

**SUBMISSION OF THE FEDERATION OF COMMUNITY
LEGAL CENTRES (VIC.) INC
TO THE VICTORIAN LAW REFORM COMMISSION
CIVIL JUSTICE REVIEW**



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**This submission was prepared by Federation staff in consultation with
member centres.**

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The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for fifty-two Community Legal Centres ('CLCs') across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance, representation and community legal education to more than 60,000 Victorians each year. We also work on strategic research, casework, policy development and social and law reform activities.

Community Legal Centres, in our local communities, refuse to turn away those to whom the private profession and Victoria Legal Aid have not provided a service. The capacity for early intervention and an understanding of the limitations of access and resources equips Community Legal Centres with the incentive required to promote early resolution of disputes across a range of legal areas. The provision of free legal advice and advocacy services by Community Legal Centres results in the resolution of thousands of matters each year without resort to the courts.

Community Legal Centres adopt a holistic approach to addressing legal issues. We work alongside a range of community-based service providers and have developed the skills to hear and identify problems that may not have a legal dimension or solution. Obtaining assistance for these problems at an early stage can significantly reduce or avoid interaction with the broader justice system. The provision of legal assistance by Community Legal Centres prevents increased litigation costs especially with self-represented litigants, costs to social service providers generally, personal costs to the individual, and costs to our justice system and democratic system of governance.

Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We operate within a community development framework. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

The Federation, as a peak body, facilitates collaboration across a diverse membership. Workers and volunteers throughout Victoria come together through working groups and other formal and informal networks to exchange ideas and strategise for change.

The day-to-day work of Community Legal Centres reflects a thirty year commitment to social justice, human rights, equity, democracy and community participation.

A picture of the civil law work of Community Legal Centres

Community legal centres have historically and continue to provide advice and casework services across a broad range of civil law areas, some of which may not be within the scope of this Review. These include motor vehicle accidents, credit and debt matters, fines and infringement notices, complaints, victims of crime compensation, work-cover, medical negligence, personal injuries, social security matters, tenancy issues, employment law, neighbourhood disputes including fencing issues, wills and probate, powers of attorney, planning law and environmental law matters.

Over a ten-year period the amount of legal information, advice and casework conducted by Community Legal Centres has more than doubled.¹ In the 1996 financial year, Community Legal Centres in Victoria dealt with fewer than 30,000 clients in relation to civil law matters. Of that total, 11,237 clients received information, 9,278 clients received advice, and 9,240 clients had their cases taken on by Community Legal Centres.

In the 2006 financial year, Community Legal Centres dealt with over 72,193 clients in relation to civil law matters. Of this total, 18,092 clients were given information, 40,508 clients were given advice, and 13,593 clients had their cases dealt with by a CLC.

Of the civil law work done by CLCs, most work is done in the areas of credit and debt, government and administrative law which covers infringements and Ombudsman issues, consumer law and complaints, motor vehicle accidents, neighbourhood disputes and wills and probate.

Proportionally, civil law work has been and continues to be the biggest area of advice and casework for Community Legal Centres. In the 2006 financial year Community Legal Centres dealt with 72,193 clients in relation to civil law, 39,289 in relation to family law and 6921 clients in relation to criminal law.

There are currently 27 generalist CLCs across Victoria servicing a wide geographic community; 20 in metropolitan Melbourne and 7 in rural and regional Victoria. Federation members also include 25 specialist centres that work in different ways to address civil justice issues by dealing with individual matters

¹ An activity is classed as **information** where the person does not give specific details of their own particular problem, or the specific details of the problem are irrelevant to the information given or importantly, there is no discussion of options. An activity is classed as **advice** where a service provider helps a client to select between options about the client's own problems. Advice includes assistance with drafting of simple correspondence or other advice to assist the client. A **case** is an activity where a service provider provides ongoing assistance and/or acts on behalf of a client in respect of a client.

and supporting generalist CLC's to work on particular civil issues in their communities.

The Consumer Action Law Centre is just one example of a specialist Community Legal Centre that provides civil casework, community legal education and support of generalist CLCs around civil law issues. Other specialist Centres that specialise in civil law include the Tenants Union, Jobwatch, the Welfare Rights Unit, and the Environment Defenders Office.

Issues in rural areas are often different to issues faced by Community Legal Centre clients in metropolitan Melbourne. For instance, fencing disputes are common issues dealt with by rural and regional CLCs. For inner city CLCs close to new developments fencing disputes are also becoming more common. Rural and regional issues also vary from region to region. For example in Mildura where there are no labour law firms and a limited union presence, Community Legal Centres do more work on employment law issues such as unlawful dismissals and reduction of wages.

The clients' path to a Community Legal Centre

People come to Community Legal Centres for help for different reasons. Often people seek assistance from a CLC because Legal Aid cannot assist them. Community Legal Centres bore the brunt of the impact of reduced funding of legal services to the Victorian community throughout the 1990's. In local communities, however, CLCs have refused to turn away those to whom the private profession and legal aid have not provided a service.

People may also come to a Community Legal Centre because they cannot afford a private solicitor or because there is limited private work done in the areas of civil law that CLCs provide assistance with. For example many large plaintiff firms only offer 'no-win no-fee' services for personal injury matters only where there is likely to be substantial compensation awarded. Whilst the pro bono efforts of the profession have become more coordinated and committed, for the bulk of CLC clients in civil law such assistance is not accessible or appropriate. Specialist centres such as the Environmental Defenders Office also provide a service that is not available, even on a fee-paying basis, in the private sector.

Disadvantaged groups experience particular problems in relation to both understanding and accessing the law. High levels of disadvantage have also been linked to an increased occurrence of problems in non-legal areas. Associated with this multiplicity of problems is a tendency for legal and non-legal problems to intertwine. Factors such as language difficulties, cultural and social isolation and disability may all act as barriers to an individual finding appropriate assistance. This means that often a problem may become quite complex before an individual accesses assistance.

Increasingly, people come to a CLC after being referred from a court because they are self-represented litigants, and the court feels that they should be legally represented or the client should be advised to investigate other avenues of resolution.

For various reasons, people with legal problems do not access the legal system immediately or seek out legal assistance at all, or are initially unaware of where to go for help with their legal problem. Individuals may consult a wide range of non-legal agencies at the first instance about their legal problem.¹ Non-legal agencies such often receive a relatively high number of legally related enquiries. Community Legal Centre clients are often referred from a financial counsellor or other community support agency. Most CLCs provide advice to community based financial counsellors and other community workers in relation to their casework with consumers with civil law problems.

Case Study – Consumer Law Centre (CLCV) – now Consumer Action Law Centre following a merger between CCLV and the Consumer Credit Legal Service (CCLS)

The CLCV worked from mid 2003 until mid 2006 on a rural Outreach Project. The Outreach Project was designed to facilitate access to the Consumer Law Centre's free Consumer Legal Practice for rural and regional and Indigenous consumers and to improve our knowledge of systemic issues affecting rural and regional and Indigenous consumers.

Working together with a range of organisations, including local community and Indigenous organisations, CLCV lawyers undertook outreach and education visits to specific regions in Victoria to provide greater access to their Consumer Legal Practice for rural and regional and Indigenous consumers. The CLCV was particularly keen to ensure that small rural communities and Indigenous consumers were able to access to their legal practice.

CLCV lawyers made visits to Gippsland, South-Western Victoria and the Central Victoria and Wimmera regions. In these regions CLCV lawyers met with community workers during their outreach visits to discuss client problems or systemic issues affecting low-income and vulnerable consumers that workers have observed. Community workers also had the opportunity to make appointments for a CLCV lawyer to see their client(s) during an outreach visit.

As part of the free Consumer Law Practice run by the CLCV, also offered in rural areas as part of the Outreach project, clients were offered ongoing legal advice and representation depending on the problem type and the consumer's financial circumstances. Legal advice provided as part of the program was provided in relation to consumer law problems such as banking disputes; debt collection; defective goods and services; electricity, gas and water company disputes; Insurance; motor vehicle purchases and disputes; overcharging for goods and services and rights to refunds; public transport fines; telephone and internet company disputes (including billing, misleading selling practices, unfair contracts); and unfair contract terms.

The role that Community Legal Centres play in civil law matters

People come to Community Legal Centres at different stages of their legal matter. The circumstances in which clients seek advice on civil law matters from Community Legal Centres are also very diverse. The assistance that CLCs can provide varies, not only depending on the needs of the client, but also according to the resources of the CLC (number of staff and volunteers), the expertise of staff and to some extent the priorities set by the CLC in conjunction with the community that determine casework guidelines.

Civil law issues around credit, debt and consumer disputes involving small amounts of money often have a disproportionate impact on low-income and vulnerable customers due to their limited financial circumstances. Many CLC clients in credit and debt matters are defendants or people owing money to a bank or lender, mobile phone company, or insurance company following a motor vehicle accident involving property damage.

Where clients seek help from a Community Legal Centre at the letter of demand stage, commonly, CLCs will play the role of seeking early dispute resolution. By writing a letter, discussing the matter with the other party or outlining a client's limited financial circumstances, or lodging a complaint with a regulator or relevant Ombudsman, many disputes can be resolved quickly and inexpensively.

A timely application to VCAT or to an industry dispute scheme can resolve matters without resource to the courts.

While industry Ombudsman schemes cannot deal with a matter once legal proceedings have been issued, there are a range of matters that can be resolved through such schemes if the dispute is raised in time. These include banking disputes (including irresponsible lending), insurance disputes (including inappropriate sales as well as claims), investment disputes (including timeshare purchase), and some finance broker and mortgage disputes.

Community Legal Centres adopt a holistic approach to addressing legal issues. We work alongside a range of community-based service providers and have developed the skills to hear and identify problems that may or may not have a legal dimension. In the area of civil law, CLCs work closely with local financial counsellors in particular.

Case study – Environment Defenders Office

A client came to the Environment Defenders Office seeking advice about how to protect native vegetation along a roadside which was being widened. The piece of road was long and the vegetation quality varied along the road. The Centre advised the client that compromise may be able to be reached through mediation. The client accepted this advice and with the assistance of the Centre embarked upon a process of negotiations to protect tracts of vegetation importance. These discussions resulted in resolution after 10 months whereas without the intervention of the Centre, the matter would have proceeded to a lengthy court hearing.

Many people do not seek assistance until proceedings are issued. As outlined above, this could be for a range of reasons including their limited understanding of the legal system and process, limited English language skills or poor health or personal circumstances. Again, Community Legal Centres will usually try and resolve the matter without proceeding to litigation. CLCs will assist clients to engage in negotiations with the trader or company, or try to negotiate through conciliation or dispute resolution processes. If this does not succeed then CLCs will help the client to obtain redress in another way.

This may involve providing representation, resources permitting, assisting clients with self-representation or briefing Victoria Legal Aid duty lawyers where these schemes are in operation. In terms of services within the scope of this review, Victoria Legal Aid operates a duty lawyer scheme at Melbourne Metropolitan psychiatric inpatient services, and for the Melbourne Magistrates' Court judgement debt recovery service and fines special circumstances list.

Case Study – Fitzroy Legal Service

Camilla was employed by a catering company that provided a "sandwich van" to businesses around Melbourne. Her job involved driving the van to various businesses and then selling food to employees. She had been working for the company for a little under 10 years when the company folded, in December 2005. The company went into liquidation and Camilla was owed wages and entitlements.

In September 2005 Camilla and the van she was driving was involved in an accident. It was a minor accident, she was parked in angled parking and was slowly reversing the van out. She reversed out a short distance and the van was stationary when it was hit by a car driving along the road. The van had virtually no damage and the car was scraped along one side. Camilla and the driver of the car exchanged details, police were not called. Camilla informed work of the accident.

In May 2006 a complaint was filed in the Magistrates Court naming Camilla and one of her previous employers' companies as defendants. The claim was for \$5,826.81, representing the alleged cost of repairing the car in the accident the September before.

The company in question was in liquidation. There was a complicated structure of group companies handled by different receivers. Camilla knew who the receiver for the employer company was and contacted them – they could point her in the direction of the company they "thought" owned the motor vehicles and she spoke to their receivers. They were not the party named in proceedings and would not assist in the matter. The liquidator for the party named in proceedings was not of much help to Camilla as

they were not planning to investigate the matter or lodge a defence – they were of the view that the plaintiff could get judgement and line up behind the unsecured creditors.

Camilla contacted the plaintiff's solicitors who reiterated her liability and asked her to make an offer.

Camilla contacted Legal Aid, they explained that they could not help as it was a civil matter. She called a solicitor she knew of in her area, he was a criminal lawyer but took the time to read the documents and talk to her. He explained that she was most likely liable for the repairs to the car (and entitled to an indemnity from her employer – which was not worth anything in current circumstances!) and suggested that she make an offer. The cost of employing a solicitor, in his view, would probably not be worth it and she was better off offering a couple of thousand dollars by way of settlement rather than spending this on legal fees. He also recommended a local community legal service.

At this stage Camilla was very confused and most distressed. She didn't understand the intricacies of the company structure or the obligations of the liquidators. She felt that her previous employer's liquidators were giving her the "run around". Her and her family were in dire financial circumstances. She has two small children and the family relied heavily on her income. Her husband is employed casually and they had personal debts. Their car was subject to finance and they had no assets to speak of. They rented their home. Camilla hadn't received any of her entitlements and was not yet working again. She could not afford a lawyer, and neither could she afford to make a settlement offer.

She didn't feel that morally she should bear the cost of the car repairs. She insured her personal car and so would only ever be liable for the \$500 excess. She couldn't insure her work van – so surely the driver of the other car should claim on her insurance? She was also very upset by the amount of the claim, she felt very strongly that the repairs were not worth anywhere near \$5,800. In fact, the replacement value of the car in question was around \$4,500!

At this stage Fitzroy Legal Service (FLS) assisted by contacting the relevant liquidators in an attempt to find some insurance over the vehicle that may have been current at the time of the accident. They eventually uncovered a policy but unfortunately the excess was for \$50,000! Their advice to Camilla was to represent herself, and FLS would assist her in lodging a defence and put a strategy together to try and dissuade the plaintiff from pursuing Camilla.

Camilla swore a statutory declaration setting out her grim financial situation which FLS then sent to the plaintiff's solicitor and also directly to the plaintiff. She made the point that she couldn't afford to settle and would have to defend herself "all the way". Also in the event there was a judgement against her - it would be a very slow process getting the money from her.

Once filed FLS advised Camilla to sit tight. The plaintiff solicitor's first tactic was a very aggressive letter dated 18 May offering settlement for \$5,000. This included the following, "...any adverse order against you in court will be financially disastrous and it will be enforceable against you for many years"

FLS did not respond to this and a few weeks later a second offer of compromise for \$3,500 was sent. There was a mediation set down for 10 August and FLS' advice was to come up with a low offer just before that date. Around the middle of July Camilla received a letter from the plaintiff's solicitor agreeing to withdraw proceedings. They stated:

"Due to the background of this matter the plaintiff has reluctantly agreed to withdraw proceedings".

Camilla was overjoyed.

If a client is seeking to initiate proceedings, the extent to which a Community Legal Centre can provide advice or whether they can take on a particular case may depend on the type of legal problem.

For instance if a client seeking assistance from a CLC is owed money, the other party is often someone without many assets. Conversely, if a client is seeking money or redress against a large company such as an insurance company, often the CLC will provide advice about the merits of the claim. Demand for representation to pursue civil claims exceeds resources available, so cases taken on may be limited to the most disadvantaged customers or to strategic litigation. Strategic litigation for Community Legal Centres may be litigation that is particularly important to pursuing social equity and challenging injustice, or has the potential to create a precedent or raise the profile on an important issue.

Some CLCs have developed partnerships with pro bono law firms and conduct litigation in partnership with particular law firms. Other Community Legal Centres have the resources and expertise to conduct particular civil law cases themselves. This is particularly so for specialist centres such as the Environment Defender's Office who provide a specialist service and expertise not available in the private sector.

Prior to the changes to the *Wrongs Act 1958* (Vic) CLCs successfully referred many clients with personal injury matters to private firms conducting litigation on a 'no win no fee' basis. Since the amendments to the *Wrongs Act 1958* (Vic), however, many clients have been precluded from bringing a personal injury claim by the new three-year limit under the statute of limitations. The new injury thresholds brought in by the amendments also mean that it is harder to bring a personal injury claim and private law firms are therefore more reluctant to take on clients without significant injuries.

Community Legal Centres have extensive experience in developing innovative and flexible approaches to making justice more accessible and affordable to all communities. As part of the early dispute resolution focus, many CLCs conduct community legal education programs in civil law and have developed self-help strategies to enable limited resources to stretch further. This is done by providing information in an accessible form (plain language workshops, storytelling, pictures, performance), linking people up with similar issues and publishing and providing self-representation kits on various civil law issues. Eastern Community Legal Centre publishes two self-help guides, 'Neighbourhood Disputes and Solutions: fences, trees, animals, noise and other nuisances' and 'Crash Course: a step-by-step guide to your options, rights and responsibilities after a motor vehicle collision'.

Whilst self-help strategies are useful in many cases, self representation is not appropriate for many CLC clients who may face language barriers, mental health

issues, other disabilities or merely lack the personal capacity and self-esteem to represent themselves.

Case Study – Consumer Law Centre (Now Consumer Action Law Centre)

The Consumer Law Centre Victoria (CLCV), now merged with the Consumer Credit Legal Service to form the Consumer Action Legal Centre, developed a kit to assist consumers and their legal representatives to prepare a defence to legal action brought by National Exchange Pty Ltd. National Exchange Pty Ltd is a licensed securities dealer that conducts a business of sending unsolicited offers to consumers to buy their shares or securities in publicly listed companies for well below the market value of the shares or securities. The CLCV recognised that a large number of requests for assistance were being made to their Consumer Legal Practice in relation to National Exchange cases. The CLCV considered that a coordinated response to the defence of legal proceedings brought by National Exchange would significantly benefit consumers and their lawyers, as the demand on community legal centre lawyers working individually on specific cases would not be sustainable. The kit contained a number of pro-forma documents and enabled generalist community centre lawyers to assist their clients more effectively.

Barriers to civil justice - a Community Legal Centre perspective

Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard. The following reflects our experience working with communities in some of the areas within the scope of this review.

1. Uninsured claimants and defendants against insurance companies in motor vehicle accidents.

The cost of taking legal action in itself is a barrier for many people, in particular where there may be contributory liability. Even where self-help kits or fact sheets exist in relation to a particular area of law, or where a Community Legal Centre is able to offer advice, many people may not be able to self-represent. Disadvantaged groups, for example people of non-English speaking background or with disabilities, may experience particular problems understanding and accessing the law. Individuals with high levels of disadvantage often need high levels of assistance such that if a Community Legal Centre is unable to represent them they will be unable to continue with legal action.

The risk of costs is a barrier for many low-income and disadvantaged people defending legal action by an insurance company. This essentially means that many people are precluded from access to justice because of a fear of having costs awarded against them, even where their case has merit. For example, the Environment Defender's Office has identified the threat of an adverse costs order as a significant obstacle to pursuing public interest environmental litigation.

When arbitration occurs in the Magistrates Court pursuant to Part 5, Division 2 of the *Magistrates Court Act 1989* (Vic) for matters where the dispute is for less than \$10000, the legislation provides that the normal rules of evidence need not apply. In practise CLCs have had the experience of Magistrates requiring the normal rules of evidence to be followed, such that clients have been unable to proceed with their matters because they cannot afford to pay the expert assessor to give their evidence on oath at court, and can only afford to obtain the assessor's written report.

In the 1980's, the Federation undertook research into the feasibility of a "no-fault" accident compensation scheme and concluded that this would be worth enacting. This research needs to be updated to take into account the significant changes that have occurred in the area.

Further consideration needs to be given to subjecting parties to compulsory mediation or conciliation as a precondition for issuing proceedings in Motor Vehicle Accident matters. Another alternative would be to encourage the Insurance Ombudsman Scheme to widen its terms of reference to allow it to deal with individuals who believe that they are wrongly being pursued by an insurance company in relation to a motor vehicle accident. Options for making the determination of disputes cheaper and simpler should also be explored, whether that be changes to procedure, changes to the Insurance Ombudsman's rules or a new jurisdiction in VCAT.

The situation with insurance companies has improved with the introduction of protocols for people on low-incomes by some insurance companies. This is, in part, in response to hardship provisions in the Insurance Code of Practice. This protocol should be replicated in other areas so that people on low incomes or who are experiencing financial hardship are entitled to consideration of this hardship by insurance companies.

2. Exploitation of newly arrived migrant and non-English speaking taxi drivers

Community Legal Centres have experienced many cases of taxi drivers who aren't owners of the taxi licence and assume they are insured for motor vehicle damage but when an accident occurs, find out they are not actually insured. This is a typical case at CLCs with concentrations of newly arrived refugee communities that are vulnerable to financial exploitation due to language and other issues. In some cases they have paid what they thought were insurance premiums without seeing the documentation and have not actually been insured.

More work needs to be done to increased and improve regulation and reform of the taxi industry to ensure contracts between drivers and owners are enforceable or that orders against taxi drivers are shared with the taxi owner and to require compulsory third party insurance as part of the taxi driver licensing process.

Case study – North Melbourne Legal Service

North Melbourne Legal Service (NMLS) has assisted numerous taxi drivers, mainly from the local Horn of Africa community, who have been sued for property damage as a result of motor vehicle accidents. These clients were often recent arrivals to Australia, who were working under harsh conditions for very little money and were unclear as to the law in Australia regarding their circumstances. NMLS has provided assistance to these clients including enforcing contracts between owners and drivers or ensuring that orders obtained against drivers share liability with the taxi owner. NMLS has also worked on the issue systemically. In conjunction with the Victorian Taxi association, it is educating the local community to ensure that drivers understand contracts with fleet owners and that those contracts include indemnities for third party claims. NMLS is also seeking increased regulation and reform of the taxi industry.

3. Inaccessibility of Supreme Court Judicial Review

Community Legal Centres advise clients on a number of different legal problems and issues where all other remedies are exhausted except for judicial review of a decision in the Supreme Court.

These situations can be as diverse as suspension and expulsion decisions by state school principals, Governor's hearings for prisoners, local government decisions about increasing council levied rates, and local government decisions about planning and environment.

In these circumstances, there needs to be another avenue of appeal such as VCAT merits review to provide a more accessible and less costly alternative to the Supreme Court. In addition or alternatively, there needs to be costs rules in place that mean that litigants in public interest matters are not exposed to the risk of adverse cost orders. The threat of an adverse costs order is a significant obstacle to pursuing public interest environmental litigation.

The Federation Supports:

- Another avenue of appeal such as VCAT merits review to provide a more accessible and less costly alternative to the Supreme Court
- The submission of the Environment Defenders Office to this Review in its recommendation that that costs rules in Victoria be amended in line with the recommendations of the Australian Law Reform Commission recommendations with respect to public interest costs orders.

4. Fencing disputes

The Victorian Parliamentary Law Reform Committee's *Review of the Fences Act 1968* was conducted in 1998, and was the most comprehensive review of the Act conducted in over thirty years. The Committee recommended wide ranging reform to the law of fencing and other related matters in an effort to reduce the level of neighbour disputation and to improve efficiency in the operation of the Act. The Committee recommended the vesting of jurisdiction in respect of fencing and boundary disputes in the Victorian Civil and Administrative Tribunal ('VCAT') and nominated a series of powers of the tribunal to be included in any new legislation. The Committee also recommended the establishment of a 'Neighbour Disputes' Division at VCAT.

Following the review, the Liberal government, which was in power at the time, produced a government response. The Liberal government recognised the significance of fencing issues to Victorians, particularly those in rural and regional Victoria, and the promotion of efficient and effective resolution of fencing disputes. It supported the recommendation as to VCAT in principle, but noted the complex issues to be considered in the relocation of any jurisdiction. The

government was particularly concerned that regional and rural Victoria remain serviced in a comprehensive manner. The government also noted that the powers would not be large but limited to determination of disputes on defined matters under the Act, ensuring that there was no overlap with building or planning legislation. None of the recommendations of the Committee, including in relation to the jurisdiction of VCAT regarding fencing disputes, have been implemented by the current Victorian government.

For Community Legal Centres the issue of neighbourhood disputes and in particular fencing is a common legal problem among our clients. For rural and regional Community Legal Centres this is perhaps the biggest area of law of civil law that they deal with, although for inner city CLC's close to new developments this is also becoming a relevant issue.

The Federation supports:

- Another close analysis and review of the Victorian Parliamentary Law Reform Committee's *Review of the Fences Act 1968*, given its comprehensiveness and important recommendations for reform in this complex and problematic area.

5. Compensation for injury – lack of options for meaningful compensation

Community Legal Centres often assist victims of crime seeking compensation because this is an area of law that private law firms are often unwilling or unable to assist with. Both young people and Aboriginal and Torres Strait Islanders are overrepresented as victims of crime. A successful compensation claim may help a survivor to feel that the offender has been called to account and provides funds for ongoing counselling and a fresh start in life.

Currently, the *Victims' of Crime Assistance Act 1996* (Vic) does not provide adequate financial compensation to victims of sexual or physical assault. While courts have the power to force offenders to pay compensation to a victim, this mechanism is often useless when the offender has no assets. Essentially this means that victims of crime can only receive adequate compensation if their attackers have assets.

For some victims of crime, it may be possible to bring civil proceedings through the courts for physical or psychological injuries caused as a result of an assault. For many people, however, civil compensation for victims of crime from the perpetrator is not a meaningful option as defendants often do not have the financial means and a compensation order is not worthwhile. Moreover, the recent changes to *The Wrongs Act 1958* (Vic) make it more difficult for people to sue for compensation for pain and suffering as a result of a crime. Changes to the statute of limitations for personal injury law also mean that many victims of

crime will be precluded from bringing a claim once they pass the three year time limitation.

The Federation supports:

- Reforms to legal processes and practices to overcome the re-victimisation suffered by survivors of violent crimes and particularly victims of sexual offences seeking access to justice.
- Reforms to the amount of financial compensation available for victims of crime to a level that truly reflects the pain and suffering the victim has experienced as a result of the crime.

6. Reform to litigation concerning protest and public participation

In Victoria a person may have a cause of action against individuals or organisations where the latter have made public statements about the person with the aim of influencing government, public opinion or lawful public action. Defamation is the most prominent illustration.

The Federation strongly believes that where this public participation is otherwise lawful, the individuals and groups involved should be protected from potential legal proceedings. The increasing phenomenon of litigation against community participation in public issues has the serious effect of chilling public debate and silencing voices which should be heard in a democratic society. Free speech and robust public debate, together with the ability to participate in community and political activity without the fear of litigation, are fundamental human rights.

Community Legal Centres are particularly concerned about situations where there is a great imbalance of resources, such as where a large corporation sues a small non-profit organisation or group of volunteers. Even if the suit does not proceed to litigation, the costs of legal advice and the threat of court action can be sufficient to stifle future public communication and even destroy the organisation. There are not only free speech implications in these contexts, but also issues of the accessibility of justice and the right to a fair trial.

The Federation therefore believes that in order to fulfil human rights obligations, it would be more effective to enact legislation to protect public participation and to adopt broader and more flexible measures for those situations where a plaintiff does not bring an action for an improper purpose and is able to prove their claim. This would also reduce costly and protracted litigation.

The Federation supports:

- The enactment of legislation or changes to civil procedure rules to protect individuals and groups from defamation actions that are aimed at silencing debate about matters of public interest, political debate and dissent.

- Reform to allow defendants in defamation cases to apply for the opportunity to prove on the balance of probabilities that the proceeding was brought against public participation for an improper purpose.

Particular questions in the Consultation Paper

The particular areas of civil law that Community Legal Centres often deal with and the way in which we assist our clients with these matters has been outlined above. As there are many questions in the Review Discussion Paper that are not relevant to Community Legal Centres and the work that we do, we have chosen to address only some of the questions.

Commencing and Defending Proceedings

Question 7

When a person commences a civil proceeding and serves the initiating documentation on the person who is being sued, is there any further information or documentation which you consider he or she should be required to provide to that person before being permitted to proceed? If so, what information or documentation should be required to be provided at this stage?

There are two different aspects which we believe should be covered by the information or documentation that should be required to be provided at this stage.

One aspect is the issue of obtaining information and documents. This issue can be a problem where a more powerful party will refuse access to documentation referred to in a statement of claim and require the discovery process be followed. For many Community Legal Centre clients trying to defend an action or conversely, to initiate an action, the formal discovery process is an unnecessary procedural barrier. For example, some clients may simply be trying to access a contract in order to understand the terms that they agreed to. The provision of greater information and clarity in relation to some claims may mean avoiding litigation and reducing court costs.

Another aspect is the provision of information about the procedural aspects of civil law and what options a client has in defending a claim once initiating documentation has been served. When a person is served by the police with their charge sheets in relation to a criminal offence, documentation is attached to notify them of their rights, obligations and options in relation to those charges. This provision of this documentation acknowledges that for many people, navigation of the criminal justice system is a difficult and confusing experience.

For Community Legal Centre clients, many of whom are from excluded and disadvantaged communities and culturally and linguistically diverse backgrounds, navigating the civil justice system is equally confusing. For example many individuals served with a Magistrates' Court complaint have little or no understanding about the default process. It is vital that individuals understand their legal position when they are served with court documents. Current

documentation does not achieve the goal of providing plain English information to the recipient.

When a person serves initiating documentation on someone being sued, documentation and information similar to that provided to criminal law defendants should also be provided including:

- The basic legal rights and obligations of the person being sued
- Information about the fact that legal advice should be obtained and how to obtain legal advice for their matter – for example through a Community Legal Centre, Victoria Legal Aid Civil Section or from a private lawyer if they have the capacity to pay
- Information about related services such as free financial counselling should also be included.

This information should also be provided in languages other than English. Information should be presented to maximise the likelihood that it can be read and understood.

Obviously for many civil matters this may not be appropriate or necessary but the provision of this information in relevant civil matters may prevent increased litigation costs and wasted court time especially in relation to self-represented litigants.

Questions 9 & 10

When claimants wish to commence civil proceedings should there be any legal obligation on them (in addition to those which may already exist) to be satisfied of the merit of the claim before they are permitted to commence the proceeding? If so, what steps should they be required to take?

When claimants wish to commence civil proceedings should there be any legal obligation on their lawyers (in addition to those which may already exist) to be satisfied of the legal merit of the claim before they are permitted to commence the proceeding? If so, what steps should lawyers be required to take?

Please refer to our comments in relation to 'public participation' for our view on whether claimants and their lawyers should have a legal obligation to be satisfied of the merit of their claim before they are permitted to commence a proceeding.

While this may be a difficult aspect to prove, an onus on a claimant to be satisfied of the merit of their claim may prevent unmeritorious defamation suits, brought solely for the purpose of preventing public participation and debate. It is important, however, that any reform to this area does not result in additional barriers to those who already have little access, for example consumers attempting to take action against a large company.

Summary Judgement or Dismissal

Question 15

Do the rules about summary disposal (without trial) of civil proceedings need reform? If so, what are the problems and what changes should be implemented?

For many Community Legal Centre clients attendance at court can be a daunting prospect. In the Supreme Court, the effect of failure to attend is often that a judgement is made in default of attendance against the absent party. An application to set aside the judgment and for a re-hearing must be made within 14 days and must include an affidavit to demonstrate a strong case and an explanation of failure to attend.

In the Magistrates Court an Application for a Rehearing is heard before a Magistrate in Court to have the final order made against the person in their absence set aside. This application costs \$31 to have issued in the Magistrates Court. The client must also fill out a special form and an affidavit setting out their reasons for failure to attend. Often the other side will consent to a re-hearing application if costs are paid upfront.

Alternatively, clients may fail to lodge a defence or a notice of appearance, which results in similar difficulties and the potential of a default judgement or final order being made. For many clients involved in disputes over small amounts of money, this is a barrier to pursuing their case and will mean they will discontinue their litigation.

Alternative Dispute Resolution

Questions 23-25

Are there particular procedural changes that should be implemented for the purpose of facilitating early settlement of civil claims? If so, what should those changes be?

Are there any processes that parties should be required to engage in to facilitate early settlement of civil claims? If so, what should those processes be?

Is there a need for judicial officers, court officers or others to play a more proactive role in facilitating:

- *resolution of pre-trial issues without the need for hearings and judicial determination of such issues;*
- *early settlement of cases?*

If so, what particular changes should be implemented?

While Alternative Dispute Resolution (ADR) may prevent litigation and promote earlier settlement of disputes, one of the problems with ADR is that laws are not tested. Alternative dispute resolution can also fail to account for power inequalities between the disputants and often does not offer substantive rights and procedural safeguards.

The resolution of civil disputes through ADR can be a problem in consumer matters against large corporations such as banks where many individual disputes about relatively small amounts add up to a large total. Large corporations avoid litigation seemingly to avoid having a test case judgement made against them that would be costly if applied to a large volume of customers.

Relationships between corporations such as large banks and their customers are often characterised by unequal bargaining power and a lack of ability of customers to negotiate any terms of their contract of relationship. This unequal relationship may mean that clients are happy to accept a negotiated settlement and avoid the risk of adverse costs orders and the stress of litigation, yet through doing so do not have their rights fully realised or the merits of their case properly tested.

While ADR is a positive mechanism within civil justice, changes should be implemented to ensure that more powerful parties are not exploiting ADR to the detriment of less powerful parties who may be afraid of incurring court costs and the ongoing stress of litigation.

Fees and costs

Question 57

Is there a need for reform in relation to court and transcript fees in civil proceedings? If so, what are the problems and what changes should be implemented?

Currently, in order to obtain a waiver of fees and charges to lodge documents in the Magistrate's Court it is necessary to write a statutory declaration about the particular persons' financial circumstances. For many CLC clients this may be a barrier to obtaining the waiver and therefore pursuing their claim, particularly if they are self-represented. We believe that claimants should just be able to present a Health Care Card in order to prove their financial hardship and obtain a waiver of court fees and charges.

Incentives and Penalties

Questions 62 and 63

Are there any economic (or other) incentives which should be introduced to:

- (a) facilitate greater access to the courts;*
 - (b) achieve greater fairness for the party that succeeds on disputed pre-trial issues;*
 - (c) achieve greater fairness for the party that succeeds at a trial;*
 - (d) provide greater encouragement for lawyers to represent clients who have claims with merit;*
 - (e) encourage parties to settle disputes;*
 - (f) increase the use of alternative dispute resolution mechanisms?*
- If so, what incentives should be provided?*

Are there any economic (or other) disincentives which should be introduced to:

- (a) deter parties from pursuing claims which are without merit;*
 - (b) deter lawyers from pursuing claims which are without merit on behalf of clients;*
 - (c) deter parties from defending claims which have merit;*
 - (d) deter lawyers from pursuing defences which are without merit on behalf of clients;*
 - (e) deter expert witnesses from giving partisan evidence;*
 - (f) encourage the parties to settle disputes;*
 - (g) encourage the parties to use alternative dispute resolution mechanisms?*
- If so, what disincentives should be provided?*

Currently, interpreters are not provided by the Magistrate's Court for civil matters as they are in the criminal jurisdiction. In order to facilitate greater access to the courts we believe that interpreters should be provided free of charge for civil matters, particularly in the Magistrate's Court.

When represented by Victoria Legal Aid or a Community Legal centre a client will generally be provided with an interpreter at court, however, providing interpreters through the court would ensure that self-represented litigants also have access to an interpreter if necessary.

While the right to a free interpreter is guaranteed under international treaties and the Victorian Charter of Rights only in criminal jurisdictions, to provide a free interpreter also for civil matters where a person is experiencing financial hardship would expedite civil proceedings and ensure that all people have access to justice regardless of their financial means.

Conclusion

Community Legal Centres overwhelmingly provide advice, information and casework in civil law, compared to the amount of work that we do in criminal and family law. Given that Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds, the work that we do in civil law relates mainly to the issues and problems that these communities face. This includes but is not limited to credit and debt issues, neighbourhood disputes, in particular in relation to fencing disputes, and claims arising from property damage following motor vehicle accidents. The ready provision of free legal advice by CLCs increases the early resolution of many of these legal problems and thus decreases litigation, delay and court costs.

¹ NSW Law and Justice Foundation *Gateways to the Law* (2001), 30.