



VICTORIAN COUNCIL FOR CIVIL LIBERTIES

Reg No: A0026497L  
Phone: (03) 9670 6422  
Fax: (03) 9670 6433

GPO BOX 3161  
Melbourne Victoria 3001  
email: [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au)  
website: [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au)

**By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)**

8 May 2009

Committee Secretary  
Senate Standing Committee of Legal and Constitutional Affairs  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

### ***Senate Inquiry into Access to Justice***

Thank you for the opportunity to comment on the Committee's inquiry into Access to Justice.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. Liberty works to defend and extend human rights and freedoms in Victoria.

Liberty Victoria welcomes the move by the Australian Greens who initiated this inquiry to identify the limitation of the Australian justice system and is keen to comment on the measures that can be taken to remove the barriers faced by people trying to access justice.

We make the following comments in relation to access to justice →

1. It is a fundamental principle of any democratic society that all those living within it have equal access to a justice system where they can expect, and be given, a determination of their rights without fear or favour, and free from external pressures upon a court or tribunal. The right to a fair hearing is recognised in the Victorian Charter of Human Rights and Responsibilities in section 24. This section is based on Article 14 of the United Nations International Covenant on Civil and Political Rights (ICCPR) which Australia has signed and ratified.

Section 24 of the Victorian Charter states that a fair hearing requires that a person charged with a criminal offence or a party to a civil proceeding must have the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This is broader than the ICCPR in that it clearly includes right to a fair hearing in civil proceedings. The right to a fair hearing includes right to legal representation for all, not just those that can afford it.

---

**President**  
Michael Pearce SC

**Vice Presidents**  
Jamie Gardiner  
Anne O'Rourke  
Prof Spencer Zifcak  
Georgia King-Siem

**Secretary**  
Agusia Kapitaniak

**Assistant Secretary**  
Jessie Taylor

**Treasurer**  
Yanlo Yue

**Immediate Past President**  
Julian Burnside QC

**Committee**  
Rachel Ball  
Hugh Crosthwaite

Judy Magassy  
Lucie O'Brien

Dr Di Sisely  
Marian Steele

Penny Underwood  
Brian Walters SC

Timothy Warner  
Jonathon Wilkinson

2. Liberty is firmly of the view that without the adequate provision and funding of legal aid services (this includes legal aid commissions “LACs” and community legal centres “CLC”) many people who are impecunious or disadvantaged may miss out on a fair hearing. A strong and vibrant legal aid system is integral to protecting the right of a fair hearing. It is a fundamental obligation of governments to adequately fund legal aid services. So much is inherent in any promise of access to justice, in a society where many cannot afford lawyers. Pro bono legal assistance is not, and should never be, a replacement for such adequate funding, as it is necessarily ad hoc by nature. Liberty is of the view that more commonwealth funding is needed both for Commonwealth legal matters and to support the ability of state LACs to fund themselves and CLCs. We must ensure effective legal assistance for those who would otherwise be shut out of the legal system because they don’t understand it and cannot afford it.

The work of both LACs and CLCs should not be underestimated. CLC’s in particular provide legal and welfare services to vulnerable individuals but also have a preventative role by providing community legal education and policy law reform work. For many people with legal problems, they are the first point of call for those in dire need of assistance. They assist people in engaging services available to them and further take on their legal matters that need urgent attention.

The national body of CLCs, National Association of Community legal Centres (“NACLCLC”) estimates that for every dollar invested in CLCs, around \$100 may be saved by CLC clients, governments and other affected parties.<sup>1</sup> It follows that any investment in CLCs is an investment and cost effective.

The inadequacy of legal aid funding is evidenced by the Committee’s previous reports, the Victorian Law Reform Commission and the Law Council of Australia. Liberty therefore supports the conclusion that have been previously reached by these bodies, that there is an urgent need for greater legal aid funding. An increase in legal aid funding would increase the availability of legal representation and advice would enhance the protection of human rights of litigants.

3. Rules of procedure which discourage litigants, e.g. by requiring security for costs or undertakings as to damages, should be reviewed especially in their application to public interest litigation. Public interest litigants should also be freed of the burden of paying the other party’s costs when they do not succeed in genuine cases with a real public interest. This would allow for a greater ability of people to access justice without the huge hurdle of costs particularly in public interest matters.
4. Anecdotally, most lawyers have encountered members of the public who have not been able to afford legal representation, who have not been eligible for legal aid, and whose encounter with the system has left them feeling as though they have not had justice. Often enough, their perception that they did not get a just result is accurate. Our system of litigation is the adversary system. It is predicated on the assumption that both parties will be represented, and at a level of competence appropriate to the matter. If a person is unable to afford legal representation, the assumption on which

---

<sup>1</sup> Institute for Sustainable Futures, *The Economic Value of Community Legal Centres*, February 2006, available at [www.naclc.org.au](http://www.naclc.org.au)

the system is based fails. This carries at least 2 major costs, both difficult to quantify. First, the cost the created by inefficiencies associated with self-represented litigants. This is well-recognised by Judges and practitioners. Judges spend an inordinate amount of time trying to help unrepresented litigants understand what is going on. In addition, Judges quite properly look to the parties to help them reach the right result. It is not uncommon to see wrong results achieved when one party is unrepresented. This can result in the matter going on appeal and then having to start again.

5. The second cost is less difficult to quantify: it is the social cost of a growing number of disaffected people feeling that, in a fundamental way, society has failed them. Justice is one of Society's basic promises. Those who do not have genuine access to justice are entitled to feel that Society has broken its part of the social contract.

Should you require any further comments please feel free to contact me on 9225 7488 or Aggy Kapitaniak on 9225 8746.

Yours faithfully

Julian Burnside AO, QC  
Immediate Past President, Liberty Victoria

Aggy Kapitaniak  
Secretary, Liberty Victoria