

**CIVIL LAW
POLICY REVIEW
BACKGROUND
PAPER**

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Civil Law Policy Review

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Executive Summary

Over many years, the Legal Aid NSW (LA NSW) State civil law policies have been enabling the access of disadvantaged people to legal aid services to help them resolve problems in their day to day lives in areas such as housing, credit and debt, discrimination, civil liberties and consumer protection. Left unaddressed, such problems tend to exacerbate the difficulties that disadvantaged people face, propelling them towards social exclusion.

“Civil justice problems...are not problems that should concern only lawyers and those charged with civil law policy development. They relate to and impact on many aspects of peoples' lives....They are also part of the complex social processes that manifest in crime and social exclusion, and actions aimed at preventing, reducing and mitigating them will also have a bearing on actions aimed at preventing, reducing and mitigating crime and social exclusion.”

(Kemp, Pleasence, and Balmer, 2007, p.7)

To a large extent, the civil law policies have been meeting the civil law needs of disadvantaged communities by helping them to protect and enforce basic rights. Though not expressed in the policies, this has been the rationale for the policies to date.

However in recent times, there has been a convergence of a number of interrelated issues, which demands a fresh approach to the policies. There is now ample research that shows that disadvantage is multi dimensional, encompassing not only poverty, but also deprivation and social exclusion. The reliance of the current policies, on poverty (the means test) and “special disadvantage” is now out of step with current research.

It is through the “special disadvantage” test, that disadvantaged people may access legal aid for a broader range of civil law matters. This test is now inadequate to capture the most disadvantaged in our community including the LA NSW priority client groups: Aboriginal people, older people, the homeless and people experiencing mental illness.

The prevention and alleviation of social exclusion have been gaining increasing importance both at a Commonwealth and State level in government policies seeking to address community disadvantage. Recent ground breaking research provides an evidence base for the development of a new civil law policy framework with a strategic focus on preventing and alleviating social exclusion.

The Review makes recommendations about civil law policies that are not intended to mark a great shift in the types of matters for which legal aid is available, but will make these policies much more accessible to those at most disadvantage.

The policies will be prefaced with a broad statement, which articulates the principles and strategic focus that guide their application and interpretation.

This approach includes participation in a network of responses to problems required to re-dress social exclusion. The policies will also clearly articulate the rights that LA NSW intends to protect and enforce.

The Report recommends that the concept of “special disadvantage” be revised and replaced by articulating the types of matters for which legal aid will be available to those at most disadvantage. This will be achieved by requiring applicants to satisfy a set of evidence based indicators of disadvantage in order to be granted legal aid in particular matters.

This approach will provide a more effective means for meeting the legal needs of the most disadvantaged in our community, including members of the LA NSW priority client groups. It will be more compatible with the integrated approach required to tackle social exclusion and will acknowledge the role that LA NSW civil law policies can play in this regard.

The Review also makes recommendations that will improve the capacity of the civil law program to provide enhanced civil law services, particularly to the LA NSW priority client groups through the provision of minor assistance and paralegal or advocate positions.

Following is a list of all recommendations. They are more fully discussed in the main Report.

List of Recommendations

Civil Law Policies – The Findings

Recommendation 1: *A New Civil Law Policy Framework*

Develop a civil law policy framework that is evidence based, with a clear strategic focus, and informed by a social inclusion approach.

Recommendation 2: *Pilot the New Civil Law Policy Framework*

Pilot the new framework prior to full implementation.

Recommendation 3: *Monitor and Regularly Review Civil law Policies*

Civil law policies should be monitored and regularly reviewed to ensure that they continue to meet community legal need.

Unmet Legal Need – Coverage of the State Civil Law Policies**Recommendation 4: *Early Intervention***

Aid should be available for the most disadvantaged, for early intervention, particularly for matters before the SSAT and ADB.

Recommendation 5: *Ancillary Matters*

Where a grant of aid is made, the policies should allow for the granting of aid for all ancillary matters and causes of action.

Recommendation 6: *Employment Law Matters*

Aid should be available for the most disadvantaged for employment related matters, particularly unfair dismissals.

Recommendation 7: *Victims Compensation Applications and Appeals*

Aid should continue to be available for the most disadvantaged for victims compensation applications and appeals.

Recommendation 8: *Victims Compensation Restitution*

Aid should be available for victims compensation restitution matters for the most disadvantaged people where a "gross injustice" would result if an applicant for legal aid is unrepresented.

Recommendation 9: *Privilege Claims by Victims of Sexual Assault or Domestic Violence*

Aid should be available for victims of sexual assault and/or domestic violence for the purpose of advice and representation regarding their rights to claim privilege in response to subpoena issued during criminal prosecutions.

Recommendation 10: *FOI Matters*

Aid should be available for FOI matters, including applications and appeals, if ancillary to other legally aided matters.

Recommendation 11: *Privacy Matters*

Aid should be available for privacy matters for the most disadvantaged.

Recommendation 12: *Gross Injustice if Applicant is Unrepresented*

Aid should be available in circumstances where a gross injustice would occur if the applicant is unrepresented.

Recommendation 13: *Motor Vehicle Property Damage*

Legal Aid should continue to not be available for motor vehicle property damage matters unless for the most disadvantaged, it will amount to a "gross injustice" as defined by the policies, if the applicant is unrepresented.

Recommendation 14: *Personal Injury Including Medical Negligence*

Aid should continue to be available for personal injury (including medical negligence) matters for the most disadvantaged.

Recommendation 15: *Neighbourhood Disputes*

Aid should continue to be available for neighbourhood disputes for the most disadvantaged.

Recommendation 16: *Commercial and Investment Disputes*

Aid should continue to be available for matters arising from commercial and investment transactions for the most disadvantaged.

Recommendation 17: *Consumer Protection – Professional Negligence*

Aid should be available for claims against lawyers and other professionals retained to advise and represent a client for the purpose of a consumer transaction.

Recommendation 18: *Coronial Inquests Ancillary Matters*

Aid should be available for coronial inquest ancillary matters: proceedings in the Supreme Court necessary for the proper conduct of coronial inquests; reviews of decisions declining to hold inquests; and the making of submissions for the holding of inquests; where there is a public interest.

Recommendation 19: *Children*

Aid should continue to be available to children in the same way as it is available for the most disadvantaged, that is subject to the means, merit and availability of funds tests in the broader range of civil law matters.

Policy Ambiguities

Recommendation 20: *Public Interest Matters*

Aid should continue to be available for public interest matters. However there should be a more consistent approach to identifying whether or not a matter demonstrates public interest, across the various matters covered by the civil law policies. Further policy development should await reviews of the human rights and environmental policies.

Recommendation 21: *Public Interest Environment Matters*

A review of the public interest environment policies should be undertaken, as these policies were not considered by this Review.

Recommendation 22: *Short Term – Clarify Policy Ambiguities*

The following current policies should be clarified as soon as possible:

- **Ancillary legal professional negligence** – in legally aided proceedings, aid should be available for claims against lawyers and other professionals involved in providing advice to a client for the purpose of a consumer transaction.
- **Consumer protection** – legal aid is available for legal costs disputes; local court disputes even if the defence is not one under State consumer protection legislation; tribunals where leave is granted.
- **Victims Compensation** – aid may be granted in accordance with the policies for in house representation; aid is available for appeals from the VCT.
- **Section 90AE Family Law Act** – Aid is available to people who may be at risk of losing their home, to intervene in family law property proceedings.
- **Extraterritoriality** – confirm that aid is available for proceedings in NSW arising from situations that arose either outside NSW or overseas, if there is jurisdiction in NSW.

Civil Law Program Capacity to Provide Enhanced Legal Services to Priority Client Groups

Recommendation 23: *Minor Assistance – Paralegals*

An appropriate number of paralegal positions should be created in the Civil Law Division to undertake minor assistance work and provide other litigation support services including court and minor tribunal court appearances and research.

Recommendation 24: *Minor Assistance – Tools and Precedents*

Suitable resources and tools including comprehensive sets of precedents and templates are developed to facilitate the undertaking of the majority of minor assistance type work by paralegals under the supervision of solicitors.

Recommendation 25: *Minor Assistance – More Structured*

Minor assistance services should be structured with more clearly expressed priorities.

Recommendation 26: *Legal Education for Advice Service*

Modules of training should be developed and provided on an annual basis to update legal knowledge in the main types of matters for which advice and assistance are sought. The possibilities of this being delivered via *eLearning* should be explored.

Recommendation 27: *Legal Education for Outreach*

For LA NSW staff providing outreach advice services, particularly in remote locations, training is provided to equip them to provide basic information and advice across all areas of law. The possibilities of this being delivered via *eLearning* should be explored.

Recommendation 28: *Civil Law Program Communication Strategy*

Develop and implement a communication strategy for the civil law program in consultation with Strategic Planning and Policy to better inform our stakeholders and clients about the range of services provided by the civil law program.

Recommendation 29: *Future Client Surveys*

Future LA NSW client surveys should include questions about the pathways taken by legal aid clients to obtain assistance for their civil law problems.

Recommendation 30: *Future Directions*

LA NSW should investigate the need for and feasibility of a system of triaging disadvantaged people utilising legal aid services to ascertain and address any multiple legal problems they may be experiencing.

1 – Introduction

“The diversity of civil law is a challenge for legal aid policy makers.”

(NSW Audit Office, 2006, p.25)

Civil law problems are problems that impact on people's' day-to-day lives. They encompass a wide variety of problems such as housing, credit and debt, welfare payments, discrimination and involve equally varied courts, tribunals and dispute resolution mechanisms. They can arise at any given point along a continuum ranging from problems that can be resolved quickly and at little cost, to costly, complex, time consuming litigation in a superior court.

The circumstances of disadvantaged clients often add to the complexity of the civil law landscape. A growing body of research is highlighting the interrelationships of problems experienced by disadvantaged people across civil, family, criminal and mental health law. The research has found that there is little benefit to individuals and the community as a whole, in focusing attention on dealing with some legal problems and not others.

“Civil justice problems...are not problems that should concern only lawyers and those charged with civil law policy development. They relate to and impact on many aspects of peoples' lives....They are also part of the complex social processes that manifest in crime and social exclusion, and actions aimed at preventing, reducing and mitigating them will also have a bearing on actions aimed at preventing, reducing and mitigating crime and social exclusion.”

(Kemp, Pleasence, and Balmer, 2007, p.7)

Early action at a Federal level including the creation of a Ministry for Social Inclusion, signal important fundamental changes to addressing disadvantage which also have relevance to legal aid policy development. At a State level, the NSW State Plan recognises the significance of social inclusion through the priority:

“Increased participation and integration in community activities.”

Saunders et al have shown that social disadvantage is multi dimensional and comprises the distinct but overlapping concepts of poverty, deprivation and social exclusion (2007a, p.viii).

“Social exclusion exists when people do not participate in key activities in society. Whereas deprivation focuses on what people cannot afford, what matters for exclusion is what people do not do.”

(Saunders et al, 2007a, p.viii)

Amongst the well documented initiatives to address social exclusion including housing, health, employment and education, access to justice also has an important role to play in preventing social exclusion and promoting social inclusion.

The LA NSW civil law policies aim to provide legal assistance in the types of civil law matters of particular relevance to disadvantaged people. It is timely that a review of those policies has been undertaken. This is the Report of that Review.

This Report makes recommendations for the development of a civil law policy framework that is informed by a social inclusion approach. It responds to consultations in relation to the coverage of existing civil law policies and discusses strategies to enhance the capacity of the civil law program to provide civil law legal aid services, in particular to the LA NSW priority client groups.

This Report assumes a good knowledge of the current civil law policies. Full details of the policies are available at Policy On Line at www.legalaid.nsw.gov.au.

A Background Paper is also available, which provides the backdrop to the Report including a summary of the civil law policies, the context within which the Review took place and details the feedback received from consultations about civil law legal need and policy ambiguities. Finally, it summarises other research and data which led to the findings and recommendations of the Review.

Dora Dimos
Senior Project Officer Civil Law Policy Review
May 2008

2 – Terms of Reference

The 2003 Civil Law Review found that there was then general acceptance that the State Civil Law Policies were appropriately targeted to areas of law which have the most relevance to our clients.¹ However, it also found that there were certain aspects of the policies that were in need of revision, that certain client groups did not sufficiently access civil law legal aid services and that limited civil law resources adversely impacted on the program's capacity to deliver a state wide legal service.

Since the 2003 Civil Law Review, civil law program resources have improved and there is now better understanding of the importance of community need in the development and delivery of legal aid services. In that context, the civil law policies (excluding mental health and veterans' law policies) will be reviewed in order to:

- Determine whether or not the current (state) civil law policies meet the legal needs of Legal Aid NSW (LA NSW) clients and in particular our priority client groups: Aboriginal people, the elderly, the homeless and people experiencing mental illness and make recommendations for improvements to the policies.
- Examine the capacity of the civil law program to provide enhanced civil law legal aid services, in particular to our Legal Aid NSW priority client groups: Aboriginal people, older people, the homeless and people experiencing mental illness and make recommendations for the development of that capacity.
- Clarify ambiguities in policy interpretation (including State and Commonwealth policies)

¹ Report of the Civil Law Review November 2003, at p.62.
<http://lacextra.legalaid.nsw.gov.au/internet/pubs/civil%20law%20review%20report.pdf>.

3 – Methodology

A literature review was undertaken. Relevant statistics, including LA NSW, LawAccess and selected court and tribunal statistics were also analysed.

Consultations took place in the form of semi structured interviews with stakeholders, individuals and agencies who are working in legal environments with disadvantaged clients, about civil law matters for which in their experience, there is community need.

A schedule of consultations is contained in the Background Paper.

Clients were not directly surveyed as this was outside the scope of this Review. However it is noted that separately commissioned research is currently under way as follows which will in due course provide the invaluable direct input of disadvantaged clients:

- Civil and Family Law Legal Needs of Aboriginal People in NSW
- National Legal Needs Survey

A written submission was received from the Law Society of NSW.

A Consultative Group was formed to provide guidance, advice and information for the Review. The Group was comprised of the following:

Table 1. Consultative group details

Name	Title
Richard Funston	Director Strategic Planning & Policy
From 22.01.2008	
Monique Hitter	Director Civil Law
Scott Hawkins	Director Aboriginal Services
From 22.01.2008	
Sarah Burke	RPC Civil Law
Tim Smith	Senior Solicitor Civil Litigation
George Domaradzki	Legal Officer, Grants
Sally McAtee/Aideen McGarrigle	Senior Solicitors, Strategic Planning and Policy
Steve O'Connor	Deputy CEO Legal
To 18.01.2008	
Carol Thomas	Director Aboriginal Services
To 18.01.2008	

4 – Civil Law Policies – The Findings

The need for civil law legal aid services is great. Left unresolved, civil law problems exacerbate poverty and contribute to a downward spiral of disadvantage. Therefore, for the civil law program, which is the smallest of the LA NSW programs, it is vital that the civil law policies have a clearly articulated strategic focus.

The current civil law policies strive to meet community legal need by enabling legal aid to be granted to disadvantaged people to protect and enforce basic rights. The key matters for which legal aid is currently available for “all applicants” cover inter alia housing, discrimination, consumer protection, civil liberties. These policies meet the legal needs of disadvantaged people in areas pivotal to their day to day lives. It is appropriate that aid is available in these matters for those who meet the means and merit tests.

However, the “special disadvantage” test which enables the granting of aid in a broader range of civil law matters is now outdated and does not provide an effective means for meeting the civil law legal needs of the most disadvantaged in the community, including members of our priority client groups: Aboriginal people, older people, the homeless and people experiencing mental illness.

This report recommends that the civil law policies be informed by considerations that move beyond a concentration on poverty alone (the means test) to a more inclusive concept that would include poverty together with more accurate indicators of need and disadvantage than is currently the case.

4.1 Special Disadvantage

The “special disadvantage test” was established as a means of managing Legal Aid NSW’s limited resources in the early 1990’s by targeting legal aid in a broader range of matters to those most in need.

It is a pivotal consideration in the current state civil law policies. This is because the civil law policies cast a wider net of assistance based on poverty (the means test) and “special disadvantage” criteria. Applicants who meet both sets of criteria may obtain assistance for a broader range of civil law matters. A more narrow net of assistance is cast for those who meet eligibility tests based on poverty alone.

The criteria for the current “special disadvantage test” are as follows:

“An applicant is at special disadvantage if:

- the applicant is a child or acting on behalf of a child; or
- they are a person who has substantial difficulty in dealing with the legal system because of a substantial:
 - psychiatric condition
 - developmental disability
 - intellectual disability, or
 - physical disability.”

There was consistent feedback by stakeholders that the above criteria are difficult to apply, are prone to inconsistent application and place undue barriers in the way of disadvantaged people seeking legal assistance.

These criteria are also out of step with current research into disadvantage (Saunders et al, 2008a; Saunders et al, 2007a; Vinson 2007; Berry et al, 2008) The research highlights the multidimensional nature of disadvantage and that measures of poverty alone or even poverty and “special disadvantage” as is currently defined, do not adequately capture those that are the most disadvantaged in our community (Saunders et al, 2008a, p.1).

The limitations of the current “special disadvantage” criteria are also readily apparent in that they do not adequately capture people within our priority client groups e.g., a homeless person does not come within the definition of “special disadvantage” without having to demonstrate that they meet the additional criteria of having substantial difficulty in dealing with the legal system because they are suffering from one of the listed conditions.

4.2 Social Exclusion

Social policy research is increasingly referring to “social exclusion” as a short hand description of the multi faceted nature of disadvantage. Saunders et al have identified that “social disadvantage” has three elements as follows (Saunders et al, 2007a, p.17):

- Poverty – lacking the adequate economic resources required to achieve an acceptable standard of living
- Deprivation – exists where there is an enforced lack of socially perceived necessities or essentials²
- Social exclusion – occurs when people do not participate in the key activities in the society in which they live

Social exclusion encompasses:³

- *Disengagement* – lack of participation in social and community activities. Indicators included: ‘No regular social contact with other people’; ‘Did not participate in community activities’
- *Service Exclusion* – lack of adequate access to key services when needed. Indicators included: ‘No access to a local doctor or hospital’; ‘No access to a bank or building society’; ‘Could not make electricity, water, gas, telephone payments’.
- *Economic exclusion* – restricted access to economic resources and low economic capacity. Indicators included ‘Does not have \$500.00 in emergency savings’; ‘Lives in a jobless household’

Promoting and maintaining social inclusion have been priority targets for governments internationally, particularly in the UK and European Union, for some years (Buck et al, 2005). It is also a priority policy area for some Australian states including Victoria and South Australia. Social inclusion has gained increasing importance in Australia with its adoption as a priority policy focus by the current Federal government.

² Saunders et al, 2007a p.51 lists the ten items identified as essential by the community sample.

³ Saunders et al, 2007a p.69. The ten exclusion indicators are listed at p.75.

The Deputy Prime Minister, the Hon. Julia Gillard is also the Minister for Social Inclusion. In a recent speech Ms Gillard highlighted the significance of “social inclusion” for Australia as follows:

“And we know that if some areas of the country, some parts of our communities, some groups of people within Australia, are not well served by the opportunities and the services that they experience, then collectively we will be paying a high price for that marginalisation in the decades ahead. Our long term prosperity depends on securing the full participation, economic and social, of all Australians. We have to find new ways to support that participation. That is why social inclusion matters...”

(Gillard, 2008)

Therefore this convergence of a number of interrelated issues: the limitations of the current “special disadvantage” test; the legal needs of our priority client groups; the multidimensional nature of disadvantage and the increasingly central role that social inclusion is playing in government policy; demands a fresh approach to the civil law policies.

LA NSW civil law services, together with criminal and family law services, can play an important part in the multi faceted responses that are needed to address poverty, deprivation and social exclusion.

The way forward is the development of civil law policies that are aimed at the prevention and alleviation of social exclusion and promote social inclusion.

A rationale to underpin the civil law policies

The policies should be prefaced with a statement that sets out the rationale on which the civil law policies are based to explain their purpose and strategic focus. For example:

The LA NSW civil law policies aim to prevent and alleviate disadvantage by ensuring that people have access to legal aid services that will help them resolve their legal problems and protect and enforce their fundamental social rights.

The statement should identify broad categories that represent the types of rights the policies intend to protect.

These rights are of the kind protected through the instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and may include:

- Right to secure accommodation
- Right to secure income
- Right to basic employment

- Right to basic education
- Right to participate in the community
- Right to access health services
- Right to an adequate standard of living
- Right to freedom from discrimination in relation to fundamental services
- Protection against arbitrary abuse of power by government departments & instrumentalities and corporations
- Rights as a consumer.
- Right to liberty

This rights-based approach to legal policy development is consistent with the direction advocated by a number of people with direct experience of holistically working with disadvantaged people. Lynch for example has argued that

“... the international human rights framework is useful and important in identifying, monitoring and addressing factors which contribute to homelessness and social exclusion...”

(2005, p.116)

The purpose of the policies is then clearly aimed at either protecting the rights of a person who is at risk of being socially excluded or reclaiming the rights of a person who has become socially excluded.

Revising “Special Disadvantage”

LA NSW (led by the Strategic Planning and Policy Division) is exploring the use of alternative indicators based on social exclusion as a means of reformulating the “special disadvantage” test. In this regard, LA NSW has been working with Professor Saunders of the Social Policy Research Centre to assess the feasibility of utilising indicators of social exclusion developed in his important study *Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia* (Saunders et al, 2007a).

The development of appropriate indicators for the civil law policies will be solidly based on evidence including: the available information as to legal needs, relevant statistics published by the Australian Bureau of Statistics, other published research on indicators of disadvantage and further collaborative work with Saunders et al.

This Report recommends removing the separate category of people “at special disadvantage” from the civil law policies. Instead, the availability of legal aid for the various types of matters will be determined by an evidence-based set of indicators identifying the most disadvantaged.

The indicators would effectively function as gates that would be “wide” or “narrow” depending on the matter for which legal aid is being sought.

A narrow gate is set by requiring a number of evidence based indicators (indicative of high levels of disadvantage) to be satisfied. In satisfying these criteria the person is deemed to be highly disadvantaged. To be eligible for a grant of legal aid in these broader areas, a means and merit test plus these other factors (which would be clearly defined) will need to be met.

A wide gate is set through the application of minimal criteria to qualify for a grant of legal aid – means and merit test only.

To illustrate this approach:

Wide gate

A wide gate is set to access the civil law policy that protects a person's right to social security such as a dispute with Centrelink in relation to a pension or benefit. To be eligible for a grant of legal aid only a means and merit test would apply (as it is currently).

A wide gate is also set for the right to secure rental accommodation (as it is currently).

The policy is then articulated thus:

Tenancy eviction

Legal aid is available for a person who is at risk of or is being evicted from their home.

For legal aid to be available the applicant must meet the following tests:

- Means Test A, and
- Merit Test, and
- Availability of Funds Test.

Narrow gate

A narrow gate is set in order to access a broader range of civil law policies. For example, medical negligence.

The policy is articulated thus:

Medical Negligence

Legal aid is available for a person in relation to a claim of medical negligence.

For legal aid to be available the applicant must meet the following tests:

- Means Test A, and
- Merit Test, and
- Availability of Funds Test

AND

The applicant satisfies at least two of the following criteria:

- lack of education
- Aboriginal
- geographical isolation
- poor health
- Age (over 65)

Or one of the following criteria

- Age (Children)
- Homeless
- Disability

Another example:

Loss of Employment

Legal aid is available for a person who has either lost their occupational licence or is unable to work through the unlawful actions of their employer.

For legal aid to be available the applicant must meet the following tests:

- Means Test A, and
- Merit Test, and
- Availability of Funds Test

AND

The applicant satisfies at least 2 of the following criteria:

- lack of education
- Aboriginal
- geographical isolation
- poor health
- Age (over 65)

Or one of the following criteria

- Age (Children)
- Homeless
- Disability

The intended outcomes

It is important to acknowledge the means, merit and availability of funds tests will continue to be integral to civil law policies, and an important mechanism to

address concerns in relation to cost considerations. These existing gates will continue to be strong checks on the appropriate granting of legal aid.

The recommendations to revise the civil law policies if accepted, will only effectively allow greater access to the policies for the most disadvantaged. Otherwise, access to the policies will more than likely remain the same.

It is also recommended that the revised policies be piloted prior to full implementation in order to ascertain a more detailed assessment of future cost implications, if any, and whether the revised policies are achieving their stated objectives.

These objectives include:

- The most disadvantaged are better able to access civil law policies
- Civil Law Policies are easier to understand with fewer ambiguities
- A clear and cohesive strategic focus
- Reduced risks of people in need of assistance being unable to access legal aid services
- Better information about the type of work undertaken by the civil law program
- Compatibility with a more holistic, preventative approach to resolving the legal needs of disadvantaged people
- Better coverage of the legal needs of disadvantaged people, including the priority client groups

Recommendation 1: *A New Civil Law Policy Framework*

Develop a civil law policy framework that is evidence based, with a clear strategic focus, and informed by a social inclusion approach.

Recommendation 2: *Pilot the New Civil Law Policy Framework*

Pilot the new framework prior to full implementation.

Recommendation 3: *Monitor and Regularly Review Civil law Policies*

Civil law policies should be monitored and regularly reviewed to ensure that they continue to meet community legal need.

5 – Unmet Legal Need – Coverage of the State Civil Law Policies

The Review received substantial feedback on areas of unmet civil law need for the community generally and particularly for our priority client groups: Aboriginal people, older people, the homeless and people experiencing mental illness. This feedback is comprehensively detailed in the Background Paper.

The key identified unmet legal needs for particular matters are discussed below. For some of these, aid is currently available under the “special disadvantage” test. The approach recommended in this report will enable better coverage of these legal needs, particularly for the priority client groups.

Also, for many matters, the perceived legal need arises from ambiguities in the current policies, which create confusion as to whether or not particular matters are covered by the policies. More details of feedback about ambiguities in the current policies are available in the Background Paper.

For each of the matter types discussed, a recommendation is made about whether or not matters should remain in the civil law policies and if so, whether aid should be generally available (wide gate) or available only for the most disadvantaged (narrow gate). These decisions were based on a consideration of the needs of the most disadvantaged people (such as those at risk of social exclusion and our priority client groups), the availability of alternative sources of assistance and existing resources.

5.1 Early Intervention

Feedback highlighted the great benefits associated with providing assistance to the most disadvantaged earlier than currently allowed by the policies particularly for matters being determined by the Social Security Appeals Tribunal (SSAT) and Anti Discrimination Board (ADB). These jurisdictions are concerned with fundamental rights (such as social security and discrimination).

Aid is not currently available for matters before the SSAT or the ADB. Advice and minor assistance are available in these areas but the extent of assistance provided is subject to available resources, and is not conducted under grants of legal aid.

It is recommended that assistance is provided at an early stage of a dispute with Centrelink to those at most disadvantage on the basis of:

- The great difficulty experienced in effectively representing themselves
- It being much more cost effective to resolve such disputes at an early stage (and before it reaches the AAT)

Disadvantaged people also require assistance with preparation of complaints to the ADB.

Case Study – ADB

Complaint handling

In 2006–2007 the NSW Anti-Discrimination Board received 59 complaints of discrimination from Aboriginal and Torres Strait Islander people, which is a decrease of 27% from 2005–2006 (81 complaints).

Given the anecdotal evidence the outreach team hears about the high level of discrimination experienced by Indigenous people, the decrease in complaints may indicate that the process of translating evidence of discrimination into complaints needs to be overseen more effectively. This issue will be closely monitored by the Aboriginal and Torres Strait Islander Outreach Team and discussed with the team’s Advisory Committee. (ADB 2006–2007 p.26).

Not only do individuals gain real benefits by receiving early legal assistance, but there are obvious wider ranging benefits to the community as a whole when “responsive costs” are avoided and disputes are resolved more cost effectively (Edgerton et al, 2006).

Recommendation 4: *Early Intervention*

Aid should be available for the most disadvantaged, for early intervention, particularly for matters before the SSAT and ADB.

5.2 Ancillary Proceedings

Various causes of action may be available in a civil law dispute for which aid is sought. The situation frequently arises that aid is available under the policies for some of those ancillary causes of action but not others. One example is in relation to a matter concerning a bank foreclosure on a mortgage loan, secured against the client’s home where the strongest prospects for relief lie against a solicitor who negligently advised the applicant before entering into the mortgage (no legal aid available) rather than the bank itself (legal aid available).

Another common scenario arises in discrimination complaints with related employment law causes of action.

A strict application of the current policies, which constrain the causes of action that are eligible for legally aid, creates difficulties in effectively pursuing a client’s rights that arise from a set of facts and places the lawyer in some difficulty in the discharge of her or his professional responsibilities. Lawyers must be able to

pursue the most effective causes of action arising out of a set of circumstances where a grant of legal aid is made.

Recommendation 5: *Ancillary Matters*

Where a grant of aid is made, the policies should allow for the granting of aid for all ancillary matters and causes of action.

5.3 Employment Law

Employment law matters frequently featured in consultations as an area of high demand for assistance. Employment related matters consistently feature amongst the areas of highest demand for advice services.

Employment matters can be conducted in several different courts and tribunals. Some unfair dismissal matters for example are being attempted through state courts on the basis of common law duties such as the ‘duty of good faith’. Matters involving employment and restrictions on employment may also be brought before the Administrative Decisions Tribunal.

People may obtain advice on employment related matters from a number of avenues including LawAccess, Community Legal Centres (CLC’s) and LA NSW. However legal aid for representation in proceedings, particularly for unfair dismissal, is currently available only for those who meet the “special disadvantage” criteria.

This area of law continues to be in a state of flux with further imminent changes in the Commonwealth arena, further complicating this important area.

CLC’s reported in consultations, that employment law continues to be an area of high demand for their advice services. Some CLC’s also provide legal representation, but resources are limited.

Union members can often obtain assistance with employment law and unfair dismissal related issues from their union. However, this assistance is available to fewer and fewer people as union membership continues to decline in NSW and across Australia.

A number of private law firms specialise in employment law matters. Awards given for unfair dismissal matters tend not to be high. Anecdotally, few private lawyers are prepared to conduct matters on a “no win no fee” basis. Most disadvantaged people would be unable to meet legal costs without suffering extreme hardship.

Recommendation 6: *Employment Law Matters*

Aid should be available for the most disadvantaged for employment related matters, particularly unfair dismissals.

5.4 Victims Compensation

The whole cross section of consultations highlighted the heavy demand for assistance for applications for statutory compensation under the *Victims Support and Rehabilitation Act 1996*.

According to the Victims Compensation Tribunal Chairperson's Report 2005–2006, 5,098 applications were received in 2004–2005 and 5054 in 2005–2006. Apparently, there was a downward trend in the number of applications lodged and it remains to be seen if this trend continued in 2006–2007.

Nevertheless, there has been a steady increase in the number of applications lodged by Indigenous victims with 286 claims received in 2004–2005 and 334 in 2005–2006. This has been attributed to a special focus in 2005–2006 on Indigenous issues (Chairperson's Report 2005–2006).

It is important to note that awards made to victims of crime can also include counselling services, particularly important for victims of domestic violence and sexual assault.

Case Study – Extract from: Law and Justice Statistics – Aboriginal and Torres Strait Islander people: a snapshot, 2006

The relative socioeconomic disadvantage experienced by many Aboriginal and Torres Strait Islander people is reflected in considerably high rates of victimisation. Victims of violence may suffer serious injury, disability or death and, together with those who witness violence, are more likely to experience debilitating stress and trauma (ABS & AIHW 2005). ...

In 2002, about one quarter (24%) of Indigenous people aged 15 years and over reported being a victim of physical or threatened violence in the 12 months prior to the survey (26% of males and 23% of females), nearly double the overall rate reported in 1994 (13%) (ABS 2004).

Overall, 11% of indigenous people reported abuse or violent crime as a life stressor experienced in the 12 months prior to the survey (ABS 2004).

Indigenous people living in remote areas were almost twice as likely as those living in non-remote areas to have reported abuse or violent crime as a life stressor (17% compared with 9%) (ABS 2004).

Indigenous females were around one-and-a-half times more likely than Indigenous males to have reported abuse or violent crime as a life stressor (13% compared with 9%)...” (ABS, 2007, pp.2 and 3).

Some private lawyers do represent applicants for victims compensation. The *Victims Support and Rehabilitation Act 1996* regulates the costs that a legal practitioner can be awarded for legal services carried out in respect of a victims compensation claim. Currently a legal practitioner can be awarded up to \$825 (plus GST) in relation to all aspects of work carried out in connection with an application for statutory victims compensation. Costs awarded are paid in addition to the victims compensation award and a legal practitioner can only charge a client the amount awarded by the assessor at determination or by the Tribunal on appeal.

Legal Aid for victims compensation is limited to people who meet the “special disadvantage” criteria for disbursements only but is also available for these matters to be conducted by the in-house practice.

People with complex applications experience difficulty in locating a private lawyer to assist them, due to the limitation on the costs that are recoverable from the Tribunal.

Women’s Legal Services NSW suggested:

“CLC’s and many of the large pro bono practices do significant amounts of VCT work mostly for clients with complex cases – where the time taken significantly exceeds the regulated fee. These are usually sexual assault or domestic violence matters where collecting evidence to prove acts of violence and personal injury is significant work; and clients need to be carefully supported through the process.”

The situation is different for appeals from the Victims Compensation Tribunal to the District Court or higher courts. An applicant can appeal against the Tribunal’s decision to the District Court, but only on a question of law. The scale of fees does not apply in an appeal to the District Court, and a legal practitioner can enter into a costs agreement with the client.

Recommendation 7: *Victims Compensation Applications and Appeals*

Aid should continue to be available for the most disadvantaged for victims compensation applications and appeals.

5.5 Victims Compensation Restitution

Victims compensation restitution matters were highlighted as a legal need for Aboriginal people, the homeless and people experiencing mental illness. There is currently no legal aid for such matters.

Restitution is based on the convicted perpetrator's culpability and ability to pay restitution in the context of financial hardship. Without legal representation, unjust decisions may be made against the most disadvantaged compounding their disadvantage with more debt.

Case Study – Restitution

A Victims Restitution claim of \$40,000.00 was made against B, aged 40 years, following his conviction for acts of indecency 20 years prior to his conviction. B had borderline intellectual disability and received a community service sentence. He had inherited the family home, his sole asset. He was likely to remain reliant on welfare payments for the rest of his life. He was unlikely to ever be able to manage in a private rental world. If this order had been made against him, his home was at risk. Following the provision of a report to substantiate his circumstances and the making of appropriate submissions, the amount payable was reduced to nil.

Recommendation 8: *Victims Compensation Restitution*

Aid should be available for victims compensation restitution matters for the most disadvantaged people where a "gross injustice" would result if an applicant for legal aid is unrepresented.

5.6 Privilege Claims by Victims of Sexual Assault or Domestic Violence

This is an emerging area of unmet need. Victims of sexual assault and/or domestic violence have statutory rights to challenge subpoena based on sexual assault communications privilege, confidential counselling privilege, or the general rules about subpoena. Without legal representation, the victim is left to represent themselves in any interlocutory proceedings relating to subpoena in criminal prosecutions.

To date, community legal centres have relied on pro bono barristers for assistance with these matters. Such matters could potentially be the subject of applications for aid under the LA NSW Public Interest Human Rights policies.

This is an area of unmet legal need, not currently covered by the policies. Allowing aid to be granted for advice and representation in these circumstances should not be costly. Such assistance should generally involve two to three hours legal work.

Recommendation 9: *Privilege Claims by Victims of Sexual Assault or Domestic Violence*

Aid should be available for victims of sexual assault and/or domestic violence for the purpose of advice and representation regarding their rights to claim privilege in response to subpoena issued during criminal prosecutions.

5.7 FOI and Privacy

FOI and privacy issues are matters where there is a stark imbalance between disadvantaged people and government. Such applications are particularly important if ancillary to other proceedings.

Recommendation 10: *FOI Matters*

Aid should be available for FOI matters, including applications and appeals, if ancillary to other legally aided matters.

Recommendation 11: *Privacy Matters*

Aid should be available for privacy matters for the most disadvantaged.

5.8 Gross Injustice

A number of examples were given of cases where a gross injustice would have resulted if aid were unavailable due to the policies (see for example, the earlier Case Study – Restitution). Proper application of policies requires sufficient flexibility to allow for aid to be granted notwithstanding the policies in appropriate cases.

Currently, the policies do not refer to how matters that fall outside the policies should be dealt with, although it is understood that the Chief Executive Officer has discretion to grant aid in exceptional cases, for matters not covered by the policies.

Recommendation 12: *Gross Injustice if Applicant is Unrepresented*

Aid should be available in circumstances where a gross injustice would occur if the applicant is unrepresented.

5.9 Motor Vehicle Property Damage and Related Matters

There continues to be strong demand for advice for motor vehicle property damage and other related matters. Motor vehicle property damage matters consistently feature amongst the areas of highest demand for advice services for LA NSW and LawAccess. Feedback particularly identified such matters as a legal need for Aboriginal people and people experiencing mental illness.

While people may obtain advice for such matters, there is no legal aid for case representation.

Disadvantaged people are often unable to afford third party property insurance. The External Dispute Resolution (EDR) scheme for general insurance has jurisdiction to deal with matters on behalf of uninsured motorists in dispute with insured motorists where the damage to the uninsured is \$3000.00 or less. Many people are unaware that as uninsured drivers, they have access to this scheme. Access to this service can avoid the incurring of unnecessary debts and ultimately bankruptcy. Disadvantaged clients often need assistance with the preparation of submissions to the EDR.

It is not recommended that legal aid become available for motor vehicle property damage matters, even for the most disadvantaged, unless it will amount to a gross injustice because it has the potential to consume substantial resources to the detriment of other areas. The most disadvantaged should however be able to obtain advice and minor assistance. Under a more structured minor assistance service, as discussed later in this paper, it should be possible to meet that need.

Recommendation 13: *Motor Vehicle Property Damage*

Legal Aid should continue to not be available for motor vehicle property damage matters unless for the most disadvantaged, it will amount to a “gross injustice” as defined by the policies, if the applicant is unrepresented.

5.10 Personal Injury (incl. Medical Negligence)

Personal injury and medical professional negligence claims were identified as a legal need for the LA NSW priority client groups.

Disadvantaged clients are the most reliant on the public health system and consequently the most exposed to potential shortcomings. Older people are particularly vulnerable as patients in the public hospital system (McDonald, 2007).

Currently, legal aid is available for those who meet the “special disadvantage” criteria.

There have been recent highly publicised cases of catastrophic failures by health services, particularly the public health system in NSW which have culminated in a Special Commission of Inquiry.

Anecdotally, a number of private law firms do conduct such claims on a “no win no fee” basis, thus facilitating access to legal representation for such matters. These firms tend to be concentrated in more highly populated urban areas.

It is appropriate that legal aid continue to be available for the most disadvantaged in our community.

Recommendation 14: *Personal Injury Including Medical Negligence*

Aid should continue to be available for personal injury (including medical negligence) matters for the most disadvantaged.

5.11 Neighbourhood Disputes

Neighbourhood problems were identified as a legal need for Aboriginal people, older people and people experiencing mental illness. Currently, aid is available for those who meet the “special disadvantage” criteria and who can also demonstrate exceptional circumstances and that they would suffer undue hardship if legal aid were refused.

It is appropriate that legal aid continue to be available for neighbour disputes for the most disadvantaged.

Recommendation 15: *Neighbourhood Disputes*

Aid should continue to be available for neighbourhood disputes for the most disadvantaged.

5.12 Commercial and Investment Disputes

The commercial and investment dispute guidelines provide that legal aid is available to applicants at special disadvantage for matters which result from commercial and investment transactions conducted if the applicant can also demonstrate exceptional circumstances and would suffer undue hardship if legal aid is refused.

The term “commercial and investment transactions” is broad and is subject to varying interpretations. For older people, matters involving “financial abuse” (including in relation to commercial or investment transactions) have been identified as an area of high un-met legal need (Commonwealth of Australia, 2007).

Often, these matters involve the consequential loss of the family home. These matters can also relate to the loss of life savings or retirement funds (particularly since the advent of a more de-regulated superannuation sector). In such circumstances, it would be appropriate for the policies to allow for the granting of aid.

Case Study – Older People

The clients were only receiving aged pensions and so had extremely limited income. They had no ability to repay the amount borrowed and so it was clear that the mortgagee was engaged in asset based lending. Despite this fact the clients were requested to sign a business purpose declaration with a notation on one document that they were borrowing money to lend to their children for investment purposes as property developers. The clients’ children were told that if their parents did not sign this declaration then the money would not be provided.

The clients obtained “independent” legal advice from private solicitors and “independent” financial advice from an accountant. The solicitors involved claim that their role was only to provide advice regarding the legal effects of the transactions and they had no duty to advise on the financial providence of the transaction. The financial advice provided by the accountant was extremely inadequate.

There could also be matters involving consumer protection issues which are potentially caught by the current exclusion simply because the problem is related to a small business e.g., the client may be a first time business proprietor with no other substantial assets or other assets such as the family home may be at risk. In such circumstances, it would be appropriate for the policies to allow for the granting of aid.

Case Study – Consumer Protection or Commercial Dispute?

The owner of a small shop that stocked a wide range of food and drink had entered into a lease of a refrigerator for storing drinks and other perishable foods. He was being sued for breaches of the lease. His financial means were relatively slight, since he owned little in the nature of real, immediately disposable, assets. If it were not for the commercial aspect of his use for the refrigerator, he would have been entitled to legal aid under State policies on consumer law, but he faced the specific exclusion of aid for 'disputes arising from commercial or investment transactions'.

It is worth noting that under the Commonwealth Policies no such exclusion specifically applies to the granting aid for consumer protection matters.

Recommendation 16: *Commercial and Investment Disputes*

Aid should continue to be available for matters arising from commercial and investment transactions for the most disadvantaged.

5.13 Consumer Protection

In some consumer protection matters, the most viable cause of action lies against a professional person such as a lawyer who advised the client prior to their entering into a transaction such as a mortgage or guarantee. This is illustrated by the above case study "Older People". While there are relatively few cases against lawyers, reported cases play an important role in reinforcing good practice and promoting consumer protection. The claim against the professional, whilst based in negligence, is in reality a consumer protection matter. Commensurately with consumer protection matters, aid should be available for such matters.

The policies currently allow for grants of legal aid for legal professional negligence claims for those who meet the special disadvantage criteria. It is appropriate that for these matters, which do not arise from a consumer transaction, they continue to be included in the policies with aid available for the most disadvantaged.

Recommendation 17: *Consumer Protection – Professional Negligence*

Aid should be available for claims against lawyers and other professionals retained to advise and represent a client for the purpose of a consumer transaction.

5.14 Coronial Inquests

While the current policies allow for the granting of aid for coronial inquests, particularly where there is a “public interest”, they do not explicitly refer to related matters including the following:

- Supreme Court proceedings including interlocutory appeals and reviews of decisions declining to hold inquests
- Submissions to Coroners to hold inquests in appropriate matters of “public interest”.

It is appropriate that the new framework clarify these ambiguities and explicitly include these matters.

Recommendation 18: *Coronial Inquests Ancillary Matters*

Aid should be available for coronial inquest ancillary matters: proceedings in the Supreme Court necessary for the proper conduct of coronial inquests; reviews of decisions declining to hold inquests; and the making of submissions for the holding of inquests; where there is a public interest.

5.15 Children

Application of the civil law policies to children warrants special mention. Currently, children are included under the “special disadvantage” category and consequently have access to legal aid for the broader range of civil law matters.

Appropriately, children hold a special place in LA NSW policies. For example, aid is available for criminal law representation and representation in care and protection proceedings for all children without a means test. Also, LA NSW plays a significant role in family law proceedings as independent children’s lawyers. It is appropriate that the special status of children continue to be acknowledged as being at most disadvantage.

Recommendation 19: *Children*

Aid should continue to be available to children in the same way as it is available for the most disadvantaged, that is subject to the means, merit and availability of funds tests in the broader range of civil law matters.

6 – Policy Ambiguities

The Review received substantial feedback about ambiguities in the current policies and the confusion that these create. A summary of this feedback is contained in the Background Paper. These ambiguities should be addressed in the development of the new framework. The previous section made recommendations with respect to some of the key ambiguities.

6.1 The Commonwealth/State Divide

There are currently separate civil law policies depending on whether matters arise under State or Commonwealth laws. This creates a number of inconsistencies as illustrated by the case study under commercial and investment transactions discussed earlier.

Unfortunately, the extent to which policy ambiguities may be clarified will be limited for so long as the Commonwealth policies are determined by the Commonwealth.

6.2 Public Interest

The current civil law policies allow for the granting of aid in public interest matters relating to coronial inquests, human rights and environmental matters. Each of these matters has a different definition of what could be considered to be a matter of “public interest”.

The Review received a submission from the LA NSW Strategic Planning and Policy Division suggesting ways in which a more consistent approach could be achieved to public interest matters in the policies. However, the public interest human rights policies are currently the subject of a separate review. The public interest environment policies were not considered in detail by this Review.

Accordingly, any revision of the policies concerning “public interest” civil law matters should await reviews of the above policies.

Recommendation 20: *Public Interest Matters*

Aid should continue to be available for public interest matters. However there should be a more consistent approach to identifying whether or not a matter demonstrates public interest, across the various matters covered by the civil law policies. Further policy development should await reviews of the human rights and environmental policies.

Recommendation 21: *Public Interest Environment Matters*

A review of the public interest environment policies should be undertaken, as these policies were not considered by this Review.

6.3 Short-Term Action

A number of current policy ambiguities are capable of being clarified in the short term, pending development of the new framework. This clarification will assist the decision making process for these matters. This clarification simply explains the current application of the policies and will not require referral to the LA NSW Board.

Recommendation 22: *Short Term – Clarify Policy Ambiguities*

The following current policies should be clarified as soon as possible:

- **Ancillary legal professional negligence** – in legally aided proceedings, aid should be available for claims against lawyers and other professionals involved in providing advice to a client for the purpose of a consumer transaction.
- **Consumer protection** – legal aid is available for legal costs disputes; local court disputes even if the defence is not one under State consumer protection legislation; tribunals where leave is granted.
- **Victims Compensation** – aid may be granted in accordance with the policies for in house representation; aid is available for appeals from the VCT.
- **Section 90AE Family Law Act** – Aid is available to people who may be at risk of losing their home, to intervene in family law property proceedings.
- **Extraterritoriality** – confirm that aid is available for proceedings in NSW arising from situations that arose either outside NSW or overseas, if there is jurisdiction in NSW.

7 – Providing Enhanced Legal Services to Priority Client Groups

The civil law program faces a number of challenges in meeting the legal needs of our priority client groups.

7.1 Minor Assistance and Advice

The number of people assisted with civil law matters through advice and minor assistance far outweighs the number of clients who receive grants of legal aid. The early intervention which is available through advice and minor assistance has the potential to contribute to the early resolution of civil law problems, resulting in many wide ranging benefits.

The range of matters that can be dealt with through advice and minor assistance is not strictly governed by the civil law policies for case representation. Minor assistance includes a wide variety of work such as negotiations to resolve a dispute, assistance with letter writing, completion of other documents, further investigations, referrals to other lawyers or services etc. However, it is not provided to all clients who attend for advice as resources are limited. It is a matter for the discretion of each lawyer to determine the level of minor assistance that will be provided, taking into account their available resources, other competing commitments and the circumstances of each client.

Access to advice and minor assistance is vitally important for our priority client groups. LA NSW lawyers providing civil law outreach services at the Aboriginal Legal Service (ALS) have observed as follows:

“ALS clients often suffer a particular level of disadvantage and so require a higher level of assistance. Aid is granted where possible but where a matter falls outside guidelines it is often necessary to provide a higher degree of minor assistance to ensure that the client receives a worthwhile service.”

The same applies to disadvantaged older people, the homeless and people experiencing mental illness.

Case Study – Assisting People Experiencing Mental Illness

I have a client who has a mental illness (psychosis) who was under 18 at the time he incurred \$850 worth of fines for travelling without a valid ticket. He is homeless. The matter came to me via the Children's Legal Service who requested that I make representations to the SDRO for waiver of the fines. The making of representations to SDRO is not within the current guidelines but this client belongs to several of our priority client groups.

For older people: substitute decision making, family agreements, estate matters, wills, end of life matters, strata title issues, are all matters that could be appropriately dealt with through advice and minor assistance.

A substantial proportion of minor assistance is given for debt related matters, fines, preparation of complaint letters, motor vehicle property damage, letters to government agencies and employment matters.

Considerable legal professional resources are expended on meeting the demand for minor assistance and advice. LA NSW civil lawyers reported that they managed a number of minor assistance matters in addition to their case loads, ranging up to 25 minor assistance matters for one lawyer situated in a regional office with a large number of Aboriginal clients. Lawyers expended varying amounts of time on minor assistance matters, ranging up to ten hours per week.

The availability of minor assistance is an important means of meeting legal needs, particularly for our priority client groups. However it is also critical that the civil law program retain a capacity to conduct litigation. The capacity to conduct civil law litigation is an important resource for the community and sets the civil law program apart, in terms of the legal skills and expertise that this develops. Therefore, a means of balancing the demand for minor assistance services with the capacity to conduct litigation needs to be found.

A sizeable proportion of minor assistance type work could be undertaken by non-legal staff or paralegals under the supervision of legal officers subject to the availability of suitable resources, tools and a comprehensive set of precedents. This system is found in the community and pro bono legal sector. A recently advertised Advocate Clerk 6/7 in the Mental Health Advocacy Service provides a good basis for the further development of advocate/paralegal positions in the Civil Law Division.

The advocates could also undertake tribunal work, particularly in the SSAT and ADB, were the policies to be amended to cover these proceedings. Such positions could also provide opportunities for professional development of the advocates in our Veterans Advocacy Service.

Advocate/paralegal positions are also likely to be attractive to people who are undertaking legal studies at tertiary level.

Recommendation 23: *Minor Assistance – Paralegals*

An appropriate number of paralegal positions should be created in the Civil Law Division to undertake minor assistance work and provide other litigation support services including court and minor tribunal court appearances and research.

Recommendation 24: *Minor Assistance – Tools and Precedents*

Suitable resources and tools including comprehensive sets of precedents and templates are developed to facilitate the undertaking of the majority of minor assistance type work by paralegals under the supervision of solicitors.

Recommendation 25: *Minor Assistance – More Structured*

Minor assistance services should be structured with more clearly expressed priorities.

Legal Professional Education and Training

The education and training needs of legal staff for advice services demand special consideration. There is scope for the development of modules of training on an annual basis to update legal knowledge in the main types of matters for which advice and assistance are sought.

The provision of advice and outreach services requires that legal staff have knowledge and skills not only across the broad spectrum of civil law but also criminal and family law. It is often not cost effective to have a legal officer from each practice area attending outreach services in remote areas.

Recommendation 26: *Legal Education for Advice Service*

Modules of training should be developed and provided on an annual basis to update legal knowledge in the main types of matters for which advice and assistance are sought. The possibilities of this being delivered via *eLearning* should be explored.

Recommendation 27: *Legal Education for Outreach*

For LA NSW staff providing outreach advice services, particularly in remote locations, training is provided to equip them to provide basic information and advice across all areas of law. The possibilities of this being delivered via *eLearning* should be explored.

7.2 Communication Strategy

The civil law program has recently implemented many new initiatives, including Civil Law Outreach at ALS offices, the Older Persons Legal and Education Unit, participation in the Homeless Persons Legal Service and homeless outreach. It is timely that a communication strategy be developed to better inform our clients and stakeholders about the variety of services available through the civil law program.

This strategy should include communication at a number of different levels including with stakeholders unique to each of the priority client groups, our partners in legal aid service delivery and more generally by better targeting the information published on the Internet.

Recommendation 28: *Civil Law Program Communication Strategy*

Develop and implement a communication strategy for the civil law program in consultation with Strategic Planning and Policy to better inform our stakeholders and clients about the range of services provided by the civil law program.

7.3 Responding to Complex Legal Needs – Future Directions

Recent literature has highlighted the “clustering” of legal issues experienced by disadvantaged people.

In Justice Made to Measure, the Law and Justice Foundation surveyed people in six disadvantaged areas in NSW regarding their legal issues. They found inter alia that certain types of legal events tended to re-cur and to co-occur and that people from certain socio-demographic backgrounds were particularly vulnerable to experiencing particular types of legal events (Coumarelos et al, 2006, p.xix).

“People with a chronic illness or disability had a higher incidence of a wide range of civil, criminal and family legal events, reporting higher rates for nine of the 10 most frequent types of events.”

(Coumarelos et al, 2006, p.xix)

“The clustering of different types of legal events also suggests that legal services need to have the capacity for resolving complex situations faced by some individuals involving multiple, concurrent, interconnected legal problems.

(Coumarelos et al, 2006, p.164)

The pathways taken by disadvantaged people to seek out assistance for legal problems do not usually initially include lawyers (Clarke et al, 2007). By utilising these “pathways”, legal aid services can more effectively work with communities to build their capacity to deal with civil law problems.

Accordingly, the civil law program will need to routinely re-assess the types of services being delivered as well as their location to ensure that priority client groups do not experience unnecessary barriers to accessing legal aid services.

Given that current research indicates that it is likely that disadvantaged people seeking assistance for one legal problem are likely to also have a cluster of other legal problems, this presents challenges to the way in which LA NSW should respond when such clients contact legal aid services. The client before the Mental Health Review Tribunal may also have tenancy, Centrelink, fines and other criminal matters pending.

A detailed UK study found as follows:

“A particularly important area is the extent to which advisers failed to expose the true extent of clients’ problems during interview. Of the clients we followed up in interview, 29 out of 58 had some additional problems not dealt with in their initial adviser interview. These were generally significant problems and about half were linked to their presenting problems in some way.

There are a variety of possible reasons for not exposing the full range of a client’s problems. These factors include pressures of time, the natural tendency of advisers to concentrate on the presenting problems, and client reluctance to raise problems which are, to them, separate from the ones they wanted advice on.

(Moorhead et al, 2006, p.92)

If LA NSW is to take a more holistic approach to assisting socially excluded disadvantaged people, many of whom are included amongst the priority client groups, to resolve legal problems, it will be vital that further consideration be given to appropriate strategies to support such an approach.

Recommendation 29: *Future Client Surveys*

Future LA NSW client surveys should include questions about the pathways taken by legal aid clients to obtain assistance for their civil law problems.

Recommendation 30: *Future Directions*

LA NSW should investigate the need for and feasibility of a system of triaging disadvantaged people utilising legal aid services to ascertain and address any multiple legal problems they may be experiencing.

8 – Conclusion

This Review has recommended an innovative way forward for the LA NSW civil law policies. It will be challenging, particularly in a climate of ongoing competing demands on limited legal aid resources. It will also place LA NSW at the vanguard of civil law legal aid policy development.

Recognition of the vital role that legal services can play in addressing social exclusion is growing. By acknowledging the contribution that LA NSW civil law services can make in preventing social exclusion and promoting social inclusion amongst disadvantaged communities, LA NSW will be participating in the

“portfolio of rational responses to social problems needed to address social exclusion”.

(Flood et al, 2006, p.96)

The recommendations made in this report will also ensure that LA NSW stands ready to meet the challenges that lie ahead.

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