SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC.) INC

TO THE VICTORIAN LAW REFORM COMMISSION

SECOND CIVIL JUSTICE DRAFT REFORMS

27 September 2007

This submission was prepared by Adrian Snodgrass of the Civil Law Reform Task Group, on behalf of the Federation of Community Legal Centres.

Inquiries to Chris Atmore, Policy Officer, Federation of Community Legal Centres (Vic) on 9652 1506 or policy@fclc.org.au

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 across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance and representation to more than 100,000 Victorians each year. We exercise an integrated approach combining assistance of individual clients with preventative community legal education and work to identify and reform laws, legal and social systems.

Community Legal Centres (CLCs) 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 30-year commitment to social justice, human rights, equity, democracy and community participation.

The Federation has formed a Civil Law Reform Working Group to address the barriers our clients face in gaining access to civil justice. The Group is a coalition of representatives from the Consumer Action Legal Centre, the Mental Health Legal Centre, Youthlaw, the Victorian Aboriginal Legal Service, the Environmental Defender's Office and the generalist community legal centres.

We thank you for the opportunity to comment on the review's second draft proposals. Our responses focus on the specific areas of the proposals relevant to the experience of CLCs. For this reason only some of the recommendations presented in the draft proposals are discussed

Responses to the Second Draft Civil Justice Reform Proposals

1. Case Management

The Federation is concerned that case management schemes designed for professional litigants will have harsh, unintended consequences for our clients, most of whom are unrepresented. We reiterate the point from our previous submission that any reforms must not further disadvantage people for whom the civil justice system is already inaccessible and unaccommodating. We note the recent authority in *Tomasevic*[1] that the court has a Charter obligation to assist self-represented litigants to obtain a fair civil hearing. Any new case management system must be imposed with that obligation in mind.

1.4 Sanctions for non-compliance with court procedure

The civil justice system is not designed for use by people without legal training. CLC clients already face considerable difficulty in court proceedings and will be further disadvantaged by more sanctions.

We suggest that providing representation and assisting people to comply with court rules should be the preferred approach to sanctions, consistent with the right to a fair hearing under the Charter.

It is only appropriate to penalise a party for failure to comply with court procedure if it can be shown that:

- they were aware of their procedural obligations;
- they were sufficiently well-informed and resourced to be able to comply with their obligations within the time specified; and
- no extenuating circumstances apply.

Sanctions should be confined to their intended purpose – to deter litigants from deliberate breaches of the principles described in the 'overriding obligations'.

1.8 Summary disposal of unmeritorious claims

We refer the VLRC to the finding by the Australian Law Reform Commission that justice is equated in most people's minds with 'fair, open, dignified and careful processes' and that a 'justice system that over-emphasises matters of cost, speed and "efficiency" may not succeed in delivering "true justice":

> It may be that the public is more concerned with the substance of justice than with the specific procedures put in place to achieve it … Yet, there are many

[1] *Tomasevic v Travaglini & Anor* [2007] VSC 337 (13 September 2007)

> studies suggesting the opposite. The outcome of a trial, even in cases where one or both parties feel that 'true justice has not prevailed, is seen as less important than the fairness of the process. Indeed, to feel that one has been listened to impartially and conscientiously, even if this imposes significant costs and delays, is a central litigant value. In other words, it is important not to … assum[e] that all things being equal, the best solution to problems with the civil justice system would be to ensure an efficient, timely and inexpensive judicial process.[2]

The ALRC report goes on to note that it is those litigants who feel that they have been unfairly dealt with at the early stages that come back to court with repeat applications.

> The fact that the parties have been badly handled by the Court at early stages makes such parties – who are basically reasonable at heart – become outrageous and obstructive in their behaviour in court.[3]

Today's summary disposal is tomorrow's vexatious litigant.

1.10 Power to make decisions without giving reasons

The Federation opposes the suggestion that courts should have the power to make decisions without reasons. The legal process must be seen to be fair, open and transparent. Reasons safeguard the rule of law and guarantee participants that their submissions have been given due consideration. Decisions made without stated reasons are inconsistent with the Charter right to a fair trial.

1.12 Deterring unnecessary litigation and refusing to accept documents

The Federation agrees with the Commission that it is important to distinguish between vexatious litigants and the majority of unrepresented litigants. However, we question the ability of court staff to make those determinations on the spot, especially when confronted with a non-English speaking litigant, a litigant with poor verbal skills, a mentally ill litigant with a legitimate issue, or any unrepresented litigant with poorly drafted paperwork. It is the experience of community legal centres that unrepresented litigants are routinely turned away by registry staff for technical defects in court forms, without proper explanation of how those defects can be remedied. This can leave self-represented litigants out of time as they attempt to re-draft their submissions to an acceptable form.

---

[2] Rod MacDonald, 'Prospects for civil justice' in Ontario Law Reform Commission *Study paper on prospects for civil justice* Ontario Law reform Commission 1995, 15-16, quoted in Australian Law Reform Commission report 89 *Managing Justice: a review of the federal civil justice system* Australian Law Reform Commission 1.85.

[3] Family Court judges Consultation 28 September 1999 in ALRC report, *Ibid*, 1.86.

The Federation is concerned with the conflation of 'irregular' court documents with documents that are an abuse of process of the court. We are concerned that any extension of the court's power to refuse documents will disadvantage our clients, who almost always have 'irregular' paperwork, regardless of the merits of their case.

2. Self-Represented Litigants

We note that the provision of Legal Aid funding for civil proceedings is beyond the scope of this first stage of the Commission's reference. We urge the Commission to adopt this issue in subsequent stages. It is the Federation's submission that there can be no real access to the legal system without adequate legal representation and advice, ideally through a civil duty lawyer scheme.

We note the Commission's competing perspectives on self-represented litigants:

- as people requiring improved services and access to justice
- as impediments to the efficient running of the courts, requiring deterrence.

There is an institutional bias in the courts against self-represented litigants. Self-represented CLC clients often report that they feel powerless and ignored in court proceedings as the Magistrate speaks only with the solicitor from the other side. There is very little patience in the courts for people who are unable to express their claim in the mandated form, and self-represented litigants are frequently made to feel as though their arguments are vexatious. Our clients feel enormous frustration as they venture unassisted into an impenetrable bureaucracy, often against experienced and well-resourced opponents.

The Federation is concerned at the number of proposals in the second draft that emphasise deterrence over assistance. Access to the courts is a civil right and in the absence of civil legal aid, self-representation is a necessity for many people. Deterrents to self-representation are not only counter-productive but they fuel unacceptable prejudices against self-represented litigants

2.1.1 Self-represented litigants' co-ordinator

The Federation supports the resourcing of all courts to provide a dedicated court worker to assist people to understand and complete documents required for court hearings.

CLCs assist clients who have previously had their claims rejected not for the content of the claim, but because they have not been able to conform to the form of submission required by the court. If court procedures do not provide flexibility, for example to take into account literacy issues, courts must be resourced to

provide necessary support to litigants. It is necessary that at all times consistent and accurate advice is provided by these services to limit delay in the courts.

2.1.2 Special Masters

While the Federation welcomes the proposal to introduce Special Masters, we note that those officers would be appointed to improve case management in the courts, not to directly assist the parties in dispute. For this reason it would be inequitable to order the costs of Special Masters as costs in the cause.

2.1.3 Court-based pro bono assistance/ Case management strategies

The Federation supports these initiatives, with the proviso that pro bono assistance should not be a substitute for properly funded legal aid programs.

The vast majority of CLC clients are in the Magistrates' Court, where crowded lists and summary procedures mean that self-represented litigants are most likely to be ignored. We recommend that case management and pro bono schemes be extended to the Magistrates' Courts.

4. Interpreters

The Federation has addressed this issue in previous submissions. We strongly endorse the Commission's proposals.

Conclusion

Community Legal Centres appreciate the difficulties presented by vexatious litigants. Part of our role is to explain to insistent, aggrieved people that they don't have a legal claim. We take the time to give them a fair hearing, and as respectfully as possible we give reasons why the law is not a suitable means of redress. We hope that the courts will adopt the same approach.

We appreciate that the deterrents suggested in the second draft proposal are aimed at preventing a minority of people from jamming up the courts with vexatious complaints. In our submission, many of the proposals as they stand would have harsh, unintended consequences for the majority of unrepresented litigants who are not vexatious and who should be assisted rather than deterred.

We propose that a fair, open, dignified and careful justice system is preferable to a justice system that over-emphasises quick, cheap 'case management', summary disposals and decisions without reasons.

We propose that self-represented litigants have a legitimate presence in the courts, and that the courts have a duty under the Charter to provide them with the assistance necessary to receive a fair hearing.

We thank the Commission for the opportunity to respond to the second draft proposals and look forward to making further contributions to the Civil Justice Review.