

# ADDING PUBLIC VALUE

The integration of  
frontline services  
and law reform in  
the NSW Community  
Legal Sector



4 AUGUST 2014



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This Report has been prepared for



Community  
Legal Centres  
NSW

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# Executive Summary

## 1.1 Rationale for the Study

Community Legal Centres (CLCs) in NSW have historically undertaken policy and law reform as part of an integrated suite of services designed to meet the legal needs of those disadvantaged socially and economically, and to improve access to the legal system and to justice for such individuals and groups.

For at least two decades, it has been argued by the CLC sector, academics, institutional leaders and decision makers that combining policy and law reform activities with a primary focus on frontline services leads to a more efficient use of resources through reaching more people than could be achieved by casework alone; assists in the proper operation of the legal system through helping people to obtain appropriate legal remedies; and leads to more just outcomes for disadvantaged individuals, groups and society as a whole through changes to policies or legislation with unintended consequences or perverse outcomes. It has also been argued that activities associated with law reform, such as the production of evidence-based submissions, participation in parliamentary inquiries and the like brings an ‘on the ground’ perspective to important debates and contributes to the operation of a robust democracy.<sup>1</sup>

*It has been argued that a change to the law in such circumstances will not only benefit the group or individual concerned, but can also meet the efficiency and equity goals of government in terms of better use of scarce funding resources, and ensuring that the benefits of living in Australian society are enjoyed by all people.*

Implicit in these claims, and in legal theory, is an understanding that ‘access to justice’ will sometimes go beyond ‘access to the legal system’, where for example, access to the law as it stands may still result in an unjust outcome for some people or groups. It has been argued that a change to the law in such circumstances will not only benefit the group or individual concerned, but can also meet the efficiency and equity goals of government in terms of better use of scarce funding resources, and ensuring that the benefits of living in Australian society are enjoyed by all people.<sup>2</sup>

In more recent years, however, the role of CLCs in policy and law reform has been increasingly contested. A concern has been most recently expressed by government that engagement in policy and law reform activities will divert resources away from the important direct service activities that provide access to the legal system for those at risk of not having their legal needs met.<sup>3</sup> Changes to Commonwealth-State funding agreements, and constraints imposed by funding principles on lobbying activities, have further called into question the value of policy and law reform as a core function of CLCs, and the nature of the activities in which CLCs may legitimately engage.<sup>4</sup>

.....  
1 See Section 2.2 below for detailed discussion.  
2 See Section 2.3 below for detailed discussion.  
3 Reported comments by Senator Brandis (February 2014 Senate Estimates), that, ‘where resources are limited, I would rather see that money spent helping individual people in need who cannot afford a lawyer rather than spent on policy development’.  
4 See Section 2.2.3 below for detailed discussion.

To date, studies that have sought to evaluate the benefit of policy and law reform have been quite descriptive in nature. Whilst such studies are valuable in describing the nature and to some extent the outcomes of these activities, they have not always been clear with regard to the analytical framework within which the study is being conducted, nor have they undertaken a systematic evaluation against clearly articulated outcome measures relevant to both government and the sector.

The current study seeks to address the gap in the evidence base in relation to the value of policy and law reform activities, and contribute to the development of policy with regard to this aspect of CLCs' activities.

## 1.2 Study Framework

### 1.2.1 The Research Question

This study was commissioned by the Financial Rights Legal Centre (formerly the Consumer Credit Legal Centre) and funded by Community Legal Centres NSW Incorporated (CLCNSW).

It seeks to understand, document and where possible quantify the impact of linking policy and law reform as part of an integrated service provided by Community Legal Centres (CLCs) in NSW. It also seeks to test the claims made by the sector and academics in relation to the value of policy and law reform using a robust methodology, and to fill a gap in the empirical literature in this regard.

The research question is therefore:

▶ How effective is policy and law reform work when integrated with direct legal service in the CLC sector in achieving desired outcomes of government and the sector, by comparison with using direct legal services alone.

### 1.2.2 Outcome Measures

The following outcome measures (or key performance indicators), derived from relevant legal and economic theory, have been considered in answering the primary research question:

- ▶ 'Equitable access to the legal system' – achieved when policy and law reform activities result in improved access to the legal system for particular groups;
- ▶ 'Equitable access to justice' – achieved when policy and law reform activities identify areas where existing law and policy does not reflect the views of society as a whole, with this demonstrated through changes in policy, legislation and case law;
- ▶ 'Cost efficiency' – achieved when there is a reduction in the cost of service provision, such as reductions in litigation arising from a change in or improved application of the law so that more can be done with existing resources; and
- ▶ 'Benefit to society' – achieved when the benefits to society of a policy and law reform activity outweigh the costs to society. Those costs will be assessed in terms of the proper operation of the law,<sup>5</sup> savings in operation of the legal system, and reductions in externalities such as incarceration, homelessness and the like;
- ▶ The likely scale of the benefits to society in terms of the likely number of people affected, or the relative magnitude of the benefit likely to be achieved.

.....  
5 Using Posner's Economic Analysis of Law framework

## 1.3 Overview of findings

### 1.3.1 Survey of CLCs

The survey of NSW CLCs undertaken as part of this study provides a context to the case studies that form the major part of the research. Thirty of the 36 CLCs in NSW responded to the survey. This is reported in **Section 3 below**.

*Law reform or systemic advocacy activities were generally seen as important and effective, typically using 10% of a centre's resources* Law reform or systemic advocacy activities were generally seen as important and effective, typically using 10% of a centre's resources, but with some centres allocating greater or lesser resources, and most centres reported that they spend time on law reform or systemic advocacy activities in addition to or in conjunction with their case work activities and considered them to be important in their delivery of services.

Around one-fifth of CLCs who responded to the survey had a dedicated policy and law reform position, and two thirds considered that law reform and systemic advocacy activities were a more efficient use of resources than case work alone.

The most common types of law reform and systemic advocacy activity engaged in by CLCs was identifying law reform through case work and gathering supporting case studies for use in submissions, inquiries, community education and the like. Conducting research was also frequently mentioned.

### 1.3.2 Case studies

CLCs that completed a survey were also asked to nominate a policy or law reform initiative linked to their casework practice that they considered had resulted in important outcomes with regard to the outcome measures outlined above. Ten case studies were then selected by JSA for further analysis, including a review of files, data and documentary evidence to validate the process and outcomes cited where possible. Each of the case studies was then systematically evaluated against these outcome measures.

The policy and law reform activities detailed in the ten case studies cover a wide range of legal issues, with some of greater significance in terms of the relevant outcome measures than others. In all cases, there was a benefit on at least two of the key outcome measures areas, with six activities providing a benefit on all outcome measures, and eight activities providing a benefit on at least three outcome measures.

The degree of impact varied, particularly with regard to the likely number of people impacted, and their relative disadvantage and vulnerability. Of the ten case studies, six provided significant benefits across a range of areas and to larger groups often characterised by disadvantage and vulnerability. In another three cases, there was a significant benefit to a small group characterised by significant disadvantage. In the remaining case, the activity provided a benefit to a small group.

The following table summarises the systematic evaluation of case studies against the four key outcome measures, and the likely range of impact, whilst **Section 4** provides details on the case studies.

*Of the ten case studies, six provided significant benefits across a range of areas and to larger groups often characterised by disadvantage and vulnerability.* Impact is assessed in a qualitative way, giving regard to the likely number of people impacted by the law reform activity and the likely benefit to those people. For example a high impact activity would provide a significant benefit to a large group of people, a medium impact activity would provide a significant benefit to a smaller group of people or a smaller benefit to a large group of people, and a lower impact activity would provide a smaller benefit to a smaller group of people.

**Table 1 1:** Summary of evaluation of case studies against key outcome measures

Case Study	Equitable Access to the Legal System	Equitable Access to Justice	Cost Efficiency	Benefit to Society	Range of impact	Assessment of overall significance
1. Boarding House Reforms	Yes	Yes	Yes	Yes	The reform provided benefits to a small group (the occupants of boarding houses) characterised by significant disadvantage.	B
2. Bail Reforms	No	Yes	Yes	Yes	There is likely to be a significant decrease in costs to government, while the purposes of bail are retained.	A
3. Mortgage Exit Fee Ban	No	Yes	No	Yes	The reform provided significant benefits to a large group (borrowers of housing loans).	A
4. Intestacy Laws in WA	Yes	Yes	Yes	Yes	The reform provided benefits to a small group (aboriginal people in WA) characterised by significant disadvantage.	B
5. Work and Development Orders	Yes	Yes	Yes	Yes	The reform provided benefits to a large group characterised by disadvantage (people unable to pay off fines), and appears to have resulted in significant cost savings to government.	A
6. Centrelink Breaches and Fines	Yes	Yes	Yes	Yes	The reform provided benefits to a large group (welfare recipients) characterised by disadvantage, and is likely to result in significant cost savings across society.	A
6. Centrelink Breaches and Fines	Yes	Yes	Yes	Yes	The reform provided benefits to a large group (welfare recipients) characterised by disadvantage, and is likely to result in significant cost savings across society.	A
7. Mortgagee eviction	Yes	Yes	Yes	Yes	The reform provided benefits to a small group (Renters whose property was the subject of foreclosure).	C
8. Retirement Villages	No	No	Yes	Yes	The reform provided benefits to a large, and, to some degree, vulnerable group (prospective tenants of Retirement Villages).	A
9. Blindness Discrimination	No	Yes	No	Yes	The reforms provided benefits to a small group (blind users of trains) characterised by significant disadvantage.	B
10. External Dispute Resolution	Yes	Yes	Yes	Yes	The reforms provided considerable benefits to a large group (people entering into loan agreements).	A

All the policy and law reform activities in the case studies were triggered by case work undertaken by the CLC, and in a number of cases initial activity by a CLC highlighted structural problems and initiated a broad law reform process by government. This is particularly evident in activities with quite wide impacts such as Bail Reform, Mortgage Exit Fee Ban, Work and Development Orders, Centrelink Breaches and Fines, Retirement Villages and External Dispute Resolution.

In these cases (and indeed in most), CLCs functioned as an early warning system as new legal issues arose due to changes within society as a whole (such as the increase in the retirement industry as a result of population aging), or due to perverse outcomes of policy reform (such as tightening up of bail provisions, or increasing competition and deregulation in the financial industry sector).

Although a full economic assessment (cost benefit analysis) was beyond the scope of this study, a preliminary review of *one* case study indicates that the cost benefit ratio would be very favourable to the CLC sector and thus to government funding bodies.

In 2009/10, CLCs that were funded under the Commonwealth and State Community Legal Services Program (CLSP) received total annual CLSP funding of \$47,254,132. Using some preliminary estimates and reporting that suggests 10% of resources are typically used in policy and law reform activities, the annual cost of such activity would be in the order of \$5 million. In comparison, one of the law reform case studies where good and readily available data exists, the Mortgage Exit Ban Case Study, appears to have resulted in annual savings to households. Disaggregated data is not available, but if mortgage exit fees represented one third of the decrease in fees, this would be around \$50 million,<sup>6</sup> more than offsetting the small annual cost to the community of *all* policy and law reform activities undertaken across Australia<sup>7</sup> (by a factor of 10).

Some other preliminary estimates of annual cost savings from policy and law reform work include \$3 million per year from reduced policing and enforcement of bail conditions for young people, and, if rates of remand return to those in the mid-1990s, another \$50 million per year; and reduction in levels of breaches representing a cost saving in appeals of \$2–3 million (noting that this is a saving for NSW, whilst the cost of \$5 million per annum for policy and law reform activities is for all CLCs in Australia).

A detailed cost benefit analysis of the case studies in Section 4 below is thus likely to be highly favourable to the sector on the preliminary estimates on a few case studies reviewed in Section 4 below.

## 1.4 Conclusion

The study finds that policy and law reform activities undertaken by Community Legal Centres provide good value to society, **are** generally of high merit, and meet the social and economic objectives of government and the sector when assessed against key outcome measures.

Policy and law reform activities appear to be targeted widely, and are grounded in case work, and so respond to an identified need in the community. While many of the activities are targeted towards more disadvantaged groups within the community, this is largely

.....  
6 Pratten, J. (2013) *Banking Fees in Australia*, Reserve Bank, Table 2 and JSA calculation, with the total reduction in the order of \$159.0 million (see Section 4 below).

7 Assuming that the Australian/National rate of participation in such activities was in line with that of NSW CLCs.

because these people form a large part of the client base of community legal centres. Other activities however, such as the Mortgage Fee Exit Ban and Retirement Village consumer reforms, in fact provide benefits to a very wide cross section of the Australian community.

Where policy and law reform initiatives are acted upon by government, for example, as reflected in legislative or procedural changes, this is not undertaken lightly. Review of material in the critical evaluation of case studies indicates that a typical response by government will involve reports commissioned from a number of bodies, the holding of inquiries, and the review of extensive expert opinion and evidence. Given the rigour of this process, a policy and law reform proposal of limited merit or favouring one part of the community at the expense of another would face considerable obstacles during the government law reform process.

*This study finds that there is an important role for the sector in continuing its work in policy and law reform, integrated with front line services, to maximise the efficient use of resources, further the objectives of government, and support access to justice for all people, particularly those most disadvantaged in Australian society.*

As well as the demonstrated social and economic benefit to disadvantaged people and the whole of society, and the increase in efficiency of service delivery and access to justice through addressing systemic issues affecting large numbers of people, the take up by government of policy and law reform initiatives in the case studies reported here indicates that such activities strongly support the objectives of government, and are thus matters in the public interest.

This study finds that there is an important role for the sector in continuing its work in policy and law reform, integrated with front line services, to maximise the efficient use of resources, further the objectives of government, and support access to justice for all people, particularly those most disadvantaged in Australian society.

# 2

# Developing Research Questions and KPIs

## 2.1 Overview

This section seeks to frame the research questions and outcome measures relevant to evaluating the impact of including policy and law reform as part of an integrated service in NSW CLCs.

In doing so, it draws upon the stated vision and aims of the sector, the history and some of the tensions inherent in the policy debate surrounding CLCs, and a brief review of relevant literature and theory.

## 2.2 Relevant Policy Considerations for CLCs

### 2.2.1 The mission of the CLC sector and its relationship to policy and law reform activities

Community Legal Centres (CLCs) are independently operating not-for-profit community organisations that provide legal and related services to the public focusing on disadvantaged people and people with special needs.<sup>8</sup> Within this context, the National Association of Community Legal Centres (NACLC) sets out the following mission for CLCs:

CLCs are committed to striving for equitable access to the legal system and justice, and the equal protection of human rights.<sup>9</sup>

*Implicit in this mission is an acknowledgment that that equitable access to the legal system as it stands is important, but may not be sufficient to guarantee 'justice', for example, where a law has unintended consequences for a person or social group.*

Implicit in this mission is an acknowledgment that that equitable access to the legal system as it stands is important, but may not be sufficient to guarantee 'justice', for example, where a law has unintended consequences for a person or social group. Likewise, equal protection of human rights implies a wider responsibility than that found within the bounds of domestic law, and may engage the sector in a process of reform where internationally identified human rights are not protected, or are less protected for some groups.

This opens the way for a role for policy and law reform in the sector that is integrated with direct service activities.

8 <http://www.naclc.org.au>

9 [http://www.naclc.org.au/cb\\_pages/clcs.php](http://www.naclc.org.au/cb_pages/clcs.php) accessed 25 February 2014.

## 2.2.2 Integration of direct service with policy and law reform

Community legal centres (CLCs) are an important and established part of the legal landscape in Australia.<sup>10</sup> Arising from activist roots and historically providing an alternative to conventional lawyering, CLCs have more recently been viewed as ‘reformers within established legal structures.’<sup>11</sup> There are around 200 CLCs operating in Australia, both generalist and specialist, providing a diverse range of services depending on funding sources, size and the needs of the communities in which they are operating.

Broadly speaking, most CLCs provide direct services to individuals facing problems with access to the legal system due to disadvantage or other special needs. Direct legal services commonly provided include referrals, information, advice and representation or casework.<sup>12</sup> Such services provide an important role in providing access to the legal system for those who would otherwise face significant barriers, and assists in upholding the rule of law in Australia.<sup>13</sup> If all citizens are not able to access the legal system effectively, the operation of the legal system as a whole is arguably diminished.<sup>14</sup>

There is little disagreement about the primacy of providing direct services to disadvantaged members of society. However, as noted, such services primarily address procedural issues, or access to the legal system *as it is*. They generally do not address underlying substantive problems in society or the legal system itself.<sup>15</sup> For example, better access to the courts because of free legal representation does not help a client whose legal problem is not recognised by the law. If CLCs do not advocate for systemic changes, it has been argued that they are ‘simply assist[ing] an unjust system to process the cases which are put before it.’<sup>16</sup>

*CLCs are often only able to see a proportion of potential clients due to resource constraints. Law reform activities directed at resolving issues facing a large number of current and potential clients are also an efficient means of addressing legal need, including for groups who may not access the services of CLCs.*

Further, CLCs are often only able to see a proportion of potential clients due to resource constraints. Law reform activities directed at resolving issues facing a large number of current and potential clients are also an efficient means of addressing legal need, including for groups who may not access the services of CLCs.

As such, many CLCs also engage in a range of policy and law reform activities, generally associated with or arising from their direct service work. These include running test cases, class actions and other strategic litigation; as well as systemic advocacy such as submissions, appearances at inquiries, and work with other agencies to develop cross-sectoral solutions to legal problems. Some forms of community legal education may also be directed at policy or law reform outcomes.<sup>17</sup> These activities are often focussed on addressing legal issues identified through casework with individual clients, for example, where an issue is raised repeatedly in direct service, or where it become apparent that an existing law or procedure is having an unintended consequence for disadvantaged or vulnerable groups in society.

Researchers have argued for at least the last two decades that policy and law reform activities by CLCs have had a significant impact in various areas of public policy and the law, and yielded a greater benefit to disadvantaged or vulnerable members of the community than

10 Liz Curran, *Making the Legal System More Responsive to Community: A Report on the Impact of Victorian Community Legal Centre Law Reform Initiatives* (2007). ISBN 978-0-646-47603-2, p68.

11 Simon Rice, *Are CLCs Finished?* 12 *Alternative Law Journal* Vol 37:1 (2012) 17, 17.

12 In 2006–2007 the Attorney-General’s Department found that 99.4% of CLC activity consisted of direct legal advice, information and casework. Nicole Rich, *Reclaiming CLCs: Maximising our potential so we can help our clients realise theirs*, (2009) Consumer Action Law Centre and Victoria Law Foundation. Available at: <http://consumeraction.org.au/wp-content/uploads/2012/04/Reclaiming-community-legal-centres.pdf>, p31.

13 Rich, *op cit*, p36.

14 Rich *op cit*, p36.

15 Rich *op cit*, p36.

16 Rich, *op cit*, p13.

17 Rich, *op cit*, p9.

casework and advice alone would have done.<sup>18</sup> The unique role of CLCs in linking case work with law reform, and the development of relevant and sometimes innovative solutions that benefit regulators, industry and governments has also been noted.<sup>19</sup>

It has also been argued that this integrated service delivery model allows CLCs to achieve beneficial outcomes for people and communities that extend beyond the individuals coming through their doors.<sup>20</sup>

In 2008, Curran conducted a study into the value and impact of law reform activities among CLCs and found that CLCs are often the sole agency identifying and advocating on a specific problem that has been encountered by their clients for many years.<sup>21</sup> She also found that CLCs play a critical role in informing decision-makers of clients' experiences and suggesting how the law might be improved.<sup>22</sup> She argues that in the course of delivering individual legal services, 'CLCs are ideally placed to see how the legal system's operation impacts upon clients; as well as having the ability to identify a trend that creates difficulties or which enhances the legal system's operation.'<sup>23</sup>

*Extensive casework and advice experience means that CLCs are well placed to ensure feedback to government on policies and how laws operate on the ground, and provide unique insights and contributions to policy development in their areas of expertise.*

One of the most common justifications for CLC's engagement in policy and law reform activities is because of their continuing connections to the community.<sup>24</sup> It is noted that CLCs collect vast amounts of data and case studies through their direct legal services, making them a good source of information about legal problems at the community level.<sup>25</sup> It has been argued that the extensive experience of CLCs 'at the very front line of service delivery' means that they are often able to make a unique contribution to policy and law reform informed by strong practical experience.

Extensive casework and advice experience means that CLCs are well placed to ensure feedback to government on policies and how laws operate on the ground,<sup>26</sup> and provide unique insights and contributions to policy development in their areas of expertise.<sup>27</sup> In her research on law reform, Curran argues:

CLCs through casework experience, have been able to identify problematic laws and policies which negatively affect clients and brought these experiences to the attention of governments, the public and industry, and albeit sometimes slowly, have forged changes that have led to the improvement of the justice system.<sup>28</sup>

Finally, it has been argued that engagement with policy and law reform activities play an important role in the maintenance of a robust democratic civil society.<sup>29</sup> CLCs provide a practical perspective in public debates that is grounded in their direct legal services experience and is reflective of the community's interests.<sup>30</sup> Because of their extensive knowledge of local issues CLCs are able to give a voice to disadvantaged members of

.....  
18 Rich, *op cit*, p54.  
19 Rich, *op cit*, p9.; David Weisbrot, *Australian Lawyers* (1989) Addison-Wesley Educational Publishers Inc, ISBN:0582939666, p245.  
20 Victoria Legal Aid, *Submission to the Productivity Commission* (November 2013), p5.  
21 Curran, *op cit*, p4.  
22 Curran, *op cit*, p67.  
23 Curran, *op cit*, p67.  
24 Paula O'Brien, Changing Public Interest Law: Overcoming the law's barriers to social change lawyering, (2011) Vol36:2 *Alternative Law Journal* pp 82-5  
25 Victoria Legal Aid, *op cit*, p7.  
26 Schetzer, *op cit*, 159.  
27 The Hon Mark Dreyfus QC MP, Shadow Attorney General for Australia, *CLCs, Access to Justice and the Contest of Ideas*, speech given at 2013 National Association of Community Legal Centres Conference (24 July 2013).  
28 Curran, *op cit*, p67.  
29 Curran, *op cit*, 17; Dreyfus, *op cit*  
30 Curran, *op cit*, p4.

*CLCs' engagement with policy and law reform can thus be seen as fundamental to the promotion of government objectives of social equity.*

the community who could not otherwise advocate effectively for themselves.<sup>31</sup> CLCs' engagement with policy and law reform can thus be seen as fundamental to the promotion of government objectives of social equity, and is viewed as essential to ensuring that the law reflects the traditions, values and aspirations of all Australians.<sup>32</sup>

The value of policy and law reform activities has been acknowledged in work by key institutions and research bodies. Delia Rickard, the Deputy Chair of the Australian Competition and Consumer Commission (formerly of ASIC) is reported as saying that this type of integrated work regularly results in real changes to industry conduct or law reform.<sup>33</sup> The importance of policy and law reform activities by CLCs has also been recognised in a recent Productivity Commission report, where the Commission notes that:



Strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities). Advocacy can also be an efficient use of limited resources. It can be an important part of a strategy for maximising the impact of LAC and CLC work.<sup>34</sup>

### 2.2.3 The emerging policy environment

Despite the benefits said to be associated with policy and law reform activities, the role of CLCs in this area has been increasingly contested, and there is arguably a lack of clear agreement about the role and functions of CLCs in the current policy landscape.

The role of CLCs in relation to policy and law reform has until recently been viewed as a core activity of the sector in Commonwealth-State funding agreements that provide core funding for CLCs' legal activities under the Community Legal Services Program (CLSP),<sup>35</sup> although many centres also auspice diverse programs funded from other government and private sources such as financial counselling, tenancy and advocacy in relation to victims compensation.

However, the most recent CLSP funding agreements roll over<sup>36</sup> now defines core activities as 'information, advice, casework and community legal education activities'; and has removed clause 5 of the service agreement which, in essence, formerly provided that Commonwealth agreements did not contain provisions that could stifle 'legitimate debate' or 'advocacy activities', including limiting an organisation's 'right to enter into criticism of the Commonwealth'.

Although the most recent funding agreements do not contain an express prohibition to engage in policy and law reform, and is likewise silent on previous guarantees of protections in relation to entering into legitimate public debate, CLCs are no longer expressly funded by the Commonwealth under the CLSP to engage in policy and law reform activities.

.....

31 Dreyfus, *op cit*.

32 Cited in Curran, *op cit*, p1 (ALP National Platform and Constitution, Chapter 12, *ensuring Community Security and Access to Justice*, 33 and 56: [http://alp.org.au/platform/chapter\\_12.php#12access\\_to\\_justice](http://alp.org.au/platform/chapter_12.php#12access_to_justice)).

33 Curran, *op cit*, p14.

34 Productivity Commission: Access to Justice Arrangements - Interim Report. Released 8 April 2014. Available at: <http://www.pc.gov.au/projects/inquiry/access-justice/draft>, p 623.

35 With such activities included in core activities until the most recent 12-month roll over of CLSP agreements. Law reform and advocacy changes are to the Commonwealth CLSP Service Agreements, however some state positions on the issue differ.

36 i.e. as of 1 July 2014 for a further 12-month period

As well as restricting proactive law reform activities, this in practice could also make activities such as responding to government requests for input to inquiries and the like problematic for staff funded under the CLSP.

Nonetheless, it appears possible to continue policy and law reform activities through other programs not funded under the CLSP, and through unfunded means including resources raised through fee-for-service activities, donations and fund raising, and volunteers at the centres. It is also noted that overarching protections to engaging in such activities are still provided for in sections 4 and 5 of the *Not-for-profit Sector Freedom to Advocate Act 2013 (Cth)*.<sup>37</sup> Despite the removal of clause 5 of the CLSP funding agreement, this legal protection remains.

The NSW State Government's position continues to provide for policy and law reform activities, although there appear to be some restrictions. The NSW State Government has indicated that it expects CLCs to undertake policy and law reform activities in accordance with its *Principles for the Funding of Legal Assistance*.<sup>38</sup> These *Principles* apply to 'casework and non-casework services funded under the CLSP and NSW Public Purpose Fund, and relevantly include, 'Provision of factual information, research and advice on law reform and policy issues focusing on systemic issues, such as issues affecting disadvantaged individuals and vulnerable groups to assist in policy development' under cl 2(vii).<sup>39</sup>

The extent to which providing representation would 'promote the public interest' under cl 5 and cl 6 is also a relevant consideration under the *Principles*. This includes promoting 'access to justice' for disadvantaged individuals or vulnerable groups, and in relation to protecting the individual rights of individuals in certain situations.<sup>40</sup>

However, cl 3 provides for a number of restrictions on specific activities. These include 'activities which may reasonably be described as political advocacy or political activism', such as 'lobbying governments' in ways that go beyond what is described above, 'public campaigning' such as participation in rallies and demonstrations, and providing representation or advices to activist or action groups.

*There is thus a risk in the current policy environment that some of the valuable, and cost effective, work reported below could be lost to government and Australian society* Whilst this signals more explicit constraints on the activities of CLCs than existed previously, it appears to leave the path open for many policy and law reform activities described in the case studies in Section 4 of this report. Nonetheless, the explicit constraints set out in clause 3 could make CLCs more reluctant to engage in such work where, for example, these is a risk that research conducted as part of policy and law reform submissions may be reported in the press, and construed as 'lobbying'. There is thus a risk in the current policy environment that some of the valuable, and cost effective, work reported below could be lost to government and Australian society.

.....  
37 Section 4 states that an agency is 'not to include prohibited content in Commonwealth agreement' or such an agreement is void, with section 5 defining 'prohibited content' as 'any requirement that restricts or prevents a notfor profit entity (including staff of the notforprofit entity) from commenting on, advocating support for or opposing a change to any matter established by law, policy or practice of the Commonwealth' (section 5(1)).  
38 The NSW State Government Document, *Principles for Funding of Legal Assistance*, does not form part of funding agreements, and at this stage, its status is uncertain.  
39 The NSW State Government Document, *Principles for Funding of Legal Assistance*, clause 2(vii).  
40 The NSW State Government Document, *Principles for Funding of Legal Assistance*, clauses 5 and 6.

## 2.3 Review of relevant studies and theoretical positions in framing research questions

### 2.3.1 Studies related to policy and law reform

There are few studies which seek to document and assess policy and law reform activities carried out by community legal centres and other bodies in a systematic way, and thus to provide a strong evidence base for testing the claims regarding the value of integrating casework and law reform as set out above.

Curran (2012) identifies a number of evaluations and reports carried out in the last ten years within legal assistance services.<sup>41</sup> Two of the studies, Curran 2007 and Kirby (undated)<sup>42</sup> assess CLCs with regard to law reform and community education. Of these studies, Curran 2007 is largely descriptive and is somewhat unclear regarding the public policy and legal framework against which outcomes are being assessed. Kirby did not systematically assess the effectiveness of community legal education, but largely documented anecdotal evidence from key informants as to what comprised good practice in this area.

Relevantly, Curran (2012) contends that,

*Significant difficulties are identified in much of the domestic and international literature in the measurement of outcome/results, quality, efficiency and effectiveness.*

*The literature domestically and internationally, identifies the lack of a common language with which to articulate results, the lack of a framework in which to capture them and the difficulties in being able to measure and prove success. Where such results based measurement exists it will often need to be descriptive, subjective and there is a risk that cannot be avoided, of its being anecdotal and vague.<sup>43</sup>*

The present study seeks to address these shortcomings in existing studies through the conceptual framework and methodology set out below.

### 2.3.2 Theories of Law and their relationship to measuring effectiveness and efficiency

It also appears that some of the methodological issues identified in relation to previous studies may arise from quite different embedded, or unarticulated, theoretical positions on commonly used concepts such as ‘the law’ and ‘justice’. It is important in framing the research questions and the outcome measures that are used in this evaluation that these theoretical positions are more clearly articulated and linked to the outcome measures.

Whilst a position that considers that ‘access to justice’ can be equated to ‘access to the legal system’ may arise from a legal positivist perspective, a view that the legal system may need to be changed to provide ‘access to justice’ for all people is more likely to arise from a theoretical position more aligned with ‘natural law’ perspectives. (*see chapter endnote*)

.....  
41 Curran, L. (2012) A Literature Review: examining the literature on how to measure the ‘successful outcomes’: quality, effectiveness and efficiency of Legal Assistance Services, Curran Consulting: Enhancing Justice and Human Rights.  
42 Curran, L. (2007) *Making the Legal System More Responsive to Community: A report on the impact of Victorian Community Legal Centre Law Reform Initiative*, La Trobe University and the Reichstein Foundation; and Kirby, J. (undated) *A Study into Best Practice Community Legal Education*, Victorian Law Foundation.  
43 Curran, L. (2012) *op cit*, page 5.

If one approached this from a legal positivist model, then ‘access to justice’ could be interpreted as access to the legal system *as it exists*, with this view supporting for example a case work type approach that provides equitable access to the legal system for disadvantaged people. This accords with the notion of ‘access to the legal system’ as expressed by NACLC in its vision for the sector, as set out above.

*As noted, ‘access to the legal system’ and ‘access to justice’ may not always be synonymous, which justifies activities to reform from the perspective of the sector, and from a ‘natural law’ perspective.*

However if one approached this from a natural law perspective, one might view an existing law as ‘unjust’, where for example it has an unintended consequence for vulnerable individuals or groups. Such a law could require modification of notions of what is ‘just’, and involve changes to the law by providing evidence to legislators that the new view is preferred over the existing view. This may be seen as NACLC’s vision of providing ‘access to justice’ in its vision for the CLC sector.

As noted, ‘access to the legal system’ and ‘access to justice’ may not always be synonymous, which justifies activities to reform from the perspective of the sector, and from a ‘natural law’ perspective. Clearly, both are important perspectives, and this study seeks to understand whether there is any greater benefit when access to the legal system through casework is integrated with relevant policy and law reform activities.

### 2.3.3 The role of CLCs from a public policy perspective

Theoretical perspectives on the role of government in public policy are also relevant in understanding the different views and tensions evident in earlier discussion. It is also important in framing the research question regarding the role of CLCs and their legitimacy in relation to policy and law reform activities, and how effectiveness may be measured from the perspective of government.

There are two important principles of government to be considered when allocating resources to competing needs or when making decisions as to whether the rights of one group within society may take precedence over the rights of another group. The first is efficiency,<sup>44</sup> and the second is equity.<sup>45</sup> While the first may be quantifiable in dollars using methods such as cost effectiveness and cost-benefit analysis, the second is a matter of values.

In western parliamentary democracies, such as Australia, decisions about ‘values’ are made by elected representatives.<sup>46</sup> As an example, the existence of a welfare system including services for people disadvantaged by income, culture, geography or disability, which transfers wealth from one part of society to another, shows the importance placed by government on matters of equity and demonstrates that this a central policy concern of government. Decisions about values are also made by judges when applying and interpreting the law.

Both are relevant concerns for CLCs in terms of relevant outcome measures for this study. In relation to ‘efficiency’, this may relate to the relative cost of services provided or savings made through reduction in litigation as a result of law reform; benefits arising from ensuring the proper operation of the legal system; and the benefits arising from reducing or eliminating externalities, for example, preventative work that leads to the avoidance of incarceration, relationship breakdown, homelessness and the like.

.....  
44 This concept is a technical term whereby the maximum utility is obtained from the available resources. Relative efficiency can be empirically observed through the operation of markets and hence is measurable.

45 Defined as fairness or distribution of resources. The meaning of the notion itself is contested, for example does equity mean equality of opportunity or equality of outcome? The two approaches have quite different policy implications. See for example Friedman L, (2002), *The Microeconomics of Public Policy Analysis*, Princeton, Princeton University Press, page 58.

46 *Ibid*, page 66.

In the case of ‘equity’ considerations, the fact that CLCs are funded to promote the interests of and provide access to justice for more disadvantaged members of society indicates that government (and the community) supports activities that lead to more equitable outcomes.<sup>47</sup>

As such, a proper understanding of the role of government in public policy, including as it relates to CLCs, indicates reasonable alignment between what government and CLCs would regard as ‘successful outcomes’ from CLCs activities, including policy and law reform.

From a public policy perspective (government), an effective outcome may be one that advances the equity agenda of government (noting that the equity agenda of government may differ from the equity agenda of the CLC sector and that the equity agenda of government will include at least two prongs, allocation of resources and allocation of rights) and framed in ‘natural law’; or one that results in a cost saving to government (cost effectiveness); or one that provides an overall benefit to the community (cost benefit analysis). The analysis in these latter two cases is likely to be framed in a critical theory of law, that is law in its’ social context. It is noted that equity (including human rights) considerations align with considerations of CLCs, however government, the judiciary and CLCs may not share common values.

## 2.4 Study Framework

### 2.4.1 The Research Question

In consideration of the above discussion, our research question is framed as follows:



How effective is policy and law reform work when integrated with direct legal service in the CLC sector in achieving desired outcomes of government and the sector, by comparison with using direct legal services alone.

‘Effectiveness’ will be considered in the context of public policy with regard to:

- ▶ Equitable access to the legal system;
- ▶ Equitable access to justice;
- ▶ Cost efficiency; and
- ▶ Benefit to society.

By ‘equitable access to the legal system’, an effective outcome will mean that more people will be able to use the legal system as it stands. An example could be a program that provides a court service to a disadvantaged group, such as young people, who might otherwise have difficulty accessing legal avenues available to them.

By ‘equitable access to justice’, an effective outcome will mean that the law may need to be changed to provide justice for all people. An example might be a change in a discriminatory law, based for example on notions of race whereby some groups do not have the same rights as other similar groups in society.

By ‘cost efficiency’, we mean evaluating effectiveness in terms of use of government resources, in that an effective outcome will be one which will lead to decreases in government expenditure or will allow more to be done with the same resources. An example might be

.....  
<sup>47</sup> See also discussion in Judith Stubbs and Associates (2012) Economic Cost Benefit Analysis of Community Legal Centres, NALCLC.

a change in a law which streamlines a process, thereby reducing the cost of managing the particular law. The cost efficiency to the CLC sector is also considered, such that a larger number of people may be serviced with available resources.

By ‘benefit to society’, we mean evaluating effectiveness in terms of costs and benefits across society, where an effective outcome means that the benefits to society are increased, and/or the costs to society are reduced. The costs and benefits to society are much wider than the costs and benefits to government alone. An example might be the introduction of laws on consumer protection. Society is better off when people get what they pay for as individual resources are not wasted.

## 2.4.2 Outcome Measures

In terms of outcome measures related to the above evaluation question and framework, the following are considered in the study:

- ▶ ‘Equitable access to the legal system’ will be achieved when policy and law reform activities result in improved access to the legal system for particular groups;
- ▶ ‘Equitable access to justice’ will be achieved when policy and law reform activities identify areas where existing law and policy does not reflect the views of society as a whole, with this demonstrated through changes in policy, legislation and case law;
- ▶ ‘Cost efficiency’ will be achieved when there is a reduction in the cost of service provision, such as reductions in litigation arising from a change in or improved application of the law so that more can be done with existing resources; and
- ▶ ‘Benefit to society’ will be achieved when the benefits to society of a policy and law reform activity outweigh the costs to society. Those costs will be assessed in terms of the proper operation of the law,<sup>48</sup> savings in operation of the legal system, and reductions in externalities such as incarceration, homelessness and the like.

## 2.4.3 Overview of Methodology

This study adopts the following methodology:

- ▶ Presents quantitative data on policy and law reform activities conducted by community legal centres in NSW, based on a survey of community legal centres;
- ▶ Documents, validates and critically reviews ten selected case studies;
- ▶ Describes outcomes achieved using qualitative and quantitative measures of effectiveness as set out above;
- ▶ Assesses the efficiency of strategic approaches; including drawing on previous cost/benefit work carried out by JSA (2012) for NACLC;
- ▶ Drawing on the evaluation above, identifies policy and advocacy strategies that have been successful in achieving positive outcomes (as defined) for disadvantaged people; and
- ▶ Reports on the importance, effectiveness and efficiency of policy and advocacy work as represented in the case studies.

.....  
48 Using Posner’s Economic Analysis of Law framework

## ENDNOTE

Theories of law are attempts to understand why, in judicial matters or legal principles, our society prefers one legal principle to another. Many such theories of law are documented. Himma (2012) proposes a useful taxonomy of three categories into which the topics of legal philosophy fall, each with a number of schools.

- ▶ Analytic Jurisprudence addresses the underlying question of determining the necessary conditions for the existence of law that distinguish law from non-law. Schools are identified as Natural Law (morality), Legal Positivism (social convention, social facts, separability [from moral considerations]) and Dworkin's Third Theory.
- ▶ Normative Jurisprudence considers prescriptive questions about the law. Some of these questions include Freedom and the limits of Legitimate Law, Obligation to obey Law and Justification of Punishment.
- ▶ The final category is Critical Theories of Law whereby law is considered within the context of society. Schools include Legal Realism (understanding the values of judges), Critical Legal Studies (understanding the importance of ideology), Law and Economics (understanding ways in which the law maximises the wealth of society) and Outsider Jurisprudence (understanding ways in which law promotes the interests of elites at the expense of other groups such as women or racial and ethnic minorities).

Other authors use other taxonomies, preferring, various types of categories under which the law may be grouped.

# 3

## Policy and law reform activities in the context of CLCs in NSW

### 3.1 Overview

A survey was carried out of NSW CLCs to understand their attitudes to and engagement with policy and law reform activities. Thirty centres responded to the survey, which represents over 80% of CLCs in NSW. The findings reported below provide a context to the case studies that follow. Law reform or systemic advocacy activities were generally seen as important and effective, typically using 10% of a centre’s resources, but with some centres allocating greater or lesser resources.

### 3.2 Engagement with policy and law reform

Most Community Legal Centres (93%) spend time on law reform or systemic advocacy activities in addition to or in conjunction with their case work activities.

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Does your CLC spend time on law reform or systemic advocacy activities?



**Figure 1** Time spent on law reform or systemic advocacy activities

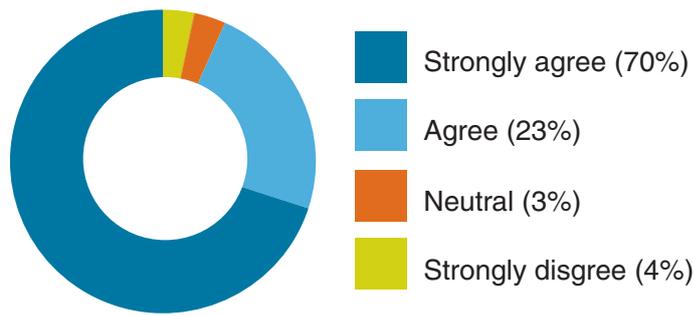
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### 3.3 Importance of policy and law reform

Most CLCs (93%) agreed or strongly agreed that law reform or systemic advocacy activities were an important part of the services they offered to the community. Details are shown in the figure following.

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Do you consider law reform or systemic advocacy activities an important part of the services that your Centre provides to the community?



**Figure 2** Are law reform or systemic advocacy activities an important part of CLC services

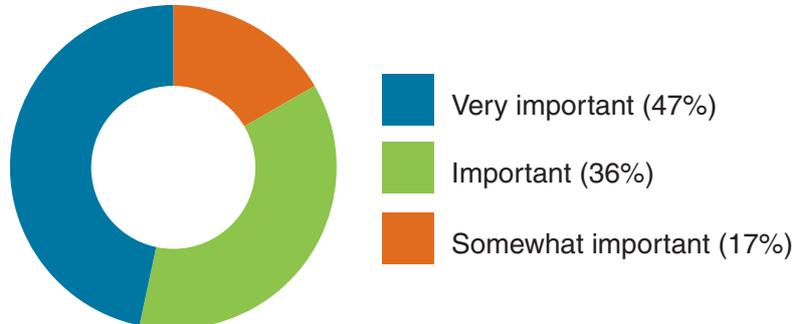
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### 3.4 Importance in delivery of services

Half of CLCs (47%) rated law reform or systemic advocacy activities as very important in their delivery of services, with more than one third (36%) seeing them as important in their delivery of services. No CLC rated the activities as not important. Details are shown in the figure below.

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How would you rate the importance of law reform and systemic advocacy activities to services that your Centre provides to the community?



**Figure 3** Rating of law reform or systemic advocacy activities

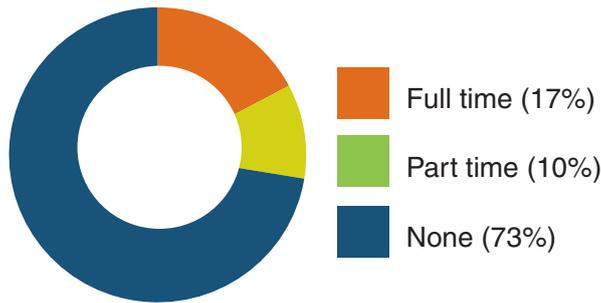
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### 3.5 Resourcing of policy and law reform

About one fifth of centres (17%) had a full time position devoted to policy and law reform, one tenth (10%) had a part time position, while nearly three quarters of centres (70%) did not have a dedicated position. Details are shown in the figure following.

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Do you have a dedicated policy/law reform position in your Centre?



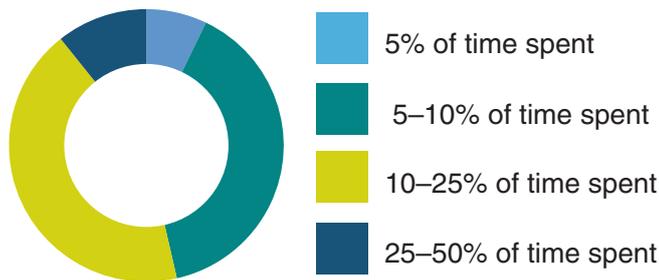
**Figure 4** Dedicated policy/law reform position

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Further, 90% of CLCs spent less than 25% of their resources on law reform and systemic advocacy activities, and none spent more than 50% of their resources. The median CLC spent 11% of their resources on law reform and systemic advocacy activities. Details are shown in the figure below.

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Can you estimate what percentage of your CLC's resources/time is spent doing law reform or systemic advocacy activities in any given financial year?



**Figure 5** Time spent doing law reform or systemic advocacy

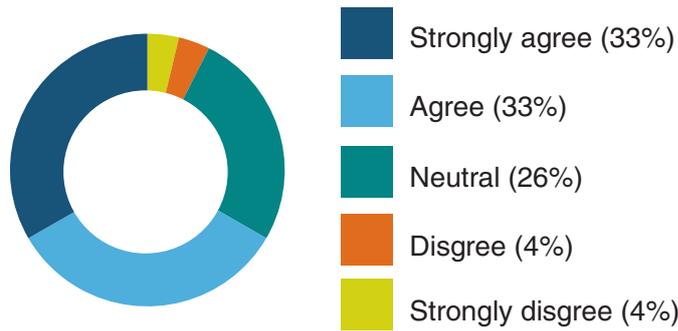
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### 3.6 Efficiency of policy and law reform activities

Two thirds of CLCs considered that law reform and systemic advocacy activities were a more efficient use of resources than case work alone. The balance were neutral with one centre disagreeing. Details are shown in the figure following.

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Do you agree that law reform and systemic advocacy activities can be a more efficient use of your Centre's resources than just casework alone?



**Figure 6** Is law reform and systematic advocacy a more efficient use of resources

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### 3.7 Types of activities

The most common type of law reform and systemic advocacy activity engaged in by CLCs was identifying law reform through case work and gathering supporting case studies, with this comprising the two most common activities (1 and 2), and four of the six most common activities (1, 2, 4 and 6).

The next most common type of activity (3, 5, 10 and 13) was informing government or other bodies of concerns. Public education (7, 9 and 12) was the next most frequent approach, followed by research (8).

Making complaints or facilitating others to complain was also common (11, 14, 16 and 18) while test cases (15 and 17) were the least used reform approach.

Details are shown in the table following.

**Table 31** Types of law reform and systemic advocacy activities undertaken

Question	Rank	Response Percent	Response Count
Use individual client cases to identify law reform opportunities	1	85.7%	24
Gathering case studies	2	85.7%	24
Meeting with or writing to Ministers or MPs	3	85.7%	24
Look for patterns in client cases to identify law reform opportunities	4	82.1%	23
Submitting to and/or appearing before Government inquiries	5	82.1%	23
Selecting cases with a view to highlighting a gap/problem with the law	6	75.0%	21
Speaking at public forums/running CLE about the impact of existing and proposed laws	7	71.4%	20
Research reports/project(s) forming basis of potential law reform	8	67.9%	19
Media comments/releases/strategies	9	67.9%	19
Participating in government consultations/committees with a law or public policy reform component	10	67.9%	19
Complaints to oversight bodies/regulators (for individuals)	11	64.3%	18
Sharing stories in On The Record, Alternative Law Journal, local paper	12	50.0%	14
Meeting with industry associations, businesses, government and/or professional bodies with a view to changing policies and practices affecting clients	13	50.0%	14
Helping clients write to their local MP or give evidence to inquiries affecting them	14	46.4%	13
Test cases or class actions	15	42.9%	12
Complaints to oversight bodies/regulators (for groups or people/systemic issues)	16	39.3%	11
Liaison with pro bono or no win, no fee law firms to arrange class actions, test cases	17	39.3%	11
Organising surveys, protests, online campaigns (including using social media)	18	28.6%	8

# 4

## Case Studies

### 4.1 Overview of methodology

CLCs that completed a survey on their engagement in policy and law reform activities were also asked to nominate a policy or law reform initiative linked to their casework practice that they considered have resulted in important outcomes with regard to the key outcome measures outlined above. In consultation with the Financial Rights Legal Centre, JSA then selected 10 policy or law reform initiatives for further analysis.

Services were asked to provide more detail on selected case studies, together with documentary evidence to validate the process and outcomes cited where possible. JSA then conducted further research to validate and critically review the benefits claimed in relation to each case study.

Each of the case studies was then systematically evaluated against the key outcome measures outlined above, and a summary of findings regarding the value of policy and law reform activities was made.

### 4.2 Case Studies

#### 4.2.1 Case Study 1: Boarding House Reforms

##### Summary

The Tenants' Union of NSW (TU) is a community legal centre specialising in residential tenancies law. Its work includes advocating for the reform of policies and laws affecting tenants; conducting strategic litigation to advance the interests of tenants; and supporting Tenants Advice and Advocacy Services.<sup>49</sup>

While most renters in NSW are covered by residential tenancies legislation, the TU was aware of a group of marginal renters who were not covered by any legislation. Their legal relationships with their landlords were governed by unregulated common law contracts. The only opportunities to resolve disputes required action in the equity division of the Supreme Court using common law and contract law or through the Consumer, Trader and Tenancy Tribunal (CTTT) (now the NSW Civil and Administrative Tribunal) using consumer protection legislation.

Some 25,000 marginal renters were identified in NSW, about half of whom were in residential colleges; with the balance in boarding houses, hostels for disabled people and homeless hostels and refuges.

*While most renters in NSW are covered by residential tenancies legislation, the TU was aware of a group of marginal renters who were not covered by any legislation.*  
*o The care provided in hostels for disabled people was often unsatisfactory, and at worse was abusive and exploitative.*

.....  
49 <http://www.tenantsunion.org.au/about-us> accessed 2 April 2014.

Marginal renters in the latter groups were often socially disadvantaged, and in many cases had disabilities. The care provided in hostels for disabled people was often unsatisfactory, and at worse was abusive and exploitative.

Through case work, the TU was aware of problems in a number of areas. Lack of formal agreements made disputes difficult to resolve and uncertainty was not in the interests of either landlords or tenants; conditions were often poor and rules onerous; and people with disabilities were sometimes subject to abuse and exploitation.

The TU and other Tenant's Advice and Advocacy Services had taken test cases through the Supreme Court and CTTT, with varying levels of success. It was evident that the problems faced by marginal renters were systemic rather than individual, and so the TU prepared a four point plan for reforming marginal renting. This included law reform to create 'occupancy agreements'; measures for more viable boarding houses; services to promote social inclusion and appropriate housing; and support for people with a disability. As part of the law reform initiative, the TU undertook extensive consultation including with property owners in order to find a common ground and promote acceptance of the model. The approach adopted was to present a model of legislation that allowed prescriptive matters, such as notice periods, to be addressed after the passage of legislation; both through the bureaucracy in drafting a standard form of agreement; and through the Tribunal by resolving disputes about occupancy principles while agreeing and legislating key principles. As a result of the policy proposal put forward by the TU, the NSW Government enacted the *Boarding Houses Act 2012*. Among other things, the Act provided for occupancy principles, the registration of boarding houses and the authorisation of assisted boarding houses.

### **Equitable access to the legal system**

*This policy and law reform activity resulted in improved access to the legal system for Aboriginal people or their beneficiaries.*

This policy and law reform activity meant that residents of boarding houses had access to the CTTT (now the NCAT) for tenancy matters and resolution of disputes. Previously they would have had to pursue their rights through the equity division of the Supreme Court using common law and contract law or through the CTTT in terms of consumer protection legislation. Action in the Supreme Court was likely to be prohibitively expensive for most tenants;<sup>50</sup> while action using consumer protection legislation was ineffective in protecting the rights of tenants, as the terms of agreements were often not clear. Consequently tenants of boarding houses now have affordable access to independent dispute resolution.

### **Equitable access to justice**

This was an important outcome of the policy and law reform activity, as the act redistributed rights between residents and operators of boarding houses by increasing the rights of residents and articulating principles to be considered in disputes. Prior to the legislation, the most likely outcome of any dispute was the eviction of the boarder, as the boarder had few, if any, rights. The changes gave residents and proprietors of boarding houses occupancy principles appropriate to the needs of marginal renters and boarding houses. Feedback from advocates is that many residents are reluctant to apply to the tribunal while they are still residents, but are more likely to pursue rights after exit.

### **Cost efficiency**

While there is likely to be an additional cost to government through increased activity in the NCAT, the number of applications is very small with 15 as of January 2014. These

.....  
50 The Supreme Court of NSW publishes fees for service. As at 1 July 2013, to initiate a process costs \$999, and allocating a hearing date costs \$1,995. By comparison, a person on a disability pension receives \$383 per week (<http://www.humanservices.gov.au/customer/enablers/centrelink/disability-support-pension/payment-rates> accessed 24 June 2014). The basic fees for court action are therefore equivalent to nearly eight weeks income. People may also be prohibited by other reasons, such as a lack of sophistication, disability or low levels of literacy.

proceedings are more straightforward and less time consuming than earlier proceedings under consumer law and so are likely to be lower cost. The prospect of going through proceedings in the NCAT also means that some disputes get settled reasonably between the parties without proceedings, rather than through operator's traditional remedy of going straight to eviction, with the latter often resulting in costs to government such as police attendance, or calls for emergency housing.

*From the perspective of Tenant's Advice and Advocacy Services, there has been a marked increase in cost efficiency, with a significant reduction in the level of resources required to assist a tenant in resolving a dispute.*

From the perspective of Tenant's Advice and Advocacy Services, there has been a marked increase in cost efficiency, with a significant reduction in the level of resources required to assist a tenant in resolving a dispute. Consequently Services can provide assistance to more clients, meaning that they are less likely to turn away boarders requiring assistance. For example, the Tenants Union received enquiries from 188 boarders/lodgers in 2009; increasing to 346 in 2013.

### **Benefit to society**

There is likely to be some cost to society through an increase in the cost of providing boarding house accommodation due to compliance with the Act and through the possibility of increased activity in NCAT.

Against this, there are likely to be efficiencies to boarding house operators through compliance with the regulatory scheme, such as reductions in disputes as a result of having written agreements in place, better management of finances through issuing receipts and contact and support from government.

Because boarders now have written contracts, the price paid by boarders is more likely to truly reflect the value of the services offered, that is boarders know what they are paying for.

As discussed above, there is likely to be a significant cost to society from the provision of emergency housing and support by government or charities when people are evicted with little or no notice and the incurring of other costs of homelessness. The costs of homelessness are quite high, and have been estimated by JSA previously as between \$50,000 and \$75,000 per homeless person per year.

Lastly, the boarder themselves will receive a considerable benefit from improved amenity and security. This is particularly important given the vulnerability of this segment of the population.

## **4.2.2 Case Study 2: Bail Reforms**

### **Summary**

Prior to the enactment of the *Bail Act 1978* (NSW), bail law in NSW was a mixture of common law principles and piecemeal legislative provisions. Following enactment, there were extensive amendments to the Act over the years, making it difficult to comprehend and operate. The most significant amendments removed the presumption for bail in some areas, introduced a presumption against bail in other areas, and required that bail should only be granted in exceptional circumstances in other areas.

*The impact of these changes was a rapid increase in the number of people forced to remain in custody while awaiting trial (remand).*

The impact of these changes was a rapid increase in the number of people forced to remain in custody while awaiting trial (remand), with the number of remand prisoners trebling (from 700 in 1995 to over 2,500 in 2010), and the rate of remand prisoners per 100,000 population doubling from 18 in 1994–95 to 45 in 2010–11. The number of young people on remand increased from 225 in 2000 to over 400 in 2010.<sup>51</sup>

.....  
51 Law Reform Commission *Bail*, pp 45–46.

Because of their client base, CLCs were aware of the adverse impacts of the Act on particular client groups including young people, indigenous people, people with cognitive disabilities and other vulnerable people including those experiencing homelessness.

In 2010, the Youth Justice Coalition produced a research report entitled *Bail Me Out*. The report quantified the reasons the Bail Act was leading to high levels of remand for young people. The report found many young people were in remand for breaching bail conditions, or could not be released because they could not meet bail conditions. While some people (44%) had breached their bail conditions by committing a new offence, the balance had breached a 'welfare' provision of their bail, with those welfare provisions well outside the primary purposes of bail of ensuring attendance at court and preventing re-offending. Similarly most of those unable to meet a condition of bail could not comply with a welfare requirement such as a fixed address. Notably, other data sources showed that only 8–16% of those in remand progressed to a custodial sentence.

For several years, the Public Interest Advocacy Centre (PIAC) had strongly supported reform of NSW bail laws, making submissions to a number of enquiries. As a result of advocacy by this and other organisations, including the Youth Justice Coalition, in 2011 the NSW government referred a review of the Bail Act to the Law Reform Commission.

PIAC made a detailed submission to the Commission, including 21 recommendations. These included references to the impact of bail provisions on young people, homeless people, Indigenous people and people with cognitive impairments; and to the focussing of bail on its primary purpose of ensuring a person's attendance at court and protecting the community.

The Commission report largely reflected the concerns raised by PIAC, and recommended wide ranging changes to the *Bail Act*. In December 2013 the NSW Government enacted its reform of the bail legislation with the passage of the *Bail Act 2013*. Notable changes include a right to release for fine-only offences, selected offences under the *Summary Offences Act 1988* and some offences under the *Young Offenders Act 1997*. Pre-release requirements are restricted to surrender of passports, security, character acknowledgements and accommodation requirements. The latter is only applicable to a child, and has a requirement for ongoing review.

### **Equitable access to the legal system**

The *Bail Act 2013* will not generally result in improved access to the legal system for those subject to assessment.

### **Equitable access to justice**

The *Bail Act 2013* has important implications for access to justice. The most important of these is likely to be a significant decrease in people held on remand. More broadly, the changes to the legislation can be seen as affirming the principle of presumption of innocence, with people much less likely to be unjustly imprisoned. This is particularly important when, in most cases (over 80%), those previously held on remand did not proceed to a custodial sentence. It is hard to see this as anything other than unjust.

### **Cost efficiency**

There are likely to be significant cost savings to government, both through a savings in the judicial system from a more streamlined bail assessment process, and within the prison system from reduced levels of incarceration. To provide some context, the average daily cost per prisoner has been estimated by JSA at \$188 per day or nearly \$70,000 per year; the average cost of a police response at \$8,781 and the average cost of a court hearing at

*There are likely to be significant cost savings to government, both through a savings in the judicial system from a more streamlined bail assessment process, and within the prison system from reduced levels of incarceration.*

\$1,762. Using these figures, a bail hearing as a response to an investigation by police of a breach of bail conditions and resulting in ten days remand<sup>52</sup> could cost over \$12,000, with most of this in police action. If rates of youth remand return to rates experienced in the mid-1990s, government could expect to save around \$3 million per year from reduced policing and enforcement of bail conditions for young people.<sup>53</sup>

More widely, the bail reforms will result in significant savings to government, with the average time spent on remand six months. If rates of remand return to those of the mid 1990s, 1,500 fewer people will be held in remand each year,<sup>54</sup> with an annual cost saving of around \$50 million.<sup>55</sup>

Marrickville Legal Centre advised that introduction of bail reforms had made little difference to their workload as their target group (young people) are typically represented by Legal Aid in criminal matters.

### **Benefit to society**

As well as the savings to government, there will be a considerable benefit to society from cost savings in the police, judicial and prison systems. A range of externalities will also be avoided. In the words of the Law Reform Commission “a person refused bail is denied liberty, removed from an ordinary life in society and subjected to the hardships of prison life”. The individual will avoid real and significant costs associated with loss of employment, loss of housing, debt and difficulties in preparing for court. They are also exposed to impacts of imprisonment including an increased likelihood of assault and association with criminals leading to possible future criminal activity. The number of individuals impacted is difficult to estimate, but in 2010, 5,218 people on remand were released either as unconvicted or were not subject to further custodial sentence.<sup>56</sup>

## **4.2.3 Case Study 3: Mortgage Exit Fee Ban**

### **Summary**

The Financial Rights Legal Centre (formerly the Consumer Credit Legal Centre) is a CLC specialising in financial services, particularly individual cases and policy issues related to consumer credit, banking and debt recovery. It has a particular focus on issues that affect vulnerable and disadvantaged consumers. Through case work, it became increasingly concerned about mortgage exit fees.

*Consumers often reported being trapped in high interest loans, because they could not borrow enough to cover the exit fee upon refinancing. This left some borrowers in the position where they had to sell their homes even though they could have afforded a more competitive loan with lower repayments.*

While many fairly mainstream loans were subject to mortgage exit fees of several hundred dollars, in the non-bank sector these sometimes amounted to thousands of dollars. Among clients of Financial Rights reports of \$3,000–\$5,000 dollars were common, many fees were higher, and the worst reported to Financial Rights was \$22,100 (based on a percentage of the amount borrowed). Consumers often reported being trapped in high interest loans, because they could not borrow enough to cover the exit fee upon refinancing. This left some borrowers in the position where they had to sell their homes even though they could have afforded a more competitive loan with lower repayments. Clients were also affected when a change of circumstances (such as illness or unemployment) forced the sale of their home in the first 3–5 years of a loan, in some cases resulting in a shortfall on the sale of the property and ongoing debt. Financial Rights advised and/or acted for a number of affected clients.

.....  
52 Average length of stay for a young person is 10 days; Law Reform Commission *Bail*, p 46.  
53  $(1-18/45)*400*12,000=\$2.9$  million  
54  $(1-18/45)*2,500=1,500$ .  
55  $1,500*0.5*\$70,000=\$52.5$  million.  
56 Law Reform Commission *Bail*, page 51.

There are four broad areas of concern with the exit fees. The fees may be unconscionable in that it is not a reasonable estimate of the lender's loss arising from the early termination. The fees may be unfair because rights are not balanced. They cause detriment to one party if they are applied and are not reasonably necessary to protect the legitimate rights of the other party. The fees can mislead consumers as to the cost of a loan; and the fees can trap borrowers in unsuitable loan products.

In 2008 ASIC conducted a review of mortgage entry and exit fees at the request of the then Treasurer Wayne Swan. The results of that review, published in *Report 125: Review of mortgage entry and exit fees* (April 2008) were a useful contribution to the debate. In 2009 the Financial Rights represented a client in the Consumer Trader and Tenancy Tribunal. The decision in that matter is *Broadfoot v RHG Mortgage Corporation Limited (Commercial)* [2009] NSWCTTT 447 (14 August 2009). The CTTT decision found that the fee charged was not a genuine pre-estimate of RHG's loss in the early termination (refinance) of the mortgage. This decision was appealed in the District Court by RHG but then the matter was settled before it was heard. Financial Rights continued to advise clients on how to use the decision to run their own disputes.

In 2012 ASIC issued regulatory guidance in the form of *RG 220 Early termination fees for residential loans* and conducted compliance activity resulting in substantial refunds to consumers. The effect of that regulatory advice was to provide guidelines as to what might comprise unconscionable or unfair terms. This may have been only partially effective, as in a number of cases taken by the Financial Rights, lenders framed their exit fees in terms of the guidance note, but provided little or no substantiation.

While compliance with the guidelines can address unfairness and unconscionableness, the Financial Rights continued to be concerned as to whether consumers were fully informed in making a decision, with their ability to inform themselves limited by their own level of sophistication. Financial Rights and other consumer advocates wrote a number of submissions to government on the issue. In 2011 the Government introduced a ban on mortgage exit fees and the ban came into force for all new mortgages in July 2011.

### **Equitable access to the legal system**

The ban on mortgage exit fees did not generally result in better access to the legal system, as a low cost option was available via External Dispute Resolution by the time the ban on exit fees came into effect. The test case run by the Financial Rights assisted people to access the legal system by providing guidance in how to frame action in case of disputes regarding unfairness and unconscionability.

### **Equitable access to justice**

There were two aspects of access to justice in this case study. The first was the codification of what comprised unconscionable and unfair conduct under common law, facilitating judgement and ensuring consistency. The second related to protecting consumer interest through banning exit fees. While contract law assumes that both parties are equal, this is not always the case, and consumers are not always sophisticated enough to understand what may or may not be in their interests; may not have been aware of the magnitude of the fees; may have underestimated the likelihood of changing lenders or falling into financial difficulties; or may be reluctant or simply unaware of the prudence of seeking independent advice prior to entering into an agreement.

For the Financial Rights, the ban on exit fees has led, over time, to a sharp drop off in advice being required in these cases, with that mostly relating to older loans. No further cases have been run since the ban was introduced.

### **Cost efficiency**

There was little impact on cost efficiency for government, as most of these matters were referred to External Dispute Resolution after the commencement of the national credit laws in July 2010. For the Financial Rights, the ban on exit fees has led, over time, to a sharp drop off in advice being required in these cases, with that mostly relating to older loans. No further cases have been run since the ban was introduced.

### **Benefit to society**

The main benefit to society will come from ensuring transparency through the ban on exit fees, as people are more likely to be getting what they pay for, that is the price of the product is correct, whereas previously exit fee provisions could result in paying a high price, for example through not being able to access savings from lower interest rates available elsewhere. The ban may also have resulted in increased competition between lenders. Banks mortgage fee income from households fell by \$159 million between 2010 and 2012,<sup>57</sup> despite increases in overall mortgage lending in the period. Much of the reduction is explained by the ban on mortgage exit fees.

## **4.2.4 Case Study 4: Intestacy laws in WA**

### **Summary**

Generally in Western Australia, when a person dies without leaving a will, the Court can, under clause 25 of the *Administration Act 1903*, grant administration of the estate to one or more people entitled to receive part of that estate. This would typically be another family member. However under Part IV of the *Aboriginal Affairs Planning Authority Act 1972*, when a person of Aboriginal descent died without leaving a will, the estate could only be administered by the Public Trustee.

The Arts Law Centre of Australia specialises in providing specialised legal advice, education and resources to Australian artists and arts organisations across all art forms, on a wide range of arts related legal and business matters. Through its Artists in the Black service, it provides programs targeted to Aboriginal and Torres Strait Islander artists nationally.

The Arts Law Centre became aware of the impact of the legislation through casework related to Aboriginal arts centres and artists' families. The legislation affected people in a number of ways. Distribution of an estate was often delayed depending on work load within the Public Trustee. The estate bore a cost impost from administration by the Public Trustee, and often there were other costs such as the hiring of consultants to prepare genealogies prior to finalising an estate.

The Arts Law Centre, with pro bono assistance negotiated with a range of departments and stakeholders. This resulted in the passage of the *Aboriginal Affairs Planning Authority Amendment Bill 2012*. The Bill repealed part IV of the Act and achieved parity at law for Aboriginal people who die intestate by bringing them under the same scheme of distributing intestate estates as non-Aboriginals. The law reform activity has also focused the WA Government on the extent of Aboriginal intestacy in WA and led to further policy work across Government agencies.

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57 Pratten, J. (2013) *Banking Fees in Australia*, Reserve Bank, Table 2 and JSA calculation.

### **Equitable access to the legal system**

This policy and law reform activity resulted in improved access to the legal system for Aboriginal people or their beneficiaries. Prior to the legal change Aboriginal people were not able to apply for letters of administration to administer the estate of an intestate family member. Administration was by the Public Trustee, which resulted in significant delays in families accessing the benefits of the estate.

### **Equitable access to justice**

This was an important outcome of the policy and law reform activity, as the act provided Aboriginal people with the same rights as are given to other members of society.

*Estates can now be settled without incurring unnecessary costs and delays in administration such as hiring of consultants to prepare family genealogies. This means that estates are less likely to be consumed in fees, leaving more to those entitled to receive all or part of the estate. Estates will also be accessed more quickly. There is no data available on typical disbursement costs or administration costs.*

### **Cost efficiency**

This policy and law reform activity is likely to result in increased cost efficiency for government, as estates may now be determined by methods other than via the Public Trustee at public cost, noting however that some costs were likely to be recouped from the estate. There is no data available on typical disbursement costs or administration costs, however it is noted that about 50% of funding for the Public Trustee comes from government and the balance from other sources.

Negotiation avoided bringing a test case under the Racial Discrimination Act which would have resulted in significant cost being incurred by both parties. Negotiation was an efficient use of CLC resources.

### **Benefit to society**

There is likely to be a benefit to society (and particularly to recipients of estates) through decreased use of the Public Trustee, with associated costs. Estates can now be settled without incurring unnecessary costs and delays in administration such as hiring of consultants to prepare family genealogies. This means that estates are less likely to be consumed in fees, leaving more to those entitled to receive all or part of the estate. Estates will also be accessed more quickly. There is no data available on typical disbursement costs or administration costs.

## **4.2.5 Case Study 5: Work and Development Orders**

### **Summary**

The *Fines Act 1996* was introduced to address concerns regarding people serving jail terms for unpaid fines. The Act set out a graduated process with regard to recovery of unpaid fines. The process was triggered by issuing a penalty notice. If this was not paid, a reminder notice was sent, followed by a fine enforcement order. If this was not responded to, a person's driver's license was suspended or cancelled and any vehicle registered in their name could have its registration cancelled. The next step was civil enforcement or debt recovery. If this was unsuccessful, then a community service order could be made, and if this was breached then a person could be sent to jail.

Through work with homeless people, young people and other disadvantaged groups, the CLC sector became increasingly aware of the disproportionate effect of the Act on these and other groups. Because of the magnitude of fines, it was next to impossible for anyone on welfare payments to pay fines. As the process escalated, the amount owing increased due to additional penalties and costs at each stage; and for low wage earners, the loss of their driving license or registration of the family car meant that many were unable to work. While fines could eventually be worked out with a community service order, by the time such an order was issued the original fine had increased markedly due to penalties and costs and some years had passed. In addition, any new fine started the process again.

The Act provided a number of options for people in hardship who were not able to pay fines, but in practice these provided little mitigation for affected people. In 2004 for example, the Office of State Revenue wrote off 0.1% of the value of fines and in the same year the Hardship Review Board gave full relief to four applicants and allowed deferred payment to another three.

In 2006, the Public Interest Advocacy Centre (PIAC) prepared a report *Not Such a Fine Thing!* setting out options for reforms of the management of fines matters in NSW. Subsequently PIAC worked cooperatively with other community organisations and with the Attorney General's Department to reach a practical answer to address the unintended consequences of the *Fines Act*.

In December 2008, the Act was amended to incorporate a pilot scheme for Work and Development Orders (WDOs). The pilot scheme provided guidelines for WDOs where a person has an intellectual disability, a mental illness or a cognitive impairment, is homeless or is experiencing acute economic hardship following issuing of a fine enforcement order. The WDO effectively allowed the person to work off their fine at an early stage, and the order could include unpaid work, training, counselling or drug and alcohol treatment.

Uptake of the pilot scheme was slow, with only thirty WDOs implemented after the first year and uncertainty generally regarding how WDOs were to be obtained and implemented. The Illawarra Legal Centre (ILC) worked with community organisations and the State Debt Recovery Office (SDRO) to operationalise the mechanisms by which people would be able to undertake and register for WDOs. It also worked to promote use of WDOs and take up of the scheme by sponsors. As a result there was a significant uptake in the next year with 900 WDOs issued through ILC action alone.

*The pilot scheme was evaluated as successful, and in 2009 the Act was amended to incorporate WDOs. Currently, 16,000 WDOs have been approved, \$2.0 million worth of unpaid work has been carried out and \$18.0 million in outstanding debt has been cleared.*

**Equitable access to the legal system**

While opportunities existed under the previous law for options in the event of hardship, those options were difficult to access, particularly for vulnerable people. People had to go through the Hardship Review Board to either get a Community Service Order or to have some or all of the fine waived. The complexities were such that action by organisations such as CLCs were resource intensive, and chances of success were low. As a result of the introduction of WDOs, it is much simpler to access hardship options.

**Equitable access to justice**

The group of people eligible for WDOs are differentially impacted by fines due to their reduced circumstances and the regressive nature of fines. This group generally does not have the resources to appeal fines or seek review and are typically unsophisticated. Consequently, the impact of a fine on them is much greater than the impact on another member of society with greater resources who can easily pay a fine, as fines can be a large proportion of their income. Failure to pay the initial fine previously led to a cascade of increasing debt, which people had little or no chance of paying off.

The availability of WDOs means that disadvantaged and eligible people can now pay off fines with the currency available to them, that is time, rather than with money.

*Costs of recovery are difficult to quantify, but the average cost of a court hearing has been estimated at \$1,762; and there are other costs such as action by the Sheriff. On this basis, the 900 WDOs issued through action by ILC are likely to represent a \$1.5 million saving to government, and the 16,000 WDOs issued represents a saving of \$28 million.*

### **Cost efficiency**

Previously SDRO would spend a great deal of effort and resources pursuing fines that would never be collected. This administrative effort is now avoided, as are the court costs associated with community service orders. There are likely to be administrative savings in other areas as well, such as cancellation of licenses and the like. Costs of recovery are difficult to quantify, but the average cost of a court hearing has been estimated at \$1,762; and there are other costs such as action by the Sheriff. On this basis, the 900 WDOs issued through action by ILC are likely to represent a \$1.5 million saving to government, and the 16,000 WDOs issued represents a saving of \$28 million.

There is likely to be increased efficiency to legal centres as well, as the hours required to obtain a WDO are much less than those for the previous hardship review system.

### **Benefit to society**

There is likely to be a benefit to society through the cost savings identified above. Currently, 16,000 WDOs have been approved, \$2.0 million worth of unpaid work has been carried out and \$18.0 million in outstanding debt has been cleared.

There is a considerable benefit to the people involved. Often fines debts are an underlying cause of homelessness with resultant costs, and people are restricted from working or training through loss of car and driver's license; and these costs can be avoided with a WDO. Due to lack of data it is not possible to quantify these benefits.

## **4.2.6 Case Study 6: Centrelink breaches and penalties**

### **Summary**

Income support payments for people of workforce age in Australia have had some sort of job search requirement attached to them since their inception in 1947. There has always been the ability to apply penalties for breaches of requirements, however prior to 1987 the imposition of penalties was discretionary, as were the penalty levels, ranging from two to twelve weeks of postponement of benefits. From 1987 the work test was progressively tightened, and in 1994–95 breaches were separated into activity test (job search requirements) and administrative breaches (failure to attend interviews, notification requirements etc.). In 1997, activity tests were further tightened, and the range of actions that could attract breaching penalties became wider, and were more strictly defined. The number of breaches, where benefits were cut for periods of up to 26 weeks, increased markedly, from 113,100 in 1996–97 to 386,946 in 2000–01, more than tripling in number. In addition, many breaches were overturned on appeal, numbering 172,000 in 1999–2000. The large financial penalties were out of all proportion with the seriousness of the “offence” — a penalty of between \$280 to \$340 was imposed for failing to reply to a letter, and a penalty of between \$630 and \$1,300 applied for failure to attend an interview.

Due to the impact on their client group, the large number of people approaching them for assistance and the high levels of hardship experienced by those who had their payments suspended, this rapidly came to the attention of the National Welfare Rights Network, who, in conjunction with charities, the Australian Council of Social Service and other organisations, commenced a campaign for reform of the penalty system. A number of reports were prepared identifying the scope and impact to welfare recipients of breaching, and underlining the harshness of the system, with the reports attracting considerable media attention.

This campaign culminated in a report by the Commonwealth Ombudsman, a review by the Senate Community Affairs Reference Committee and an Independent Review of Breaches and Penalties in the Social Security System, headed by a former Commonwealth Ombudsman and a key business representative.

Due to administrative responses within the Centrelink system, and the introduction of legislative reforms, by 2002–03 the number of breaches had returned to 1996–97 levels (134,239 breaches) and the harshness of penalties had been ameliorated to some extent. The reforms were of three kinds: there was greater attention to procedural fairness within the Centrelink system; increased levels of support were provided for vulnerable groups such as those with handicaps or low levels of literacy; and some breaches were reclassified from ‘activity test’ to ‘administrative test’ breaches.

### **Equitable access to the legal system**

The rapid reduction in breaches with greater attention to procedural fairness, the comments in the Ombudsman’s report regarding deficiencies in the sample of complaints, the number of breaches overturned on appeal, and the very large number of breaches issued, suggest that many of the people issued with breaches and therefore subject to a financial penalty could have successfully appealed, but did not. Similarly, organisations in the National Welfare Rights Network, such as the Welfare Rights Centre NSW, were overwhelmed by the number of approaches and so resorted to a collective response rather proceeding on a case by case basis. To the degree to which the reforms resulted in greater levels of procedural fairness, the campaign has resulted in increased equitable access to the legal system.

### **Equitable access to justice**

The rapid increase in the number of breaches, followed by an equally rapid fall, suggests that, for a period, many people were not receiving equitable access to justice.

### **Cost efficiency**

The matter of cost efficiency to government in this case is confounded. In the simplest terms, the high level of breaches resulted in a net saving to government estimated at \$170 million in 1999–2000. However cost efficiency should be based on unit cost for service delivery, rather than on reductions in service delivery. Using this approach, higher levels of internal review and other changes are likely to have led to reduced levels of appeals with commensurate cost savings to tribunals, the ombudsman and organisations such as CLCs. For example, in 1998–99, around 2,100 appeals went to tribunals at a typical cost for the hearing of \$1,762, or a total cost of around \$4 million. On a pro-rata basis, the reduced levels of breaches by 2002–03 would represent a cost saving in appeals of \$2–3 million.

For CLCs, the change in policy meant that many more people received access to the legal system and to justice than could be achieved by the CLCs proceeding on a case by case basis.

### **Benefit to society**

Based on the responses of charities to high levels of breaches around 2000, it is likely that the levels of breaching led to a massive cost shift from government to other sectors, such as charities. It is likely that people would be forced into hardship, as the requirements for accessing payment such as Youth Allowance and Newstart required people to have largely consumed their savings. The costs of such hardship are difficult to quantify, but if considered in terms of willingness to pay, the \$170 million estimated saving to government in 1999–2000 could be seen as equivalent to the cost to society over the same period.

*On a pro-rata basis, the reduced levels of breaches by 2002–03 would represent a cost saving in appeals of \$2–3 million. For CLCs, the change in policy meant that many more people received access to the legal system and to justice than could be achieved by the CLCs proceeding on a case by case basis.*

## 4.2.7 Case Study 7: Mortgagee Eviction

### Summary

Prior to amendments to the *Residential Tenancies Act*, tenants had little or no recourse if a landlord defaulted on his/her mortgage. In the event of default, the Supreme Court would give the mortgagee (usually a bank) possession under the *Real Property Act*. Enforcement of the writ of possession could mean immediate eviction of a tenant by the Sheriff, particularly if the mortgagee was not prepared to negotiate a notice period with the tenant. There were opportunities for the Court or the CTTT to order a new tenancy agreement in 'special circumstances' however most tenants did not meet this threshold test and action was uncertain and expensive. While the tenant may have had a compensation claim for breach of contract by the landlord, such claims are expensive to pursue, outcomes are uncertain and timeframes are such as to be of little use to a tenant facing the immediate problem of being on the street.

As a result of growing levels of mortgage defaults between 2004 and 2005, The Tenants Union of NSW and Tenants Advice and Advocacy Services found itself dealing with a growing number of mortgagee in possession cases. As a result of advocacy by the Tenants Union and others, in 2005 the NSW Office of Fair Trading issued a Residential Tenancy Law Reform Options Paper. Following consideration of submissions on this and other matters, including by the Tenants Union, a range of reforms were introduced to the *Residential Tenancies Act*. In 2009 the Act was amended to provide for a 30 day rent free notice period for the tenant in the event of mortgagee possession. Thirty days' notice is to be given by the Sheriff. The intention was to give the tenant sufficient time to find somewhere else to live, with the rent free period recompensing the tenant for relocation expenses.

### Equitable access to the legal system

*As a result of the amendments, tenants no longer need to take court action to prevent immediate eviction and to recover damages.*

Prior to the reforms, tenants had a course of action in the event of mortgagee possession, but that course of action was likely to be expensive and timeframes uncertain. As a result of the amendments, tenants no longer need to take court action to prevent immediate eviction and to recover damages.

### Equitable access to justice

*The reforms resulted in a better balancing of the rights of the tenant and the mortgagee.*

Prior to the reforms, the legal position was that there was no relationship between the tenant and the mortgagee. Rather they both had a relationship with the landlord. The mortgagee had an effective remedy against the landlord through a possession order, but the tenant did not have an effective remedy, even though the immediate effect on the tenant was homelessness, despite complying with their obligations under the applicable residential tenancy agreement. The reforms resulted in a better balancing of the rights of the tenant and the mortgagee.

### Cost efficiency

Prior to the changes, there were likely to be significant costs incurred by tenancy services (including legal centres) trying to assist tenants faced with immediate eviction. As a minimum, CLCs would undertake negotiations with mortgagees; and CLC involvement would increase markedly if a case was taken to the Supreme Court or the CTTT. Due to the reforms, there are administrative cost savings to government because there is less need for 'special circumstances' hearings in the Supreme Court and CTTT (now NCAT). The 30 days' notice means that people are able to sort out their housing without recourse to legal action. The average cost of a court hearing has been estimated at \$1,762, however there is no data available on the number of such matters prior to the changes.

*CLCs assisting tenants now spend significantly less time trying to prevent or stall evictions, leaving them more resources to help more clients.*

CLCs assisting tenants now spend significantly less time trying to prevent or stall evictions, leaving them more resources to help more clients. As well the number of clients presenting to CLCs is expected to fall markedly, as evictions are no longer urgent.

### **Benefit to society**

The main benefit to society is that the tenant (and society) no longer incurs the cost of homelessness. While this might be at the cost of the mortgagee, it seems doubtful that the 30 days' notice period will have any particular impact on the ability of the mortgagee in possession to sell the property.

## **4.2.8 Case Study 8: Retirement Villages**

### **Summary**

In NSW, around one in every twenty households aged over 65 lives in a retirement village. For most of these people, moving to a retirement village is a major financial commitment often involving the sale of their family home. Over the years the retirement village industry has become increasingly regulated to ensure the rights of consumers are protected, resulting in the *Retirement Villages Act 1999*. The Act sought to set out matters such as the rights and obligations of residents and operators and village rules and required contracts to be entered into.

While the Act was a considerable advance in protecting consumer rights, The Aged Care Rights Service (TARS) continued to encounter consumer problems in two areas. The first was the difficulty for consumers in comparing an offer by one village with an offer by another, with different villages offering different terms and facilities and varying levels of documentation. The second was in the area of contracts. Consumer groups were of the view that village contracts, in general, were unnecessarily long, full of legalese, contained ambiguous terms or had important details in the fine print. This meant that contracts were difficult for consumers to read, and, if they sought legal advice, were difficult to understand for lawyers who did not have specific expertise in the area.

During the 2011 election, the Liberal and National parties undertook a commitment to developing a standard contract and disclosure documents for the retirement village sector. Once in government, they set up a committee to develop these documents. The committee contained representatives from TARS, aged persons groups and industry. Because of the legal training of the TARS representative, they were able to provide significant and valuable input into the preparation of the model documents which came into effect on 1 October 2013.

Now when an older person enquires about a village, an operator is obliged to give them a General Inquiry Document, which is two pages and will give them general information about the village. If they express interest in a particular unit, the village operator must give them a Disclosure Statement which provides more detailed and specific information about the village and the unit.

Finally, when they do enter into a contract, the standard form sets out their rights and obligations clearly and transparently, set out in plain English. Rights under legislation, such as the right to sub-let, their right to set the sale price if they sell, and the right to peaceful enjoyment of their property are also identified in the contract, so that residents have a greater awareness of their rights, and timing for payments and refundable payments (including events which 'trigger' payments) are clearly set out. Entry costs, recurrent costs and exit fees are also clearly and transparently set out.

### **Equitable access to the legal system**

The policy and law reform activity did not result in increased access to the legal system.

### **Equitable access to justice**

The policy and law reform activity did not result in increased equitable access to justice.

### **Cost efficiency**

This policy and law reform is likely to result in improved cost efficiency for CLCs and for government through reductions in disputes relating to contracts, and, where disputes do occur, through streamlining of dispute resolution due to standard forms of contract.

### **Benefit to society**

There are likely to be benefits to society in three areas. Firstly use of standard contracts will lead to reductions in administrative costs when entering into retirement village contracts. Secondly reductions in disputes and/or streamlined resolution of disputes will be of benefit to society. Thirdly there is a considerable benefit when consumers receive what they pay for, or alternatively pay the correct price for what they are getting.

*This policy and law reform is likely to result in improved cost efficiency for CLCs and for government through reductions in disputes relating to contracts, and, where disputes do occur, through streamlining of dispute resolution due to standard forms of contract.*

## **4.2.9 Case Study 9: Blindness Discrimination**

### **Summary**

Mr Graeme Innes, the former Australian Disability Discrimination Commissioner, is a blind person and a regular user of Sydney suburban train services. Because of his disability, he was reliant on audible ‘next stop’ announcements in order to know he was getting off at the right station, but often those announcements were unclear or inaudible.

In 2010 he had a meeting with RailCorp to discuss what he believed to be the organisation’s responsibility under the Commonwealth Government’s Disability Standards to provide clear, audible announcements. Six months after this meeting, Mr Innes began to document his journeys and found that over a six month period clear, audible announcements were not made in respect of all the stops upon his journeys 18–20 percent of the time. He also had a meeting with the Minister for Transport for New South Wales, where he reiterated his complaints.

Mr Innes made 36 complaints to the AHRC, and when these failed to be resolved by conciliation, brought proceedings pursuant to the Australian Human Rights Commission Act 1986 (Cth) to the federal magistrates court alleging breaches of disability standards. He was supported in these proceedings by the Public Interest Advocacy Centre (PIAC), who provided legal advice and representation.

The court awarded damages of \$10,000 to Mr Innes. Following an undertaking from Sydney Trains (a new body with some of the previous functions of RailCorp) to take specific steps to continue monitoring and improving on-train announcements, including dedicated training and disability awareness programs for staff, Mr Innes withdrew further complaints.

*Without the CLC sector, it is unlikely that any one blind person, although affected by the poor quality of announcements, would have had the resources to pursue the matter in the courts.*

### **Equitable access to the legal system**

The policy and law reform activity did not result in increased access to the legal system.

### **Equitable access to justice**

This was an important outcome of the policy and law reform activity, as without the CLC sector, it is unlikely that any one blind person, although affected by the poor quality of announcements, would have had the resources to pursue the matter in the courts.

### **Cost efficiency**

This policy and law reform activity most likely did not result in changes to cost efficiency for government.

### **Benefit to society**

Although difficult to quantify, the undertaking by Sydney Trains to improve the quality of their announcements will mean that blind users of trains are able to use the train system with improved confidence that they will get off at the correct stop.

## **4.2.10 Case Study 10: External Dispute Resolution in Credit Disputes**

### **Summary**

Prior to 1973, the Australian Banking Industry was heavily regulated. This provided a degree of consumer protection by limiting the risks that banks could take but at the expense of reduced competition and increased costs to consumers. By the early 1980s, the market share of banks had fallen to 40% compared to 70% in the early 1950s.

The Uniform Consumer Credit Code commenced operation in 1996, and provided some protection to consumers. However its application was limited in a number of ways. Notably, these included exclusions for lending for business or investment purposes (with this provision often used by lenders to evade the code). Amendment of the Code also required the agreement of all states and territories.

Consumers had limited opportunity to seek redress under the Code and had limited access to external dispute resolution, with the vast majority of consumer credit matters dealt with by the courts. This appeared to exclude many consumers from the legal system, with one Victorian report finding that 98% of 30,814 consumer civil debt matters lodged in 2005–06 ended in default judgement against the debtor.

In August 2002, ASIC, following a recommendation by its Consumer Advisory Panel, commissioned the Financial Rights Legal Centre (formerly the Consumer Credit Legal Centre (NSW)) to produce a report examining the mortgage and finance broker industry. This decision was a response to ASIC taking over Commonwealth level responsibility for consumer protection in the credit marketplace, and the growing importance of mortgage brokers in that market. It was also a response to concerns expressed by community advocates and caseworkers who were experiencing a growing incidence of complaints involving brokers. These experiences led to these groups identifying the industry as lightly and unevenly unregulated, and as containing some high-risk players and unfair practices.

The report raised two areas of concern. These were the regulation of brokers in Australia; and the effectiveness of consumer redress. With respect to redress, dominant issues were lack of access to alternative dispute resolution; and the inclusion of three parties, the consumer, the lender and the broker, where the consumer has to take action against the broker for money owed to the lender.

In 2006, a Productivity Commission Review of Australia's Consumer Policy Framework was undertaken, with the final report released in 2008. Amongst other proposals, the review raised Alternative Dispute Resolution.

Concurrently, the House of Representatives Standing Committee on Economics, Finance and Public Administration conducted an inquiry into Inquiry into home loan lending practices and the processes used to deal with people in financial difficulty. Similarly the Committee considered External Dispute Resolution.

In 2008, Federal Treasury released a Green Paper on Financial Services and Credit Reform noting, among other things, concerns regarding the mortgage brokering industry and other concerns regarding the availability of external dispute resolution.

These various policy reviews culminated in the National Consumer Credit Protection Act 2009 (Cwth). The Act required holders of an Australian Credit License to be a member of an approved external dispute resolution scheme. Financial Rights Legal Centre was involved at each stage of the process, making submissions to the relevant inquiries, and being involved in extensive government consultation about the new Bill.

*The introduction of a requirement for external dispute resolution appears to have resulted in a marked increase in equitable access to the legal system as evidenced by the increase in the number of consumers accessing external dispute resolution.*

The impact of the requirement was immediate, with the number of credit representative members of the Financial Ombudsman Service increasing from zero in 2008–09 to over 11,000 in 2011–12. Similarly members of the Credit Ombudsman Service doubled, from 8,645 in 2008–09 to 17,091 in 2012–13.

This has been accompanied by a dramatic increase in consumers accessing the services, increasing from around 10,000 complaints across the two services in 2008–09 to over 20,000 complaints in 2012–13.

### **Equitable access to the legal system**

The introduction of a requirement for external dispute resolution appears to have resulted in a marked increase in equitable access to the legal system as evidenced by the increase in the number of consumers accessing external dispute resolution. By contrast, the high level of default judgements reported in Victoria suggests that many consumers did not contest matters, possibly because of financial constraints.

*The ability of consumers to obtain redress through a relatively simplified system is likely to have a significant benefit to society. The basis of consumer law is to ensure that people get what they pay for and that asymmetries in information are addressed. The availability of external dispute resolution will further this aim.*

### **Equitable access to justice**

This policy and law reform activity was unlikely to result in increased access to justice in so far as it related to External Dispute Resolution. However, there was an increase in access to justice in relation to the other substantive provisions of the new credit law, such as the responsible lending obligations placed on both lenders and finance/mortgage brokers.

### **Cost efficiency**

This policy and law reform is likely to result in improved cost efficiency for CLCs and for government through reductions in matters going to court.

### **Benefit to society**

The ability of consumers to obtain redress through a relatively simplified system is likely to have a significant benefit to society. The basis of consumer law is to ensure that people get what they pay for and that asymmetries in information are addressed. The availability of external dispute resolution will further this aim.



# 5

## Conclusion

It is likely that policy and law reform activities undertaken by Community Legal Centres provide good value to society, are generally of high merit, and meet the social and economic objectives of government and the sector when assessed against key outcome measures.

Policy and law reform activities appear to be targeted widely, and are grounded in case work, and so respond to an identified need in the community. While many of the activities are targeted towards more disadvantaged groups within the community, this is largely because these people form a large part of the client base of community legal centres. Other activities however, such as the Mortgage Fee Exit Ban and Retirement Village consumer reforms, in fact provide benefits to a very wide cross section of the Australian community.

Where policy and law reform initiatives are acted upon by government, for example, as reflected in legislative or procedural changes, this is not undertaken lightly. Review of material in the critical evaluation of case studies indicates that a typical response by government will involve reports commissioned from a number of bodies, the holding of inquiries, and the review of extensive expert opinion and evidence. Given the rigour of this process, a policy and law reform proposal of limited merit or favouring one part of the community at the expense of another would face considerable obstacles during the government law reform process.

As well as the demonstrated social and economic benefit to disadvantaged people and the whole of society, and the increase in efficiency of service delivery and access to justice through addressing systemic issues affecting large numbers of people, the take up by government of policy and law reform initiatives in the case studies reported here indicates that such activities strongly support the objectives of government, and are thus matters in the public interest.

This study clearly indicates that there is an important role for the sector in continuing its work in policy and law reform, integrated with front line services, to maximise the efficient use of resources, further the objectives of government, and support access to justice for all people, particularly those most disadvantaged in Australian society.

- ASIC (2011) *Regulatory Guide 220 Early termination fees for residential loans: Unconscionable fees and unfair contract terms.*
- Attorney-General's Department (2009) *A Strategic Framework for Access to Justice in the Federal Civil Justice System.*
- Australian Government Productivity Commission (2008) *Review of Australia's Consumer Policy Framework.*
- Australian Government (The Treasury) (2008) *Financial Services and Credit Reform (Green Paper).*
- Bailey, B., Brown, L., Dodd, P., Mawuli, V. and Schetzer, L. (2011) *Review of the Bail Law in NSW: Submission to the New South Wales Law Reform Commission*, Public Interest Advocacy Centre.
- Consumer Credit Legal Centre (2011) *Submission to Mortgage Exit Fees Ban.*
- Consumer Credit Legal Centre (NSW) Inc. (2003) *A Report to ASIC on the Finance and Mortgage Broker Industry.*
- Credit Ombudsman Service Annual Reports on Operations.
- Curran, L. (2007) *Making the Legal System More Responsive to Community: A Report on the Impact of Victorian Community Legal Centre Law Reform Initiatives.*
- Curran, L. (2012) *A Literature Review: examining the literature on how to measure the 'successful outcomes': quality, effectiveness and efficiency of Legal Assistance Services*, Curran Consulting: Enhancing Justice and Human Rights.
- Eardley, T., Brown, J., Rawsthorne, M., Norris, K. and Emrys, L. (2005) *The Impact of Breaching on Income Support Customers*, Social Policy Research Centre.
- Federal Ombudsman Report (2002) *Social Security Breach Penalties - Issues of Administration.*
- Financial Ombudsman Annual Reviews.
- Friedman L, (2002), *The Microeconomics of Public Policy Analysis*, Princeton, Princeton University Press.
- House of Representatives Standing Committee on Economics, Finance and Public Administration (2007) *Home Loan Lending*, The Parliament of Australia.
- Innes v Rail Corporation of NSW (No 2) [2013] FMCA 36 (1 February 2013).
- Judith Stubbs and Associates (2012) *Economic Cost Benefit Analysis of Community Legal Centres*, NACLC.
- Kirby, J. (undated) *A Study into Best Practice Community Legal Education*, Victorian Law Foundation.
- Legal and Constitutional Affairs References Committee (2013) *Impact of federal court fee increases since 2010 on access to justice in Australia.*

- National Consumer Credit Protection Act 2009 (Commonwealth).
- National Welfare Rights Network and ACOSS (2000) *Doling out punishment the rise and rise of social security penalties*, ACOSS INFO 220.
- Niven, D. and Gough, T. (2004) *The Operation of the Uniform Consumer Credit Code*, Consumer Credit Legal Service Inc.
- NSW Law Reform Commission (2012) *Bail*.
- NSW Office of Fair Trading (2007) *Residential Tenancy Law Reform A New Direction*.
- Posner, R. (2007) *Economic Analysis of Law*.
- Pratten, J. (2013) *Banking Fees in Australia*, Reserve Bank of Australia
- Public Interest Advocacy Centre (2006) *Not such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW*.
- Rice, S. (2012) *Are CLCs Finished?* Alternative Law Journal Vol 37:1
- Rich, N. (2009) *Reclaiming CLCS: Maximising our potential so we can help our clients realize theirs*, Consumer Action Law Centre and Victoria Law Foundation.
- Schetzer, L. (2008) *Courting Debt: The Legal Needs of People Facing Civil Consumer Debt Problems*, Department of Justice, Victoria.
- Tenants Union (2011) *Reforming Marginal Renting: Policy Paper*.
- Victoria Legal Aid (2013) *Submission to the Productivity Commission*.
- Weisbrot, D. (1989) *Australian Lawyers*, Addison-Wesley Educational Publishers Inc.
- Wong, K., Bailey, B. and Kenny, D. (2010) *Bail Me Out*, Youth Justice Coalition.