QCA 35 [28].

Examples of this that we routinely see are:

1. A self represented party who has not pleaded a case properly may, in response to a strike out application, be given an opportunity to re-plead their case.
2. A self represented party who has not filed a defence in accordance with the rules, facing a summary judgment application that relies on deemed admissions that have been made, may be given an opportunity to present material to substantiate a defence and to withdraw the admissions that they are deemed to have made.
3. A self represented party will be given direction in a trial about how to ask questions in and particularly the important rules governing cross examination.
4. A self represented party who is given the represented party's written submissions on the day of a hearing (sometimes including copies of the cited cases) will be given an adjournment to enable them to read through the material and to consider their response.

Nonetheless, in our experience members of the judiciary are scrupulously careful to ensure that they do not "enter the arena" when providing information to a self represented party.

While the Equal Treatment Benchbook[22] provides a detailed set of guidelines for members of the courts dealing with self represented parties, the current regime applying in Queensland is one that gives an individual trial judge a great deal of discretion in terms of how to deal with a self represented party.

The service is in a position to see a wide range of responses of members of the profession to a self represented party on the other side.

For example, one member of the profession in a widely read column giving members of the profession practical advice on dealing with a self represented litigant wrote of the need to ensure that all dealings are thoroughly documented and witnessed.[23]

Some firms adopt a very combative approach to a self represented litigant, while other firms, still strongly representing their client's interests, are able to engage more constructively with a self represented party.

> *AB commenced a professional negligence action against his former solicitor CD. AB retained CD to act in a personal injuries matter. AB alleged that CD had negligently failed to commence proceedings arising out of an accident. AB submitted affidavit material and made requests for disclosure of documents relating to an earlier personal injuries claim that he had retained CD for. CD's lawyers wrote to AB telling him that:*
>
> - It appeared he wished to raise issues out of an earlier claim
> - His claim at present related to a later accident
> - If the client wished to raise that issue before the Court, AB would have to attempt to amend his pleadings so that he was properly claiming out of that case too
> - CD's lawyers would defend any such claim if it was raised
>
> *EF was suing her bank G Pty Ltd. EF served a 60 page statement of claim in narrative format. G's lawyers filed a defence. G's lawyers wrote an 8 page letter to EF setting out paragraph by paragraph, the defects in EF's proceedings, giving notice to EF that they intended to apply to strike out EF's proceedings.*

The Queensland Law Society and QPILCH have published guidelines on dealing with Self Represented Parties.[24]

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[22] http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf

[23] Kylie Downes "Self-represented litigants: what will be expected of you?" *Proctor* (February 2011) pp 21-23

[24] http://qpilch.org.au/cms/details.asp?ID=681

A common view is that adopting a more constructive attitude to a self represented party adds to the costs of the litigation. This is oversimplifying things. The basis of legal charging is the labour costs of the lawyer. Costs reflect the lawyer's time in applying the lawyer's legal training to advise the client either directly (time-charging) or indirectly (a fixed fee that is based on the lawyer's estimate of the time that task is going to take).

That process is still undertaken, regardless of whether the other party is or is not self represented, it is just that the parties lawyers may put down on paper some more information about the intermediate steps in the legal reasoning so as to inform the self represented party.

In the above examples, the letter that CD's lawyers wrote to AB was perhaps marginally longer than a simple letter dismissing AB's contentions. While the letter that G's lawyers wrote to EF was lengthy, if it was not sent, the same material would largely have been included in written submissions in the following strike out application. By sending that letter, G's lawyers were able to show the court that they had provided EF with a substantial account of the deficiencies in EF's pleading. This made the Court much more inclined to grant G's strike out application.

The Court Rules in Queensland generally leave it to the parties to run their litigation; this means that a represented party who faces a SRL can make tactical decisions on their response to a case brought by an SRL. Examples of tactical approaches would be:

1. not applying to strike out a defectively pleaded case, particularly if it appeared that the SRL may have a meritorious underlying case, in the hope that the SRL will not be able to present a competently set out case at trial, leading to a "successful outcome" for the client; or
2. bringing a number of interlocutory applications against the SRL on the basis of non-compliance with the rules in the hope of adding to their costs, and leading to the case being struck out, or to the client becoming bankrupt (this can often have the same result).

The Queensland Supreme Court's Caseflow Management System[25] and a Supervised Case List[26] set up a framework for the Court to help the parties to move a case forward. Caseflow Management activates when a trial date has not been requested more than 180 days after a defence has filed. The Supervised Case List deals with matters that require additional supervision and management by the Court.

These mechanisms only exist in the Queensland Supreme Court. The *Uniform Civil Procedure Rules 1999 (Qld)* specifically allow Magistrates Courts to make directions,[27] and Chapter 10 of the *Uniform Civil Procedure Rules 1999 (Qld)* gives the courts the power to make directions generally.

There are two distinct issues here: the nature of legal disputes and the nature of court rules.

The nature of legal disputes

Legal disputes are of their nature complex and can be very difficult to understand and place in context. Indeed even lawyers are under some ethical obligation to not accept instructions to act in areas with which they are unfamiliar. Even if the procedures are simplified, putting a case forward to establish, for example, the ownership of land under a constructive trust founded on the unconscionability of allowing the registered owner to resile from the parties' common intention where the other party has relied to their detriment on the registered owners' representations, is an inherently complex task.

[25] http://www.courts.qld.gov.au/__data/assets/pdf_file/0010/159454/sc-pd17of2012.pdf
[26] http://www.courts.qld.gov.au/__data/assets/pdf_file/0020/150266/sc-pd11of2012.pdf
[27] *Uniform Civil Procedure Rules 1999* (Qld) rr 523-526.

Many client's of the service experience difficulty in understanding the process of legal reasoning, and in particular the concept of what is (and what is not) relevant to a determination of a case.

The nature of court rules

It has to be recognised that rules of court are designed to make the resolution of cases easier and more efficient and expeditious. However court rules are in the main the creation of lawyers. Underlying the rules as currently drafted is an expectation that the parties to litigation will conduct the matter expeditiously and with a minimum of expense. As such the courts take a "hands off" approach to management of litigation.

The Civil Justice Council's 2011 report on *Access to Justice for Litigants in Person (or self represented litigants*) in the English and Welsh Courts suggests that early intervention can be of great assistance for self represented parties.[28]

In the Queensland Supreme Court, this type of intervention takes place either when a judge puts a matter on the Supervised Case List, or six months has passed since a defence has been filed without a request for trial date and the matter goes on the Case Management List.

Some of the cases that we have seen at the Service demonstrate tactical decision-making by a represented party that can leave an SRL at a very serious disadvantage.

> *LM was the defendant in a nuisance action brought by his neighbour ON. LM was initially represented by lawyers who drafted LM's defence. This defence essentially alleged that ON had not given proper particulars of the claim, but did not contain a proper denial of the allegations, as required by the UCPR in Queensland. LM ran out of money to pay his lawyers, and ON continued to progress the matter to trial, including sending LM a "Request for Trial Date" that LM signed.*
>
> *Unfortunately, LM was deemed to have admitted most of the allegations against him[29] in the case, and was not given leave to amend his defence. LM therefore did not have an opportunity to present any real defence in court.*

While LM was initially represented, his defence was not properly drafted, and this is something that many SRLs (not to mention lawyers who do not regularly work in litigation) have trouble with.

Two questions that ought to be considered are:

1. Is the "hands off" expectation of the courts that litigants will progress their matters expeditiously appropriate for SRLs?
2. What role can additional and more intensive case management by the court play in cases generally, and specifically in cases with SRLs?

Past inquiries (e.g. the Senate Access to Justice report of 2010) have advocated an increased used of duty lawyer schemes. While duty lawyers can give valuable assistance to SRLs on their trial or hearing day, there are serious limits to the amount of value that duty lawyers can really add to a case. In civil litigation, the pre-trial steps, the pleadings, discovery, are absolutely critical. The day of trial is often too late to amend a document.[30]

The service's model of discrete task assistance throughout the proceedings addresses that gap in duty lawyer and other legal assistance schemes. Our volunteers are given the materials a

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[28] http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fCJC+papers%2fCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+(or+self-represented+lit See paragraph 78

[29] *Uniform Civil Procedure Rules 1999 (Qld)* r 166.

[30] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 217.

couple of days before an appointment. This gives them the opportunity to prepare beforehand for the appointment. It increases the effectiveness of our assistance.

The service also has a good record of diverting unmeritorious cases from even entering the court system, and for encouraging people with cases that lack merit to settle. For example in 2012-13, sixty three per cent of clients that we encouraged to discontinue or not commence proceedings took that advice and took steps to bring their proceedings to an end.

6. AVENUES FOR IMPROVING ACCESS TO JUSTICE

6.1 Collaboration

Recognising what parts of the system do best and supporting and coordinating services to fully play their part, is in our view the key challenge for improvement of the system.

There are many informal and formal networks which work to improve collaboration, cooperation and coordination of services, but these are all 'extra-curricula'. Representatives of services with limited funding contribute to coordinating activities on top of their duties to deliver services. While they are committed to do this, there is no support for or recognition of this work.

There has been recent progress in improving collaborative measures. The Queensland Legal Assistance Forum (QLAF) for example has reviewed its procedures in order to meet these new challenges. LAFs in NSW, Victoria and the NT have recently done the same.

Good services have been delivered by the many lawyers and non-legal staff who work hard with limited resources and who also work together to collaborate and coordinate the justice system with limited structural and financial support.

Government has to accept responsibility for the lack of coordination in the system. Government uses funding as a stick rather than as a partner in developing appropriate structures and services and fails to give guidance except in a prescriptive way,

Service providers are motivated to provide more access for more people, not less access for fewer people. If politicians agree with that statement, and are cognisant of the fact that our population is growing, and that as a result of that growth, people are more disconnected from services, have greater competition for jobs and resources, have greater distances to travel, have less access to the environment, then more money will be needed to deal with the transactions and disputes that befall our communities. Greater efficiency may pick up some of the load, but efficiency has its limits too.

While it may cost more now, greater collaboration without too many prescriptions will save money in the longer-term. But collaboration must be genuine, led by state and regional service providers with government participation, not imposed by Commonwealth of state governments.

We recommend that the Commission support the resourcing of consensual collaborative mechanisms that promote equal participation by all stakeholders.

6.2 Red tape

Reducing excessive red tape will create efficiencies without reducing accountability. There is too much unnecessary, duplicative and wasted reporting, compounded by the failure of Federal and state governments to work together to address the impact of red tape on NGOs. There is much that could be done, but too much to detail in this paper.

We recommend that the Productivity Commission conduct a separate focussed study of this issue.

6.3 Innovation

CLCs have much to offer now, but their full potential has not been appreciated or explored by government.

QPILCH is in an enviable position in that we have access to a wonderful resource – a membership comprised of skilled and confident lawyers – barristers and solicitors in the private profession. QPILCH has used our members to help us develop several innovations, the ideas for which arose in the course of our coordinating work. We can get quality advice and labour to help set them up. Innovation is said to come from "freedom within bounds". If freedom is fully constrained, innovation will be stifled. QPILCH is lucky to have a degree of freedom that enables innovation. All service providers should have this freedom.

Elsewhere in this paper, we have outlined two QPILCH innovations – the Legal Health Check and the Self Representation Service.

QPILCH has also amended its conflict policy to permit assisting multiple parties without compromising our professional responsibilities and in accordance with the solicitors' rules. Strict adherence to conflict of interest rules often prevent CLCs from helping multiple parties in a dispute, even though all parties are without means and different volunteers can be called on to assist.

There are many other things that could be done to make services more accessible if governments trusted those working in the legal assistance sector and if it too looked creatively at the systems it operates.

We recommend that the Productivity Commission look at ways in which innovation can be enhanced, red tape cut, but at the same time accountability improved.

7 PREVENTION

QPILCH's Homeless Persons' Legal Clinic, Refugee Civil Law Clinic and Mental Health Law Practice all use the strategies of outreach, diagnosis and training to deliver access to justice earlier in the dispute cycle, to avoid the escalation of disputes and the severity of their impact on the client.

Outreach

HPLC, RCLC and Mental Health Outreach legal clinics are located where disadvantaged clients are already present – such as food, accommodation and health services, with pro bono lawyers attending for one or two hour-long sessions weekly at that location, and completing casework at their firm, in firm time.

Diagnosing legal need

The HPLC developed the Legal Health Check in 2009 as a legal needs diagnostic tool which enables lawyers and community workers to collaborate with each other and their mutual client to provide targeted, timely and appropriate legal assistance on the matters likely to have the greatest impact for the client, rather than the self-identified needs of the client. The Legal Health Check operates as a:

1. Structured interview tool for pro bono lawyers who provide legal services to disadvantaged clients;

2. Resource for community workers to identify and prioritise the legal needs of their clients; and a
3. Menu for clients to maximise their choice by understanding which issues the lawyer can assist with.

The Legal Health Check assumes that disadvantaged client don't know what/how/who to ask about legal needs and will benefit from "diagnosis" of those needs; that the client has multiple legal needs; that community workers need training, resources and support to identify and refer legal need; and that both clients and lawyers will benefit from the involvement of community workers in the process of delivering a legal service.

The questions in the Legal Health Check echo the "safety" tier in Maslow's well-known Hierarchy of Need, and cover legal issues which are connected to disadvantage, such as debts, tenancy, crime and family matters; as well as issues which are endemic to the experience of homelessness but which clients rarely seek help for - fines enforcement, issues surrounding alternative decision-making bodies such as the Public Trustee, and child protection issues. All of these issues if unaddressed, form barriers to sustainable housing for the individual and contribute to greater social upheaval for the community.

The Legal Health Check encourages support workers to complete all or part of the Legal Health Check with clients prior to the client attending the legal clinic, as this orients the client to their legal need and enables the worker to prioritise their time with the client. Resources, such as the mini-legal health check postcards offer prompts to workers and clients where there is limited time.

The content of the Legal Health Check can be altered according to the demographic targeted by the legal service – for instance, the Legal Health Check used in the Mental Health Outreach clinics highlights issues around mental health orders and system practices. The LHC used for migrant and refugee populations highlights questions around car loans and insurance. These targeted questions are developed in collaboration with the community agencies servicing these populations, and their knowledge of the needs and priorities of the population.

The HPLC has used the Legal Health Check to diagnose and address an average of three legal issues per client, not just the presenting issue. In 2011/12, 67 clients at a crisis accommodation service were assisted with 204 matters across the 7 matter types raised by the LHC. In 2012/13, 37 clients were assisted with 89 matters.

In 2012/13, the Legal Health Check enabled the HPLC to identify that 65% of homeless clients had fines debts requiring legal advocacy, even though only 5.4% of typical HPLC clients raised this issue with the visiting lawyers.

Further details about the use of the Legal Health Check are available in a report *Sharing the Menu: Perspectives and data from the Legal Health Check*, available at www.qpilch.org.au/lhc.

Training and resourcing non-legal service providers

The HPLC, RCLC and the MHLP assumes that support workers in the community sector will not be aware of the legal needs of their clients and require training as well as support and resources to effectively identify and refer the legal need of their disadvantaged clients. Skilling caseworkers in legal need is strategic for the following reasons:

1. The literature acknowledges non-legal workers as pathways to access to justice for disadvantaged clients.
2. Social workers are already assessing the client's needs but often without either the worker or client identifying issues raised as "legal need".
3. The social worker can support both the communication and trust of the client with the lawyers, but requires motivation to prioritize that task.

4. The social worker is best placed to attend to the non-legal needs of the client and to ensure the legal service is delivered in an appropriate way for the circumstances of the individual.

Accordingly, QPILCH services direct significant amount resources to train support workers to identify the legal needs of their clients and to have a clear process for effective referral.

This training occurs in regular formal and informal training sessions at community organisations, tailored to the operation and priorities of that service. Workers can consider the most appropriate time to raise legal solutions with their client.

The HPLC/RCLC and MHLP also coordinate caseworker training days, providing free training to 60-plus workers on a range of specific legal issues faced by the community workers' clients. Topics include debt, tenancy, criminal matters and involuntary treatment orders. Lawyers from Legal Aid Queensland and the Community Legal sector volunteer to present.

The combined strategy of resourcing caseworkers and embedding the Legal Health Check in community organisations' procedures has enabled the HPLC to deliver comprehensive legal solutions to 81% of residents at Roma House since 2009, and is now used in many legal service settings throughout Australia.

Videos which train caseworkers in these concepts have been recently developed by the HPLC and are available on the QPILCH website.

QPILCH's comprehensive assessment process offered by both the referrals and self-representation services also offers support.

Dealing directly with their own legal needs
Where a client is deeply disadvantaged, self-help strategies are rarely appropriate according to the literature (Lawler/Giddings).

Barriers and incentives to avoid disputes
The barriers to resolving legal issues faced by people experiencing disadvantage are:

i. Perceived cost
ii. The stress or chaos of lived disadvantage, generating competing priorities
iii. Lack of awareness of legal need or of legal solution
iv. Lack of clear pathways to resolve – perception that complicated.
v. No previous experience of positive outcome when lawyers involved.

This is the experience of the HPLC and confirmed in Law and Justice Foundation research.

Various government agencies also provide limited resources to assist people with disadvantage to access a suitable and fair solution. An example is the poor recognition by the Queensland State Penalties Enforcement Registry of the homelessness of many of its debtors, and their eligibility for hardship consideration.

Most disputes between government agencies and people with disadvantage could be resolved more readily by the government agency applying good administrative law practices which provide clients with an adequate hearing and transparent and accountable decision making practices.

Predictive indicators and targeting
Governments collect sufficient data to demonstrate the causal connection of homelessness with circumstances such as family breakdown and accommodation problems (e.g. Qld Audit office Report to parliament 6: 2012/13). This same report is also clarifies the intersection of types of

disadvantage for some Queenslanders' – for example that people experiencing homelessness are likely to have a disability, be unemployed and five times more likely to have cash-flow problems.

Each of these highlighted casual factors or types of disadvantage are connected to legal issues and solutions – such as debt, tenancy and family law.

The co-existence of types of disadvantaged and certain legal issues has also been extensively researched by the Law and Justice Foundation of NSW, which found, for instance that 50% of homeless people had three or more unaddressed legal needs, as well as offering evidence of what these legal needs are.

These realities underpin the HPLCs Legal Health Check, discussed extensively in section 7a. of this submission. The Legal Health Check targets the researched needs of a population rather than the felt needs.

8 EFFECTIVE MATCHING OF DISPUTES AND PROCESSES

Identification of the most appropriate dispute resolution pathway
There are a multitude of different courts and tribunals dealing with increasingly specialised dispute types.

While the specialised nature of these bodies are generally considered desirable for various reasons, the sheer number of mechanisms in existence are likely to cause confusion for those initially attempting to identify the appropriate path without professional advice. QPILCH considers the situation could be improved by creating and publicising a single referral based system, similar to the New South Wales model (discussed in detail below).

In Queensland, when seeking advice on dispute resolution pathways, information is available from a range of sources. These include court and government information, private solicitors providing information as part of indirect marketing (which may not be kept up to date), community legal centres, and professional bodies. People with legal problems may contact the Queensland Law Society, Legal Aid Queensland, the Bar Association of Queensland, or their Members of Parliament for assistance.

This can lead to multiple referrals before the person finds the correct dispute resolution mechanism. QPILCH considers this is both an inefficient use of resources and likely to lead to 'referral fatigue'– the phenomenon whereby people become less likely to continue to seek assistance the more times they are referred on.[31] The recent *Legal Australia-Wide Survey: Legal need in Australia* found that most advisors were sourced from the person's own personal resources or networks (74–81%).[32] QPILCH considers these methods are unlikely to result in the person always receiving the appropriate advice and increases the risk of incorrect advice or referral fatigue.

Gaps, pressure points or overlaps in the various dispute resolution mechanisms
Queensland's Department of Justice and Attorney-General provides dispute resolution assistance for parties to civil disputes including neighbourhood disputes, workplace disputes, commercial disputes, relationship separation, and property settlement matters.

The Department's annual report for 2012-2013 found:

[31] 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, 218.
[32] n1, pxviii

- an 85% finalisation/clearance rate on matters subject to a civil mediation provided by the Dispute Resolution Centres;[33]
- 82% of civil matters were settled within 30 days;[34]
- 98% of clients who responded found staff to be helpful and courteous and 93 per cent said they would recommend the service to others.[35]

However, it is not clear from the figures how many actual disputes were handled, the type of people who accessed the service, or what these dispute represent as a total of disputes in the court or tribunal system.

While QPILCH occasionally refers clients to this service, many clients have reached the point where consent to mediation is unlikely. However, QPILCH also operates a free mediation service as part of its Self Representation Service. Clients are more amenable to seeking resolution at this stage with the threat of impending trial.

Directing people with complex problems to multiple legal and non-legal services

Addressing disadvantaged clients

Ensuring that socio-economic disadvantage does not preclude access to justice continues to be a challenge for many service providers.

A 2012 survey by the Law and Justice Foundation provides an insight into this issue. The survey found that the people with a disability and single parents were twice as likely to experience legal problems, and those who were unemployed or living in disadvantaged housing were also more likely to encounter legal problems.[36]

The study also found there was significant overlap between these groups and those who were less likely to take action in respect to their legal problems – although people with a disability were a notable exclusion from this overlap, being more likely to take action.[37] Those with lower levels of education were also less likely to take action on their legal problem. The survey found that people who took no action in response to their legal problems achieved the poorest outcomes to their problem across jurisdictions.[38] The survey concluded:

> *"Disadvantaged or socially excluded groups appear to fare worst. Not only are they more vulnerable to experiencing multiple legal problems, they are also less likely to take action to resolve these problems, less capable of handling their problems alone and more likely to suffer a variety of adverse consequences that may further entrench their social exclusion. Thus, tailoring legal service provision to meet the legal needs of socially excluded groups is an important priority, and access to justice is likely to play a critical role in combating social exclusion.*
>
> *In contrast, educated, affluent individuals more often have sufficient legal capability to handle their legal problems successfully without recourse to expert advice".*[39]

Integrating Legal Services

Legal and non-legal needs impact on each other in a variety of ways. For example, an individual's non-legal needs may prevent or hinder him or her from effectively dealing with their

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[33] Department of Justice and Attorney-General, *Annual Report 2012-2013,* at p. 20*.* http://www.justice.qld.gov.au/__data/assets/pdf_file/0004/211837/annual-report-2012-13.pdf
[34] Ibid, 16.
[35] Ibid.
[36] Law and Justice Foundation (NSW), *Legal Australia-Wide Survey (LAW Survey) Legal Need in Australia*, By Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, published by the Law and Justice Foundation of NSW, August 2012
[37] n1 at 103-106
[38] n1 at page xx.
[39] n1 at page 45

legal problem. For these reasons, QPILCH supports a holistic approach to legal service delivery that better integrates legal and non-legal services.

Research findings stress the importance of well-coordinated or 'joined-up' legal services in order to deal with multiple legal problems.[40] Disadvantaged people are particularly vulnerable to a wide range of legal problems and therefore legal service delivery needs to be able to respond to disparate legal issues.[41] While recent justice reforms in countries such as the UK and the US have emphasised an integrated approach to justice, similar large scale initiatives have not taken place in Australia.

However, the issue has been recently placed on the national agenda with the COAG 2010 National Partnership Agreement on Legal Assistance emphasising that adopting a more holistic approach to resolving people's legal problems will improve the way services are provided.[42]

In the limited time available to respond to the Inquiry, QPILCH is unable to propose specific models of service delivery. However, QPILCH advocates an approach which:

- aims to reduce the fragmentation of legal services in Queensland or, at least, to improve linkages between specialist services and agencies;
- encourages services that address both legal and non-legal needs as part of a holistic case-management approach; and
- emphasises appropriate training for both legal and non-legal service providers to enable them to effectively refer clients to the most appropriate service, reducing referral fatigue and the cost of ineffective referrals.

However, integration does not necessarily mean amalgamation.

Fragmentation of legal services

The current structure of legal services in Queensland is considerably fragmented. Legal advice and assistance can be sought from a wide range of sources, such as Legal Aid, community legal centres, private lawyers, the state or federal Ombudsman, courts and tribunals or government agencies.

Many of these services are specialised, in the sense that they only deal with certain types of legal issues, and many will have their own eligibility criteria and funding constraints. While specialisation is not necessarily undesirable, this structure operates to create a legal services market focussed on addressing discrete legal 'problems' that fall within a particular service's mandate, rather than managing a client's legal needs in a holistic way.

This is problematic as it may often be inadequate to deal with each legal problem in isolation.[43] Further, disadvantaged clients may not be well equipped to navigate the complex array of services available, leading to referral fatigue or unmet legal needs.

QPILCH considers that any review of access to justice in Australia needs to consider the impacts of current practice in legal service delivery and how Australia might move towards a more client-focused, case management approach. In particular, QPILCH recognises the need for improved linkages between legal service providers to promote better outcomes for disadvantaged people.

As disadvantaged groups often experience multiple legal needs as well as complex, sometimes related non-legal needs, addressing legal needs in isolation from a disadvantaged client's other problems is unlikely to provide an optimal outcome for the client. To achieve a comprehensive

[40] n1 at page 219.
[41] n1 at page 219.
[42] National Partnership Agreement on Legal Assistance Services, Preliminaries, clause 2.
[43] n1 at page 219.

solution to their concurrent legal and non-legal problems, disadvantaged clients may require a response that involves input from a range of providers.[44]

QPILCH recognises this and has undertaken a number of initiatives that aim to provide a more integrated response to legal problems. For example, QPILCH's Homeless Persons' Legal Clinic is based on an 'outreach' model, where legal services are located in places that homeless people frequently access, such as community 'drop in centres' like the 139 Club in Brisbane's inner city.

Volunteer lawyers attend legal clinics at these locations, providing legal advice on a drop-in basis. In this way, non-legal and legal services are co-located in the same premises and clients are able to speak to a number of service providers to coordinate responses to their complex problems. This model also makes it easier for lawyers and other service providers to communicate with each other and effectively refer clients when required. Lawyers use the Legal Health Check to identify multiple problems.

The now disbanded Brisbane Special Circumstances Court, although operating in the criminal jurisdiction, also adopted a more holistic approach to case-management. Representatives from non-legal services, such as housing and welfare, were present at the Court and able to provide important assistance to people before the court. QPILCH worked effectively with the Court when it was in operation and is supportive of such models of service delivery, particularly for disadvantaged groups.

Integration and co-location of services can be complex. However, jurisdictions such as the UK have gone much further than Australia in implementing holistic service delivery models.

QPILCH recommends further discussion and consultation in this area.

Appropriate training for legal and non-legal service providers

Research suggests that a wide variety of non-legal workers are routinely the only points of contact with professionals for many people with legal problems.[45] Accordingly, non-legal professionals are ideally placed to notice or signpost legal problems and to act as gateways to legal services.[46] Similarly, legal professionals (particularly those who engage with clients through outreach legal services) can act as important gateways to refer clients to appropriate non-legal professionals for assistance.

However, for this type of 'cross-referral' to be effective, both legal and non-legal professionals first need to be able to recognise other problems a client may be experiencing. This requires significant training and support. For example, QPILCH relies on lawyers from its private member firms to staff its legal clinics and conduct follow up work on client files.

Many of these lawyers work in corporate law firms and their training and day-to-day experience does not necessarily expose them to other non-legal service providers.

While QPILCH provides ongoing training and support to its volunteers, appropriate training for both legal and non-legal professionals must be an important component of any model for holistic, integrated service delivery.

In addition, encouraging the establishment of institutionalised linkages and networks between legal service providers and non-legal service providers would promote holistic service delivery and improve the effectiveness of both to act as effective referral gateways.

[44] n1 at page 220.
[45] n1 at page 217.
[46] n1 at page 217.

Legal Hotlines - A first port of call?

In Queensland, there is no central referral agency or hotline that connects people with the correct services and mechanisms with a minimal number of referral events. This means even if an appropriate service exists, it may not be accessible to the person with the legal problem.

The 1300 telephone number 'LawAccess NSW' operated by Legal Aid New South Wales provides an example of a comprehensive telephone hotline which could be adopted in other jurisdictions. LawAccess is accompanied by a comprehensive website including various 'plain English' legal fact sheets.

The high levels of customer satisfaction recorded in client surveys reflect the ongoing success of the program. A 2012 survey found that 94.4% of clients provided a 'high satisfaction' rating for the service.[47] The operation of a comprehensive telephone service as the first port of call for general queries has the potential to reduce overlap between the various community legal service providers and provide a centralised referral process. QPILCH recognises that the effectiveness of any legal outreach service is dependant upon the public's awareness of the service.

The Law and Justice Foundation 2012 survey found that less than half a percent of respondents surveyed could identify LawAccess when asked to identify a free legal service.[48] The results where higher (at 14.2%) when respondents were provided with the name of the service via a 'cued' question.[49] These findings underscore the importance of ensuring that community legal services are adequately promoted in the wider community.

QPILCH recommends that the Commonwealth join with the states and territories to facilitate appropriate first contact points, building on existing platforms. Consideration should also be given to greater publicity of the central, nation wide website, backup by a hotline, whereby clients can readily obtain advice on whether their legal problem should be addressed by a state or federal agency.

Liaising with electorate offices

QPILCH is mindful that the constituent services offered by members of parliament can provide a valuable service to many clients dealing with government-related issues.

This is particularly the case in circumstances where clients may be experiencing difficulties with a particular government department or require general assistance with navigating bureaucracy. For example, general queries concerning Centrelink, Department of Immigration and Citizenship or veteran's affairs related matters may be apt for referral to the electorate offices of Federal parliamentarians depending upon the specific circumstances. Local councillors are also an important point of contact for local government issues, such as noise complaints or fencing disputes.

There are currently 89 members of state and 41 federal parliamentarians respectively in Queensland. The electorate offices of these representatives provide an important resource for the community and can serve as a valuable liaison with other service providers.

Many electorate office staff members also have extensive contacts with other non-legal service providers and can provide a valuable source of advice to community lawyers in regards to cross referrals. Accordingly, QPILCH encourages community legal service providers to be aware of

[47] http://info.lawaccess.nsw.gov.au/lawaccess/lawaccess.nsf/files/LawAccessCustomerSatisfaction2012.pdf/$FILE/LawAccessCustomerSatisfaction2012.pdf

[48] n1 at page 134.

[49] n1 at page 135.

the valuable assistance which electorate offices can provide to clients with certain issues. QPILCH writes to all new members of parliament to advise them of its services.

Mechanisms adopted to deal with disputes within specific communities
The multicultural composition of contemporary Australian society has implications for the provision of community based legal services.

QPILCH recognises that many aspects of the Australian legal system and methods for dispute resolution may be unfamiliar to clients from overseas backgrounds. QPILCH is mindful of the Commonwealth Parliament's Joint Standing Committee on Migration's Inquiry *into Migration and Multiculturalism in Australia* of March 2013 and the finding that:

> *"The Committee does not support legal pluralism and recommends that the Government promote the message that multiculturalism entails both a respect for cultural diversity and a commitment to the framework of Australian laws and values which underpin social cohesion".*[50]

QPILCH works closely with Brisbane-based organisations such as the Multicultural Development Association Inc. and the Refugee And Immigration Legal Service to assist clients from multicultural backgrounds in accessing community legal services. QPILCH considers that overcoming language barriers and ensuring that interpretation services are available are the most effective methods for ensuring that cultural diversity does not impede access to justice.

9 USING INFORMAL MECHANISMS

9.2 Alternative dispute resolution

In the absence of hard data on the number, proportion and types of disputes resolved through ADR, our understanding is that parties seek to resolve disputes through ADR or non-court processes where possible and appropriate. There is a general sense that if disputes can be resolved quickly, cheaply and fairly through ADR, disputants are likely to be more satisfied than if their dispute has been resolved through court process.

Unfortunately, we do not have hard data that demonstrates that ADR translates into quicker, more efficient and less costly dispute resolution without compromising fairness and equity. ADR is not necessarily cheap. Mediators can be expensive, particularly where they are experienced barristers.

It is undeniable that the potential exists for certain types of disputes to be resolved through ADR without compromising fairness or equity. However, ADR service providers need to be cognisant of power imbalances between disputants and the impact that can have on the fairness or equity of process and outcome. Power imbalances are often created by the relative financial resources of the parties, but can exist in other forms such as disability, gender, ethnicity, language and age.

ADR services could be strengthened by provision of pro bono mediation services (such as the free mediation service run by QPILCH through the Self Representation Service), as well as culturally sensitive services and mediators trained to recognise and deal with disadvantaged parties and power imbalances. The potential for ADR to improve access to justice could also be strengthened through promoting awareness amongst legal practitioners of available ADR services and an understanding of the different ADR processes, which would improve their confidence in both participating in, and assisting parties to participate in, ADR processes.

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[50] Australian Parliament Joint Standing Committee on Migration: *Inquiry into Multiculturalism in Australia* (March 2013), Chapter 4, p. 85, paragraph 4.113.<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=mig/multiculturalism/report.htm>

ADR is appropriate for most civil matters, but has acknowledged limitations, particularly in relation to family law matters. Greater use of ADR could be made in relation to minor disputes, disputes within and between not-for-profit organisations, and disputes involving self-represented litigants. ADR mandated by legislation as a prerequisite step to court action seems to be more successful than courts order disputing parties to ADR. All practitioners delivering ADR services should be trained, accredited and regulated in some fashion.

9.3 Ombudsmen

We do not have hard data on the number and types of disputes resolved through ombudsmen services. However, the number of ombudsmen and the services provided by ombudsmen appears to be growing. This would indicate that ombudsmen are perceived as an efficient and effective way to resolve particular types of disputes. Further, industry ombudsmen are funded by the industry and are generally considered independent, so are valuable tool for access to justice.

It would appear that ombudsmen work best in certain industries, for example, the Financial Ombudsman Service and Telecommunications Ombudsman. However, these industry ombudsmen can be under-resourced and therefore limited in the number and complexity of cases they can take on. Further, industry ombudsmen services can also be utilised by disputants for ulterior purposes.

Whilst ombudsmen may have investigative powers and can make recommendations, their decisions are not binding. This is a potential area for improvement.

10 IMPROVING THE ACCESSIBILITY OF TRIBUNALS

10.1 Tribunals and access to justice

Queensland Civil and Administrative Tribunal

The Queensland Civil and Administrative Tribunal ("**QCAT**") was established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("**QCAT Act**") in 2009. The QCAT amalgamated 18 former tribunals that had dealt with matters ranging from child protection to complaints about members of the legal profession. The QCAT was established because the proliferation of 26 separate tribunals over several decades had created a fragmented and complicated system of administrative justice that was confusing for community members and costly for the government to run. The spectrum of specialist tribunals meant that decisions did not follow a consistent pattern and there were no common procedures[51]. By establishing a single recognisable entry point to the justice system, the QCAT aimed to facilitate access to justice and to improve the efficiency and quality of administrative decision-making[52].

It seems that the QCAT is a popular avenue for resolving disputes in Queensland. In respect of the 2011-2012 financial year, the Tribunal reported that an overall clearance rate of 96 per cent was achieved against a backdrop of 29,832 cases having been lodged that year. Alternative dispute resolution settlements were achieved in 45 per cent of minor civil disputes and in 62 per cent of non-minor civil disputes[53]. Client satisfaction was rated at 71 per cent, up four per cent from the previous financial year[54].

Operation of the QCAT

[51] Queensland, Legislative Assembly, *Hansard*, 17 June 2009 at 978.
[52] Queensland Civil and Administrative Tribunal Bill 2009 (Qld), *Explanatory Notes* at 1.
[53] *QCAT Annual Report 2011-12* at 10, 13-14.
[54] *QCAT Annual Report 2011-12* at 10.

In conjunction with the Magistrates Court, the QCAT delivers its services throughout the State and approximately half its matters are heard outside Brisbane. The QCAT aims to provide services at a low cost to community members and to implement processes that are efficient, diverse and flexible[55]. These aims are entrenched in the QCAT Act; section 3(b) provides that the objects of the Act include having QCAT deal with matters in a way that is "accessible, fair, just, economical, informal and quick". In aid of these objectives, s 4 of the QCAT Act requires the QCAT to, among other things:

- facilitate access to its services throughout Queensland;
- encourage the early and efficient resolution of disputes before it;
- conduct proceedings informally so as to minimise the costs to the parties; and
- ensure it is flexible enough to respond to the diverse needs of the people who use its services.

An example of the flexibility the QCAT Act has sought to entrench is provided by s 61. Under that section and where warranted by the circumstances, the QCAT may provide relief to parties from procedural requirements by extending or shortening time limits or waiving procedural requirements prescribed by the QCAT Act.

The QCAT operates three divisions:

(i) the human rights division, which deals with anti-discrimination, child protection and guardianship matters;
(ii) the administrative division, which decides disciplinary matters for various professions and reviews administrative decisions of government agencies; and
(iii) the civil disputes division, which focuses on minor civil disputes, building industry disputes and retail tenancy disputes.

When it comes to hearing a particular matter, the President of the QCAT must choose the members that will constitute the panel[56]. The President's selection is based on the importance and complexity of the matter and panel members must have special expertise that relates to the matter in question[57]. Panels are made up of a mix of legally-qualified and lay people and it is reported that this approach is effective and important in protecting the rights of vulnerable litigants. Legally qualified members ensure that one party is not taken advantage of and that QCAT decisions are consistent[58]. The role played by non-legally qualified Tribunal members with special expertise in relevant areas is equally important because they ensure QCAT decisions are just. Constituting QCAT panels with people who have extensive professional experience in particular areas, such as child protection, has been described as "essential to protecting the rights of vulnerable groups" [59].

Shortcomings

The QCAT Act has been criticised for blurring the objectives of fairness and just resolutions, on the one hand, with the objective of efficiency, on the other. It has been observed that because s 3(b) of the QCAT Act lists these objectives at the same priority level, efficiency can at times be prioritised in favour of fairness. In a 2013 review of the QCAT Act, the Queensland Association of Independent Legal Services Inc ("**QAILS**") recommended that s 3(b) be amended to give primacy to fair process and just outcomes in preference to efficiency and economy[60].

QAILS also pointed to jurisdictional difficulties for people attempting to access the QCAT. In minor civil disputes, the QCAT is empowered to hear claims seeking to recover a debt or

[55] *QCAT Annual Report 2011-12* at 10.
[56] Section 165(1) of the QCAT Act.
[57] Section 167 of the QCAT Act.
[58] QAILS, *Review of the QCAT Act*, 22 February 2013 at 15.
[59] QAILS, *Review of the QCAT Act*, 22 February 2013 at 15.
[60] QAILS, *Review of the QCAT Act*, 22 February 2013 at 5.

liquidated demand of money[61]. QAILS reported that because this jurisdiction was commonly misapplied to include claims for damages where there was no evidence of a debt or liquidated demand, it was difficult to confidently advise clients about the extent of the QCAT's jurisdiction regarding minor civil disputes[62]. This also meant that if a claim was issued as though it were a liquidated demand, but was actually a claim based upon negligence or some other breach of duty, the QCAT's jurisdiction to award damages was limited and the matter would need to be pursued separately in the courts if the QCAT's jurisdictional limit was exceeded. This is contrary to the aims and purposes of the QCAT Act.

Legal representation in QCAT

There has been an increase in the amount and the complexity of litigation occurring throughout Australia, which has certainly been the driving force behind the States and Federal Parliament's creation of tribunals[63] as a means for quicker and less expensive dispute resolution. The increasing costs of legal representation and the informality of processes in tribunals have resulted in a number of claimants representing themselves before tribunals. Accordingly, in many tribunals procedures have been established to assist these self-represented persons. However, whether a person is entitled to be legally represented when they appear before a tribunal is an entirely different matter. The entitlement to legal representation can be determined by the relevant Act establishing the tribunal and in respect of procedural fairness in relation to the individual case.[64]

As detailed above, Queensland's largest tribunal is the QCAT which is regulated by the QCAT Act and which is an amalgam of a number of former specialist tribunals. Parties involved in a matter in QCAT must represent themselves, except in certain specified cases. Unless an exception applies, parties do not have a right to legal representation unless the leave of the tribunal has been obtained (refer to section 43 of the QCAT Act which expressly states the intention of the section as being that parties should represent themselves, unless the interests of justice require otherwise).

A person may always be represented where:

- the party is a child, or is a person who has impaired decision-making capacity, or
- if the matter relates to disciplinary proceedings including a review of a disciplinary decision (e.g. under an Act regulating professional or occupational conduct), or
- if the enabling Act related to the matter allows it.[65]

All other parties must seek leave from QCAT if they want to be represented by a person (including a lawyer). Where a person has applied for representation, QCAT may consider the following when determining whether to give leave for a party to be represented:

- the party is a State agency;
- the proceeding is likely to involve complex questions of fact or law;
- another party to the proceedings is being represented; or
- all of the parties have agreed to the party being legally represented.[66]

QCAT may also appoint a person to represent an unrepresented party.

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[61] Section 12(4)(a) of the QCAT Act.
[62] QAILS, *Review of the QCAT Act*, 22 February 2013 at 9.
[63] Latimer P, Hocken M & Marsden S, "Legal Representation in Australia before Tribunals, Committees and other Bodies" (2007)14 *Murdoch University E Law Journal* 122 at 122.
[64] Latimer P, Hocken M & Marsden S, "Legal Representation in Australia before Tribunals, Committees and other Bodies" (2007)14 *Murdoch University E Law Journal* 122 at 123.
[65] Section 43(2)(b) of the QCAT Act and QCAT, Legal Advice and Representation, http://www.qcat.qld.gov.au/using-qcat/legal-advice-and-representation.
[66] Section 43(3) and QCAT Act and QCAT, Legal Advice and Representation, http://www.qcat.qld.gov.au/using-qcat/legal-advice-and-representation.

Parties may be represented by a lawyer as a matter of course, or by another person who acts on their behalf (e.g. an advocate for a person with impaired capacity) where the tribunal is satisfied that person is an appropriate representative for the party. In the latter case, the tribunal may require the representative to produce a certificate of authority made by the party s/he purports to represent.

In 2011-2012, legal representation was only sought in 4% of the 29,832 matters commenced in QCAT.[67] In the proceedings in which legal representation was sought, leave was in fact granted in 86% of cases.[68]

Representation is sought more frequently in some areas of QCAT's jurisdiction than in others. For example, in 59% of anti-discrimination cases, legal representation was sought, whereas it was only requested in 18% of retail shop leases matters and 4% of guardianship matters. In respect of each of those areas, when sought, QCAT granted leave allowing legal representation on 82%, 90% and 99% of occasions respectively.[69] QCAT also provides information to people involved in matters before the tribunal as to where and how to get legal advice.[70]

The Queensland Law Society ("**QLS**") has made various submissions in respect of legal representation in QCAT. QLS recommends that people involved in the QCAT process should have an automatic right to legal representation for disputes involving in excess of $15,000. On 19 January 2012, QLS issued a media release in relation to this issue[71] noting that the current position (i.e. automatic right to legal representation only in certain limited circumstances) had the potential to cause a miscarriage of justice on a significant scale. In this media release, Annette Bradfield explained:

> *"For example, if you're a home owner and have a dispute with your builder over tens of thousands of dollars, you have to appear before court on your own… Now the large organisation at the other end of the dispute can only have one representative as well, but it's more than likely this would be the contracts manager, or even a technical specialist who has expertise in these matters.*
>
> *How is that fair to the average person who doesn't have that expertise to have their arguments weighted against these professionals?*
>
> *It's understandable to want to service the community and see justice done swiftly, but it must also be fair and reasonable. To pitch a worker against a multinational, or a small business against a shopping centre conglomerate, or a consumer against a retail giant, with no access to legal advocacy before the tribunal, doesn't make sense. The act of appearing in the formal tribunal setting is intimidating enough without denying people the right to have their solicitor by their side."*

As it stands, QPILCH is of the view that QCAT representation position is fairly good. As identified above, in instances where leave to be represented has been requested, it is approved 86% of the time. QPILCH believes that the scope for having legal representation within the context of tribunals should be more limited than that of courts. However, parties should still be entitled to legal representation in certain circumstances. As it stands, the current process of seeking leave is working well and for those who are not granted leave, QPILCH's Self

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[67] QCAT News February pg 2.
[68] QCAT News February pg 2.
[69] QCAT News February pg 2.
[70] QCAT, "Where to get legal advice", http://www.qcat.qld.gov.au/__data/assets/pdf_file/0010/159706/legal-advice.pdf.
[71] Queensland Law Society, "No fair fight when David meets Goliath before tribunal", http://www.qls.com.au/About_QLS/News_media/Media_releases/No_fair_fight_when_David_meets_Goliath_before_tribunal.

Representation service provides useful practical assistance to those parties who cannot afford private representation.

Mechanisms to ensure benefits of tribunals are not undermined by lawyers
In the context of legal representation in tribunal systems, special care needs to be taken to ensure that the benefits of tribunals are not undermined by lawyers. While QPILCH is broadly comfortable with the scope for legal representation in matters before QCAT, QPILCH has first hand experience with unwarranted complexity and/or the potential for disadvantage to unrepresented parties due to the conduct of lawyers representing other parties to a matter.

The QCAT Act contains several provisions which aim to "encourage the early and economical resolution of disputes before the tribunal",[72] including:

- placing the onus on the tribunal (rather than parties or their representatives) to ensure parties understand the practices and procedures of the tribunal, the nature of assertions made in the proceeding and legal implications of the assertions, and any decision of the tribunal in that proceeding;[73]
- empowering the tribunal to explain the above matters to a party, verbally or in writing, to assist with ensuring the party understands those matters;[74]
- where the tribunal considers a party is acting in a way that causes unnecessary disadvantage to another party, empowering the tribunal to strike out proceedings, remove the party or make a decision in the applicant's favour (where the party causing the disadvantage is not the applicant);[75]
- empowering the tribunal to make costs orders against a *representative* of a party, which representative the tribunal considers is responsible for unnecessarily disadvantaging another party to the proceeding;[76]
- placing a general obligation on parties to act quickly in any dealing relevant to the proceeding.[77]

Despite these provisions, in QPILCH's experience, there is often a problem with the conduct of lawyers representing parties to a QCAT hearing in respect of the nature of their correspondence on the matter (i.e. letters of offer). Lawyers for parties in QCAT often write as if they are involved in litigation in a superior court and this can cause confusion and potential delays where the other party is not represented, and that party is not familiar with the language and formality of legal communications.

An example which we have seen occur several times recently, is where solicitors representing clients in QCAT matters write to the other side, who is self-represented, threatening to seek a costs order if they do not withdraw the proceedings. We have seen several self-represented parties withdraw their proceedings in response to letters like this because they are intimidated and do not understand that costs are only awarded in very limited circumstances in QCAT.

Some mechanisms which could be implemented to ensure that the benefits of tribunals are not undermined by parties' legal representatives are:

- referring an unrepresented party, who is unable to afford legal assistance, for free legal assistance when the other party is granted leave to be represented (this is already done on an ad hoc basis in QCAT. In some cases, the tribunal will send a factsheet on legal assistance with correspondence.)

[72] See Section 4 of the QCAT Act regarding the Tribunal's functions relating to the Act's objects.
[73] Section 29 of the QCAT Act.
[74] Section 29 of the QCAT Act.
[75] Section 48 of the QCAT Act.
[76] Section 103 of the QCAT Act.
[77] Section 45 of the QCAT Act.

- rules or requirements regarding the nature and content of communications with parties if one or more parties are not represented by a lawyer (i.e. self-represented litigant and a lawyer);
- directing people before tribunals to various resources (which in many cases already exist) to assist them in understanding and participating in the process; and
- practice directions detailing the right of members/conciliators to take a more inquisitorial approach when one party is represented (the QCAT Act gives the tribunal broad powers in this respect – see section 28 of the QCAT Act which empowers the tribunal to inform itself in any way it considers appropriate and to admit into evidence the contents of any document despite non-compliances with time limits and other requirements and section 29 which puts an obligation on members to ensure that each party understands what is going on).

11 IMPROVING THE ACCESSIBILITY OF COURTS

11.1 The conduct of parties in civil disputes and vexatious litigants

The model litigant rules in Queensland

The Commonwealth government was the first in Australia to adopt model litigant rules in 1997 (contained in the *Legal Services Directions*) ("**the Cth Rules**"). In 2006, the Queensland Government introduced its own model litigant policy in the form of guidelines which apply to the provision of legal services in matters involving Government agencies ("**the Qld Rules**").[78]

The Qld Rules include the following obligations:

- to not take advantage of a claimant who lacks the resources to litigate a legitimate claim;
- to deal with claims promptly without causing unnecessary delay;
- to only start court proceedings if the State has considered other methods of dispute resolution (for example, alternative dispute resolution or settlement negotiations).

Policy reasons for governments to act as model litigants

The courts have identified three policy reasons for government litigants being held to higher standards of conduct than those expected of private litigants:

1. Citizens have a reasonable expectation that public bodies act honestly and fairly;
2. Public bodies must exercise their powers "for the public good" - that is, public bodies, having no legitimate private interest in the performance of their functions, should be required to act fairly towards those with whom they deal in so far as this is consistent with their obligation to serve the public interest for which they have been created; and
3. Governments and their agencies should act as "moral exemplars".[79]

Status of the rules and enforcement

Both under the Commonwealth and the Queensland regimes, a failure to comply with the model litigant rules does not generally allow litigants opposed to the government party to rely on the rules to challenge the government party's actions. However, enforcement avenues are generally stronger in jurisdictions where the model litigant rules are based in statute. For example, under the Cth Rules, which are a statutory instrument having their statutory basis in Part VIIIC of the *Judiciary Act 1903* (Cth)) the Attorney-General can impose sanctions for non-compliance. In addition, statistical information regarding compliance with the rules is published in the Australian Government Attorney-General's Department Annual Report.[80] There are no

[78] Available here:http://www.justice.qld.gov.au/corporate/model-litigant-principles.

[79] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.

[80] Section 55ZG(2) of the *Judiciary Act 1903* (Cth). The ACT has also recently enacted a statutory compliance system for its model litigant principles. Under s5AC of the *Law Officer Act 1992* (ACT) government agencies must include in their annual report information about their compliance with the

comparable enforcement avenues associated with the Qld Rules (which emanate from a formal statement of Cabinet and take the form of policy guidelines).

It is recommended that Queensland enact a statutory compliance system for its model litigant guidelines.

In some jurisdictions the model litigant rules are binding on private lawyers acting for the government

Government agencies often outsource their litigious matters to private legal representatives. For this reason, under the Cth Rules, the Australian Government Solicitor and private lawyers acting for the Commonwealth are required to act in accordance with the rules and the rules override legal professional privilege.[81]

Similarly, In Victoria, where the model litigant rules are, like in Queensland, policy-based, the model litigant guidelines have now been incorporated in the Standard Legal Services to Governmental Panel Contract, so that they are binding on external providers of legal services to Victorian Government agencies. This includes private lawyers, in-house government lawyers and the Victorian Government Solicitor's Office. Under the Governmental Panel Contract, sanctions may be imposed on a Panel firm, including removal from the Panel. [82] There are no comparable obligations on legal representatives hired on behalf of the Queensland government.

Should the model litigant rules be extended to apply to all represented litigants?

A number of arguments support the view that the model litigant rules should be made to apply to all represented litigants. For example, one justification which is often cited in support of the model litigant rules is fairness, that is, government litigants are better equipped to engage in litigation than their private opponents, and should therefore be subject to additional duties. [83] However, it is not necessarily always the case that the government litigant is the wealthier of the parties, and where this is not the case, the model litigant obligations may provide the private opponent with a positive advantage. [84]

There can also be significant imbalances in power and resources between private parties engaging in litigation. For example, in the case of unrepresented litigants, where there are limits on how far judges can go to assist unrepresented litigants (given the judges' duties to remain impartial and to be seen to remain impartial) - it is arguable that some of the remaining imbalance can be made up by represented opponent being held to the standards of conduct expected of a model litigant.[85]

However, it is also arguable that in practice, in Queensland, some of the principles contained in the model litigant rules are already partly applicable to private litigants pursuant to the overarching obligations found in section 5 of the *Uniform Civil Procedure Rules 1999* (Qld). These obligations require all parties to proceed in an expeditious way so as to avoid undue delay, expense and technicality, failing which the court may dismiss a proceeding or impose a sanction as to costs.

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model litigant guidelines and any breaches of the guidelines during the financial year. The ACT Attorney-General also has power to enforce compliance with the guidelines.

[81] Section 55ZG and 55ZH of the Judiciary Act 1903 (Cth).

[82] Lynn Buchanan and Dr John Lynch, "*Model litigant rules, ok?"* (2011) 52(3) LIJ 40, 42.

[83] Zac Chami, "*The Obligation to Act as a Model Litigant*",2010 AIAL National Administrative Law Forum, Sydney, 22 July 2010.

[84] This was recognised in *ACCC v Leahy Petroleum Pty Ltd* (2007) ATPR 42-200 where Gray J observed that the obligation "is of significant value to parties against whom the Commonwealth is involved in litigation."

[85] Zac Chami, "*The Obligation to Act as a Model Litigant*",2010 AIAL National Administrative Law Forum, Sydney, 22 July 2010.

Should existing obligations to encourage cooperation be strengthened or expanded?
The obligation to exhaust Alternative Dispute Resolution ("**ADR**") mechanisms prior to engaging in litigation was added to the Qld Rules in 2012, thus bringing the Qld Rules into line with ADR-specific obligations in the Commonwealth rules.

Declaring an individual a vexatious litigant
It is important to note that whilst the Issues Paper refers to 'vexatious' and 'querulous' litigants interchangeably, [86] in QPILCH's view, these are very different concepts; while QPILCH will, in certain circumstances, provide some assistance to the latter, it will not assist the former, as in its opinion the process in Queensland (described below) adequately deals with vexatious litigants.

In Queensland the process for having individuals declared vexatious litigants is governed by the *Vexatious Proceedings Act 2005* (Qld) ("**the Act**"). Under the Act, the Supreme Court ("**the Court**") can make an order prohibiting someone from starting proceedings, or starting a proceeding of a certain type, in Queensland. In deciding whether to make a vexatious proceedings order against a person the Court will look at the number of proceedings instituted by that person and will decide if their actions were fair and reasonable and/or if the same action has been decided in the past.[87]

Vexatious proceedings under the Act include those cases that are:[88]

a) an abuse of the process of a court or tribunal
b) designed to harass or annoy, to cause delay or detriment, or for any other wrongful purpose
c) instituted or pursued without fair or reasonable grounds.

Persons who may apply to the Court for a vexatious proceedings order to be made are:

a) the Attorney-General
b) the Crown solicitor
c) the registrar of the Court.
d) the other party in a case brought by a party acting vexatiously.[89]

The person against whom the Vexatious Proceedings Order is to be made must be given a right to be heard before any such order can be made.[90]

Having been declared a vexatious litigant, how difficult is it for a litigant to access justice when a dispute has merit?
It is QPILCH's view that the Queensland process generally adequately allows litigants who have been declared vexatious to access justice when a dispute has merit.

The Act allows for varying types of orders to be made, including staying all or part of any proceeding in Queensland already instituted by the person, or prohibiting the person from instituting proceeding, or proceedings of a particular type, in Queensland.[91]

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[86] Pg 19 of the Issues Paper.
[87] Queensland Court, "Vexatious Litigants" http://www.courts.qld.gov.au/courts/district-court/vexatious-litigants.
[88] Definition of "vexatious proceedings", Schedule to the Vexatious Proceedings Act 2005 (Qld).
[89] Section 5 the *Vexatious Proceedings Act 2005* (Qld). Note that rule 389A of the *Uniform Civil Procedure Rules 1999 (Qld*) enables the court to make an order preventing further interlocutory applications by a party who has previously brought more than one interlocutory application that is frivolous, vexatious or an abuse of process. This is an alternative to using the vexatious proceedings legislation.

[91] Section 6 of the *Vexatious Proceedings Act 2005* (Qld).

If someone is subject to a vexatious proceedings order, they will be unable to start further proceedings without the permission of the court. [92] Section 11 of the Act deals with applications for leave to institute proceedings, the application must be made to the Court and the applicant must file an affidavit together with the application which sets out certain matters, including all facts material to the application, whether supporting or adverse to the application, that are known to the applicant. [93] There is a prohibition on any appeal from any decision disposing of the application.[94]

Section 13 provides that before a Court can grant an application the Court must order that the applicant serve each relevant person with a copy of the application and affidavit and a notice to the persons that they are entitled to be heard on the application and give the applicant and each relevant person an opportunity to appear and be heard. The Court may grant leave to institute a particular proceeding or a proceeding of a particular type subject to conditions.[95]

11.2 Court processes

General matters

Generally speaking, the Queensland justice system is complicated and difficult for under-resourced and self represented litigants to negotiate. The Uniform Civil Procedure Rules 1999 (Qld) ("**UCPR**") impose timeframes on many steps to be taken in the courts, prescribe technical rules for drafting court documents and establish often complicated processes for pursuing claims. These requirements may be unrealistic and onerous for parties that do not have the benefit of legal representation.

The philosophy of the UCPR, set out in r 5, provides a measure of protection against technical court procedures impeding access to justice. Rule 5(1) provides that the purpose of the UCPR is to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". Rule 5(2) specifically provides that the UCPR are to be applied by the courts in such a way as to avoid undue delays, expense and technicality.

Addressing resource imbalances between disputants

In helping to address imbalances that may result from disputants being unequally resourced, services like QPILCH have an important role to play. The assistance offered by QPILCH, including referring people for pro bono assistance, is effective in addressing imbalances and empowering under-resourced parties to take meaningful steps in litigation.

One recent example of QPILCH's work involved a well-resourced plaintiff who had engaged aggressive solicitors to file a case against several impecunious defendants. The matter was in the justice system for over a year before the defendants heard about QPILCH and sought assistance. When QPILCH became involved, it was clear that the plaintiff's case was unmeritorious and by sending one letter on the defendants' behalf, the plaintiff was convinced to abandon the claim. This is one example of the role that QPILCH plays in the justice system.

Assessing costs of inefficient or ineffective court processes

Philosophy provision of the UCPR

Rule 5 of the UCPR provides some protection against a party being disadvantaged due to the other side employing court processes in an inefficient or ineffective manner. Under r 5(3), a party in court proceedings impliedly undertakes to the court and to the other party to proceed in an expeditious way. Rule 5(4) confers power on the court to impose any sanctions that it considers appropriate if a party does not comply with an order of the court or with the UCPR, including r 5(3).

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[92] Section 7 of the *Vexatious Proceedings Act 2005* (Qld).
[93] Section 11(3) of the *Vexatious Proceedings Act 2005* (Qld).
[94] Section 12 of the *Vexatious Proceedings Act 2005* (Qld).
[95] Section 13(a) of the *Vexatious Proceedings Act 2005* (Qld).

There has been a suggestion that model litigant obligations be extended to apply to wealthy parties in order to protect impecunious litigants. It is arguable in Queensland that r 5 of the UCPR gives the courts sufficient power to impose appropriate sanctions on parties that do not proceed expeditiously.

Costs regime in Queensland

In Queensland, the costs indemnity rule applies to legal proceedings; successful parties are generally compensated by receiving at least some costs from the unsuccessful party.

Of course, at the outset it is important to recall that even a successful party in proceedings is still almost certainly going to be out of pocket. Costs are calculated on the scales of costs that are located (in Queensland) in the schedules to the UCPR. The amounts provided in the scales are well below solicitors' charging rates. Costs on the standard basis are often between half and two-thirds of a party's actual costs. Costs on the indemnity basis can be about three-quarters of a party's actual costs.

If a party is entitled to costs under the UCPR or by an order of the court, r 687 of the UCPR provides that the costs are generally to be the "assessed costs". Costs are generally assessed on the standard basis unless the UCPR or a court order provides otherwise.[96] When assessing standard costs, a costs assessor must allow for all costs necessary or proper for the attainment of justice and for enforcing or defending the rights of the party whose costs are being assessed.[97] Under r 703(1), a court may order costs be assessed on the indemnity basis. A costs assessor has discretion to consider the effect of inefficient or ineffective court processes. When making an assessment, r 721 of the UCPR allows the costs assessor to consider various factors, including:

- the nature and importance of the proceeding;
- the amount of money involved in the proceeding;
- the competing interests of the parties;
- the general conduct and cost of the proceeding; and
- any other relevant circumstances.

The costs indemnity rule is based on the principle of fairness, because it would be unfair for a party to suffer financial detriment by pursuing a valid legal claim or defending an unmeritorious one.[98] The costs indemnity rule is formally provided for by Chapter 17A of the UCPR, which establishes the procedure for assessing costs.

There has been some suggestion from the Australian Law Reform Commission that this rule may provide a disincentive for parties to reduce the costs of litigation. Generally, legal costs are higher in jurisdictions which apply the costs indemnity rule because the rule raises the stakes of litigation and reduces the "expected marginal costs of legal services".[99] The costs indemnity rule is reportedly not effective in discouraging parties from using inefficient and expensive court procedures, and in fact may encourage such conduct.[100]

Nonetheless, even with a costs order, a successful party in the District or Supreme Courts of Queensland still has to enforce that order, and will still have to pay substantial legal costs into

[96] Rule 702(1) of the UCPR.
[97] Rule 702(2) of the UCPR.
[98] Australian Law Reform Commission, *Costs Shifting — Who Pays For Litigation*, ALRC Report 75, 20 October 1995 at [4.7].
[99] Australian Law Reform Commission, *Costs Shifting — Who Pays For Litigation*, ALRC Report 75, 20 October 1995 at [4.19].
[100] Australian Law Reform Commission, *Costs Shifting — Who Pays For Litigation*, ALRC Report 75, 20 October 1995 at [4.20].

the tens of thousands of dollars to cover the gap between actual costs and the scale costs that are allowed.

The costs rule promotes access to justice, as it allows for firms to act for clients on a speculative or deferred fee basis when there is a strong likelihood of a successful outcome. It can also, provided that there is an appropriately drafted costs agreement (*King v King* [2012] QCA 81), allow for a successful party represented on a pro bono basis to recover his or her legal costs.

As such, the costs indemnity rule should be retained.

Discovery

Current discovery practices in Queensland

It is acknowledged that discovery constitutes one of the most significant costs of litigating. Frequently, discovery incurs costs that are out of reasonable proportion to the benefits the process offers. The most cost-intensive aspect of discovery is the document review stage. Current discovery practices generally cast a broad net to capture all potentially relevant documents. The huge number of documents retrieved is then reviewed, one by one, by lawyers. These problems have been exacerbated by technological advances. The vast quantity of electronic files now stored means that modern discovery often involves reviewing data stored on computers, mobile phones and other electronic devices and extends to documents that have been deleted and electronically archived.

Electronic documents create further problems for access to justice. Lawyers and sophisticated litigants generally use specific software to access, categorise and review documents. Software also aids with the process of exchanging documents with the other side. While well-resourced litigants have the means to employ specialist software, litigants that cannot afford this technology suffer a significant disadvantage. Not only is the software not available for them to review their own documents, when it comes to reviewing the documents disclosed by the other side, they will not be able to use the streamlined electronic review processes to help them cope.

From a general perspective, some of the rules relating to discovery are difficult for self-represented litigants to understand and this, of itself, may impede access to justice. One example is provided by r 212(1) of the UCPR, which provides that the duty of disclosure does not extend to documents that: attract privilege; are additional copies of a document that is already disclosed; or are relevant only to credit. Often, self-represented litigants have difficulty understanding the "document only relating to credit" concept.

Directly relevant test

In Queensland, r 211 of the UCPR stipulates that each party has a duty to disclose each document in its possession or under its control that is *directly relevant* to an allegation in issue in the pleadings, or a matter in issue in the proceeding. The directly relevant test was intended to impose a threshold on the process of discovery. It replaced the old *Peruvian Guano* test.[101] Still applicable in some other Australian jurisdictions, the *Peruvian Guano* test required disclosure of every document relating to matters in question in the proceeding including those containing information which could directly or indirectly enable either party to advance its case.

In practice, the introduction of the directly relevant test in Queensland is said not to have had a significant impact on the burden of disclosure. In a speech given in 2010, the Hon Justice Byrne of the Supreme Court of Queensland explained that this limited impact may be due to some litigants continuing to cynically over-disclose in order to hinder the proceedings by swamping the other side with documents.[102] His Honour also suggested that some lawyers

[101] In reference to the decision of *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

[102] See the Hon Justice Byrne, "Developments in Civil Litigation – The Better Resolution Group", paper presented at the Bar Association of Queensland Conference, 6 March 2010.

search through their client's documents to ensure nothing is overlooked. This suggestion hints at what the Hon Justice Keane has said on this point, in suggesting that problems with discovery in Australia are caused as much by lawyers being excessively cautious as they are by the impact of technological advances on the increased availability of documents.[103]

Judicial discretion

In addition to rule changes, there are other ways for the courts to limit the process of discovery in Queensland. The courts have discretion to relieve a party of the duty of disclosure under r 224 of the UCPR. In exercising this discretion, a court may consider:

- the time, cost and inconvenience likely involved in disclosing the documents in comparison to the amount involved in the proceeding;
- the relative importance of the question to which the documents relate;
- the likely effect on the outcome of the proceeding of disclosing the documents; and
- any other relevant considerations.

A further discretionary power under r 367 of the UCPR allows the courts to make any direction that is appropriate about the conduct of a proceeding. A direction can be made under this rule even if it is inconsistent with another provision of the UCPR. This broad power means that new practices can be developed and applied by the Queensland courts without enacting changes to the UCPR.

Recent improvements in Queensland

Despite introducing a directly relevant test for discovery and giving the courts discretion to relieve parties from cumbersome discovery requirements, cost inflation still results from the practical issues arising from discovery. In acknowledging certain problems with the existing system, the Supreme Court of Queensland convened the Better Resolution of Litigation Group ("**Group**") in 2009. The Group has since examined ways of more quickly and cost-effectively resolving disputes in Queensland and one of the focus areas has been discovery. In this regard, the Group has considered several alternatives for improvement.

One possible improvement that has been examined is to focus on the early identification and exchange of critical documents in litigation. This would encourage parties to identify, at the preliminary stage, those documents that are likely to have a decisive impact on the resolution of the dispute. However, the impact of this option is questionable. Often, it is not until the long process of document review has been completed, and the pleadings refined to reflect what has been found during that review, that it is apparent what the critical documents in fact are. This possible improvement seems not to address the cost-intensive process of document review.

A more effective option considered by the Group might be to introduce protocols limiting the extent of searches that parties conduct in the first place. Protocols could require parties to agree on the limits of document retrieval and review to ensure that discovery remains proportionate to the nature and complexity of the proceedings, the amount of damages claimed, and the real issues in dispute.

To some extent, these options have been implemented by the Supreme Court. Practice Direction 11 of 2012 was introduced on 18 May 2012 to apply to proceedings on the supervised case list.[104] The Practice Direction attaches a set of guidelines called the Management of Documents during Litigation Guidelines for Practitioners in Supervised Cases ("**Discovery Guidelines**"). The Discovery Guidelines are intended to address the problems of unnecessary costs and disproportionate burdens that arise when inappropriate document management

[103] The Hon Justice Keane, "Access to Justice and Other Shibboleths", paper presented to the Judicial Conference of Australia 2009 Colloquium, 10 October 2009.

[104] Available online at http://www.courts.qld.gov.au/__data/assets/pdf_file/0020/150266/sc-pd11of2012.pdf.

practices are adopted. The Discovery Guidelines encourage parties to agree, at an early stage, upon a document plan to govern how documents will be managed throughout the proceedings. The document plan should aim to ensure the cost-effective retrieval, review, exchange and use of documents in a manner that is proportionate to the case.

The Discovery Guidelines also provide for the Supreme Court to make tailored discovery directions where the circumstances of a case are appropriate. Appendix C to the Discovery Guidelines includes example directions that may be made, including directing the parties to consult and agree upon procedures that will:

- provide for the early identification and exchange of a limited number of critical documents;
- exchange written proposals about the extent of searches for documents they intend to undertake;
- limit disclosure to particular types or classes of documents; or
- implement a proportionate document plan that the parties have agreed, or will attempt to agree.

Witnesses and experts

Current practice in Queensland

Part 5 of Chapter 11 of the UCPR regulates procedures for adducing expert evidence in Queensland in a way that aims to ensure that, where it is practicable and can be done without compromising the interests of justice in a matter, expert evidence is given by a single expert. The objective is to avoid parties incurring unnecessary costs by retaining different experts.[105]

Rule 429D of the UCPR imposes cost consequences on parties for needlessly retaining different experts, when one might have sufficed. The rule provides that when exercising its discretionary power to award costs, the court may disallow the costs for an expert's report on an issue if the court considers that the proceedings may have been facilitated by the appointment of a single expert in relation to the issue. Where more than one expert is to give evidence in proceedings, the court may direct them to meet before the trial to identify the matters upon which they can and cannot agree, and to attempt to resolve any disagreements.[106]

Practice Direction 11 of 2012 was introduced in the Supreme Court of Queensland in May 2012 and includes guidelines for joint conferences and reports of expert witnesses. Attachment 2 to the Practice Direction attaches guidelines called the Supervised Case List Guidelines for Joint Conferences of Expert Witnesses ("**Expert Witness Guidelines**"). The objectives of the Expert Witness Guidelines are stated as including:

- "the identification and narrowing of issues in the proceedings by discussion between the experts;
- the consequential shortening of the trial and enhanced prospects of settlement;

…

- requiring experts to state their position on issues, thereby enhancing certainty as to how the expert evidence will come out at the trial … ; and
- reducing the need for experts to attend court to give evidence."

The Expert Witness Guidelines encourage parties to convene a conference between their experts in order to dispose of proceedings in a just, quick and cost effective way. The experts are to provide their respective opinions on questions arising out of witness statements. A report should subsequently be prepared outlining the matters agreed and giving reasons for those questions upon which agreement could not be reached. Once finalised by the experts, the report should be filed in the Court.

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[105] Rule 423 of the UCPR.

[106] Rule 429B(1) of the UCPR.

11.3 Reforms in court procedures

Case management

Court administration agencies provide a range of services integral to the effective performance of the judicial system. One of the primary functions of court administration agencies is to provide case management services, including client information, scheduling and case flow management.[107] The different delivery locations, case loads, case mixes and government policies may affect the equity, effectiveness and efficiency of court administration services. A number of specialist courts (such as drug courts and children's courts) operate in order to improve the responsiveness of courts to the special needs of particular clients. Tribunals can also improve responsiveness and assist in alleviating the workload of courts — for example, small claims tribunals may assist in shifting work away from a magistrate's court.[108]

The case management systems currently operating in Queensland courts include:

- Case flow management system;
- Supervised case list;
- Commercial list (for the purposes of access to justice arrangements, the commercial list will not be discussed); and
- Alternative Dispute Resolution processes.

There is a lack of information as to how effective these case management systems are in Queensland – i.e. the only data available is the number of cases dealt with in a year. Below is a summary of how each system is intended to operate.

Case flow management system

The Caseflow Management System ("**System**") is a system by which the Supreme Court intervenes in proceedings which are progressing slowly in order to help parties bring the proceedings to a timely resolution. The System is regulated by Supreme Court Practice Direction 17 of 2012. Proceedings to which Caseflow Management applies are commenced when a plaintiff files a claim in the registry and serves it on the defendant(s). The defendant(s) must then file a notice of intention to defend within 28 days.

If any proceeding has not been concluded within 180 days of the filing of the last notice of intention to defend, the Court will send the plaintiff an Intervention Notice. An Intervention Notice means that the Court requires the parties to either:

- file a request for trial date;
- inform the court if for some reason the matter has been resolved; or
- explain why the matter is not yet ready for trial and propose a plan to the court to get the matter ready for trial.

If a party does not respond to the Notice - then the Court may list the matter for hearing, and may deem the matter resolved if the parties do not attend.

Case flow reviews are generally conducted once per month, on the last Friday of every month, unless it is more convenient to the Court to conduct it at a different time. At these reviews, the judge will set out a timetable for the matter to be brought to an expeditious resolution. The orders which are made are procedural.

The final direction in a Caseflow order will generally be that the parties file a request for trial date by a certain date "or the matter be deemed resolved".

[107] Report on Government Services 2006, at 6.1
[108] Report on Government Services 2006, at 6.2

This is a self-executing order, whereby if a request for trial date is not filed by that date, and no further order has been made in the matter extending the deadline, the proceeding is in abeyance and no step can be taken unless and until the matter is reactivated by the court.

Supervised case list
The Supervised Case List exists for cases that are likely to involve a considerable use of the Supreme Court's resources either because the trial is likely to take more than 5 days, or because of the issues involved in the case, it is going to be particularly complicated.

Supreme Court Practice Direction 11 of 2012 sets out the procedures that apply to cases on the Supervised Case List.

Cases on the List are managed with a view to reducing the case down to the key issues.
It involves regular review hearings before a designated Judge, who sets directions for the progress of the matter.

There are three ways that a case can be placed on the List.

- a Judge of the Supreme Court can refer the matter to the List, either as a result of an application by one of the parties, or by decision of the judge.
- a party can apply to the Supervised Case List manager for the matter to be placed on the List.
- the Supervised Case List Manager can place a matter on the Supervised Case List.

If an application to have a matter placed on the Supervised Case List is brought, a party will receive a Supervised Case List Questionnaire, which is designed to give the Supervising Judge more information about the issues in the case.

The Court will then set regular review hearings at which Directions will be given about the progress of the matter.

In these review hearings, the Court can consider a broad range of matters. These are set out in paragraphs 16 - 24 of the practice direction. These include:

- whether all the parties required to decide the case are part of the case;
- the pleadings filed;
- disclosure;
- alternative dispute resolution;
- whether any issues can be determined prior to the trial of the substantive case;
- expert evidence;
- trial arrangements (including trial plans, ways of giving evidence, and proof of documents);
- the dates for any further reviews.

QPILCH's recommendation to improve the scope of this mechanism to include Self Represented litigants is discussed below.

Alternative Dispute Resolution process
Alternative dispute resolution helps parties (organisations and individuals) to reach a settlement out of court so that the expense, time and conflict of a trial can be avoided.

The use of Alternative Dispute Resolution (ADR) is encouraged in cases before in the Supreme and District Courts, the Magistrates Court (mediation), the Land Court (preliminary conferences before a judge or judicial registrar and external or free supervised mediation) and Planning and Environment Court. The latter court provides a free ADR service for parties involved in Planning and Environment Court matters.

Our experience is that, particularly in disputes where expert evidence is required due to the technical or complex factual issues in dispute, the ADR process can be very effective in narrowing the issues in dispute and in many cases, resolving the dispute before the hearing proceeds.

An independent third party can help resolve disputes through ADR. However, involvement in this process does not mean that the parties forgo their right to a trial if the dispute doesn't settle.

Barriers to effective implementation of case management systems

Differences in court jurisdictions, along with the use of specialist courts and tribunals, can mean that the allocation of cases to courts varies across states and territories. As a result, the seriousness and complexity of cases heard in each jurisdiction's equivalent court often vary. Any performance comparison needs to account for these factors.

One of the barriers to the case management systems is the lack of involvement of Self Represented litigants within the existing case management systems. These systems largely focus on complex and commercial cases and do not address access to justice arrangements at all.

QPILCH recommends that either:

- a case management system for cases involving one or more Self Represented litigants is established;
- Self Represented litigants are included on the Supervised Case List; and/or
- a practice direction relating to self-represented litigants is drafted and implemented.

QPILCH recommends that the Supervised Case List practice direction should permit the court or the Supervised Case List manager to place a matter on the list after the close of pleadings. The problem with the current system is that a represented party facing an incompetently worded claim by a self represented party, will often not bring an application to have the claim struck out (because the court will give the client liberty to replead). For tactical reasons, it is easier to point out the deficiencies to the party but not formally apply. That way if the client does not amend their pleadings, the represented party can just raise the issue at trial and defend an incompetent case. Moving a case into a supervised case hearing could reduce the potential for this happening.

However, this should aim to avoid tarnishing all self-represented litigants with the "difficult case" tag. Irrespective of the rightness or wrongness of such a label, there are clearly issues for the courts in dealing with self represented parties, which warrant some sort of special measures to help manage them.

The Supervised Case List is not a rigid procedure and can be adapted on a case by case basis. From the matters where the case is already on the list, there are a few hearings (but not many, maybe every couple of months at the most). Dealing with these matters earlier makes a lot more sense. There is a risk of potential costs orders against clients who don't comply with the court orders, but this risk already exists. Cases with arguable points but ultimately lose, will face higher costs orders. However, by having more hearings and having them earlier, it will hopefully mean that the cases when they get to trial can be dealt with more efficiently.

Attempting to "manage" these cases – by imposing strict timetables on parties may add to the general stress, although if the judges are going to give realistic time frames (and that is the key), then that can be worked around.

Creating a separate case management list purely for self-represented litigants could address some of the potential disadvantages as discussed above.

The practice direction should institute some guidance for judges when dealing with self-represented litigants including:

- granting realistic timeframes to the Self Represented litigants for doing things; otherwise it's just going to be more stressful for them;
- the practice direction could just rely on the general requirements of the Queensland UCPR that a party is entitled to a fair hearing, and the requirements of rule 5, or it could attempt to prescribe a framework for the exercise of the broad discretionary power that judges are currently given under the practice direction;
- dealing with the concerns about imposing unrealistic deadlines by borrowing part of the current procedure in the Caseflow List. There's a designated Caseflow Review date each month. So if the Supervised List Practice Direction included a provision that hearings are to happen no more frequently than once a month (often only every two or three months), in accord with what appears to be the current practice;
- develop a management plan procedure, putting in more resources earlier, but increasing the likelihood of early resolution, particularly if there are some incentives to participate in mediation, and with encouragement to use the QPILCH free mediation service;
- the directions given by judges would aid understanding by Self Represented litigants if they are required to undertake actual step-by-step tasks rather than processes, for example, directed to "prepare a file an affidavit of documents by …" rather than "undertake disclosure by…".

However, overall the process should remain flexible so that the individual needs of the Self Represented litigant can be monitored and addressed.

Modern management and communication practices

With the increasingly sophisticated technology widely available to the public, the justice system should ensure that modern management and communication practices are implemented and are available to enhance access to justice.

An example of a modern management practice is the eTrial, which is like a paper-based hearing, although all relevant documents are submitted and viewed as fully text-searchable, multi-page PDFs.[109]

Currently, the Queensland Supreme and District Court offers eTrial facilities where:

- the number of relevant documents is likely to exceed 500;
- parties to the matter will benefit;
- eTrial technology is available in the court; or
- parties can produce relevant documents electronically.

The Queensland Courts were one of the first Australian jurisdictions to provide eCourtbook software and hardware at no cost to support eTrials. However, this practice should be extended to all cases, allowing people to file court documents online. This would benefit a number of people (including people from regional and remote areas) who are unable to attend the court to file these documents and might enhance access to justice arrangements. Many of QPILCH's clients find it a struggle to attend the courts (especially ones in Brisbane City) so full e-access might benefit some disadvantaged sections of the community. Having said that, it is worth noting that many of QPILCH's clients are not "computer savvy" and that electronic filing assumes that litigants have access to appropriate scanning equipment and software.

As it stands, the Queensland Courts provide a lot of information on its website[110] . However, in order to ensure that this information can be easily disseminated, the courts should provide more

[109] www.courts.qld.gov.au/4274.htm

information on an online delivery forum, such as YouTube videos explaining the court process (e.g. what happens in court, what is required, what to wear, how to address the court etc.). These questions are commonly asked by QPILCH's self-represented clients.

Another modern communication which could be adopted by the Courts is a better referral process for self-represented litigants. For example, when a Self Represented litigant files an originating document/defence or seeks assistance via the phone or in person court staff could provide them with useful information set out in pamphlets referring them to the court website. In addition, the court staff could make these people aware of the assistance which may be available from community legal centres (such as QPILCH's Self Representation Service). The Courts' website has a lot of information already publically available, so if people are directed to the information they may find the whole process less daunting.

11.4 Costs awards and court fees

Judicial discretion

Courts have a wide judicial discretion when ordering costs. While cost orders are ultimately at the court's discretion, the general rule is that costs 'follow the event' and the unsuccessful party in litigation will be ordered to pay the successful party's costs.

The reason for this approach, which was derived from English law, was articulated by Mason CJ as follows:[111]

> *If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings …*

Courts sometimes depart from this general rule where there are 'special circumstances', such as the successful party engaging in misconduct in the lead up to litigation.

Public interest litigation

In *Oshlack v Richmond River Shire Council*,[112] the Judge declined to order that the unsuccessful plaintiff, Mr Oshlack, pay the other parties' costs in part because the litigation could be characterised as "public interest" litigation. Subsequent cases have tended to distinguish *Oshlack*, rather than liberally applying this costs award basis.

Costs are of particular concern in public interest cases, which raise important and often complex legal issues and must be litigated in superior courts such as the Supreme Court of Queensland. In public interest matters, particularly where the plaintiff has nothing to gain other than the satisfaction of justice being served, the prospect of an order of costs if unsuccessful deters litigants who would otherwise be willing to litigate important issues.

The award of security for costs is another approach which places a further burden upon the public interest litigant. When a party is faced with an opponent of limited means, that party can apply to the court for an order that an opponent of limited means pay a sum into the court as security for the other party's costs. If such an order is made against a bona fide, but poorly resourced, public interest litigant, the litigation is likely to be suspended, often indefinitely.

Another potential hurdle is the costs convention when a party applies for interim relief. When a party applies for interim relief, courts often require an undertaking as to damages. As a public

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[110] www.courts.qld.gov.au
[111] *Latoudis v Casey* (1990) 170 CLR 534, 543.
[112] (1994) 82 LGERA 236.

interest litigant may not have the means to give this undertaking, they may not obtain interim relief which may render further litigation useless. Although the Uniform Civil Procedure Rules recognises "public importance" as a relevant matter which the court may take into account when ordering security for costs or damages, there is no obligation upon the court to do so.

Alternative approaches
Jurisdictions outside Australia have specific public interest cost regimes. In England, courts can make Protective Costs Orders at any stage of proceedings. Protective Costs orders either prevent a litigant being subject to an adverse costs award, or cap the amount of recoverable damages. One of the factors a court may take into account is the general public importance of the case. In April 2013 the UK codified the Protective Costs regime for environmental cases.

In Canada, courts can make an award of costs before hearing the substantive case.

The appropriateness of court fees
Formerly, the courts had a waiver for those who were unable to afford court fees, for example, pensioners. While in the scheme of litigation fees, court fees may appear minimal, these fees can represent a large amount of a low income earner's salary. This waiver should be reintroduced as it can inhibit low income earners from obtaining access to justice.

12 EFFECTIVE AND RESPONSIVE LEGAL SERVICES

12.1 A responsive legal profession

Appropriateness of restrictions on non-lawyers
The general prohibition on non-lawyers engaging in legal practice in Queensland under the *Legal Profession Act 2007* (Qld) (**LPA**) is appropriate given the strict fiduciary duties owed by lawyers to clients. However, as the industry evolves, certain categories of legal work may be more efficiently provided by non-lawyer professions. In Queensland, this restriction has been lifted on certain classes of legal work including, for example, the preparation of wills, the administration of trusts, and the estates and affairs of deceased and living persons.[113] The *Legal Profession Regulations 2008* (Qld) prescribes additional exceptions relating to the provision of legal services: to the community by a community legal service; to Aboriginal and Torres Strait Islander people by a non-profit corporation whose primary purpose is to provide such legal services; and to both of the former examples by a publicly funded non-profit corporation under an agreement.[114] Specific consideration should be given to the potential to expand the statutory exceptions, particularly in areas of law which are discrete and relatively simple, such as tenancy advice.

The development of legal skills for non-legal professionals could improve access to justice, especially for those users who face significant barriers (such as the homeless or mentally ill). QPILCH has found that providing training to staff at community service providers (e.g. homelessness services) has not only been well received by the workers, but has helped to streamline referrals and ensure greater access to justice.

Generally, however, QPILCH does not consider that lifting restrictions on the provision of legal advice is the solution to improving access to justice, as the complexities of the law and the ramifications of incorrect advice mean that this is best left to qualified lawyers.

In the model used by QPILCH, caseworkers help to identify legal problems and ensure the client is appropriately referred.

[113] *Legal Profession Act 2007* (Qld), section 24.
[114] *Legal Profession Regulations 2008* (Qld), regulation 6.

The impact of restrictions on lawyers' business structures and models
The LPA regulates business structures in Queensland, including officers and employees of incorporated legal practices, partners and employees of multi-disciplinary partnerships,[115] as well as advertising by legal practitioners.[116]

It is unlikely that fewer restrictions on lawyers' business structures and models would translate to increased access to justice, particularly where legal fees remain high.

The Council of Australian Governments' (**COAG**) 2010 'National Legal Profession Reform Project' Consultation Report recognised that 'disparate State and Territory regulation of the Australian legal profession creates regulatory burdens for practices and inconsistent consumer protection'. QPILCH agrees with this finding, which is still valid, and may potentially result in inconsistent outcomes between the jurisdictions. The nationalisation of the legal profession may result in a wide range of benefits, including maximising efficiencies by reducing regulatory burdens and associated costs for law firms and individuals. However, nationalisation is unlikely to be a significant factor in enabling access to legal assistance services, as it will not address the financial barrier of paying for legal advice.

Competition in the market for legal services
The Queensland Law Society helps to facilitate the legal services market for consumer protection (largely by the Australian Solicitors Conduct Rules 2012). Arrangements for complaint processes in Queensland are independently managed by the Queensland Legal Services Commission, a statutory body established under the LPA. The key principles that should apply to ensure complaint bodies have sufficient powers to investigate and deal with complaints and systematic issues, include: clearly set rules around the length of time since the alleged conduct occurred (e.g. Queensland differentiates between complaints received before and after 3 years); transparency of process and decision making; and complete independence.

Legal education and skills
QPILCH supports the submission of the *University of Queensland Pro Bono Centre*. We are a strong supporter of skills based legal training in addition to a strong theoretical legal education that university law schools provide. QPILCH strongly supports increased funding for university clinical programs. We see the clear benefits to students and to clients that flow from structured clinical programs.

Uptake of alternative fee arrangements in Australia
Queensland allows for the use of uplift fees[117] (i.e. additional legal costs payable on a successful outcome).[118] Although there may be an additional cost to the client, in many cases the matter may not have otherwise been pursued. Lawyers accept this fee arrangement often at great financial risk and there are protections in place to protect consumers. Although lawyers' traditional practice of time-based billing has been criticised for its ability to reward lawyers' inefficiency, it is worth noting that alternative fee arrangements do not necessarily provide a better outcome for consumers. For example, a fixed fee arrangement can provide a disincentive to lawyers to continue working past a point at which the matter is profitable.

QPILCH considers that legal fees should be clearly expressed in plain English writing and communicated at an appropriate level of understanding of the user. This communication should happen prior to the engagement of the lawyer and throughout the matter, and will be particularly important under alternative fee arrangements such as costs agreements that involve uplift fees.

[115] *Legal Profession Act 2007* (Qld), pt 3.2, div 224.
[116] *Legal Profession Act 2007* (Qld), section 126.
[117] *Legal Profession Act 2007*, section 313.
[118] *Legal Profession Act 2007*, section 300.

12.2 Legal assistance services

Mix of services

Funding priorities have reduced the effectiveness of legal services by failing to capitalise on the strengths, skills and structures of the various legal assistance service providers. QPILCH's experience is that CLCs are generally more flexible, and are well placed to get information out to target groups, provide preliminary advice, develop community relationships to facilitate multiagency approaches and conduct targeted research. Legal Aid and pro bono services are, on the other hand, better resourced for case work. The current funding model does not capitalise on these strengths, resulting in inefficient delivery of services.

There is a need to ensure services are sufficiently specialised so that they can reach out to the right people. For example, outreach and mobile support are key areas of support provided by those working with the homeless and those at risk but such services are not (and in many cases, cannot be) provided by many legal assistance services. It is therefore imperative that services work with outreach and community organisations to ensure that their services are provided to the right people, when needed, and supported by the people in agencies that provide non-legal services.

Although specialisation of service delivery is desirable, there also needs to be flexibility. Legal assistance services provide advice on a wide range of issues including family, criminal and tenancy. One area of concern for QPILCH is the number of clients requiring criminal and family law advice. Delays in accessing Legal Aid can mean clients are left to fend for themselves or to seek assistance from providers lacking the necessary resources and experience.

For this reason, there is a need for better working partnerships between legal assistance services, private practice and other community organisations. There is a growing body of research which suggests that outcomes for at risk members of society can be improved through service integration and partnerships between community, private and government agencies and between mainstream and specialist service providers.[119]

QPILCH has identified that legal assistance service providers lack a consistent, coherent best practice model which can be applied across the sector. QPILCH has adopted its own best practice approach to services and evaluation but other providers either have different approaches or do not adhere to best practice models. Work needs to be done to coordinate what is being done across the sector. QPILCH considers research should be done to establish a best practice model and framework for legal assistance services which encourages and incentivises cooperation with community, private and government agencies to achieve a holistic response to a wide range of client needs. Government has a clear role to fund and encourage best practice and collaboration.

Assisting those with complex needs

Marginalised persons (such as the homeless, mentally ill and refugees) often have multiple and complex needs which can cause, contribute to or maintain legal problems. Legal assistance services need to be flexible to provide assistance across multiple areas or work with other services to do so. In QPILCH's experience, many providers do work which is not specifically supported or within their service area. The failure to institute coordinated referral mechanisms across the sector means many providers 'go it alone', with limited resources and limited success. Staff working in the legal assistance sector are often committed and highly motivated but, in QPILCH's experience, there is a failure to fully recognise and capitalise on their skills.

[119] Evaluation of QPILCH Homeless Persons' Legal Clinic and Refugee Civil Law Clinic, November 2011.

Coordination would help to match supply and demand and maximise existing resources, but there is no clear institutional support for this to occur. The ability to effectively evaluate service delivery and ensure demand is being met is hampered by a lack of independent, cost benefit analysis research. There are a number of shortcomings in the data that is available – due to inconsistency of collection and storage methods across the sector and many services do not have the resources or capacity to effectively collect and analyse data. Until the legal assistance sector and the institutions with which its works develop a coordinated approach to data collection and storage, any ability to conduct data matching and analysis will be severely limited – limiting the ability of the sector to independently evaluate its effectiveness. Development of a standard for collection, storage and sharing of data by legal assistance service providers would facilitate data matching and analysis and allow for better coordination of services.

The effectiveness of other approaches

The Issues paper asks if other approaches, such as vouchers, could be more efficient. The voucher argument is that:

- Current legal aid funding arrangements are responsible for an industry that fails to provide quality legal services.
- Funds used for services are used for political lobbying.
- Funds are used to feather the nests of lawyers in the legal aid industry.
- Goods and services in a market economy will only be produced where they satisfy consumer preferences. The current system, it is argued, is based on bureaucratic whim rather than consumer preference.

According to this argument, a voucher system will solve these problems by:

- Bringing competition to the sector to increase access by placing pressure on service providers (the private profession) to think creatively and efficiently, thus reducing costs.
- Making legal services respond to consumer preferences.
- Removing CLCs from the system and therefore saving money spent on lobbying.
- Removing legal aid bureaucracies and therefore improving efficiencies.

The problems with these claims are:

- There is no evidence that legal assistance services fail to provide quality services.
- While CLCs may occasionally enter politically controversial areas, all of their lobbying is targeted at systemic issues to help clients. If a voucher system is introduced, it will not only stop 'political' lobbying but also the research, law reform and educational work that governments and parliamentary committees not only welcome but frequently request.
- Introduction of a voucher system would also result in the loss of local knowledge and an understanding of clients and systemic issues. We need more research to understand and improve our services, not less.
- CLCs are not the nests that many in the public or private sectors would tolerate. Many work long hours doing things that are not funded but they are expected to do, such as participating in coordinating committees, collaborating on developing innovative programs, supervising out of hours clinics, working with government bodies, working with local communities and community agencies, doing research, undertaking continuing legal education, coordinating volunteers and students, developing best practice measures, often done in their own time because of their focus on service provision. No CLC lawyer in Queensland, of any experience, receives a wage as much as an Administrative Office level 8 (AO8) in the Queensland Public Service. CLC lawyers do all of this because of their commitment to their clients.
- Introduction of a voucher system is unlikely to produce competition in the provision of legal services. The private profession is already paid low comparative fees for undertaking legal aid work. After the last efforts to make it more efficient, many law firms dropped out of the legal aid system.
- The provision of legal services is not like the sale of soap, where consumer demands can be simply and efficiently met by providing the kind of soap that consumers want for a particular purpose, with other kinds becoming redundant. In civil law, every case and every client is different, has different needs, will need access to different forums which will require a different level of funding.

- It cannot be expected that the private profession would have the range of skills and specialist knowledge that specialist legal services can provide, particularly services providing assistance to marginalised clients, who may require a greater level of service.
- This approach would also fail to detect and support clients who have multiple legal problems.
- We are aware of no cases where public servants guess what consumers want. Legal aid guidelines and CLC activities are constantly and regularly under review, often to cope with funding and priority changes, rather than whim, always trying to make the scarce dollar stretch to assist as many clients as possible.
- Loss of the broad functions performed by CLCs will impact on the enormous volunteer contribution of the profession. It also fails to understand the significant unfulfilled opportunity that CLCs could offer.
- If the legal aid system becomes largely a private system, it will not be as accountable as it is now. Commercial in confidence would be used to limit accountability and equal access to the legal system could be denied without proper explanation.
- Who will administer the voucher system – another finance bureaucracy without any knowledge of legal need or legal service?

12.3 Legal assistance service funding

The volume and distribution of current funding

In QPILCH's experience, funding of CLCs in Australia is uncoordinated, fragmented and inequitable. Funding is provided from a variety of sources including the Community Legal Services Program (CLSP), one-off grants from both the Commonwealth and State governments, philanthropic sources and statutory and non-statutory financial assistance schemes. Funding by the States is not uniform with larger states such as Queensland and Western Australia facing greater demands to service far-flung clients but not receiving additional funding to do so.

People in need of legal assistance services do not fit well within distinct jurisdictions. Where funding is limited by jurisdiction, clients can be referred to multiple services for assistance, leading to 'referral fatigue'. Other clients are ineligible for funding altogether because of their unique circumstances. Of course, government has a responsibility to ensure funding is used appropriately, but this should not prevent services addressing urgent needs or avoiding injustices. Services should be designed to deliver the services people need, when and where they need them. Clients may need assistance outside of strict legal services and providers need to be able to accommodate this. For example, QPILCH's ability to leverage other pro bono services, such as the provision of tax advice, for clients is one element of its success.

Determining the volume and distribution of funds

Funding for legal assistance services in Australia lacks an appropriate structure. It has been QPILCH's experience that there is a lack of transparency in how funds are allocated and a lack of cost benefit evaluation of that funding. QPILCH has in the past, and continues to advocate for creation of a project fund with guidelines that encourage partnership, strong project development and evaluation, in addition to the existing CLSP fund. The project fund could be administered either by the Attorney-General's Department or a committee comprised of representatives from various sectors of the community (such as government, legal aid commissions and PILCHs). The project fund's responsibilities could include developing a formal structure, priorities and criteria for the application of funding, coordinating and assessing funding applications, making recommendations for successful applications, establishing benchmarks by which funding levels and effectiveness can be assessed, and coordinating Commonwealth funding with state funding mechanisms. QPILCH sees a number of benefits to this structure, including a more equitable spread of funds to smaller states and regional areas, better targeting of resources to where they are most needed, the coordination of funding, leading to efficiency gains for CLCs, and the participation of CLCs and PILCHs in determining where at least a portion of the money goes.

Examples of 'work arounds' in response to resource constraints
Pro bono is one response to funding and resource constraints faced by those requiring legal assistance services. For some groups (such as the homeless and mentally ill), pro bono is the only serious legal assistance available. QPILCH's members (and Australian lawyers generally) provide a significant level of pro bono services in a variety of ways – including acting pro bono for individual clients or volunteering at QPILCH and CLCs. However, the ability of firms and lawyers to donate time and resources to pro bono work is not infinite and pro bono services are not a substitute for properly funded and managed services. Further, many of QPILCH's member firms do not have expertise in core areas of legal need faced by QPILCH clients – such as criminal and family law, referring to LAQ and specialist CLCs. Firms also rely on publicly funded services for pro bono referrals. Greater cooperation is needed between private practice, legal assistance service providers and publicly funded services which should be encouraged through benchmarking and funding incentives, for both legal assistance services and private practice.

12.3 Pro bono

The importance of pro bono work in facilitating access to justice
QPILCH is heavily reliant on the contributions of member firms, individual barristers and students. These contributions are invaluable in increasing access to justice.

The National Pro Bono Resource Centre (**NPBRC**) reports that pro bono legal work undertaken by law firms with more than 50 lawyers amounts to 5.98% of the overall capacity of government-funded legal assistance services. The pro bono contribution of the entire Australian legal profession is about 17.5% of the capacity of legal assistance services.[120] On average, 62.8% of the work is done for organisations, and 37.2% is done for individuals. As such, pro bono contributions by the legal profession are no substitute for government funded legal aid.

In 2012-13, QPILCH members provided well over $5 million of free legal representation for more than 1500 clients, the majority of which involved full service casework. There are four casework services run by QPILCH – the Referral Services, Homeless Persons' Legal Clinic, Mental Health Law Practice and Self Representation Service. The demographics of clients differ depending on the type of service. Employment, credit and debt, government and administration and other civil matters made up the largest percentage of the 448 applications received by the QPILCH's Referral Services in the 2012-2013 financial year. Of all applicants to the Referral Services 46% were reliant on government benefits. 55% were female, 43% were male, and 2% was not stated. 101 of the 448 applications for assistance were from regional Queensland. A further 182 were received from the Gold Coast, Sunshine Coast, Logan and Ipswich.

The National Pro Bono Aspirational Target
QPILCH supports the NPBRC's findings that the Target leads to increased awareness of the ethical and social aspects of lawyers' professional responsibilities within a firm and encourages staff participation in the firm's pro bono scheme. The NPBRC reports that pro bono performance is consistently stronger in firms that have been signatories for longer and QPILCH supports this finding.

As at June 2013, the Target covered approximately 15% of the Australian legal profession.[121] The NPBRC reports a 48.8% increase in firms signing up to the Target since 2010/2011.[122] This increase in the rate of participation is in part due to firms having to either subscribe to the

[120] Speech delivered by John Corker (Director, National Pro Bono Resource Centre) on 13 May 2013 at the Banco Court, Supreme Court of Queensland, Brisbane.
[121] Sixth Annual Performance Report on the National Pro Bono Aspirational Target – October 2013 – National Pro Bono Resource Centre
[122] Sixth Annual Performance Report on the National Pro Bono Aspirational Target – October 2013 – National Pro Bono Resource Centre

Target or specify the value of pro bono work that they aim to provide when applying to be included on the Commonwealth Legal Services Multi-Use List. Effective from 1 July 2014, firms with more than 50 lawyers will no longer be able to nominate a target value and must instead have signed up to the Target. As such, QPILCH anticipates the number of firms signing up to the Target will continue to increase. The Victorian Government has introduced a similar incentive scheme, and it is hopeful that other state governments might adopt similar requirements.

The costs and benefits for legal service providers who provide pro bono services
Our members report on a range of benefits that accrue to firms, individual lawyers and barristers undertaking pro bono work. Participating in clinics and undertaking referral work exposes lawyers to work and clients that otherwise might not be encountered. The work is rewarding, challenging and leads to an increased awareness of the social responsibilities of lawyers. The costs to firms in allowing their staff to work for free should not, however, be underestimated. It is important to recognise that firms are businesses which cannot continue to provide pro bono legal work unless they are also profitable; for this reason, pro bono cannot be considered to be a solution to access to justice but is, in itself, a 'work around'.

Cost effective ways to make the provision of pro bono services more attractive
Optional question in the practising certificate renewal process
The Queensland Law Society President, Annette Bradfield, recently suggested that it might be useful to include an optional question in the annual practising certificate renewal process that asks members to estimate the number of pro bono hours worked in the year. This process could further draw attention to the pro bono contributions of individual lawyers, and lead to an increase in the number of pro bono hours undertaken by individual lawyers.

Mandatory student pro bono
Students play an important role in resourcing community legal centres. According to the NPBRC, community legal centres reported that 55% of all individual volunteering hours came from law students in 2012, contrasted with 26% from lawyers.[123] QPILCH provides opportunities for students to be formally involved in the provision of pro bono legal services in a range of ways that benefit both the community and the student. 58 students gained clinical experience with us in 2012-2013. Since 2002 when our student programs began, 480 students have worked at QPILCH.

A compulsory pro bono requirement for students to be admitted as lawyers is an idea that merits further consideration. This approach has been adopted in New York, and received strong support from the former Attorney-General, the Hon. Mark Dreyfus QC. Such a requirement could help develop a pro bono culture and sense of social justice amongst students, while providing them with practical legal experience at an early stage.

However, it would be important to ensure that such a program is run and administered well. Badly administered programs could leave students with a negative impression of pro bono work at a very early stage in their careers. Additionally, sufficient staff must be made available to supervise students and ensure that high quality work is delivered to clients.

Eligibility for state government legal work
A requirement for firms to sign up to the Target before qualifying for state government legal work is worth considering. Larger and mid tier firms are the principal recipients of government legal work. These firms are more highly leveraged, and have more resources to devote to pro bono work. As such, this requirement would be well targeted at firms that can afford to commit more resources to pro bono work.

[123] Speech delivered by John Corker (Director, National Pro Bono Resource Centre) on 13 May 2013 at the Banco Court, Supreme Court of Queensland, Brisbane.

Programs tailored to members expertise
QPILCH's clinics have been designed to maximise the pro bono contribution by tailoring its clinics to the capacity of its members. For example, the Self Representation Service offers members with less resources the ability to make a discrete and defined contribution.

Barriers to pro bono involvement
There are several difficulties faced in the provision of legal assistance to disadvantaged people in rural, regional and remote areas. Lawyers and legal assistance services in these areas face issues such as the inflated costs associated with running smaller practices, geographical isolation and limited access to resources. Additionally, conflict of interest issues can also arise more readily in rural and regional areas. QPILCH runs clinics across Queensland to improve access to services to disadvantaged people in rural, regional and remote areas. In some cases, clients are able to phone in to these clinics rather than attend in person. However, there is still a considerable need in rural, regional and remote areas for legal assistance services. It is hoped that new communications technologies may form part of the solution to this issue.

QPILCH welcomed the introduction of the National Pro Bono Professional Indemnity Scheme run by the NPBRC. This scheme provides professional indemnity insurance at no charge to in-house and government lawyers who want to undertake pro bono legal work, removing one of the constraints that previously existed for in-house and government lawyers. It is hoped that this scheme will continue to improve the rate of participation in pro bono activities amongst in-house and government lawyers.

The Queensland Law Society has instituted an effective volunteer practising certificate that enables retired and career break solicitors to undertake pro bono work through a CLC at no cost.

13 FUNDING FOR LITIGATION

We refer the Commission to QPILCH's 2006 submission on litigation funding to the Standing Committee of Attorneys-General, which is located at:

14 BETTER MEASUREMENT OF PERFORMANCE

14.1 Performance measurement of the civil justice system

The civil justice system involves the deployment of public funds. Its performance needs to be measured to ensure that funds are properly and efficiently deployed. There are two dimensions to its measurement. First, the parties to an individual dispute must be treated fairly and efficiently. Secondly, the overall system must produce outcomes which are consistent with the expectations of a well informed community.

We see the following as being the key measures of the performance of civil justice:

- Absence of corruption;
- Community and individual understanding of the processes for accessing justice;
- Costs incurred by individuals in accessing justice;
- Costs incurred by the court system in dealing with matters;
- Time taken to access the system and achieve an outcome;
- Participant and community satisfaction with the processes deployed to achieve an outcome.

However, with the exception of item 1.2.1, there are inherent tensions in these measures:

- Different matters have different levels of complexity. Accordingly it will be difficult to compare costs and time outcomes except perhaps with very large amounts of data;
- Parties who seek to access justice will have varying levels of sophistication;
- A cheaper and more timely solution may be less legally 'perfect';
- Satisfaction with the processes will be tainted by stakeholder perceptions as to the outcomes.

Lastly, it will be very difficult to gather data about the interdependence between the formal justice system and the very large number of matters which are resolved outside it. Relevant factors at this level include:

- The clarity with which justice agencies state the law;
- The fact that the costs and delays associated with access to the formal justice system create incentives for the settlement of claims outside the system;
- The proposition that following the processes of formal justice lead all parties to disputes to understand the position of other parties, and thus create a platform for incentives;
- The wish for parties to maintain privacy.

This means that even if data can be readily obtained, the data itself might not produce useful comparisons. Further, any comparison has embedded in it judgements about the best case for deployment of funds and the level of perfection that the parties wish to achieve in accessing the justice system.

The NSW Law and Justice Foundation in their Australia-wide survey of legal need in Australia discussed and critically analysed various measurement frameworks for the purpose of selecting an appropriate method for conducting their survey.[124] This illustrated some of the inherent issues in data collection, selection of indicators and utility of results. It concluded that there is no definitive measure to quantify legal need and similarly there is no-agreed upon method in Australia to measure the performance of civil justice services.[125]

It was noted that legal needs surveys conducted globally have used a variety of socioeconomic indicators to identify subgroups in their samples and differed in relation not only to socioeconomic indicators but the precise measurement of each and the level of each indicator deemed to constitute disadvantage.[126]

This lack of consistency in relation to measures and indicators is an inherent issue in analysing the performance of the civil justice system in Australia. At present, each State and Territory collects and analyses different sub-sets of data. As a result, because there is no consistency of approach or collection across jurisdictions, direct comparisons are problematic and it is not possible to make meaningful generalisations from the information available.

At present, there are limits to the practicalities of collecting data, for example, the courts in Queensland retain some data on the number of people who start litigation as self-represented litigants. However, there are no subsequent records to indicate whether they are later able to obtain legal representation, whether they continue with the proceedings or whether or not they ultimately succeed.

[124] Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Access to Justice and Legal Needs, Vol 7, Law and Justice Foundation of New South Wales, August 2012) 4.
[125] Ibid, citing Dignan, T 2006, Northern Ireland Legal Needs Survey, Northern Ireland Legal Services Commission, Belfast.
[126] Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Access to Justice and Legal Needs, Vol 7, Law and Justice Foundation of New South Wales, August 2012) 4.

In order to measure the performance of the civil justice system in Australia, as a first measure, a standardised way by which to collect and measure data needs to be developed and introduced to relevant civil law services. This will enable data collection to become incidental to the legal services offered. Data itself can be used in informing judgments about the allocation of resources. For example it may assist to determine for example, whether a particular demographic group appears to be at a disadvantage.

Development and implementation of a standardised data collection system should allow an opportunity for the mechanism and measures to be reviewed annually to incorporate any developments in the civil law system and its users. This will ensure measures and data remain current and relevant to allow assessment and necessary intervention in the civil law system.

14.2 Data collection to enable better measurement and evaluation

At present, there is no common data collection mechanism across the Australian justice system. Significant investment is required to develop a standardised data collection system capable of capturing data in relation to at-risk demographics, access to services, quality of services and issues and successes within the justice system.

At the community legal centre level, to better measure and evaluate cost drivers would require a complete reformulation of the community legal centre data collection system.

The limited resources of community legal centres means that there needs to be an efficient means of data collection that is secondary to the legal services offered.

For example, where a party registers at a community legal centre to seek assistance with their matter, a set of common demographic questions and agreed-upon measures can be included in the registration form for the purpose of collecting data. This could then be uploaded to a central national database and allow the statistics to be utilised at various times to paint a picture of the state of the justice system. The measures would not always need to be uniform. For example, a CLC set up to serve clients from a NESB, refugee law, or women's law perspective may not need to gather general data as to its client base.

The questions and measures could be framed to focus on access to justice issues and perceived difficulties and benefits of the justice system.

However, gathering the data itself can be difficult. First many interactions with a CLC are 'one off'. The CLC accordingly has limited visibility on the outcomes of their work. Individual cases taken on a long term basis by a CLC can tend not to be indicative of the general case load of the CLC. That is, individual cases may be selected because of the precedent they might set or the extreme circumstances of the case.

These concerns could in part become a condition of receiving pro bono assistance from a community legal centre that a client fill out surveys or questionnaires at various stages throughout their matter. There are of course inherent issues with the reliability of such data but may be a way of acquiring some individual case studies for the purpose humanising statistics and allow real world application to the indicators measures.

14.3 Minimising the costs of data collection be minimised

The costs of data collection may be minimised by centralising data collection and narrowing the fields of data which is collected. The Commission should consider the merits of standardised methods of data collection and centralised reporting.

However, the costs benefits in centralising data collection should be weighed against the importance of adopting a methodology that takes into account:

- Differences between jurisdictions and communities.[127]
- The increasing complexity of legal problems and civil legal systems (including the interaction between traditional adversarial and ADR methods of dispute resolution). A large-scale random sample may be reflective of the broader population but, due to the complexity of the legal system, generalisations will not necessarily be applicable to a small-scale study of a sector of a community.[128]

We are aware of two current types of data collection, namely:

- data collected and provided by community legal centres for the Community Legal Service Information System (CLSIS); and
- information collected through the QPILCH legal health check with clients.

The collection and provision of data for the CLSIS is a funding requirement for CLCs.[129] The National Association of Community Legal Centres provides training material on collecting and maintaining this data.[130] This data is not currently being analysed or consolidated in a transparent or useful way. As far as we are aware, this data is not being published.

The QPILCH legal health check is an informal means of data collection. It is a tool to prompt QPILCH representatives to ask questions regarding the client's legal needs in any area of the law (including family, criminal and civil law). This tool has proved effective in identifying the legal needs of clients but is not currently being used as a formal method of data collection.

14.4 Administrative data collection

The Commission should consider whether it is important to identify high risk of substantial legal need in individuals or in sectors of the community.

The information collected for the CLSIS is de-identified and therefore not going to assist with identifying individuals at high risk. Redacting this type of information ensures the privacy of the individuals concerned but it also limits the ability for Commonwealth or state organisations to identify individuals at high risk of substantial legal need. It might be possible for an assessment matrix to be developed to identify individuals with a high level of need, but this will inevitably be time consuming and needs to be balanced with privacy concerns.

Alternatively, if the Commission is concerned with identifying high risk in *sectors* of the community, the data currently being produced may be useful.

However, the Commission should consider how data can be collected on 'legal need that is expressed outside the legal system or the level of unmet legal need in the community'.[131] There is limited utility in only considering data that is being collected by service providers who, by their very nature, deal primarily with people already engaging with the legal system. There is also limited utility in surveys which ask people questions about legal need on the assumption people

[127] Ibid 8, citing Coumarelos et al, '*Justice* Made to Measure: NSW Legal Needs in Disadvantaged Areas' (Law and Justice Foundation of NSW, Sydney, 2006) <www.lawfoundation.net.au/report/survey2006>.
[128] Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Access to Justice and Legal Needs, Vol 7, Law and Justice Foundation of New South Wales, August 2012) 11-12.
[129] National Association of Community Legal Centres, *CLSIS* <http://www.naclc.org.au/cb_pages/clsis.php>.
[130] Ibid.
[131] Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Access to Justice and Legal Needs, Vol 7, Law and Justice Foundation of New South Wales, August 2012) 4.

are aware of their legal rights and thus aware of their own legal need.[132] One of the benefits of the legal health check tool is that it does not assume people are aware of their own legal needs.

[132] Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Access to Justice and Legal Needs, Vol 7, Law and Justice Foundation of New South Wales, August 2012) 4, citing T Dignan, *Legal Need in Northern Island: Literature Review*, (Northern Island Legal Services Commission, Belfast, 2004).