

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

ACCESS TO JUSTICE IN THE A.C.T.

REPORT NO.2 OF THE STANDING COMMITTEE ON LEGAL AFFAIRS
JUNE 1993

TERMS OF REFERENCE

On 25 June 1992 the Legislative Assembly passed the following resolution:

That the Standing Committee on Legal Affairs:

(1) Inquire into and report on the accessibility of the legal system addressing the following questions:

- (a) which socio-economic groups are disadvantaged and given advantage under the current legal system;
- (b) how accessible is the legal system across the socio-economic spectrum;
- (c) how can the legal system be made more accessible;
- (d) are legal charges reasonable compared to other professions;
- (e) should the legal profession retain control over conveyancing of property or should the ACT adopt a similar Land Brokerage system as used in South Australia and elsewhere; and
- (f) any other question the Committee considers relevant.

(2) The Committee to report to the ACT Legislative Assembly by the first sitting in April 1993.

On 20 August 1992 the Legislative Assembly passed the following resolution:

That the resolution of the Assembly of 25 June 1993, referring the accessibility of the legal system to the Standing Committee on Legal Affairs for inquiry and report be amended by omitting paragraph 1(e).

On 25 March 1993 the Legislative Assembly passed the following resolution:

That paragraph (2) of the resolution of the Assembly of 25 June 1992, as amended on 20 August 1992, referring the accessibility of the legal system to the Standing Committee on Legal Affairs for inquiry and report, be amended by omitting 'by the first sitting in April 1993' and substituting 'by the last sitting day of June 1993'.

COMMITTEE MEMBERSHIP

Mr Gary Humphries	(Chairman)
Mr David Lamont	(Deputy Chairman)
Ms Helen Szuty	(Appointed 25 February 1993)

Secretary (Acting):	Judy Starceovich
Administrative Support:	Karen Pearce

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RECOMMENDATIONS

The Committee recommends that:

1. the ACT Attorney-General's Department coordinate a public campaign to widely disseminate information on the component parts of the legal system in the ACT and the means of access to them. The Law Society of the ACT should be approached to take part in the campaign (Paragraph 2.30);
2. the ACT Attorney-General's Department evaluate cost structures paid by the ACT Government for legal services (Paragraph 3.20);
3. the ACT Government review the membership of the Community Law Reform Committee to ensure that a wider cross-section of interests within the community are represented (Paragraph 3.29);
4. the Legal Aid Commission (ACT) produce an information paper on its role, sources of funding, means of access and criteria for assistance and widely disseminate this information through the ACT Attorney-General's Department public campaign on the legal system (Paragraph 5.10);
5. the ACT Government press for a review of the funding formula for legal aid (Paragraph 5.20);
6. the eligibility tests for legal aid be reviewed with the view to addressing access and types of cases presented for legal aid (Paragraph 5.23);
7. the ACT Attorney-General's Department in conjunction with the ACT Legal Aid Commission undertake a review of the number of applicants who do not meet the Commission's eligibility tests but are still unable to afford legal costs. The results of the review should be used in determining the level of funding for legal aid (Paragraph 5.26);

- 8 the ACT Attorney-General's Department monitor the frequency of use of the Night Time Service provided by the Welfare Rights and Legal Centre as one method of assessing demand for out of hours services (Paragraph 5.39);
9. the ACT Attorney-General's Department determine the impact of the regional nature of the ACT as a provider of legal services so that the ACT Government can determine the percentage of its budget used for this purpose (Paragraph 5.44);
10. the Committee undertake a separate inquiry into the operation of the legal profession in the ACT (Paragraph 6.4);
- 11 the ACT Government place a moratorium on the appointment of Queen's Counsel until the Committee has completed its inquiry into the legal profession in the ACT (Paragraph 6.19);
12. as part of the public campaign on the legal system to be coordinated by the Attorney-General's Department, people be encouraged to shop around for legal advice and other legal services (Paragraph 6.28);
13. the ACT Government approach the Commonwealth Government to urge a review of the right of businesses to claim business litigation as tax deductions (Paragraph 6.35);
14. the Committee undertake a separate inquiry into the court system in the ACT with particular reference to the procedures used in the courts and the costs of administering justice in the ACT (Paragraph 8.3);
15. the Registrars of the Magistrates and Supreme Courts in the ACT liaise with each other to produce an information paper on all aspects of the court system. This paper should be used in the proposed public campaign on the legal system to be coordinated by the ACT Attorney-General's Department (Paragraph 8.7);

16. the ACT Government give consideration to making it mandatory that alternative dispute resolution methods such as mediation be used before any action is heard in court (Paragraph 8.29);
17. the ACT Government give consideration to the establishment of a computerised information system for the court system in the ACT and as part of that process examine the IJIS system used in the Northern Territory (Paragraph 8.40);
18. the ACT Education Department further develop programs for legal education in schools in cooperation with school communities, the legal profession and the ACT Attorney-General's Department (Paragraph 9.8)
19. the ACT Government give consideration to the extension of interpreter services for the courts, legal centres and other community centres as well as the printing of legal documentation in other languages (Paragraph 9.13); and
20. the ACT Government examine the feasibility of providing legal databases for general community access through public libraries (Paragraph 9.19).

1. INTRODUCTION

Background

1.1 The Standing Committee on Legal Affairs was formed on 27 March 1992 to:

inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community relating to administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, law reform and consumer affairs.

1.2 On 25 June 1992 the Assembly passed the following resolution:

That the Standing Committee on Legal Affairs:

- (1) Inquire into and report on the accessibility of the legal system addressing the following questions:
 - (a) which socio-economic groups are disadvantaged and given advantage under the current legal system;
 - (b) how accessible is the legal system across the socio-economic spectrum;
 - (c) how can the legal system be made more accessible;
 - (d) are legal charges reasonable compared to other professions;
 - (e) should the legal profession retain control over conveyancing of property or should the ACT adopt a similar Land Brokerage system as used in South Australia and elsewhere; and
 - (f) any other question the Committee considers relevant.
- (2) The Committee to report to the ACT Legislative Assembly by the first sitting in April 1993.

1.3 On 20 August 1992 the Chairman moved that the resolution of the Assembly of 25 June 1993, referring the accessibility of the legal system to the Standing Committee on Legal Affairs for inquiry and report, be amended by omitting paragraph 1(e).

1.4 The Chairman stated that he considered it was appropriate to discharge that particular part of the reference as the Attorney-General had released a discussion paper on the question of conveyancing property and the licensing of conveyancers in the ACT. He also argued that most political parties had a particular position on the issue and it would cause difficulty for him to respond in the public arena as his party's spokesman on the issue while, as Chairman of the Standing Committee on Legal Affairs, he was undertaking a parliamentary inquiry on the subject.¹

1.5 The amendment was agreed to by the Assembly.

1.6 On 25 March 1993 the Chairman moved that the reporting date for the inquiry be extended from the first sitting in April to the last sitting day in June 1993. The extension was agreed to by the Assembly.

1.7 On 25 February 1993 the Assembly passed a resolution appointing Ms Helen Szuty to the Committee.

Conduct of the inquiry

1.8 The inquiry was advertised in the *Canberra Times* on 6 March 1993.

1.9 The Committee also wrote to a number of individuals and organisations requesting a written submission. A total of ten submissions were received. A list of those who provided written submissions is at Appendix A.

1.10 On 22 April 1993 the Chairman expressed concern in the media over the limited public response to the inquiry. In particular, the Committee was disappointed that submissions from private individuals relating their personal experiences with the legal system were not forthcoming.

1.11 The Committee held a public hearing on 6 May 1993. This gave the Committee the opportunity to question those with major interests in the legal system at length. A list of those who appeared as witnesses is at Appendix B.

¹ Hansard: 20 August, 1992 p.1881.

1.12 As part of the inquiry the Committee visited Darwin on 25 and 26 May 1993 and examined the court system in the Northern Territory. Discussions were held with the Registrars of the Supreme and Local Courts and tours were conducted of the court buildings. Discussions were also held with the Attorney-General for the Northern Territory, the Honourable Daryl Manzie, MLA.

1.13 The Deputy Chairman also met with representatives from the Department of Law in Darwin. Discussions with departmental representatives centred on information technology as it related to the keeping of court records, procedures and other information for court purposes.

2. CURRENT INQUIRIES INTO THE LEGAL SYSTEM

2.1 There is general dissatisfaction with the high cost of legal services and growing recognition that change to the legal system is necessary.

2.2 A number of inquiries into the legal system are currently underway at both the state and federal levels of government in Australia. The following information is not intended to represent an exhaustive list of this momentum for change.

Senate inquiry into the cost of justice

2.3 On 10 May 1989 the Senate referred an inquiry on the legal system to the Senate Standing Committee on Legal and Constitutional Affairs.

2.4 Amongst its terms of reference, the Committee was asked to inquire into and report on the cost of legal services and litigation in Australia including lawyers' fees, charges and overheads, as well as delays, costs, listing arrangements, hours of operation and overheads in the court system. The Committee was also asked to determine whether the cost of taking legal action was unacceptably high, to examine the provision of legal aid, and to determine whether there was any practicable alternatives to the present legal system.

2.5 The inquiry became known as the Inquiry into the Cost of Justice, reflecting its main concern that the community should have access to affordable means of enforcing their legal rights.

2.6 As part of the inquiry two background papers, one on the English Legal Profession and the other on the role of market forces in the access to legal services, were produced. The Committee also issued eight discussion papers. They were:

- . Introduction to the issues;
- . Lawyers' Fees;
- . Contingency Fees;
- . Methods of Dispute Resolution;
- . Legal Ethics;

- . The Courts and the Conduct of Litigation;
- . Legal Aid – 'For Richer and for Poorer'; and
- . The Legal Profession – A Case for Microeconomic Reform.

2.7 In February 1993 the Committee tabled its report, *The Cost of Justice: Foundations for Reform*.² The report, which deals with the issues in conceptual terms, made four recommendations. In particular, it recommended that the Senate provide the Committee with a continuing reference enabling it to monitor and report annually on specific initiatives undertaken to increase access to, or reduce the overall cost of, justice, and on the cost of justice generally.

2.8 The Senate Committee intends to deal with the matters referred to it in its original terms of reference progressively and produce additional reports on the various aspects of the legal system it has examined. The Committee considered that a one-off report would not provide and maintain the permanent momentum for change needed for effective reform of the legal system and because the issues raised are so wide and complex that they are better dealt with in a series of reports.³

Trade Practices Commission inquiry into the legal profession

2.9 In April 1991 the Trade Practices Commission (TPC) announced a major study of the professions. The objective of the study is to examine the effects of current regulatory practices on competition in the markets for professional services.

2.10 As part of its study of the legal profession the TPC released an Issues Paper in July 1992.⁴

² *The Cost of Justice: Foundations for Reform*. Report by the Senate Standing Committee on Legal and Constitutional Affairs. February 1993.

³ *ibid* p.3.

⁴ Legal Profession, Study of the Professions. Issue Paper. Trade Practices Commission. July 1992.

2.11 The objectives of the study are to:

- . clarify the role of the trade practices law and competition policy in relation to the legal profession;
- . identify the nature and extent of the public benefits that may arise from the various regulations and restrictions that apply to the market for legal services;
- . examine the likely effects of the current restrictions on the cost, quality and availability of legal services; and
- . canvass options for reform of the existing regulatory arrangements in ways which would contribute to greater competition and efficiency without jeopardising public benefits.⁵

The push for change in NSW

2.12 The Fahey Government in NSW has proposed a number of changes to the operation of the legal system in NSW.

2.13 In November 1992 the Attorney-General, the Honourable John Hannaford MLC, released an issues paper entitled, *The Structure and Regulation of the Legal Profession*.⁶ The paper raised a number of matters relating to the NSW profession for discussion.

2.14 The paper builds on the work of the NSW Law Reform Commission reference to inquire into and review the law and practice relating to the legal profession undertaken between 1976 and 1984; the Lord Chancellor's 1989 white paper which made a number of recommendations for reform of the legal profession in Britain; the

⁵ *ibid* pp.2-3.

⁶ Issues Paper, *The Structure and Regulation of the Legal Profession*. Attorney-General's Department NSW. November 1992.

Victorian Law Reform Commission Inquiry into Access to Law and the Senate inquiry discussed above.

2.15 The paper stated that in the light of those inquiries a further inquiry in NSW would serve no useful purpose. Rather, it was appropriate to consider the issues raised in the inquiries referred to above and to determine whether it is in the public interest that the regulation, structure or practices of the legal profession be amended.

2.16 The paper emphasised that no assumptions should be drawn that reform is necessarily warranted.

The Committee's approach

2.17 The national and interstate developments described above have relevance to the ACT since the legal system in the ACT is analogous to that operating in other areas of Australia.

2.18 The Committee welcomes the fact that it was able to use and build on the work of those inquiries.

2.19 Indeed, the Law Society of the ACT suggested that, in terms of efficiency, it might be best that the Committee waited until the Senate inquiry was completed.⁷

2.20 The Committee took the view that its role was to focus primarily on the features of the legal system peculiar to the ACT.

2.21 The Chairman informed the Law Society that the Committee did not want to re-invent the wheel as far as the federal parliament inquiry was concerned. However, the Committee hoped it would be able to come to more specific conclusions in relation to how the ACT court system operated, the relationships that existed between the court system and the legal profession and the costs associated with the legal system in the Territory.⁸

⁷ Transcripts 6.5.93.

⁸ Transcripts 6.5.93.

2.22 The Committee is aware that a number of bodies within the ACT are currently examining aspects of the legal system. The role of the Community Law Reform Committee and the Canberra in the year 2020 study are discussed in Chapter 3.

2.23 In this report the Committee makes a number of recommendations which it considers will increase the accessibility of the legal system in the ACT.

2.24 Recommendations for further inquiries by the Committee into particular areas are made in the appropriate places in the report.

The provision of information

2.25 The Committee found that the overriding problem with its inquiry into the accessibility of justice in the ACT was the lack of readily accessible information on the various component parts of the legal system.

2.26 This lack of readily available information was widespread throughout the community and hindered access to the legal system.

2.27 To address this problem the Committee considers that a number of stakeholders should produce information papers on their roles, objectives, practices and procedures.

2.28 These are recommended where appropriate in the remainder of this report.

2.29 The Committee considers that the dissemination of this information should be co-ordinated by the ACT Attorney-General's Department in conjunction with the Law Society of the ACT.

2.30 The Committee recommends that:

the ACT Attorney-General's Department coordinate a public campaign to widely disseminate information on the component parts of the legal system in the ACT and the means of access to them. The Law Society of the ACT should be approached to take part in the campaign.

3. ACT GOVERNMENT LEGAL INITIATIVES

3.1 The ACT Attorney-General's Department provides ongoing support to the government of the day in the area of law and justice. Its various functions, therefore, impinge on the quality of justice and the accessibility of the legal system in the ACT.

Initiatives undertaken by the ACT Attorney-General's Department

3.2 The ACT Attorney-General's Department stated that it actively strives to improve the quality of community access to justice and is committed to ensuring that access and equity is a primary focus in developing laws. For that reason, the Department believed that ACT laws should be visible, sensible, understandable and cost effective.⁹

3.3 The Department has adopted a number of strategies to enhance community access to justice. Twelve strategies were identified by the Department.

3.4 The Department reviews all new and amending laws to ensure that where an administrative decision materially affects a person's right, the person has a right to seek a review of the decision on the merits of the case.

3.5 The Department also assists in the development of government policy generated from other agencies and examines cabinet submissions for adherence to public interest protections such as civil liberties and the protection of Constitutional guarantees.

3.6 The Department actively pursues a policy of reducing the cost of justice through the review of laws which delay or frustrate justice and the implementation of processes which make justice more cost effective. Under this policy the Government funds the ACT Conflict Resolution Service as an alternative dispute resolution service and has initiated a number of inquiries which will impact on this area. The work of the Community Law Reform Committee on the Rules of Court is one example of those inquiries.

⁹ Submission No.9.

3.7 Under its criminal law policy the Government reviews all new or amending criminal laws to ensure that penalties and criminal procedures are fair, appropriate and consistent with other criminal laws.

3.8 In the area of human rights the ACT has enacted legislation which makes various forms of discrimination unlawful and which provides avenues for citizens to seek redress.

3.9 The Government has also enacted legislation that removes some of the barriers previously faced by those with mental or physical disabilities, and persons acting for them, in managing property and other interests. The Guardianship and Management of Property Tribunal was established for this purpose and the Office of Community Advocate represents and protects the interests of this client group.

3.10 The Department analyses international conventions, particularly those concerning human rights matters, to determine their applicability and whether there is any need to revise ACT laws.

3.11 The Department has also adopted a plain english approach to the drafting of legal forms and explanatory materials.

3.12 The Community Law Reform Committee has been established to assist the Government in the examination of law reform issues. This Committee is discussed below.

3.13 The Department places a continuing emphasis on providing structured opportunities for the community to participate directly in the setting of the law reform agenda and in the development of specific reform proposals. Besides the Community Law Reform Committee, other processes for community access are the Criminal Law Consultative Committee and the Consumer Affairs Advisory Committee.

3.14 The ACT Law Reform Program also ensures a coherent and structured approach to the process of reform and review of legislation.

3.15 Finally, the ACT Government is an active participant in the Standing Committee of Attorneys-General which acts as a national co-ordinating body for the making of Australian uniform laws. The ACT also participates in a number of other Ministerial forums with law reform agendas.

The ACT Government as a user of the legal system

3.16 It was suggested by the Legal Aid Commission that the briefing scales government agencies pay to solicitors was too high. This in turn impacts on the cost of justice.

3.17 The Commission stated that it had told the Senate cost of justice inquiry that the Commonwealth was allowing its government solicitors and its other agencies, such as the DPP, to brief at levels approximately twice that which it allowed the Legal Aid Commission through its funding mechanisms.¹⁰

3.18 The ACT Attorney-General's Department suggested that the Commission's view was based on its experience in a number of Commonwealth trials where the ACT Legal Aid Commission was unable to match the quality of representation provided simply because it could not afford to pay for such services.¹¹

3.19 The Committee considered that since this issue impacted on the cost of justice it warranted further investigation.

3.20 The Committee recommends that:

the ACT Attorney-General's Department evaluate cost structures paid by the ACT government for legal services.

The Community Law Reform Committee

3.21 The Community Law Reform Committee was established in June 1990.

3.22 Its role is to provide expert advice to the Government on law reform issues and any references it receives.

¹⁰ Transcripts 6.5.93.

¹¹ Transcripts 6.5.93.

3.23 At present the Committee is considering nine references. They are:

- . victims of crime;
- . domestic violence;
- . residential tenancy law;
- . sexual offences;
- . public assemblies and street offences,
- . defamation;
- . natural death;
- . mandatory reporting of child abuse; and
- . rules of court.

3.24 The Law Reform Unit of the ACT Attorney-General's Department provides secretariat support for the Chairperson and the Committee.

3.25 In principle, the Committee's membership seeks to ensure community input into law reform issues.

3.26 The Legal Aid Commission suggested that the Community Law Reform Committee was not a suitable model to examine procedural and structural reforms of the legal system.¹² Rather, the Commission saw the need to establish a focal point within the community charged with proposing such changes. Its primary charter should be to increase the quality of justice. Such a working party should not be a bureaucracy of its own but should be constituted of participants in the legal system and by community members who have special expertise in the area of access to the legal system. This would include judges, magistrates, groups such as ACTCOSS, Legal Aid and other community bodies.

3.27 The Committee examined the membership of the Community Law Reform Committee. It considers that while a variety of groups are represented, membership is slanted towards those with expertise in the legal profession at the possible expense of the representation of community interests.

¹² Transcripts 6.5.93; Submission No.5.

3.28 The Committee considers that this imbalance needs to be addressed.

3.29 The Committee recommends that:

the ACT Government review the membership of the Community Law Reform Committee to ensure that a wider cross-section of interests within the community are represented.

Canberra in the year 2020 study

3.30 On 20 August 1992 the Assembly passed a motion requiring the Government to inquire into and report on strategic planning in the ACT addressing the key question, 'What should Canberra be like in the year 2020?'.¹³

3.31 The motion required the Government to provide quarterly reports on the progress of the study to the Assembly, with a final report being due on the first sitting day of August 1993.

3.32 During the second stage of the study, 11 issues papers and one background paper were prepared. These papers, which cover a wide range of subject areas important to the future development of Canberra, were tabled by the Chief Minister on 25 February 1993.¹⁴

3.33 Issues Paper No.6, *Law and Justice*, is designed to stimulate debate about the legal and justice related aspects of Canberra's future. The paper states that a key part of the vision of law and justice in the year 2020 is the aim that all members of the community will have access to a fair, affordable and timely system of justice. The three concepts in this outcome are access, fairness and timeliness.

¹³ Hansard: 20 August 1992 pp.1902-05.

¹⁴ Hansard: 25 February 1993 p.529.

3.34 Options canvassed in the paper to improve access to justice include:

- . allowing para-legals to compete with the legal profession in certain areas such as conveyancing;
- . streamlining court procedures to make litigation quicker and cheaper;
- . special forms of legal assistance such as suitors' fund and legal insurance;
- . reform of compensation law to widen coverage and to reduce the overall cost to the community; and
- . greater self-service, such as 24 hour self-serve searches of legal databases or registers.

3.35 Suggested proposals to make the ACT court system more efficient and accessible ranged from the technical to the procedural, among them computerised production of transcripts, and evidence being taken and given interstate and overseas by videolink.

3.36 While the study is being carried out by the Government, a Reference Group was appointed by the Chief Minister in April 1993.

3.37 The Reference Group consists of a chair and fourteen members. The membership of the Group reflects a wide range of community interests including sport and recreation, multiculturalism, youth, the arts, business and unions.

3.38 The Committee considers that the membership of the Group includes a wide cross-section of the community which will provide a varied input into consideration of the law and justice issues.

4. WHO HAS ACCESS?

Identifying advantaged and disadvantaged groups

4.1 When referring the inquiry to the Committee, Mr Michael Moore, MLA stated:

people in the middle of our society, those who are not so poor that they can access legal aid but are perhaps what may be described as lower middle class, seem to have a great difficulty in getting access to reasonable legal representation. Those with money to burn can access the best legal representation and that gives them significant advantage.¹⁵

4.2 Mr Moore's statement reflected the accepted convention that the poor and the rich in the community have access to legal services while those on middle incomes do not.

4.3 The validity of this proposition is now being widely questioned.

4.4 The Legal Aid Commission stated that:

There is a platitude in currency that only the rich and the poor can afford justice. We have no difficulty with the proposition that the rich can access the legal system. Indeed the statement is a tautology. However, as to the poor, we believe that the situation is more complex. The issue becomes one of the quality of access. The legal system can cater for a spectrum of levels of service delivery. Much will of course will be beyond the capacity of a poor person.¹⁶

¹⁵ Hansard: 25 June, 1993 p.1275.

¹⁶ Submission No.3.

4.5 This view was echoed by the Welfare Rights and Legal Centre. The Centre argued that poor people do not gain access, not only because of the lack of funds but also because they are intimidated by a system which they do not understand, which they do not perceive as serving their needs and because they are not aware of the services which are available to them. In fact the legal system was not generally accessible to most people except in a very limited way because most people with a need for a sustained legal action could not afford to undertake the action. The result was that to a limited degree most people can gain access to the legal system if it is essential that they do so but this access may be inadequate to address their real needs and many people are precluded because their need to gain access is not 'desperate' enough.

4.6 The Centre further stated that:

In our opinion it is difficult to say that any group is advantaged in our legal system. The costs of undertaking any sustained legal action are now prohibitive. Of course many people do access the legal system to obtain basic advice and to have simple procedures carried out for example conveyancing. However, for most people, even relatively well off people, engaging in anything more than a limited legal action is not possible. It is our opinion that whether one can gain adequate representation within the legal system at an affordable price is largely a matter of luck.¹⁷

4.7 ACTCOSS also argued that the convention referred to in paragraph 4.1 was a myth. This was because while it is true that legal aid is available so that the poor will get a grant of aid in some situations, there are categories of work which are not covered. For example, to obtain a grant of legal aid in family law matters there **must** be an issue or dispute between the parties. If the parties are simply negotiating a settlement so that there is no impasse reached there will not be a grant of legal aid.¹⁸

¹⁷ Submission No.6.

¹⁸ Transcripts 6.5.93.

4.8 ACTCOSS also stated that, of those who the Council came in contact with, the unemployed were the most disadvantaged of all. This was because the Legal Aid guidelines gave weight to the possibility of loss of employment in consideration of granting aid. This created the anomaly of punishing the person who has no job to lose. In addition, migrants were disadvantaged due to language difficulties.¹⁹

4.9 According to the ACT Legal Aid Commission Canberrans were disadvantaged in their access to justice which was capable of socioeconomic classification by population. This disadvantage took the following forms:

- (a) cultural (including communication);
- (b) financial;
- (c) intellectual (including mental illness);
- (d) sexual; and
- (e) being under 18 years of age.

4.10 Advantage in the legal system, therefore, existed in the following forms:

- (a) financial (including corporate status);
- (b) taxation deductibility; and
- (c) the converse of (a) - (e) above.²⁰

4.11 The Conflict Resolution Service identified the advantaged groups as those with the funds (private or public), good language ability and those who are used to and comfortable with the legal system. Consequently, groups which suffer various levels of disadvantage included migrants, Aboriginal and Islanders, young people, those with disabilities and those with limited income but not qualifying for legal aid.²¹

4.12 Also in terms of advantage, ACTCOSS identified the business sector as the one notable group who are relatively advantaged under the legal system. This was because

¹⁹ Submission No.5.

²⁰ Submission No.3.

²¹ Submission No.4.

legal costs of all types incurred by persons in the course of their business are tax deductible. These commercial users of the legal system can use the legal system 'liberally with economic impunity'.²² This issue is addressed further in Chapter 6.

Barriers to access

4.13 The high cost of undertaking legal action is the most obvious barrier to accessing justice. However, many other barriers can also be identified.

4.14 The ACT Attorney-General's Department listed a number of barriers which frustrated community access to justice. In addition to the high cost of justice, they are:

- . communication barriers as a result of legal jargon so that many members of the community may be unaware of their rights and obligations under the law;
- . communication barriers as a result of language difficulties for those from non-English speaking backgrounds;
- . information barriers as a result of the community's lack of knowledge about the structure of government in the ACT and changes to ACT law;
- . physical barriers as a result of the often inappropriate location of public legal facilities;
- . physical barriers because accessing the written law is difficult for people without the knowledge of law libraries and bookshops so that location of the written law and the immense volume of laws is an impediment;
- . attitudinal barriers due to the mystique of the law which has a reputation of being elitist, mysterious and costly so that people avoid seeking legal solutions because of misconceptions and misunderstandings about the legal process;

²² Submission No.5.

attitudinal barriers due to misconceptions about the role of the ACT Attorney-General's Department; and

cultural barriers which result from the fact that since the legal system is Anglo-Saxon in origin those of different cultural backgrounds find the legal system daunting, inflexible and insensitive to their cultural concerns.²³

4.15 The Conflict Resolution Service also referred to a number of barriers affecting access to the legal system. Besides financial cost, language was a hindrance for many newer immigrants. Language was also an issue for people with disabilities of sight, hearing and speech impairment as well as the intellectually disabled and mentally ill. Cultural differences also affect the way in which people use the legal system since some communities see the court appearances as something shameful leading to the avoidance of taking civil action. Lack of trust in the justice system is a further factor which prevents people from using the legal system which was often based on prior experience with the justice system. Young homeless people, Aboriginals and Islander groups and some migrants have negative experiences of their treatment by authorities. Lack of information and awareness about the legal system is a factor for all groups who lack experience in the justice system.²⁴

4.16 ACTCOSS reflected the views of the Conflict Resolution Service when it stated that migrants face two difficulties: the first barrier is the stylisation of legal language and the fear of legal process arising from negative life experiences in their country of origin. In addition to this and the cost of justice, ACTCOSS argued that complex procedural laws provided a barrier to access.²⁵

²³ Submission No.9.

²⁴ Submission No.4.

²⁵ Submission No.5.

4.17 The Committee concurs with the views expressed about people who lacked access to the legal system. It has used the barriers identified to devise recommendations to facilitate greater access.

5. THE PROVISION OF LEGAL AID

5.1 The recognition that the cost of justice is prohibitive to many within the community is partially offset by the provision of various forms of legal assistance. The Committee examined the major forms of assistance in detail.

The Legal Aid Commission (ACT)

5.2 The Legal Aid Commission, historically, has aimed to provide the level of service used by the 'prudent self-funded litigant'. It does this within limits set by four eligibility tests.²⁶

5.3 The means test is a guideline of the Legal Aid Commission established under the Legal Aid Act. It operates by way of a sliding scale, taking into account the likely cost of proceedings in determining eligibility: the more expensive the proceedings, the more capacity for a person to be eligible. However, because of restricted funding, the ACT office has been operating with a ceiling of eligibility of \$156.73 net per week (the net figure being the figure achieved by deducting allowable deductions from gross income). The Commission stated that this restriction allows people on very modest incomes eligibility to legal aid, but it does not permit access to what might be considered 'middle class incomes', or even in some cases moderately low incomes.

5.4 The 'class of matter test' is another Commission guideline. It involves the listing of the types of matters for which the Commission would normally expect a person would be eligible for legal aid. The major categories include criminal, domestic violence and children's matters. Criminal matters are restricted to those cases where a person, if convicted, is likely in the opinion of the Chief Executive Officer, to be imprisoned, to be dismissed from employment or to otherwise lose livelihood or vocation. In family law matters, applicants must convince the Commission that all reasonable steps, including where appropriate counselling or mediation, have been taken to resolve matters in dispute and there remains a dispute of such substance that legal aid is warranted. In access proceedings, the Commission also needs to be satisfied that in access disputes, a real issue as to the welfare of the child is involved.

²⁶ Submission No.3.

5.5 Section 28(3)(b) of the Legal Aid Act establishes a 'prospects' test which requires the Commission to consider whether the proceedings are likely to terminate in a manner favourable to the person. This has historically been interpreted as imposing a requirement that the case be shown to be at least 50% likely to be successful.

5.6 The fourth eligibility test is imposed under section 28(3)(a) of the Legal Aid Act. It requires the applicant for legal assistance to show that the nature of the benefit likely to be gained from a grant of assistance warrants such a grant.

5.7 The Legal Aid Commission argued that the continued effect of these hurdles has regulated the provision of grants of legal assistance to 2281 people in the ACT in 1991/92. Of those, 39% of the matters were criminal, 51% were family matters and 10% were civil matters. Average case costs were \$1,153 criminal, \$1,465 family and \$4,010 civil.

5.8 However, the Commission also provided legal services in the form of free legal advice and duty services to 11,223 people which represents 3.8% of the ACT's population. The services offered by the Commission include:

- . free legal advice at the Commission's North Building, Civic;
- . duty lawyer services at the Magistrates Court on each of the court's sitting days;
- . a domestic violence legal service including duty solicitor services for applicants for protection orders, operating each working day; and
- . grants of legal assistance to 1,049 people in 1991/92 who received the services of private practitioners.

5.9 The Committee concluded that while the community was generally aware of the existence and role of the Commission, there was widespread lack of knowledge about its role, sources of funding, means of access and criteria for assistance. The Committee considers that the Commission should take steps to increase community awareness of its role through the production of an information paper.

5.10 The Committee recommends that:

the Legal Aid Commission (ACT) produce an information paper on its role, sources of funding, means of access and criteria for assistance and widely disseminate this information through the proposed ACT Attorney-General's Department public campaign on the legal system.

Problems with the provision of legal aid

5.11 The Commission acknowledged that community demand for legal assistance was greater than the Commission's capacity to provide such services.

5.12 The most obvious reason for this shortfall was the limited nature of the Commission's funding.

5.13 The Commission stated that despite the volume of material which is coming forward to suggest micro-economic reform of the legal system, it had not sighted any proposals which suggested the significant level of reform which would obviate the need for funding injections into significant areas of the legal system.²⁷

5.14 While the Commission admitted that there were many ancillary services such as legal aid which are part of that proposition, it believed that you could not target any specific area of the legal system where more money should be spent. The system needed to be examined holistically.²⁸

5.15 The Commission's funding comes from three sources: the Commonwealth and ACT Governments, the Statutory Interest Account of the ACT Law Society and the Commission's clients though contributions levied on them and costs recovered in successful civil cases.

²⁷ Submission No.3.

²⁸ Transcripts 6.5.93

5.16 In 1991-92 the two Governments provided \$3.16 million between them, the Statutory Interest Account \$0.5 million and recovered costs \$0.95 million.

5.17 The two Governments have an obligation under a Funding Agreement between them to share Government funding in the ratio of the Commonwealth's 55% to the ACT's 45%.

5.18 The Government funding formula, which is applied throughout Australia, funds the Commission at 1987/88 levels with adjustments for movement in the cost of living and average weekly earnings. This led to an additional \$90,000 being available for the ACT Commission in 1991-92. The Commission stated:

The formula rests on two assumptions. It assumes incorrectly that the legal aid provided in 1987/88 was adequate and that needs have not increased since. It assumes further, also incorrectly, that the cost of using the legal and justice system has not increased more than has the cost of living and average weekly earnings. Accordingly the effect of the agreement in recent times has been to reduce Commission capacity to assist its target group.²⁹

5.19 The Committee shares the Commission's concern about the formula used to determine funding. It is of the opinion that the formula should be reviewed.

5.20 The Committee recommends that:

- the ACT Government press for a review of the funding formula for legal aid.

5.21 The Legal Aid Commission also identified a number of problematic areas with the provision of legal aid in the ACT. These were based on the restrictions put in place by the eligibility tests and included:

- criminal proceedings where a person is not likely to go to gaol or lose their job or other livelihood;

²⁹ Legal Aid Commission (A.C.T.) Fifteenth Annual Report 1991-92, p.6.

family court proceedings where there is no substantial dispute between the parties but where the parties are seeking court orders for certainty as to their affairs; and

proceedings with the flavour of a commercial or employment dispute; and

matters before the Guardianship Tribunal.³⁰

5.22 The Committee considers that cases in these areas may warrant the provision of legal aid more than some cases passing the eligibility tests. Accordingly, it is the Committee's opinion that the Commission should have more flexibility in determining which cases it will accept.

5.23 The Committee recommends that:

the eligibility tests for legal aid be reviewed with the view to addressing access and types of cases presented for legal aid.

5.24 In addition to the above areas the Commission highlighted the issue of the unmet legal needs of those who 'fail' the Legal Aid Commission's mean test but who may nevertheless be unable to afford the costs of legal services. The Commission was unable to provide any estimate of the extent of the problem.

5.25 It is the Committee's opinion that the determination of the extent of this problem would facilitate the determination of the real need for legal aid funding.

5.26 The Committee recommends that:

the ACT Attorney-General's Department in conjunction with the ACT Legal Aid Commission undertake a review to determine the number of applicants who do not meet the Commission's eligibility tests but are still unable to afford legal costs. The results of the review should be used by the ACT Government in determining the level of future funding for legal aid.

³⁰ Submission No.3.

5.27 The Legal Aid Commission also stated that, as an acknowledgement in part that community demand for legal information is greater than the Commission's capacity to deliver it in terms of traditional legal services, the Commission embarked, in 1992, on a project of community legal education. The Commission stressed that these programs were not intended to be a substitute for appropriate legal services but were designed to assist ACT residents to define and redefine legal issues so that any financial, personal or other costs were minimised.

5.28 Examples of the Commission's education activities in 1992 are:

- . women's information sessions dealing with issues such as family law, domestic violence and the like held in Tuggeranong;
- . information sessions on legal aid to newly arrived migrants and refugees, in consultation with the Department of Immigration, Local Government and Ethnic Affairs;
- . bilingual information sessions on family violence at the Migrant Resources Centre;
- . a seminar on family law and family violence for school counsellors;
- . completion of a booklet with Belconnen TAFE for information on multilingual legal and social services in the ACT; and
- . an information sheet for non-English speaking background people as to court procedures and personnel.³¹

5.29 The Committee commends the Commission for its effort in these areas.

The role of the Welfare Rights and Legal Centre

5.30 The work of the Legal Aid Commission is complemented by that carried out by the Welfare Rights and Legal Centre.

³¹ Submission No.3.

5.31 Like the Legal Aid Commission, the funding for the Centre comes from three particular sources: the Commonwealth Government as part of its legal aid budget, the ACT Government and the Law Society.

5.32 However, unlike the Legal Aid Commission it is a community legal centre for the ACT area and therefore is not government run.

5.33 The Centre operates as a specialist centre by providing advice in the areas of social security, tenancy and consumer credit. It provides both night and day time services.

5.34 The Day Time Service is means tested and deals only with those areas of the law designated above. The Service is staffed by paid employees consisting of three full time solicitors, one part time solicitor, three para-legal support staff, an administrator and a part-time librarian.

5.35 The Night Time Service has been operating for approximately 12 months providing advice in any area of law. It is supervised by one of the paid solicitors but otherwise is staffed by volunteer solicitors and law students.³² The Night Time Service has been very successful to the extent that up to approximately 1000 have accessed the service over the last 12 months. The Centre hoped to obtain government funding for the service in the future.³³

5.36 The Centre also emphasised its limited funding for all its services. It stated:

Our Centre provides a good service to those who get to us but we cannot afford to advertise our service, and therefore make it available to more people because we are too small to deal with the demand that would be generated by advertising.³⁴

³² Submission No.6

³³ Transcripts 6.5.93.

³⁴ Submission No.6.

5.37 As such it argued that the only way in which people are going to be able to achieve adequate access to the legal system is by making more community legal services available. This was because, in a situation where salaried solicitor's incomes do not determine the fees which are set and for whom the length of an action is not relevant to the advice which they give, it would appear that costs can be significantly reduced.

5.38 The Committee considers that the Night Time Service provided by the Centre would provide a useful indicator of the demand for legal aid.

5.39 The Committee recommends that:

the ACT Attorney-General's Department monitor the frequency of use of the Night Time Service provided by the Welfare Rights and Legal Centre as one method of assessing demand for out of hours services.

5.40 The Committee considers that its recommendations in relation to the Legal Aid Commission if adopted will also have a positive impact on the role and resources of the Centre.

The ACT as a regional provider of legal services

5.41 The Legal Aid Commission pointed out that the ACT was very much a regional centre in the delivery of legal services. In the Commonwealth sphere the Canberra Family Court Registry serves a large area of southeast New South Wales and a small area of northern Victoria. Further, a substantial minority of people appearing before ACT criminal and civil courts are not residents of the ACT.

5.42 The Commission stated:

Indeed the Legal Aid Office's statistics show that at least 10% of its budget is spent on people who are not residents of the ACT but who are before the courts in the ACT. Thus while the ACT is itself a relatively small jurisdiction with few geographical hurdles to access, the statement is not universally true. We are aware of the difficulties

of access to appropriately legal advice in family law matters in country New South Wales. That difficulty impacts on this Office.³⁵

5.43 Similarly, the Welfare Rights and Legal Centre stated that it offered advice and representation to social security recipients in New South Wales living in the area designated as the South West Area for Social Security purposes and advice to local New South Wales residents in the areas of tenancy and consumer credit.³⁶

5.44 The Legal Aid Commission stated that allowance for this situation was made through the Commonwealth Grants Commission. However, only a marginal allowance was made through this process.³⁷

5.45 The Committee considers that the regional nature of the ACT as a provider of legal services must be fully taken account of in funding allocations.

5.46 The Committee recommends that:

the ACT Attorney-General's Department determine the impact of the regional nature of the ACT as a provider of legal services so that the ACT Government can determine the percentage of its budget used for this purpose.

The Legal Advice Bureau

5.47 Free legal advice can also be obtained from the Legal Advice Bureau which is accessible to people with any legal problem.

5.48 The Bureau was opened by the ACT Law Society on 1 August 1973. It is staffed by two solicitors each week day.

5.49 The number of people helped by the Bureau is approximately between 2000 and 2500 each year.

³⁵ Submission No.3.

³⁶ Submission No.6.

³⁷ Transcripts 6.5.93.

5.50 Although solicitors at the Bureau covered the full range of legal advice, in 1991 for example, a third of the clients had sought advice on family law, 12 per cent on criminal law, 13 per cent on civil debts and 6 per cent on commercial agreements. Just over a third of those who had sought advice needed to be referred to a solicitor for further assistance. In the bulk of cases, however, solicitors on duty had been able to provide sufficient assistance themselves. They would also refer people to other services such as counselling.³⁸

5.51 The work of the Legal Advice Bureau increases access to justice for ACT residents. The Committee commends the Law Society for the work of the Bureau.

³⁸ *Canberra Times* 24 March 1992.

6. THE LEGAL PROFESSION

6.1 The 1993 High Court decision of *Dietrich vs The Queen* established legal representation as a necessary condition of a fair trial.

6.2 The Committee received a number of submissions which identified problems with the operation of the legal profession in the ACT. The basis of the evidence was that the problems identified made the legal profession and legal representation inaccessible to some sections of the ACT community.

6.3 The Committee was unable to give each of those issues raised the attention they warranted. It considered that on the basis of the evidence received a separate inquiry into the legal profession was needed.

6.4 The Committee recommends that:

the Committee undertake a separate inquiry into the operation of the legal profession in the ACT.

6.5 The following information addresses the main evidence received during this inquiry. It will form the basis of the Committee's proposed future inquiry but is not intended to represent an exhaustive list of issues on the profession that the Committee intends to pursue.

The legal profession in the ACT

6.6 The ACT has over 100 legal practices. Those practices conduct over 600,000 legal transactions per year. In the last year the costs for those transactions was \$63 million. The average return to practitioners is about \$48,000.³⁹

³⁹ Transcripts 6.5.93.

6.7 The Law Society of the ACT stated:

The fact is that the legal system as a whole serves our community well and secondly most clients receive good service from a responsive legal profession which handles matters in a thoroughly professional manner for a competitive fee.⁴⁰

6.8 The work of the Legal Advice Bureau was discussed in Chapter 5.

6.9 Members of the legal profession in the ACT also participate in many other community based activities. In particular, during Law Week, Canberra lawyers dispense free legal advice in shopping centres, hospitals and by telephone.

6.10 The Legal Aid Commission stated that:

We believe that those who receive grants of legal assistance have access to high quality legal services, whether provided by private practitioners or by practitioners employed by the Commission. We believe that there is insufficient community appreciation of the dedication of a large number of Canberra lawyers to helping the disadvantaged through the Legal Aid program. Indeed without that dedication and support of the program, the program could not survive. This comment applies to solicitors and to barristers.⁴¹

6.11 ACTCOSS also noted that:

While legal charges have been widely criticised as excessive, it should be noted that many legal practitioners undertake 'pro bono' work. This expectation of free service does not extend to other high skill

⁴⁰ Submission No.8.

⁴¹ Submission No.3.

professions. For example, society does not anticipate that surgeons, pathologists, etc will perform free services 'for the good of the people'.⁴²

6.12 The Committee commends members of the legal profession who participate in voluntary work in the ACT.

6.13 In Chapter 2 the Committee recognised the need for wider dissemination of information on the legal system and the role the Law Society should play in the process. The Committee is confident that the Law Society will accept the role proposed.

Structure of the legal profession

6.14 Mr S H Pyne suggested that a way of reducing legal costs in the ACT was to remove the requirement in the ACT Supreme Court that barristers must be briefed by a solicitor. The submission also stated that, in appropriate circumstances, there was no need for a competent barrister to be supported by a solicitor or a 'senior counsel' to be supported by a 'junior counsel'. These proposals would reduce the large amount of unproductive yet costly time that was wasted by the legal profession in attendance at courts.⁴³

6.15 The Committee intends to examine the structure and operation of the legal profession in its proposed inquiry.

6.16 However, at this stage the Committee has some concern about the future appointment of Queen's Counsel in the ACT.

6.17 In NSW the appointment of Queen's Counsel has been discontinued.

⁴² Submission No.5.

⁴³ Submission No.7.

6.18 The Committee considers that until it has completed its proposed inquiry the ACT Government should not appoint any additional Queen's Counsel.

6.19 The Committee recommends that:

- the ACT Government place a moratorium on the appointment of Queen's Counsel until the Committee has completed its inquiry into the legal profession in the ACT.

Fee structures and competition within the legal profession

6.20 One of the most important factors in the cost of justice is the rate of fees charged by the legal profession.

6.21 ACTCOSS stated that:

Charging rates vary a little between firms and subject matter but few firms in Canberra are charging less than \$150 per hour, and many charge substantially more. In some cases firms are charging \$300 per hour, including for family law matters notwithstanding that the scale rate is approximately \$110 per hour. At these rates there are few people even in the large middle class of Canberra that can afford any form of protracted legal services.⁴⁴

6.22 It was also contended by ACTCOSS that there was no genuine competition for fees in the legal profession and a monopoly existed.⁴⁵

6.23 The Council suggested that one way to address this was to impose mandatory maximum court scales on solicitors.

⁴⁴ Submission No.5.

⁴⁵ Transcripts 6.5.93.

6.24 Alternatively, ACTCOSS suggested that solicitors be required to:

- (i) disclose in advance their charging rate;
- (ii) provide a realistic opportunity for clients to shop around for competitive rates; and
- (iii) have an affordable and accessible means by which clients can have their accounts taxed.

6.25 Solicitors should also be required to:

- (a) advise clients at the commencement of the first interview of the cost of that interview;
- (b) at the conclusion of the first interview, if the solicitor has received instructions to act, take no step (except in emergencies) until the solicitor writes to the client confirming the instruction to act; setting out clearly the charging basis; estimating the cost of the work and advising the client of his/her right to obtain quotations from other solicitors. Most of this advice should be in the form of a standard notice.

6.26 The Committee intends to examine the issue of solicitors' charging rates in its impending inquiry including the introduction of some form of contingency fee system for the ACT.

6.27 However, the Committee considers that people should be encouraged to shop around for legal advice, obtain a quote before proceeding and seek regular acquittal against the quote as the case proceeds.

6.28 The Committee recommends that:

as part of the public campaign on the legal system to be coordinated by the ACT Attorney-General's Department, people be encouraged to shop around for legal advice and other legal services.

6.29 As indicated in Chapter 4, ACTCOSS identified the business sector as the one notable group which is relatively advantaged under the legal system because legal costs of all types incurred in the course of business are tax deductible.

6.30 The TPC stated that over 60% of court time in Australia is taken up by corporate disputes.

6.31 This not only impacts on the cost of and access to justice through the use of the court system but it also impacts on the legal fees charged. This is because the high fees businesses are able to pay creates unrealistic expectations in the legal profession causing an inflationary effect on fees charged for all clients.⁴⁶

6.32 The tax deductibility of legal costs also means that when an individual takes on a company this greatly advantages the company in relation to recovery of its legal costs, even in a loss situation.

6.33 The Federal Attorney-General in his report to the TPC stated that tax deductibility ought to be removed at the Commonwealth level for all legal proceedings of corporations.

6.34 The Committee agrees that this imbalance must be removed but believes that in some circumstances business litigation might justify some tax deductibility. The Committee believes that the right to claim tax deductions should be limited.

6.35 The Committee recommends that:

the ACT Government approach the Commonwealth Government to urge a review of the right of businesses to claim business litigation as tax deductions.

⁴⁶ Transcripts 6.5.93.

The awarding of costs

6.36 The awarding of costs in court cases also impacts on who has access to justice.

6.37 ACTCOSS argued that the American system of costs was superior to the English system. In the American system each party bears their own costs, irrespective of the outcome, except in frivolous or vexatious matters. Under the English system the loser generally pays.

6.38 It was ACTCOSS's experience that the English system of costs is a substantial deterrent to low income people exercising their rights, even if they were able to obtain representation on a pro bono basis. The threat of costs from the other side was a deterrent to a large number of low-income people.

6.39 The Law Society was asked to comment on the proposal of abolishing the awarding of costs against losers in court proceedings as occurs under the American system where each side bears its own costs. The Society stated it was not a matter that would affect lawyers one way or the other.⁴⁷

6.40 The Committee intends to examine the issue of the awarding of costs during its proposed inquiry into the legal system.

Advertising by the legal profession

6.41 Restrictions on advertising by members of the legal profession have been removed in the ACT.

6.42 ACTCOSS claimed that while there has been some advertising by solicitors, particularly in the local papers, this was for conveyancing only. As such solicitors did not advertise their rate of charging for general legal work. ACTCOSS also claimed that this was a result of attitudinal collusion between law firms. Tacit agreement

⁴⁷ Transcripts 6.5.93.

existed that if one firm advertised the other firms would also have to and this would drag down the fees charged by all firms.⁴⁸

6.43 The Committee concluded that clients, in some cases, are still confused about the range of expertise available in the legal profession in Canberra notwithstanding the right of solicitors to advertise.

6.44 The Committee considers that the Law Society should examine the points made by ACTCOSS and encourage all solicitors to advertise the services they provide and charges levied.

Regulation of the legal profession

6.45 The legal profession is regarded as being in a privileged position within the community in that it is self-regulated.

6.46 The Law Society provided the Committee with a copy of its *Guide to Professional Conduct and Etiquette*.

6.47 The Society argued that it received approximately 130 complaints a year concerning individual members. Given that approximately 600,000 transactions are conducted each year in the ACT this represents .01% of transactions about which complaints are made.⁴⁹

6.48 In a dissenting report into the Senate's cost of justice inquiry Senators Schacht and Spindler stated:

Self-regulation is truly a privilege, and it is a privilege that the legal profession has abused. The evidence put before the Committee demonstrates in the clearest terms that the legal

⁴⁸ Transcripts 6.5.93.

⁴⁹ Transcripts 6.5.93.

profession is incapable of self-regulation, particularly in the setting of its prices and in the handling of complaints against its members.⁵⁰

6.49 ACTCOSS urged the Committee to consider the recommendations of the Federal Attorney-General who asked the Senate inquiry to seriously consider moving the statutory powers of the Law Society over conduct, discipline, admission and associated matters and fee structures which they indirectly had through the Federal Costs Advisory Committee. ACTCOSS argued that those powers should reside in a community based board so that the community was empowered to determine the standards and fees that it wanted from the legal profession.⁵¹

6.50 In its proposed inquiry the Committee intends to consider whether self regulation of the legal profession should be allowed to continue in the ACT. Amongst its considerations will be the proposal for more effective review and complaint mechanisms including consumer representation on legal bodies which set fees and handle complaints against lawyers.

⁵⁰ Cost of Justice, op. cit, pp.35.

⁵¹ Transcripts 6.5.93.

7. COMPARING THE LAW WITH OTHER PROFESSIONS

7.1 Part 1(d) of the Committee's terms of reference required the Committee to consider whether legal charges were reasonable compared to other professions.

7.2 Mr Michael Moore, MLA stated:

Professionals of the same standing in society as lawyers, such as doctors, have a very restricted fee basis and can still do their jobs extremely well. A specialist gets more than a general practitioner and perhaps that's part of the general solution.⁵²

Determining criteria for comparative purposes

7.3 The Welfare Rights and Legal Centre stated that it believed that the question as to whether legal charges were reasonable compared to other professions was not a particularly good one. This was because if one asked whether solicitors believe that legal charges were reasonable they might say that they were too low. In terms of the average solicitor's ability to survive given overheads and 'status pressures' such solicitors might well be right. Alternatively, if one asked whether clients believed they are reasonable they may say they are too high. In terms of the average person's ability to pay, such clients might also be right.

7.4 The Centre suggested that some criteria, relevant to the practice of the law, needed to be set against which the level of fees could be assessed. The Centre did not suggest what criteria it thought would be appropriate.⁵³

7.5 A range of statistics are collated by a number of bodies which have the potential to be used for a comparative study of this nature.

⁵² *Canberra Times*, 27 June 1992.

⁵³ Submission No.6.

7.6 For example, the Australian Bureau of Statistics collates information on income levels within the legal profession.

7.7 Similarly, the Australian Institute of Judicial Administration has collected information on the cost of civil litigation in intermediate courts in Victoria and Queensland.

7.8 The Committee concluded that making such comparisons required the consideration of a wide range of issues. These included the supply of and demand for solicitors, infrastructure used by solicitors such as accommodation and other overheads, and the impact of infrastructure outlays on fees.

7.9 It would also be necessary to determine what precisely was being compared with what. For example, what sized legal firms should be compared with which particular professions providing what level of services?

Lawyers' Incomes in Australia Report

7.10 A report prepared for the Law Council of Australia by Richard Blandy and Frances Robertson of the National Institute of Labour Studies, Flinders University of South Australia, is one study which attempts to determine solicitors' incomes in comparison with other professions.⁵⁴

7.11 The research was conducted using evidence from the previous three Censuses, from the ABS 1986 Income Distribution Survey, from the 1989 Melbourne Graduate Survey and from the 1989 NILS National Survey of Lawyers.

7.12 Amongst their findings Blandy and Robertson concluded that:

the average incomes of lawyers are approximately the same as the average income of other professional groups in Australia;

⁵⁴ R. Blandy and F. Robertson, *Lawyers' Incomes in Australia*. Report to the Law Council of Australia.

the dispersion in lawyers' incomes is greater than for some other professional groups. Hence some lawyers earn large incomes compared with these other professional groups. These lawyers are atypical, however, and their large incomes are counter-balanced by lawyers earning low incomes by comparison with other professional groups;

lawyers' real incomes remained approximately constant over the decade from 1975/76 to 1985/86. Some professional groups' real incomes rose over this period and others fell. Lawyers' incomes did not increase in any unusual way over this period; and

years of experience have an important effect on lawyers' incomes, as do promotion to Senior Counsel or partner in a large firm. Main field of work may also effect a lawyer's income.

Comparing professions in the ACT

7.13 The ACT Attorney-General's Department stated that it was not aware of any comparative study of legal charges with other professional charges in the ACT. The Department commented:

A detailed empirical study might be costly – in time and money. The value of such a study would need to be examined closely – it might prove difficult to compare different professions in terms of cost-outcomes and, even if this could be done, what would it establish?⁵⁵

7.14 While the Committee believes that a study of the nature needed to address the issue would have some merit, it concurs with the ACT Attorney-General's Department that such a study would be costly in terms of time and money and would require overcoming many comparative analytical difficulties.

7.15 The issues raised in this section will be further addressed in the Committee's proposed inquiry into the legal profession.

⁵⁵ Submission No.9.

8. THE COURT SYSTEM

8.1 The evidence received during the inquiry gave rise to a range of issues relating to the court system in the ACT.

8.2 The Committee considers that the importance of these issues warrant a separate inquiry into the court system.

8.3 The Committee recommends that:

the Committee undertake a separate inquiry into the court system in the ACT with particular reference to the procedures used in the courts and the costs of administering justice in the ACT.

8.4 The following information summarises the evidence received by the inquiry and addresses the major issues the Committee intends to pursue in its proposed inquiry into the ACT court system.

8.5 It was indicated in Chapter 2 that the overriding problem the Committee found with the accessibility of the legal system in the ACT was the lack of easily available information on the various component parts of the legal system.

8.6 The Committee considers that the Registrars of both the Magistrates and Supreme Courts in the ACT should liaise with each other to produce an information paper on all aspects of the court system.

8.7 The Committee recommends that:

the Registrars of the Magistrates and Supreme Courts in the ACT liaise with each other to produce an information paper on all aspects of the court system. This paper should be used in the proposed public campaign on the legal system to be coordinated by the ACT Attorney-General's Department.

Court procedural rules

8.8 A number of submissions emphasised that a major problem with the legal system was the complex procedural rules imposed in both the Magistrates and Supreme Courts.

8.9 The Legal Aid Commission stated that reforms targeting the removal of unnecessary complexity, duplication and formality in court procedural rules should be continued.

8.10 ACTCOSS contended that the complex procedural laws used in the ACT courts were not necessary. The Council proposed dispensing with the rules which are an effective barrier to anyone other than trained lawyers using this system. The complexity of procedural laws is such that it represents a substantial barrier even to inexperienced lawyers.

8.11 The Conflict Resolution Service also emphasised the unnecessary formality of the legal system.

8.12 The Committee is aware that the Community Law Reform Committee has released a discussion paper on the Rules of Court.

8.13 The Committee agrees that a significant means of increasing access to justice is to streamline court procedures which will make litigation quicker and therefore cheaper. It intends to examine court procedural rules in its inquiry into the court system in the ACT.

The nature of the adversarial system

8.14 Another problem identified with the legal system was its adversarial nature.

8.15 ACTCOSS stated:

In general movement should be towards facilitating self advocacy where legal representation cannot be afforded. This will be assisted by movement towards an inquisitorial system where the Court is charged

with a statutory responsibility to ensure all relevant evidence is put before it irrespective of a party's capacity to comply with the procedural and evidential rules.⁵⁶

8.16 The Committee considers the adversarial nature of the legal system is best addressed through the use of tribunals and mediation services.

The role of tribunals

8.17 Historically, tribunals were designed to increase access and efficiency by avoiding the formality and complexity of courts.

8.18 The Legal Aid Commission argued that the history of tribunals has been marked by an accretion of barriers such as complex interlocutory procedures, complex documentation, fee structures and requirements in relation to legal representation.

8.19 The Commission referred to the Administrative Appeals Tribunal (AAT) which began as a people's self-help process against adverse government decisions. The Commission stated it was now fairly structured in terms of interlocutory process, including representation. These all impact on the costs of the system.⁵⁷

8.20 ACTCOSS maintained a more positive view of the AAT. It argued that the AAT managed to run million dollar cases such as superannuation, customs, compensation, taxation, etc., without recourse to complex procedural rules.

8.21 However, ACTCOSS also referred to the inappropriate use of tribunals. In particular, the Council commented that under the Small Claims Act claims under \$5,000 can be commenced in the Small Claims Court where no legal costs are allowed, no rules of evidence apply and procedural rules are minimal. Solicitors in Canberra, however, have adopted the practice of commencing claims in the Magistrates Court which could have been commenced in the Small Claims Court. This was done, it suggested, to maximise solicitors' gains.

⁵⁶ Submission No.5.

⁵⁷ Transcripts 6.5.93.

8.22 The Council suggested that perhaps it should be mandatory for all claims under \$5000 to be commenced in the Small Claims Court.

8.23 Any litigant is able, where the amount claimed is below \$5,000, to require the matter to be dealt with in the Small Claims Court. This matter will be further reviewed during the Committee's proposed inquiry into the court system.

Alternative dispute resolution

8.24 The use of processes other than the courts to resolve disputes suggests provision should be made for a wider and more cost-effective range of dispute resolution structures.

8.25 In addition to the use of tribunals there is a range of informal dispute resolution mechanisms, such as conflict mediation services.

8.26 The Conflict Resolution Service stated that fear of and mistrust in the legal system requires some changes to the nature of services provided.

In particular, accessible and non-adversarial methods of dispute resolution need to be further developed to complement the formal justice system. Community mediation as offered by the Conflict Resolution Service in the ACT and by Community Justice Centres in NSW does provide a viable option for many parties in dispute. It seems to be attractive across all socio-economic groups. About 25% of parties are from NESB [non-english speaking background] – compared to the population figure of 12%. Young people are increasingly making use of the service, as are pensioners and people on low incomes.⁵⁸

8.27 The Law Society supported the important role of mediation services.

⁵⁸ Submission No.4.

8.28 While the Committee intends to examine alternative methods of dispute resolution in its proposed inquiry immediate consideration should be given to the requirement to resort to alternative dispute resolution methods such as mediation before any action is heard in court.

8.29 The Committee recommends that:

the ACT Government give consideration to making it mandatory that alternative dispute resolution methods such as mediation be used before any action is heard in court.

Physical access to the ACT courts

8.30 Physical access to the court buildings is also important to the over all accessibility of the legal system.

8.31 The ACT Attorney-General's Department recognised that the Court buildings inherited by the ACT provided real barriers to community access to justice.⁵⁹

8.32 The Law Society stated that with the Magistrates Court being dispersed to a number of locations this caused problems with the efficient handling of cases. Confusion as to exactly which location a case was being heard at can lead to an application to have the judgement set aside and the matter re-opened which adds to the cost of justice. The Law Society concluded that the new \$17 million court building which will house all of the Territory's courts would greatly enhance efficiency.⁶⁰

8.33 Similarly, the Legal Aid Commission stated that it was strongly in favour of the proposal because the Commission often spent a large amount of time going to seven different court locations in one day. However, the Commission emphasised that the proposal needed to be examined so as to ensure that it did not create inefficiencies

⁵⁹ Submission No.9.

⁶⁰ Transcripts 6.5.93.

elsewhere in the system. It also cautioned that perhaps the priority of the court building was not so great if it meant that the Commission or some other community based office was to lose its funding as a result of it.⁶¹

8.34 The Committee supports the proposal to provide a single building to house the various courts of the ACT. However, it intends to thoroughly examine the proposal during its proposed inquiry into the ACT court system.

The keeping of court records

8.35 During its examination of the *Crimes (Amendment) Bill 1993* the Committee was hampered in its inquiry by the lack of readily available statistics relating to designated offences. A part of this problem was that the courts lacked a computerised system for recording convictions and other information.

8.36 A proposal to establish such a system was among the Committee's recommendations.

8.37 As indicated in Chapter 1, the Deputy Chairman held discussions with representatives of the Northern Territory Department of Law on information technology as it related to the keeping of court records, procedures and other information.

8.38 Specifications for the IJIS system used in the Northern Territory courts runs to 34 volumes. While the system appeared cumbersome in some respects the principles behind the system may have merit.

8.39 The Committee considers that a similar system could be introduced in the ACT court and legal systems.

⁶¹ Transcripts 6.5.93.

8.40 The Committee recommends that:

ACT Government give consideration to the establishment of a computerised information system for the court system in the ACT and as part of that process examine the LJIS system used in the Northern Territory.

8.41 The Committee intends to examine the issue more closely in its proposed inquiry.

9. ALTERNATIVE MEANS TO ACCESSING JUSTICE

9.1 Chapter 4 identified disadvantaged and advantaged groups in relation to the legal system and the barriers that deny access to justice.

9.2 The ACT Attorney-General's Department stated:

Access and equity in justice is a diffuse and complex issue that lends itself to a range of innovative solutions.⁶²

9.3 The Committee considered suggestions to ameliorate the disadvantages identified which do not relate particularly either to the legal profession or the court system.

Educating the public on the law

9.4 The most apparent way to make the legal system more accessible is to demystify the law through public education.

9.5 The Welfare Rights and Legal Centre contended that increased accessibility could be achieved through community legal education:

As the cost of legal services becomes higher it would appear that there is a very real need for people to be able to better understand their rights and responsibilities and to be able to access the legal system themselves. By the use of creative community legal education greater awareness within the community can be engendered. Community legal education can be made available through schools and colleges, community centres, legal aid and community legal centres. It can involve the use of a wide range of resources including videos, books and pamphlets, workshops and seminars and can be facilitated

⁶² Submission No.9.

between different sectors, the community sector, police, public service, schools, Courts and Tribunals. It seems that there is a lot of scope for the development of effective, wide ranging community legal education programs.⁶³

9.6 The Committee hopes that its recommendation proposed in Chapter 2 will go a long way towards achieving the public education that the Welfare Rights and Legal Centre has referred to.

9.7 However, the Committee considers that education on the legal system should begin at a young age. Potential exists to begin educating individuals about the legal system while still at school.

9.8 The Committee recommends that:

the ACT Education Department further develop programs for legal education in schools in cooperation with school communities, the legal profession and the ACT Attorney-Generals' Department.

The provision of interpreter services

9.9 A number of submissions listed language as a significant barrier to accessing the legal system.

9.10 The Conflict Resolution Service stated that this could be partly overcome through the provision of free interpreting and other facilities to enable effective communication. The Service stated that there has been some confusion over the availability of interpreting services to those appearing in Court which significantly disadvantages those with limited fluency.⁶⁴

9.11 The Legal Aid Commission also stated that interpreting services was one area which was relatively underfunded.

⁶³ Submission No.6.

⁶⁴ Submission No.4.

9.12 The Committee considers that in recognition of an increasingly multicultural ACT community, it is increasingly necessary to provide for the widespread use of interpreters in legal contexts. Other options include the printing of legal documentation in other languages.

9.13 The Committee recommends that:

the ACT Government give consideration to the extension of interpreter services for the courts, legal centres and other community centres as well as the printing of legal documentation in other languages.

Technology and the law.

9.14 The Committee intends to examine the use of technology in the court system in its proposed inquiry.

9.15 However, technological advances will continue to affect the administration of the law and the way legal services are delivered.

9.16 In particular, the provision of public information databases on legal rights, processes and procedures as well as the statutes themselves has the potential to increase the accessibility of the legal system.

9.17 A submission from Mr Alan Walker strongly urged the provision of easily accessible information on the legal system through public libraries.⁶⁵

9.18 The Committee considers that a computerised database made available in public libraries would provide the public with immediate up-to-the minute access to legislation and legal processes and procedures.

⁶⁵ Submission No.2.

9.19 The Committee recommends that:

- the ACT Government examine the feasibility of providing legal databases for general community access through public libraries.**

Gary Humphries
Chairman

17 June 1993

APPENDIX A

WRITTEN SUBMISSIONS RECEIVED

ACT Attorney-General's Department

ACT Council of Social Services Inc.

Conflict Resolution Service Inc.

Commonwealth Attorney-General's Department

Law Society of the ACT

Legal Aid Commission (ACT)

S H Pyne

Walker Tate and Associates (2 submissions received)

Welfare Rights and Legal Centre

APPENDIX B

LIST OF WITNESSES

Anforth, Mr Allan	Director ACTCOSS
Cashman, Mr G	Deputy Law Officer ACT Attorney-General's Department
Clynes, Mr R	Senior Vice President Law Society of the ACT
Crebbin, Ms L K,	Acting Assistant Director Legal Aid Commission (ACT)
Dalton, Mr C	Director ACT Attorney-General's Department
McDonald, Ms F	Solicitor Welfare Rights and Legal Centre
Miller, Mr R	President Law Society of the ACT
Quinton, Mr P	Deputy Law Officer ACT Attorney-General's Department
Staniforth, Mr C J,	Chief Executive Legal Aid Commission (ACT)
Walker, Mr Alan V,	Principal and Senior Consultant Walker Tate and Associates
Whitten, Mr R J	Executive Director Law Society of the ACT