



human  
rights

law  
resource  
centre



**Submission in Response to the  
Victorian Law Reform Commission  
Civil Justice Enquiry  
Draft Civil Justice Reform Proposals**

**2 August 2007**

Human Rights Law Resource Centre Ltd  
Level 1, 550 Lonsdale Street  
Melbourne 3000  
[www.hrlrc.org.au](http://www.hrlrc.org.au)

Ben Schokman and Philip Lynch  
Human Rights Law Resource Centre Ltd  
Level 1, 550 Lonsdale Street  
Melbourne VIC 3000  
T: + 61 3 9225 6695  
F: + 61 3 9225 6686  
E: [hrlrc@vicbar.com.au](mailto:hrlrc@vicbar.com.au)  
W: [www.hrlrc.org.au](http://www.hrlrc.org.au)

### **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the content, implementation, operation and review of the Victorian Charter of Human Rights and Responsibilities;
- (b) the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
- (c) the importance, interdependence, indivisibility and justiciability of economic, social and cultural rights; and
- (d) equality rights, particularly the right to non-discrimination, including on the grounds of race, religion, ethnicity, disability, gender, age and poverty.

## Contents

1.	Introduction	1
2.	Executive Summary	1
3.	Key recommendations	3
4.	Response to Exposure Draft	4
	(1) Standards of Conduct	4
	(2) Disclosure of Information and Co-operation Before Proceedings are Commenced	6
	(3) Getting to the Truth Before Trial	7
	(4) Alternative Dispute Resolution	8
	(7) Access to Justice and Litigation Funding	8
	(8) Self-represented Litigants	10
	(9) Costs	11
5.	Other Matters	12
	5.1 Access to Interpreters	12
	5.2 Self-represented Litigant's Coordinator	12

## 1. Introduction

---

1. The Human Rights Law Resource Centre (**HRLRC**) welcomes the opportunity to comment on the Victorian Law Reform Commission's *Summary of draft civil justice reform proposals for Stage One of the Civil Justice Enquiry as at 28 June 2007 (Exposure Draft)*.
2. We refer to and reiterate the HRLRC's previous submission to the Victorian Law Reform Commission Civil Justice Review dated December 2006 (**HRLRC Submission**). The HRLRC Submission considered the implications of the introduction of the Victorian *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Victorian Charter**) on the process of civil justice reform, and specifically the likely impact of the right to a fair hearing provision, enshrined in section 24, on civil litigation in Victoria.
3. This submission seeks to provide further comment on the potential impact of the Victorian Charter in response to the proposals and recommendations contained in the Exposure Draft. The HRLRC hopes that this submission, together with its previous submission, will inform the Victorian Law Reform Commission (**VLRC**) in its finalisation of the proposals contained in Stage One and also be considered in Stage Two of the Civil Justice Enquiry.
4. The HRLRC notes the further submissions provided by it in relation to third party interveners and amici curiae, the Public Interest Law Clearing House (**PILCH Submission**) and the Law Institute of Victoria (**LIV Submission**), which focus on the importance of access to justice, legal assistance and reform of other aspects of the civil justice system. The HRLRC strongly endorses the PILCH Submission and the LIV Submission.

## 2. Executive Summary

---

5. The HRLRC observes that the recommendations and proposals contained in the Exposure Draft are overwhelmingly concerned with procedure for the conduct of civil litigation and matters of cost and efficiency. In light of the potential impact of the Victorian Charter, the HRLRC is concerned that the current recommendations and proposals are not sufficiently focused on issues of access to justice.
6. As identified in the HRLRC Submission, international and comparative jurisprudence on the content of the right to a fair hearing sets down principles which espouse that a civil justice system must balance the need for a more efficient justice system with the fundamental right of all individuals to have access to justice regardless of their means. The right to a fair hearing is regarded as a fundamental and non-derogable norm of international human

rights law that must not be compromised in the interests of mere cost and convenience.<sup>1</sup>

The HRLRC observes that many of the recommendations and proposals contained in the Exposure Draft may provide additional barriers to those who already have limited access to the civil justice system.

7. The HRLRC is particularly concerned about aspects of the following reforms proposed in the Exposure Draft, which we consider may raise issues in relation to the right to a fair hearing contained in the Victorian Charter:
  - (a) standards of conduct, in particular the introduction of 'override obligations' (section 1 of the Exposure Draft);
  - (b) disclosure of information and co-operation before proceedings are commenced, in particular the introduction of 'pre-action protocols' (section 2 of the Exposure Draft); and
  - (c) getting to the truth before trial, in particular pre-trial examinations to obtain information (section 3 of the Exposure Draft).
  
8. In response to the proposals and recommendations in the Exposure Draft, the HRLRC wishes to highlight and reiterate, in particular, the following fundamental elements of the right to a fair hearing, as identified in the HRLRC Submission:
  - (a) equal access to, and equality before, the courts;
  - (b) the right to legal advice and representation;
  - (c) the right to procedural fairness;
  - (d) the right to a hearing without undue delay;
  - (e) the right to have the free assistance of an interpreter where necessary.

These principles are found and have authority in international and comparative jurisprudence relating to the content of the right to a fair hearing and are likely to have implications on the administration of the civil justice system in light of the operation of the Victorian Charter.

---

<sup>1</sup> See, eg, *R v McBride* [2007] ACTSC 8, [7] (Connolly J).

9. The High Court, in *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 expressed the clear view that:

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.<sup>2</sup>

10. International and comparative jurisprudence on the basic elements of the right to a fair hearing indicate that access to justice and equality before the law are fundamental values underpinning not just the right to a fair hearing, but also the civil justice system. Although these values do not have great leverage in decision-making by the courts, they are a crucial foundation of the civil justice system and a powerful argument for arrangements such as legal aid and the impartial application of the law.

### 3. Key recommendations

---

11. International and comparative jurisprudence highlights that fulfilment of the duty to ensure the right to a fair hearing requires positive action by the state, and thus a positive duty to ensure effective access to the courts for all.<sup>3</sup> It is worth noting that the right to a fair hearing has been one of the most litigated rights in the United Kingdom under the *Human Rights Act 1998*. The following table indicates the percentage of all cases citing the *Human Rights Act* in the United Kingdom that involved article 6 (the right to a fair hearing):<sup>4</sup>

**Table: Use of article 6 at pre- and post-permission stages (% of Human Rights Act cases)**

	Immigration/asylum matters	Housing matters	Other civil matters*
Pre-permission	21%	40%	43%
Post-permission	9%	40%	44%

\* 'Other civil matters' includes matters in relation to community care, coroners, disciplinary bodies, education, mental health and prisons.

---

<sup>2</sup> Per Dawson, Gaudron and McHugh JJ at 154.

<sup>3</sup> See HRLRC Submission, [40].

<sup>4</sup> Source: Public Law Project, *The Impact of the Human Rights Act on Judicial Review*, 2003.

12. To ensure compliance with the content of the right to a fair hearing contained in the Victorian Charter, the HRLRC recommends that the Victorian Government should take steps to ensure greater equality in access to justice, including:
  - (a) providing increased levels of funding for legal aid, community legal centres and impecunious and disadvantaged litigants, particularly for pre-litigation advice to prospective litigants;
  - (b) increasing accessibility to courts by simplifying rules of procedure and preventing the disproportionate impact of associated costs of litigation for certain individual litigants; and
  - (c) providing adequate services to assist individuals in accessing the justice system, including legal aid and free interpreters.
13. An increase in the availability of legal advice and representation and other reforms guaranteeing the basic elements of the right to a fair hearing would reduce the number of unmeritorious claims brought before the courts and also enhance the protection of the human rights of litigants, thereby ensuring a fair and effective civil justice system in Victoria.
14. The HRLRC notes that many, if not all, of the recommendations relating to ensuring greater equality in access to justice in actual fact are likely to have the additional effects of increasing the efficiency of the civil justice system, reducing the costs of litigation and providing a more effective and just system.

#### **4. Response to Exposure Draft**

---

##### **(1) Standards of Conduct**

15. The proposed 'Overriding Obligations' by the VLRC specify various legal obligations and duties to regulate the manner in which civil proceedings are conducted. The 'Overriding Obligations' involve the imposition of complex legal concepts, duties and procedures on participants in the civil justice system.
16. The HRLRC considers that the 'Overriding Obligations' are likely to act as an additional barrier to justice for many individuals, particularly self-represented litigants from marginalised and disadvantaged communities and culturally and linguistically diverse backgrounds. Many of the legal concepts, duties and procedures imposed by the 'Overriding Obligations' would not be reasonably comprehensible to self-represented litigants. It is unrealistic to expect litigants with no legal training and no legal assistance to

carry out legal research in order to understand and comply with the proposed obligations. As a result, the 'Overriding Obligations' are likely to further disadvantage self-represented litigants in a system that for many individuals is already procedurally complex.

17. The HRLRC considers that any proposals for reform of the civil justice system must recognise the difficulty that court proceedings pose for many individuals, particularly unrepresented individuals. Any obligations must not become a tool which further excludes marginalised and disadvantaged people. As identified in the HRLRC Submission, the principle of equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.<sup>5</sup> In particular, the complexity of procedures is a significant factor in determining whether legal aid is required so that an individual is not denied access to the courts.
18. The HRLRC observes that a state may meet its obligation to guarantee a fair hearing by simplifying procedure in order to ensure equal access to justice. In light of the complex legal concepts, duties and procedures contained in the proposed 'Overriding Obligations', the HRLRC advocates that those obligations be simplified to provide a procedure that is accessible to everyone, including, in particular, self-represented litigants.
19. As identified in the HRLRC Submission, the fair conduct of a civil proceeding is meaningless if one does not have the right to bring the proceeding in the first place.<sup>6</sup> Especially in light of the proposed introduction of more complex procedures in the Exposure Draft, the need and requirement for increased funding for legal advice and representation becomes even more important. Access to legal assistance, particularly legal advice at a pre-proceeding stage, must be provided so that people attempting to access the courts can understand the 'Overriding Obligations'.
20. Indeed, the requirement that parties certify that they have read and understood the 'Overriding Obligations' would leave many self-represented litigants in the unsatisfactory position of effectively requiring legal advice as to the meaning and effect of the obligations prior to providing a certificate. In the current climate of insufficient resources to assist self-represented litigants in civil matters (discussed further below), this requirement clearly provides a further, and unfair, obstacle for self-represented litigants. The proposed 'Overriding Obligations' are therefore likely to actually increase costs and delays in the civil justice system, and further restrict the ability of individuals to access the courts.

---

<sup>5</sup> HRLRC Submission, [35].

<sup>6</sup> HRLRC Submission, [44].

21. Further, the HRLRC submits that the provision of more funding for legal services at an early stage will in fact help to channel people away from the courts and towards settlement. This would achieve the objective of a more efficient and effective civil justice system, as there would be fewer cases, particularly unmeritorious cases, brought before the courts.

**(2) Disclosure of Information and Co-operation Before Proceedings are Commenced**

22. The proposed 'Pre-Action Protocols' are designed to limit the issues in dispute in civil matters and avoid litigation so as to reduce costs and delay. The HRLRC considers that imposing a pre-litigation process is likely to have a particular impact on self-represented litigants.

23. As discussed in the HRLRC Submission, international and comparative jurisprudence indicates that the content of the right to a fair hearing requires equal access to the courts and that no individual is deprived, in procedural terms, of his or her right to claim justice.<sup>7</sup> The HRLRC considers that the introduction of the proposed 'Pre-Action Protocols' would require legal advice to be provided to self-represented litigants during the pre-litigation process, particularly to ensure that they can access and participate in the judicial proceedings in a meaningful way. The right to procedural fairness contained in the right to a fair hearing also ensures that litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party.<sup>8</sup>

24. In the absence of further funding being provided to legal aid and community legal centres for the provision legal advice during the pre-litigation process, further pressure will be placed on courts, legal aid, community legal centres and pro bono resources, which are already under-resourced. This is likely to have the effect of leading to a less efficient and effective civil justice system.

25. The HRLRC is also concerned about parties being required to pay the costs of the other party on an indemnity basis as a consequence of failure to comply with the 'Pre-Action Protocols'. This proposal has the potential to further disadvantage self-represented litigants who have few resources and little understanding of the legal issues involved. While pre-litigation processes in theory have the potential to streamline the efficiency of the resolution of civil disputes, in practice this is not necessarily the case. Instead, such processes often lead to additional hurdles and a more substantial costs burden for litigants.

---

<sup>7</sup> HRLRC Submission, [34].

<sup>8</sup> HRLRC Submission, [42].

26. As identified in the HRLRC Submission, a rigid application of a policy to award costs may breach the right of access to justice contained in the right to a fair hearing due to the discriminatory effect this has on disadvantaged members of the community.<sup>9</sup> Further, such proposals may prevent individuals with meritorious cases from bringing them at all and therefore hinder their ability to remedy a breach of their rights.
27. The proposed 'Pre-Action Protocols' are also likely to cause further delays due to the requirement for parties to outline relevant legal issues and produce supportive evidence, particularly given a self-represented litigant's lack of legal knowledge and familiarity with the processes and procedures involved. The 'Pre-Action Protocols' may have the effect of delaying the onset of litigation (and indeed further increasing costs), which in some circumstances may be a breach of the right to an expeditious hearing.<sup>10</sup> The proposed 'Pre-Action Protocols' are not likely to be a suitable and effective process when a matter is urgent and where the immediate impact of the issue disproportionately affects one party.

**(3) Getting to the Truth Before Trial**

28. The introduction of 'Pre-Trial Examinations to Obtain Information' is intended to simplify procedure and accelerate the process for obtaining relevant information and documents once proceedings have commenced but before trial. The HRLRC's view is that, in the absence of legal assistance, it is unlikely that individuals will have the ability to identify the relevant issues in dispute and therefore seek relevant disclosure of documents and information from witnesses. The HRLRC therefore questions the effectiveness of the process when one or both of the parties are unrepresented, and considers that these proposals may cause a self-represented party to be at a substantial disadvantage to the other party.
29. While the right to a fair hearing does not impose an obligation on the state to provide free legal assistance in civil matters, international and comparative jurisprudence does emphasise that each side should be afforded a reasonable opportunity to present their case under conditions that do not put them at a substantial disadvantage.<sup>11</sup> The proposed procedures are likely to add significantly to the costs of a matter, as well as increase the delay for aggrieved individuals to access the court in an expeditious manner.

---

<sup>9</sup> See HRLRC Submission, [49-51].

<sup>10</sup> HRLRC Submission, [60]-[63].

<sup>11</sup> HRLRC Submission, [42].

30. In addition, the HRLRC observes that the proposal for 'Pre-Trial Examinations to Obtain Information' may not be a suitable and effective process when a matter is urgent and where the immediate impact of the issue disproportionately affects one party. In certain circumstances, an unnecessarily prolonged procedure may be a violation of the right to an expeditious hearing.<sup>12</sup> Reforms of the civil justice system must provide sufficient flexibility to move urgent matters through the court system, particularly where a more powerful party may have the advantage of both time and money to stymie proceedings.

**(4) Alternative Dispute Resolution**

31. Proposals in the Exposure Draft include the introduction of further alternative dispute resolution (**ADR**) options to assist the courts to more efficiently and effectively manage civil disputes. The HRLRC endorses the use of ADR in circumstances where adequate independent legal advice is appropriate and available.
32. The relationship between parties, particularly the relative power that may exist between parties, is an important factor in whether ADR may be a suitable and effective process. The right to procedural fairness dictates that ADR should not be used compulsorily where there is a power imbalance between the parties. Essentially, the right ensures litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party.<sup>13</sup>

**(7) Access to Justice and Litigation Funding**

33. The HRLRC would particularly like to draw the VLRC's attention to the findings of the Senate Legal and Constitutional Affairs Committee into legal aid and access to justice released in June 2004 (**Senate Committee Report**).<sup>14</sup> The Senate Committee Report addressed some serious issues in relation to legal aid, and access to justice more generally, that were drawn to the Senate Committee's attention. The findings of the Senate Committee Report included the following:
- (a) community legal centres and the legal aid system have a vital role to play in helping to achieve a fairer and more effective civil justice system that is available and accessible to all Australians;

---

<sup>12</sup> HRLRC Submission, [60]-[63].

<sup>13</sup> See HRLRC Submission, [42].

<sup>14</sup> Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice*, June 2004.

- (b) the major problems experienced by community legal centres are caused by:
    - (i) increased pressure due to reduced availability of legal aid; and
    - (ii) lack of funding;
  - (c) current legal aid arrangements are having a serious adverse affect on community legal centres;
  - (d) existing services provided by community legal centres and legal aid commissions should be supported in terms of ensuring they have adequate funding to address the demands of their clients; and
  - (e) many community legal centres and legal aid systems are facing a 'funding crisis'.<sup>15</sup>
34. Specifically, the Senate Committee Report recommended that:
- (a) Commonwealth and state and territory governments engage in consultations with legal aid commissions when introducing legislation that may increase demand for legal aid. If such an increase is identified, governments should provide corresponding increases in funding to compensate legal aid commissions for this increase in demand;<sup>16</sup> and
  - (b) the diminishing capacity of community legal centres needs to be recognised and overcome by, for example, providing increased levels of funding to enable community legal centres to better perform their core functions, and establishing new community legal centres to ease some of the burden on existing community legal centres and to address unmet legal need.<sup>17</sup>
35. In light of many of the proposals in the Exposure Draft, particularly the 'Overriding Obligations', 'Pre-Action Protocols' and 'Pre-Trial Examinations to Obtain Information', it is likely that pro bono service providers such as Victoria Legal Aid and community legal centres will be further stretched. The content of the right to a fair hearing obliges the Victorian Government to make the civil justice system accessible to everyone. Indeed, as referred to in the HRLRC Submission, the availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way. Indeed, the jurisprudence indicates that an

---

<sup>15</sup> Ibid, [11.26].

<sup>16</sup> Ibid, Recommendation 8 at [2.116].

<sup>17</sup> Ibid, Recommendation 60 at [11.51].

individual's access to the justice system should not be prejudiced by reason of his or her inability to afford the cost of independent advice or legal representation.<sup>18</sup>

36. Additional and appropriate levels of funding should be provided to Victoria Legal Aid and community legal services to provide legal assistance and representation to litigants requiring assistance, particularly those who are likely to require further assistance in light of the proposals contained in the Exposure Draft.
37. The HRLRC observes that the gap in legal aid for civil law matters contributes to significant inefficiencies and additional costs in the civil justice system. Importantly, significant time and money for parties to a dispute, court resources, and pro bono resources could be saved if people were able to obtain appropriate legal advice in civil matters at an early stage.

**(8) Self-represented Litigants**

38. As discussed throughout this submission, many of the proposals and recommendations contained in the Exposure Draft are likely to have a significant impact on self-represented litigants, particularly the proposals relating to the 'Overriding Obligations', 'Pre-Action Protocols' and 'Pre-Trial Examinations to Obtain Information'.
39. Many self-represented litigants have an adverse affect on access to justice by increasing the costs of litigation and impairing the efficient and effective administration of justice. The HRLRC appreciates that a stated policy objective of the civil justice reform is to provide a more effective mechanism to filter out, at an early stage, claims or defences without merit. However, any reforms to the civil justice system must also ensure that no individual with a meritorious claim is prevented from bringing a proceeding at all and thereby not be able to remedy a breach of their rights.
40. Many community legal centres report instances where individuals have previously had claims rejected by courts because they have not been able to conform to the form of submission required by the court, and not because of the content or merit of their claim. Such results are contrary to the right of access to justice contained in the right to a fair hearing in the Victorian Charter.

---

<sup>18</sup> HRLRC Submission, [46].

41. In order to ensure that the civil justice system is administered effectively:
- (a) sufficient resources must be provided to self-represented litigants to assist them to conform to court procedures; and
  - (b) court procedures must be sufficiently flexible to accommodate individuals requiring assistance.
42. The effect of the implementation of these principles will be equal access to justice in accordance with recognised standards and a more effective and efficient civil justice system.

**(9) Costs**

43. As identified in the HRLRC Submission, an important aspect of ensuring equal access to justice is the applicant's ability to pay the associated costs of litigation and the discriminatory effect this has on disadvantaged members of the community.<sup>19</sup>

**(a) Awards of Costs**

44. The HRLRC welcomes Recommendation 9.11 of the Exposure Draft that there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation.
45. The HRLRC also commends Recommendation 9.4 of the Exposure Draft that the Justice Fund provide assistance, including indemnity, in respect of adverse costs in cases other than class actions after it becomes self funded. However, the HRLRC strongly recommends that these proposals be adopted in conjunction with the provision of increased funding to both Victoria Legal Aid and community legal centres, as discussed above.

**(b) Court Fees**

46. The HRLRC notes that court fees are still to be considered by the review.
47. The HRLRC refers in particular to paragraphs 49 to 54 of the HRLRC Submission, which discuss the disproportionate burden that may be imposed on an individual by the requirement to pay court fees.

---

<sup>19</sup> HRLRC Submission, [49].

48. The HRLRC also notes that court fees and charges can act as a barrier to capacity of legal organisations to accept pro bono referrals. The HRLRC recommends that consideration be given to waiving all court filing fees, other fees and charges in circumstances where the solicitor and counsel are acting on a pro bono basis.

## **5. Other Matters**

---

### **5.1 Access to Interpreters**

49. The HRLRC refers to its previous submission in relation to the right to a fair hearing including the right to the free assistance of an interpreter in certain circumstances.<sup>20</sup> Particularly in light of many of the recommendations contained in the Exposure Draft in relation to procedure, the HRLRC reiterates that the unavailability of interpreting services in the courts presents a major barrier to access to justice and in certain circumstances may constitute a breach of the right to a fair hearing.

### **5.2 Self-represented Litigant's Coordinator**

50. The HRLRC supports the one year pilot program currently underway at the Supreme Court of Victoria to establish a Self-represented Litigant's Coordinator, funded by the Victoria Law Foundation. Anecdotally, the HRLRC understands that the position has proven very effective and has afforded self-represented litigants who may wish to obtain legal assistance the opportunity to be referred to pro bono service organisations. This role has undoubtedly assisted the operations of the Supreme Court. The HRLRC strongly recommends that recurrent funding be provided for this position and that a similar position be created and funded in each Victorian court jurisdiction.

---

<sup>20</sup> HRLRC Submissions, [69]-[71].