National Welfare Rights Network

Submission to Productivity Commission Inquiry into Access to Justice

21 May 2014

The NWRN responses to draft recommendations and information requests are as follows:

DRAFT RECOMMENDATION 5.1
All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.
Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

The NSW LawAccess model in NSW works well. The Welfare Rights Centre (NSW) receives a large number of referrals from LawAccess each year. We understand that LawAccess refers most social security issues directly to the Welfare Rights telephone advice line for specialist legal advice on social security, which can often be provided immediately, or within around 48 hours.

We note that mistakes of the past, such as the Federal Government's 'Dial-a-law' program in the mid-2000s should be avoided.

It is also important to note that information and referral centres like LawAccess cannot replace a specialist Welfare Rights service. Social security is extremely complex. The high quality advice and recognised expertise of welfare rights services comes from the casework and advocacy work the centres provide. Services that do not have caseworkers running a dedicated specialist social security practice (whether located in a generalist practice or in a stand-alone Welfare Rights centre) cannot provide the same advice service in this area.

For example, it is not possible to advise a person of the likely outcome or risks of pursuing a particular appeal if the person providing the advice has not run enough

similar cases to be able to distinguish between theoretical risk and actual risk. Another example may be that while a person without casework experience may be able to advise of appeal rights and time-limits, a caseworker can often solve a person's problem, without the need to lodge an appeal, if they have intimate knowledge of the social security and family assistance law, DHS/Centrelink systems and know who to ring or what to say to fix it because of their daily interaction with it.

The Welfare Rights Centre (NSW) works co-operatively with LawAccess. The Network is broadly supportive of this model but cautions that such a model only works for social security matters if it operates co-operatively alongside specialist social security advice and casework services. We note that in other States, Legal Aid Advice lines provides referrals, rather than providing advice, in recognition of the fact that their Legal Aid call centres do not have the expertise in social security law to provide advice.

DRAFT RECOMMENDATION 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

The NWRN considers that funding to the Commonwealth Ombudsman should be increased for investigation of social security matters. The role of the Ombudsman in dealing with complaints and investigating systemic issues in social security administration is important and is currently inadequately funded.

However, we note that legal need in the social security and family assistance area cannot be met by expanding the Ombudsman service. While it is an appropriate service for people with treatment complaints, it does not meet the needs of people requiring complex legal advice or representation. Unlike the Ombudsman, Welfare Rights services are aimed at helping people whose problems need to be resolved through formal appeal mechanisms. This is confirmed by the significant number of referrals Welfare Rights centres receive from the Office of the Ombudsman.

Clients of Welfare Rights services frequently have complex matters requiring specialist legal advice and assistance which can only be properly given where there is a formal lawyer/client relationship. Often, social security advice may require consideration of factors relevant to other areas of law, such as family, criminal, trust, companies, taxation, mental health, superannuation, wills and estates.

INFORMATION REQUEST 10.3

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

The NWRN Member Centres have provided advocacy for clients each year at the Social Security Appeals Tribunal and Administrative Appeals Tribunal for over 20 years. We also provide advocacy at the internal level to Authorised Review Officers and Subject Matter Experts within the Department of Human Services (DHS). In addition to telephone advice services for many thousands of people, casework and advocacy assistance is provided to over well over 5,000 clients per year. As such, the NWRN has

insight in to the workings of all stages of the review process from the consumer's perspective. This insight does not only extend to assisting persons who pursue appeals, but also to reading and assessing a great number of decisions received by people who were unrepresented at these tribunals.

The Social Security Appeals Tribunal (SSAT) as it exists now is extremely cost efficient. The average cost for an SSAT matter is $2,215. However, this includes both the child support and social security jurisdictions. The figure for the social security jurisdiction would be much lower (somewhere around $632). This is because costs for child support matters are 3.5 times higher than social security matters.[1] By contrast, the Administrative Appeals Tribunal (AAT) cost per completed application is $3,538.[2] If the matter is finalised at a hearing, the cost is more substantial, at $16,461.[3] The SSAT is clearly superior in terms of financial cost per appeal in the social security jurisdiction.

A two tier level of external appeal is critical for our clients and must be retained in any consolidation of the SSAT and AAT. We agree a two tier review system needs to be operated as efficiently as possible to be sustainable. We consider that any consolidation should:

- be along the lines of the NSW Civil and Administrative Tribunal model – that is a first tier review followed by a second tier internal appeal to a review panel; and,

- must ensure the key features of the SSAT are retained (timeliness, informality, simplicity, a non-adversarial environment and being cost-free – described in detail below).

Two tier review

The loss of two tier external review will create increased resource pressures upon community legal services, Legal Aid, the Tribunal and even the Department to ensure that every first tier review is dealt with in a manner befitting a final tier of review, inevitably increasing cost in all these areas and reducing the speed and informality of the process.

As social security law and Departmental administrative practices are complex and technical, there is a tension between the need for early decisions and the need for thorough examination of complex matters. This is complicated by the fact that the majority of consumers in the jurisdiction are often ill equipped to undertake preparation and that there are inadequate resources for legal services to assess the level of complexity and to meet the need for assistance in every case. The current two tiered system meets the varied needs of social security consumers. It does this by enabling the bulk of consumers to undertake a first relatively quick review procedure, conducted by the SSAT in a manner conducive to their needs as disadvantaged and usually unrepresented persons, while keeping the safety net of a further right of appeal to the AAT. The AAT is a more formal body with prehearing and settlement

[1] Social Security Appeals Tribunal, *Annual Report 20112-13*, p. 11.
[2] Administrative Appeals Tribunal, *Annual Report 2012-13*, p. 32.
[3] Ibid, p. 32.

procedures which provides:

- a slower, more deliberate review with external scrutiny though reportable decisions
- a body of case-law to inform decision makers and drafters of departmental policy.

Consumers in the social security jurisdiction are more likely than those in other jurisdictions to be disadvantaged by factors such as poverty, health, education, literacy, age, work experience, language, disability (physical, psychiatric, acquired brain injury, intellectual), homelessness and Indigenous or migrant background. These people lack the funds to access private legal services and rely on Welfare Rights services (of which there are too few) and State Legal Aid services (which offer limited services). Social security law is extremely complex and many decisions are highly technical. These people are often unable to effectively advocate for themselves without assistance, due to disadvantage.

Key features of the SSAT that must be retained in any consolidation

In our experience, people in the social security jurisdiction are disadvantaged and many experience disability and mental illness. We see people, particularly those experiencing high levels of stress or anxiety, suffer a significant deterioration in their health during the appeal process. Factors such as timeliness, informality, simplicity, a non-adversarial environment and being cost-free are essential to ensuring access to justice for individuals in the social security and family assistance jurisdictions.

Timeliness is critical in the social security jurisdiction: Matters in the social security jurisdiction are often truly urgent; for example, where a person's income support has been incorrectly suspended or cancelled, the cost of delay in appeals may be that a person is unable to pay their rent and becomes homeless. The SSAT provides a fast, informal and accessible external review process. The SSAT's standard time for finalisation of a social security matter is 10 weeks, whereas the AAT's standard is 12 months.[4]/[5] This is a key feature that must be retained in the first tier of review of a consolidated tribunal. A Welfare Rights service in Perth recently had a case where it was quicker (and more appropriate) for a young person seeking Youth Allowance at the "unreasonable to live at home" rate to obtain a decision from the SSAT than it would have been to lodge a new claim with Centrelink.

Payment Pending Review is not available at the AAT level: A person appealing to the SSAT may continue to be paid, as if the decision that their payment be reduced suspended or cancelled had not been made, pending the outcome of the review by the SSAT. This is commonly referred to as "Payment Pending Review" or PPR. It applies only to discretionary decisions and does not apply to people whose claim has been rejected (regardless how dire their circumstances). It may be granted by an Authorised Review Officer at Centrelink.

PPR is not currently available at the AAT. Rather, the AAT has a more formal and

[4] Social Security Appeals Tribunal, Op cit, p. 12.
[5] Administrative Appeals Tribunal, Op cit, p. 34.

legalistic process whereby a person may seek a "stay order" from the AAT to have the adverse decision of the SSAT "stayed" until the outcome of the AAT. This involves an application and stay order hearing. By contrast to the PPR process at the SSAT, it is less accessible to vulnerable people as it is more formal, legalistic, slower and confusing. Payment Pending Review is a key feature that must be retained in the first tier of review of a consolidated tribunal.

Benefits of absence of Government representative at the SSAT: When appealing against a government decision, a consumer does not start out on a level playing field with the Department, whose representative is an experienced "repeat player" well aware of the issues and procedures and whose mere presence can inhibit consumers who are generally unrepresented and often very fearful of an adversarial environment. The SSAT provides a non-adversarial, less intimidating space where vulnerable people feel more comfortable to speak openly and more fully to the questions being asked. The absence of a Government representative is a key feature that must be retained in the first tier of review of a consolidated tribunal.

INFORMATION REQUEST 10.4

Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

We do not oppose co-location, shared administration and shared outreach provided that it does not lead to increased formality, longer timeframes and a more legalistic environment.

DRAFT RECOMMENDATION 12.2

Commonwealth, State and Territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

There are already model litigant guidelines that apply in the social security jurisdiction. On the whole, the actions of Department's advocates in this jurisdiction work in a manner which is consistent with the model litigant guidelines. However, from time to time we receive feedback from unrepresented litigants about the actions of the Department's representative in matters at the AAT level which would be appropriately dealt with by a formal avenue of complaint. Given the vulnerability of these unrepresented litigants, the formal avenue of complaint would need to be straightforward and simple to use.

INFORMATION REQUEST 12.4

The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory

level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?

We consider that, from a consumer perspective, such complaints would be best handled by the Office of Legal Services Co-ordination. This issue does not arise at the SSAT for social security matters, only at the AAT and Federal Court. A very simple complaints mechanism is required for unrepresented/disadvantaged people in the social security jurisdiction of the AAT. Correspondence from the AAT to such clients should include information about the right to complain and where to direct the complaint. Clients who indicate they consider they have been treated inappropriately should be referred to legal services for independent advice.

We are not in a position to make submissions about investigating complaints state/territory level as we operate only in the federal social security and family assistance jurisdictions.

DRAFT RECOMMENDATION 13.6

Courts should grant Protective Ccosts Orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

Social security appeals lie from the AAT to the Federal Court on a question of law. The Federal Court has power to make orders capping costs and has considered that these may be made in public interest cases. However, we consider that clearer direction and a specific power to make PCOs would help to encourage their use by the Federal Court.

Welfare Rights services see clients elect not to lodge meritorious appeals to the Federal Court, even where their prospects of success are reasonable and we have offered to provide free representation, because they are afraid of potential costs orders.

Part of the problem is that a person will need to lodge with the Federal Court before an application to cap costs can be made. The initial costs incurred (or potentially incurred) by this point are already prohibitive for such disadvantaged clients.

AAT decisions do not create binding precedent and from time-to-time the Department will implement particular decisions, but will not change its policy and will not itself appeal to the Federal Court. Clients will generally not appeal to the Federal Court due to the fear of costs, so the opportunity to obtain clarification on the law from the Federal Court is limited, particularly in States where Legal Aid grants for indemnity against costs are limited or capped.

Changes to provisions for costs orders to increase protection for people in cases where there is a public interest would be extremely beneficial in the social security jurisdiction.

INFORMATION REQUEST 16.2

The Commission invites comment on the relative merits and costs of automatically exempting parties from paying court fees based on:

- ***the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card***
- ***passing an asset test in addition to possessing a concession or health card***
- ***the receipt of a full rate government pension or allowance.***

The Commission also seeks feedback on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.

We oppose the introduction of an asset test for people in the social security jurisdiction because we already have a tightly targeted Social Security system which is based on need. We consider that the social security jurisdiction should continue to be fee free due to the disadvantage of the people using it.

If it is decided to introduce fees in the social security jurisdiction, general fee waiver provisions should also exist to grant fee relief in cases of financial hardship. For example, there may be people who have no income but do not receive income support as their claim has been rejected (eg due to residence requirements).

The family home in particular should always be excluded for social security claimants and recipients as they are generally unable, in practical terms, to access the equity in their home as they do not have the income levels required to repay loans against the house.

The existence or nature of an asset may be in contention. Eg: some cases are based on the disputed existence or treatment of an asset. Other cases may be considering whether an asset should be disregarded due to hardship. A person who is disputing a rate reduction or claim rejection on the basis of assets should be given the benefit of the doubt for the purpose of fees as the final decision about the asset will not be made until the finalisation of the case.

DRAFT RECOMMENDATION 21.2

The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

People experiencing social security problems will more often than not be in the priority groups as set out in the National Partnership Agreement ***(***NPA). The NWRN supports measures to target assistance to the most vulnerable. Centres have casework guidelines which ensure that this is the case.

Guidelines vary from service to service, but the guiding principle is targeting need with limited resources. Differences are due to differing structures and resources, or to accommodate need (eg, to cover different gaps in access to legal advice/assistance caused by different areas of practice in State Legal Aid services).

In recent surveys of Community Legal Centres clients in Victoria, ninety-six percent were in receipt of social security benefits. Whilst we note comments made by the Commission in relation to those on reasonably low wages, those on social security still make up the bulk of people considered to be in need of extra assistance. We note, however, that many Welfare Rights services provide legal assistance to casual workers on the minimum wage who receive family assistance or who receive a small amount of primary income support.

The lack of personal income is a major generator of many other social issues of which generalist community legal centres need to deal with (family violence, neighbourhood disputes, petty theft, criminal damage and homelessness).

The only groups in more need of legal assistance than social security recipients are those ineligible for such benefits such as asylum seekers, newly arrived residents and some New Zealanders.

DRAFT RECOMMENDATION 21.3

The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.

We agree that community legal centres should be required to have casework guidelines which target assistance to the most disadvantaged and vulnerable.

We note that Welfare Rights services are different to legal aid and meet different aspects of legal need. An example is timeliness of services and early intervention. Welfare Rights services are able to respond rapidly to what is often extremely urgent legal need by running telephone advice lines. It would be inappropriate to apply a financial eligibility test to such services. The test may take longer to administer than it would to provide the advice. We consider that advice services should be free from any formal eligibility testing on the basis that it would not be cost-effective to administer, and in recognition of the well-known benefits of early intervention and access to legal assistance.

Currently a number of Legal Aid Commissions (LACs) include the principal family residence in their means test. We note that such an asset is not counted for the assets tests for social security benefits. A number of Welfare Rights services see clients who would otherwise go to the LAC but for the assets tests. From a practical perspective, it is very difficult (often not possible) for social security recipients to borrow against their homes as they are unable to afford repayments to the loan. Many are already carrying significant debts and struggling to meet basic daily needs, particularly those with

dependent families and disabled children. Using the principal home to finance private legal assistance is too high a cost for social security recipients. For this reason, if a means test is included for all services, we consider that it should disregard the value of the principal home.

DRAFT RECOMMENDATION 21.4

The Commonwealth Government should:

- ***discontinue the current historically-based Community Legal Services Program (CLSP) funding model***
- ***employ the same model used to allocate legal aid commissions funds to allocate funding for the CLSP to state and territory jurisdictions***
- ***divert the Commonwealth's CLSP funding contribution into the National Partnership Agreement on Legal Assistance Services and require state and territory governments to transparently allocate CLSP funds to identified areas of 'highest need' within their jurisdictions. Measures of need should be based on regular and systematic analyses in conjunction with consultation at the local level.***

The National Welfare Rights Network is a network of community legal centres, some of which are specialist centres practicing only in social security law and some are generalist centres with a specialist Welfare Rights program. The National Welfare Rights Network will not make general submissions about the funding model for CLSP, as some of our members will have CLSP funding that is not directed to Welfare Rights but rather to generalist services. However we wish to stress that rationalisation of funding should not lead to any reduction in funding. Welfare Rights services are significantly underfunded across Australia and there is a lot of unmet legal need among people who have problems accessing or receiving their social security entitlements.

Welfare Rights services fill a critical gap in provision of legal advice and casework which distinguishes them from services which receive complaints (eg the Ombudsman) or provide only information and referrals (eg LawAccess NSW). In Western Australia, for example, a person who contacts Legal Aid would be referred to a Welfare Rights service for advice. Similarly, a person in NSW who contacts LawAccess would be referred to the Welfare Rights Centre in NSW.

Welfare Rights services are able to provide a rapid response to legal need (eg in NSW people can access immediate (or within 24 hours) telephone advice from the Welfare Rights Centre where they would wait for up to 5 weeks for a face-to-face interview with Legal Aid). Social security is an extremely complex area of law. Specialisation in stand-alone services means that Welfare Rights services resource other legal services in terms of backup specialist advice and training (eg, we provide training on social security to private solicitors, legal aid services, other community legal centres, Salvo's Legal and so on).

All Welfare Rights services, whether located within a generalist CLC or specialist centre, cover broad geographical areas. There are only 14 Welfare Rights services in Australia under the welfare rights funding program. Welfare Rights services cover large

(often state-wide) regions and predominantly provide telephone advice and casework services. While some run drop in or appointment services as they are also servicing a local community, most service large geographic areas or a state-wide population via telephone advice lines. Their physical location does not reduce their effectiveness. Telephone advice lines are designed to increase accessibility for the many areas of highest need. For example, in Victoria, people can ring the Welfare Rights service from anywhere in the state on a landline (including payphones) for a maximum of a single call cost (50c – payphone cost). In most rural areas, calls from such lines are free. Welfare Rights services actively use call-back arrangements for clients contacting on mobile phones to reduce costs for clients and improve accessibility.

It is appropriate for specialist services covering broad geographical areas to be located in capital cities or large service centres, for a number of compelling reasons:

- Placing a centre in one region of high need may make it harder for people in other regions of high need to access
- Centres are near transport hubs for travel by train, bus and aeroplane to outer metropolitan, regional and remote areas (eg for the purposes of community legal education), reducing travel time and cost and consequently increasing the scope for such activities.

- Centres are located near tribunals and courts, again reducing cost and travel time for advocates. This increases the scope and volume for such activities within the limited resources of the centre.

INFORMATION REQUEST 21.3

The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.

As the Commission points out, social security and "poverty law" are particularly complex. In reality the social security (and aligned Family Assistance) legislation is second in size only to taxation law. The existence of Welfare Rights services with close to three decades of experience and expertise in the sector is a resource that cannot be easily replicated. The complexity of social security law (the Act was once accurately described by a Federal Court judge as a "labyrinth") and the huge bureaucracy required to administer it, means that larger organisations working across a number of different fields do not develop the same level of expertise as Welfare Rights services.

However, larger organisations are often in a stronger position in such a tender process, eg due to economy in their centralised administration etc. A competitive tender program, if applied, must be very careful to complement, not damage the specialist Welfare Rights service model that exists, in order not to lose the expert resources, and historic community support, of Welfare Rights services.