Law Institute Victoria

7 October 2003

Senate Legal and Constitutional Committee
Room S1.61
Parliament House
CANBERRA ACT 2600

SFrench
(03) 9607 9385
E-mail: sfrench@liv.asn.au

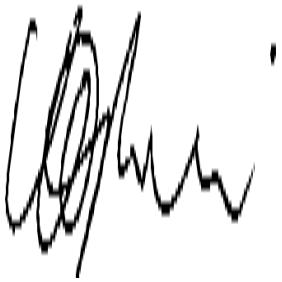
Dear Committee Members,

Legal Aid & Access to Justice

Please find attached a submission from the Law Institute of Victoria. We would like to express our thanks to you for granting us an extension of time to gather input from the contributing sections/committees.

We await with keen interest the outcome of the inquiry.

Yours sincerely,



Bill O'Shea
President

Legal aid and access to justice submission

7 OCTOBER 2003

1. Executive Summary

1.1 The innovative work of Victorian Legal Aid (VLA) is to be commended. Its efforts have done much to ameliorate problems that are created by under-funding of legal aid. However the limits of self-help schemes must be recognised.

1.2 The distinction between Commonwealth and State matters for the purposes of legal aid allocations should be abolished. Legal aid funds should continue to be administered by VLA (and similar bodies in other States and Territories) but VLA should not be prohibited from applying Commonwealth funds to matters arising out of State law.

1.3 Legal aid should be more widely available in relation to criminal matters.

1.4 The operation of the fee-cap in relation to family matters is arbitrary and it should be abolished.

1.5 Legal aid should be more widely available in relation to family matters and in particular should be available in relation to cases involving domestic violence.

1.6 Litigation involving children should automatically attract a grant of legal aid and the discretion of VLA should be abolished.

1.7 Measures should be adopted to make it easier for ordinary people to access the civil courts, particularly in relation to matters not well suited to 'no-win no-fee' arrangements.

1.8 Legal aid fees should be appropriately indexed.

2. Introducing the Law Institute of Victoria

2.1 The Law Institute of Victoria is the professional association for Victorian solicitors. The Institute represents its members' interests and works to improve the law so that it better serves a changing society. It aims to increase public understanding and respect for the law and legal process, while encouraging full participation in the profession by all members.

2.2 As a result of the passing of *Legal Practice Act* 1996, from 1 January 1997 the Law Institute of Victoria became a business name used by Victorian Lawyers RPA Limited. The Law Institute of Victoria is responsible for the representation of members and the provision of services to them. The regulatory functions are carried out by Victorian Lawyers RPA Limited through the Professional Standards Division.

3. Human Rights Background

3.1.1. The ability of individuals to effectively access the justice system is a fundamental human right that should not be lightly disregarded in a democratic society. Although Australian domestic law does not yet recognise such a right (beyond the limited scope of the *Deitrich* principle) there are various international rights documents that, although not enforceable need to be considered. The principles espoused in these documents apply to criminal, family and civil law matters. We therefore set out the nature of the international obligations that exist before examining the terms of reference.

3.1.2. The opening provisions of the Basic Principles on the Role of Lawyers[1] ("the Principles") provide that all persons within the jurisdiction should have equal access to lawyers without discrimination including on the basis of property or economic status.[2] Governments are obliged to "ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons".[3]

3.1.3. The Principles make particular provision in respect of criminal matters. Article 6 provides that anybody who lacks the funds to retain their own lawyer should be entitled "to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them".

3.1.4. Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") (to which Australia is a signatory) provides for legal assistance in criminal proceedings. In particular, sub-paragraph (b) provides that a everyone is to 'have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. Sub-paragraph (d) goes on to provide a right to 'defend himself in person or through legal assistance of his own choosing: to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'

3.1.5. Although note binding, Article 6(3)(c) of the European Convention on Human Rights ("ECHR") provides that a person charged with a criminal offence has the right to -

[1] A/CONF.144/28/Rev.1 (1990)
[2] Article 2.
[3] Article 3.

Defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require.

3.1.6. This provision of the ECHR has been construed as requiring Member States to ensure that there is 'adequate representation of the case for the defence'.[4] This must include ensuring that there is equality of arms as between the prosecution and the defence.[5] The rationale is that an accused's lawyer is able to alert the accused to any procedural irregularities. He is thereby seen to be performing an essential task which is in the public interest as well as that of his client.

4. Terms of Reference

4.1 The performance of current arrangements in achieving national equity and uniform access to justice across Australia, including in outer-metropolitan, regional, rural and remote areas.

4.1.1 It is beyond the scope of our experience to comment upon whether the current arrangements provide uniformity of access to justice across Australia. In that regard we defer to and support the submissions of the Law Council of Australia.

4.1.2 However, as a representative body for Victorian solicitors we are able to comment upon whether the current arrangements achieve uniformity of access throughout the State. The concept of access to justice includes access to legal materials, information, advice, assistance in settling documents as well as assistance by way of representation. There is no doubt that improvements have been made in respect of improving access to legal materials, information and telephone advice. These improvements have, to a large extent, been facilitated by the widespread use of the Internet. In particular Victoria Legal Aid's (VLA) web-site provides a wealth of valuable information sheets that can be accessed free of charge. Such developments are to be welcomed but it should not be forgotten that they are only necessary because of the gaps that exist in the legal aid system.

4.1.3 In most areas Legal Aid offices will provide a minor assistance scheme, consisting of one-off access to a solicitor at no charge. Again this is an innovative scheme that is to be welcomed but its limited value must be recognised. Understandably, these are services that are in great demand and that tends to mean that appointments are not easy to make. The scarcity of

[4] *Pakelli v FRG a 64* (1983) Com Rep para 84

appointments necessarily operates to the disadvantage of those living in remote areas. It is therefore much easier for people living in regional centres to access these types of services.

4.1.4 VLA also operates a valuable community legal education program. The purpose of the program is to educate those who are going to have to represent themselves in court. These include workshops dealing with traffic offences and divorce. The traffic offence workshops operate mainly out of Melbourne but the divorce workshop is run at most regional offices. A further workshop for self-represented litigants will shortly be offered in Albury/Woodonga, Mildura and Dandenong.

4.1.5 There are also extensive materials available online or via a telephone information service. Each of these services are available in a variety of languages.

4.1.6 Similarly VLA operates a Human Rights & Civil Law Service out of its Melbourne office. Lawyers within this service have expertise in social security, asylum seeker and immigration law, and mental health law. Once again this is worthwhile service that is important to individuals who need access to specialist advice in what are complex areas of law. Of course, it is likely that lawyers in regional centres will be able to offer some assistance in respect of these matters but it remains the case that the specialist advice is only available in Melbourne. Again the support that is offered by this scheme is only available to those who are able to travel to Melbourne which clearly leaves those unable to do so in a position where they are not receiving the same quality of assistance.

4.1.7 As will be discussed in detail below the Federal government continues to rely heavily (in relation to civil matters) upon the willingness of legal practitioners to offer 'no-win no-fee' arrangements and to undertake pro bono work. It is quite clear that those closer to Melbourne and other regional centres are better placed to access these services. For example, the Public Interest Law Clearing House (PILCH) operates out of Melbourne and much of the support for its work is from Melbourne based practitioners. By reason of the better resources at their disposal it is Melbourne based practitioners who are better able to undertake pro bono work. A further consideration is that the solicitors will be extremely cautious about undertaking work on a 'no-win no-fee' basis and are likely to cherry-pick, the more straightforward cases. Larger firms are more able to carry the risks that are inherent in running 'no-win no-fee' litigation, which also operates, to the disadvantage of those who cannot easily access Melbourne.

[5] *X v FRG No 10098/82*, 8 EHRR 225 (1984)

4.1.8 There are also reports of difficulties obtaining access to criminal representation in rural and remote areas, where there may be very few solicitors undertaking criminal legal aid work. This in turn shifts the burden of providing legal aid services to the in-house practitioners. This does not fully address the problem because in situations where both parties need to be separately represented there will be a conflict difficulty. VLA last year reported that in Melton there were no lawyers willing to undertake family law work, although it is understood that this problem has now been resolved.

4.1.9 There is an extent to which living in rural areas will make it harder for people to access legal services, but the chronic under-funding of legal aid services in Victoria exacerbates this problem. People living in rural and remote areas are disproportionately disadvantaged by gaps in the legal aid funding scheme.

4.2 The implications of current arrangements in particular types of matters, including criminal law matters, family law matters and civil law matters

A. Criminal Law

4.2.1. In criminal matters a defendant will only receive legal aid in limited circumstances. In broad terms this is where there is a risk that they will receive a custodial sentence, be subjected to an Intensive Correction Order or where the matter is complex and likely to result in a community based order requiring more than 200 hours of unpaid labour. In the case of contests legal aid will be available if there is a reasonable prospect of acquittal on the most serious charge and the penalty would be likely to exceed a $750 fine. If a defendant faces a charge and these outcomes are adjudged to be unlikely legal aid will not be available. Limited legal assistance may be available through other channels such as the self-help schemes mentioned above. However, it is unlikely that the defendant would be represented in the course of negotiations with the prosecution, at trial or when considering whether there were grounds to sustain an appeal.

4.2.2. The starting premise must be that a criminal conviction is a serious matter. At the very least it is something that will significantly reduce an individual's career opportunities. Various career paths may be closed to them. Even where a career path remains open it will necessarily prove more difficult for that individual to succeed. In our increasingly protectionist society the circumstances when others may access our private records are increasing. For example clause 13(g) of the

Education (Workplace Learning) Act 2003 (Vic) envisages criminal record checks on all employers and persons likely to supervise children on work placements. Without passing comment on the need for such legislation it is apparent that this and similar provisions tend to make it more likely that others will be able to access an individual's criminal record. Accordingly the protection that is afforded to those charged with criminal offences should reflect the seriousness of being convicted of a criminal offence.

4.2.3. Even in seemingly straightforward cases such as drink-driving offences there are often technical defences that a lawyer might deploy but that a layman is unlikely to be aware of.[6] It is no answer to say that a judge or magistrate can be relied upon to determine the availability of such a defence. Their role is to act impartially, not to investigate possible lines of defence or attack for the parties. Often they will rely upon defendants' lawyers to raise technical defences and to remain abreast of the latest legal developments. Whilst this is a role that the judiciary will often assume when faced with a litigant in person this is not a satisfactory method of securing fundamental rights. Moreover, a lawyer acting for a defendant would investigate and consider the defendant's case in a way that a judge or magistrate is simply unable to do in the course of the case. Such an interventionist approach by the judiciary is no substitute for proper legal representation.

4.2.4 The phrase 'where justice requires'[7] should not be cynically used to reduce the Commonwealth's legal aid liability to the bare minimum. In determining whether justice requires that assistance be provided in particular cases it is inappropriate to adopt a blanket approach. It is too simplistic to asses the availability of assistance based upon the nature of the likely penalty. As a minimum, regard should in all circumstances be had to the complexity of the issues, the ability of the individual to adequately conduct the case and make rational decisions as well as to the significance of a conviction for the accused.

4.2.5 Where an accused has been denied legal aid at his trial it is all the more important that he has access to legal aid for the purposes of any potential appeal. Litigants in person are unlikely to be able to identify fertile grounds of appeal in the same way that a skilled lawyer will be able to.

4.2.6 It is perfectly clear that the present arrangements do not provide for equality of arms as between an accused and the prosecution. To deny legal aid to those charged with criminal offences is to

[6] This is evidenced by the frequency with which articles are carried in the Law Institute Journal detailing the latest developments in relation to drink driving laws. The defences are often highly technical. Nor is such complexity restricted to drink driving matters.

deny the gravity of the offence itself. Alternatively it is to deny the importance of the right to representation in criminal matters. This approach is patently unjust and fails to take account of the serious social consequences that flow from receiving a criminal conviction.

4.2.7 The prosecution will always be represented and they are funded from the public purse, whether the Office of Public Prosecutions, the police, a local authority or some other body carries out the prosecution. By contrast the public purse is deemed unable to fund the defendant in respect of the very same matter. This is a good example of how the criminal justice system is tilted against the interests of minority groups.

4.2.8 It is not satisfactory to rely on duty solicitors to fill the gaps in respect of matters that are not covered by legal aid. Those accused of crimes are entitled to be represented by a lawyer who is able to properly prepare, consider the issues and familiarise themselves with the accused's case. It is not a criticism of duty solicitors to observe that they are in no position to perform this function.

4.2.9 Those that are provided with legal representation will be facing more serious charges and probably a custodial sentence. By reason of the low fees that are paid by legal aid they are likely to be represented by inexperienced junior lawyers. It will be recalled that Article 6 of the Principles requires that the lawyer's experience and expertise be commensurate with the nature of the offence. Despite this provision a defendant is likely to be at a significant disadvantage, as the prosecution will invariably assign its more experienced lawyers to prosecute cases of this gravity. The fees paid to legal aid practitioners are low and mean that it is difficult for lawyers to devote appropriate time to the preparation of cases. The prosecution does not, so far as we are aware, operate under comparable circumstances.

4.2.10 That is not to say that the representation provided by junior lawyers is not highly professional but it must be recognised that more senior lawyers are able to bring years of experience to bear. Whilst it is necessary that junior lawyers gain access to court work to develop their skills it is not appropriate that they be given responsibility for representing a defendant who risks losing their liberty. Junior lawyers should be able to gain experience in less complex and significant cases in the lower courts, which should, as we argue above, be funded by legal aid.

4.2.11 Of course, on the whole criminal matters are the concern of the States and Territories. The rule that Commonwealth funds may only be applied to Commonwealth matters is illogical and

[7] As used in Article 6 of the Principles and Article 14(d) of the ICCPR.

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 that it is supposed to serve. We adopt the position that this rule should be abolished and that VLA should be allowed to allocate legal aid funding according to need. It should be left to VLA to determine where the interests of justice require that legal aid be made available. Distinctions between Federal and State laws are historical anomalies that are meaningless for present purposes. The cynical adoption of this arbitrary distinction operates to diminish the standing of the administration of justice in the eyes of those who come into contact with it. To adopt these distinctions as a basis for withholding funding encourages obfuscation of the issues by allowing the Federal and State governments to shift responsibility for the gaps in the legal aid system.

B. Family Law

4.2.12 The Law Institute considers that the rules in relation to family law operate unfairly.

4.2.13 Whilst we appreciate the motivation for introducing a funding cap in respect of family law matters its capricious operation renders it unfair. It operates unfairly against individuals and against lawyers. To restrict the funding for legal aid matters by reference to financial limits fails to have regard to the vagaries of legal practice. There are reports of the funding for a matter expiring during the course of a court appearance. Of course, lawyers will ordinarily continue to represent their client out of a sense of professionalism and courtesy. However it is inappropriate for the good will of lawyers to be exploited in this way.

4.2.14 Further, the restriction of legal aid to cases involving property disputes or children is irrational and fails to take account of the complex and traumatic nature of family law disputes. A high proportion of persons appearing in the Family Court are reported to be litigants in person and many of these will be women who are victims of domestic violence and/or sexual abuse who are being forced to face the perpetrators in the course of hearings without legal representation. In such cases it is unrealistic to expect people who have been abused to be able to properly conduct their case, which is likely to involve cross-examination of the perpetrator.

4.2.15 Even in those cases where legal aid is granted the fees that are paid to lawyers are so low that it will ordinarily be only the most junior lawyers who are instructed. Typically the fees paid by legal aid to barristers are about a quarter of the sum paid to those briefed by the Department of

Human Services ("DHS"). This allows those briefed by the DHS to devote more time to the preparation of the case.

4.2.16 The Law Institute is also greatly concerned that children are having difficulties accessing legal aid for appeals from the Children's court to the County Court. *The Children and Young Persons Act* 1989 (Vic) ("the Act") provides for the mandatory representation of children who are capable of giving instructions (including for appeals). The provisions for representation reflect Australia's obligations under Article 12 of the *UN Convention on the Rights of the Child,* which provide that a child shall be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child.

4.2.17 In order for the mandatory representation provisions to have effect, it was agreed in a lengthy consultation period that it was the responsibility of the Legal Aid Commission of Victoria to provide funding to ensure compliance with the mandatory representation provisions of the Act.

4.2.18 Unfortunately, in some cases legal aid funding has been denied for the representation of children who are the subject of an appeal before the County Court. It is an anomaly that the Act provides for mandatory representation and yet the granting of legal aid for such representation is discretionary.

4.2.19 It is essential that the child be represented on appeal. Children are our most vulnerable members of society and must be represented at all stages in the judicial process, including at appellate stage. The effect of the decision of the Court is one of great importance on the child's life and for a child to be unrepresented is a breach of Australia's obligations under the *UN Convention on the Rights of the Child.* If legal aid funding is not available, the effect can also be that a child is denied the right to appeal as the child, overwhelmed by the legal system, choses not to pursue an appeal without representation.

4.2.20 In practice however, the effect of a child being denied legal aid has meant that lawyers, greatly concerned by the fact that a child will be unrepresented, have made their services available on a pro bono basis. As we have argued previously, it is inappropriate for the good will of lawyers to be used to support the failings of the legal aid system.

C. Civil Law

4.2.21 Legal aid is not available for civil matters in Victoria.[8] Instead the government relies upon 'no-win no-fee' arrangements and pro bono work by the legal profession to fill the gaps that its policies have left. Whilst most lawyers contribute significantly by generously giving of their time

[8] Save for a narrow field of in-house work undertaken by VLA such as mental health matters and guardianship issues.

to undertake pro-bono work there remains a perception that it is the lawyers who are exploiting people through the use of 'no-win no-fee' arrangements.

4.2.22 There is also a perception that there is an increasing amount of unsatisfied need for legal assistance. So far as we are aware there has been no substantial study concerning unmet legal need in Victoria. In the United Kingdom Professor Hazel Genn's study has identified that 40% of the 4,000 people surveyed had experienced a justiciable problem (this excluded corporate matters and matters that were too trivial). It was established that 95% had tried to do something to resolve the problem but only 20% had resorted to legal proceedings (and then normally as a defendant). [9] The point is that absent legal aid it is very difficult for ordinary individuals to enforce their strict legal rights.

4.2.23 Whilst 'no-win no-fee' arrangements are clearly suited to straightforward personal injury claims their suitability may be questioned in more complex cases. For instance, claims where there is likely to be counterclaim, multiple parties or where the remedy sought is something other than damages. In these cases it will be difficult to use a 'no-win no-fee' funding formula and unless lawyers are willing to do the work on a pro bono basis the case will be dropped or pursued by the individual in person.

4.2.24 The withdrawal of legal aid from civil matters has tended to encourage a view that there is no prospect of gaining funding for civil matters. This, coupled with concerns about the cost related risks that are associated with pursuing civil litigation, will discourage people from enforcing their rights. The lack of any real incentive for corporate bodies to settle disputes through alternative dispute resolution processes means that they are able to exploit the system (by forcing individuals to litigate) safe in the knowledge that most individuals cannot take the financial risk of issuing proceedings. If the system provides for legal aid for such individuals then the financial muscle of corporate bodies is not so significant. Unfortunately, current arrangements (both in terms of the lack of legal aid and incentives to use ADR) operate to increase the power of corporate bodies who find themselves in dispute with individuals and thereby impose a further barrier to access to justice.

4.2.25 Nor should it be forgotten that most members of society are more likely to come into contact with the civil justice system than the criminal justice system. Whilst the moral imperatives for supporting those charged with criminal offences carry significant weight most people will never

[9] Genn, H (1999) *Paths to Justice,* Oxford, Hart Publishing

require assistance in relation to criminal matters. There is clearly a tension between these competing demands on limited resources, which needs to be logically resolved. If the resolution is to divert legal aid funds away from the civil justice system then other measures need to be contemplated to provide effective access to justice for the vast majority. These measures will need to be clearly explained to the public so as to ensure that people are aware of how they are able to access the civil justice system at a reasonable cost.

4.3 The impact of current arrangements on wider community, including community legal services, pro bono legal services, court and tribunal services and levels of self-representation.

4.3.1. It is a widely thought that the levels of litigants in person are increasing, particularly in the family and civil courts and in lower level criminal matters. Cases involving litigants in person will necessarily take longer to dispose of and are less likely to reach a negotiated settlement. Litigants in person will often require significant assistance from the court to develop their arguments and address the relevant issues. There is far less chance that the papers will properly identify the issues between the parties. These factors are likely to lengthen trials in matters involving litigants in person. Further, litigants in person are (understandably) less able to take an objective view of their case and reach a settlement. It follows that more trials involving litigants in person are likely to proceed right through to trial. The costs that are associated with the lengthening of trials and the increased number of trials are difficult to quantify. However, it clearly involves the cost of the premises, the judge, court administrative staff and the additional costs to the other party. This last aspect is particularly relevant where the represented party are supported by the public purse[10]. It is a factor that should be offset against the perceived savings that are made in circumstances where legal aid is not available.

4.3.2 The Law Institute applauds those practitioners and firms who undertake work on a pro bono basis. However, it is inappropriate for the goodwill of the profession to be used to support failings of the legal aid system. Pro bono work should properly be viewed as complementary to the provision of legal aid. Further, the nature of pro bono works raises concerns about

[10] The most obvious example being the Office of Public Prosecutions but actions against government departments, local authorities [is that the correct term for councils in here?], the police and other publicly funded services should also be considered.

'fragmentation, lack of co-ordination and the difficult task citizens face when they try to find pro-bono schemes when they need them".[11]

5. General Matters

5.1 The crisis in legal aid funding in Victoria was alleviated to some extent by the increase in State funding that was granted during 2002. Despite that the problem remains that legal aid practitioners are continuing move into areas of law which do not require them to rely legal aid payments. This is no doubt in part because of the low level of legal aid payments but it is also because of the failure to index legal aid payments. Without a commitment to indexation practitioners are forced to live from year to year hoping that they will secure an increase in their fees. Given that criminal practitioners in Victoria went for 10 years without any increase in their fees between 1992 and 2002 it should surprise nobody that they are now looking to ensure that such a situation will not occur again. Although indexation is not a panacea to the multitude of problems that have been identified with the current arrangements it would go some way to reassuring those practitioners still willing to undertake legal aid work. Once reassured it is likely that more of them will continue to practice in this area.

5.2 We make no particular recommendations about the way in which indexation should take place.

6. Conclusion

6.1 The alterations to the legal aid system have steadily eroded the ability of the individuals to gain access to public funding for the enforcement or protection of their legal rights. Similarly, in those cases where funding might be available the number of experienced lawyers willing to undertake such work is diminishing.

6.2 The current arrangements are unfair and do not make the justice system accessible. On the contrary the perception is that legal aid is broadly unavailable and most people are not able to instruct lawyers to represent them throughout the litigation process. The result is that many people will abandon their legal rights and others will be forced to pursue them as litigants in person. Neither of these results is satisfactory.

6.3 It is unfair that many people facing criminal charges are not legally represented. The provision of legal aid in relation to family matters is arbitrary. There is likely to be a substantial body of unmet

[11] See Reegan, F. "Legal Aid without the State; Assessing the rise of pro bono schemes" in O'Reilly J., Paterson, A & Pue, W. (Eds), "Legal Aid in the New Millennium" (1999) at 56

legal needs, particularly in relation to civil matters that are not well suited to 'no-win no-fee' arrangements.

6.3 The fees paid by legal aid remain inadequate to attract and retain experienced practitioners.

6.5 The current arrangements fail to satisfy the basic needs of the community for legal assistance.