

**Access to Justice Research in  
Australia**  
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**INTRODUCTION**

A consistent theme at International Legal Aid Group meetings are the reports of research addressed at measuring or assessing aspects of access to justice.<sup>1</sup> It was noted in 2001 that this renewed interest in research into 'unmet needs for legal aid' was generated by the new public management.<sup>2</sup> Despite the Australia legal aid system being subject to similar fiscal restraint and shift in public management there has not been the same level of national commitment to

research into access to justice and needs for legal aid.

A constant refrain in the recent Australian government reviews relating to access to justice and legal aid has been the lament over the lack and deficiencies in the available data.<sup>3</sup> In June 1998, the Australian Senate (Upper House) Legal and Constitutional References Committee noted that there was inadequate data on the 'unmet need' for legal aid.<sup>4</sup> The same committee reported in 2004 there had been no progress and restated the urgent need for reliable data on which to base government decisions.<sup>5</sup>

Although significant Australian work was done on defining and studying the problems of access to justice in the 1970's and early 1980s, since then, there has been limited interest or

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<sup>1</sup> See Johnsen, J. 'Studies of Legal Needs and Legal Aid in a Market Context' in Regan F., Paterson A., Goriely T. & Fleming D.(eds) *The Transformation of Legal Aid* 1999 Oxford Uni Pres; Opie A. & Smith D., 'Needs Assessment: Knowing Disadvantaged Communities'; Orchard S., 'Needs Assessment and Prioritisation of Legal Services in England and Wales' in Reilly J, Paterson A. & Pue, W, *Legal Aid in the New Millennium* Papers Presented at the International Legal Aid Conference, University of British Columbia 1999; Currie A., 'The Emergence of Unmet Needs as an Issue in Canadian Legal Policy Research'; Pleasence P & Buck A, 'Needs Assessment and Prioritisation of Legal Services in England and Wales in *International Legal Aid Group Papers Vol 1 &2* Australia 2001; Pleasence P, 'Needs Assessment and Community Legal Services in England and Wales'; Currie A, 'The Nature and Extent of Unmet Need for Criminal Legal Aid in Canada' in *International Legal Aid Group Papers* Massachusetts USA 2003

<sup>2</sup> Currie, A. (2001) 'The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research' in *International Legal Aid Group Papers* Vol 11 p 32 at 71

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<sup>3</sup> Inquiry into the Legal Aid System, Third Report, June 1998 pages xvi, 20-21,132, 171 and Government Senator's Response to the Report pages 15, 17 and 19 ; *Review of Legal Services in Rural and Regional Victoria*, Victorian Parliamentary Law Reform Committee, May 2001, 14; Australian Law Reform Commission, *Managing Justice- A review of the federal civil justice system* Report No 89 (2000) AGPS Canberra recommendations 39 & 40

<sup>4</sup> Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System – Third Report* , (June 1998) p 17

<sup>5</sup> Senate Legal and Constitutional References Committee, *Legal aid and access to justice* June 2004 Senate Printing Unit p 40

progress in researching unmet legal need and access to justice issues on a national basis in Australia.<sup>6</sup> This is primarily due to the lack of funding sources for such research.

Nonetheless in the last five years a range of isolated research projects, both large and small, have been conducted into various aspects of Australian legal aid services provision, access to justice and assessment of needs.<sup>7</sup> This paper surveys recent projects that have a focus on assessing need or gaps in service provision during the period 2000 to 2005. A brief outline of a small innovative project currently being conducted by the authors is discussed. The paper concludes that there is a need for a process that can facilitate the dissemination of the information and results of these isolated projects and encourages nationwide coordination and consistency in the research.

### **Australian legal aid system**

Australia has a federal system of government and funding for legal aid is provided by both the Federal and State governments.<sup>8</sup> The legal aid system is a

'mixed model'. Salaried lawyers are employed by state based Legal Aid Commissions and community legal centres and the private profession provides services through 'judicare' arrangements. Federal funds are targeted predominantly towards family law matters whilst the States have responsibility for criminal law.

Legal Aid Commissions are statutory bodies, each constituted by a board of commissioners prescribed by State legislation, where the bulk of funds are expended on family and criminal law matters. Complementing this service are the community legal centres, small independent non-statutory bodies, which provide advice and assistance in primarily civil law areas, including family law as well as involvement in community legal education and law reform activities. A network of Aboriginal Legal Services also exists throughout Australia. Aboriginal Legal Services provide individual legal services to the indigenous population as well as pursuing test cases and land rights issues.<sup>9</sup> In addition to government-funded legal aid, there are a growing number of pro bono schemes and contingency legal assistance schemes.<sup>10</sup>

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<sup>6</sup> A selection of work includes Sackville, R, *Law and Poverty in Australia: Second Main Report of the Australian Government commission of Inquiry into Poverty* AGPS (1975); Cass, M. & Sackville, R. *Legal Needs of the Poor*, Research Report, Law and Poverty Series AGPS Canberra (1975); Cass, M. & Western J., *Legal Aid and Legal Need* Commonwealth Legal Aid Commission, (1980); Hanks, P. *Social Indicators and the Delivery of Legal Services* AGPS (1986). A recent exception is the Rush Social Research Agency and John Walker Consulting Services, *Legal Assistance Needs Project: Phase One and Two* 1999

<sup>7</sup> Professor Rosemary Hunter outlined some of this research, both completed and ongoing, at the Legal Aid Congress see Hunter, R.,(2004) *Legal aid research in Australia and future needs* at <http://www.legalaid.qld.gov.au/congress2004/content/papers/Thu18-Plenary2-RosemaryHunter.ppt>

<sup>8</sup> The states are Victoria, New South Wales, Queensland, South Australia,

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Western Australia, Tasmania and there are two territories, the Northern Territory and Australian Capital Territory.

<sup>9</sup> For a discussion of the history of Aboriginal Legal Services see Chapman, M, "Aboriginal Legal Service - A Black Perspective" in Neal, D., (Ed) *On Tap, not on Top - Legal Centres in Australia 1972-1982* (1984) at 35 and Lyons, G., "Aboriginal Legal Services" in Hanks, P. & Keon-Cohen, B.(eds), *Aborigines and the Law* (1984)

<sup>10</sup> Regan, F., 'Legal Aid without the State: Assessing the rise of Pro Bono Schemes' in Reilly, J., Paterson. A., & Pue W., *Legal Aid in the New Millennium: Papers presented at the International Legal Aid Conference* June 1999; See National Pro Bono Resource Centre at <http://www.nationalprobono.org.au>; Arup, C. & Laster K.(eds) '*For the Public Good: Pro Bono and the Legal Profession in Australia* (2001) Federation Press

There is no longer any funded national body to oversee and facilitate advice, policy development and research into legal aid service delivery. The Australian Legal Assistance Board was dissolved in December 1996. Since then, there has been no formal body that advises the Federal Attorney-General on legal aid matters.<sup>11</sup>

In response to this policy vacuum, at a forum in 1999, sponsored by the Law Council of Australia, the Australian Legal Assistance Forum was formed. This is a body with representatives of the Law Council, directors of Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services and National Association of Community Legal Centres. The aim of the Forum is to promote cooperation and communication between legal aid service providers, to enhance service delivery and response to client needs, and to develop and promote policies regarding access to justice issues.<sup>12</sup> The Australian Legal Assistance Forum and Legal Aid Queensland organised a Legal Aid Congress in November 2004. There is no formalised mechanism through which government takes advice from the Australian Legal Assistance Forum.

### **ACCESS TO JUSTICE RESEARCH**

As indicated above, there is no research occurring on a national basis that seeks to measure particular areas of need for legal aid services or identify gaps in service delivery. The following are discreet projects that are attempting to measure or identify the legal needs of particular communities or groups of people.

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<sup>11</sup> This body replaced the National Legal Aid Advisory body in 1995. It had no direct input from the legal aid commissions, private profession or community legal centres representatives. See Fleming, D. (2000) 'Australian legal aid under the First Howard Government' 33 *University of British Columbia Law Review* 343.

<sup>12</sup> Australian Legal Assistance Forum, *Media Release* 22 April 1999.

### **Access to Justice and Legal Needs Program**

The most significant research in this area is currently the *Access to Justice and Legal Needs Program* of the Law and Justice Foundation, New South Wales. This extensive program of research has already generated a set of useful publications.<sup>13</sup> A central aspect of the research is the largest quantitative legal needs survey conducted in Australia in over 30 years. The quantitative survey methodology is based on the UK *Paths to Justice* work.<sup>14</sup>

The program objectives are to examine the ability of disadvantaged people to:

- obtain legal assistance (including information, basic legal advice, initial legal assistance and legal representation)
- participate effectively in the legal system (including access to courts, tribunals, and formal alternative dispute resolution mechanisms)
- obtain assistance from non-legal advocacy and support (including non-legal early intervention and preventative mechanisms, non-legal forms of redress and community based justice)
- participate effectively in law reform processes.<sup>15</sup>

The program's first stage is complete. It included a literature review and analysis

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<sup>13</sup> Law and Justice Foundation of New South Wales, (2004) *The Legal Needs of Older People in NSW Access to Justice and Legal Needs Volume 1* Sydney ; Law and Justice Foundation of New South Wales, (2003) *Access to Justice and Legal Needs; Stage 2: Quantitative Legal Needs Survey Bega Valley (Pilot)* Sydney; Law and Justice Foundation of New South Wales, (2003) *Access to Justice and Legal Needs; Stage 1: Date Digest* Sydney;

<sup>14</sup> Schetzer, L. (2003) *Measuring Legal Needs* Paper given at National Community Legal Centre Conference Sept 2003 p 1 at [http://www.naalc.org.au/docs/Assessing\\_Legal\\_Needs.pdf](http://www.naalc.org.au/docs/Assessing_Legal_Needs.pdf) p 1

<sup>15</sup> Extracted from Law and Justice Foundation New South Wales website: [www.lawfoundation.net.au/access/](http://www.lawfoundation.net.au/access/) 21 April 2005

of previous studies; receipt of submissions from individuals, community organisations, non-government organisations and government bodies; wide consultation with relevant government, professional, community and other groups and individuals; collection and analysis of data from the inquiries handled by major NSW legal assistance and complaint handling bodies, to gauge expressed need; and a pilot survey of legal need in the Bega local government area.<sup>16</sup>

The *Public Consultations* report records the submissions and contributions made to the Foundation, collated according to the four program objectives. They are unanalysed. It details the contributions and submissions of more than 100 individuals and organisations. Issues such as the high cost of legal services and the availability of legal aid, the intimidating formalities of court procedures and the risk of 'costs' orders, were among those mentioned as key barriers for the community generally. In addition, contributors identified barriers particular to different disadvantaged groups.<sup>17</sup>

The *Data Digest* study recognised that potentially valuable data about community legal needs is collected daily by numerous service delivery organisations including both government and non-government. Previously this data has not been aggregated in a way to allow for comparison across services. The *Data Digest* provides a snapshot of expressed legal need in the community. The Digest analyses data collected by

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<sup>16</sup> Law and Justice Foundation of New South Wales, (2003) *Access to Justice Roundtable, Proceedings of a Workshop July 2000* Sydney; Law and Justice Foundation of New South Wales, (2003) *Access to Justice and Legal Needs; Stage 1: Data Digest* Sydney; Law and Justice Foundation of New South Wales, (2003) *Access to Justice and Legal Needs; Stage 2: Quantitative Legal Needs Survey Bega Valley (Pilot)* Sydney.

<sup>17</sup> Schetzer L 7 Henderson J. (2003) *Access to Justice and Legal Needs; Stage 1: Public Consultations* Law and Justice Foundation of New South Wales Sydney

the main publicly funded legal service providers in NSW relating to the nature of legal inquiries received, the demographic characteristics of inquirers and the pathways they took to resolve their issues. The data covers the period 1999 to 2002 and was supplied by the Chamber Magistrate Service, LawAccess NSW, Legal Aid NSW Information/Advice Service, Legal Aid NSW Duty Solicitor Service, Legal Information Access Centre, State Library of NSW, NSW Community Legal Centres (generalist and specialist) and Women's Information and Referral Service. The Digest also includes a brief overview of published demographic data on the users of non-court dispute resolution agencies in NSW.<sup>18</sup>

The purpose of the *Bega Valley Quantitative Legal Needs Survey* was to pilot the methodology for the larger survey. It was conducted in the Bega Valley local government area in South East New South Wales in July & August 2002. This area was chosen because it exhibits disadvantage (according to Australian Bureau of Statistics data) and there is a limited range of legal services in the region. A total of 306 people (1.5 per cent of the population), participated in the telephone survey which covered: legal issues faced in the previous 12 months; how these were handled; how services were accessed; the barriers to obtaining assistance; perceptions of outcome; the demographic characteristics of participants — gender, age, income, education, Indigenous status, whether born in a predominantly English-speaking country, chronic disability. Respondents were asked if they had experienced a problem or event of a particular kind. There were also 24 face to face interviews conducted. Both the *Data Digest* and the *Bega Valley Pilot* confirmed that housing issues rank prominently among legal problems. Credit/debt issues also featured prominently (top three) among civil law issues experienced by the

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<sup>18</sup> Law and Justice Foundation of New South Wales, (2003) *Access to Justice and Legal Needs; Stage 1: Data Digest* Sydney;

people of Bega and inquirers to LawAccess NSW, NSW generalist community legal centres and the Legal Aid NSW Information/Advice Service. This was also the issue in the *Bega Valley Pilot* least likely to be resolved. Forty three per cent of respondents experienced two or more legal events in last 12 months. Participants sought assistance in 52 per cent of events. In 25 percent of all events participants sought no help at all. In the remainder they dealt with it themselves.<sup>19</sup>

Stage Two of the *Access to Justice and Legal Needs Program* comprises:

- legal needs surveys in six local government areas selected on the basis of the Australian Bureau of Statistics indices for disadvantage
- a series of in-depth studies of the particular needs of specific disadvantaged groups (older people, people experiencing homelessness and people with mental illness) that were identified for further research during Stage One
- a project to examine the accessibility of the formal law reform processes for disadvantaged people.

During September 2003, more than 2,400 people were surveyed by telephone in six NSW local government areas, three in metropolitan Sydney, one in a regional town and the remaining two in rural/remote NSW. The data from this survey is still being analysed and is expected to be released in late 2005.

The most recent report from the program looks at the *Legal Needs of Older People in NSW*. This research is based on an extensive literature review, interviews with a range of individuals and organisations with an interest in elder law, nine focus-groups involving 78 participants including older men and

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<sup>19</sup> Law and Justice Foundation of New South Wales, (2003) *Access to Justice and Legal Needs; Stage 2: Quantitative Legal Needs Survey Bega Valley (Pilot)* Sydney.; Schetzer, L. (2003) *Measuring Legal Needs* Paper given at National Community Legal Centre Conference Sept 2003 at [http://www.nalc.org.au/docs/Assessing\\_Legal\\_Needs.pdf](http://www.nalc.org.au/docs/Assessing_Legal_Needs.pdf)

women and carers and 135 individual submissions from older people. The report details that the particular obstacles for older people in accessing legal services reflects the characteristics of the current cohort of older people including “ a lack of awareness of their legal rights, a lack of confidence in enforcing those rights, a reluctance to take legal action and perception that the law is disempowering and cannot solve their problems”. The range of relevant issues discussed includes accommodation related legal issues, health related legal issues, financial and consumer related legal issues, discrimination, elder abuse, substitute decision-making and the end of life issues and grand parenting. A commonly recurring theme was that older people are often reluctant to complain about issues affecting them and the report concludes that “there is a danger that the legal needs of older people may be largely hidden from legal and non-legal service providers, courts, tribunals, and complaint handling bodies.”<sup>20</sup>

The Foundation has indicated that in addition to publishing individual reports it intends to allow the findings to be accessed cumulatively via an online search facility to enable searchers to rapidly locate all material from the program reports relevant to their area of interest. This is scheduled to occur in 2005.

### **Demons, Damsels or Discard- Exploring the Legal Needs of Young Women**

In Western Australia, the Youth Legal Service undertook a research project that focussed on young women. The Youth Legal Service provides legal services to young people (less than 25 years of age), distributes information relating to a broad range of issues affecting young people particularly legal

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<sup>20</sup> Ellison, S., Schetzer L., Mullins J., Perry J. & Wong K. (2004) *Access to Justice and Legal Needs Volume 1: The Legal Needs of Older People in NSW* Law and Justice Foundation of New South Wales,

issues and is an active participant in policy discussions around services to young people.

This research project arose from a commitment by the Service to actively promote the status of young women. The concept was to facilitate young women's participation in defining their emerging legal needs.<sup>21</sup> The project sought to explore several factors identified by the Youth Legal Service that may influence the legal needs of young women. The factors included the societal representations of young women, myths about young women such as the liberation of women being responsible for women's visibility in criminality and the existence of a set of factors that contribute to young women being at risk of involvement in criminal activity. The research consisted of five discussion groups with young women and one with service providers held in mid 2001.<sup>22</sup> The numbers of participants in the discussion groups are not provided.

The report begins with a summary of criticisms of mainstream criminological writings. These include the lack of focus on women and crime and the assumptions that have been made about gender to explain differences in the criminal behaviour of men and women. It then details recent statistics which indicate that there was a downward trend in the percentage of young women clients at Youth Legal Service but an increase in the severity of the offences facing young women and an increase in requests for assistance in civil matters. One hundred per cent of young women clients charged with criminal offences in the final six months of 2000 had no income. Overall 40 % of young women clients generally indicated no income. This section also lists a range of other data relating to the place of young people within the criminal justice system

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<sup>21</sup> Vernon, C. (2002) Demons, Damsels or Discard- Exploring the Legal Needs of Young Women Youth Legal Service Inc, Perth Western Australia p 1

<sup>22</sup> Vernon (2002) p 3

including the high incidence of young people as victims of crimes.<sup>23</sup>

The report details the experiences of the young women and places those experiences within a range of sociological and criminological literature. The findings from the discussion groups are grouped under the themes: the conflict of being a woman; getting caught, and getting help or advice; the contradictions of being a young mother; its too hard and too scary!; and I can look after myself. In the section 'Getting caught and getting help or advice' the conclusions from the discussions mirror the findings of international empirical research that young women do not know where to turn to for assistance with legal and social concerns and have little understanding of their legal rights and responsibilities. Additionally, the young women rarely felt listened to when interacting with legal and welfare organizations and many services were inaccessible. The report concludes that for young women getting important needs met, such as legal advice, income support and accommodation can be incredibly difficult.<sup>24</sup> The suggestions for future action in the report are wide ranging and aspirational and do not address specific proposals.

### **Analysis of the Legal Needs of Horn of Africa people in Melbourne**

This project focussed on identifying good practice in the provision of culturally appropriate legal services by community legal centres in Melbourne, Victoria. It was conducted as part of a pro bono arrangement. The Horn of Africa, a prominent emerging community was chosen as the case study. The project was focussed on the services provided by Victorian Community Legal Centres and did not canvass the approach taken by Victoria Legal Aid Victoria to this client group. This was action research with a community development approach. Interviews were conducted with relevant workers from community legal centres and other

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<sup>23</sup> Vernon (2002) p 9-10

<sup>24</sup> Vernon(2002) p 16

welfare agencies and individuals with experience in assisting Horn of Africans. The leaders of the Horn of African communities were also interviewed and community legal education sessions were conducted on Somalian radio.<sup>25</sup>

Barriers in accessing legal services, unique to Horn of Africans included a concern about a lack of confidentiality arising from the interpreters or community workers from the client's ethnic community; lack of trust in the domestic legal system; and a perception that service providers are disconnected from the needs of the communities.<sup>26</sup>

The report concluded that improvement in the accessibility of community legal centres to Horn of Africa clients requires a combination of cultural awareness training, exposure to the target networks of professionals and community leaders and a willingness to trial outreach and co-location programs.<sup>27</sup>

#### **Northern Outreach – A Client Needs Survey of Aboriginal and Torres Strait Islander Communities in Cape York Peninsula and the Gulf of Carpentaria**

This research by Legal Aid Queensland details a legal needs survey of Indigenous communities in remote Cape York and Gulf of Carpentaria communities. 18 community consultation meetings were held, "mostly in remote regions where road access is cut off for approximately five months of year due to the wet season". The meetings focussed primarily on the needs of Indigenous women as the project was an initiative of the Integrated Indigenous Strategy Unit at Legal Aid Queensland which aims to increase access to

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<sup>25</sup> Aplin, S. (2002) *Analysis of the Legal Needs of Horn of Africa People in Melbourne* Pro Bono Fellowship Report p 17-19

<sup>26</sup> Aplin, S. (2002) *Analysis of the Legal Needs of Horn of Africa People in Melbourne* Pro Bono Fellowship Report p 22-26

<sup>27</sup> Aplin, S. (2002) *Analysis of the Legal Needs of Horn of Africa People in Melbourne* Pro Bono Fellowship Report p 46

specialist legal services by Indigenous women and their families.<sup>28</sup>

Although the project was prompted by the engagement of several new lawyers to provide legal services to victims of crime in these remote areas, the research identified a wide range of problems for which people could benefit from legal advice. The consultations revealed that many community members did not identify that many of the problems they faced had a legal dimension including tenancy, consumer and employment issues.<sup>29</sup>

The report also identifies issues in service provision including the need to recognise the complex social and cultural structures that dominate the remote communities and to provide services in a manner consistent with community values. The need for family law Services and community legal education was noted as well as the desirability of mediation services in matters of community and family conflicts to prevent disputes from escalating to violence.<sup>30</sup>

#### **Law for All: An analysis of legal needs in Inner Sydney today**

This study was conducted in 2000 by four inner city community legal centres in New South Wales. It was prompted by the perceived imminent review of community legal centres in that state (the review did not begin until 2004) and a concern that centres might be forced to close or amalgamate as had occurred in another state.<sup>31</sup> Nonetheless the

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<sup>28</sup> Legal Aid Queensland (2001) *Northern Outreach – A Client Needs Survey of Aboriginal and Torres Strait Islander Communities in Cape York Peninsula and the Gulf of Carpentaria* p 7

<sup>29</sup> Legal Aid Queensland (2001) *Northern Outreach – A Client Needs Survey of Aboriginal and Torres Strait Islander Communities in Cape York Peninsula and the Gulf of Carpentaria* p 7

<sup>30</sup> Legal Aid Queensland(2001) p 7 and 54

<sup>31</sup> For a discussion of the reviews see Giddings, J. & Noone M.A. (2004) 'Australian community legal centres move into the twenty-first century' (11) 3

report does provide significant detail about legal needs in this area. The project included an analysis of a range of demographic data, semi-structured interviews were conducted with specialist community legal centres in the area, community agencies and individuals in related areas.<sup>32</sup>

The report detailed levels of expressed and felt need and a range of gaps in the provision of legal services. But most interestingly, the report identified that there are “hidden communities” that have demand for legal services in the areas of immigration, family law, employment, social security, debt and credit. The “hidden” client communities featured in the interviews were Aboriginal and Torres Strait Islander communities, younger people with disabilities, newly arrived immigrants and refugees, people from non-English speaking backgrounds with mental health disabilities, women with mental health disabilities, homeless people, people with intellectual disabilities, transgender people, sex workers, people with mental health disabilities, people with brain injuries and sweat shop workers.<sup>33</sup>

## **RELATED STUDIES**

The projects described in this section are not specifically focussed on legal needs but nonetheless their outcomes can inform and illuminate the gaps in access to justice.

### **Erosion of Legal Representation in the Australian Justice System**

The issue of increasing numbers of unrepresented litigants has been of concern for much of the last decade. In 2002 the Law Council of Australia (peak national legal professional organisation) undertook research in conjunction with

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International Journal of the Legal Profession 257 at 261-263

<sup>32</sup> Inner City Legal Centre et al, (2000) Law for All: An analysis of legal needs in Inner Sydney today p3-4

<sup>33</sup> Inner City Legal Centre et al, (2000) Law for All: An analysis of legal needs in Inner Sydney today p58-59

the Australian Institute of Judicial Administration, National Legal Aid and the Aboriginal and Torres Strait Islander Services to examine whether there had been erosion in the level of legal representation since 1994 and if so, the consequences of that erosion. The paucity of relevant data meant that a ‘defensible statistical analysis’ was not possible instead this research relies on surveys and interviews with experienced legal practitioners, providers of publicly funded legal services and the courts.<sup>34</sup>

The limited data available together with the qualitative material did indicate that there had been a growth in the numbers of self-represented litigants in the last decade.<sup>35</sup> The report proceeds to explore possible causes for this increase and the impact of self-represented litigants on the justice system. Unsurprisingly the research found that one of the reasons for the rise in self represented litigants is the lack of available publicly funded representation. It notes that the legal aid fees payable to the private legal profession are below the real cost of providing the necessary legal services and that there is a significant withdrawal of experienced lawyers from publicly funding work.<sup>36</sup> A significant reduction in citizen’s rights before the courts and inequity in access to representation were seen to be characteristics of the erosion of legal representation.<sup>37</sup>

### **Legal Aid and Self-Representation in the Family Court of Australia**

This project was commissioned by National Legal Aid (CEO’s of legal aid commissions) and conducted by academics at Griffith University, Queensland. The focus was on the link between self-representation and the availability of legal aid funding in family law. It employed both quantitative and

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<sup>34</sup> Law Council of Australia, (2004) *Erosion of Legal Representation in the Australian Justice System* para 2-4 in Executive Summary.

<sup>35</sup> Law Council of Australia(2004) p 12

<sup>36</sup> Law Council (2004) Ch 4 & 5

<sup>37</sup> Law Council (2004) p 76

qualitative approaches gathering information from both the self-representing litigants (459 respondents interviewed) and Legal Aid Commissions. The research results indicated an extensive relationship between the unavailability of legal aid and self representation in the Family Court. The report shows that the relationship exists in non-applications for legal aid as well on in legal aid rejections or terminations.<sup>38</sup>

Eighty five per cent of litigants interviewed were self-represented at the time and 48% had applied for legal aid. A quarter of those who had not applied for legal aid were self represented for reasons unrelated to legal aid. The remaining three quarters had not applied for legal aid for reasons primarily related to the means test.<sup>39</sup>

The link between the means test and merits test and self representation was examined. The data suggested that the level of the mean tests creates a group of people that are not eligible for legal aid but who cannot afford private representation. These people become self representing. The data indicated that the private representation becomes affordable at an after-tax income level of \$40,000(AUS) approximately.<sup>40</sup> As an example, in Victoria, to qualify for legal aid without contribution under the means test, the net disposable income is \$230 or \$11,960 per annum. This highlights the gap for those on low incomes in affordability of representation.

This research also confirmed the importance of non-representation services provided by the Legal Aid Commission. The majority of self represented litigants had used services such as advice services (both personal

and telephone), assistance with documents and letters and duty lawyers.<sup>41</sup>

### **Tracking Access & Equity in Legal Aid Queensland**

Legal Aid Queensland (LAQ) has developed a range of initiatives to maximise the opportunity for Queenslanders to access and utilise the range of services it provides. The current access strategies target women, indigenous people, youth and people from rural and regional areas. The strategies provide specialist casework services and advocacy for clients, training in community organisations, input to state-wide organisations and partnerships and policy advice.

In 2004, LAQ engaged a consultant to review the benchmarks currently used to enable a comprehensive and consistent measure of access and equity as a whole and per population group per region and per type of legal issue.<sup>42</sup> The report details key performance indicators in civil and family law for the population groups women, indigenous, youth, rural and cultural and linguistic diversity. Benchmarks are based on Eligible Population Percentages and the basis for this was Centrelink (social security) Data. The benefits of this data are that it is “consistently updated, accessible, research and statistically parsimonious to use and comprehensive” and available on a quarterly basis.<sup>43</sup>

This approach assessed access within the current restraints of service provision within the areas of law and type of service already provided. Although it discusses ‘Equity’ as the ‘how’ of service provision and that services should be provided in a way that they account for the particular service demands of population groups, the measurements used are not able to get

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<sup>38</sup> Hunter, R., Giddings, J. & Chrzanowski, A. (2003) *Legal Aid and Self-Representation in the Family Court of Australia* Socio Legal Research Centre, Griffith University p 33-34

<sup>39</sup> Hunter, R., Giddings, J. & Chrzanowski, A. (2003) p iii

<sup>40</sup> Hunter, R., Giddings, J. & Chrzanowski, A. (2003) p 34 Hunter, R., Giddings, J. & Chrzanowski, A. (2003) p 34

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<sup>41</sup> Hunter, R., Giddings, J. & Chrzanowski, A. (2003) p v & 34

<sup>42</sup> Legal Aid Queensland and Colmar Brunton, (2004) *Tracking Access & Equity in Legal Aid Queensland* p 2

<sup>43</sup> Legal Aid Queensland (2004) p 11

to that level of qualitative detail. The measurements do facilitate identification of a population group and/or geographic region that is not utilising services in a particular area of law to a level predicted. This identification alerts the organisation and will require further exploration by the organisation of the specific nature and extent of need.

### **Justice Too Far Away: Report of the Tennant Creek Regional Legal Access Project**

This project was undertaken to improve access to legal services in Tennant Creek, a remote town in the Northern Territory where there are no permanent legal services available either by the private profession or public funded organisations. It was undertaken in cooperation with other legal service providers in the area. The project aimed to "identify any missing legal services needed by people in Tennant Creek" and propose ways to meet those needs through improved services. A range of consultations took place primarily with people representing service providers both within and external to Tennant Creek. A consultation paper was prepared and discussed at a workshop.<sup>44</sup> The consultations indicated that a wide range of legal and related services were unavailable, inadequate or difficult to access in Tennant Creek.<sup>45</sup>

The most significant recommendation proposed the establishment of a Tennant Creek Legal Resource Centre which would provide a focal point for legal services and be a link between clients and legal service providers and assist clients to access appropriate services. It would also liaise with community leaders and agencies about areas of legal need and work with visiting legal services to develop responses to those needs.<sup>46</sup>

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<sup>44</sup> Renouf, G., (2003) *Justice Too Far Away: Report of the Tennant Creek Regional Legal Access Project* Northern Territory Legal Aid Commission p13-15

<sup>45</sup> Renouf (2003) p 23

<sup>46</sup> Renouf (2003) p 6

### **Women and Legal Aid: Identifying Disadvantage**

This is a current research project of Griffith University (Professor Rosemary Hunter and Dr Jane Bathgate) and Legal Aid Queensland which is examining the situation of women who have been refused legal aid from the Brisbane and four regional offices in the areas of family law, domestic violence and anti-discrimination. The project involves a statistical analysis, analysis of legal aid files and interviews with the women. It is scheduled to conclude in 2005.<sup>47</sup>

### **Access to Justice: A trial project**

My colleague, Liz Curran and I are engaged in a project that takes a different approach to access to justice research. Recognising the unlikelihood of extensive research being funded in Australia we drew on our practical and policy experience of poverty law practice, the work of the Legal Services Research Centre,<sup>48</sup> work on benchmarking human rights by Mike Salvaris<sup>49</sup> (Victoria University) and others and began to explore new approaches to the issue.

The first stage of the research included a literature review and interviews with key stakeholders from a wide range of organisations some of which work with marginalised groups.<sup>50</sup> After analysing

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<sup>47</sup> Legal Aid Queensland, *Annual Report 2003-2004* p 40 - 41

<sup>48</sup> Pleasence P, Buck, A, Goriely, T, Taylor, J, Perkins H and Quick, H, (2001) *Local Legal Need*, Research Paper 7, Legal Services Research Centre; Pleasence P, Buck A, Balmer, N, O'Grady A, Genn H & Smith M. (2004) *Causes of Action: Civil Law and Social Justice*, Legal Services Research Centre London.

<sup>49</sup> M. Salvaris, K. Weekley, E. Tomaras, M. McGillivray, M. Muetzelfeldt, *Human Rights Benchmarks: Benchmarks and Indicators for Economics and Social Rights in Development Assistance Programs*, Swinburne Institute for Social Research and Deakin University June 1996

<sup>50</sup> Discussed in more detail in Curran E., Noone M.A. & Giddings J., *Identifying Gaps in Access to Justice* Paper

this material we, together with our colleague Professor Jeff Giddings, decided on an approach that seeks to make an assessment of matters significant to the capacity of members of the community to participate fully in their citizenship and the realisation of their human rights. Rather than just measuring what exists or does not exist in legal service delivery, we want to work out criteria for assessing the level of access that a civilized, fair and just society should seek to attain for all its citizens with a focus on the most socially disadvantaged.

We are using as a starting point internationally agreed minimum standards for human rights and citizenship namely, United Nations Conventions. From these we determine what the standard should be and then work out whether in practice this standard is reached. This can enable a broadening of issues beyond merely legal need and starts a conversation of what level of civilization and justice a society should be seeking to attain.

We believe this idea has potential to dovetail into the type of work undertaken by the Law and Justice Foundation of New South Wales and the Legal Services Research Centre. We have however moved away from the problematic terminology of "legal need" towards access to legal rights and remedies. The measurements used in that research can be utilised as practical indicators within the much broader context of human rights, many of which are in the purview of civil law. The UN standards also provide a useful basis for comparison across jurisdictions. The difficulty with a "legal needs" approach can sometimes be that it focuses on subsistence service provision rather than starting from a point of what is an acceptable standard in society and how the practical reality measures up to that standard.

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presented to 5<sup>th</sup> International Legal Services Research Centre Conference March 2004 Cambridge.

Given the limited opportunities for funding in Australia we have endeavoured to identify a methodology that provides research of real value which combines qualitative and quantitative studies but which is inexpensive. Also, it is our view that research in this area should actively seek to include the views and experiences of those who are excluded and likely to suffer a lack of access to justice.

We are currently engaged in a very small trial of the approach in the West Heidelberg area of metropolitan Melbourne. West Heidelberg has been selected for this trial on the basis of a range of demographic information and indicators of disadvantage. It is a community of significant poverty and disadvantage.<sup>51</sup> The methodology relies heavily on the input of health and social service providers, law firms and legal aid services in the area of West Heidelberg.

Given the small scale of the trial, we have focussed on one aspect of access to justice that affects a large number of residents in West Heidelberg, the human right to social security. The legal needs of Australian social security recipients have been the subject of research since 1975.<sup>52</sup> The human right is founded both in the International Covenant on Economic, Social and Cultural Rights and clarified in the Committee on Economic, Social and Cultural Rights,

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<sup>51</sup> Vinson, T.(2004) *Community adversity and resilience: the distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion*, The Ignatius Centre for Social Policy and Research, see page 73 West Heidelberg is ranked on the second band of the forty highest postcode areas on general disadvantage factors.

<sup>52</sup> Sackville, R, (1975) *Law and Poverty in Australia: Second Main Report of the Australian Government Commission of Inquiry into Poverty* AGPS, Ch.6 'Law, Lawyers and social security'; Chamberlain, E., De Maria, W., Foley, M., Lavender, K. & Melville, R. (1984) *Legal Needs for Social Security Claimants\_Report* for Commonwealth Legal Aid Council, Canberra AGPS

General Comment. Decisions about social security should be *accessible, affordable, timely and effective*.<sup>53</sup>

If this human right (the right to have a decision about social security be accessible, affordable timely and effective) were fully implemented then these conditions need to exist:

- a. Knowledge of the right/remedy by the person affected
- b. Capacity of the person affected to pursue the remedy
- c. Confidence of the person affected to pursue the remedy
- d. The availability of a process that is accessible, affordable, timely and effective for the person affected.

In this research we seek to examine whether these conditions exist for the people living in the area West Heidelberg. The project uses the following qualitative and quantitative methodology to gather data about the extent of these indicators in the West Heidelberg area.

1. Convening a community advisory panel. The panel is assisting in making linkages within the community and ensures we are informed in the conduct of the research by local knowledge and understandings. This panel includes key people involved in service delivery in the West Heidelberg area, a worker from the Victorian welfare rights organisation and an academic adviser.

2. Mapping of local services relevant to the project and its geographical area.
3. Conducting a "Turn Away Survey" over a one month period of reception staff in relevant offices to quantify the number of people who make an approach to an organisation for assistance but do not receive it due to resource or other limitations on the provision of service.
4. Conducting questionnaires of legal, social and relevant health services in the region.
5. Conducting a focus group with service providers in the region
6. Conducting a focus group with people most likely to have had a decision about social security affect them (selected with help from service providers and advisory panel).

An integral aspect of the research methodology is not only to assess existing services and awareness about the issue but as part of the methodology to increase the awareness and educate services providers as to their client's rights and remedies so that they are able to assist clients. (A similar aim as that contained in the Horn of Africa research mentioned above).

The research is taking place over the next six months and we hope to be able to report by early 2006. Having undertaken the trial of the methodology, the aim is to refine the approach and then develop its use in a larger study in different parts of Australia. This would promote greater consistency and capacity for measurement and comparison across Australia overcoming the patchy approach outlined above. The research methodology at the same time enables a process that uses local knowledge and understanding in the conduct of the research through the input of each community advisory panel and input by local service providers which still makes it relevant to different communities. The other advantages are that it can be applied across different areas of law and different vulnerable

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<sup>53</sup> International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. *Article 9*; Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003) : General Comment No. 9 (1997)

groups and undertaken at relatively low cost.

## **CONCLUSION**

At the end of the Legal Aid Congress (Brisbane, Australia) in November 2004, a resolution was passed that the Australian Legal Assistance Forum develop a set of national research priorities for the future of legal aid in Australia.<sup>54</sup>

Early in the Congress Professor Rosemary Hunter (Griffith University) described a range of significant research that she has completed or is currently conducting. She identified the threads in this research as having a “family law focus; directly or indirectly examining impact of legal aid funding cuts / restrictions; testing whether legal aid services live up to their own claims? (e.g. the merits test, conferencing, ‘new’/innovative services, access for disadvantaged groups); and analysing whether theoretical/anecdotal concerns are borne out in practice? (e.g. ‘flight’ of experienced lawyers from legal aid; relationship between legal aid cuts and self represented litigants; and gender bias in legal aid provision)”. Professor Hunter listed the following themes in the research findings as: “persistent gaps between funding and services provided, and actual needs; strategy of spreading scarce funding by giving a little to as many as possible is not always effective or appropriate; and don’t believe everything you hear! (e.g. about legal aid lawyers, family lawyers in general, self represented litigants)”. Commenting on the future directions for legal aid research in Australia, Professor Hunter referred to the Law and Justice Foundation of New South Wales work and the recent Senate Inquiry and noted that we “already know quite a lot about dimensions of unmet needs” She posed the choice “Should we be examining how to redistribute existing funding more efficiently/effectively/appropriately; or

should we be making the argument for increased funding levels?”<sup>55</sup>

The Australian Senate Legal and Constitutional References Committee found, after conducting public hearings in four locations around the country and receiving 115 written submissions, that “there was much evidence to suggest that various groups are particularly restricted in gaining access to justice, due to such factors as socioeconomic disadvantage, cultural background and remoteness from mainstream legal services”.<sup>56</sup> The Committee’s report identified that the following groups were experiencing problems in accessing the justice system: Women and Family Law, Indigenous Legal Services, Legal Aid in Outer-Metropolitan, Regional, Rural and Remote Areas, Migrants and Refugees, Other Groups with Particular Needs (includes homeless, mentally ill people and young people).<sup>57</sup>

The minority (Government senators) report also accepted that the inquiry had demonstrated “some areas of considerable need” and supported, in principle, the call for better statistical and practical information. These senators identified three key areas in need of further examination: national survey of demand and unmet need for legal services and identification of the obstacles to service delivery; gender bias in access to legal services; people living in rural, regional and remote Australia.<sup>58</sup>

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<sup>55</sup>Hunter, R.,(2004) *Legal aid research in Australia and future needs* at <http://www.legalaid.qld.gov.au/congress2004/content/papers/Thu18-Plenary2-RosemaryHunter.ppt>

<sup>56</sup> Senate Legal and Constitutional References Committee, *Legal aid and access to justice* June 2004 Senate Printing Unit p.1

<sup>57</sup> Senate Legal and Constitutional References Committee, *Legal aid and access to justice* June 2004 Senate Printing Unit

<sup>58</sup> Senate Legal and Constitutional References Committee, *Legal aid and access to justice* June 2004 Senate Printing Unit p221

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<sup>54</sup> See report of plenary sessions at <http://www.legalaid.qld.gov.au/congress2004/>.

The various projects described in this paper together with the Senate report indicate there is generally a good recognition of a range of groups of people and geographic areas that are experiencing difficulties in accessing legal services and justice. However not all the projects are rigorous in their methodology and their approaches vary significantly. Several of the projects seek to chart the extent of 'local legal need' whilst others seek to explore the options for best addressing the needs or in researching how best to establish a new service discover that the needs are broader or different from those envisaged. The Access and Equity work currently being conducted in several Legal Aid Commissions is about ensuring the currently available services are going to those most in need.

There is no indication from the current federal government that the Senate Committee's recommendations calling for a national survey and the collection of reliable data are likely to be acted on. Unfortunately, with the Howard government poised to take control of the Senate on 1 July 2005, it is unlikely that this committee will hold any further enquiries into legal aid and so the government's inaction will go without scrutiny.

Many in the country are looking to the release of the Law and Justice Foundation of New South Wales report to fill the gap. This is the largest study of its type in Australia for over 30 years. Obviously there are limitations to the use that can be made of the New South Wales data but nonetheless it should provide a solid foundation for other related research.

Equally the small projects listed in this paper merit recognition. This work is often done in isolation and with limited funds. Sometimes it is these smaller projects that identify the "hidden communities" that have a demand for legal services as disclosed in the *Law for All* report and noted in the recent *Legal Needs of Older People in NSW*.

When, viewed as a whole, the large and small projects reveal a growing body of relevant research material. Ideally these research developments and findings should be readily available to the legal aid and related community in order to ground decisions about legal aid funding, service provision and further research.

The challenge is how is this to be done? If the recommendation from the Legal Aid Congress to develop a set of national research priorities for the future of legal aid in Australia is to be acted upon then there is a strong imperative for a mechanism that will facilitate the dissemination of the information and results of these isolated projects and encourages nationwide coordination, coherency and consistency in the research. The current federal government is most unlikely to provide any resources for this work. National Legal Aid and the Australian Legal Assistance Forum are obvious candidates for the task but have very limited resources to allocate to this purpose. Consequently, in the short term, those Australians interested in improving access to justice for those in most need have no alternative but to continue to gather together the disparate and patchy relevant research as best they can.