

**Submission to the  
Victorian Law Reform Law  
Commission  
Civil Justice Review**

**15 December 2006**

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## 1 Executive Summary

This submission is made by the Public Interest Law Clearing House (**PILCH**) to the Victorian Law Reform Commission (**VLRC**) in response to the questions raised in its consultation paper entitled, *Civil Justice Review (the Paper)*.

PILCH welcomes this opportunity to comment on the Paper and to have input into the VLRC's inquiry into the civil justice system in Victoria.

The submission draws on PILCH's extensive experience in the access to justice sector, in particular as a facilitator of pro bono legal services. PILCH has worked with 1000s of pro bono lawyers and clients since its inception in 1994. PILCH has included in its submission many case examples which highlight the barriers and difficulties faced by pro bono clients and pro bono lawyers in the Victorian civil justice system.

In Part 2 of the submission, we provide an overview of PILCH. In Part 3, we discuss the importance of access to justice. In Parts 4 -7 of the submission, we address questions 22, 33, 49, 50 and 51 which are set out in the Paper.

PILCH has sought to draw attention to all issues within its knowledge which affect the operation of the civil justice system in Victoria. These issues relate to the policies, procedures and conduct of various organisations which have a role in the civil justice system.

PILCH's submission raises the following issues and makes the following related recommendations:

- (a) The principle of equitable access to justice underpins a fair and efficient civil justice system.

**Recommendation 1:** PILCH recommends that, in its Civil Justice Review, the VLRC give priority to the importance of access to justice as a fundamental requirement of a fair civil justice system.

- (b) PILCH considers that there is a lack of availability of appropriate and timely legal advice in civil law matters. PILCH considers that costs to parties and the resources of the courts could be saved if people were able to obtain appropriate legal advice in civil matters at an early stage.

**Recommendation 2:** PILCH recommends that the Commonwealth and Victorian Governments continually increase funding to community legal centres to enable them to provide case work assistance to the community in civil justice matters.

**Recommendation 3:** PILCH recommends that the Victorian Government seek to restore the National Civil Legal Aid Scheme in partnership with the

Commonwealth Government.

**Recommendation 4:** PILCH recommends that the Commonwealth and Victorian Governments, as a minimum, include the following extensions to the current civil law legal aid guidelines:

- i Assistance should be available for matters where the amount of the claim is less than \$5,000.00;
- ii Increased assistance in the area of Crimes Family Violence should be available for applicants and respondents to intervention orders.
- iii Assistance should be available in employment matters such as unfair dismissal or unlawful dismissal matters, de facto property settlements and property settlements in the Family Law Courts.
- iv Legal assistance to prisoners should be increased.

**Recommendation 5:** PILCH recommends that Victoria Legal Aid ensures that when determining eligibility for aid pursuant to the guidelines, that the concept of 'special circumstances' is not interpreted in an unduly restrictive manner.

**Recommendation 6:** PILCH recommends that VLA ensures that when determining eligibility for aid pursuant to the guidelines, the 'potential benefit to the public' of bringing a discrimination complaint is not interpreted in an unduly restrictive manner.

**Recommendation 7:** PILCH recommends that VLA ensures that when determining eligibility for aid pursuant to the guidelines, the public interest guideline is not interpreted in an unduly restrictive manner.

**Recommendation 8:** PILCH recommends that VLA does not seek financial contribution from applicants who have been granted aid under a 'public interest' guideline.

**Recommendation 9:** PILCH recommends that VLA considers the introduction of a system of 'cascading' financial contributions from applicants, where applicants do not mean the means test.

- (c) PILCH considers that the Supreme Court of Victoria and County Court of Victoria's policy regarding provision of language services is inadequate and inconsistent with the Department of Justice's languages services policy. Further, the lack of free interpreting services for utilisation by practitioners acting pro bono creates a significant barrier to making pro bono referrals to practitioners who would otherwise be prepared to provide pro bono advice

and assistance to clients referred through PILCH.

**Recommendation 10:** PILCH recommends that the Victorian Government take immediate action to ensure that interpreting services are made available in all civil proceedings in Victorian courts and that the practice of Victorian courts is consistent with the Department of Justice's languages services policy.

**Recommendation 11:** PILCH recommends that the Victorian Government provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.

- (d) PILCH considers that the availability of funding for disbursements in litigation is critical to ensuring access to justice in pro bono matters. The lack of available funding for disbursements creates a significant barrier to a matter being progressed and undermines the applicant's ability to have the merits of his/her matter determined and the applicant's access to the court system.

**Recommendation 12:** PILCH recommends that the Victorian Government provide funding for disbursements in pro bono matters where the matter raises an issue which requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who are disadvantaged or marginalised, or the matter raises an issue concerning the human rights of the applicant involved.

**Recommendation 13:** In the alternative, PILCH recommends to the Law Aid Scheme's Board of Trustees that:

- i the guidelines for eligibility for assistance be extended in the manner outlined in Recommendation 12.
  - ii it introduce provision for waiver of the \$100.00 application fee in cases where payment of the application fee would cause significant financial hardship or where the matter raises an issue of public interest or human rights.
  - iii it introduce provision to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason for funding the disbursements retrospectively.
- (e) PILCH considers that the risk of adverse costs orders is one of the most significant barriers to access to justice in public interest matters, because the

threat of such orders acts as a strong deterrent to bringing or continuing litigation.

**Recommendation 14:** PILCH recommends to the Victorian Government that it consider adopting the Model Guidelines which provide that the State will consider giving an undertaking not to pursue costs if it is successful in public interest proceedings in which it is a party.

**Recommendation 15:** PILCH recommends to the Supreme Court of Victoria that the court considers an amendment to the Order 63 of the Supreme Court Rules to incorporate provisions relating to costs and public interest litigants.

- (f) Victorian courts are facing an ever-increasing number of litigants who appear unrepresented, largely because they cannot afford to pay for legal services and cannot access, or do not know of, government-funded legal services. These self-represented litigants are often not familiar with the substantive law or the legal system, which places them at a significant disadvantage and drains already overburdened court resources.

**Recommendation 16:** PILCH recommends that the Victorian Government provide additional duty lawyer resources to all the courts in Victoria similar to the system used in the Victorian Civil & Administrative Tribunal and the Magistrates' Courts.

**Recommendation 17:** PILCH recommends that the Victorian Government provide adequate funding for the Self-Represented Litigants Coordinator scheme at the Supreme Court of Victoria.

**Recommendation 18:** PILCH also recommends that the State Government create and fund the position of a Self-Represented Litigants Coordinator in each court.

**Recommendation 19:** PILCH recommends that the Victorian Government provide additional funding to prepare, publish and deliver training and educational material for judicial officers on best practice management of self-represented litigants.

**Recommendation 20:** PILCH recommends that the Victorian Government provide additional funding to examine and implement technological solutions for self-represented litigants.

- (g) PILCH is concerned about the emerging practice in Australia of large corporations using 'SLAPP' writs (Strategic Litigation against Public Participation) as a form of intimidation against individuals and community

groups who voice opinions on matters of public interest which differ from the interests of these corporations.

**Recommendation 21:** PILCH recommends that the Victorian Government introduce legislation against the use of SLAPP Writs.

- (h) PILCH considers that the growth of the litigation funding industry raises important public policy considerations which highlight the need for comprehensive regulation of litigation funding agreements and the litigation funding industry. Further, it is desirable that a strong approach be taken to consumer protection in this area.

**Recommendation 22:** PILCH recommends that the State Government take steps to introduce legislative provision to ensure that the professional obligations of lawyers to act independently and in the interests of clients are upheld in the context of litigation funding arrangements.

PILCH notes the submission of the PILCH Homeless Persons' Legal Clinic (**HPLC**) which complements the submission of PILCH and focuses on the barriers to accessing justice for homeless persons. PILCH strongly endorses the submission of the HPLC.

PILCH also notes the submission of the Human Rights Law Resource Centre Ltd (**HRLRC**), which addresses the term of reference relating to non-party participation in civil proceedings. PILCH strongly endorses the submission of the HRLRC.

## 2 Public Interest Law Clearing House (Vic) Inc

### 2.1 About PILCH

PILCH is a not-for-profit, independent legal service based in Melbourne. PILCH coordinates the provision of pro bono (without fee) legal assistance, primarily to people located in Victoria, through four pro bono legal assistance schemes, which operate from the PILCH office:

- Public Interest Law Scheme (**PILCH Scheme**);
- HPLC;
- Law Institute of Victoria Legal Assistance Scheme (**LIV LAS**); and
- Victorian Bar Legal Assistance Scheme (**VB LAS**).

The Human Rights Law Resource Centre is a joint project of Liberty Victoria and PILCH and is co-located with PILCH. The HRLRC aims to promote human rights in Victoria and Australia, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. It also aims to promote the development of Australian law and policy consistently with international human rights standards, including through casework, litigation, policy analysis, education and advocacy.

### 2.2 PILCH Philosophy

#### **Mission statement**

To further the public interest, improve access to justice and protect human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

In carrying out its mission, PILCH seeks to address disadvantage and marginalisation in the community, effect structural change to address injustice, to foster a strong pro bono culture in Victoria and to increase the pro bono capacity of the legal profession.

#### **Values**

PILCH is committed to:

- (a) providing a responsive, effective and professional service to its members and the community;
- (b) acting with integrity and fairness at all times;
- (c) treating all people equally and with dignity and respect; and
- (d) innovation and creativity in pro bono



## 2.3 The Work of PILCH

The PILCH Scheme, VB LAS and LIV LAS (**the Schemes**) receive, assess and refer requests for pro bono legal assistance to the private legal profession.

The HPLC provides civil, administrative and some summary criminal legal services at crisis accommodation centres and welfare agencies.

The Schemes only provide assistance where applicants meet a means test, where their matter has legal merit, and where legal assistance is not available from another source (eg, legal aid or a community legal centre). The PILCH Scheme has an additional criterion. It only refers *public interest* matters to PILCH members. Public interest matters are:

- (a) legal matters for not-for-profit organisations with public interest objectives or
- (b) individuals' matters where the matter raises an issue which requires addressing for the public good and
  - affects a significant number of people, not just the individual
  - is of broad public concern, or
  - impacts on disadvantaged or marginalised groups.

The Schemes and HPLC work co-operatively with Victoria Legal Aid (**VLA**) and community legal centres.

## 2.4 PILCH's resources

### (a) PILCH Scheme

The PILCH Scheme is funded by the fees paid by its members. PILCH members consist of law firms, the Victorian Bar, the Law Institute of Victoria, corporate legal departments, universities and community legal centres.

### (b) HPLC

HPLC is funded by the Department of Justice, donations from a law firm and a corporate legal department, philanthropic grants and by undertaking significant fund-raising activity. Legal services are provided by volunteer lawyers from PILCH member law firms and corporate legal departments.

### (c) LIV LAS

The Law Institute of Victoria, with the support of the Legal Services Board, funds LIV LAS. Over 500 firms and individual solicitors have registered their willingness to act on a pro bono basis through LIV LAS.

**(d) VB LAS**

The Victorian Bar, with the support of the Legal Services Board, funds VB LAS. Over 400 barristers at the Victorian Bar have registered their willingness to act on a pro bono basis through VB LAS.

### 3 Access to justice: a fundamental indicator of a fair civil justice system

PILCH considers that the principle of ensuring equitable access to justice underpins a fair and efficient civil justice system. Access to justice means that there is equitable access to the legal process and there are dispute resolution processes that are widely available, explicable and affordable.<sup>1</sup> Equal access to justice means more than just equal access to the courts. Given the complexity of legal procedures and argument, which are characteristic of the adversarial system, equal access to justice requires equal access to legal services. As stated by Dewar, Smith and Banks:

*'There are three commonly made arguments for legal representation in an adversary system – those of fairness, of legitimacy and of efficiency. The legitimacy argument is that equality is one of the principles that gives our system of liberal-democratic government its legitimacy – that is, a principle that persuades the population at large to accept the power and authority of government as proper [Luban, Lawyers and Justice: An Ethical Study (Princeton UP, 1988), pp 240-266]. Equal access to law is an important aspect of the equality of citizens in our system of government. It follows, therefore, that a denial of equal access to the law undermines the legitimacy, or claims to popular acceptance, of our form of government. However, 'equal access to the law' for these purposes means more than just equal access to the courts. In view of the complexity of legal procedures and argument characteristic of the adversarial system, it is equated with 'access to legal services' – if equal access to law is to be a practice reality, it must mean equal access to legal services. On this view, then, there is thus a right to legal services, including legal representation in court, because our system of government demands it.'*<sup>2</sup>

PILCH considers that no person's access to justice and the legal system should be prejudiced by reason of their incapacity to obtain adequate information about the law or the legal system, or their inability to afford the cost of independent advice or legal representation.<sup>3</sup>

PILCH is strongly of the view that any review of the civil justice system should have a focus on the access to justice arrangements in that system. A lack of analysis of access to justice

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<sup>1</sup> Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system*, Report No 89, January 2000, 81.

<sup>2</sup> Dewar, Smith and Banks, 'Litigants in Person in the Family Court of Australia (2001), 6.

<sup>3</sup> Ibid 319.

issues will not produce a comprehensive understanding of the operation and effectiveness of the civil justice system.

**Recommendation 1:** PILCH recommends that, in its Civil Justice Review, the VLRC give priority to the importance of access to justice as a fundamental requirement of a fair civil justice system.

## **4 Legal Assistance**

**Question 51: Do arrangements for pro bono representation in and/or legal aid funding of civil cases need reform? If so, what changes should be implemented?**

### **4.1 Lack of availability of appropriate and timely legal advice in civil law matters**

PILCH, as a provider of pro bono referral services for individuals who cannot obtain legal assistance elsewhere, is well-placed to identify gaps in the availability of legal services and the barriers to accessing the justice system which exist for those who cannot afford private legal services. In PILCH's view, there remains a critical gap in the availability of advice and representation in civil law areas for those who cannot afford to pay for legal services. The difficulties in obtaining legal advice and assistance are compounded for disadvantaged groups, such as those with a mental illness or persons from Culturally and Linguistically Diverse Communities. PILCH considers that the gap in legal aid for civil law matters contributes to significant inefficiencies and additional costs in the civil justice system.

PILCH receives many requests for pro bono assistance in civil legal matters. For the period 1 July 2005 until 1 December 2006, approximately 48% of inquiries to PILCH and 46% of referrals made by PILCH were in relation to civil legal matters (not including civil matters relating to Commonwealth legislation or falling under the jurisdiction of Commonwealth courts or Commonwealth Tribunals). Further statistics showing the areas of law in which PILCH receives inquiries are included in Attachment A. PILCH only facilitates the provision of pro bono legal services to members of the community as a last resort, when the applicant has exhausted all other avenues for obtaining legal assistance. This means that they are unable to afford a private lawyer and they are unable to obtain assistance through VLA or a community legal centre. These requests and referrals for pro bono assistance clearly indicate that there is a significant gap in the availability of government-funded civil legal services for low-income earners.

In PILCH's view, significant time and money for parties to a dispute, court resources, PILCH resources, and pro bono resources could be saved if people were able to obtain appropriate legal advice in civil matters at an early stage. PILCH considers that, where a person cannot afford a private lawyer, advice and assistance is best provided by VLA and community legal

centres. VLA and community legal centres meet the legal needs of many members of the Victorian community who cannot afford to pay for legal services.

## 4.2 Expansion of Community Legal Centre Funding

At present, community legal centres are under-resourced to provide assistance in civil legal matters. PILCH recommends that funding to community legal centres be continually increased to enable them to provide case work assistance in civil law matters to the community. We commend the Victorian Government for its Access to Justice Policy statement, which includes a commitment to provide \$8.8 million of additional funding for existing CLCs (particularly specialist CLCs) and for the establishment of new CLCs. We welcome the stated commitment to the work of the community legal sector and we urge the Victorian Government to distribute these funds as soon as possible. However, we also suggest that the Government considers the need for on-going injections of funding into the sector to ensure its continued growth and development.

**Recommendation 2:** PILCH recommends that the Commonwealth and Victorian Governments continually increase funding to community legal centres to enable them to provide case work assistance to the community in civil justice matters.

## 4.3 Expansion of VLA Funding and Guidelines

At present, the VLA Guidelines are too narrow and are not directed towards providing significant assistance in civil law matters. In summary, the VLA Guidelines provide:

- (a) Advice may be available in Mental Health Review Board matters, guardianship and administration cases, coroner's inquests, equal opportunity, intervention orders, adoption, Children's Court cases, PERIN cases and public interest/ test cases.
- (b) Subject to the VLA Guidelines, VLA may grant assistance if the amount of the claim is \$5,000 or more.
- (c) In areas of civil law (where the VLA Guidelines are silent), assistance will *not* be granted unless there are *special circumstances*. Special circumstances include where the applicant:
  - is under the age of 18 years;
  - has a language or literacy problem;
  - has an intellectual or psychiatric disability.
- (d) VLA may only grant assistance to a *defendant* if the defendant's *sole place of residence is at immediate risk* and the defendant has *strong prospects of success* in defending the action or obtaining a life tenancy in respect of the property.

In relation to Legal Aid Commissions across Australia, PILCH recommends the restoration of a national civil legal aid scheme which allows an applicant to receive legal aid assistance when they have a right of action and cannot afford private legal representation, or are the defendant to an action and cannot afford private representation. PILCH endorses the policy of the Australian Legal Assistance Forum which advocates the restoration of a national civil legal aid program (**the ALAF Policy**) (see Attachment B). PILCH shares the concerns identified in the ALAF Policy regarding the consequences of the lack of a national civil legal aid program, in particular that there is a clear correlation between the erosion of legal representation caused by the changes to legal aid funding and the need, and increased demand, for pro bono services to be provided by the profession, particularly in civil litigation. PILCH endorses the ALAF Policy that there should be a national civil legal aid program which should be funded by Australian Governments on a co-operative basis, consistent with the guidelines set out in the ALAF Policy.

**Recommendation 3:** PILCH recommends that the Victorian Government seek to restore the National Civil Legal Aid Scheme in partnership with the Commonwealth Government.

PILCH recommends that, as a minimum, the restoration of a national civil legal aid scheme should include the following extensions to the current civil law guidelines.

#### **4.3.1 Minimum claim of \$5,000.00**

It appears to PILCH that where the VLA guidelines are silent on whether assistance will be granted in civil matters, there is a threshold requirement that the claim be valued at \$5000. PILCH takes the view that the guidelines should be amended to make assistance available for matters where the amount of the claim is less than \$5,000.00, and the person has special circumstances and would otherwise qualify for a grant of legal assistance. Amounts up to \$5,000.00 constitute a significant amount of money and may be critical for essential purchases. PILCH sees no reason why such individuals should not be entitled to legal advice, due to an arbitrary minimum of \$5,000.00.

#### **4.3.2 Crimes Family Violence matters**

In addition, the guidelines should be expanded in the area of Crimes Family Violence. At present, the guidelines provide that VLA expects that the applicant for an Intervention Order has begun proceedings with the help of the police or a Magistrates' Court registrar. In PILCH's view, the guidelines should be expanded to allow for a grant of aid to commence proceedings to apply for an intervention order. It is very difficult for a victim to tell their story in these often traumatic cases and they should have a lawyer assist them through the whole process. Assistance to respondents should also be broadened given the serious nature of these matters. An application for an intervention order is a serious issue for the respondent

who deserves legal representation. Case study A illustrates the type of matter where PILCH considers that a person should be entitled to a grant of legal aid in the area of Crimes Family Violence.

**Case Study A:** Ms A, a young woman, was a respondent to an application for an intervention order against her by her former partner who fathered her child. The only time she sought contact with him was for him to see his child. The applicant and a relative of his made it clear they did not want to see Ms A or the child and the relative then assaulted her. Following this incident both men sought the intervention order against Ms A. Victoria Legal Aid refused aid for Ms A as she was not at risk of being forced out of her home and it was perceived that no significant right of hers had been affected. Consequently, she was left to represent herself against two aggressive males in court in what would have been distressing circumstances for her. Fortunately, pro bono assistance was arranged for her and the matter was struck out.

#### 4.3.3 Employment and other matters

Further, the guidelines should be extended to make assistance available in employment matters such as unfair dismissal or unlawful dismissal matters, de facto property settlements and property settlements in the Family Law Courts. These are extremely important issues with serious consequences for the lives of the individuals involved.

#### 4.3.4 Assistance for prisoners

In addition, in PILCH's experience, there is a need for an increase in the provision of legal services to prisoners in the prison system, to enable them to bring legitimate claims before the courts and to access a fair hearing and achieve natural justice. Victims of crime groups have been vocal in their criticism of prisoners having the right to bring applications in the courts. However, if adequate legal resources were made available to prisoners to advise them and assess the merits of their complaints, there would be fewer cases of frivolous and vexatious proceedings by prisoners and fewer instances of prisoners appearing unrepresented. This would ultimately benefit the courts, the prisoners and the community. Case Study B below highlights the importance of prisoner's applications in the courts being decided on a case by case basis, particularly given the difficulties prisoners face in obtaining legal assistance.

**Case example B:** In 2003, Mr B, who was incarcerated, made two separate applications for the grant of emergency management days (**EMD**). Under the *Corrections Act* 1986 and *Corrections Regulations* 1998, a prisoner can apply for EMDs which, if granted, result in a reduction of the length of imprisonment or the length of the non-parole period. The legislation and regulations confers discretion to the Secretary to the Department of Justice to grant EMDs provided certain criteria are satisfied including that while the prisoner is of good behaviour, he/she suffers a disruption or deprivation.

Mr B's application was based on disruption and deprivation which he experienced as a result of two events: a change to his security rating as a result of his re-classification from minimum security to medium security, and, a lockdown which occurred after a round of live ammunition was found in the prison in which he was located.

The Commissioner (delegated the power to make decisions from the Secretary of the Department of Justice under the legislation and regulations) rejected Mr B's application for EMDs on the basis that the incidents complained of did not satisfy the criteria and the Commissioner was therefore not required to exercise his discretion to consider the application. Mr B applied for legal aid to seek judicial review of the decision in the Supreme Court. Mr B's application for legal aid was refused on the basis that the application lacked merit. A Legal Aid solicitor who regularly visits the prisons, raised the matter with PILCH and advised that in her experience the Commissioner rarely exercised his discretion to award EMDs, which was of a matter of concern to all prisoners, and that she believed Mr H's application should have been, at a minimum, considered by the Commissioner. PILCH considered that the matter raised two issues which were in the public interest, namely (1) the interpretation and application of the Correction Act in relation to EMDs and the Commissioner's exercise of the discretion to award EMDs and (2) the concern that prisoners' access to legal services and their ability to pursue their rights is limited due to their incarceration. PILCH referred the matter to a pro bono solicitor and barrister who assisted Mr B to apply for judicial review in the Supreme Court. Ultimately, the court found that the role of the Court is confined to assessing the decision made and in light of the two incidents, he was satisfied that Mr B had made out his case and the decisions should be quashed and referred back to the Commissioner for hearings and determination according to law. The Commissioner appealed the decision to the Court of Appeal and, VLA assessed that given the matter had succeeded in the Supreme Court with pro bono representation it would fund MR G's representation in the Court of Appeal. VLA provided legal aid funding to the same barrister who had appeared pro bono in the Supreme Court proceedings and briefed senior counsel to also appear. Ultimately, the Court of Appeal overturned the Supreme Court's decision.

**Recommendation 4:** PILCH recommends that the Commonwealth and Victorian Governments, as a minimum, include the following extensions to the current civil law legal aid guidelines:

- i. Assistance should be available for matters where the amount of the claim is less than \$5,000.00;
- ii. Increased assistance in the area of Crimes Family Violence should be available for applicants and respondents to intervention orders.



- iii. Assistance should be available in employment matters such as unfair dismissal or unlawful dismissal matters, de facto property settlements and property settlements in the Family Law Courts.
- iv. Legal assistance to prisoners should be increased.

#### 4.4 Restrictive interpretation of current VLA Guidelines

At present, in PILCH's experience, the application of the current VLA Guidelines by VLA is, on occasion, overly restrictive, and a significant number of matters which should be eligible for grants of assistance under the existing, albeit limited guidelines, are denied aid. PILCH considers that this issue is an important one which has a significant impact on the availability of legal assistance in civil law matters. PILCH has a close and collaborative relationship with VLA and is in consultation with VLA regarding these issues. Given the importance of this issue in the context of the current civil justice review, PILCH considered that the VLRC should be made aware of these issues, which are discussed below.

##### 4.4.1 'Special circumstances' guideline

PILCH considers that there is an overly-narrow construction of *special circumstances* by VLA in applying the current guidelines. The case studies below illustrate matters where individuals, who, in PILCH's assessment should have come within the definition of special circumstances as they did not speak English or were at risk of losing their home, were unable to receive legally aided advice and ultimately had to be referred for pro bono legal assistance. The clients set out below in case study C and D should have, as a minimum, received advice from VLA regarding the merits of defending their matters.

**Case Study C:** Mr C was the defendant in civil proceedings arising from a car accident. He did not speak any English. However, VLA determined he was not eligible for assistance. He was referred to a pro bono solicitor and barrister to represent him at the hearing in the Magistrates' Court. The barrister paid for an interpreter to be present in court out of his own pocket as the court would not provide an interpreter.

**Case Study D:** Ms D speaks limited English, having arrived in Australia from Vietnam in 1998. She is a sole parent and receives a Centrelink benefit. She was served with a notice under the Confiscation Act which placed her home at risk. She was not considered as having 'special circumstances'.

**Recommendation 5:** PILCH recommends that Victoria Legal Aid ensures that when determining eligibility for aid pursuant to the guidelines, the concept of 'special circumstances' is not interpreted in an unduly restrictive manner.

#### 4.4.2 Equal Opportunity Guideline: ‘Strong prospect of benefit to the public’

Section 5 of the VLA guidelines, Appendix 2A provides that VLA may grant assistance for equal opportunity/discrimination cases where there are strong prospects of benefit being gained not only by the applicant but also by the public or any section of the public.

In PILCH’s experience, this guideline is applied very restrictively by VLA, and sometimes the potential benefit to the public or a section of the public of bringing a discrimination complaint is underestimated in decisions made regarding eligibility for legal aid under this guideline. For example, Case Study E set out below involved conduct of the prison authorities and the provision of services to prisoners. In PILCH’s view, the matter raised issues of broad public concern and there were strong prospects that the outcome of the complaint would lead to change which was of benefit to sections of the public.

**Case Study E:** Mr E who was incarcerated, filed a complaint of indirect discrimination pursuant to the *Equal Opportunity Act 1995 (Vic)* (**the Act**) against the State of Victoria and the companies which are contracted to control and operate the prison and transfer prisoners to and from various locations (**the Respondents**). Mr E’s complaint alleged that during his incarceration he had made it known to the Respondents that he suffered from a medical condition which was caused and exacerbated by tobacco smoke-filled environments, and that the Respondents had subjected him to smoke-filled conditions in breach of the Act. Mr E applied for legal aid through one of the legal aid solicitors who attended the prison, however his application was subsequently refused, despite the fact that the legal aid solicitor who had helped him fill out the application believed the matter had merit. The legal aid solicitor assisted Mr E to apply to PILCH for pro bono representation for his case which had been listed in the Victorian Civil Administrative Appeals Tribunal (**VCAT**) after conciliation at the Equal Opportunity Commission Victoria failed. PILCH referred the matter to one of its member firms and counsel to appear on his behalf in VCAT. The matter has now settled to the satisfaction of Mr E.

**Recommendation 6:** PILCH recommends that VLA ensures that when determining eligibility for aid pursuant to the guidelines, the ‘potential benefit to the public’ of bringing a discrimination complaint is not interpreted in an unduly restrictive manner.

#### 4.4.3 ‘Public Interest and Tests Cases’ guideline

In PILCH’s experience matters which should fall within VLA’s public interest and test case guideline are not being funded.

Section 11, Appendix 2A of VLA’s guidelines, provides:

*‘Assistance may be granted for a case that involves:*

- *A legal issue that affects or is of broad concern to a significant number of disadvantaged people; or*
- *An untested or unsettled point of law that affects a significant number of disadvantaged people.*

*Disadvantage will be assessed in terms of disability, economic, age, cultural, linguistic, educational and geographic factors.*

*In deciding whether to grant assistance VLA will have regard to:*

- *The nature and extent of the likely benefit to the applicant and the disadvantaged section of the public;*
- *The cost of the case (including any pro bono work);*
- *The availability of legal aid funds.*

*Benefit will be assessed in terms of protection of life, liberty or other basic human rights; direct or potential financial benefit; and intangible benefits (such as health, safety and quality of life). Preference will be given to cases involving direct and tangible benefits.*

*Assistance will only be granted for cases that are reasonably arguable. However, the weight to be given to merit will depend on:*

- *The importance of the case;*
- *Whether the case is suitable vehicle for establishing new legal precedent;*
- *The number and relative merits of any public interest or test case applications that have been made or are reasonably expected to be made.*

*Contributions assessed under the means test and equitable charges required under the debt policy will be waived, except where:*

- *The contribution exceeds the estimated cost of the case but there is insufficient time for the assisted person to raise funds;*
- *The assisted person acquires money or property as a result as a result of the legally aided proceedings.'*

Despite these provisions for matters in the public interest to be funded, it is difficult to determine which matters the VLA considers eligible. In PILCH's experience, a number of matters which raise issues affecting disadvantaged people have not been funded and which otherwise meet the guidelines above have not been funded. .

When PILCH was first established in 1994, it had one pro bono scheme, the Public Interest Scheme, which referred matters which were considered in the public interest to solicitors and barristers to act on a pro bono basis. The public interest test applied by the Public Interest

Scheme aims to identify and assist individuals whose matters are of broad public concern, or significance to disadvantaged or marginalised groups, and to support non-profit organisations with public interest objectives which require legal assistance.

Each year the number of matters referred through the Public Interest Scheme increases. In 2005-2006, the Public Interest Scheme alone received 598 requests for assistance and made 187 referrals to barristers and solicitors to provide pro bono advice or representation in matters which PILCH assessed were in the public interest. Of the 187 referrals made, more than half were for individuals or groups in matters which PILCH considered tested the application of legislation or case law or were of broad concern to the community, affected a significant number of people (not just the individual) and/or impacted on a disadvantaged or marginalised group. PILCH has a strict policy of not referring an applicant for pro bono assistance or representation if legal aid is available, however, in the matters referred none of the applicants were eligible for legal aid under VLA's public interest guideline.

Case Study F below provides an example of a matter currently before the Federal Court which will test the application of legislation and potentially affect a significant number of people, namely activists and protestors, but which was not considered eligible for funding under the VLA public interest guideline.

**Case Study F:** An individual animal rights activist and animal liberation group requested pro bono representation through PILCH after proceedings were brought against them in the Federal Court alleging they had engaged in conduct contrary to section 45DB of the *Trade Practices Act 1974 (Cth)* (**TPA**). The matter was referred to PILCH by Gray J of the Federal Court who considered that both the individual and the group required expert legal representation, as the proceedings represent a test case regarding the application of section 45DB of the TPA (the 'boycott' provisions) to environmental protests. Despite the seriousness of the allegations and damages claimed (in excess of \$750,000) and His Honour's assessment that the matter was a test case, legal aid was not available for the individual defendant. PILCH referred the matter to its member firms and senior and junior counsel for each defendant.

In PILCH's experience, matters which affect a large number of people and which are judged by counsel to be meritorious are nonetheless rejected for a grant of aid under VLA's public interest category. While PILCH endeavours to assist all eligible applicants for assistance, these large matters in the superior courts are often difficult to refer on a pro bono basis due to the significant burden placed on the barrister or solicitor. They are more appropriately funded by VLA.

**Recommendation 7:** PILCH recommends that VLA ensures that when determining eligibility for aid pursuant to the guidelines, that the public interest guideline is not interpreted in an unduly restrictive manner.

#### 4.4.4 Caveats and 'Public interest' grants of aid

PILCH strongly considers that VLA's current practice, of requesting financial contribution from applicants who have been granted aid for a coronial inquest where it is in the public interest for the applicant to be represented, is inappropriate and contrary to the purpose of the funding pool. Case Study G below highlights a problem with the funding of coronial inquests which are assessed by VLA as raising systemic failures by the state which affect the broader community and are therefore in the public interest.

**Case Study G:** In 2003, Ms G's 16 year old daughter committed suicide while under the care of the Department of Services (DHS). Ms G applied to PILCH for representation at the Coronial Inquiry investigating her daughter's death. Ms G was eligible for aid on the condition that she agreed to a caveat being placed on her property. On Ms G's instructions, we asked that VLA waive the requirement of a caveat for the grant of legal aid in her case, given the inquiry into her daughter's death raised issues around the DHS' care of youths who have been diagnosed with mental illness and self-harming behaviour. The waiver request was denied and all appeals through VLA's internal review processes were unsuccessful. The matter was subsequently briefed by VLA to a barrister, who appeared on Ms G's behalf at the inquiry which ran for two days.

PILCH considers it to be anomalous that family members, who are eligible to obtain funding to be represented at the coronial inquest of the deceased on the basis that the matter raises matters in the public interest, are then asked to bear responsibility for the costs of the representation. It was undisputed by VLA that Ms G's case raised matters in the public interest and highlighted the need for an investigation to determine whether there are systemic flaws in the conduct of DHS, tragically brought to notice by the death of her daughter. In circumstances such as Ms G's case, where the criterion on which legal aid is provided is public interest, there appears to be little principled justification for requiring the person seeking the hearing to be financially accountable for it.

**Recommendation 8:** PILCH recommends that VLA does not seek financial contribution from applicants who have been granted aid under a 'public interest' guideline.

#### 4.4.5 Means test

PILCH is of the view that the Grants Division of VLA should be more flexible in its application of the means test, and if appropriate, consider requesting financial contributions where the applicants fall slightly outside the means test rather than refusing aid completely. PILCH often receives application for pro bono assistance by people who cannot afford legal assistance but have been denied legal aid because they do not satisfy the means requirements which have been strictly applied.

**Recommendation 9:** PILCH recommends that VLA considers the introduction of a system of ‘cascading’ financial contributions from applicants, where applicants do not mean the means test.

## **5 Other aspects of the civil justice system which require reform**

**Question 65. Are there any other aspects of the civil justice system which need reform? If so, what are the problems and what changes should be implemented?**

### **5.1 Interpreters and translators**

The unavailability of interpreting services in the courts for impecunious litigants presents a major barrier to access to justice which requires urgent redress. PILCH considers that the current policy of the Supreme Court of Victoria and County Court of Victoria regarding provision of language services is inadequate. Further, the practice of these courts is inconsistent with the languages services policy of the Department of Justice. In addition, PILCH is concerned that the current practice of the courts may be inconsistent with the human right to a fair hearing which is provided for in section 24 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**the Charter**).<sup>4</sup>

Pursuant to the Charter and specific legislative provisions, the Magistrates Court, County Court and Supreme Court of Victoria provide interpreters for non-English speaking defendants in criminal proceedings.<sup>5</sup> However, in civil proceedings, the court plays no role in organising an interpreter to be present or ensuring that the services of an interpreter are available where required. Pursuant to the practice of all three courts, it is the responsibility of parties to the proceedings and their legal representatives to provide interpreters. We understand that in the Supreme Court of Victoria, in some circumstances, a judge may make an order that an interpreter is arranged by the court, however, this occurs on an ad hoc and discretionary basis.

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<sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 24.

<sup>5</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 25 provides with respect to ‘rights in criminal proceeding’ that a person charged with a criminal offence is entitled to certain minimum guarantees, including to have the free assistance of an interpreter if he or she cannot understand or speak English’.

*Magistrates’ Court Act 1989 (Vic)*, s. 40 provides that ‘If— (a) a defendant is charged with an offence punishable by imprisonment; and (b) the Court is satisfied that the defendant does not have a knowledge of the English language that is sufficient to enable the defendant to understand, or participate in, the proceedings— the Court must not hear and determine the proceeding without a competent interpreter interpreting it.’

See also *Crimes Act 1958 (Vic)* s. 4; and *Children and Young Persons Act 1989 (Vic)* s. 6.

PILCH is concerned that the current practice of the courts is inconsistent with the right in section 24 of the Charter of every person to a fair hearing.<sup>6</sup> There is a body of jurisprudence supporting the proposition that, in certain circumstances, the right to a fair hearing includes the right to an interpreter and the right to counsel. This issue is discussed in detail in the submission of the HRLRC which PILCH endorses.

The current practice of the courts creates a significant barrier to access to justice in circumstances where a legal practitioner is acting pro bono and the represented party to the proceeding cannot afford to pay for an interpreter to attend a hearing. PILCH has dealt with many parties to court proceedings whose ability to participate in the legal process is undermined because they cannot afford to arrange for the services of an interpreter to attend court hearings. Law Aid disbursement is regularly unavailable to cover the costs of interpreters, as discussed in Part 5.2 below. PILCH recently referred a matter where the client was a defendant in Magistrates' Court of Victoria proceedings and the pro bono barrister paid for an interpreter to be present at the hearing so that his client could understand proceedings and he could obtain proper instructions (see **Case Study B** above).

A government inquiry in 2002 into language services recommended that further investigation was required into the provision of interpreting services in the corrections, courts and tribunal areas to establish the extent to which demand is met by parties other than the government agency and the extent and nature of remaining unrevealed demand'.<sup>7</sup> PILCH is unaware of any further investigation of the issue since then.

The Department of Justice Language Services Policy and Guidelines for Working with Interpreters and Translators provides that:

*'clients who are not able to communicate through written or spoken English should be given access to professional interpreting and translating services when required to make significant decisions concerning their lives; or where essential information needs to be communicated to inform decision making.'*<sup>8</sup>

PILCH considers that the current practice of the courts in relation to civil proceedings is inconsistent with the Department of Justice's language services policy. Further, PILCH

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<sup>6</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 24 provides that "Fair hearing - A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

<sup>7</sup> Report to the Department of Premier and Cabinet, Victorian Office of Multicultural Affairs, *A Needs Analysis of Language Services*, Executive Summary, February 2002, page 18, available at [www.voma.vic.gov.au](http://www.voma.vic.gov.au)

<sup>8</sup> June 2006 (available at [www.voma.vic.gov.au](http://www.voma.vic.gov.au))

considers that the lack of any policy to ensure that interpreters are provided for parties who cannot afford to pay for an interpreter in court proceedings is a serious deficiency in our civil justice system and undermines equitable access to justice for all members of the community.

**Case Study H:** Mr H, an elderly man who speaks limited English, had a fruit and vegetable stall at a primary school. Proceedings were brought against him in the County Court by a plaintiff who alleged that he fell over a box of vegetables at the stall and suffered injuries. The school did not have public liability insurance. Mr H was referred to a pro bono practitioner for representation in the County Court who advised Mr H that he had reasonable prospects of success in defending the matter. Mr H was unable to afford the cost of an interpreter to be present during court proceedings, the court would not provide an interpreter, and Mr H had to rely on his daughter to interpret for him. It is unclear at this stage who will pay for an interpreter in the event that Mr H needs to be cross-examined.

PILCH itself is able to access translation and interpreter services such as Victorian Interpreting & Translating Service and the Department of Immigration's Translating and Interpreting Service. This means that when PILCH staff are communicating with clients who do not speak English, PILCH can make use of these services. However, these services are not available to the pro bono lawyers who accept referrals from the Schemes to act pro bono and who require translation and interpreting services to communicate with those clients. The lack of free interpreting services for utilisation by practitioners acting pro bono creates a significant barrier to making pro bono referrals to practitioners who would otherwise be prepared to provide pro bono advice and assistance to clients referred through PILCH. In many instances, PILCH has been unable to refer a matter to a pro bono practitioner in circumstances where the client would need an interpreter as the practitioner was unwilling to meet the out-of-pocket expense of the interpreting service, but was willing to provide their own legal services pro bono. PILCH is of the view that if telephone interpreting services were made available to legal practitioners acting pro bono, the amount of valuable pro bono legal services being provided could be significantly increased.

**Recommendation 10:** PILCH recommends that the Victorian Government take immediate action to ensure that interpreting services are made available in all civil proceedings in Victorian courts and that the practice of Victorian courts is consistent with the Department of Justice's languages services policy.

**Recommendation 11:** PILCH recommends that the Victorian Government provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.

## 5.2 Pro bono disbursement funding

PILCH considers that the availability of funding for disbursements in litigation is critical to



ensuring access to justice in pro bono matters. Disbursements include court expenses other than professional legal costs such as filing fees for documents, daily sitting fees, interpreters' fees and transcript fees. The current court fee waiver schemes allow for the waiver of most court fees where the party can show financial hardship. However, the court fee waiver schemes do not cover the costs of many disbursements which are incurred in civil proceedings, such as expert reports. PILCH regularly coordinates pro bono legal services for persons in matters where the lack of available funding for disbursements creates a significant barrier to progressing the matter and may result in a client being unable to access to justice, as illustrated in Case Studies J and K below. In PILCH's experience, the limited availability of funding for disbursements acts as a disincentive to practitioners providing pro bono legal advice.

Currently, in Victoria, there is one scheme funding disbursements in civil litigation matters undertaken by law firms on a pro bono or no-win no-fee basis. The Law Aid fund was established as a joint initiative of the Law Institute of Victoria, the Victorian Bar and the Victorian Government to provide monies for disbursements for impecunious civil litigants in 1996. Law Aid was established with a seed grant of \$1.7 million from the Victorian Government to establish a non-profit charitable trust, pursuant to the Law Aid Deed of Trust and the Memorandum of Understanding dated 1996.

PILCH considers that funding for disbursements in litigation should be more available and one avenue for achieving this may be to expand the Law Aid guidelines. PILCH notes that the criteria for eligibility for assistance under the Law Aid Scheme is a matter for the Law Aid Board of Trustees. PILCH is currently engaging in discussions with the LIV and the Victorian Bar regarding the operation of the Law Aid Scheme. Given the relevance of the Law Aid Scheme to access to justice in Victoria, PILCH considered that the VLRC should be made aware of this issue in the context of the current review.

Law Aid is self-financing and its ongoing revenue comprises investment return on trust funds, an application fee of \$100.00 from each applicant, and a fund fee charged to successful litigants which is usually 5.5% of the amount of any damages awarded plus the amount of the grant from Law Aid.

The Law Aid website states that:

*All forms of civil litigation cases are supported including:*

- (a) Personal injury claims*
- (b) Claims against institutions involving discrimination or oppressive behaviour*
- (c) Professional negligence claims*
- (d) Wills and estates claims.*

*Assistance is not available for criminal law or family law matters.*

*A voluntary, not-for profit scheme, Law Aid is a charitable trust managed by the Law Institute of Victoria and the Victorian Bar Council.*

***How the scheme operates***

- (a) Prior to application, you must agree not to seek payment of fees until the successful conclusion of the case and to waive all professional costs incurred should the case not succeed.***
- (b) Applications must be made on the Law Aid Application Form and can only be accepted from legal practitioners.***
- (c) Both you and your client must sign the application form.<sup>9</sup>***

We note that Law Aid does not fund lawyers' costs but only funds out-of-pocket costs. Law Aid is therefore different from litigation funding agreements where the litigation funding company pays the costs of the legal service provider. Only lawyers who waive all professional costs in the event the case is unsuccessful can apply to Law Aid on behalf of their client for support in relation to disbursements.

PILCH considers that the types of matters in which Law Aid provides funding for disbursements should be broadened to include cases where the matter raises an issue which requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who are disadvantaged or marginalised, or the matter raises an issue concerning the human rights of the applicant involved. The matters for which Law Aid funding is available should not be confined to civil proceedings, but should also include criminal law or family matters, even where there is a limited or no prospect of Law Aid recouping the funding it provides.

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<sup>9</sup> [www.lawaid.org.au](http://www.lawaid.org.au)

**Case study I:** LIV LAS recently referred a matter to a criminal solicitor for assistance to appeal against a sentence for burglary and theft charges and a breach of a five month suspended sentence. The County Court had imposed a 14 month imprisonment term. The client was on appeal bail. The Court decided to adjourn the matter for three months pending further urine screening samples which would show whether the client was drug free. The client had exhausted the rebate available to him for Medicare for urine samples and he could not afford to pay for further tests. The pro bono solicitor involved asked PILCH to assist in finding a welfare agency or other organisation who could donate money for further urine testing. Without funding for this disbursement, the client faced a significantly longer jail term.

**Case study J:** LIVLAS referred a client who was the defendant in proceedings brought by the parents of a child who had been injured on the client's property. It was alleged that the client was responsible in negligence for the child's injuries. The pro bono practitioners obtained a report regarding the cause of the child's injuries. As a result of obtaining the expert report and receiving sound legal advice, the client decided to accept liability rather than defend the matter at trial. The cost of obtaining the expert report, which was significant, was covered by the pro bono practitioner. However, in most cases, a pro bono practitioner would not be prepared to pay for an expert report, and a case such as this would proceed to trial.

Similarly, PILCH has referred matters where a transcript of tapes of court or tribunal hearings is critical but the client cannot afford to cover the cost of such a disbursement, and Law Aid is not available.

PILCH also considers that the Law Aid should also have provision for waiver of the \$100.00 application fee in cases where payment of the application fee would cause significant financial hardship or where the matter raises an issue of public interest or human rights.

Finally, Law Aid should grant funding retrospectively in situations where disbursements were incurred urgently or where there is another compelling reason for funding the disbursements.

**Case Study K:** In a deportation matter where an expert's report was crucial to preventing Mr K from being deported on character grounds, a family member 'went into debt' to pay the expert for his report and to give evidence at the hearing within an extremely tight time frame. Funding by Law Aid was later refused because the application was retrospective and because the Tribunal had made its decision by that stage, though the decision was favourable to Mr K. The expert has not been fully paid as yet and the applicant, who does not work and has no assets, is struggling to find the money to pay the amount that is outstanding.

**Recommendation 12:** PILCH recommends that the Victorian Government provide funding for disbursements in pro bono matters where the matter raises an issue which requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who are disadvantaged or marginalised, or the matter raises an issue concerning

the human rights of the applicant involved.

**Recommendation 13:** In the alternative, PILCH recommends to the Law Aid Scheme's Board of Trustees that:

- i. the guidelines for eligibility for assistance be extended in the manner outlined in Recommendation 12.
- ii. it introduce provision for waiver of the \$100.00 application fee in cases where payment of the application fee would cause significant financial hardship or where the matter raises an issue of public interest or human rights.
- iii. it introduce provision to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason for funding the disbursements retrospectively.

### 5.3 Costs orders in Public Interest Litigation

PILCH considers that the risk of adverse costs orders is one of the most significant barriers to access to justice in public interest matters, because the risk of these orders acts as a strong deterrent to bringing or continuing litigation. This is particularly the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. The community potentially suffers when important legal issues are not properly agitated and resolved.

A recent example of public interest litigation being aborted because of concern about costs is the case of *Schou v The State of Victoria*. This involved a complaint of indirect discrimination under the *Equal Opportunity Act 1996* (Vic). The plaintiff, a single mother, chose not to make a special leave application to the High Court, after losing in the Court of Appeal, because the consequences of an adverse costs order, if made, would have been too great.

Cases which have come to the attention of PILCH and other public interest law organisations demonstrate that a number of litigants, whose matters raise public interest issues, have not proceeded with litigation or exhausted all legal avenues for redress, due to a fear of adverse costs orders.

In order to address this issue and to improve access to justice, PILCH considers that an alternative regime should be established to reduce the potential financial risk from adverse costs orders for individuals and organisations that bring bona fide proceedings in the public interest.

The Costs Orders in Public Interest Litigation Project (**the Project**) has been developed by PILCH, Victoria Law Foundation, Stephen Lucas of Sparke Helmore and John Manetta of Counsel. As the Project has developed, we have adopted a two-pronged approach which focuses on:

- Model guidelines for the State Government as a party to public interest proceeding (**Model Guidelines**); and
- Amendment of the Supreme Court Rules in order to better protect bona fide public interest litigants from adverse costs orders (**Rules Amendment**).

The Model Guidelines aim to improve access to justice by providing a framework to deal with the issue of costs insofar as it concerns the State as a party in public interest proceedings. Specifically, the Model Guidelines provide that the State will *consider* giving an undertaking not to pursue costs if successful in public interest proceedings in which it is a party. The Model Guidelines set out a number of factors that should be taken into consideration when the State decides whether to make an undertaking. These factors include whether the litigant has an arguable case, whether the case raises an important public interest issue and whether there is a substantial risk that access to justice may be denied due to the litigant's fear of an adverse costs order.

The Rules Amendment involves changes to Order 63 of the Supreme Court Rules to incorporate provisions relating to public interest litigants. The amended Order would provide a regime whereby, on application, a litigant could be declared a 'public interest litigant'. As long as that declaration remains current and has not been revoked, no adverse costs order would be made against a public interest litigant and the public interest litigant would not be required to pay any adverse costs orders, which relate to the final determination of the litigation.

PILCH considers that the Project is an extremely important step towards improving access to justice for individuals and groups seeking to bring proceedings that are in the public interest and will benefit the community.

We are also of the view that the Project would complement any future expansion of not-for-profit litigation funding. In the event that not-for-profit funding of litigation is adopted in Victoria, the outcomes of the Project would also ensure that, in the case of public interest litigation, the risk of having to pay the other side's costs would be removed. This would, in turn, provide not-for-profit funders with greater certainty and with greater incentive to take on matters. Also, if the guidelines in relation to disbursement funding are expanded as recommended in Part 5.2 above, and the risk of having to pay an adverse costs order is removed, this would greatly improve access to justice for bona fide public interest litigants.

**Recommendation 14:** PILCH recommends to the Victorian Government that it consider adopting the Model Guidelines which provide that the State will consider giving an

undertaking not to pursue costs if it is successful in public interest proceedings in which it is a party.

**Recommendation 15:** PILCH recommends to the Supreme Court of Victoria that the court considers an amendment to the Order 63 of the Supreme Court Rules to incorporate provisions relating to costs and public interest litigants.

## **6 Self-Represented Litigants**

**Question 33: - Is there need for reform to deal with cases where parties do not have legal representation? If so, what specific changes should be implemented?**

Victorian courts are facing an ever-increasing number of litigants who appear unrepresented, largely because they cannot afford to pay for legal services and cannot access, or are not aware of, government funded legal services. These unrepresented or self-represented litigants are often not familiar with the substantive law or the legal system which places them at a significant disadvantage and drains already overburdened Court resources.

The number of individuals and organisations referred by PILCH each year to the legal profession for pro bono advice and/or representation has increased, and yet the tide of people appearing in the courts unrepresented has not abated.

There are a number of possible explanations for this trend, including:

- (a) Restrictions on the availability of legal aid;
- (b) The increasing cost of litigation;
- (c) Society becoming more litigious; and
- (d) Information about the law and legal remedies which have been pursued in the courts, gaining increasing coverage in the media, including on television and the internet.

In some cases, self-represented litigants are unaware they may be eligible for pro bono representation. They are often directed by officers of the court to PILCH and, if eligible, are able to obtain pro bono representation. However, it is clear that the existence of PILCH and the significant ongoing contribution of pro bono practitioners are not enough to ensure self-represented litigants are able to have their cases heard fairly and expeditiously nor does the present system enable the courts to operate as efficiently as they might.

In 2002, the Courts Consultative Council<sup>10</sup> embarked on a project to map out the future directions of Victoria's courts and VCAT, known as the Courts Strategic Directions Project. Their resulting *Courts Strategic Directions Statement*<sup>11</sup> (**Statement**) provides a set of directions for the structural, procedural and administrative reform of the Courts and VCAT over the next decade and includes a number of recommendations aimed at increasing the capacity of the Courts and VCAT to serve the community. Section 8.2.5 of the Statement considers the issue of legal aid and self-represented litigants and makes a number of recommendations in relation to measures which would help address issues associated with self-represented litigants which PILCH supports.<sup>12</sup>

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<sup>10</sup> The Courts Consultative Council consists of the Attorney-General, the Chief Justice of Supreme Court of Victoria, the President of the Court of Appeal, the Chief Judge of the County Court, the Chief Magistrate and the President of VCAT.

<sup>11</sup> Courts Consultative Council, 'Courts Strategic Directions Report', 2004.

<sup>12</sup> Recommendation 15 of the Court Strategic Directions Statement provides:

- The Commonwealth and Victorian Governments should provide an adequate level of legal aid funding to ensure that people have adequate legal representation and that the operation of the Courts and VCAT is not adversely affected either by increased numbers of litigants in-person, by under qualified legal representation or the inappropriate allocation of cases to courts and to enable the proper allocation of cases.
- The Courts and VCAT should be consulted when either the Commonwealth or State Governments propose to alter the levels of legal aid funding.
- Before any laws are passed by the Parliament, it should be provided with a report on the likely implications for the legal aid system for the Courts and VCAT and the funding required to meet any likely additional financial burden.
- The following practical measures should be assessed and where appropriate implemented and adequately resourced:
  1. Development of litigant in-person plans to provide necessary information to unrepresented persons;
  2. Increasing the level of legal advice and support for litigants in-person including extension to courts of additional duty lawyers or registrars;
  3. Training and educational material for judicial officers through the Judicial College of Victoria in dealing with litigants in-person; and
  4. A programme to collect and analyse data about litigants in-person should be initiated to form the basis for seeking improvements for the support of such litigants.

In PILCH's view, the methods of assisting self-represented litigants requires reform and a commitment by the government to consider the funding and implementation of specific changes. This includes increasing the level of legal advice and support available to self-represented litigants by adopting and implementing the recommendations which are discussed and set out below.

## **6.1 Extend Duty Lawyer Schemes to all jurisdictions in Victoria**

There are currently duty lawyers provided by VLA at VCAT and VLA and CLCs in the Magistrates' Courts to provide legal advice and support to self-represented litigants.<sup>13</sup> There is an expectation that most litigants will appear without legal representation in the majority of lists in VCAT and in the Magistrates' Court, however, given the nature and complexity of matters in the Supreme and County Courts a self-represented litigant's ability to achieve the outcome he/she is seeking is seriously compromised. In 1999, the Law Reform Commission of Western Australia undertook a review of the civil and criminal justice system in Western Australia and identified a number of possible responses to the issue of self-represented litigants. These included more extensive use of duty solicitor schemes and community legal education programs.<sup>14</sup>

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<sup>13</sup> The majority of Victoria's Magistrates' Courts have duty lawyers provided by Victoria Legal Aid. These lawyers typically deal with custody matters and mentions hearings. In addition, the Broadmeadows Magistrates' Court has a duty solicitor provided by the Broadmeadows Community Legal Centre on Fridays for Family Violence Applications. The Frankston Magistrates' Court has a duty solicitor provided by Peninsula Community Legal Centre on Thursdays who assist the Crimes Family Violence Program. The Darebin Community Legal Centre provides a duty solicitor for the Darebin Intervention Order Support Service at the Heidelberg Magistrates' Court. The Ringwood Magistrates' Court also has Crimes Family Violence duty solicitors provided by Eastern Community Legal Service. At the Sunshine Magistrates' Court a duty solicitor is provided by Brimbank Melton Community Legal Centre for Crimes Family Violence Applications on Tuesdays and Wednesdays. The Werribee Magistrates' Court has a duty solicitor provided by Wyndham Community Legal Service on Thursdays for Crimes Family Violence.

<sup>14</sup> Law Reform Commission of Western Australia, *Review of the Civil and Criminal Justice System in Western Australia*, 1999, 153-160.



**Recommendation 16:** PILCH recommends that the Victorian Government provide additional duty lawyer resources to all the courts in Victoria similar to the system used in the Victorian Civil & Administrative Tribunal and the Magistrates' Courts.

## 6.2 Fund a Self-Represented Litigants Coordinator in each jurisdiction

In 2006, the Supreme Court of Victoria obtained funding from the Victoria Law Foundation to employ a Self-Represented Litigants Coordinator (**SRL Coordinator**) based in the Prothonotary's office of the Supreme Court for a one-year pilot program. The SRL Coordinator acts as the primary contact for self-represented litigants on a day-to-day basis. The major tasks of the SRL Coordinator include:

- (a) Providing accurate and consistent procedural and practical advice to self-represented litigants (but not giving legal advice);
- (b) Assisting litigants to complete necessary forms and file documents;
- (c) Liaising with other court staff, including judges and associates, registry and prothonotary staff and lower courts, in order to expedite self represented litigants' proceedings;
- (d) Keeping statistics on self-represented litigants;
- (e) Monitoring best practice responses to self-represented litigants from other jurisdictions; and
- (f) Providing referrals to PILCH, VLA and community legal centres.

The referral process between the court and PILCH has proven effective and affords self-represented litigants who may wish to obtain some legal assistance the opportunity to be referred to PILCH for assessment against PILCH's usual eligibility criteria for pro bono representation. In many cases, the self-represented litigants were not aware of the existence of PILCH or the process for applying for pro bono advice or representation.

Since the commencement of the pilot program, PILCH has worked closely with the SRL Coordinator to develop a Memorandum of Understanding between the Supreme Court and PILCH, and conducts regular meetings to discuss the court's and PILCH processes. The SRL Coordinator has referred a number of self-represented litigants to PILCH which has resulted in pro bono advice and representation and has undoubtedly assisted the operations of the Supreme Court. The case studies below highlights some of the previously unrepresented litigants whom upon referral to PILCH were able to obtain pro bono representation.

**Case Study M:** Mr M, who did not speak English, was referred to LIV LAS by the SRL Coordinator. Mr M appealed a decision of the County Court to refuse to stay proceedings due

to a requirement in the agreement between the parties requiring that arbitration of disputes take place China. LIV LAS referred the matter to pro bono solicitors and VB LAS referred the matter to counsel. The appeal was successful and the proceedings were stayed pending determination of the dispute in China.

**Case Study N:** Mr N was diagnosed as suffering from a brain tumour requiring invasive neuro-surgery and necessitating that he stand down from practising as a doctor while he underwent rehabilitation. Mr N entered into a hire purchase agreement with a finance company in 2004. He failed to make payment under the agreement and the finance company issued proceedings. A default judgement was entered against Mr N. He applied to the County Court to have the default judgement set aside, however this application was dismissed. Mr N sought leave to appeal in the Supreme Court. The Court of Appeal held that Mr N had an arguable defence and counter claim, and identified several grounds of defence. The court gave Mr N one month to lodge a fresh application to set aside the default judgment and the SRL Coordinator referred Mr N to PILCH, where he was referred to a firm of solicitors and counsel for representation and to assist him to make a fresh application in the Supreme Court.

**Case Study O:** VBLAS accepted a referral from the SRL Coordinator of Mr O, an elderly man who was representing himself in an action against a mortgagee of his former family property. When it was referred to VB LAS, the matter had been stayed indefinitely by the judge handling the case. VB LAS referred the matter to counsel with experience in mortgage and property law to conduct a merits assessment. In the event counsel finds that there is merit in some or all of the action, VBLAS and LIVLAS will seek pro bono counsel and solicitors to represent Mr O.

**Recommendation 17:** PILCH recommends that the Victorian Government provide adequate funding for a Self-Represented Litigants Coordinator scheme at the Supreme Court of Victoria.

**Recommendation 18:** PILCH also recommends that the State Government create and fund the position of a Self-Represented Litigants Coordinator in each court jurisdiction.

### **6.3 Review and improve existing written information and where appropriate, produce new materials, fact sheets and guides in conjunction with the courts**

Self-represented litigants often come to PILCH and the courts with the wrong forms or the right ones incorrectly filled out. These types of issues slow down court proceedings and in some cases cause the matter to be discontinued. In an article entitled '*Self Representing*

*Litigants: A Queensland Perspective*,<sup>15</sup> the authors state that an examination of court files in which a party is self-represented reveals patterns such as:

- (a) Incorrect use of forms;
- (b) Detailed correspondence with the registry, often containing applications;
- (c) Misdirection of correspondence containing formal submissions or requests;
- (d) Requests for extensions of time; and
- (e) Wrongly framed requests for relief, particularly judicial review.<sup>16</sup>

As part of the Supreme Court's SRL Coordinator pilot program, it is envisaged that the SRL Coordinator will also be responsible for the development of materials including:

- Developing materials to assist self-represented litigants;
- Updating the Supreme Court website to cater specifically for self-represented litigants, in conjunction with the existing website development project; and
- Developing new materials to assist judges, masters and staff to work effectively with self-represented litigants.

In PILCH's view this is an effective method to assist both the self-represented litigants and the courts. PILCH has met with the SRL Coordinator and provided feedback on information which could be covered in materials for self-represented litigants, including:

- (a) basic information about the Courts':
  - Location;
  - Officers;
  - Rules;
  - Proceedings;
  - Procedures;
  - Judgements, and
- (b) information about issues which generate frequent contact with VLA, CLCs, PILCH and court staff such as:

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<sup>15</sup> *Self-representing Litigants: A Queensland Perspective*, John Dewar, Bronwyn Jerrard and Fiona Bowd, December 2002.

<sup>16</sup> Ibid.

- What is meant by listing, review or mention and how a matter obtains a trial date;
- How to complete court forms;
- Costs orders and what bearing they should have on a litigant's decision to proceed to trial;
- Procedures for disputing evidence being given or tendered in court;
- Procedures for complaining about the lawyers on the other side.

#### **6.4 Overseas models to assist Self-Represented Litigants**

In the United States, the Judicial Council has provided funding for projects to address the needs of self-represented litigants. The Los Angeles County Superior Court for instance established a program to create a centralised Self-Help Management Centre to develop partnerships with the local courts, the Bar, schools, and social services organisations.<sup>17</sup> The services provided by the centre include the provision of information, materials about the court and its proceedings and procedures, instructions on how to complete forms, and the provision of reference materials regarding legal service providers, social service agencies, and government agencies, as well as other educational material. Clients can also attend workshops or receive one-on-one assistance. It is an interesting model. The aims and services of the Centre are very similar to the aims and objectives of the SRL Coordinator pilot program.

#### **6.5 Review and improve existing written information and where appropriate, produce new materials for judicial officers to assist with self-represented litigants.**

As mentioned in the Court Strategic Directions Statement, the impact of self-represented litigants on courts' operations is significant and registry staff spend considerable time with self-represented litigants explaining the nature of the Court's processes and assisting with completion of court documents. PILCH believes that judicial officers would benefit from training and educational materials on how to assist self-represented litigants with basic legal and procedural information, assist with filling out forms, available interpreter services and legal services such as VLA, CLCs, pro bono schemes (such as those administered by PILCH) and other community resources.

Although many self-represented litigants have meritorious matters and may be eligible for pro bono assistance or legal aid, the courts will always be faced with vexatious litigants or difficult

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<sup>17</sup> Judicial Council of California, Administrative Office of the Courts – Model Self-Help Centers Pilot Program [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)

complainants. In his paper entitled '*The Vexatious Litigant*'<sup>18</sup> Dr Grant Lester suggests guidelines for judicial officers to manage difficult complainants. PILCH submits that court staff would also benefit from training and educational materials regarding guidelines for managing difficult complainants.

**Recommendation 19:** PILCH recommends that the Victorian Government provide additional funding to prepare, publish and deliver training and educational material for judicial officers on best practice management of self-represented litigants.

## 6.6 Explore technological solutions for providing services to self-represented litigants

In the Supreme Court of California, County of Contra Costa, a program has been established to emphasise the use of technology in providing services. The goals of the program are to explore the use of technological solutions for completion of forms, provision of information, meeting with litigants at a distance, and other services. The program is intended to combine and deliver expert information and assistance via the internet, computer applications, and real time videoconference workshops to develop a Virtual Self-Help Law Centre for self-represented litigants with divorce, child custody and visitation, domestic violence, civil and guardianship cases. The Virtual Self-Help Centre resources are intended to help parties to navigate the court process, complete, file, and serve court forms, handle their court hearings, understand and comply with court orders.<sup>19</sup>

In PILCH's view, these models and other technological solutions should be reviewed by VLRC and the government when considering ways to improve access to services for self-represented litigants, such as:

- (a) Publication of written materials (proposed above) on the court's website;
- (b) Provision of information;
- (c) Links to VLA, the Federation of CLCs, pro bono referral services, social service agencies and government complaint bodies and agencies;
- (d) Completion of forms online; and
- (e) Ability for self-litigants at a distance to submit questions to the SRL Coordinators at the courts.

**Recommendation 20:** PILCH recommends that the Victorian Government provide additional funding to examine and implement technological services for self-represented litigants.

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<sup>18</sup> The Vexatious Litigant, by Dr Grant Lester, Judicial Officers' Bulletin April 2005-Volume 17 No 3.

<sup>19</sup> [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)

## 7 Abuse of Process

**Question 22: - Do the rules or laws relating to abuse of process need reform? If so, what are the problems and what changes should be implemented?**

**Case Study O:** In 2004, a number of environmental advocates approached PILCH in relation to obtaining pro bono representation to defend a writ filed in the Supreme Court of Victoria by a logging company and two individuals, against 20 defendants for, amongst other claims, (1) wrongful and malicious interference with the plaintiff's trade and business by unlawful means with the intention of causing injury to that trade and business (2) wrongful and malicious interference with the performance of contracts entered into by plaintiffs by unlawful means with the intention of injuring the plaintiffs (3) wrongful and malicious conspiracy to injure the plaintiffs by unlawful means, and (4) trespass. PILCH referred those defendants who were eligible for pro bono representation (because of their means) to one of its members firms and ultimately six barristers to prepare their defence against the proceedings which threatened to either bankrupt them or leave them destitute, if undefended. After thousands of hours of preparation and countless interlocutory hearings, the plaintiff's Statement of Claim was struck out for the third time and the plaintiffs ordered to file a new Statement of Claim properly articulating the allegations and damages sought. More recently, proceedings have been discontinued against five defendants (including two clients referred for pro bono representation by PILCH), notwithstanding that those defendants have had to defend baseless proceedings for over two years.

Case Study O illustrates the emerging problem in Australia of large corporations using 'SLAPP' writs (Strategic Litigation against Public Participation) as a form of intimidation against individuals and community groups who voice opinions on matters of public interest which differ from the interests of these corporations.<sup>20</sup>

In the United States, SLAPP writs have been increasingly used by the corporate sector as a tactic to stifle public opinion on particular issues and have damaged public debate to a degree where 'Anti-SLAPP' laws have been passed in some states to ban such legal action. For example, in California, the Code of Civil Procedure section 425.16 provides a judge with the ability to dismiss a suit against a member of the public at the very beginning of the suit where the proceeding arises from a person exercising their right of petition or free speech under the United States or California Constitution in connection with a public issue.<sup>21</sup> The company that filed the SLAPP Writ is then required to pay the defence costs of the person served with the

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<sup>20</sup>, Editorial, 'Forests debate turns into a test for democracy', *The Age*, 17 Dec 2004

<sup>21</sup> Anti-Slap Resource Centre, <http://www.thefirstamendment.org/antislappresourcecenter.html>

writ as well as their legal fees. So although it is still possible to file a SLAPP writ, the Anti-SLAPP legislation gives the court the discretion to dismiss such a claim and order the plaintiff to pay the costs and damages to the defendant(s) upon application of the affected party.

In 2003, Brian Walters SC of the Victorian Bar published a book entitled '*Slapping on the writs: defamation, developers and community activism*,' in which he suggested a model for Anti-SLAPP legislation in Australia. In 2005, the Greens Party in the Australian Capital Territory tabled in Parliament the Court Procedures (Protection of Public Participation) Amendment Bill 2005, largely based on Mr Walters' model for Anti-SLAPP legislation. The Bill, which is currently before the ACT Parliament, aims to protect the right of members of the community to 'get involved in a range of activities without fear of retribution, physical, financial or legal'<sup>22</sup>. In September 2005, a similar Bill was tabled in the South Australian House of Assembly by the Independent Member for Mitchell, Kris Hanna<sup>23</sup>.

PILCH strongly recommends that the Victorian Government pass Anti-SLAPP legislation in order to protect members of the public in the expression of opinions on important political, environmental and social issues. Such legislation could largely follow the legislation in North America and the proposed Bills in the ACT and South Australia by providing a mechanism for defendants to apply to the court for a proceeding to be dismissed summarily if the proceeding is brought for an 'improper purpose' to interfere with 'public participation' where:

- (a) 'public participation' means a publication or conduct aimed at influencing public opinion or promoting or furthering lawful action by the public, but excludes unlawful conduct; and
- (b) a proceeding is brought for an 'improper purpose' where it relates to public participation and where the plaintiff could have no reasonable expectation that the proceeding would succeed; and
- (c) the intent of the case is to:
  - silence public participation;
  - divert resources from public participation to a legal proceeding; or
  - penalise the defendant for engagement in public participation<sup>24</sup>.

**Recommendation 21:** PILCH recommends that the Victorian Government introduce

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<sup>22</sup> Dr Deb Foskey, Member for Molonglo in the Legislative Assembly, Hansard 29 June 2005, p2412, <http://www.hansard.act.gov.au/hansard/2005/pdfs/20050629.pdf>

<sup>23</sup> Protection of Public Participation Bill 2005, House of Assembly (SA)

<sup>24</sup> Court Procedures (Protection of Public Participation) Amendment Bill 2005 (ACT), ss37C, 37D and 37E

legislation against the use of SLAPP Writs.

## **8 Commercially Funded Litigation**

**Question 49: Are procedural, regulatory or other reforms required for cases funded by commercial litigation funders? If so, what are the problems and what changes should be implemented?**

**Question 50: Where parties are being financially supported by:**

- commercial litigation funders; or
- insurers

**should there be an obligation on those parties to disclose to the other parties the terms and conditions on which such financial support is being provided?**

PILCH considers that there are important public policy considerations which mean that there should be comprehensive regulation of litigation funding agreements and the litigation funding industry. In particular, PILCH is concerned with consumer protection considerations.

PILCH recently made a submission to the Standing Committee of Attorneys-General (**SCAG**) in response to the questions raised in its discussion paper, *Litigation Funding in Australia*. In its submission, PILCH commented on a number of questions relevant to this term of reference, which are summarised below. PILCH's submission to the SCAG is available at [www.pilch.org.au](http://www.pilch.org.au)

In PILCH's experience of coordinating pro bono legal services for people in Victoria, many consumers lack a basic understanding of the nature of contractual agreements and the legal system. This is often compounded by disadvantage such as lack of English language skills or mental illness. For example, many individuals who seek assistance through PILCH have entered into imprudent contractual arrangements without understanding the terms of the agreement or seeking independent legal advice. It is important to recognise that many litigants do not have the private means to engage a lawyer and, in the absence of adequate civil legal aid, the unavailability of no win-no fee arrangements and the lack of pro bono capacity, they may be desperate to find some way to fund their matter. This desperation may make them vulnerable to entering a litigation funding arrangement which is adverse to their interests.

In the context of litigation funding agreements, there already existing doctrines of law which regulate the duties of solicitors to their clients, such as the duty of legal practitioners to act in the best interests of their client, to act on a client's instructions and not to act in a position of conflict of interest. Such doctrines will go some way to ensuring that litigants who have entered into funding agreements will receive proper legal representation from practitioners



who act in their best interests, rather than in the interests of the litigation funding company (LFC) or in accordance with the financial objectives of the LFC, should a conflict arise.

Nevertheless, in PILCH's experience, many people are unaware of their legal rights or the obligations of legal practitioners they engage. PILCH considers that it is desirable that a strong approach be taken to consumer protection in this area. PILCH considers that this would be best achieved by requiring a direct contractual agreement between solicitor and litigant, and by legislating to include certain protective terms and disclosure requirements into litigation funding agreements to ensure transparency and the informed consent of consumers entering into such agreements. PILCH also considers that clear and uniform legislation outlining the requirements for a legally enforceable litigation funding agreement would provide a higher degree of certainty for consumers regarding the validity of litigation funding agreements. PILCH considers that it may be preferable that a body is empowered to investigate complaints regarding the conduct of LFCs or litigation funding agreements, similar to the role that the Legal Services Commission plays in monitoring the conduct of solicitors in Victoria. PILCH considers that such legislative measures warrant further development.

PILCH considers that LFCs should be subject to mandatory minimum disclosure requirements similar to the obligations of solicitors to make certain disclosures to clients regarding, for example, the basis on which costs will be calculated and uplift fees. PILCH considers that such mandatory disclosure is an important requirement for the protection of consumers and will improve certainty regarding the validity of litigation funding agreements.

PILCH also considers that explicit measures should be implemented to ensure that the professional obligations of lawyers to act independently and in the interests of clients are upheld. There is a potential for a lawyer's commercial relationship with an LFC to create a conflict of interest which would undermine a lawyer's duty to his or her client.

We note that the recent High Court of Australia decision in *Fostif* made significant findings in relation to the validity of litigation funding agreements.<sup>25</sup> The High Court in *Fostif* held that the funding arrangement in question did not constitute a ground to stay the proceedings, as the funding arrangement did not constitute an abuse of process and was not contrary to public policy. The decision in *Fostif* has removed the previous uncertainty regarding whether a particular litigation funding agreement would be stayed on public policy grounds, in jurisdictions where the torts of maintenance and champerty have been abolished (ie New South Wales, Victoria, South Australia and the ACT). However, in *Fostif*, the High Court did not consider the position in jurisdictions where maintenance and champerty continue to be

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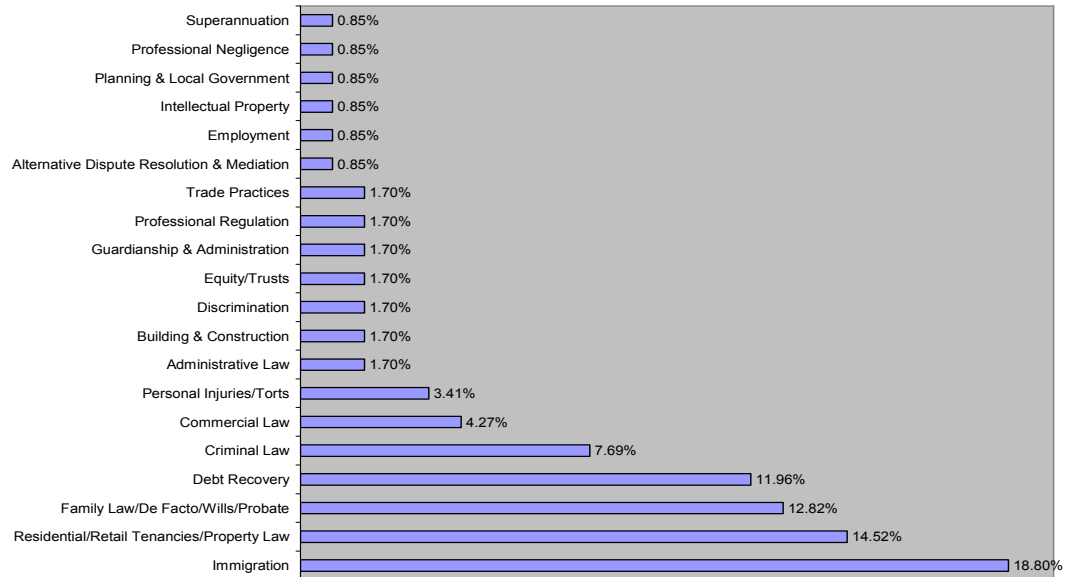
<sup>25</sup> *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41.

torts or crimes. Accordingly, there continues to be a degree of uncertainty in some jurisdictions and a lack of uniformity across Australia on this issue. PILCH is concerned that such inconsistency and lack of uniformity is undesirable, as it creates legal uncertainty and may impede access to justice if LFCs are reluctant to fund litigation outside the insolvency context in some jurisdictions. One way to achieve a degree of uniformity would be for the torts or crimes of champerty and maintenance to be abolished in the jurisdictions where they continue to exist.

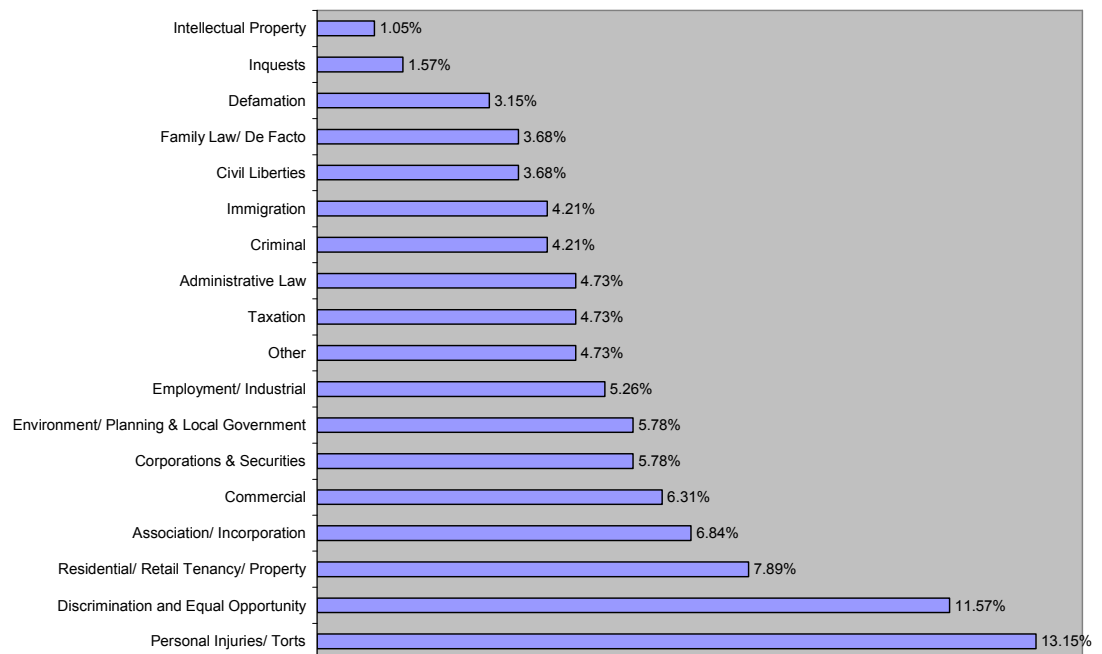
**Recommendation 22:** PILCH recommends that the State Government take steps to introduce legislative provision to ensure that the professional obligations of lawyers to act independently and in the interests of clients are upheld in the context of litigation funding arrangements.

## Attachment A

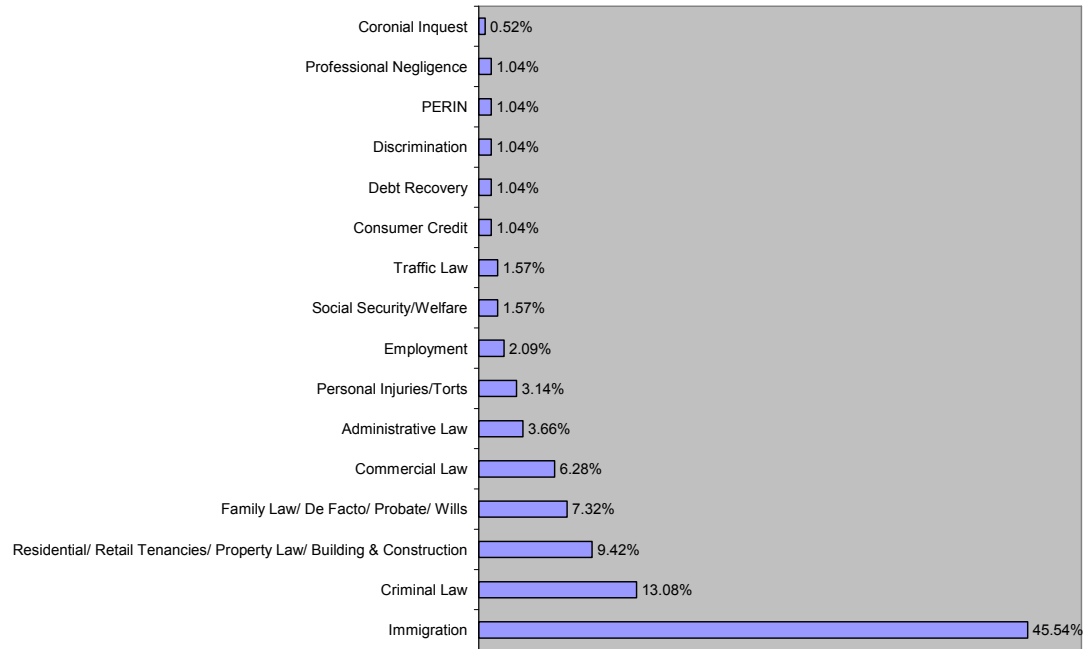
### LIVLAS referrals – Areas of law- 2005 - 2006



### PILCH Scheme referrals – Areas of law- 2005 - 2006



### VBLAS referrals – Areas of law- 2005 - 2006



**Attachment B**

Law Council of Australia  
 National Aboriginal & Torres Strait Islander  
 Legal Services Secretariat  
 National Legal Aid  
 National Association of Community Legal Centres

**TOPIC**

Restoration of a National Civil Legal Aid Scheme

**PURPOSE**

To provide National Access to Justice and Pro Bono Conference 2006 Delegates with proposals for:

- ☐ A policy to restore a national civil legal aid program and
- ☐ A means whereby resolutions of various stakeholders supporting such a program might be implemented.

**BACKGROUND**

1. Almost a decade ago, significant changes occurred to the funding of legal aid by the Commonwealth Government. These changes included the abandonment of the 'cooperative' model of legal aid funding, the introduction of the Commonwealth/State 'legislative competence dichotomy' as a basis of funding, and the introduction of the 'purchaser/provider' model of funding. The changes also took place within the context of Government departments all being required to reduce expenditure to cope with an unexpectedly severe budget deficit which the (then) new Government alleged it had inherited.

2. The 'co-operative' model of funding had the Commonwealth on the one hand and State and Territory Governments on the other providing, respectively, 55% and 45% of the identified funding requirements of legal aid commissions around the country. The model in turn had its origins in an arrangement forged upon the merger of the

former Australian Legal Assistance Office and various State and Territory legal aid schemes, many of which were controlled by LCA constituent bodies.

3. The 'purchaser/provider' model represented both a philosophical and fiscal shift in Commonwealth funding. Put simply, the Commonwealth under this model selected those legal problems in those areas of the law which it was prepared to fund (or purchase), and obliged providers (legal aid commissions and the private profession) to only fund that legal work so selected.

4. The 'co-operative' model had previously meant that all government funding went to legal aid commissions to be used as they saw fit. Inevitably, 'Commonwealth' funds were used to provide services in areas such as criminal law, and civil actions. The 'legislative competence dichotomy' principle has been used to prevent commissions from providing legal work arising under State or Territory law using Commonwealth funding. The intellectual and legal nonsense which the principle represents has been pointed out by manifold reports, submissions and research papers – which have, without exception, been rejected by the Commonwealth.

5. In the event, it has been estimated that the 1996 changes removed approximately \$120 million (in 1996 terms) from legal aid, with one of the more significant results being the end of the civil law programs operating in most Commissions and significant cut backs in the others.

## **ISSUES**

### ***Consequences of the lack of a national civil legal aid program***

6. In this context, 'civil' matters are defined as disputes (not involving reliance upon the *Family Law Act 1975*, State or Territory child welfare legislation, or legislative, or common law or equity relating to property of *de facto* or same sex couples) between natural persons or bodies corporate and others including governments and government agencies and instrumentalities which do not involve any party in the matter being prosecuted for breaches of the criminal law.

7. Since 1996, there have been a number of studies which have identified the following major consequences of the changes:-

- a multitudinous increase (some studies use the word ‘explosion’) in the number of litigants representing themselves before all courts in all jurisdictions;
- a consequential increase in the time work undertaken by administrative staff and judicial officers to cope with litigants in person which has been the subject of adverse comment at the highest level;
- a clear correlation between the erosion of legal representation caused by the changes and the need and increased demand for pro bono services to be provided by the profession;
- increased pressure upon ill-resourced community legal centres, and other agencies to provide assistance in what would have been casework provided by lawyers funded by former civil legal aid programs;
- increased pressure upon information agencies to ‘teach’ litigants in person how to conduct cases by various means;
- clear examples of litigants in actions or proposed actions for damages seeking to pressure firms offering contingent litigation packages to take on cases without being prepared (or able) to fund the investigatory work necessary to assess merit, and a consequent increase in pressure on publicly funded LAFs to meet the shortfall; and
- litigants’ rights being rendered nugatory because of the limitations on access to justice caused by the litigant in person’s lack of necessary skill.

### ***Responses to the consequences***

8. The Commonwealth Government’s response to what is aptly described as a crisis has been to seek all manner of ‘reforms’ (not involving the restoration of funding). Indeed the seminal work *Federal Civil Justice Strategy Paper (December 2003)* examines a number of the consequences noted above, and makes more than forty recommendations, none of which include the restoration of civil legal aid.

9. On the other hand, constituent bodies of the Law Council, community legal centres, various NGOs in the social services sector, National Legal Aid, and others have all identified that a justice system (including a civil justice system) which has no legal aid

component as an integral part is no justice system at all. This is supported by studies abroad in comparable jurisdictions, including the often quoted *Woolf* report.

10. Notwithstanding this identification, action by governments has not eventuated.

11. At the Legal Aid Congress 2004, it was resolved that the Australian Legal Assistance Forum (ALAF) develop a proposal for a civil national legal aid scheme.

12. The lack of a national civil legal aid program emerged as an important consideration in many deliberations of the Law Council of Australia's Access to Justice Committee, particularly following preparation and circulation of its 2004 paper *Erosion of Legal Representation*. As a result and following consultations with ALAF, the Law Council produced this paper which has been endorsed for wider consultation by ALAF.

13. ALAF believes that despite the protestations of government that the *pro bono* efforts of the profession should not be a substitute for properly funded legal aid programs, that is precisely what is happening to an ever greater extent in civil litigation.

14. There is, in ALAF's view, an overwhelming consensus on the need for a co-ordinated policy position to be adopted by its constituent bodies and the profession in respect to a national civil legal aid program.

### ***A policy proposal***

15. ALAF therefore recommends the following policy :-

(a) There should be a national civil legal aid program.

(b) The program should be recommended for endorsement as policy by all constituent bodies of ALAF and their constituents with a view to adoption by all Australian Governments.

(c) The program should be funded by Australian Governments on a co-operative basis.

(d) A person who is eligible for a grant of assistance from a legal aid commission on the basis of the person's means should be eligible for a grant of assistance in a civil matter if that person's application meets the following criteria:-

(i) the person has a right of action against a person, corporation or government which is justifiable in a court or tribunal of competent



jurisdiction; or

(ii) the person has been or is likely to be the subject of an action in such a court or tribunal; and

(iii) the person's legal position is assessed as having merit, viz it passes the 'reasonable prospects of success' test, the 'prudent self funding litigant' test, and the 'appropriateness of spending public funds' test.

(e) A grant of legal assistance to the person qualifying for it should comprise grants for discrete stages of matters as follows:-

(i) a grant enabling the assisted person's lawyer to take instructions and commence negotiations with the other party or the other party's legal representative with a view to settling the matter, and should include disbursement funding for an appropriately qualified mediator;

(ii) if the initial grant fails to resolve the matter, then assistance to prepare and issue proceedings (or documents responding to proceedings, as the case may be) and to attend with the assisted person's lawyer any conference, mediation or other event designed by the court or tribunal to facilitate negotiations with a view to settlement, with further assistance to draw or check documents evidencing the settlement;

(iii) if settlement is not achieved then to prepare the matter for hearing or trial (as the case may be), including obtaining counsel's advice on evidence; and

(iv) to conduct the hearing or trial according to good litigation practice.

(f) Where the grant of assistance is directed to a lawyer not employed by a commission or community legal centre, or in any case where independent counsel would be engaged to perform legal work, then the scale of fees attaching to such grant should be not less than the scale fee provided for in the rules of the jurisdiction in which the matter would ordinarily be litigated, or such fees as would ordinarily be paid by the prudent self-funded litigant in such cases where no scale

exists.

(g) In any case where fees would be payable to a court or tribunal by a litigant who is the subject of a grant of assistance under the program, such fees should be waived by the registrar or proper officer upon receipt of a certificate from the assisted person's lawyer that assistance has been granted.

(h) All grants of aid would be subject to costs recovery by legal aid commissions from the successful legally aided party. Such costs recovery would significantly subsidise the national scheme.

(i) The costs indemnity rule ordinarily applying in jurisdictions in which the matter is litigated should continue to apply notwithstanding the program and should be a debt recoverable by the commission granting assistance to the successful assisted litigant.

## **RECOMMENDATIONS**

16 THAT Conference delegates:

- a. Endorse in principle the policy for a national civil legal aid program;
- b. Recommend the policy for in principle adoption by all constituent bodies, and request those bodies to respond to the recommendation as soon as practicable;
- c. Co-operate in research proposed by the LCA to review the proposal for research prepared by the LCA's Access to Justice Committee to engage an appropriately qualified person to investigate and provide a report on the empirical evidence existing to support the contention the *pro bono* efforts of the profession are being employed to assist persons who would otherwise qualify for legal aid assistance if the policy were adopted by governments, and to quantify the extent of that employment; and
- d. Resolve that ALAF report thereafter to its constituent bodies on the appropriate means to seek implementation of the policy by Australian Governments.