



**pilch**

promoting law in the public interest

**Submission to the  
Senate Legal and Constitutional Affairs Committee  
on the Inquiry into Access to Justice**

**30 April 2009**

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## Part A - Executive summary & recommendations

### 1. Executive Summary

1.1 The Public Interest Law Clearing House (**PILCH**) welcomes the opportunity to contribute to the inquiry by the Senate's Standing Committee on Legal and Constitutional Affairs (**Standing Committee**) into Australia's judicial system, the role of judges and access to justice. We commend the Standing Committee on Legal and Constitutional Affairs on its initiative to undertake the inquiry.

1.2 In addition to the findings and recommendations of this submission, PILCH endorses the submissions made by PilchConnect and the Human Rights Law Resource Centre to this Inquiry.

### 2. Recommendations

PILCH makes the following recommendations to the Standing Committee:

#### ***Recommendation 1***

PILCH recommends that the Commonwealth Government establish a scheme for funding disbursements in all jurisdictions in matters where the applicant is represented pro bono.

#### ***Recommendation 2***

PILCH recommends that a disbursements funding scheme provide for:

- (a) the guidelines for eligibility for assistance to extend to 'public interest cases';
- (b) the waiver of any application fee in cases of financial hardship and in 'public interest cases'; and
- (c) the ability to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason

#### ***Recommendation 3***

PILCH recommends that the Courts be specifically empowered to make protective costs orders, through an amendment to the Courts' relevant empowering legislation.

**Recommendation 4**

The Commonwealth government should encourage and facilitate the provision of pro bono legal services, through measures such as:

- a) Reinforce and strengthen provisions in government legal services contracts and tendering requirements, for pro bono.
- b) Enact legislation that will abrogate the indemnity principle, to the extent necessary, to ensure that litigation costs can be awarded and recovered in pro bono cases.
- c) Support organisations such as PILCH, which promote and facilitate pro bono legal assistance.
- (b) Establish a scheme to enable and encourage the participation of government lawyers in pro bono.

**Recommendation 5**

PILCH recommends that the Commonwealth government increase funding to Legal Aid and the CLC program for the provision of services to rural, regional and remote areas and considers ways to facilitate the provision of pro bono legal assistance to persons living in rural, regional and remote areas.

**Recommendation 6**

PILCH recommends that all restrictions on the applications of Commonwealth legal aid funds be removed.

**Recommendation 7**

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.

**Recommendation 8**

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 9**

PILCH recommends that the government reverse the 2008 funding cuts and reappoint 600 independent children's lawyers.

**Recommendation 10**

PILCH recommends that VLA restores the allowable asset deduction to the level which existed before the cuts in 2008.

**Recommendation 11**

PILCH recommends that the government provide funds to allow VLA to provide instructing lawyers in family law proceedings.

**Recommendation 12**

PILCH recommends that the government consider restoring an adequately funded national civil legal aid scheme which extends the current civil law guidelines.

**Recommendation 13**

That grants of legal aid be available for matters which may lead to eviction by the Residential Tenancies List of the Victorian Civil and Administrative Tribunal.

**Recommendation 14**

PILCH recommends that Legal Aid assistance be extended to employment matters such as unfair dismissal and unlawful dismissal matters.

**Recommendation 15**

PILCH recommends that Legal Aid funding be increased to provide representation before the Mental Health Review Board as of right.

**Recommendation 16**

PILCH recommends that Legal Aid funding arrangements for involuntary patients be streamlined to avoid means and merits tests and enable broader access to representation.

**Recommendation 17**

PILCH recommends that VLA guidelines be relaxed to provide a grant of aid in matters where the claim is less than \$5,000.

***Recommendation 18***

PILCH recommends that VLA guidelines be expanded to provide for a grant of aid to assist a client to commence proceedings for an intervention order.

***Recommendation 19***

PILCH recommends that VLA guidelines be expanded to provide for a grant of aid to assist respondents to oppose the making of a family violence intervention order in a wider variety of circumstances.

***Recommendation 20***

PILCH recommends that the government should expand the Duty Lawyer service to all courts and ensure adequate funding for its effective operation.

***Recommendation 21***

PILCH recommends that the government should expand the SRL Coordinator role to other jurisdictions and ensure adequate funding for its effective operation.

***Recommendation 22***

PILCH recommends that additional funding be provided to prepare, publish and deliver training and educational material for judicial officers on best practice management of SRL.

***Recommendation 23***

PILCH recommends that additional funding be provided to prepare, publish and deliver jurisdiction-specific plain language materials to assist SRL.

***Recommendation 24***

PILCH recommends that the government implement technological services for SRL.

***Recommendation 25***

PILCH recommends that the Government introduce legislation that would discourage the use of SLAPP (Strategic Litigation Against Public Participation) writs and encourage public participation.

***Recommendation 26***

PILCH recommends removal of constraints under the Community Legal Service Program which quarantine Commonwealth funding from State and Territory matters.

***Recommendation 27***

PILCH recommends an independent review of the salaries and conditions for CLC workers, with a comparative study of those in comparable international regimes, and looking at retention rates, career paths, flexible secondment arrangements across government, the private legal sector and CLCs.

***Recommendation 28***

PILCH recommends that the Commonwealth increase funding to CLCs to enable them to provide case work assistance to the community in civil justice matters

***Recommendation 29***

PILCH recommends that the Commonwealth provide additional funding to the CLC program for provision and support of generalist and specialist legal services addressing: discrimination; victims of crime; elder law; homelessness; prisoner rights; indigenous legal services; women and family law and domestic violence; and police accountability.

PILCH recommends that the Commonwealth provide additional funding to the CLC program for provision and support of generalist legal services in rural, remote and regional (RRR) areas.

***Recommendation 30***

PILCH recommends that the Commonwealth should establish an independent Special Project Fund to fund CLC law reform, education, advocacy and special projects.

***Recommendation 31***

PILCH recommends that Commonwealth funded CLCs are funded to a minimum recurring core funding of \$520,000 and continually increase funding to CLCs to enable them to provide case work and assistance to the community in civil justice matters.



## Part B – About this submission

### 3. About PILCH

- 3.1 PILCH welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice.
- 3.2 PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.
- 3.3 PILCH coordinates the delivery of pro bono legal services through six legal assistance schemes:
- the Public Interest Law Scheme (**PILS**);
  - the Victorian Bar Legal Assistance Scheme (**VBLAS**);
  - the Law Institute of Victoria Legal Assistance Scheme (**LIVLAS**);
  - PILCH Connect (**Connect**);
  - the Homeless Persons' Legal Clinic (**HPLC**); and
  - Seniors Rights Victoria (**SRV**).
- 3.4 PILCH's objectives are to:
1. improve access to justice and the legal system for those who are disadvantaged or marginalised;
  2. identify matters of public interest requiring legal assistance;
  3. refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
  4. support community organisations to pursue the interests of the communities they seek to represent; and
  5. encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.
- 3.5 In 2007-2008, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.

#### 4. Scope of this submission

- 4.1 Given PILCH's knowledge, experience and expertise as community lawyers, as a facilitator of pro bono legal services, and in law reform and policy work on human rights and access to justice issues, it is well placed to comment on the terms of reference of this inquiry. PILCH's work is predominantly in the area of civil and administrative law rather than criminal law. Accordingly its submission will focus on access to justice in respect of civil and administrative law matters.
- 4.2 In addition, PILCH has specific expertise in legal assistance for not-for-profit organisations, homelessness, elder persons' legal issues, human rights and public interest litigation, and will bring this experience to bear in responding to the terms of reference of this inquiry.
- 4.3 The high cost of private legal services, the increasing complexity and specialisation within the law, and the ever-increasing regulation of activity in Australia is placing more people at the fringe of a legal system whose activities it governs and whose rights it protects.
- 4.4 In speaking to the Queensland Law Society, the Commonwealth Attorney General, the Hon Robert McClelland MP, observed that "unless justice is accessible, respect for the rule of law is diminished and the integrity of our justice system is compromised", and that "access to justice helps guarantee sound democratic governance and promotes social stability... [it] is a basic human right and is central to the rule of law." He also observed the importance of "ensuring that all our citizens can access the justice system, regardless of their particular circumstances".<sup>1</sup>
- 4.5 PILCH respectfully endorses this position, and adopts the view that an individual's access to justice should not be prejudiced by reason of their inability to obtain adequate information about the law or the legal system, or their inability to afford the cost of independent legal advice or representation.<sup>2</sup> Equitable access to justice implies that all individuals have the ability to access legal services.<sup>3</sup>
- 4.6 In practice, however, there is a substantial rate of inaction in response to legal events. There are various reasons for this, including insufficient knowledge and availability of affordable and accessible legal services.<sup>4</sup> A substantial proportion of disadvantaged people experience barriers in seeking legal help. This situation is exacerbated amongst low-income earners, those with chronic illness or disability, the young and elderly and amongst Indigenous members of the community.<sup>5</sup>

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<sup>1</sup> The Hon Robert McClelland MP, 'Remarks at the Queensland Law Society Symposium' (Speech delivered at the Convention Centre, Brisbane, 28 March 2009).

<sup>2</sup> John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia*, Research Report No 20 (2001), 319.

<sup>3</sup> *Ibid* 6.

<sup>4</sup> Christine Coumaleros, Zhigang Wei & Albert Zhou, NSW Law and Justice Foundation, *Justice Made to Measure: NSW legal needs survey in disadvantaged areas* (2006), xviii.

<sup>5</sup> *Ibid*.

## 5. Human rights framework

- 5.1 In comparative jurisdictions, such as the United Kingdom, a human rights approach has been found to be advantageous in discouraging a ‘one size fits all’ response to complex issues. Instead, the human rights framework has been found to encourage approaches which are capable of adjustment to recognise the circumstances and characteristics of individuals.<sup>6</sup>
- 5.2 The Department of Constitutional Affairs in the United Kingdom has recognised that the implementation of the UK’s Human Rights Act has led to “*better policy outcomes, by ensuring that the needs of all members of the UK’s increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services...*”.<sup>7</sup> In the UK it has also been recognised that “*human rights offer an effective framework for making decisions which take into consideration the needs of individual service users*”.<sup>8</sup>
- 5.3 Further, the human rights framework provides a sophisticated and nuanced system of laws and principles that can assist in identifying competing rights and interests, prioritising rights, and achieving the delicate balance between competing rights and interests. This balancing is inherent in considering issues of access to justice and the terms of reference of this inquiry.
- 5.4 The terms of reference of this inquiry specifically engage the right to a fair hearing, equality before the law and the right to be free from discrimination. The right to a fair hearing contained in article 14 of the ICCPR provides, ‘...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal’. The right to a fair hearing is also a norm of customary international law. International jurisprudence establishes that the basic requirements of a fair hearing include:
- (i) Equal access to and equality before the courts;
  - (ii) The right to legal advice and representation;
  - (iii) The right to procedural fairness, including a hearing without undue delay;
  - (iv) The right to the free assistance of an interpreter where necessary<sup>9</sup>.
- 5.5 The Submission to this inquiry made by the Human Rights Law Resource Centre (dated 6 March 2009) discusses in detail the content of the right to a fair hearing and international and comparative jurisprudence on this right. PILCH refers to and endorses that submission in this regard.

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<sup>6</sup> Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), page 4.

<sup>7</sup> Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), page 1.

<sup>8</sup> British Institute of Human Rights *The Human Rights Act – Changing Lives (Second Edition)*, page 25.

<sup>9</sup> General Comment 32, [7]. See also *Yves Morael v France* UN Doc CCPR/C/36/D/207/1986 and *Ruben Turibio Munoz Hermoza v Peru* UN Doc CCPR/C/34/D/203/1986, which held that a fair hearing in civil proceedings required justice to be rendered without undue delay.

## Part C – Cost of Delivering Justice

### 6. Introduction

- 6.1 PILCH's experience and observation is that the cost of delivering and achieving justice is becoming increasingly high and beyond the reach of many sections of the community, particularly disadvantaged and marginalised individuals and groups. For many, litigation costs are so prohibitive that they act as a barrier to accessing the legal system and to having disputes resolved and rights upheld. These costs include: the cost of legal representation; the costs of disbursements, including court fees; and the exposure to adverse costs orders.
- 6.2 The right to a fair hearing includes the right to equal access to and equality before the courts and the right to procedural fairness. Where the costs of bringing a legal claim are so prohibitive that some potential litigants are unable to afford to pursue legal redress or defend a claim, and are thereby excluded from the court process, the right to a fair hearing is violated.
- 6.3 PILCH considers that there are a number of areas of reform necessary to counter the prohibitive cost of delivering justice and thus ensure greater access to justice:
- (1) Disbursement funds;
  - (2) Costs in public interest litigation;
  - (3) Access to free legal representation – this is considered in Part D below.

### 7. Disbursement funds

- 7.1 In addition to the need for pro bono legal assistance, many litigants or potential litigants need the assistance of other professionals before they can pursue their legal rights. For instance, litigants may require medical opinions as part of their evidence or a mediator to attempt to settle a litigious dispute. Litigants also face out-of-pocket expenses, such as court and tribunal filing fees, daily sitting fees, interpreters' fees and transcript fees. Even if pro bono legal assistance is available, the costs of these disbursements can be a barrier to accessing the justice system.
- 7.2 The current court fee waiver schemes allow for the waiver of most court fees where the party can show financial hardship.
- 7.3 Limited disbursement funds which assist litigants in meeting the costs of disbursements in civil litigation also exist in some jurisdictions in Australia. In Victoria, a disbursement fund called Law Aid was established by the Victorian Government and the private legal profession to assist people with meeting the costs of disbursements in civil litigation where they are unable to afford these costs. Law Aid was established in 1996 with a seed grant of \$1.7 million from the Victorian Government to establish a non-profit charitable trust administered by the Law Institute of Victoria and the Victorian Bar Council.
- 7.4 The types of civil litigation funded by Law Aid include: personal injuries claims, claims against institutions involving discrimination or oppressive behaviour, some property claims, wills and estates matters and professional negligence claims. Assistance is not available

for criminal law or family law matters. Law Aid will provide money to the applicant's solicitor to cover necessary disbursements, such as medical reports.

- 7.5 All applicants pay a non-refundable application fee of \$100. Successful litigants pay a fee representing 5.5% of any award they receive and the cost of the disbursements, if they are recovered from the unsuccessful party. Law Aid is self-financing and relies on these payments to sustain the fund.
- 7.6 PILCH regularly procures 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 not pursuing a meritorious claim, as illustrated in the case studies below. In PILCH's experience, the limited availability of funding for disbursements acts as a disincentive to practitioners providing pro bono legal advice and to litigants pursuing important cases.

#### **Case study A**

PILCH 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. Law Aid was not available. Without funding for this disbursement, the client faced a significantly longer jail term.

#### **Case study B**

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.

#### **Case Study C**

In a deportation matter where an expert's report was crucial to preventing Mr C 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 C. 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.

#### **Case Study D**

PILCH has received a number of inquiries from persons subject to involuntary treatment orders in psychiatric hospitals who seek legal assistance to challenge their involuntary treatment order. In order to do so it is usually highly desirable to obtain a second opinion from a qualified clinician as to the appropriateness of the ITO. Frequently, the person is unable to afford the cost of obtaining a second opinion and is advised that his or her legal claim lacks merit without a second opinion. Therefore, the person either decides not to pursue the claim, or is unable to secure pro bono legal assistance on the basis that the claim lacks legal merit.

- 7.7 PILCH has also received requests for legal assistance for matters on appeal where tape transcripts of court or tribunal hearings are critical but the client cannot afford to cover the cost of such a disbursement, and Law Aid is not available. In such cases, PILCH is unable to procure pro bono assistance as we are unable to assess the merits of the case without the transcript of the hearing.
- 7.8 PILCH considers the right to a fair hearing, and in particular the right to equal access to and equality before the courts, requires that funding for disbursements in litigation be available in all Australian jurisdictions and in a broad range of cases.
- 7.9 PILCH considers that a disbursement funding scheme should be extended to apply to 'public interest cases', being 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 disbursements 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 the disbursements funding scheme recouping the funding it provides.
- 7.10 PILCH also considers that a disbursement funding scheme should have provision for waiver of any 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.
- 7.11 Finally, a disbursements funding scheme should grant funding retrospectively in situations where disbursements were incurred urgently or where there is another compelling reason for funding the disbursements.

**Recommendation 1**

PILCH recommends that the Commonwealth Government establish a scheme for funding disbursements in all jurisdictions in matters where the applicant is represented pro bono.

**Recommendation 2**

PILCH recommends that a disbursements funding scheme provide for:

- (a) the guidelines for eligibility for assistance to extend to 'public interest cases';
- (b) the waiver of any application fee in cases of financial hardship and in 'public interest cases'; and
- (c) the ability to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason.

**8. Costs in Public Interest litigation**

8.1 In its role as a pro bono referral service for public interest matters, PILCH has observed that many meritorious public interest matters are not ultimately pursued because of the risk of an adverse costs order. In this way, the costs regime in Australia acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people. This is especially 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. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the important test case.

8.2 The Victorian Law Reform Commission in its Civil Justice Review Report of May 2008 also considered that the risk of adverse costs orders was a significant deterrent to public interest litigation and concluded:

The Commission believes that there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases. They could include orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.<sup>10</sup>

8.3 Similarly, the Australian Law Reform Commission has recommended that 'if private citizens are to be able to [initiate public interest litigation], any unnecessary barriers erected by the law of costs should be removed'.<sup>11</sup>

8.4 Below are three case studies of matters where the risk of an adverse costs order acted as a disincentive to litigants pursuing meritorious public interest litigation.

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<sup>10</sup> Victorian Law Reform Commission, *Civil Justice Review Report* (2008), 676.

<sup>11</sup> Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (1995), 78.

**Case Study E**

PILCH referred the Tampa<sup>12</sup> matter and undertook much of the preparatory work for the proceedings. Since the appropriate applicants (the asylum seekers) could not be contacted, PILCH spent considerable time attempting to identify an alternative applicant to bring the claim on behalf of the asylum seekers. PILCH had real difficulties locating an applicant that would be prepared to bring the claim because they were concerned about the costs exposure. Ultimately Liberty Victoria was prepared to institute proceedings as the applicant despite this risk. In making a 'no costs' order in this matter, Black CJ and French J of the Federal Court said 'This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights'.<sup>13</sup>

**Case Study F**

PILCH is aware of a matter in which an elderly woman with an acquired brain injury had a very strong discrimination and administrative law claim in respect of a failure to provide adequate medical treatment. Proceedings were not instituted by the person's guardian, appointed under the Guardianship and Administration Act 1986 (Vic), because the guardian was concerned about his personal exposure to a costs order. Guardians appointed under the Act can be personally liable for costs in proceedings that they bring on behalf of a person with an impairment. This costs risk acts as a significant disincentive to meritorious claims being pursued on behalf of very vulnerable and disadvantaged persons.

**Case Study G**

In the case of *Schou v The State of Victoria*,<sup>14</sup> the plaintiff, a single mother, made a complaint against her employer for indirect discrimination in contravention of section 9 of the Equal Opportunity Act 1995 (Vic), in relation to her request to work from home to enable her to care for her ill son. The plaintiff succeeded at first instance but lost at the Court of Appeal. She was unable to make a special leave application to the High Court because of the significant risk of an adverse costs order. The decision of the Court of Appeal raised issues of importance for the development of the law in Victoria on indirect discrimination. Given that the majority and dissenting judgments in the Court of Appeal applied the High Court authority on indirect discrimination differently, it was a matter of considerable public interest that an application be made to the High Court to determine the issues of the *Schou* case.

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<sup>12</sup> *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229.

<sup>13</sup> *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229, at [29].

<sup>14</sup> [2004] VSCA 71 (30 April 2004)



- 8.5 These case studies demonstrate that reform of the costs regime is necessary to ensure that impecuniosity is not a bar to the vindication of peoples' rights or the pursuit of meritorious claims in the public interest.
- 8.6 Under Australian law, whilst the courts retain a discretion as to costs, the general costs rule in civil proceedings is that costs follow the event. This means that the successful party can expect a costs award in his or her favour. Although Australia does not have any specific public interest costs regime, some courts have been prepared to make orders protecting public interest litigants against adverse costs orders.
- 8.7 In the UK the courts of England and Wales have developed specific rules for the granting of a 'protective costs order' (**PCO**). The leading decision is that of the Court of Appeal in *R (Corner House Research) v Secretary for State for Trade and Industry*<sup>15</sup> (**Corner House**).
- 8.8 A PCO is a court order that protects a party to a proceeding from an adverse costs outcome. PCOs may include orders that:
- a party will not be exposed to an order for costs if it loses at trial;
  - the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; or
  - there will be no order for costs whatever the outcome of the trial.
- 8.9 Whilst the High Court has confirmed courts' jurisdiction to make orders in the nature of PCOs, such orders are rare in Australia and case law provides little guidance on what will constitute appropriate circumstances for making a protective costs order. Therefore, there is a need for law reform to:
- (1) confirm the courts' jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about 'judicial law making'; and
  - (2) clarify what factors are relevant to the discretion to make a PCO in public interest matters.
- 8.10 PILCH proposes that the Courts be specifically conferred with power to make PCOs in relation to 'public interest matters', by amendment to the relevant empowering legislation.<sup>16</sup>
- 8.11 Such amendments would empower the relevant courts to make a PCO in a proceeding at any time prior to judgment. The court would be empowered to make orders (on such terms and conditions as the court deems fit) that:
- a specified party will not be liable for costs, whether or not it is successful;
  - one party's costs will be paid in whole or part by the other, regardless of the outcome of the proceeding; or
  - the amount of costs for which a specified party may be liable will be capped.

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<sup>15</sup> [2005] 1 WLR 2600.

<sup>16</sup> For instance, PILCH proposes that the conferral of power on the Federal Courts be effected by amendment to each of the *Judiciary Act 1903* (Cth), the *Federal Court Act 1976* (Cth), and the *Federal Magistrates Act 1999* (Cth).

- 8.12 PILCH believes that the conferral of power on the courts to make PCOs would significantly improve access to justice for marginalised and disadvantaged Australians and is necessary to promote and fulfil the rights contained in article 14(1) of the *International Covenant on Civil and Political Rights* (the **ICCPR**) which states that everyone is entitled to a fair hearing. In essence, the right to a fair hearing requires a party to be able to present his or her case and evidence to the court under conditions that do not place him or her at a substantial disadvantage when compared with the other party.
- 8.13 The PCO amendment would not fetter the court's discretion to make orders as to the costs in a proceeding but would empower the court and guide the exercise of its discretion. In order to guard against misuse the PCO amendment should prescribe matters that the court must take into account when considering making a PCO. For instance, the amendment could enable the court to consider the nature and extent of any private or pecuniary interest that the applicant may have in the outcome of the proceeding, so that matters that do not have implications for a broader group will be unlikely to attract a PCO.

**Recommendation 3**

PILCH recommends that the Courts be specifically empowered to make protective costs orders, through an amendment to the Courts' relevant empowering legislation.

## Part D – Ability of people to access legal representation

### 9. Introduction

- 9.1 Equitable underpins a fair and efficient justice system. Access to legal representation is obviously a central component of a commitment to access to justice and of the right to a fair hearing. In many instances, particularly given the complexity of legal procedures and argument, which are characteristic of the adversarial system, the ability of a person to access legal representation impacts on their ability to achieve a just resolution to their legal problems or to receive a fair trial. This is particularly so for marginalised and disadvantaged persons who tend to be over-represented in the justice system and who, because of the high cost of legal representation, frequently cannot afford to pay for legal services. 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 legal advice or representation.
- 9.2 Legal aid and community legal centres (**CLCs**) meet the legal needs of many members of the Australian community who cannot afford to pay for legal services. The significant work of Legal Aid and CLCs in meeting the legal needs of marginalised and disadvantaged persons is essential to the smooth functioning of the Australian justice system and the realisation of the right to a fair hearing. It is critical that the government maintain adequate funding for these services to ensure that Australians are able to access the justice system. The issue of funding for Legal Aid and CLCs is discussed in detail in Parts E and G of this Submission.
- 9.3 Where assistance cannot be provided by Legal Aid or a CLC, pro bono assistance may be available. Through various schemes including those operated by PILCH, the private legal profession undertakes a considerable amount of pro bono work for the benefit of marginalised and disadvantaged people, who would not otherwise have access to a lawyer. Whilst a significant amount of pro bono work is undertaken in criminal matters, the majority undertaken by the private profession is in the area of civil law. We note that a large amount of work is performed by solicitors and barristers without fee, or for substantially reduced fees, that is not recorded through formal pro bono schemes such as PILCH. Some clients will approach a solicitor or barrister directly to assist them on a pro bono basis.
- 9.4 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 Legal Aid or a CLC. These requests and referrals for pro bono assistance indicate that there is a significant gap in the availability of government-funded civil legal services for low-income earners.
- 9.5 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 legal advice and representation, particularly 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.

- 9.6 PILCH expects that the demand for its services and for other pro bono services will increase in the coming months as the impact of the global financial crisis begins to be felt in Australia. For instance, it is likely that the instance of homelessness and debt recovery will increase and the legal issues commonly associated with homelessness, poverty and unemployment will become more prevalent.
- 9.7 PILCH submits that in addition to increased funding for Legal Aid and CLCs, the government should address the following matters regarding the ability of persons to access legal representation:
- (1) Support and encouragement of pro bono; and
  - (2) Access to legal representation for persons in regional and remote areas

## **10. Support and encouragement of pro bono**

- 10.1 PILCH holds the strong view that pro bono is no substitute for an adequately funded Legal Aid and CLC sector. In any event, capacity for pro bono is finite and private law firms are reluctant to undertake legal work on a pro bono basis in areas that are traditionally the domain of Legal Aid or CLCs. Therefore, pro bono can not satisfy the total demand for legal services by those who cannot afford to pay for them.
- 10.2 Nevertheless, there are untapped or under-utilised pro bono resources (particularly in the medium-sized law firms) that the government could seek to engage with to enlarge the pool of pro bono resources to meet the significant unmet need. PILCH considers that the government should take steps to encourage the private profession to undertake pro bono work. There are a number of practical ways of doing this:
- (1) ***Legal services contracts***  
Reinforce and strengthen provisions in government legal services contracts and through tendering requirements, requiring law firms (and other professional service providers) to contribute to pro bono.
  - (2) ***Recovery of costs in pro bono matters***  
There is significant uncertainty in the law as to the circumstances in which the courts may award costs to a successful party in litigation where that party is represented on a pro bono basis. At present, the court's ability to make a costs order in such cases, and the ability of a pro bono litigant to actually recover costs under such an order, appears to depend upon the proper interpretation of the relevant pro bono retainer and, in particular, the terms of any conditional costs agreement. PILCH believes that greater certainty is required – for both pro bono litigants and pro bono lawyers – and that greater certainty is likely to encourage more lawyers to participate in pro bono schemes, including those co-ordinated by PILCH.  
PILCH proposes that this can be achieved by the abrogation of the indemnity

principle in pro bono cases, through uniform amendments to the State and Territory *Legal Profession Acts*.

**(3) Support pro bono facilitators**

The government should support organisations such as PILCH, which promote and facilitate pro bono legal assistance.

PILCH received 2039 requests for pro bono assistance in 2008 and made 538 referrals to law firms and barristers through its 6 legal assistance schemes. Private law firms and barristers rely heavily on PILCH to take and filter these inquiries and to co-ordinate referrals to the most appropriate legal service. PILCH also undertakes significant direct casework itself through the use of large teams of volunteer lawyers attending outreach clinics for elderly people and people experiencing homelessness. It also carries out important law reform and policy work on access to justice issues.

Support of the pro bono referral schemes that PILCH operates will ensure that the private profession has an avenue for undertaking pro bono and that there is some consistency in the allocation of pro bono.

**(4) Government lawyers**

Establish a scheme to enable and encourage the participation of lawyers employed by government agencies and legal services, such as the Commonwealth Attorney-General's Department, the State and Territory Departments of Justice, the Australian Government Solicitor and the State and Territory Government Solicitors, in the provision of pro bono legal services.

**Recommendation 4**

The Commonwealth government should encourage and facilitate the provision of pro bono legal services, through measures such as:

- a) Reinforce and strengthen provisions in government legal services contracts and tendering requirements, for pro bono.
- b) Enact legislation that will abrogate the indemnity principle, to the extent necessary, to ensure that litigation costs can be awarded and recovered in pro bono cases.
- c) Support organisations such as PILCH, which promote and facilitate pro bono legal assistance.
- (b) Establish a scheme to enable and encourage the participation of government lawyers in pro bono.

**11. Rural, regional and remote areas**

11.1 PILCH's experience is that the ability of persons living in rural, regional and remote (RRR) parts of Australia, to access legal representation is considerably poorer than persons living in metropolitan areas. Anecdotal evidence suggests that this is because:

- (1) There are fewer Legal Aid and CLC services in RRR areas;

- (2) Fewer private lawyers operating in RRR areas participate in formal pro bono programs;
  - (3) The cost of travel to metropolitan centres to access legal services can be prohibitive for some clients who require legal assistance but cannot obtain it in their local area;
  - (4) In country areas, due to the smaller number of lawyers in practice, there is a greater likelihood that any lawyers willing to act on a pro bono basis will have a conflict of interest in acting for the client seeking pro bono assistance, as they, or their firm, have already advised other parties to the dispute.
  - (5) The time and costs of travel to RRR areas and the cost of accommodation necessary for city-based lawyers to undertake pro bono in RRR areas, is a very significant disincentive for lawyers to take pro bono referrals in those areas.
- 11.2 PILCH receives a number of inquiries each year from RRR clients. PILCH's members are predominantly based in the capital cities and prefer to undertake pro bono work for clients living in the same city. PILCH, through the LIVLAS also refers to some non-member firms who are located in RRR areas.
- 11.3 In order to ensure that persons living in RRR areas have equal access to justice and are able to realise their right to a fair hearing under the Charter, the government should increase funding to Legal Aid and CLCs to provide increased services in RRR areas.

***Recommendation 5***

PILCH recommends that the Commonwealth government increase funding to Legal Aid and the CLC program for the provision of services to rural, regional and remote areas and considers ways to facilitate the provision of pro bono legal assistance to persons living in rural, regional and remote areas.

## Part E – Adequacy of legal aid

### 12. Overview

- 12.1 In discussing access to justice, the demands of the justice system should be kept in mind. Indeed, it should be remembered that '[o]ur society invests in a necessarily complex system of justice, a system of institutions – the courts, tribunals and other related agencies – to protect rights, ensure civil liberties and enforce civic responsibilities.'<sup>17</sup>
- 12.2 Legal Aid Commissions are imbued with the responsibility to provide marginalised, disadvantaged and vulnerable people with access to justice. In this regard, the Law Council of Australia succinctly notes 'Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers.'<sup>18</sup>

### 13. Legal aid and the Commonwealth

- 13.1 There have been several approaches to Commonwealth legal aid funding. The first approach is referred to as the 'Commonwealth persons' model and involved the government identifying groups that it considered it had a special responsibility to assist (social security recipients, returned servicemen, women, indigenous Australians, migrants) and provided aid for matters arising under Commonwealth law.
- 13.2 The second approach handed the responsibility for use of Commonwealth funds to the States. State and Commonwealth governments agreed 55% of the funding would be spent on Commonwealth matters while the balance could be spent on State matters.
- 13.3 The third approach was introduced in 1997 and has come to be known as the 'Commonwealth State divide.'<sup>19</sup> Since this point, the Commonwealth requires all Legal Aid Commissions to comply with its priorities and guidelines as a precondition to receipt of funding.<sup>20</sup>
- 13.4 At the same time as the Commonwealth State divide was introduced, \$120 million dollars was cut from the Commonwealth legal aid contribution. Soon after the announcement of these cuts, the civil law sections in Legal Aid Commissions were either closed or dramatically reduced.
- 13.5 There are two main arguments against the practice of tying Commonwealth funding to matters arising under Commonwealth laws. First, some legal matters may engage both State and Commonwealth laws. For example, a client with proceedings under the Family

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<sup>17</sup> National Legal Aid, A new National Policy for Legal Aid in Australia, p 1

<sup>18</sup> Law Council of Australia, Legal Aid and Access to Justice Funding – 2009 – 2010 Federal Budget, p 3

<sup>19</sup> It is understood the Commonwealth government has indicated it will be reviewing the Commonwealth State divide however for the moment the current agreements and restrictions on application of aid is being extended pending negotiation.

<sup>20</sup> Victoria Legal Aid, Grants Handbook – Qualifying for Legal Assistance, p 2.1.1

Law Act may also require assistance in respect of State law matters which involve child protection or family violence legislation.

- 13.6 Secondly, both relaxing the restrictions on Commonwealth funding and increasing the amount of funding would also work to address the drastic reduction in civil law assistance which occurred in 1997.
- 13.7 This would mean that Legal Aid could be responsive to need rather than selecting cases on the basis of jurisdiction.

#### **Recommendation 6**

PILCH recommends that all restrictions on the applications of Commonwealth legal aid funds be removed.

#### **14. Legal aid remuneration**

- 14.1 Under the current service model, clients may be legally aided either by a lawyer employed by a Legal Aid Commission or by a private practitioner. Benefits of this model include the ability to provide legal services to vulnerable or disadvantaged consumers in RRR communities and also the ability to legally aid both sides to a dispute, where required.
- 14.2 Recent research indicates that 33% of law firms which previously did legally aided work have now stopped.<sup>21</sup> Further, the same research also indicated that 19% of law firms had never provided assistance on a legally aided basis.<sup>22</sup> The main reason for disengagement is clear: low fees.
- 14.3 Interestingly, the TNS research indicates practitioner dissatisfaction with 'low fees' involves a number of factors including:
- The lost opportunity cost involved in accepting a low paying legal aid brief which prevents a practitioner accepting higher paying work;
  - The level of complexity of legal aid files which may involve serious crime or child abuse;
  - Issues related to 'managing the client base' as legal aid clients 'often present challenging circumstances, contributed to by their low socio-economic status (i.e. money and education), adverse life circumstances and they commonly present with multiple legal and other (health and financial) problems.'<sup>23</sup> and
  - 'Red tape' or bureaucratic processes involved in obtaining a grant of aid. One practitioner gave the following example of bureaucratic processes for obtaining a grant of aid, 'Let's say you're doing a plea in mitigation of sentence, you then have to write to

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<sup>21</sup> TNS Social Research – Study of private legal practitioners in the provision of legal aid services, December 2006, p 25

<sup>22</sup> Ibid, p 25

<sup>23</sup> Ibid, p 32



the grants officer to request funding for something like a psychological report for a magistrate. You basically have to write a psychological report about your client in order to get \$400 in order to get a psychological report, and you can't recoup those costs.<sup>24</sup>

- 14.4 The President of the Law Council of Australia, John Corcoran, recently wrote that 'Unless the main issue affecting practitioners is addressed – the rate of remuneration – there will be a continuation of and an increase in the decline in the number of practitioners willing to take legal aid cases over the next five years.'<sup>25</sup> The consequences of this decline are equally clear; reduced access to legal services in RRR areas and reduced access to justice in matters where both parties are legally aidable.

#### **15. Victoria Legal Aid – qualifying for assistance**

- 15.1 It is obvious that Legal Aid Commissions are required to work within their budgets.<sup>26</sup> As such, Commissions attempt to ensure that limited funds are directed to areas of greatest need. Furthermore, in order to assess the competing applications for aid and direct funding to areas of greatest need, VLA uses a means test and guidelines to assist in making a decision.
- 15.2 Despite the obvious rationale of such measures, it may be that means tests and guidelines have contributed to the situation where research indicates only 12% of people – one in eight – turn to the legal profession for assistance with a legal problem.
- 15.3 Of itself, this figure seems like a fundamental failure in the drive for access to justice. Tony Parsons (former Managing Director of VLA) referred to this statistic in a speech on the issue of access to justice. Of people who do seek legal help, Parsons states that these people are confronted by 'a myriad of different services which are often shrouded by an almost impenetrable fog of stringent funding and case criteria, guidelines, and means and merits tests that have been put in place to manage and prioritise legal aid expenditure because the level of government funding is so hopelessly inadequate, so hopelessly disproportionate to the need.'<sup>27</sup>
- 15.4 PILCH considers that access to justice and the adequacy of VLA funding should be considered (1) in terms of matters for which a grant of aid is not available (and should be) and (2) in relation to matters which come within the guidelines but are denied aid.

#### **(1) Restrictive interpretation of VLA Guidelines**

- 15.5 Notwithstanding the VLA resource limitations, in PILCH's experience the application of the current VLA Guidelines can be overly restrictive. As a result, a significant number of matters which should be eligible for grants of assistance under the existing, albeit limited guidelines, are denied aid. PILCH considers this issue is an important one which has a significant impact on the availability of legal assistance in civil law matters.

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<sup>24</sup> Ibid p 34

<sup>25</sup> John Corcoran, Law Council of Australia – President's Message, accessed from <http://www.lawcouncil.asn.au/media/news-article.cfm?article=EDA41E17-1E4F-17FA-D283-3E54D8C3411117> on 17/03/09

<sup>26</sup> The VLA grants handbook notes that VLA is not able to grant legal assistance to everyone, given limited resources, VLA grants handbook, para 2.1.1 of appendix 2B

<sup>27</sup> Speech by Tony Parsons on access to justice, <http://www.legalaid.vic.gov.au/364.htm>, accessed 8 April 2009

**(2) 'Special circumstances' guideline**

15.6 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. In our view, the following case studies are examples of clients who should have, as a minimum, received advice from VLA regarding the merits of defending their matters.

**Case study H**

Mr H 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 I**

Ms I 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 7**

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.

**(3) 'Public Interest and Tests Cases' guideline**

15.7 If aid is not otherwise available, VLA may assist in relation to matters in the 'public interest'. The VLA public interest and test case guideline<sup>28</sup> contains 2 parts. The first part briefly defines 'public interest' and provides that assistance may be granted for cases that involve:

- 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.

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<sup>28</sup> Grants handbook, Section 11, Appendix 2B

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

The second part provides a cascading set of considerations relevant to 'public interest'. It provides that 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.'

15.8 PILCH broadly agrees with the definition of public interest but considers the second part of the test to be both too onerous and vague in its application. In PILCH's experience, a number of matters which raise issues affecting disadvantaged people and which otherwise meet the guidelines above have not been funded.

15.9 PILCH's Public Interest Scheme refers matters which are considered to be 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.

15.10 Each year the number of matters referred through the Public Interest Scheme increases. In the 2005 – 2006 financial year, the Public Interest Scheme received 540 inquiries and made 239 referrals. The following financial year it received 571 inquiries and made 227 referrals and last financial year it received 627 referrals and made 326 referrals. PILCH considered each of the successful referrals met its public interest criteria. PILCH has a

strict policy of not referring an applicant for pro bono assistance or representation if Legal Aid is available. In the matters referred by PILCH's Public Interest Scheme none of the applicants had received legal aid under VLA's public interest guideline.

- 15.11 The case study below provides an example of a Federal Court matter testing the application of legislation that would potentially affect a significant number of people, namely activists and protestors. This matter was not considered eligible for funding under the VLA public interest guideline.

**Case study J**

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 represented 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 considered to be meritorious have nonetheless been 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 8**

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.

**16. Family law aid**

- 16.1 The VLA annual report (2007 – 2008) notes that it receives the lowest funding of all Legal Aid Commissions in Australia<sup>29</sup>. In 2008, Victoria Legal Aid (VLA) announced an overall operating deficit of \$20.3 million dollars. Of this amount, \$14.3 million dollars represents the deficiency in Commonwealth funding to VLA.

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<sup>29</sup> Victoria Legal Aid, Annual Report 2007 – 2008, p 3

- 16.2 As a result of the budget deficit and the fact that between 80 – 85 percent of Commonwealth funding is spent on family law<sup>30</sup>, VLA elected (among other measures) to do the following:
- Cut the number of independent children’s lawyers by 600;
  - Tighten the means test; and
  - Stop funding lawyers to instruct in family law trials (including independent children’s lawyers)
- 16.3 The VLA annual report also states that if the organisation were to be funded in line with other commissions, the cuts would not be necessary.<sup>31</sup>
- 16.4 Following these VLA funding changes, the Law Institute of Victoria Legal Assistance Scheme (LIVLAS) experienced an increase in inquiries from 73 to 128 between financial years 2007-08 to 2008-09.<sup>32</sup> During the same period, inquiries of the Victorian Bar Legal Assistance Scheme (VBLAS) increased from 40 to 73 and referrals increased from 8 to 23.
- 16.5 PILCH has received requests for pro bono assistance from a number of clients in circumstances which suggest that they arise from reduced funding for family law matters and the operation of pre-existing ‘grants procedures.’
- 16.6 A number of clients had been refused legal aid on the basis of the operation of stricter ‘allowable asset deductions’. As a result of these changes, applicants become ineligible for legal aid if they had more than \$100,000 equity in their home.

**Case study K**

VBLAS received a request from an individual for pro bono assistance in a parenting dispute.

The parties were married for 10 years and had two children. There were significant family law proceedings with respect to parenting and property issues. The wife had spent over \$50,000 in legal fees and was unable to continue privately funding the case. At the time the wife contacted VBLAS, the property matter had been resolved. The property interest in the former family home was transferred to the wife, estimated value was \$500,000. The current issue related to the eldest child (aged 12) spending time with the husband.

On 18 February 2008, VLA ceased funding parenting issues where the applicant’s equity is in excess of \$100,000. VLA also refused to place an equitable charge on the property to secure payment of legal fees. The wife was in receipt of a government benefit and also suffered from a mental impairment.

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<sup>30</sup> Hamish Gilmore, A New National Policy for Legal Aid, 2008, p 4

<sup>31</sup> Victoria Legal Aid, Annual Report 2007- 2008, page 3

<sup>32</sup> The minor increase in successful referrals during the same period (from 5 to 6) demonstrates the difficulties in referring family law matters for pro bono assistance

VBLAS accepted the wife's application for pro bono assistance and referred the matter to pro bono counsel to appear at the interim hearing. Due to the complexity of the matter, VBLAS also secured the assistance of a CLC to act as instructor.

The matter was settled with the assistance of pro bono counsel and final parenting orders were made.

#### **Case study L**

VBLAS received a request from a community legal centre for pro bono assistance in a parenting dispute.

The two children of the relationship lived with the mother. Allegations were made against the father that he has sexually abused the children. Accordingly, the matter was listed in Magellan List of the Family Court, which is a specialist list to deal cases involving serious allegations of physical and sexual child abuse.

On 18 February 2008, VLA ceased funding parenting issues where the applicant's equity is in excess of \$100,000. In this case, VLA refused aid as the mother owned a property and had approximately \$175,000 of equity. The mother was in receipt of a government benefit.

Another factor in this case was that the Court ordered that the mother undertake a psychiatric assessment, the costs to be paid by legal aid. Despite this order, VLA refused to fund the costs of the report.

Given the complexities of the matter and the length of the final trial, VBLAS was unable to provide pro bono assistance.

- 16.7 In case study K, it is accepted that this client held considerable equity in her home and would not have been eligible for aid before the changes to the means test (previous allowance provided for home equity just above \$300,000). Nonetheless, as a single mother on a government benefit, she was unable to privately fund family law proceedings. Furthermore, she was unable to use her equity to obtain the assistance of VLA. She would also have had difficulty borrowing against the equity because she would not have been able to repay a loan (due to her mental impairment and custody of her children) and this would have led to sale of the family home. As such, in the circumstances this client was vulnerable by virtue of her circumstances and was disadvantaged by the operation of VLA grants procedures as they applied to the equity in her home.
- 16.8 The matter referred to in case study L was a serious matter involving allegations of physical and sexual child abuse and requiring Court ordered psychiatric assessment. It should be noted this client would have been legally aided but for the latest range of funding cuts at VLA. The subsequent inability of VBLAS to obtain counsel to assist in this matter also points to another issue aside from the adequacy of legal aid funding, that is, the difficulties in obtaining pro bono barristers in family law matters. Anecdotally, barristers have been reluctant to accept pro bono family law briefs on the basis that these matters are onerous, complex and time consuming.

- 16.9 Case Study L is therefore a prime example of access to justice failing as a result of the inadequacy of legal aid funding. Case Studies M and N below both derive from the decision of VLA to cease funding contravention and enforcement of court orders.

**Case study M**

VBLAS received a request from a community legal centre for pro bono assistance in a family law contravention application.

Orders were made in 2008 which provided for the child to live with the father and spend time with the mother. Under the orders, if the father formed a reasonable view that the mother's health was "psychologically impaired", he could suspend her time with the child. The father formed such a view and time was suspended. The orders also stated that if the mother provided a medical certificate to the father confirming that she was "mentally" capable of caring for the child, time with the child could be resumed.

Despite the mother providing a medical certificate, thereby complying with the orders, the father continued to deny the mother time with the child. Accordingly, the mother had no other option but to issue proceedings for contravention.

On 18 February 2008, VLA ceased funding contravention and enforcement of court orders. The mother was in receipt of a government benefit, suffered from a mental impairment and did not own any property.

VBLAS accepted the mother's application for pro bono legal assistance and referred the matter to pro bono counsel to appear at the hearing of the application.

The matter was settled with the assistance of pro bono counsel and the mother was able to resume spending time with the child.

**Case study N**

VBLAS received a request from a community legal centre for pro bono assistance in a complex family law matter involving parenting, property and the contravention of orders.

Following separation, the wife commenced property proceedings to prevent the husband of disposing a business leasehold that had been purchased a year after marriage. The husband subsequently transferred the leasehold to a third party, despite orders restraining him from dealing with or alienating property in his name. The wife subsequently sought parenting orders with respect to the child. Although the true value of the leasehold was unknown, it was thought to be worth approximately \$90,000.

On 18 February 2008, VLA ceased funding contravention and enforcement of court orders, as well as property matters including those associated with parenting issues. The wife was in receipt of a government benefit and did not own any property.

VBLAS accepted the wife's application for pro bono legal assistance and referred the matter to pro bono counsel to appear at the final hearing. While the CLC remained on the record as instructor, there was no funding to pay them to attend court to instruct counsel.

On 18 February 2008, VLA also ceased funding for an instructing solicitor to attend court to instruct counsel in family law matters

The husband attended the final hearing unrepresented and the matter was unable to be resolved on a final basis. Interim orders were made and the matter was adjourned. Unless pro bono assistance is secured for the final hearing, both parties will appear unrepresented, which is an increasing phenomenon for the courts.

- 16.10 In case study M, this meant legal assistance was not available to enable a woman to maintain a relationship with her children. This client had a mental impairment and no property and yet was still unable to obtain legal assistance.
- 16.11 Case study N deals with similar issues and also touches on another decision by VLA to cut funds for solicitors to instruct in family law matters. In its submission about the funding crisis, the Law Institute of Victoria (*LIV*) identified a family law matter listed for 10 days and involving 20 witnesses. The LIV states, 'It is impossible for this matter to be heard efficiently and effectively if the instructing solicitor is not present to assist in managing the witnesses, cannot hear evidence or liaise with the client and is unable to instruct Counsel.'<sup>33</sup>
- 16.12 Under current terms of engagement, VBLAS is not able to assist where a matter is partially funded by Legal Aid. Case study O is an example of the arbitrary effect of current VLA funding arrangements whereby one aspect of a dispute is funded (parenting issues) and another is not (property issues).

#### **Case study O**

VBLAS received a request from a community legal centre for pro bono assistance in a parenting and property dispute.

The parties recently separated, and after spending time with the children the husband refused to return them to the wife. The husband filed an urgent application seeking parenting and financial orders.

At the time of the initial application to VBLAS the wife had not formally applied to legal aid and accordingly VBLAS was unable to provide assistance at the interim hearing.

The CLC contacted VBLAS again, on behalf of the client, for further assistance. They advised that aid was subsequently granted for parenting but not for property issues. Despite the funding, the wife was unable to secure a private lawyer to take on the matter. Anecdotal evidence suggests that private lawyers are becoming increasingly reluctant to accept legally aided matters, especially a partly aided matter, due to inadequate funding.

On 18 February 2008, VLA ceased funding property matters including those that are associated with parenting issues. The property in dispute was the former family home,



valued at \$320,000 with a mortgage of \$251,000 (joint equity of \$69,000). The wife was in receipt of a government benefit.

Due to the partial availability of legal aid funding, VBLAS was unable to provide pro bono assistance.

**Recommendation 9**

PILCH recommends that the government reverse the 2008 funding cuts and reappoint 600 independent children's lawyers.

**Recommendation 10**

PILCH recommends that VLA restores the allowable asset deduction to the level which existed before the cuts in 2008.

**Recommendation 11**

PILCH recommends that the government provide funds to allow VLA to provide instructing lawyers in family law proceedings.

**17. Civil law aid**

- 17.1 As a result of the 1997 reduction in Commonwealth funding, 'civil law legal aid has fallen through the cracks, tenancy, consumer, employment and social security legal services... are no longer core commission priorities although problems in these jurisdictions equally have profound consequences on peoples' lives.'<sup>34</sup>
- 17.2 The ways in which Commonwealth funding has impacted the availability of aided civil law services is also relevant. As discussed above, following the significant withdrawal of Commonwealth funds in the late 90s, a number of legal aid commissions closed their civil law programs altogether.
- 17.3 Fortunately, a civil law program still exists in Victoria, despite funding deficiencies. The VLA annual report states that of a total of 42,044 grants of legal aid, 6,457 grants of aid were made in relation to civil matters for the 2007 – 2008 financial year. Accordingly, approximately 6 – 7% of legally aided work is in respect of civil matters.<sup>35</sup>

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<sup>33</sup> Kathryn Smith, Submission 'Funding crisis: Victoria Legal Aid Funding for Family Law Matters, Law Institute of Victoria, p 6

<sup>34</sup> National Legal Aid, A New National Policy for Legal Aid in Australia, p 3

<sup>35</sup> Unfortunately the annual report does not provide a break down of the type of legal matters for which civil aid is granted.

- 17.4 The VLA annual report also refers to legal representation, minor work files<sup>36</sup>, legal advice and duty lawyer work undertaken by the Family, Youth and Civil Law section but does not appear to provide a break down of the areas in which duty lawyers provide representation or detail the nature of minor work files. While it is acknowledged a significant amount of legal support is provided in these areas, it is submitted that one off advice and representation should not be a substitute for complete legal services.
- 17.5 While PILCH commends VLA for its ability to maintain a civil law program, it should be acknowledged that there is significant unmet need in respect of this area of law. Whilst pro bono has provided significant assistance in meeting this need, and should be encouraged to do so, there are limits to the capacity and appropriateness of pro bono to do so.

**Recommendation 12**

PILCH recommends that the government consider restoring an adequately funded national civil legal aid scheme which extends the current civil law guidelines.

**(1) Matters specifically excluded from aid guidelines**

- 17.6 The VLA Grants Handbook specifies the matters which qualify for a grant of aid. Appendix 2B of the Handbook refers to state civil law matters and provides a number of specific circumstances in which a grant of Legal Aid is not available.
- 17.7 Part 8 of appendix 2B provides VLA will not grant assistance for the following matters:
- Cases at the Residential Tenancies Tribunal
  - Town planning disputes
  - Royal Commissions or Parliamentary inquiries
  - Internal disputes in organizations
  - Proceedings on behalf of an unincorporated association
  - Employment disputes
  - Building disputes
  - Change of name applications
  - Commercial or business disputes
  - Testator family maintenance applications.

**(a) Cases at the Residential Tenancies Tribunal**

- 17.8 The duty lawyer scheme provides for representation before the Residential Tenancies List of the Victorian Civil and Administrative Tribunal. While access to advocacy on the day of hearing in part ameliorates the harshness of the Part 8 exclusion of aid for tenancy

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<sup>36</sup> Minor work is a legal advice and addition assistance that falls short of legal representation

matters, PILCH believes a grant of Legal Aid should be available to enable adequate preparation. It should be noted that the recently released White Paper on homelessness notes that 'Legal issues and lack of access to legal advice can contribute to or increase homelessness'<sup>37</sup> and specifically acknowledges there is a 'clear need to increase access to legal services to individuals and families at risk of homelessness'<sup>38</sup> in areas of law such as tenancy.

**Recommendation 13**

That grants of Legal Aid be available for matters which may lead to eviction by the Residential Tenancies List of the Victorian Civil and Administrative Tribunal.

**(b) Employment disputes**

- 17.9 VLA will not grant assistance for employment disputes<sup>39</sup>. In PILCH's view, the guideline should be extended to make assistance available in employment matters such as unfair dismissal or unlawful dismissal matters.

**Case study P**

Mrs P was dismissed from her employment as a cleaner with a major international hotel chain. As a result of the dismissal, the client and her husband were required to survive on his Disability Support Pension. The client sought assistance because she felt her employer had taken advantage of her limited English and the hotel's complicated policies about misconduct. During the course of a conciliation conference it became apparent that Mrs P had committed superficial breaches of rules and that the rules had been unfairly applied. Further, Mrs P was shown to have an excellent employment record. Ultimately a PILCH Homeless Persons' Legal Clinic lawyer was able to assist the client to obtain compensation and to have her job reinstated.

- 17.10 Case study P is an example of a client who met the PILCH Homeless Persons' Legal Clinic criteria for legal assistance and received advice and advocacy in respect of an employment law matter. As a result of this legal assistance the client received compensation and was able to return to employment. In PILCH's view, the implications of this case study in terms of access to justice are clear. Moreover, it should be noted that in providing this client with access to justice, the Homeless Persons' Legal Clinic was also able to provide her with a pathway out of homelessness.

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<sup>37</sup> The Road Home: A National Approach to Reducing Homelessness, 21/12/08, p 55

<sup>38</sup> Ibid, p 55

<sup>39</sup> Grants Handbook, part 8 of appendix 2B of the grants handbook

**Recommendation 14**

PILCH recommends that Legal Aid assistance be extended to employment matters such as unfair dismissal and unlawful dismissal matters.

**(2) Mental Health Review Board**

- 17.11 VLA may grant assistance for cases before the Mental Health Review Board where there are reasonable prospects of obtaining the applicant's release from hospital or some other improvement in the client's conditions or some other improvement in his or her conditions.<sup>40</sup> It is worth noting that the VLA civil section also provides advice and representation via duty lawyers.<sup>41</sup>
- 17.12 The Mental Health Review Board annual report (2007 – 2008) states that of a total of 7,348 matters determined by the board, only 4.3%<sup>42</sup> (316) cases resulted in an order discharging the patient from hospital. This percentage drops to .88% in relation to hospital inpatients. In these circumstances it is difficult to see how a grant of aid for representation before the Board could ever be justified.
- 17.13 In a 2006 report, the President of the Board, John Lesser referred to the low rate of legal representation (5.6%) before the review Board and speculated this was a result of 'available legal aid funding and priorities'.<sup>43</sup> Lesser also observes that 'In every jurisdiction I visited, legal aid-funded legal representation appeared to be available to all involuntary patients as of right, resulting in legal representatives being involved in more than 90% of hearings. In many cases, the funding arrangements made for involuntary patients, because of their perceived vulnerability and disadvantage, are streamlined to avoid the normal means and merits tests usually associated with grants of legal aid for civil litigation.'<sup>44</sup>

**Recommendation 15**

PILCH recommends that Legal Aid funding be increased to provide representation before the Mental Health Review Board as of right.

**Recommendation 16**

PILCH recommends that Legal Aid funding arrangements for involuntary patients be streamlined to avoid means and merits tests and enable broader access to representation.

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<sup>40</sup> Ibid, Part 3 of appendix 2B

<sup>41</sup> The Mental Health Legal Centre assists involuntary patients in the community and VLA assists involuntary patients in hospital.

<sup>42</sup> Mental Health Review Board annual report 2007 – 2008, page 46

<sup>43</sup> John Lesser, Review and Decision Making for Persons with a Serious Mental Illness: Achieving Best Practice, 2006, p 40

<sup>44</sup> Ibid, p 40

**(3) Minimum claim of \$5,000**

17.14 It appears 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.

17.15 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.

**Recommendation 17**

PILCH recommends that VLA guidelines be relaxed to provide a grant of aid in matters where the claim is less than \$5,000.

**(4) Crimes family violence matters**

17.16 In addition, the guidelines should be expanded in the area of Crimes Family Violence. The VLA guidelines state that VLA expects an applicant to begin proceedings with the help of the Police or a Magistrates' Court Registrar<sup>45</sup>.

17.17 In PILCH's view, the guidelines should be expanded to allow for a grant of aid to commence proceedings 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.

17.18 VLA guidelines provide a grant of assistance may be made to a respondent to oppose the making of a family violence intervention order if:

- The respondent is aged under 18 years; or
- The order would deprive the respondent of an important right (for example, it would exclude the respondent from their home); or
- The respondent is in custody as a result of the alleged family violence; and
- The respondent is more likely than not to succeed in contesting the making of a family violence intervention order in the terms sought by the applicant.<sup>46</sup>

17.19 An application for an intervention order is a serious issue for both applicant and respondent. PILCH considers assistance to respondents should also be broadened given the serious nature of these matters. The case study relating to Miss Q, below, is an example of circumstances where PILCH considers that a person should be entitled to a grant of Legal Aid in the area of Crimes Family Violence.

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<sup>45</sup> VLA Grants Handbook, part 6.1, Appendix 2B

<sup>46</sup> Ibid, part 6.2, Appendix 2B

**Case Study Q**

Miss Q, 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 came into contact with the applicant was for him to see his child. The applicant and a relative of his made it clear they did not want to see Miss Q or the child and the relative then assaulted her. Following this incident both men sought the intervention order against Miss Q. Victoria Legal Aid refused aid for Miss Q 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.

**Recommendation 18**

PILCH recommends that VLA guidelines be expanded to provide for a grant of aid to assist a client to commence proceedings for an intervention order.

**Recommendation 19**

PILCH recommends that VLA guidelines be expanded to provide for a grant of aid to assist respondents to oppose the making of a family violence intervention order in a wider variety of circumstances.

**18. Conclusion**

- 18.1 In 2008, National Legal Aid noted 'There is a need for research and evaluation in the access to justice area, so that there is proper data and a comprehensive knowledge base for improving delivery of legal aid services and the administration of legal assistance to disadvantaged Australians.'<sup>47</sup>
- 18.2 The results of a National Legal Needs Survey conducted by National Legal Aid are due in 2009. It has been stated that this survey of 20,000 Australians is 'undoubtedly the largest legal needs survey undertaken anywhere in the world'<sup>48</sup> and will hopefully provide an accurate picture of legal need and determine who is missing out. As such, while the current inquiry into access to justice is to be welcomed, we submit the results of this needs survey must be carefully considered and will require a response by both State and Federal Government.
- 18.3 Furthermore, it is also understood that Legal Aid Commissions are currently in negotiations in relation to funding agreements. In light of the current negotiations, it may be necessary

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<sup>47</sup> National Legal Aid, Policy & Position Statement , July 2008, p 4

to reconsider issues of adequacy of legal aid once these agreements have been concluded.

- 18.4 Despite uncertainty surrounding Commonwealth funding, it is worth noting that the \$120 million dollars stripped from legal aid budgets has not been reinstated.

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<sup>48</sup> Tony Parsons, Speech on Access to Justice, <http://www.legalaid.vic.gov.au/364.htm>, accessed 8 April 2009

## Part F – Measures to reduce the length and complexity of litigation

### 19. Introduction

19.1 Part F of this submission considers some of the measures that are needed to reduce the length and complexity of litigation in Australia. It examines steps that might taken to:

- (1) improve access to justice for self-represented litigants (**SRL**); and,
- (2) address the emerging use of strategic litigation against public participation (**SLAPP**) to suppress adverse public debate, commentary and protest on issues of public importance.

### 20. Self-Represented Litigants

20.1 There is an increasing number of SRL seeking access to Australian courts. This is due, in part, to an inability to afford legal representation and a lack of awareness of, or inability to access, government-funded legal services. SRL are often unfamiliar with the law and legal system. This places them at a significant disadvantage as they attempt to navigate the system, and compromises their ability to access justice. SRL can also undermine the effective operation of the legal system and drain already overburdened court resources.

20.2 The number of pro bono legal referrals made by PILCH, including in respect of SRL, has increased. However, the number of SRL in Australian courts has not abated. Reasons for this trend may include: restrictions on the availability of legal aid; the increasing cost of litigation; and, the current economic climate. In some cases, SRL may be unaware that they are eligible for pro bono legal representation.

20.3 Whilst PILCH provides much needed assistance to many SRL, it is clear that the efforts of PILCH and the significant ongoing contribution of pro bono lawyers are not enough to ensure that SRL are able to have their cases heard fairly and expeditiously. Nor are they enough to enable courts to operate as efficiently as they might.

20.4 In PILCH's view, the methods of assisting SRL are in need of reform and require a commitment from government to fund and implement change. Of particular importance is the need to increase access to legal advice and support services through:

- (1) expansion of Duty Lawyer services to other jurisdictions;
- (2) expansion of the SRL Coordinator role to other jurisdictions;
- (3) improved training and information for judicial officers on dealing with SRL;
- (4) development and provision of written information on the legal system for SRL; and,
- (5) explore technological solutions for providing services to SRL.

#### **(1) *Expansion of Duty Lawyer services to other jurisdictions***

20.5 Throughout Australia, there are a number of Duty Lawyer services in place. In Victoria, for example, Victoria Legal Aid (**VLA**) provides Duty Lawyers in the Federal Magistrates Court,



the Magistrates' Court, the Family Court and the Victorian Civil and Administrative Tribunal (VCAT). Lawyers are 'on duty' at these courts and provide pro bono advice and representation to SRL so that they are not denied legal assistance through ignorance, limited financial resources or other disadvantage. In providing pro bono legal assistance to SRL, Duty Lawyers also aid the effective operation of the judicial system – especially in superior courts cases that are usually complex and resource intensive – by ensuring that cases run as smoothly and efficiently as possible.

- 20.6 Whilst the assistance provided to SRL through the Duty Lawyer services in Victoria and other states is crucial for ensuring access to justice and the effective operation of the judicial system, these services are limited in number and scope. PILCH respectfully submits that greater assistance could be provided to SRL and the operation of the judicial system could be improved if Duty Lawyer services were to be extended to all courts. PILCH further submits that additional funding is required to ensure the effective operation of such services.

**Recommendation 20**

PILCH recommends that the government should expand the Duty Lawyer service to all courts and ensure adequate funding for its effective operation.

**(2) Expansion of Self-Represented Litigants Coordinator role to other jurisdictions**

- 20.7 The Supreme Court of Victoria currently employs a Self-Represented Litigants Coordinator (SRL Coordinator), who is the Court's primary contact for SRL. The SRL Coordinator is responsible, *inter alia*, for: providing procedural and practical advice to SRL; assisting SRL in completing court forms and documents; liaising with court staff to expedite proceedings involving SRL; maintaining statistics on SRL; monitoring best practice in other jurisdictions; and, referring SRL to such bodies as PILCH, VLA and CLCs.
- 20.8 The SRL Coordinator has referred a number of SRL to PILCH for pro bono legal assistance. PILCH assesses these requests for legal assistance against its usual eligibility criteria. Where it is established that a SRL meets PILCH's criteria, it endeavours to facilitate pro bono legal assistance through a referral to one of its member firms. As Case Studies R-T demonstrate, a number of SRL have secured pro bono assistance in this way.

**Case Study R**

The SRL Coordinator referred Mr R, a non-English speaker, to PILCH. Mr R was seeking assistance in appealing a decision of the County Court to refuse to stay proceedings because of a requirement in a contractual agreement between the parties that arbitration of disputes take place in China. PILCH was able to facilitate pro bono legal assistance from counsel and solicitors for Mr R. This assistance was integral to Mr R's successful appeal and the decision to stay proceedings.

### **Case Study S**

Mr S 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 S 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 against him. A default judgment was entered against Mr S. He applied to the County Court to have the default judgement set aside. However, his application was dismissed. Mr S then sought leave to appeal. The Court of Appeal held that Mr S had an arguable defence and counter claim, and gave Mr S one month to lodge a fresh application to set aside the default judgment. The SRL Coordinator referred Mr S to PILCH for pro bono legal assistance in lodging the application. PILCH was able to secure the assistance of counsel and one of its member firms and Mr S was able to make a fresh application.

### **Case Study T**

The SRL Coordinator referred Mr T, an elderly man, who was seeking to represent himself in an action against a mortgagee of his former family property, to PILCH for pro bono legal assistance. At the point at which the matter was referred to PILCH, it had been stayed indefinitely. PILCH referred the matter to counsel with experience in mortgage and property law for the purpose of obtaining a merits advice. In the event that counsel determines that there is merit in some or all of the action, PILCH will seek to facilitate a further pro bono referral on behalf of Mr T.

- 20.9 In PILCH's view, the Supreme Court of Victoria's SRL Coordinator has provided important and much needed assistance to SRL. The Coordinator has also played a significant role in ensuring the more efficient administration of justice. PILCH respectfully submits that this initiative should be funded on an ongoing basis and implemented in other courts across Australia. This would increase the level of support and assistance available to SRLs and would relieve the pressure on court and registry staff.<sup>49</sup>

### **Recommendation 21**

PILCH recommends that the government should expand the SRL Coordinator role to other jurisdictions and ensure adequate funding for its effective operation.

### **(3) Training and information for judicial officers on dealing with SRL**

- 20.10 The impact of SRL on the legal system is significant. Court staff spend considerable time with SRL explaining court processes and procedures and assisting with completion of court documents. PILCH believes that judicial officers would benefit from training and

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<sup>49</sup> This is consistent with the recommendations of the Victorian Law Reform Commission: Civil Justice Review (2008)

educational materials on how best to assist SRL with: basic legal and procedural information; filling out forms; and, for example, referral to available interpreter and legal services, including Legal Aid, CLCs, and pro bono schemes (such as those administered by PILCH).<sup>50</sup>

**Recommendation 22**

PILCH recommends that additional funding be provided to prepare, publish and deliver training and educational material for judicial officers on best practice management of SRL.

**(4) Development and provision of written information on the legal system for SRL**

20.11 SRL usually have limited knowledge of the law and legal system. As a result, SRL often submit wrong or incorrectly completed court documents<sup>51</sup> and adopt other approaches that impede the efficient conduct of court proceedings. The SRL Coordinator has been responsible for the development of plain language materials, including on preparation and swearing of affidavits and amending pleadings,<sup>52</sup> to assist SRL in the conduct of their cases. The Coordinator has also improved the website of the Supreme Court of Victoria, with a view to improving the way in which SRL interact with the legal system.

20.12 In PILCH's view, the development of such written and online material is an effective method to assist SRL and courts. PILCH respectfully submits that the development and implementation of similar materials in other jurisdictions would help to ensure SRL have the capacity to participate effectively in the court system.

**Recommendation 23**

PILCH recommends that additional funding be provided to prepare, publish and deliver jurisdiction-specific plain language materials to assist SRL.

**(5) Explore technological solutions for providing services to SRL**

20.13 Technology has had an important role to play in improving access to justice for SRL. For example, in the Supreme Court of California, a program has been established to emphasise the use of technology in providing SRL services. The goals of the program include exploring the use of technological solutions for: completion of forms; provision of information; and, meeting with litigants at a distance. These services are intended to help

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<sup>50</sup> See, eg, The Vexatious Litigant, by Dr Grant Lester, Judicial Officers' Bulletin April 2005-Volume 17 No 3.

<sup>51</sup> Self-representing Litigants: A Queensland Perspective', John Dewar, Bronwyn Jerrard and Fiona Bowd, December 2002.

<sup>52</sup> Victorian Law Reform Commission: Civil Justice Review: Report (2008), pg 575

SRL to: navigate court processes; complete, file and serve court forms; handle court hearings; and, understand and comply with court orders.<sup>53</sup>

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

- Publication of written materials on the court's website;
- Provision of information;
- Links to VLA, the Federation of CLCs, pro bono referral services, social service agencies and government complaint bodies and agencies;
- Completion of forms online; and,
- Ability for SRL to remotely submit enquiries to SRL Coordinators.

#### **Recommendation 24**

PILCH recommends that the government implement technological services for SRL.

### **21. Strategic Litigation Against Public Participation**

21.1 PILCH is concerned about an emerging practice in Australia of large corporations using litigation as a strategic means of suppressing adverse public debate, commentary and protest on issues of public importance. The increasing trend toward litigation of this kind led to introduction of the term 'strategic litigation against public participation' (SLAPP) and the SLAPP writ.<sup>54</sup>

21.2 Faced with such litigation, or the threat of litigation, community members involved in public debate, commentary or protest have often been intimidated and withdrawn from public debate for fear of the prohibitive costs and uncertainty of litigation which can drag on for years. By these means, SLAPP writs succeed in stifling criticism, and in so doing, impact negatively on public debate and participation. This in turn undermines the fundamental principles of democracy, access to justice and the rule of law.

21.3 SLAPP writs can involve long and costly legal battles that have tie up court resources dealing with questionable legal claims brought for the purpose of furthering the complainants' strategic objectives of suppressing public participation. Indeed an objective of the SLAPP writs is to engage the defendants in long and costly litigation, so as to distract and discourage them from further criticism or protest activities.

21.4 PILCH proposes the introduction of measures that would discourage the use of SLAPP writs and thereby reduce the incidence, length and cost of litigation.

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<sup>53</sup> [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)

<sup>54</sup> The acronym was coined by American sociologists Pring and Canan.

- 21.5 Below are case studies where SLAPP writs, or the threat of legal action, have effectively suppressed public interest activities and communications. The examples illustrate the need to protect public participation.

**Case Study U**

A defamation action was brought by Frank De Stefano, chairperson of Barwon Water, against the Bannockburn Yellow Gum Action Group. Mr De Stefano sued the Action Group over their release of bumper stickers that read 'Barwon Water – Frankly Foul'. The Action Group were drawing attention to Barwon Water's proposal to turn local woodland into a sewerage farm. The defamation action had a major effect of intimidating the community and removing their voice. Those defendants who were unable to secure pro bono assistance incurred significant legal costs.<sup>55</sup>

**Case Study V**

A similar case involved a defamation writ issued by a property developer against an architecture lecturer over comments in *The Age* relating to construction of a casino by the developer<sup>56</sup>. The lecturer found himself without legal support from the paper or his university, and eventually settled with an apology for an inference that may have been drawn from his comments, as they were reported. The threat of litigation in that case was said to have stifled public debate by a qualified commentator and the media about a matter of significant public interest and importance.

**Case Study W**

Gunns Limited, a Tasmanian sawmiller and hardware retailer, is Australia's biggest woodchip exporter. On 13 December 2004 Gunns lodged a writ in the Supreme Court of Victoria seeking injunctions and damages of \$6.36 million against 20 Tasmanian environmentalists and groups. The 216 page complex writ claimed that the defendants engaged in a campaign against Gunns that amounted to a conspiracy to injure Gunns by unlawful means, and interference with Gunns' trade and business by unlawful means. PILCH was approached by 13 defendants for pro bono assistance and referred eight of them.

After 2 years of litigation, the Statement of Claim had been struck out 3 times and Gunns then re-pleaded and dropped almost half of the original claims and 6 defendants from the case. After a further 2 years of interlocutories with two hearings and an appeal in relation to discovery,<sup>57</sup> settlements were reached with 3 defendants – two involving no damages

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<sup>55</sup> See Brian Walters, *op cit*, pp 14-18 and Donald, B, "Defamation Action Against Public Interest Debate" (Paper delivered to the Free Speech Committee of Victoria, 22<sup>nd</sup> April 1999).

<sup>56</sup> See Brian Walters, *op cit*, pp 28-31

<sup>57</sup> *Gunns v Marr & Ors* [2008] VSC 464.

and both sides bearing their own costs and one with the defendant paying a 'small fraction' of what was originally sought but settling because the defendant wanted to 'stop haemorrhaging money' to his lawyers.<sup>58</sup> In April 2009 a further 5 defendants exited the case with Gunns paying their costs. Proceedings are still on foot regarding seven defendants<sup>59</sup>. The case has cost the defendants many millions to defend and has placed a significant burden on court resources.<sup>60</sup>

21.6 Other recent examples include:

- A case in Victoria where a dairy company took action against an organic food activist and the media, after the food activist had questioned the company's claims that its products were organic;
- the threat of legal action used by Toshiba in 2005 to silence Environment Victoria when it issued an environmental report card which Toshiba alleged did not do justice to its product; and
- the threat of legal action directed by Yarra Trams in 2003 against the Public Transport Users' Association, which related to a leaflet criticising the removal of seats from tram services<sup>61</sup>.

21.7 PILCH proposes that protection against SLAPP writs should be achieved by the introduction of uniform State, Territory and Commonwealth legislation that is directed at discouraging and, ultimately reducing, litigation which would constrain public participation. PILCH contends that such legislation should:

- a) establish legislative recognition of a right to engage in public participation;
- b) confer on Victorian courts the power to award damages and costs against plaintiffs who issue proceedings for the improper purpose of discouraging public participation;
- c) provide for the dismissal of proceedings where the underlying alleged conduct constitutes public participation; and
- d) allow parties to apply for a declaration that their conduct constitutes public participation before legal proceedings are brought against them.<sup>62</sup>

21.8 In the United States, '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

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<sup>58</sup> The statement from the second defendant is at: <http://www.wilderness.org.au/articles/law-discharged-from-gunns-case>

<sup>59</sup> *Gunns Ltd v Marr* [2005] VSC 251; *Gunns Ltd v Marr (No. 2)* [2006] VSC 329; *Gunns Ltd v Marr (No. 3)* [2006] VSC 386; *Gunns Ltd v Marr (No. 4)* [2007] VSC 91

<sup>60</sup> From Dr Greg Ogle *Gunning for Change: The Need for Public Interest Law Reform* The Wilderness society Dec 2005

<sup>61</sup> See Brian Walters, "Suing into Submission: Using Litigation to Quell Dissent", (Speech to Castan Centre for Human Rights Law, 9 August, 2005).

<sup>62</sup> PILCH has prepared a draft Bill for an Act to Protect Public Participation.

issue.<sup>63</sup> The company that filed the SLAPP Writ is then required to pay the defence costs of the person served with the writ as well as their legal fees. 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.

***Recommendation 25***

PILCH recommends that the Government introduce legislation that would discourage the use of SLAPP (Strategic Litigation Against Public Participation) writs and encourage public participation.

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<sup>63</sup> Anti-Slap Resource Centre, <http://www.thefirstamendment.org/antislappresourcecenter.html>

## **Part G – Adequacy of funding and resource arrangements for Community Legal Centres**

### **22. Introduction**

22.1 In this section we highlight the role of CLCs in enhancing access to justice. We examine the unmet need for legal services and the manner and degree to which this need is met by the CLC service delivery model. We submit that CLCs provide a value-for-money service to otherwise unassisted and marginalised members of the community, and add to access to justice. We make recommendations as to funding, and resource arrangements for the CLC sector.

22.2 Whilst this submission has Australia-wide application, it draws largely from the Victorian jurisdiction within which PILCH operates. PILCH is itself a CLC and an active member of the Federation of CLCs (Victoria) and the National Association of CLCs.

### **23. The Role of CLCs**

23.1 CLCs have a 35-year history of providing legal services in Australia. In addition to providing individual legal casework, advice and referrals, CLCs also operate within their geographic communities, and in the interests of constituent groups, in delivering legal education and law reform activities. There are more than 200 CLCs in Australia, located in metropolitan, suburban, regional, rural and remote areas and providing both generalist and specialist services.

23.2 CLCs service a client base which is marked by low income, marginalisation, disadvantage and a lack of social inclusion. CLCs offer a multidisciplinary and sophisticated service, and do so by engaging with their communities, government and other providers of social welfare and legal services.

23.3 CLCs are well placed to provide critical legal services, having regard to their acknowledged expertise, and the innovative and responsive approach adopted by them in providing assistance to members of the community with legal and related problems.<sup>64</sup> They are cost effective, provide integrated solutions that strengthen society and leverage the services of pro bono legal providers.

### **24. Recognition for CLCs / CLC Funding History**

24.1 “CLCs grew out of the voluntary efforts of community members in response to the failure of the bureaucratic state to adequately address the legal needs of the disadvantaged”.<sup>65</sup> The recognition by government of the cost-effective service delivery of CLCs<sup>66</sup> has long seen them come in from the margins, and they now occupy a recognised position in the

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<sup>64</sup> The Commonwealth Attorney-General, ‘Boost for Social Inclusion Through Better Legal Services’ (Press Release, 18 April 2008).

<sup>65</sup> Louis Schetzer, ‘CLCs – Resilience and diversity in the face of a changing policy environment’ (2006) 31(3) *Alternative Law Journal* 163

<sup>66</sup> Legal Aid Commission of NSW, Parliament of NSW and the Commonwealth, *Review of the NSW Community Legal Centres Funding Program* (2006) 4.



Commonwealth and State Government's wider purchaser-provider model for legal services.

- 24.2 This path has, however, been marked sometimes with suspicion as to method and merit. The endorsement CLCs now enjoy has not always existed nor allowed them to operate in a manner which might best serve the legal needs of their clients and the community. In particular, the CLC movement has at times struggled to operate within the political constraints of their funders, and within the principle limitation of inadequate funding and onerous conditions imposed on its application. In addition, structural constraints have limited the services CLCs could otherwise offer (for example: the small size of certain CLCs; litigation restrictions in the Environment Legal Program and rules which hinder CLC graduate programs).
- 24.3 Funding for many CLCs is provided under the joint Commonwealth and State Government, Community Legal Service Program (**CLSP**), and is typically administered by State Legal Aid Commissions. This program establishes the principal mechanisms under which reporting requirements are imposed, and the application of funding by CLCs is controlled. CLCs also secure funding and grants from government departments, local government agencies, universities, public charitable institutions, independent grant bodies and other support agencies and their members.
- 24.4 The 2008 Review of the Commonwealth Community Legal Services Program noted that "Funding for the CLSP in 2006-07 totalled \$24.7m, with \$22.1m allocated to 128 CLCs, and the balance used for program support activities. The State contributions totalled \$17.6m".<sup>67</sup> By 2007, however, CLCs had experienced an 18% reduction in funding over the last 10 years in real terms.<sup>68</sup>
- 24.5 This has put considerable pressure on CLSP funded CLCs, particularly in the face of increasing demand and service delivery, evidenced by a 23% increase in individual client services in the last 4 years and a 5% increase in the first 6 months of 2008/9 over the previous year in Victoria alone.<sup>69</sup> In 2004, the Senate Legal & Constitutional References Committee Inquiry Report identified the funding crisis facing CLCs at that time<sup>70</sup>, and the 2008 Review of Commonwealth CLSP has similarly identified the significant difficulties faced by CLCs in meeting the demand for services and the low funding levels for CLCs.<sup>71</sup>
- 24.6 A further feature of the CLSP is the Commonwealth's decision not to accept responsibility for funding of any matters arising under State and Territory laws. This has resulted in additional administration costs, and more seriously, impeded the application of funds

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<sup>67</sup> The Commonwealth Attorney-General's Department, *'Review of the Commonwealth Community Legal Services Program'* (2008).

<sup>68</sup> National Association of Community Legal Centres, *'Community Legal Centres Across Australia – An investment worth protecting, Funding Submission to the Commonwealth Government 2007-2010'* (2007).

<sup>69</sup> Hugh de Krestor, Federation of Community Legal Centres (Victoria), *'Briefing Notes – Australian Access to Justice Funding'*, 2 Oct 2008

<sup>70</sup> Senate Legal & Constitutional References Committee, above n 3, 218.

<sup>71</sup> The Commonwealth Attorney-General's Department, above n 5.

according to need. The Law institute of Victoria, in a position consistent with Senate inquiries into legal aid and access<sup>72</sup>, has argued strongly against the dichotomy:

“The rule that Commonwealth funds may only be applied to Commonwealth matter is illogical and arbitrary in its operation. It is this rule that has resulted in the legal aid system failing so abjectly to meet the needs of the very people it is supposed to serve. We adopt the position that VLA should be allowed to allocate legal aid funding according to need.”<sup>73</sup>

- 24.7 PILCH considers CLCs should be allowed to operate on a needs-based model, with an abolition of the current policy of quarantining Commonwealth funding from State and Territory matters. State and Territory legal aid commissions should not be required to separately account for Commonwealth contributions by applying these exclusively to Commonwealth matters.

**Recommendation 26**

PILCH recommends removal of constraints under the Community Legal Service Program which quarantine Commonwealth funding from State and Territory matters.

- 24.8 In April 2008, the Australian Government announced a welcome one-off injection of \$10 million to Australian CLCs, which helped to address certain funding shortfalls and service demands. With respect to Victorian CLCs, PILCH understands that the one-off grant has mostly been applied to settle outstanding operating shortfalls (including leave entitlements, urgent capital revitalisation and additional employment to achieve sustainable staffing structures).
- 24.9 The immediacy by which the one-off grant has been absorbed into the sector evidences the financial need experienced by them, and suggests a strong case for elevation of the contribution to core recurrent funding.
- 24.10 Against this background, it was noted in 2006 that CLC salaries are still 29-38% lower than Australian and NSW public sector equivalent salary scales.<sup>74</sup> This limits the ability of CLCs to attract and retain experienced and excellent staff. Other employment conditions within the CLC also sector lag behind those of their public and private counterparts. These deficiencies fail to reward the service offered by CLC staff, and are a structural risk to the sector.

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<sup>72</sup> Senate Legal & Constitutional Reference Committee, *'Inquiry into the Australian Legal Aid System: Second Report'*, June 1997 & Third Report, June 1998, xvi, & Fourth Report, June 2008, 31.

<sup>73</sup> Senate Legal & Constitutional Reference Committee, *'Inquiry into the Australian Legal Aid System: Fourth Report'*, June 2004, 30.

**Recommendation 27**

PILCH recommends an independent review of the salaries and conditions for CLC workers, with a comparative study of those in comparable international regimes, and looking at retention rates, career paths, flexible secondment arrangements across government, the private legal sector and CLCs.

**25. Establishing the case for CLCs**

**(1) Access to justice requires access to legal services**

25.1 People experiencing disadvantage constitute the typical client base of CLCs. For example, '58% of [CLC] clients receive some form of income support, 82% of clients earn less than \$26,000 per annum, and almost 9% of [CLC] clients (have) some form of disability'.<sup>75</sup> CLCs, as compared to private legal practitioners, also see a high proportion of clients from non-English speaking backgrounds. Many of these disenfranchised people would be infrequent clients of private legal providers, even on a grant of Legal Aid, since the low level of grants means private lawyers and barristers are increasingly refusing to undertake legal aid work.<sup>76</sup>

25.2 To the extent marginalised and disadvantaged members of society face barriers in accessing justice, and to the extent they are empowered by CLCs, PILCH submits access to justice should be furthered by strengthening the operational capacity of CLCs.

**(2) Unmet legal needs**

25.3 The comprehensive NSW Justice Made to Measure survey found that just over 50% of those who experienced a legal event sought help, and in only 12% of those instances were traditional legal advisers used.<sup>77</sup> These same people experienced a high rate of satisfaction where assistance was sought.

25.4 Coupled with this unmet need, CLCs are overwhelmed by demand for services, and are service providers with a high "turn away rate".<sup>78</sup> This reflects PILCH's experience. Indeed, referrals by PILCH to pro bono legal services are in most cases only made where the applicant has no other recourse to other free legal services, such as Legal Aid Commissions or CLCs. In 2008, PILCH assisted over 2000 individuals and organisations to access free legal and related services, and this represents only a portion of those who applied for assistance under its various schemes.

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<sup>74</sup> Mercer Human Resource Consulting as quoted in Kretser, above n 7, 2

<sup>75</sup> The Commonwealth Attorney-General's Department, above n 5, 6.

<sup>76</sup> Peter Gregory, 'Legal aid uproar: barrister would rather work for free', *The Age*, 7 October 2008. See Part E, Section 14 of this submission.

<sup>77</sup> Coumaleros, Wei & Zhou, above n 14, ..

<sup>78</sup> Australian Council of Social Service, 'Australian Community Sector Survey Report 2007' (2007) and Legal Aid Commission of NSW, above n 3, 5.

**Case Study X**

Mr X, a newly settled refugee from Iraq, was persuaded by members of his community in Melbourne to apply for a \$20,000 loan from one of the major banks. The loan application and interview were undertaken with these third parties acting as interpreters, and the bank, in granting the loan, paid the monies to the third parties. The bank then issued a complaint against Mr X to recover funds he never received. Mr X obtained assistance from the Flemington & Kensington Community Legal Centre (undertaking an outreach at the Asylum Seekers Resource Centre), which lodged a defence on Mr X's behalf. The CLC then sought further assistance through PILCH, and Russell Kennedy solicitors have been successful in defending Mr X against the claim.

- 25.5 The importance of targeting and addressing unmet legal need is captured in the following observation of the Federation of Community Legal Centres (Victoria) (**Federation**)<sup>79</sup>:

“Many people with legal problems have complex needs and multi-dimensional problems. People who cannot resolve their problems often end up in cycles of decline. If problems are not resolved early, they can escalate and become compounded by related legal issues.

The failure to resolve legal problems in a timely manner can lead to loss of employment and income, stress-related illness and relationship breakdown. The impact of unresolved legal problems represents a significant cost to government and the community.”

- 25.6 It is submitted that a multidimensional service delivery model is best suited to this diversity of experience. CLCs provide this by being accessible, providing tailored legal education, acting as gateways to other services and addressing multiple legal and non-legal needs.<sup>80</sup>
- 25.7 More could be achieved, however, with increased funding to civil law programs. This constitutes the greatest area of unmet need in legal aid funding, and similarly CLC service delivery capacity.<sup>81</sup> Inadequate support for civil law matters removes access to justice for many people facing issues as diverse as Mental Health Review Board meetings, personal injuries, tenancy, contract law, social security and motor vehicle accidents.<sup>82</sup>

**Recommendation 28**

PILCH recommends that the Commonwealth increase funding to CLCs to enable them to provide case work assistance to the community in civil justice matters.

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<sup>79</sup> Federation of Community Legal Centres (Victoria), ‘Victorian State Budget Submission 2009-2010’ (December 2008), 1.

<sup>80</sup> Coumaleros, Wei & Zhou, above n 14, xxiv -v..

<sup>81</sup> Ibid 4.

<sup>82</sup> See Section 17 of this Submission.

25.8 The Federation has also identified the following significant areas of unmet legal need requiring urgent attention<sup>83</sup>:

- establishment of legal services towards eliminating discrimination;
- improving services to victims of crime;
- addressing disadvantage in culturally and linguistically diverse communities;
- providing safe, humane and accountable prisons, with improved access to legal services for prisoners;
- support for legal issues facing women, specifically family law and domestic violence;
- improving services for the elderly;
- improving services for homeless;
- police accountability<sup>84</sup>;
- improving services for indigenous Australians, who experience significant disadvantage and poor access to justice; and
- addressing an acute gap in CLC service provision in rural, remote and regional areas, resulting in disadvantage to those communities.

25.9 The number of people seeking legal assistance is predicted to increase under the current financial crisis, particularly with issues of credit, debt, tenancy, social security, employment, and consequently relationship breakdown and family violence.<sup>85</sup>

**Recommendation 29**

PILCH recommends that the Commonwealth provide additional funding to the CLC program for provision and support of generalist and specialist legal services addressing: discrimination; victims of crime; elder law; homelessness; prisoner rights; indigenous legal services; women and family law and domestic violence; and police accountability.

PILCH recommends that the Commonwealth provide additional funding to the CLC program for provision and support of generalist legal services in rural, remote and regional (RRR) areas.

**(3) CLC Service Delivery**

25.10 PILCH submits that the CLC delivery model provides responsive and cost-effective legal services to marginalised and disenfranchised members of the community.

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<sup>83</sup> Federation of Community Legal Centres (Victoria), 'Victorian State Budget Submission 2009-2010' (December 2008).

<sup>84</sup> Tamar Hopkins, Victorian Law Foundation 2008/9 Fellowship Report 'An Effective System for Investigating Complaints Against Police' (April 2009).

<sup>85</sup> Hugh de Kretser, pro forma letter to Federal MP's - 'Australian Government funding for CLCs' (February 2009).

- 25.11 The Commonwealth Attorney General's Department 2008 Review of Commonwealth Community Legal Services Program highlighted many strengths of the CLC program including:
- "Its flexibility which enables responsiveness to emerging client needs
  - CLCs' expertise in areas of law that other providers are unwilling or unable to cover
  - CLCs' multi-dimensional approach to service delivery which is well-suited to assisting people with complex needs and multiple disadvantage; and
  - Sharing of expertise and resources between CLCs which, in turn, promotes cost savings."
- 25.12 These features match the roles identified in the Justice Made to Measure Study as being appropriate to maximising prevention and intervention, and to enhance the appropriate targeting of limited resources.<sup>86</sup>
- 25.13 Due to resource, staffing and financial constraints, however, many CLCs are unable to provide a comprehensive casework service. In addition, many CLCs cannot provide representation in court or tribunal proceedings, while other centres are limited to the provision of 'one-off' advice rather than any ongoing assistance. Very few CLCs are able to act as instructing solicitor in Supreme Court proceedings. In addition, as a result of their funding constraints, most CLCs have a very limited capacity to undertake outreach work.
- 25.14 Further, CLC service delivery of law reform, advocacy and education programs are subject to barriers raised by the increasing need to seek funding for these from external sources rather than from core recurrent income. These services are integral to a law reform framework which seeks to address potential legal problems before they occur, rather than only dealing with them afterwards.
- 25.15 PILCH proposes the establishment of a Special Project fund to assist with law reform, education, advocacy and special projects. Currently, funding for these projects is sourced from various independent bodies, which can be ineffective and results in inefficiencies. The importance of Commonwealth funding for these activities is especially relevant in a time when philanthropic and other grant money is not forthcoming.

***Recommendation 30***

PILCH recommends that the Commonwealth should establish an independent Special Project Fund to fund CLC law reform, education, advocacy and special projects.

**(4) Cost-Effectiveness**

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<sup>86</sup> Coumaleros, Wei & Zhou, above n 14, xxiv -v.

- 25.16 PILCH endorses the findings of the Senate Legal & Constitutional References Committee Inquiry Report<sup>87</sup> as to the cost-effectiveness of the CLC program, and that CLCs play a crucial part in providing access to justice for all Australians.<sup>88</sup>
- 25.17 A 2006 report by the Institute for Sustainable Futures (University of Technology Sydney) on The Economic Value of CLCs also recognised the societal benefit of work undertaken by CLCs in reducing the degree to which their clients would otherwise need to engage with the costly legal system or use government services.<sup>89</sup>
- 25.18 Further, CLCs leverage more than \$23 million worth of free legal assistance each year through volunteers and pro bono relationships. More than 2,200 private lawyers around Australia volunteer in CLCs. More than 1600 non-lawyers (law students, other professionals) volunteer in Australian CLCs.<sup>90</sup>
- 25.19 There is significant evidence, however, that pro bono legal services should not be regarded as a substitute for adequate legal aid funding, and that “there are still areas where private law firms provide very little assistance, particularly in some of the lower profile areas of law such as community law”<sup>91</sup>.
- 25.20 PILCH consider adequate minimum funding will allow CLCs to: operate in an efficient manner; maintain comprehensive service delivery at the highest standards; attract and retain excellent staff; and operate out of locations with adequate infrastructure.

**Recommendation 31**

PILCH recommends that Commonwealth funded CLCs are funded to a minimum recurring core funding of \$520,000 and continually increase funding to CLCs to enable them to provide case work and assistance to the community in civil justice matters.

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<sup>87</sup> Senate Legal & Constitutional References Committee, above n 3.

<sup>88</sup> The Commonwealth Attorney-General's Department, above n 5, 218.

<sup>89</sup> National Association of Community Legal Centres, *Why Community Legal Centres Are Good Value* (2008), 8.

<sup>90</sup> Ibid.

<sup>91</sup> Senate Legal & Constitutional Reference Committee, *Inquiry into the Australian Legal Aid System: Fourth Report*, June 2004, xix.