

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

**TO THE VICTORIAN LAW REFORM COMMISSION**

**DRAFT CIVIL JUSTICE REFORM PROPOSALS**

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**This submission was prepared by the Federation of Community Legal Centres (Vic) 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-one 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 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.

### **Introduction**

The Federation welcomes the opportunity to comment on the VLRC Draft Proposals for Stage One of its Civil Justice Review.

In its earlier submission to the Commission, the Federation canvassed the civil justice issues facing CLCs. That submission raised areas of civil justice where CLCs have particular expertise, including pathways to justice and accessing the legal system, and the diverse contributions that CLCs make when they support and represent their clients.

Civil law is a substantial part of the legal work performed by CLCs. Sixty percent of matters brought to CLCs are civil law matters, 33% are criminal law and 6% are family law matters.<sup>1</sup> Credit and debt, government and administrative law, consumer law and complaints, motor vehicle accidents, neighbourhood disputes, wills and probate are common civil law matters in CLCs.

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<sup>1</sup> Federation of Community Legal Centres, *CLC/SIS data* (2006).

The civil law work performed by CLCs has a variety of outcomes, not all of which result in a court-determined outcome. To illustrate this point, case work was undertaken in 13,853 civil law matters in 2006. However, this figure represents only 18% of all civil law client work performed by CLCs – advice was given in 40,508 instances and information was provided 18,092 times.<sup>2</sup> The court processes under review by the Commission may therefore have only limited direct impact on CLC’s civil law work.

The Federation reiterates its concerns and recommendations made in its original submission about key barriers to civil justice experienced by CLCs and their clients. Motor vehicle accidents, exploitation of taxi drivers, inaccessibility of judicial review, fencing disputes, lack of meaningful compensation for personal injury and the use of litigation to suppress public participation are areas where barriers to justice remain. We hope that the important civil law work undertaken by CLCs in these areas will not only be considered in Stage Two of the Commission’s Civil Justice Review, but that they will inform the deliberations of the Commission in Stage One.

The comments below focus on the specific areas of the Draft Proposals relevant to the experience of CLCs. For this reason, only some of the recommendations presented in the draft proposals are discussed.

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<sup>2</sup> 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: *CLSIS Data Dictionary* (2004).

## **Responses to the Draft Civil Justice Reform Proposals**

### Standards of Conduct

#### *Proposed 'Overriding Obligation'*

The Federation supports the proposal to improve the conduct of parties in litigation and believes that a statutory obligation may guide all parties to act in good faith. In its original submission to the Commission, the Federation cited the example of strategic defamation claims as one area where an obligation to be reasonably satisfied of the merit of a claim prior to commencement may prevent unmeritorious claims coming to court.

However, the Federation believes it is also necessary for courts (and other community organisations that provide advice to possible litigants) to provide clear information about the obligation. This information should be widely accessible, be written in plain English and be available in languages other than English. Similarly, any certification document should be written in plain English and be available in languages other than English. It will also be necessary for courts to provide assistance so that people accessing the courts can understand these obligations.

The Federation is unsure about the possible impact of the overriding obligations on the communities that CLCs support. CLCs have expertise working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. While supportive of an overriding obligation in principle, the Federation is concerned that the obligation not become a tool which further excludes our communities, rather than one that supports a fairer civil justice system. An objects clause could assist in the fair application of the obligation.

It is important that any reform does not result in additional barriers to those who already have little access to the civil justice system. The application of the obligation needs to recognise the difficulty that court proceedings pose for many of our clients. The obligation should not become a tool, for example, to penalise a person who misses a scheduled date in proceedings because of extenuating circumstances, such as experiencing mental illness. Many CLC clients experience disadvantage in both legal and non-legal areas and court process should attempt to accommodate the interplay of these issues as much as possible. To this end, there needs to be flexibility in any sanctions attached to the overriding obligation. A discretionary approach to sanctions, rather than imposing solely monetary or costs sanctions (which are unlikely to be of assistance when a party is impecunious) is to be preferred.

## Getting to the Truth *Before* Trial

### *Pre-Trial Examination*

The Federation does not, in principle, object to the use of pre-trial mechanisms to assist in the resolution of disputes. However, the Federation is concerned about the lack of procedural safeguards in the current proposal.

A pre-trial examination in an informal setting may be difficult for potential litigants who experience disadvantage. Power disparities between parties may be exacerbated in an informal setting. Given the difficulties of obtaining legal aid support for civil law matters, it is unlikely that representation at a pre-trial examination would be funded. Some potential litigants are likely to not have legal support during this process.

We are also unsure of the capacity of CLC clients to initiate an examination if they are required to pay 'reasonable travel and out-of-pocket expenses' of the person attending the examination. The requirement that a person initiating an examination must also provide recording equipment, in particular video-recording equipment, is likely to dissuade or prevent some litigants from using the procedure.

A special procedure should be used when a child, a person with a mental illness or a person with a disability is being examined, or seeks to conduct an examination. The Federation encourages the Commission to consider expanding the use of an independent examiner or judicial officer to cases determined at the court's discretion.

Examinees should be permitted to have a support person with them during the examination. For example, the Commission could consider the Independent Third Person program conducted by the Office of the Public Advocate. This service provides an independent person to be present at any police interview of a person with a mental illness or cognitive impairment to ensure that the person understands the process and implications of the interview.

### Alternative Dispute Resolution

The Federation supports the use of alternative dispute resolution (ADR), for reasons other than cost effectiveness, where adequate independent legal advice is available and where it is appropriate. The Federation also supports to protection of the fundamental rights and freedoms contained in the *International Covenant of Civil and Political Rights*, including in the determination of rights and obligations in a suit of law, the right to a fair trial and public hearing by a competent, independent and impartial tribunal (Article 14(1)).

The Federation submits that the appropriateness of ADR must be considered with respect to individual cases. The relationship between parties, particularly the relative power that exists between parties, is an important consideration in deciding to pursue an ADR process. CLC clients are often disadvantaged and marginalised, and ADR may not always be an appropriate approach because of the relative power exercised. Examples of power disparities present in many consumer disputes were discussed in our previous submission. The Federation calls for ADR not to be used compulsorily where there is a power imbalance between parties.

The Federation also reiterates the concern noted in its earlier submission that disputes settled through ADR do not allow for the laws to be tested, and many outcomes of ADR processes are confidential. For example, industry bodies may repeatedly use ADR for similar disputes. Significant resources are required to support a single client, who may have little idea of their prospect of success in comparison to other litigants. In this example, mediation may not provide structures to address power inequalities between the parties. Any requirement for parties to participate in ADR must consider these power inequalities, preferably through court oversight. A court could consider the benefits of ADR for both the individual case as well as the wider social justice implications of the process. The Federation has also heard from member centres that industry ADR schemes vary significantly in their structure and process. The Federation recommends evaluating various schemes before adopting their models.

The suitability of ADR must also be considered directly for the matter at hand. ADR may not be helpful when a matter is urgent and where the immediate impact of the issue disproportionately affects one party. For example, in the case of a person being evicted from their home, or a child being expelled from school, the impact of any delay is greater for one party. There needs to be capacity to move urgent matters effectively through the court system, so that they are not stymied by a more powerful party who may have the advantage of both time and money. This may require intensive judicial monitoring of the practice of parties in ADR, for example, judicial mediation. Expeditious and fair resolution of disputes is likely to increase public confidence in the civil justice system. Any reforms should ensure that more powerful parties cannot exploit ADR to the detriment of less powerful parties who may be afraid of incurring court costs and the ongoing stress of litigation.

The Federation supports the Commission's recommendations for greater resources of courts to assist with ADR process. The Federation looks forward to the findings of the Department of Justice – Civil Law Policy Unit's review of the effectiveness of mediation in the higher courts.

## Self-represented Litigants

The Federation looks forward to receiving more information about the Commission's proposals for self-represented litigants. Increasingly, people come to a CLC after being referred to the CLC by the court.

### *Assistance at court*

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. This is especially necessary in the higher courts, where a duty lawyer is unlikely to be present and where procedure may be difficult to understand. CLCs report that they assist clients who have previously had their claims at court 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 sufficient flexibility, for example to take into account literacy issues, courts must be adequately resourced to provide necessary support to (potential) litigants. It is necessary that at all times, consistent and accurate advice is provided by these services to limit delay in the courts.

The Federation understands that a one year pilot program is currently underway at the Supreme Court to establish a Self-Represented Litigant's Coordinator. The Federation encourages the Commission to report on the successes and limitations of this pilot and, if appropriate to consider its expansion to courts around Victoria.

## Civil Justice Council

The Federation supports the proposal to establish a Civil Justice Council. The Federation believes the Council would play an important role in monitoring civil law issues and ensuring that access to justice remains a priority area for Victoria's legal community.

The Federation, as the peak body for over fifty CLCs who provide information, advice and casework support to over 100,000 Victorians a year would be well placed to provide a strong community presence on this Council. The presence of a Federation representative will be particularly important in giving voice to marginalised and disadvantaged communities who have difficulty accessing justice.

## **Other matters for consideration**

We raise the following matters for consideration in Stage One of the Civil Justice Review.

## Services at Court

Access to interpreting services in court is an important issue for CLC clients. In its submission to the Consultation Paper, the Federation recommended that interpreters be provided in civil jurisdictions to achieve greater fairness in the courts. Many CLC clients do not have the funds to pay for an interpreter and this leads to negative and unfair outcomes in court. The absence of interpreters in the civil jurisdiction is a significant barrier for our clients when attending court.

The right to a free interpreter in criminal jurisdictions is guaranteed under international treaties and the Victorian *Charter of Human Rights and Responsibilities Act 2006*. Providing a free interpreter 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.

## Summary disposition

The Federation notes that summary disposition of unmeritorious claims and defences is presently under consideration by the Commission.

The Federation supports a clear process that allows litigants to have a matter reopened where a default judgment has been issued in their absence. It is important that courts have the opportunity to consider why default judgment has been issued. Excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds may experience a number of difficulties in presenting their claim to the court. Illness, literacy and financial difficulties may result in a person having judgment entered before they are able to obtain legal advice. The Federation recommends the Commissioner consider available statistics on the numbers of default judgments issued by Courts and the circumstances leading to default to inform their recommendations about default judgment.