



Senate Inquiry into Access to Justice

Submission to the Senate Legal and Constitutional Affairs Committee

30 April 2009

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Introduction

The Law Institute of Victoria (LIV) is the peak organisation for legal practitioners in Victoria and represents over 14,500 members. The LIV welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs Committee's (the Committee) inquiry into access to justice (the inquiry).

Access to justice is a key objective of the LIV. The LIV undertakes extensive advocacy to promote access to justice, including in relation to the ability of people to access legal representation; the adequacy of legal aid and the ability of Indigenous people to access justice.

We note that the Senate has withdrawn the terms of reference for the Committee's former inquiry into the judicial system and access to justice. In place of that inquiry, the Senate has referred two separate inquiries: one into Australia's judicial system and the role of judges; and the other into access to justice.

The LIV has had the opportunity to review the Law Council of Australia's submission to the inquiry and we fully support and endorse their comments. In addition to these comments, LIV wishes to provide supplementary submissions to the inquiry in respect of the following terms of reference:

- a. the ability of people to access legal representation; and
- b. the adequacy of legal aid;
- c. the cost of delivering justice; and
- g. the ability of Indigenous people to access justice

Legal Aid Funding in Victoria

Criminal law matters

In September 2008¹ and March 2009² the LIV provided submissions to the Victorian Government urging an increase in funding to Victoria Legal Aid (VLA) for criminal law matters. The LIV has been advised that no additional Victorian Government funding of VLA is contemplated in the near future. We consider that this failure to increase funding raises fundamental issues relating to the following terms of reference to this inquiry:

- a. the ability of people to access legal representation,
- b. the adequacy of legal aid; and
- c. the cost of delivering justice.

The LIV represents over 1500 criminal lawyers practising in Victoria. Our criminal law members have a long history of providing quality legal services to legally aided clients and see this as part of their professional and community obligations.

¹ Victoria Legal Aid Funding submission, available at https://www.liv.asn.au/members/sections/submissions/20080918_147/20080918_VLAFunding.pdf

² LIV Legal Aid Submission, available at https://www.liv.asn.au/members/sections/submissions/20090325_39/20090325_LegalAid.pdf

The LIV submits that the current level of Federal and Victorian Government funding for legal aid in relation to criminal cases, is vastly inadequate and undermines citizens' access to justice in this State.

Inadequate legal aid funding in Victoria has resulted in fewer people charged with criminal offences having access to legal representation by Victoria Legal Aid (VLA) or by private practitioners. Increasing demands on the legal aid budget have led to a reduction in the number of people who are eligible for aid and a reduction in the amount of funding paid to private lawyers in legal aid cases.

Role of private practitioners

Private practitioners play a vital role in Victoria's legal aid system. They provide high quality legal services to some of the most vulnerable and disadvantaged members of our society. VLA simply cannot meet the demand for criminal law case work services with their in-house lawyers.³ Without the services of private practitioners the legal aid system would collapse, and yet legal aid fees have declined in real terms over recent years and have not kept pace with the increase in the complexity and seriousness of legally aided matters being conducted by private practitioners.

In our September 2008 submission to the Victorian Attorney-General and Treasurer, we presented results of a survey conducted by LIV of criminal law practices representing approximately 40 criminal lawyers, to determine an average private rate for a range of different matter types. The table below sets out the results of this survey and shows the range of fees charged to private clients in each matter and the average private rate in comparison to VLA's payment for the same matter. All fees include GST.

Matter type	VLA rate payable	Range of fees for private client	VLA rates as a percentage of the range of private fees	Average fees for private client	VLA rates as a percentage of average private fees	80% of average private fees
Magistrates' Court plea	\$602	\$1100-\$3850	16 - 54%	\$2370	25%	\$1896
Magistrates' Court contest	\$721	\$2000-\$8450	9 - 36%	\$3884	18%	\$3107
Bail application (Magistrates' Court)	\$444	\$1100-\$4400	10 - 40%	\$2821	15%	\$2256
Committal – 1 day – solicitor/client costs only *	\$914	\$2000-\$9350	10 - 45%	\$4600	20%	\$3680
County Court plea	\$2720	\$3000-\$10756	25 - 91%	\$6145	44%	\$4916
County Court - 5 day trial – solicitor/client costs only	\$5077	\$6500-\$19500	26 - 78%	\$11290	45%	\$9032

³ According to figures in Victoria Legal Aid's Annual Report for 2006/2007 (p17) 61.6% of criminal law grants went to private practitioners.

*VLA does not pay instructor's fees in committals whereas a private client will usually have an instructing solicitor

Increase in complexity of matters

Although fees have not substantially increased, there has been a large increase in the complexity and seriousness of legally aided matters being conducted by private practitioners. This means that the work required for each aided matter has increased. A number of factors have contributed to this increasing complexity.

Because the increased demand for legal aid has not been accompanied by a meaningful increase in legal aid funding, eligibility for legal aid in summary matters has had to be tightened. Legal aid is now only available where there are serious consequences for the defendant, and aid is limited to a very small percentage of persons with serious cases who meet the strict assets and income tests.⁴ Further, there is no legal aid funding at all for applications for leave to appeal in the Court of Appeal, which has both educative and oversight functions to ensure that Victorians are treated fairly in our courts.

In addition, the summary jurisdiction of the Magistrates' Court of Victoria has been expanded to include more serious cases and the jurisdictional limit has been increased from \$25,000 to \$100,000, vastly expanding the number of more complex and serious matters being heard in that jurisdiction. Defence practitioners and defendants in sex offence cases are required to adhere to very short time frames and are required to appear at an increasing number of administrative hearings. Matters have also increased in complexity due to the greater number of ancillary orders that can be made by the courts, including DNA sampling and ongoing supervision and monitoring orders in sex cases and automatic confiscation of assets under proceeds of crime legislation.

Consequences of low level of legal aid funding

Legal aid funding for private practitioners has fallen to a level well short of what could be considered fair recompense for the work that is done. LIV members report that it is no longer economically viable for many practitioners to take on legally aided criminal matters. This finding is supported by the results of the TNS survey, commissioned by the Commonwealth Attorney-General's Department and discussed at length in the Law Council of Australia submission to the Inquiry (pp21-22).

Already many senior practitioners are no longer directly involved in legally aided files, leading to a juniorisation of the work. It will increasingly become the case that whole firms will withdraw from this work as they cannot continue without incurring a loss. The LIV submits that the withdrawal of criminal lawyers from legally aided matters will have a grave impact on Victorians' access to justice. It will lead to a situation where there are two tiers of defendants – those able to access quality, experienced representation by funding their own matters and those who receive limited legal aid or are left to represent themselves.

It is anticipated that inadequate legal aid funding will have negative consequences for the courts as more mistakes will be made by inexperienced practitioners because senior criminal lawyers are increasingly withdrawing from legally aided work. Cases before the courts will be subject to increased delay and there is a greater possibility that errors will be made that will give rise to more appeals. Additionally, inadequate resourcing for the

⁴ Aid may be provided where conviction is likely to result in imprisonment, an Intensive Corrections Order or a suspended term of imprisonment. Aid may also be provided in serious or complex matters where there is a likelihood that a community based order will be imposed either requiring more than 200 hours of unpaid community work or where the defendant will have difficulty in communicating his/her needs to the court by reason of psychiatric or intellectual disability, lack of education or difficulties in understanding English.

resolution of matters at an early stage of proceedings will lead to significant delays and increase the cost of justice.

There has already been a broader impact on the justice system as limitations on legal aid funds have resulted in reduced access to legal representation and an exodus of experienced practitioners from legally aided matters.

Increase in criminal cases and delays in the justice system

Statistics provided in the 2007/2008 County Court of Victoria and Magistrates Court of Victoria Annual Reports reveal an increase of more than 15,000 criminal cases from the previous year. However, the percentage of cases which were legally aided during the same period dropped to below the 2004/2005 level. Not surprisingly, the percentage of cases being resolved early in the Magistrates Court also fell over the period, leading to increased delays and cost blowouts.⁵

The criminal justice system functions most efficiently and fairly when each of its four limbs - the police, prosecution, defence and judiciary - are properly funded and operating at their optimum level. If one limb falls behind then the impact is felt throughout the system. If defence practitioners are not properly funded for legal aid work, the trend towards the juniorisation of this work will continue unchecked. Senior criminal lawyers will play an ever smaller role in legal aid work and this will be to the detriment of the justice system as a whole.

Human rights and access to justice

The LIV is concerned that inadequate legal aid funding is a potential breach of the right to a fair hearing, a right that is guaranteed in the Victorian *Charter of Human Rights and Responsibilities 2006*.⁶ Section 25 (f) specifically provides that a person charged with a criminal offence is entitled, without discrimination, "to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*" (Vic).

Recent developments in Victoria

In response to a public meeting in December 2008 organised jointly by the LIV and Victorian Bar to raise awareness of the legal aid crisis in Victoria, the Director of Victoria Legal Aid established the Criminal Fee Structure Review Steering Committee which is conducting research with practitioners to determine the real cost of conducting criminal cases in Victoria. The research will also identify areas in which loss of efficiency in the criminal justice system can be directly related to inadequate legal aid funding. The Committee aims to prepare a report and recommendations for government in June of this year.

Family law matters

The LIV is extremely concerned about the impact of inadequate Commonwealth legal aid funding on Victorian families, the legal profession and the Family and Federal Magistrates Courts in Victoria in family law matters. The LIV provided a submission to the Federal Government in March 2008 about the inadequacy of funding provided for family law

⁵ See LIV *Legal Aid Submission*, 25 March 2009, at https://www.liv.asn.au/members/sections/submissions/20090325_39/20090325_LegalAid.pdf

⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss24-25.

matters, which urged the government to immediately increase funding to ensure access to justice for Victorian families.⁷

In February 2008, VLA advised all Victorian family law practitioners and the Family and Federal Magistrate Courts that it was reducing the number of grants for Independent Children's Lawyers (ICLs). Under the *Family Law Act* 1975, the Court can appoint an ICL where it appears to the Court that the child's interests in the proceedings need to be independently represented. The types of cases where an ICL is appointed by the Court include where:

- there are allegations of abuse against the child;
- there is intractable conflict between the parents;
- the conduct of the parents is likely to impinge on the child's welfare; and
- neither of the parties are legally represented.

By appointing an ICL, the Court is assured that the child's best interests will be represented in the proceedings. This is an essential role because the Courts' final orders must be based on the best interests of the child.

Children have therefore been particularly disadvantaged by the reduction in legal aid funding as in many cases, the appointment of an ICL facilitates early resolution of a matter and can reduce the length of trial. Currently, VLA will only appoint an ICL in "the most compelling cases".⁸

In addition, VLA will no longer fund solicitors to attend court to instruct counsel in family law matters. The LIV submits that removing instructing solicitors from the court process will frustrate the due disposition of cases before the court. In the absence of an instructor at trial, counsel is denied access to the notes of evidence which are essential for cross examination. In addition, solicitors facilitate the running of the trial by liaising with witnesses and most importantly, giving instructions to counsel. If counsel cannot make decisions because they do not have instructions then matters will be stood down, causing delays to trials and increasing the costs to all parties and the Court. This would ultimately hinder the likelihood of success at the conclusion of trial.

VLA currently does not provide assistance with property matters including those that are associated with children's issues. VLA will also no longer fund contravention and enforcement of court order matters.

The LIV is also concerned that VLA grants are below the real cost of lawyers providing the necessary legal service in family law matters and, like criminal lawyers, might ultimately lead to a significant withdrawal of experienced lawyers from providing legally-aided work.

The LIV believes that access to justice is being impeded in Victoria as a result of inadequate legal aid funding in family law matters and we urge the Inquiry to consider this matter further. Further detail on this issue is available in our submission of March 2008, available at

https://www.liv.asn.au/members/sections/submissions/20080304_18/20080304_VLA%20Funding.pdf.

⁷ LIV submission, Funding Crisis: Victoria Legal Funding for Family Law (4 March 2008), available at https://www.liv.asn.au/members/sections/submissions/20080304_18/20080304_VLA%20Funding.pdf

⁸ VLA letter to practitioners dated 14 February 2008.

The ability of indigenous people to access justice

The LIV notes the collective experience of legal aid service providers that Indigenous Australians are the most disadvantaged clients in the communities those providers serve.⁹ We fully support Law Council of Australia calls for increased funding for Aboriginal and Torres Strait Islander legal service providers (ATSILS) to improve the ability of indigenous people to access justice.

The LIV wishes to provide additional information to the Inquiry relating to access to justice for Indigenous people.

LIV Policy Statement on *Indigenous Australians in the Legal Profession and Justice System*

In 2006, the LIV issued a Policy Statement on *Indigenous Australians in the Legal Profession and Justice System*,¹⁰ noting “the particular responsibility of the legal profession to redress disadvantage and inequity experienced by Indigenous Australians in the pursuit of justice.” We advocate that increased Indigenous participation in the legal profession is central to ensuring access to justice for Indigenous people.

The LIV’s Policy Statement provides as follows:

“The LIV recognises:

- (a) Indigenous Australians as the first owners of the land of Australia, and custodians of the land, who have a traditional association with the land in accordance with their laws and customs.
- (b) The Wurundjeri people of the Kulin Nations on whose land the LIV is located.
- (c) All Australians have the right to substantive equality before the law and the entitlement to equal protection of the law without discrimination or prejudice.
- (d) Indigenous Australians as having fundamental human rights, such as the right to self determination.
- (e) Indigenous Australians are to be treated with respect when forging the reconciliation process in building new relationships between Indigenous Australians and non-Indigenous Australians.
- (f) Indigenous Australians and their culture as dynamically contributing to the Australian community, Australia’s heritage and the ongoing development of the legal system.
- (g) The under-representation of Indigenous Australians working in the legal profession and that Indigenous Australians, their cultures and experiences, have a place within the legal profession.
- (h) Indigenous peoples as peoples for whom the issue of justice had great importance in the past and has continuing importance.

⁹ See Law Council of Australia submission, p25 as per Australian Legal Assistance Forum.

¹⁰ LIV policy statement on *Indigenous Australians in the Legal Profession and Justice System* August 2006
<http://www.liv.asn.au/members/sections/admin/pdf/2006240indigenousreconciliation.pdf>

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- (i) The over-representation of Indigenous Australians within the justice system.
 - (j) Barriers for Indigenous Australians to access legal assistance in all areas of the law and access to justice.
 - (k) The high number of Indigenous Australians who have died in custody and the continuing need for the justice system to address the ongoing occurrence of Indigenous deaths in custody.
 - (l) The need for the Australian legal system to recognise and value Indigenous Australian customary law and alternative systems to the justice system, such as restorative justice. In particular the success of the Koori Court and Circle of Sentencing is noted.
 - (m) Historically Indigenous Australians have experienced social, political, economic, education and legal disadvantage as a result of colonisation and dispossession. Even today, Indigenous Australians do not enjoy the same level of civil, social, economic, political, educational, or legal participation as non-Indigenous Australians.
 - (n) The ongoing need to ensure that Indigenous Australians are no longer subjected to discriminatory and unfair legislation, policies and practices and systemic and institutional discrimination.”

“The LIV is committed to:

- (a) Acknowledging the original people of the land on which the LIV is located including in particular LIV ceremonies and promotional material.
- (b) Working in partnerships with Indigenous Australian communities and organisations to promote Indigenous Australians’ legal rights and interests and respect for Indigenous Australian knowledge, perspectives and practices by, amongst other things, advancing Indigenous Australian participation within the legal profession.
- (c) Incorporating Indigenous Australian content and perspectives, as appropriate, into the LIV policies, practices and services.
- (d) Pursuing its goals of supporting, educating, training and empowering Indigenous Australians and non-Indigenous Australians in the spirit of reconciliation.
- (e) Providing pathways for Indigenous Australian law students and lawyers to access designated: seasonal/article and practical legal training courses; Associate positions; specialist legal education; legal training; mentoring; scholarship/funding and job opportunities.
- (f) Encouraging the legal profession to develop strategies towards the recruitment of Indigenous Australian people.
- (g) Acknowledging the achievements of Indigenous Australian law students and lawyers.
- (h) Promoting activities to increase the awareness of legal professionals and students of the impact of non-Indigenous Australian laws on Indigenous Australian laws and culture.

(i) Countering racism and prejudice by promoting and implementing LIV policies on cultural diversity, racial discrimination and harassment, paying particular attention to the diversity of Indigenous Australians' experiences.

(j) Using this Policy Statement to provide a framework for the LIV's ongoing activities and efforts toward reconciliation.

(k) Reviewing this Policy Statement on an annual basis."

This Policy Statement provides an important framework for LIV advocacy and policy initiatives relating to Indigenous Australians and access to justice.

In 2007, the *Law Institute Journal* (LIJ) conducted a comprehensive investigation into the status of Indigenous lawyers in Victoria. The following points were outlined in an article on August 2007:¹¹

- "An extensive *LIJ* investigation reveals little has been done to encourage and support Indigenous Victorians to join the legal profession."
- "While a small number of law firms are working to encourage Indigenous people to join them as solicitors, many admit to being oblivious to the issue or at a complete loss regarding how to help. At the tertiary level, the struggle is even harder as Indigenous law students battle financial pressures and cultural isolation."
- "Justice Eames said Victorian law firms have a key role in alleviating the struggle Indigenous people face in entering the mainstream legal profession."

In a follow up story in August 2008, the LIJ reported that overall, "there is a sense that momentum is building and that perhaps a vital corner has been turned. But there is also a general acknowledgement that a long journey lies ahead."¹² The article reports that:

- "Indigenous law students have been the big winners from developments over the past year, with the creation of several formal, annual Indigenous seasonal clerkships at firms and more opportunities for financial support."
- "There is cause for celebration at the Victorian Bar, where the number of Indigenous barristers has risen from one to three."
- "But there is concern that the response from the profession and government remains piecemeal and that the big picture is not being dealt with."¹³

In 2009, the LIV will continue to pursue strategies to promote and facilitate Indigenous participation in the law.

National Indigenous Law and Justice Framework

The Standing Committee of Attorneys-General (SCAG) is currently consulting on the draft National Indigenous Law and Justice Framework (the draft SCAG Framework), which follows on from the Attorney-General's Department Consultative Draft National Indigenous Law and Justice Strategy in 2007 (the Attorney-General's consultation).¹⁴ The Framework does not prescribe strategies or actions to be adopted by governments or service providers, but rather seeks to articulate agreed "good practice", providing a framework for

¹¹ Morley Harriet, 'Breaking Barriers' *Law Institute Journal* August 2007, p18

¹² Morley Harriet, 'The Journey Continues', *Law Institute Journal* August 2008, p18.

¹³ Ibid.

¹⁴ SCAG draft National Indigenous Law and Justice Framework, available at http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/pages/scag_currentprojects

governments and service providers to identify the most appropriate local response to issues.

In October 2007, the LIV made a submission to the Attorney-General's consultation.¹⁵ In this submission, we advocate that "increasing access to justice" should be addressed as a strategic aim in and of itself, recognising its relevance to each of the other strategic aims.

The LIV considers that strengthening the capacity of Indigenous communities to properly engage in law and policy-making processes and outcomes is crucial to achieving access to justice. This would include appropriate funding to ensure access to information and training and a commitment to proper and timely consultation with representatives of all facets of Indigenous communities.

The LIV will continue to engage with SCAG on this important initiative. We urge the Inquiry to consider the draft Framework in its consideration of the ability of Indigenous people to access justice.

Protection of the Rights of Indigenous Peoples

The LIV welcomes the Government Statement on the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) on 3 April 2009.¹⁶ The LIV views the Declaration as an important step in the recognition, promotion and protection of the rights and freedoms of indigenous peoples already enshrined under international instruments to which Australia is a signatory.

In our submission to the National Human Rights Consultation,¹⁷ the LIV will be calling for the Declaration to be incorporated into Australian law as part of a national human rights instrument. A legislatively enacted national charter containing both generic rights of particular relevance to Indigenous peoples together with rights specific to Indigenous peoples could go some way in properly protecting the rights of Indigenous peoples.

The LIV also supports constitutional recognition of Indigenous peoples as the first Australians and we welcome Government support for progress towards this.¹⁸

Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody (the Royal Commission) was concluded in 1991. In 2004, the Victorian government initiated the Victorian Implementation Review of the Recommendations from the Royal Commission led by two Indigenous Australian community chairpersons. The report from that Review and the government response was released in 2005. While the implementation of the Royal Commission recommendations in Victoria remains incomplete, the process of reviewing the implementation status is an example of good practice.

The LIV submits that the Commonwealth Government should undertake a national review of the implementation status of the Royal Commission and take action to promote access to justice where recommendations have not been implemented. In this respect, we

¹⁵ LIV, Consultative Draft National Indigenous Law & Justice Strategy, 26 October 2007, available at https://www.liv.asn.au/members/sections/submissions/20071026_110/NILJSFeedbackForm.LIV.26.10.07.FIN.AL.pdf

¹⁶ Jenny Macklin, Statement on the United Nations Declaration on the Rights of Indigenous Peoples at Parliament House, 3 April 2009.

¹⁷ The LIV submission to the National Human Rights Consultation will be available on our website at www.liv.asn.au/submissions

¹⁸ Above n 13.

welcome the Objective 1.3 of the draft SCAG Framework to review the Royal Commission recommendations to determine which of those recommendations remain relevant and necessary in meeting contemporary issues in Indigenous law and justice.¹⁹

Recognising the cultural and linguistic diversity of Aboriginal communities

The LIV urges the federal Government to recognise the cultural and linguistic diversity of Aboriginal communities and the impact this has on access to justice for Indigenous people. Currently, the mainstream Australian legal system is not cognisant of Indigenous legal systems and jurisprudence, rendering Indigenous people extremely vulnerable to the mainstream legal system.

For example, the need for and the ability of Aboriginal people to access interpreters has been highlighted as an access to justice issue in many reports, including the following:

- a. Australian Law Reform Report *Evidence* (1987);
- b. *Access to Interpreters in the Australian Legal System* (Draft Report) Commonwealth Attorney Generals Department (August 1990); and
- c. *Inquiry into the Provision of an Interpreter Service in Aboriginal Languages* NT Government, Office of the NT Anti-Discrimination Commissioner (1999).

The issue of customary law and sentencing options also affects the interaction of Indigenous people with the justice system. The LIV supports Law Council of Australia submissions on the *Crimes Amendment (Bail and Sentencing) Bill 2006*²⁰ and *Recognition of Cultural Factors in Sentencing*,²¹ which emphasise the importance of cultural considerations in the exercise of judicial discretion in sentencing. We understand that the government is reviewing the impact of the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth), which provides that customary law and cultural practice cannot be taken into account to lessen or aggravate the seriousness of an offence in bail and sentencing decisions.

We urge the Inquiry to consider the impact of cultural and linguistic diversity on access to justice for Indigenous people. Mandatory consideration of Indigenous legal systems and jurisprudence in legislative and judicial processes would go some way to address this issue and we recommend that the Inquiry consider fully how this might increase access to justice.

¹⁹ SCAG draft National Indigenous Law and Justice Framework, above n 11, 12.

²⁰ Law Council of Australia, *Crimes Amendment (Bail and Sentencing) Bill 2006*, 26 September 2006 available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C74E200-1C23-CACD-22AB-5B2C46631BE3&siteName=lca

²¹ Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, 10 July 2006, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C74F1B0-1C23-CACD-2282-4F9189AC9E32&siteName=lca