

Productivity Commission
SUBMISSION COVER SHEET
(not for publication)



Australian Government
Productivity Commission

Please complete and submit this form with your submission to:

Access to Justice
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

OR

By facsimile (fax) to:

Pragya Giri (02) 6240 3399

By email: access.justice@pc.gov.au

Name (first name and surname): Kellie McDonald

If submitting on behalf of a company or organisation:

Name of organisation: Kingsford Legal Centre

Position in organisation: Law Reform and Policy Solicitor

Phone: 02 9385 9566

Mobile: _____

Email address: Kellie.mcdonald@unsw.edu.au

Street address: The University of New South Wales

Suburb/City: UNSW

State: NSW Postcode: 2052

Postal address: Same as above

Suburb/City: _____

State: _____

Postcode: _____

Please note:

- Copyright in submissions resides with the author(s), not with the Productivity Commission.
- Following processing, public submissions will be placed on the Commission's website. **Submissions will remain on the Commission's website as public documents indefinitely.**
- As this is a public inquiry, 'in confidence' material can be accepted only under special circumstances. **You should contact the Commission before submitting this material.**
- For submissions made by individuals, only your name and the state or territory in which you reside will be published on the Commission's website. All other contact details will be removed from your submission.

Please indicate if your submission:

- ☒ Is a public submission, it does NOT contain 'in confidence' material and can be placed on the Commission's website.
- ☐ Contains SOME material supplied 'in confidence' (provided under separate cover and clearly marked IN CONFIDENCE).

The Draft and Final Reports will be available for viewing from the Commission's website – would you like to receive a hardcopy?

☒ No (view online)

☐ Yes (post)



4 November 2013

Access to Justice
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By email: access.justice@pc.gov.au

Dear madam / sir,

KINGSFORD

LEGAL CENTRE

Submission on access to justice arrangements inquiry

The Kingsford Legal Centre (**KLC**) appreciates the opportunity to make submissions on your inquiry into access to justice arrangements. Our submission is drawn from the experiences of our clients and staff in dealing with the law and legal system over a period of 30 years. All case studies have been de-identified to protect our clients' confidentiality.

KLC is a community legal centre (**CLC**) and a member organisation of the National Association of Community Legal Centres (**NACLC**).

We provide free advice and casework on a wide range of legal matters to people living, working or studying in the Botany and Randwick local government areas. We also provide a specialist discrimination law advice and representation service throughout NSW. We actively participate in law reform and policy projects as well as community legal education.

Reform of which particular aspects and/or features of the civil dispute resolution system will generate the greatest benefits for the community?

We submit that the community would benefit most from education about the civil dispute resolution system and where they can go for help with their civil dispute. Civil legal services also need to be located where people go for help. This means that creating combined health and legal services is a model which needs to be promoted more broadly in order for community members to be able to access the legal help they need.

In the research undertaken by Law and Justice Foundation Coumarelos et al, the significance of where people seek help from, when they have a legal problem, cannot be overemphasised.¹ This research demonstrates how people frequently seek help from their doctors or health professional and frequently do not recognise that they need help from a lawyer.

We also note the recent research done by the Law and Justice Foundation, which found that many people do not see lawyers about their legal problems. People often talk to their doctors or other health professionals. For this reason, it is essential to create legal services which provide help to people where they are seeking help in such as in combined models of

¹ Coumarelos, Macourt, People et al, Legal Australia Wide Survey Legal Need in Australia, Aug 2012.

service delivery including health/advocacy models. These have been discussed in a range of reports such as written by Peter Noble² and Mary Anne Noone³.

This demonstrates the importance of education of the community about the law and what lawyers can do. CLCs have a long tradition of providing legal help to communities about civil disputes and are experts in community legal education. CLCs could be better resourced to provide more community legal education and assistance to community members involved in civil disputes.

The Commission invites comment and evidence on the main strengths and weaknesses of the civil justice system. What should the objectives of the civil justice system be, and are they being achieved?

We submit that while there is a shift towards early resolution of disputes through alternative dispute resolution (ADR), more could be done to ensure that legal services are delivered effectively in a preventative early intervention model. We submit that this should be the primary objective of the civil justice system.

Additionally, the current divide between State and Federal jurisdictions is very complicated and incomprehensible for clients within the legal system. From a client's perspective, they have a problem and want help from the law for it. But the legal system divides an issue into a range of ways of resolving it, in differing jurisdictions, which duplicate resources and require a huge amount of time from the client. A clear example of this is when a woman experiences domestic violence.

Jamila

Jamila arrived to Australia when she was 17 years old with her mother. Jamila speaks English well but it is her second language. In her early twenties she meets Paul and starts a relationship with him. Soon she is pregnant and she moves in with him.

Close to the birth of her child Paul begins to become physically violent, pushing her off the bed, punching the wall next to her and then punching her on the upper body. She has the baby and tells social workers about Paul. She returns to living with Paul but he becomes more violent. After 10 months they separate. However Paul continues to assault her so she eventually called the Police and so her legal saga begins.

The Police apply for an AVO on her behalf and Paul is charged with assaulting her. A few months later, Paul wants to see the child and so begins family law proceedings for contact. In an informal contact visit, Paul forcibly takes the child and does not return the child to Jamila. This causes serious trauma to Jamila and the child. Eventually Jamila begins victim's compensation proceedings.

At one point, Jamila has a lawyer for her family law proceedings and various stages of mediation, she has a Police prosecutor assisting her with the AVO, there are criminal assault proceedings in which she must give evidence, there are also breach of AVO proceedings and different solicitor is assisting her with her application for victim's compensation.

Jamila spends her time seeing psychologists, Police, lawyers, doctors and court ordered mediators. There is little direct overlap in the evidence being gathered in any one jurisdiction even though there is clear overlap in the substance. The process is overwhelming for Jamila and for her child. She is

² Peter Noble, "The Future of Community Legal Centres" 12 Alternative Law Journal Vol 37:1 (2012) 22.

³ Mary Anne Noone, "They all come in the one door" The transformative potential of an integrated service model: A study of the West Heidelberg Community Legal Service' in Pleasence, Buck & Balmer, (eds), Transforming Lives: Law and Social Process, UK The Stationary Office.

remarkable in that she ultimately gets orders for the child and Paul is found guilty of assault and breaches of the AVO. Many women would not persist with such a complicated system.

What are the benefits to individuals and the community of an accessible civil dispute resolution system? How does a failure to provide adequate access to justice impact on individuals and the community broadly?

Inadequate access to justice means that people's problems become more complex and time consuming to resolve. For example, if clients cannot get accessible and easy to access legal help then problems become more serious.

Jo and Susie

Jo and Susie live in a Housing NSW apartment. They are an older couple from a culturally and linguistically diverse background. They have two children, one of whom has been staying with them occasionally over the last few months. Their son who has been staying with them has had trouble getting a job and has had a few interactions with Police. One afternoon, their son is visiting and has been drinking alcohol. He does not get on with their neighbours and this afternoon, grabs a knife, threatens and then hurts one of the neighbours. Police are called and he is charged with an offence.

After this, Housing NSW begin eviction proceedings on the basis of Jo and Susie's son's violence.

Jo and Susie are distraught by what their son has done and about the real risk that they will be homeless. KLC is able to negotiate with Housing NSW and a solution is reached which enables Jo and Susie to stay in their home, enables their neighbours to be safe, and their son to get the help he needs with his violent behaviour.

If they hadn't been able to get help early, they could have ended up homeless, with debts to a range of service providers and dealing with a violent son without support.

What are the consequences of unmet legal need? For example what are the social and economic impacts arising from problems that are either unresolved or escalate due to lack of access to legal assistance?

The consequences of unmet legal need are many and varied. As clients seek advice from KLC at different stages of their dispute, we have the benefit of seeing the impacts arising from a lack of legal assistance earlier in their disputes.

Our clients have missed out on making claims for money they may have been entitled to because of a lack of access to legal assistance. For example, many of our clients are ineligible for statutory compensation, such as victim's compensation, employment entitlements and rental bond because they were not made aware of their rights as victims of violence, employees or tenants within time limits set out in the relevant legislation.

Some of our clients have experienced financial hardship after pursuing unmeritorious claims in courts because of a lack of legal assistance with their matter. By providing legal advice early in a dispute, we are able to mitigate losses clients may have incurred if they pursued their matter in court.

Natasha

Natasha's hand was injured by her friend's garage roller door after she grabbed for her bag while the door was closing. Natasha incurred medical costs as a result of the injury she suffered.

Natasha sought advice from us about suing her friend's home insurer for the medical costs she incurred. Natasha did not want to take any action against her friend.

We advised her that she would be unlikely to succeed if she took action against her friend's insurance company. This advice stopped Natasha initiating costly, unmeritorious legal proceedings and helped her to maintain a friendship she had, which may have broken down if legal proceedings had been initiated.

A lack of access to legal assistance has left many of our clients feeling disempowered, disillusioned, ashamed, hopeless and sometimes suicidal.

Peter

Peter was once employed as a pilot, but had not been able to work for some time due to a back injury. Peter had to move into public housing, as he could no longer afford to rent in the private market.

Banks and other creditors began harassing Peter after he failed to keep on top of his bills. Peter felt ashamed that he was in so much debt and felt hopeless as he didn't know what to do about it. He was so despondent about his mounting debts that he considered committing suicide.

KLC was able to give him advice about strategies to manage his debts and referred him to a financial counsellor, who is now helping him to budget his money and deal with his creditors.

Victims of domestic violence, tenants, employees and people experiencing financial hardship who do not have access to timely legal assistance can become homeless, at risk of homelessness or be forced to live in unsafe housing.

Lisa

Lisa was living in public housing and was subject to homophobic harassment. Lisa found alternative housing in the private rental market and Housing NSW agreed to subsidise her rent.

Shortly after signing the lease for her new property, the landlord advised her that he would not be performing necessary repairs on the property, including installing smoke alarms. Lisa did not move into the property because she did not want to live somewhere that was not safe.

A few weeks later Lisa's landlord took her to the Consumer, Trader and Tenancy Tribunal (CTTT) for failure to pay rent. The CTTT ordered Lisa to pay the landlord a large sum of money, including the bond that Housing NSW had paid to the landlord, which Lisa had to repay to Housing NSW.

Lisa had to return to living in her previous property and continues to be harassed. If Lisa had had access to legal advice early in her dispute with her landlord, she could have got an order from the CTTT her landlord perform the necessary repairs and could have settled into a new property away from harassment.

Without access to legal assistance, some of our clients' disputes have escalated to such a point that government agencies have felt obliged to intervene. This intervention can have devastating effects on our clients, causing them to turn to drugs and alcohol in order to deal with their unresolved disputes and to lose faith in government agencies and the judicial system and even expose them to the criminal justice system.

Sarah

Sarah was a victim of domestic violence at the hands of John. Concerned about the impact this violence was having on her children, she took her children and left the home she was living in with John.

Sarah approached Housing NSW for emergency accommodation for her and her children. Housing NSW made a report to NSW Family and Community Services (FACS) that Sarah was homeless. FACS removed Sarah's children from her and placed them in foster care.

Devastated by the removal of her children, Sarah began abusing alcohol and illicit drugs. Sarah was eventually charged with driving under the influence of alcohol and drugs and sentenced to a period in gaol.

Sarah lost faith in the legal system after she learned that the Children's Court had ordered that her children live with John.

Some unresolved civil disputes, particularly matters involving domestic violence and family law disputes, can result one party committing suicide or committing homicide. The Australian Institute of Criminology study analysing homicides in Australia between 1989 and 1999 found that 20.8% of all homicides involve intimate partners.

We also submit that unmet legal need also impacts more broadly on the community through increased demand for public social welfare services, such as public housing, social security, and the care and protection system and in some cases, Corrective Services.

Disputes that have escalated to the point of needing an independent person to adjudicate and determine the dispute, puts further pressure on the judicial system.

The financial and emotional impacts of individuals involved in unresolved disputes can cause individuals to be less productive and participatory in our communities, which can impact on the labour market. Loss of faith in the legal system or public authorities to adequately deal with disputes between parties can lead to civil unrest.

The Commission invites comments on the financial costs of civil dispute resolution and the extent to which these costs dissuade disputants from pursuing resolution. Data is sought – from parties, lawyers, the courts and other institutions on these financial costs, including the costs of advisory services, alternative dispute resolution and litigation.

The current federal framework for discrimination is complex and creates significant barriers to access to justice. In our experience, the most significant barrier for people experiencing discrimination is the risk of adverse costs orders in the Federal Court system.

As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints with the Australian Human Rights Commission (AHRC), preferring state-based tribunals where parties bear their own costs. Where matters are contested at a federal level, KLC's experience is that most cases settle – even very strong discrimination complaints. As a result, courts at a federal level have not developed robust jurisprudence in this area of law. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative and educative role within the community.

The system as it presently stands is a war of attrition, where even very strong cases are settled because individual complainants are unable to face the risks and pressure of litigation against well-resourced respondents.

Darren

Darren worked as a labourer. He lived in western Sydney with his young family and had a mortgage. He was sacked from his job as his employer believed he had a medical condition that could affect his job in the future. Darren disputed that he did have a medical condition and therefore did not believe it affected his ability to do his job. Darren's doctor supported this.

Darren lodged proceedings with the AHRC which failed to settle. A CLC assisted Darren and told him that his case had the potential to be a test case. Darren lodged proceedings in the Federal

Magistrates Court. Despite advice from the CLC and a barrister that his case was relatively strong, Darren accepted a low figure settlement at the Federal Magistrates Court mediation. Darren did this as he was worried about an adverse costs order and the subsequent risk that he may lose his house. He wanted to seek justice but felt the risks just seemed too great.

In KLC's experience, many of our clients find the current Commonwealth anti-discrimination process to be an ineffective means of resolving their complaints and most discrimination cases settle. We believe that many settle on terms that do not reflect the seriousness of the discrimination or that result in inadequate compensation to the complainant. Our experience is that compensation offered in conciliation agreements is generally very low (often below \$10,000). The decision to litigate in a costs jurisdiction is made even more difficult when legal costs for the latter could easily be three or four times this amount.

When considering the effectiveness of the current federal discrimination system, the high percentage of conciliated outcomes cannot in itself be seen as a success. In KLC's view, many matters settle because of the costs jurisdiction that complainants must enter if the matter does not resolve at the AHRC. As a result, many complainants settle on terms that do not reflect the merits of their case.

In addition to costs considerations, there are other barriers to accessing justice within the current discrimination framework – namely, barriers to physical access, and the psychological costs and the time commitment involved in pursuing litigation (particularly for people with disabilities). It is also difficult for people living outside metropolitan areas to commence proceedings in the Federal Court or Federal Magistrates Court without a solicitor acting on their behalf. These barriers contribute to the dearth of decided cases and expertise among the judiciary in this area of law, making it even more difficult for practitioners to provide advice on prospects of success to complainants. This leads to more cases settling and fewer systemic outcomes.

Mary

Mary used a wheelchair and felt she had experienced discrimination from a public transport provider. As a result of their conduct she had been unable to get home and had felt extremely vulnerable. She lodged a discrimination complaint with the AHRC. Her primary focus was to try and ensure that what happened to her did not happen to someone else in the future, but she also sought compensation for pain and suffering. The matter did not settle and as Mary felt passionately about the issue she lodged proceedings in the Federal Court. She received advice that it was a potential test case and a CLC acted for her. The respondents employed a large law firm and a barrister. The public transport provider fought the claim vigorously and said that Mary's claim did not have merit and that they would pursue her for their costs. Although Mary was worried about this, she continued her case.

The case settled at Federal Court mediation on the terms Mary had offered at the AHRC, nine months earlier. Tens of thousands of dollars were expended on legal fees. The CLC that assisted Mary believed the matter had not resolved at the AHRC because the respondent did not believe Mary would commence proceedings at Court, and that the matter would simply go away if it did not settle.

For the purpose of discrimination complaints, the Federal Court and Federal Magistrates Court should become a no-costs jurisdiction. An exemption should allow for costs in vexatious or frivolous proceedings or for unreasonable conduct during proceedings in line with state and territory discrimination tribunals. A no-costs jurisdiction would also ensure consistency with adverse action claims under the Fair Work Act. This is significant as many discrimination claims relate to employment matters, and so could be brought under the Fair Work Act. Therefore it is important to ensure that in relation to costs, the legislative schemes are consistent.

In our experience the costs associated with obtaining transcripts of court and tribunal proceedings in NSW can act as a barrier to individuals accessing justice. The case studies below demonstrate some of our concerns.

Jane

Housing NSW initiated proceedings in the NSW Guardianship Tribunal against Jane, an older Aboriginal woman receiving Centrelink. During the proceedings, Jane thought she heard the Housing NSW representative make racist comments about Aboriginal people. Jane contacted a CLC solicitor who advised her that if she obtained the transcript of the proceedings, and there was evidence of racist comments, she may be able to make a complaint about Housing NSW to Housing NSW, the NSW Ombudsman or the NSW Anti-Discrimination Board.

A private agency, who managed requests for transcripts, advised Jane's solicitor that it would cost in excess of \$600 for a copy of the transcript of the two hour proceedings in the Guardianship Tribunal. No fee waiver was available. Jane could not afford to pay for the transcript and therefore could not be sure whether racist comments were made and could not consider taking action against Housing NSW if racist comments had indeed been made.

Sam

We represented Sam who was a victim of domestic violence. She had an apprehended domestic violence order (ADVO) to protect her from her husband. Sam's husband continued to call and harass her after the ADVO was made. Sam's husband was charged with breaching the ADVO, however he was not convicted. Sam wanted to complain about the Police Prosecutor because she believed they did not put forward enough evidence to show that her husband had breached the ADVO. We needed a copy of the court transcript in order to complain about the Police Prosecutor. We were advised it would cost several hundred dollars to obtain a copy of the transcript. Sam could not afford to pay for the transcript.

The Commission invites comments on the timeliness of civil dispute resolution. Data are sought – from parties, lawyers, the courts and other institutions – on the time taken to resolve disputes, both in and out of court, and the satisfaction of individuals with timeliness.

We are particularly concerned with the extensive delays in the NSW Chief Industrial Magistrates Court (CIMC) at the moment. The CIMC has both civil and criminal jurisdiction under a broad range of State and Commonwealth legislation and deals with such matters as recovery of money owing under industrial instruments, for example, awards, enterprise agreements and statutory entitlements.

KLC makes use of the CIMC in matters involving employees who are owed more than \$10,000 by employers, as it is more cost-effective and user-friendly than the General Division of the Local Court and the Federal Court, and it has expertise in dealing with monies owed under industrial instruments.

We understand that one Magistrate was determining all matters listed in the CIMC until he passed away recently. Matters are now being determined by other Magistrates seconded to bench on a temporary basis. This has resulted in hearings for relatively simple matters being set down to be determined in five months' time by Magistrates who arguably lack the necessary expertise in the areas typically dealt with by the CIMC. This is very frustrating for our socio-economically disadvantaged clients who need this money for everyday expenses.

The Commission invites comments and evidence on the 'user friendliness' of the civil dispute resolution system.

In our experience the NSW Consumer, Trader and Tenancy Tribunal (CTTT) is a user-friendly, cost effective means to resolve common disputes between landlords and tenants and consumers and businesses.

Mandatory conciliation between the parties empowers parties to resolve the dispute themselves and we have found that most people are able to represent themselves in the CTTT because of the informal way Tribunal Members deal with the parties to the dispute.

However, we are still concerned that particularly disadvantaged people (discussed below) may find it difficult to access justice in the CTTT and other civil dispute resolution mechanisms, particularly when they are involved in a dispute with a better resourced party.

We submit that this potential injustice could be resolved through the increased availability of advocates, who are able to represent the interests of the disempowered party to a dispute.

Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed?

To ensure better access to justice and increased accessibility in the law, KLC supports greater consistency and clarity across federal legislation in relation to how discrimination is defined and tested. In relation to the interaction between the *Fair Work Act* and federal discrimination law, KLC notes that there can be considerable overlap between the *Fair Work Act* and federal discrimination law remedies. This has made it confusing for complainants to work out where to bring proceedings and has made the provision of legal advice in this area more crucial and complex.

There are limited opportunities for people faced with discrimination in employment to get free legal advice about their options from specialised practitioners familiar with discrimination law. We believe this lack of expertise has resulted in a lack of discrimination complaints under the *Fair Work Act* provisions. KLC sees that it is a key role of CLCs to be experts in this area and believes that the further funding of employment law and discrimination law services in CLCs is required in order for people to be properly informed and to access their rights under both the *Fair Work Act* and federal discrimination law. KLC recommends that CLCs be further funded to provide specialist advice to people experiencing discrimination in employment under the *Fair Work Act* and discrimination law in order for people to exercise their rights most effectively.

In relation to the interaction of adverse action provisions and discrimination law, KLC notes that this is an area where the law remains considerably complex and unclear. There have been varying decisions under the *Fair Work Act*, including on the extent to which discrimination law concepts and jurisprudence informs the understanding of adverse actions based on a protected attribute under the *Fair Work Act*. In particular, it is unclear whether:

- the meaning of protected attributes under the *Fair Work Act* are capable of being informed by corresponding protected attributes under Commonwealth, state and territory anti-discrimination laws;⁴ and

⁴ For example, in *Hodkinson v Commonwealth*, *Hodkinson v The Commonwealth* [2011] FMCA 171(31 March 2011) it was held that the ordinary dictionary meaning of the term „disability“ is the appropriate definition of disability for the purpose of the *Fair Work Act*. The case of *Stephens v Australia Postal Corporation* *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) [86]-[87] emphasised that the ordinary definition of „physical or mental disability“ under section 351(1) of the *Fair Work Act* should be considered in the context of the aims of the Act and therefore include any “inherent and perceived

- the phrase “not unlawful” under section 351(2)(a) of the *Fair Work Act* refers strictly to express exemptions under Commonwealth, state and territory anti-discrimination laws, or whether that phrase requires elements of discrimination under another jurisdiction to be satisfied prior to establishing adverse action.

KLC believes that it is not desirable to have widely divergent understandings, definitions and tests of discrimination under the Fair Work system and federal discrimination law. KLC also believes that some concepts of “adverse action” under the *Fair Work Act* are wider than concepts under federal discrimination law, while some concepts are considerably narrower.

KLC supports greater consistency across federal legislation in relation to how discrimination is defined and tested in order to ensure better access to justice and increased accessibility in the law. KLC supports this as long as it does not reduce current protections contained in the adverse action provisions of the *Fair Work Act*.

In order to achieve consistency KLC recommends that the *Fair Work Act* includes a non-exhaustive list of protected attributes with standardised definitions across federal discrimination law and the *Fair Work Act*. KLC recommends that the *Fair Work Act* include a non-exhaustive list of protected attributes on the grounds, which are consistent with federal discrimination law.

The current approach of Commonwealth anti-discrimination law is to identify a “ground” of discrimination in an “area” of life. Where an individual seeks to claim more than one form of discrimination, they must take action where each ground and each form of discrimination is examined in isolation with a comparator without that characteristic.

Using the case study below to illustrate the point, this requires consideration of whether the Simon has been discriminated against because of his disability or because of his race. In reality, the discrimination experienced is not merely disability discrimination plus race discrimination. In the absence of an explicit discriminatory comment about one of these attributes it can be an impossible task to prove that the discrimination was linked to any one attribute in isolation of the others. The experience of discrimination is based on the intersection of multiple identities, and Simon’s experiences cannot therefore be adequately recognised as a complaint that simply identifies disability and race discrimination. As a result, cases such as this often fail and make it more difficult for the individual to accessing civil justice.

In KLC’s experience, the definition of direct discrimination and the development of the “comparator” test have fundamentally constrained the development of discrimination law. The legal test that requires a comparison of the treatment of someone without the particular characteristic has impacted on the ability of people facing complex forms of discrimination where there is no genuine comparator. Furthermore, the exact characteristics attributed to the comparator (often hypothetical) often determine whether a case can succeed or fail. Lack of clarity over the characteristics of the comparator can lead to ambiguity as to whether a case of discrimination is strong. In the context of the costs jurisdiction of the federal court system, this creates further disincentives for complainants to pursue their case.

In order for Commonwealth anti-discrimination law to adequately protect and promote the rights of persons and groups experiencing complex forms of discrimination, it should recognise intersectional discrimination as a separate ground of discrimination. Anti-discrimination law should aim to look at the “whole person” when considering discrimination and not artificially segment the experience of people experiencing discrimination.

functional impairments or consequences in relation to presentation or work in a workplace” rather than simply the underlying diagnosis [at 90].

In order to achieve this, KLC submits that the comparator test be removed, and that intersectional discrimination be recognised as more than "multiple attribute discrimination" and that it is the effect of the intersection of multiple attributes. KLC therefore recommends that intersectional discrimination be a distinct ground of discrimination.

KLC further recommends that the definition of discrimination in anti-discrimination legislation include the ability to claim discrimination "on the basis of the intersection of two or more of these attributes".

In terms of other legislative models, KLC suggests that the Canadian Human Rights Act definition is preferred over the definition in the UK Equality Act. However, we would recommend that the definition include the words "on the basis of the intersection of two or more of these attributes" rather than the term "combination", to reflect the well-established concepts of intersectionality, and the fact that it is not merely the combination of these attributes but the intersecting nature of identities.

Finally, KLC recommends that as intersectional discrimination often impacts on individuals who are facing systemic disadvantage, in preventing them from being disadvantaged in accessing the civil justice system, a finding of intersectional discrimination should have a positive impact on the awarding of damages to reflect the impact of intersectional discrimination on individuals and to further prohibit such conduct.

What groups are particularly disadvantaged in accessing civil justice and what is the nature of this disadvantage?

KLC assists many people who find it difficult to access civil justice. We submit that the following groups are particularly disadvantaged in accessing civil justice:

- prisoners because they have limited access to legal information and advice, particularly about civil and family law matters, and limited capacity to deal with their legal problems;
- people with disabilities because they have difficulty accessing legal services, identifying and resolving their legal matters, understanding and implementing legal advice, in part due to the limited training solicitors undergo in dealing with people with disabilities;
- young people because they may have limited knowledge of the legal system and find it difficult to assert their rights with people and agencies with authority, such as, landlords, police and employers;
- victims of domestic and family violence because they have been disempowered by perpetrator of violence;
- people who are socioeconomically disadvantaged because they have limited resources to assert and enforce rights and may have complex, interrelated problems;
- people at risk of homelessness because they are in a disempowered bargaining position and have limited resources to assert their rights;
- employees because they are in a disempowered bargaining position;
- Aboriginal and Torres Strait Islander people because of entrenched discrimination in our communities and distrust of government agencies; and
- sexual minorities because they may fear being outed and / or violence.

Individuals with a disability and single parents were more than twice as likely to experience legal problems, and other groups with high vulnerability are the unemployed and people living in disadvantaged housing.⁵ Accessible infrastructure and technology are very important for people with a disability, and industry codes may be very useful in improving access for people with a disability.

Those groups particularly disadvantaged in accessing civil justice are those individuals who may experience complex forms of discrimination. We submit that anti-discrimination law has failed to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination which has meant that the law has not been utilised by the most disadvantaged people in our community – that is, people experiencing complex forms of discrimination.

Intersectional, or compound, discrimination is where a person's identity includes more than one attribute of potential discrimination – for example, a person with a disability who is Indian, or an Aboriginal woman.

Simon

Simon, an Aboriginal elder from northern NSW was forced to leave his community and move to a large town so that he could access dialysis treatment, which he requires three times a week. Many non-Aboriginal people who live outside his town and who require regular medical treatment are able to use community transport services to take them to the hospital and accordingly are able to remain in their communities. However, the community transport service does not travel to many of the Aboriginal communities, including to the Simon's town. Unable to drive, Simon had no choice but to leave his community.

Simon is not being discriminated against because of his disability – as community transport is provided to others who require dialysis. Nor is he being discriminated against because of his race, as other Aboriginal people can access community transport when they are healthier and able to walk or drive to another town. It is really the intersection between these two attributes that have led to the discrimination.

According to the Legal Australia-Wide Survey on Legal Need in New South Wales, taking no action in response to legal problems was a more common response among some disadvantaged groups including those with low education background and non-English speaking background. While inaction may be suitable in some circumstances, some reasons for inaction were stress (30%), cost (28%) or not knowing what to do (21%).

What is also the nature of a disadvantage for some groups accessing the civil dispute system is the highly procedural nature of the Federal Court system which makes it difficult for self-represented litigants (or anyone other than a barrister) to effectively comply with the court rules and procedures. Therefore, KLC recommends that the Government give consideration to developing a more litigant-in-person friendly specialist court or division where the procedures are relaxed and the processes are more accessible for individuals who conduct their own matters, especially those matters in discrimination.

What mechanisms help people deal directly with their own legal needs? How successful and cost-effective have these been in resolving disputes?

Giving legal advice to clients at an early stage is an effective way of helping people deal with their disputes. KLC runs three evening advice clinics each week, seeing up to fifty clients

⁵ Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' in Access to Justice and Legal Needs (vol. 7), Law and Justice Foundation of New South Wales, August 2012.

every week for legal advice. While some of these clients are able to manage their legal dispute, others are not. Being able to access accurate, reliable, accessible legal advice is essential for members of the community.

Maria

Maria had a car accident two years ago, had reported it to the Police at the time, but then never heard anything. The accident was her fault as she pulled out into traffic without checking properly for other cars. After two years she has received a letter claiming damages to another car. However the damage was much more substantial than what she believed she caused. Maria was also concerned that the repairs were only been done in the last two months.

KLC was able to help her write a letter in response and explain to her what her options were. Maria was able to return to KLC for further advice and help. She was able to reach a negotiated solution to her legal problem, without having to go to court.

One of the other key areas of work of CLCs, including KLC is community development and law reform. This is a cost effective way of resolving disputes by skilling community members to raise issues themselves with their local members of parliament, or relevant agencies, and it also ensures that shared issues can be dealt with jointly.

KLC has recently worked with tenants in South Maroubra and other local public housing estates about getting repairs done on their homes. Tenants have met with each other, used their local tenant councils and meetings with Housing NSW representatives to raise issues of concern especially around housing repairs.

KLC has helped tenants groups taught tenants how to write effective submissions and letters to members of Parliament. Some tenants have developed better relationships with Housing NSW and serious repairs issues have been resolved.

How might ADR be strengthened to improve access to justice? In what circumstances or settings is it appropriate (or not) to facilitate greater use of ADR in resolving civil disputes?

KLC supports the appropriate use of ADR to improve access to justice. We submit that ADR is most effective when all parties to a dispute are able to fully participate in negotiations to resolve the dispute. We submit that parties are best able to participate in ADR when power between the parties is the same or comparable.

We submit that an imbalance in power between the parties can result in unjust outcomes for the disempowered party engaged in ADR. We submit that ADR between the following parties may result in unjust outcomes for the disempowered party:

- victims of domestic and family violence with perpetrators of violence;
- employees with employers;
- tenants with landlords;
- debtors with creditors;
- individuals with public authorities;
- people with disabilities and people who are socioeconomically disadvantaged may have difficulty fully participating in ADR generally.

We submit that the disempowered parties involved in disputes may be assisted by advocates who are able to represent their interests in ADR. CLC solicitors and workers commonly perform this role, negotiating on behalf of disadvantaged parties who find it difficult to do so themselves.

Li

Asian Women at Work, an organisation which aims to empower Asian women workers, referred Li to us for advice about unfair dismissal.

Li was regularly bullied by a male colleague while employed and on one occasion reacted to his bullying and threw tea at him.

Two days after this incident Li was called into a meeting with her superiors where she was dismissed. Another Cantonese speaking employee was asked to attend the meeting to translate for our client. Li was not asked for her side of the story and the word 'dismissal' was lost in translation. Li did not realise that she was being dismissed until a team leader escorted her out of the building.

We represented Li in an unfair dismissal application at the Fair Work Commission. Our client wanted to be reinstated. We successfully negotiated for our client to be reinstated before the matter went to arbitration, on the condition that she receive a written warning about her behaviour. We negotiated with her employer to re-word the warning to reflect the circumstances of her actions. Li has since resumed her job.

We submit that ADR be strengthened by better resourcing CLCs and other advocacy services to represent the interests of disempowered parties to civil disputes.

The Commission invites comments on the scope and operation of ombudsman services in Australia.

KLC believes that the NSW Ombudsman's role in the oversight of complaints made about NSW Police is inadequate. Whilst the current system of complaints allows for some degree of independent oversight by the Ombudsman, the Ombudsman's role is essentially limited to oversight / review only. The Ombudsman's Office does less than 12 direct investigations per year.⁶

We submit that the current system is open to abuse as it relies primarily on senior police officers investigating other police officers in the same station or same Local Area Command.

CLC solicitors have observed that clients demonstrate or express:

- a lack of confidence in the police complaints system by potential (and actual) complainants;
- frustration with the process and outcomes (particularly the lack of information provided); and
- fear of (or actual allegations of) retaliation or retribution by police (eg unexpectedly laying charges against the complainant).

KLC is concerned that many potential complaints are not being lodged, and police actions are going unchecked.

The Québec Ombudsman found that:

"in investigations of serious incidents involving police officers, the process must guarantee the rights of both the citizens concerned and the officers and must take into account the

⁶ Meeting with Mr Gleeson, Manager of Police Division, NSW Ombudsman's Office, 3 May 2010.

realities of police work and the circumstances of the event being investigated. The process must ensure not only that justice is done, but also the “appearance of justice.”⁷

In our view, the current system suffers from a lack of independence and impartiality (and from a perception of a lack of independence and impartiality).

Independence refers to organisational mechanisms that help foster an arm’s length relationship and independence with regard to the subject of the investigation. It mainly consists of ensuring that the persons in charge of the investigation have no ties to the police organisation involved.⁸

Impartiality refers to the absence of prejudice, whether favourable or unfavourable, with regard to one of the parties involved in the events. With respect to enforcement of the ministerial policy, the concerns expressed about investigator impartiality focus in particular on the strength of police solidarity. One of the practices applied in Canada and the UK to address these concerns is to ensure that qualified and competent civilians play a greater role in the investigative process.⁹

KLC calls for a greater level of independence and impartiality in complaint handling and investigation. Investigations of complaints about NSW Police should be managed (and conducted to the greatest extent possible) but by the Ombudsman, the Police Integrity Commissioner, or a new independent investigations body.

Some of the funds currently used by NSW Police for complaints management, and by the NSW Ombudsman for oversight, could be reallocated for this purpose.

Please feel free to contact us should you have any questions about this submission.

Yours faithfully,
KINGSFORD LEGAL CENTRE

Anna Cody
Director

Kellie McDonald
Solicitor

⁷ *The Québec Investigative Procedure for Incidents Involving Police Officers: For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect*, Le Protecteur Du Citoyen (Québec Ombudsman), February 2010. Available at: <http://www.protecteurducitoyen.qc.ca/en/>

⁸ *The Québec Investigative Procedure for Incidents Involving Police Officers: For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect*, Le Protecteur Du Citoyen (Québec Ombudsman), February 2010, p.7. Available at: <http://www.protecteurducitoyen.qc.ca/en/>

⁹ *The Québec Investigative Procedure for Incidents Involving Police Officers: For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect*, Le Protecteur Du Citoyen (Québec Ombudsman), February 2010, p.6. Available at: <http://www.protecteurducitoyen.qc.ca/en/>