LAW INSTITUTE VICTORIA

Productivity Commission's Inquiry into Access to Justice Arrangements Draft Report

SUBMISSION TO PRODUCTIVITY COMMISSION

Date: 21 May 2014

Contact:
Janet Tan, Senior Paralegal
[redacted]
www.liv.asn.au

TABLE OF CONTENTS

INTRODUCTION

The Law Institute of Victoria (LIV) is the peak body for the Victorian legal profession, representing over 17,000 members. The LIV initiates programs to support the needs of the changing legal profession; promotes an active advocacy agenda; responds to issues affecting the profession and broader community and continues to provide expert services and resources to support our members.

The LIV has a long history of contributing to law reform on the topic of access to justice and therefore welcomes the Productivity Commission's Inquiry into Access to Justice Arrangements. The LIV is a constituent body of the Law Council of Australia and in October 2013, contributed to the submission made by the Law Council of Australia in response to the Issues Paper released in relation to this Inquiry.

This submission has been prepared collaboratively by the LIV's Administrative Law and Human Rights Section, Family Law Section, Criminal Law Section, Litigation Lawyers Section, Workplace Relations Section, Future Focus Committee and Access to Justice Committee. Input has also been provided from the LIV's Professional Standards Department.

The LIV believes that the key objective of the civil justice system is to provide justice to persons in dispute. The LIV considers that justice has a number of attributes. The key attribute is to achieve a resolution to a dispute that is fair to the parties involved.

To achieve fairness, the justice system must:

- Establish the issues that are in dispute,
- Assess the evidence in relation to the parties actions in dispute, and
- Apply laws that promote a fair outcome.

In this regard, the justice system should enable persons to seek justice where they have reason to believe that they have been treated unfairly to their detriment. Accordingly, the justice system must be accessible to all, irrespective of their financial means, their intellectual capacity or their isolation (social or geographical).

The LIV strongly believes that the justice system is essential infrastructure for communities. For this reason, the LIV holds the view that it is the responsibility of governments to provide an effective justice system for the community.

The LIV has responded to select Draft Recommendations and Information Requests contained in the Draft Report.

CHAPTER 2: EXPLORING LEGAL NEED

DRAFT FINDING 2.1

Based on the most recent data, around 17 per cent of the population had some form of unmet legal need that related to a dispute that they considered substantial.

The LIV acknowledges this Draft Finding from the *Legal Australia Wide Survey* and recognises the need to address unmet legal needs throughout this submission.

DRAFT FINDING 2.2

Informal dispute resolution mechanisms such as ombudsmen could be better employed to address a significant share of unmet legal need, potentially reducing the proportion of the population with unmet legal need from 17 per cent to less than 5 per cent.

The LIV acknowledges this Draft Finding and considers that inexpensive, fast and easily-accessible means of dispute resolution should be promoted to the general public.

CHAPTER 5: UNDERSTANDING AND NAVIGATING THE SYSTEM

INFORMATION REQUEST 5.1

The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

The LIV has undertaken in depth analysis into the findings of the *Legal Australia Wide Survey* which identifies the need for a holistic approach in the delivery of legal assistance. The LIV advocates for the need for legal health checks and submits that such health checks could be administered by partnering with non-legal advisors as gateways to legal services. A wide range of organisations that are in regular contact with disadvantaged clients could be partners including the Salvation Army, health networks and community groups.

The LIV submits that consultations would need to be undertaken with the identified organisations to determine whether they will require funding to undertake the health checks.

DRAFT RECOMMENDATION 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

The LIV welcomes and supports this recommendation. In Victoria there is a vast range of information available on how to get legal assistance but no single entry point, which would be beneficial for the general public and could aid in disputes being resolved in a timely and efficient matter. To this end, the online resource should emphasise the important of resolving legal disputes with priority given the findings of the

LAW Survey which found that only 62.1per cent of respondents with substantial legal problems sought advice.[1]

The online resource should:

- Identify common legal issues that arise during the various stages of life and appropriate contacts
- Identify avenues for assistance (legal referral services, Community Legal Centres, Legal Aid, Pro Bono providers)
- Provide targeted brochures and pamphlets on the common legal issues
- Provide information about average legal costs (refer to response to Draft Recommendation 6.3)

The LIV notes that it currently operates its own Legal Referral Service. The service provides users with a referral letter listing up to 3 firms practising in the relevant area of law All law firms included in the Legal Referral Service provide a thirty minute enquiry interview free of charge, which can be used to determine with the solicitor the nature of the legal issue, discuss the available options and receive an estimate of costs to proceed with the matter.

The LIV would welcome the opportunity to work with other key legal assistance providers in Victoria to develop an online and telephone resource based on the New South Wales LawAccess website and telephone service which provides a single entry point for legal assistance. The LIV notes that government funding is required to develop the resources as well as for advertising to promote the use of the resources.

INFORMATION REQUEST 5.2

Information is sought on the costs and benefits of adopting the legal problem identification training module (being developed by the Commonwealth Attorney-General's Department and Department of Human Services) more widely among non-legal workers who provide services to disadvantaged groups.

Feedback is also sought on which agencies' staff should receive this training and whether funding should be provided to cover training costs.

The LIV recognises that one of the findings from the *Legal Australia Wide Survey* was that many individuals took no action to resolve their legal problems and consequently achieved poor outcomes, particularly among disadvantaged groups. In this regard the LIV would be supportive of legal problem identification training being made widely available to staff who provide services to disadvantaged groups.

See also response to Information Request 5.1.

[1] Law and Justice Foundation, *Legal Australia-Wide Survey* (2012), p 97.

INFORMATION REQUEST 5.3

The Commission seeks feedback on how best to facilitate effective referrals for legal assistance between organisations responsible for human service delivery, and, where appropriate, greater information sharing across departments and agencies.

The LIV considers that organisations responsible for human service delivery and legal assistance providers need to create more effective referral pathways. This should include equipping staff members working with each organisation responsible for human service delivery with information to be properly able to direct an individual with a legal problem. The LIV contemplates that a triage process could be set up to enable individuals to determine whether they qualify for assistance through a legal aid commission, and if they do not qualify, other avenues in which assistance could be sought whether through community legal centres or pro bono assistance. The LIV suggests that such a triage service could be set up under a Victorian equivalent to LawAccess as identified under Draft Recommendation 5.1.

CHAPTER 6: INFORMATION AND REDRESS FOR CONSUMERS

INFORMATION REQUEST 6.1

Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?

The LIV notes that the Legal Services Commissioner (or equivalent) in each state takes responsibility for protection of the public and enforcing professional standards and that the Commissioner has these powers under the *Legal Profession Act 2004* (Vic) and the new Legal Profession Uniform Law.

The LIV considers that Australian Consumer Law with respect to lawyers should not be applied by different bodies. To do so would lead to regulatory segmentation that is not applied to any other profession or occupational sector. However, the LIV does support appropriate levels of co-operation between agencies.

DRAFT RECOMMENDATION 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

This Draft Recommendation is not relevant to Victoria as it is a participant in the Uniform Law scheme.

DRAFT RECOMMENDATION 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

This Draft Recommendation is not relevant to Victoria as it is a participant in the Uniform Law scheme.

DRAFT RECOMMENDATION 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

- **This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.**
- **The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.**

INFORMATION REQUEST 6.2
How would central online resources with information about legal fees be implemented? What level of aggregation is required to avoid any confidentiality issues? On what measures should information be available (means, medians, hourly rates, total bills)? Are the prices charged by all providers relevant — for example, should a minimum threshold of number of cases of each type per year be required before cost data is submitted, should very small and very large firms be included?

INFORMATION REQUEST 6.3

The Commission is seeking views on the appropriate 'hosts' for central online resources with information about legal fees — should they be hosted by each jurisdiction's Attorney-General's department, legal services commissioner (or equivalent) or legal aid commission? Could this resource exist alongside a 'directory' listing of firms who are willing to advertise their prices through, say, a law society website?

How could information on quality of service elements best be gathered and reported? Are there international examples that would be applicable in Australia? Where should such ratings be reported — should they be 'hosted' by governments, professional associations or independent providers?

This response addresses Draft Recommendation 6.3, Information Request 6.2 and Information Request 6.3.

The LIV considers that a centralised online resource on typical legal fees would be difficult to develop due to differing types of legal matters and inherent variables in each matter. In this regard, the LIV is of the view that such a resource would only be practical if it was based on legal fees charged at a fixed cost.

The LIV recognises that a common complaint from the public about lawyers is that they do not know how much it costs to retain a lawyer, as well as concerns over the transparency of costs. Having due regard to this, it is suggested that the resource could provide information on costs but have caveats as to accuracy depending on the particular matter at hand.

The LIV refers to its response to Draft Recommendation 5.1, which recommends that there should be a single entry point for legal assistance information. Therefore the resource modelled on LawAccess should also provide general legal pricing information.

It is noted that the Uniform Law provides for significant penalties for breaches of cost disclosure obligations to clients.

DRAFT RECOMMENDATION 6.4

In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).

- **Lawyers should be required to provide access to this information within five days of the request.**
- **The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.**
- **Any initial conclusions drawn from the cost information can contribute to an own motion investigation if the complaints body deems that one is warranted.**

The LIV notes that the Legal Services Commissioner currently has the powers outlined in this Draft Recommendation and will retain these powers when the new Legal Profession Uniform Law comes into existence. Further, it is acknowledged that the Legal Services Commissioner has own motion powers that will.

DRAFT RECOMMENDATION 6.5

Cost assessment decisions should be published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of cost amounts or broad dispute type).

- **Cost Assessment Rules Committees (and their equivalents) should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in cost assessments.**

The LIV notes that costs assessment does not take place in Victoria, as it does in New South Wales.

DRAFT RECOMMENDATION 6.6

Other state and territory governments should align their legislation with New South Wales and Victoria to allow disciplinary actions for consumer matters (those matters relating to service cost or quality, but which do not involve a breach of professional conduct rules).

- **This should include the ability for complaints bodies to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.**

Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.

This Draft Recommendation is not relevant to Victoria as it is a participant in the Uniform Law scheme.

DRAFT RECOMMENDATION 6.7

As in New South Wales and the Northern Territory, all complaints bodies should be empowered by statute to suspend or place restrictions on a lawyer's practising certificate, while allegations are investigated, if the complaints body considers this in the public interest.

The LIV notes that this Draft Recommendation is covered by the current *Legal Profession Act* and the Uniform Law to the extent that if the regulator thinks a person is no longer fit and proper, then restrictions, suspensions and cancellations on a practising certificate may be applicable. It is recognised that under the incoming legislation, if a decision is made to cancel a practising certificate, a lawyer cannot practise without a court order.

DRAFT RECOMMENDATION 6.8

The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.

The LIV notes that the investigatory powers referred to in this Draft Recommendation currently exist under s 4.4.11 of the *Legal Profession Act* 2004 (Vic) and will continue to exist and will be broadened under Chapter 4 of the Legal Profession Uniform Law.

INFORMATION REQUEST 6.4

The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether:

- **consumers are aware of complaints avenues and using them**
- **resolution of disputes and investigations is timely and the sanctions imposed proportionate**
- **consumers and lawyers are satisfied with the outcomes of complaints processes?**

This will require a detailed and extensive research/survey project in order to obtain the requisite evidence.

CHAPTER 7: A RESPONSIVE LEGAL PROFESSION

DRAFT RECOMMENDATION 7.1

The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:

- **the appropriate role of, and overall balance between, each of the three stages of legal education and training**
- **the ongoing need for the 'Priestley 11' core subjects in law degrees**
- **the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education**
- **the relative merits of increased clinical legal education at the university or practical training stages of education**
- **the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.**

The LIV notes that attrition rates in the legal profession are incredibly high. A 2006 report by the LIV and Victorian Women Lawyers highlighted that the turnover rate in law firms is between 20 per cent and 40 per cent per annum which results in a 'complete renewal of a firm's workforce' approximately once every five years.[2] The LIV suggests that providers of legal education, including universities and PLT should be under a positive obligation to provide to students appropriate education, instruction and support on health and wellbeing issues.

The LIV notes concerns being expressed by law students about the number of graduates and inability to secure employment after attaining their law degree.

The LIV is of the view that there should be a greater emphasis on practical skills development throughout university and during practical legal training to ensure that graduates are equipped with the necessary skills to allow them to succeed in practice. In a 2011 survey the LIV asked graduates to assess the extent to which their university and practical legal training education equipped them with the skills set out in the Threshold Learning Outcomes for the Bachelor of Laws.[3] Employers were also surveyed on the extent to which the 1st and 2nd year law graduates they employ demonstrate each of these skills.

The graduates assessed their skills higher in areas such as ability to:

- identify and articulate legal issues;

[2] Law Institute of Victoria and Victorian Women Lawyers (2006) *Bendable or Expendable? Practices and Attitudes towards Work Flexibility in Victoria's Biggest Legal Employers*.
[3] Learning and Teaching Academic Standards Project, Bachelor of Laws Learning and Teaching Academic Standards Statement, December 2010 < http://www.olt.gov.au/resource-library?text=Bachelor%20of%20Laws >

- think creatively in approaching legal issues;
- engage in critical analysis and make reasoned choices;
- apply legal reasoning to generate appropriate responses; and
- produce effective, appropriate and persuasive written communication.

The only area where employers assessed the skills of graduates higher than the graduates self-assessed was on their ability to work effectively in teams.

The LIV has initiated a Law Graduates of the Future Roundtable in 2013 to discuss the survey referred to above with key legal education service providers, students and employers. An additional forum will be held with these stakeholders in late 2014.

Further to this, the LIV is currently proposing to establish a Pilot Clinical Education Program with Victorian universities where all law students will undertake a placement in a private law firm during each year of their university degree.

INFORMATION REQUEST 7.1

Which aspects of legal professional regulation present the greatest obstacles to the profession? Are there 'best practice' jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?

The LIV considers that the move towards a National Legal Profession will address many of the regulatory obstacles currently experienced by lawyers. The National Legal Profession Reforms were intended to bring a level of consistency across jurisdictional boundaries and to decrease the amount and cost of regulation imposed on the legal profession. With only New South Wales and Victoria participating at this stage, it remains to be seen if these goals will be achieved.

In 2009, the Conference of Law Societies (of which the LIV is a member) outlined the following essential outcomes from the NLPR which are of relevance to this Inquiry:

- There must remain an independent legal profession with a substantial role in its own regulation.
- Existing legislation regulating the legal profession must be substantially simplified.
- As one purpose of the regulatory reform is costs savings, it should not proceed until fully costed.
- Regulatory reform should be cost neutral in its impact on consumers and legal practitioners.

The LIV notes that financially, legal practitioners and law practices will benefit from savings resulting from nationally uniform rules and consistent regulation (in particular, for those operating in several jurisdictions).[4]

[4] LIV, *Interim report on Key Issues and Funding (National Legal Profession Reform Taskforce)* (9 November 2010) <http://www.liv.asn.au/PDF/Practising/Reform/2010TaskforceInterimReportNov>, page 7.

DRAFT RECOMMENDATION 7.2

Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

- **Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.**

The LIV acknowledges that lawyers may advertise for business however, there are particular restraints on advertising of services provided by Rule 35 of the Professional Conduct and Practice Rules and legal practitioners must comply with their obligations under Australian Consumer Law. The Advertising Guidelines drafted by the LIV reflect this.[5] The LIV is supportive of this Draft Recommendation on the basis that advertising is adequately regulated by the Australian Consumer Law.

DRAFT RECOMMENDATION 7.3

State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.

The LIV does not support the proposal in this Draft Recommendation. The existing arrangements are effective and efficient and provide appropriate protection for consumers.

The LIV refers to the submission made by the Legal Practitioners' Liability Committee (LPLC) to the Productivity Commission.

INFORMATION REQUEST 7.2

Does the inability to operate as a limited liability partnership represent a significant cost to, or barrier to entry for, law firms? What are the potential benefits of allowing this particular business structure and to whom do the benefits accrue? What are the potential costs of allowing this structure and who bears those costs?

The LIV considers that the inability to operate as a limited liability partnership does pose a barrier to the ability for a firm to internationalise, as the limited liability partnership is a common structure used in other countries such as the United States of America, United Kingdom and Singapore, and the absence of the structure in Australia adds to the difficulty and costs of merging.

Members of Law Society Professional Standards Schemes[6] can limit their liability in a similar way can limited liability partnerships.

[5] Available here: http://www.liv.asn.au/PDF/Practising/Ethics/AdvertisingGuidelines
[6] Information about the LIV's Limitation of Liability Scheme is available here: http://www.liv.asn.au/Practice-Resources/Practice-Support/Limitation-of-Liability-Scheme/FAQs/What-is-it-

INFORMATION REQUEST 7.3

To what extent would harmonising accounting standards and mutually recognising audits between jurisdictions reduce the compliance burden on firms from maintaining trust accounts in each jurisdiction? Are there alternative ways to 'earmark' interest earned from the account as arising in particular jurisdictions? Is it possible to develop funding formulas to redistribute funds if national trust accounts are adopted? If so, what should these formulas be based on — legal activity or legal need in each jurisdiction?

As part of the COAG Uniform Law process the LIV argued for the ability of firms across Australia to operate a single trust account. However governments in New South Wales and Victoria did not provide for this in the legal Profession Uniform Law.

INFORMATION REQUEST 7.5

In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?

Unbundled Legal Services / Limited Scope Representation

The LIV supports the unbundling of legal services and submits that all courts should allow for limited scope representation. The LIV notes that the *Legal Profession Act* 2004 (Vic) and Professional Conduct and Practice Rules 2005 (Vic) do not explicitly prevent a lawyer from entering into a limited retainer with a client. The LIV draws attention to the fact that the provision of unbundled services is common in non-litigious commercial matters and draws particular attention to the existence of limited scope representation as undertaken by barristers. The LIV acknowledges that current court rules are inflexible to the notion of limited scope representation as once a lawyer/firm is on the record as acting for a client, they remain on the record. In this regard, court rules should be amended to allow for the flexibility for a firm/lawyer to indicate that they are acting in a limited scope.

The LIV submits that the increasing amount of unmet legal need can be in some part attributed to individuals being unwilling to engage with legal services due to the inability to afford all costs related to retaining legal assistance. The LIV recognises the increasing number of online legal services whereby the individual client accepts responsibility for their case which leaves limited scope for redress against the online provider in the event that the individual suffers detriment in bringing about their case. Having regard to this, the ability for a lawyer/firm to act in a limited scope is likely to have a positive effect of increasing access to justice as individuals can choose and pay for the select services that they require and will not have to resort to taking full responsibility for their case.

The LIV notes that professional indemnity insurance for lawyers will need to be carefully considered as there is likely to be various consequences associated with lawyers acting in a limited scope and not having to think about future consequences when they will be ceasing to act for the client. In this regard, it will be necessary to have clarification around the scope of a retainer for the benefit for the client and court to properly ascertain when duties commence and cease.

The LIV acknowledges that if unbundled services and limited scope representation are to become mainstream practice, then the court management powers in Part 4.4 of the *Civil Procedure Act* 2010 (Vic) will require review and furthermore, will require courts to be flexible in their approach with litigants who engage lawyers on a limited retainer.

The LIV believes that an appropriate vehicle for the provision of unbundled legal services / limited scope representation is the Australian Solicitor's Conduct Rules which are a common set of professional obligations and ethical principles for lawyers when dealing with their clients, the courts, their fellow legal practitioners and other persons.

Lay advocacy

The LIV recognises that lay advocacy is already a part of certain dispute resolution systems in contemporary Australia. Tribunals such as those involving town planning, consumer and other disputes regularly have lay advocates appearing.

Similarly, those forums where a judicial function is exercised (and where a department or agency of government is a party to the dispute) observe lay advocates appearing on behalf of the institutional party regularly.

The LIV notes that one party having an advocate in a jurisdiction (although not a trained or admitted lawyer) presents two important issues:

- There is an impairment to access to justice where the now represented party is unable to engage (for an appropriate fee) a lay advocate of similar training and experience; and
- A lay advocate is not an admitted practitioner (and officer of the court), nor part of any professional regulatory regime, and owes no professional or ethical duty to the jurisdiction.

The current cohort of lay advocates consists of those employed by a party to a dispute. There are few examples of lay advocates who undertake advocacy services to a range of clients on a retainer basis.

The LIV is of the view that a proposal to permit a greater level of lay advocacy must contain all of the following:

- Lay advocates may appear in any jurisdiction which permits lay advocacy provided:-
    - The lay advocate is an employee of a law practice (and is therefore subject to regulations by the legal profession regulator)
    - The lay advocate be subject to the same ethical rules and standards as legally qualified advocates
- Jurisdictions retain (either inherently or by virtue of their governing statutes) control over those lay advocates appearing before them.
- The professional indemnity insurance policies of those law practices employing lay advocates must provide cover in respect of the advocacy services provided by them to the extent of their legal liability.

The alternative is to establish a "new" profession, with its own regulatory structure or the merging of the regulatory requirements into existing government-funded regulatory bodies (including Departments of Fair Trading etc). This is clearly a higher cost (to the government and the community), cumbersome (the creation of a new regulatory infrastructure) and confusing (to dissatisfied members of the public).

Anything less than appropriately regulated lay advocacy would be likely to impair access to justice, rather than improve it. As identified in Chapter 19 of the Productivity Commission's Draft Report, the LIV recognises the growing gap of middle Australians who do not qualify for legal aid assistance and cannot afford legal representation. A willingness to adopt lay advocacy could lead to lay advocates being able to represent individuals at a lower cost and therefore removing some financial restrictions on being able to access legal assistance and representation.

CHAPTER 8: ALTERNATIVE DISPUTE RESOLUTION

DRAFT RECOMMENDATION 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

The LIV supports this Draft Recommendation in principle, subject to the provisos listed below. The LIV notes that the Draft Recommendation is consistent with the principles enshrined in *the Civil Procedure Act* 2010 (Vic) (*Civil Procedure Act*) and with approaches in the *Victorian Civil and Administrative Tribunal Act* 1998 (*VCAT Act*). Moreover, in Victoria it is common practice in the courts an at VCAT for matters to be the subject of a mediation, conciliation conference or pre-hearing conference before it can be listed for trial.

Under the *Civil Procedure Act*, legal practitioners have overarching obligations to the court to further the administration of justice in any civil proceeding as identified in s 16-27 of the Act which includes any appropriate dispute resolution undertaken in relation to a civil proceeding.[7] Further, a court may give any directions or make any orders with respect to the use of appropriate dispute resolution to assist in the conduct and resolution of all or part of the civil proceedings.[8]

Appropriate Dispute Resolution (ADR) is defined as a process for the purpose of negotiating a settlement of a civil proceeding, or for resolving or narrowing the issues in dispute and include (but is not limited to): mediation, early neutral evaluation, judicial resolution conference, settlement conference, expert determination, conciliation and arbitration.[9]

In early 2014, amendments were made to the *VCAT Act* which addressed the importance of ADR by giving the tribunal the ability to conduct mediation or give effect to a settlement in respect of part of a proceeding.

The LIV is supportive of the Productivity Commission's view that there is merit in court and tribunals making mediation, or other appropriate ADR, compulsory for disputes of relatively low value. However, as the Commission has itself recognised, ADR is not an appropriate mechanism for resolving all disputes and mandatory mediation may not be appropriate in all circumstances.

The LIV further submits that there are a number of important categories of civil disputes which should not be subject to compulsory mediation or other ADR processes. The categories that should not be subject to compulsory mediation or alternative dispute resolution processes include the following:

- When a limitation period is about to expire and the cause of action would be barred by statute if the civil proceeding is not commenced immediately;

[7] *Civil Procedure Act* 2010 (Vic), s 16.
[8] Ibid, s 48(2)(c).
[9] Ibid, s 3.

- the civil proceeding involves an important test case or a public interest issue;
- a person involved in a civil dispute or civil proceeding has a terminal illness;
- mediation or other ADR processes would result in personal or financial hardship;
- the subject matter of the dispute or proposed civil proceeding has been dealt with at arbitration pursuant to a contractual (or statutory) obligation and such arbitration was not successful (provided that the arbitrator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such arbitration despite the best efforts of the parties to resolve the dispute);
- the subject matter of the dispute or proposed civil proceeding has been dealt with at mediation pursuant to a contractual (or statutory) obligation and such mediation was not successful (provided that the mediator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such mediation despite the best efforts of the parties to resolve the dispute);
- civil disputes and civil proceedings involving allegations of medical negligence;
- mortgagee actions for possession of land;
- civil proceedings not involving a dispute; and
- claims where there already exists a legislative or industry obligation to serve a notice or notices before taking action.

INFORMATION REQUEST 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to $50 000).

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

In a submission to the National Pro Bono Resource Centre in December 2011,[10] the LIV noted that mediation can be a valuable tool for the resolution of disputes for disadvantaged and low income clients. However, the LIV cautioned that care must be taken to ensure that low income clients are not further disadvantaged by unequal bargaining power that might arise during mediation, where there is no independent arbiter of the dispute.

The LIV submits that representation is necessary to address power imbalances during mediation as, without access to legal advice and representation prior to participation in mediation (or other alternative dispute resolution processes) disadvantaged and low income clients are unlikely to be in a position to fully appreciate their legal rights and options. The LIV considers that legal representation is crucial for parties to understand their legal rights and obligations and which underlying facts are relevant to resolving the dispute.

The LIV notes that the Magistrates' Court operates a number of mediation programs with the Dispute Settlement Centre of Victoria (DSCV). The mediation services provided by DSCV are for defended civil

[10] LIV, *Alternative Dispute Resolution and the Possible Role of Pro Bono Lawyers* (13 December 2011) < http://www.liv.asn.au/getattachment/37e4f259-d0ad-4602-9be0-34732d8defe2/Alternative-Dispute-Resolution-and-the-Possible-Ro.aspx>.

claims at some Magistrates' Courts. This service provides a quick and inexpensive means for the parties to resolve their civil claim without having to go through a court hearing.[11]

The LIV considers that there is significant value in extending requirements to undertake ADR in a wide variety of family law disputes, such as spousal maintenance and/or adult/child maintenance matters, property divisions or parenting plans. However, it would not be practical for complex family violence matters where there is a criminal charge attached to a breach of a family violence/intervention order. For example, certain conditions of an intervention order may mean that the parties would not be permitted within close proximity of each other, in which case any form of ADR would be impractical and unworkable.

DRAFT RECOMMENDATION 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015

The LIV strongly supports this Draft Recommendation. The LIV recognises that in Victoria, all public authorities are obliged to comply with the Victorian Government Model Litigant Guidelines.[12] This recommendation is consistent with the long-standing obligations of model litigant and good public sector governance.

The LIV observes that the introduction of dispute resolution management plans will need to be simple and comprehensible for users. Moreover, such plans need to recognise that a participant's legal costs in any alternative dispute resolution process remain an impediment to achieving the policy intent. Where possible, government departments, agencies and local authorities should be encouraged to document in the plan how they propose to financially support participation in such alternative dispute resolution processes.

The LIV recognises the fundamental role of the legal profession in alternative dispute resolutions processes in Victoria. Examples of this include the Transport Accident Commission's No Fault Dispute Resolution Protocols[13] that subsidises a participant's legal costs for participation in alternative dispute resolution processes. The LIV submits that this model should be extended in relevant circumstances to the models contemplated by the Productivity Commission.

The LIV considers that in stark contrast, the new National Disability Insurance Scheme (NDIS) contains administrative review rights to the Administrative Appeals Tribunal for participants and potential participants, but appears to lack a published dispute resolution management plan. The LIV submits that a fully or partially subsidised alternative dispute resolution process should be made available for potentially vulnerable people to review decisions made by the National Disability Insurance Agency (NDIA) and should be considered in such a dispute resolution action plan.

[11] More information about DSCV available here: http://www.disputes.vic.gov.au/court-based-programs
[12] Available here: http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines
[13] Available here: http://www.tac.vic.gov.au/providers/for-legal-professionals/tac-protocols/Dispute-resolution-protocols.pdf

DRAFT RECOMMENDATION 8.3

Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.

The LIV supports this Draft Recommendation. The LIV acknowledges its role in providing information and education materials about engaging in alternative dispute resolution processes to improve access to justice.

DRAFT RECOMMENDATION 8.4

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

The LIV supports this Draft Recommendation as it is consistent with the approaches already taken by the *Civil Procedure Act* and the *VCAT Act* in Victoria and by the Administrative Appeals Tribunal.

DRAFT RECOMMENDATION 8.5

Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.

Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.

The LIV supports this recommendation in principle however, considers that the courses proposed for non-lawyers should be developed so as to also enhance participants' understanding of the proper civic role of Australian courts and tribunals and the contribution made by legal professionals to the resolution of disputes in Australia.

The LIV refers to its response to Draft Recommendation 7.5 with regard to lay advocates and considers that the core curricula for a law degree may need to be reviewed in the event that lay advocates working under the supervision of a lawyer is not deemed to be feasible and other particular training is required.

DRAFT RECOMMENDATION 8.6

Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

The LIV is supportive of this Draft Recommendation in principle. The LIV is a leader in promoting the use of ADR and further, notes the importance of having properly qualified alternative dispute resolution practitioners. In this regard, the LIV is a Recognised Mediator Accreditation Body (RMAB) under the Mediator Standards Board and accredits mediators under the National Mediator Accreditation Standards.

Further to this, the LIV has its own Accredited Specialist Mediators program. All mediators on this list have a minimum of five years full time practice experience and a minimum of three years' experience in their area of specialisation. After passing a comprehensive examination process developed by legal professional experts, all Accredited Specialists must maintain a high degree of professional development in their area of specialisation. They are required to apply for re-accreditation every three years.

In addition, the LIV Mediators Directory[14] and LIV Arbitrators Directory[15] provide details of approved legal practitioners qualified to conduct mediations and arbitrations respectively. Mediators are listed together with their contact details and areas of practice or specialisation.

The LIV raises concerns that disputes that involve legal questions should be mediated by a specialist or accredited mediators who are legal practitioners. The LIV would not support disputes that involve legal questions, or which have the potential to go on to litigation or formal administrative review being mediated by non-lawyer mediators. The LIV however does recognise that in some specialist disputes mediation by a non-lawyer may be appropriate. Examples could include mediation of relationship disputes or building defect reviews.

The LIV is strongly of the view that any independent accreditation standard that may be developed needs to recognise the independence of lawyers and their key specialist role in ADR particularly in courts and tribunals

[14] Available here: http://www.liv.asn.au/Mediators
[15] Available here: http://www.liv.asn.au/For-the-Community/Find-a-Lawyer-Directories/Arbitrators

CHAPTER 9: OMBUDSMAN AND OTHER COMPLAINT MECHANISMS

DRAFT RECOMMENDATION 9.1

Governments and industry should raise the profile of ombudsman services in Australia. This should include:

- **more prominent publishing of which ombudsmen are available and what matters they deal with**
- **the requirement on service providers to inform consumers about avenues for dispute resolution**
- **information being made available to providers of referral and legal assistance services.**

The LIV is supportive of the Draft Recommendation on the basis that ombudsmen are able to resolve disputes free of charge and are simple and efficient for the general public to navigate and use.

DRAFT RECOMMENDATION 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

The LIV queries this Draft Recommendation and does not support any funding cut to ombudsmen services noting that they perform an important function for the general public and that their resources are already currently stretched.

DRAFT RECOMMENDATION 9.3

In order to promote the effectiveness of government ombudsmen:

- **government agencies should be required to contribute to the cost of complaints lodged against them**
- **ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded government ombudsmen should be subject to performance benchmarking**

The LIV agrees with the Draft Recommendation that government agencies should be required to contribute to the cost of complaints lodged against them as is the case with the Financial Ombudsman Service (FOS), whereby the costs of the services provided by the FOS are made by Financial Service Providers.

The LIV also agrees that ombudsmen should report annually, any systemic issues which have been identified and how they have been dealt with which is currently the case for the FOS. Notwithstanding, the LIV notes the need to be wary of spending the valuable resources of ombudsmen on evaluation and reporting on performance, which could be better spent assisting the general public with resolution of disputes.

DRAFT RECOMMENDATION 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

The LIV is supportive of this Draft Recommendation and considers that if ombudsmen services are to be expanded to increase access to justice for the general public, that funding arrangements need to reflect such an expansion.

CHAPTER 10: TRIBUNALS

INFORMATION REQUEST 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

The LIV refers to its comments outlined in Draft Recommendation 8.1.

DRAFT RECOMMENDATION 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

As outlined in the LIV's response to Draft Recommendation 7.5, the LIV supports the use of lay advocacy as a means of increasing access to justice, but strongly rejects any restriction on the use of legal representation in tribunals (or courts). The LIV considers that if a client engages legal assistance, they should be entitled without restriction to legal representation in a tribunal (and court) setting.

Fair Work Commission

The LIV's Workplace Relations Section notes that, historically, there are a number of non-legally qualified individuals who undertake work through unions and employer groups. However, such individuals are not under the same obligations and duties as those who are legally qualified and are not presented with the same hurdles to seek leave to appear at the Fair Work Commission (FWC) on behalf of their clients, which presents a great deal of disparity. The LIV notes that s 596 of the *Fair Work Act* 2009 (Cth) provides for representation by lawyers and paid agents at the Fair Work Commission if:[16]

- It would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- It would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- It would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

However, this provision is not applicable if the party is being represented by an employee or officer of an organisation, association of employers, union, peak council or bargaining representative.

[16] See *Fair Work Act 2009* (Cth), s 596(2).

In September 2013, the LIV raised concerns over legal representation at the FWC.[17] In particular, the requirement for a written application to seek leave to appear which was introduced with the FWC's Fair Hearing Practice Note 2/2013. The LIV submitted that the requirement for a written submission is counterproductive, as matters will not necessarily be run as efficiently and expeditiously as possible and the interests of justice may be affected. In particular, the LIV acknowledges that the need to seek leave in writing for every appearance will be onerous and expensive for clients.

In recent cases before the Commission the issue of legal representation has been discussed. In *Warrell v Fair Work Australia*,[18] it was held that:

> *The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality*.[19]

The LIV considered that:

- legal representation does not necessarily formalise hearings, but rather can have the positive effect of confining the hearing to the legal issues in dispute and, in this regard, legal representation is in keeping with the objectives of the *Fair Work Act* to allow matters to be dealt with expeditiously;
- denying a party legal representation in a hearing can have adverse consequences for that party, in particular those who are reliant on their lawyer for advice.

To date, LIV members have increasingly raised concerns over the inconsistent approaches of FWC Commissioners in granting or denying leave to appear at the Commissioner per the reasons outlined in the *Fair Work Act*.

Victorian Civil and Administrative Tribunal (VCAT)

In a 2009 submission to VCAT, the LIV submitted that legal practitioners are the most appropriate parties to represent clients in VCAT due to their professional duties and obligations to the Tribunal and their clients. Further, the LIV submitted that prohibiting legal practitioners from hearings and alternative dispute resolution processes was unlikely to address the power and resource imbalance between companies or government bodies and individuals. In addition, the LIV argued that preventing legal practitioners from appearing in matters where the amount in dispute is less than $50,000, does not accurately reflect the serious effect this amount can have on people's lives and livelihood (including the risk of bankruptcy and homelessness).[20]

Tribunal Practice Notes

The LIV considers that it would be desirable for tribunals to have consistent practices and guiding practice notes, for the benefit of parties and lawyers to understand the nature of the tribunal's processes. For example, VCAT has recently restated its practice notes to this effect and to ensure the tribunal acts fairly. Similarly the Fair Work Commission provides useful practice notes.

---

[17] LIV, *Legal Representation at the Fair Work Commission* (17 September 2013) < http://www.liv.asn.au/getattachment/8dd08b3c-32a0-4534-9bbc-e4211cd324e0/Legal-representation-at-the-Fair-Work-Commission.aspx>
[18] [2013] FCA 291.
[19] Ibid at 24 per Flick J.
[20] LIV, President's Review of VCAT (22 June 2009) < http://www.liv.asn.au/getattachment/3030b722-a6ff-4104-8a69-4ac93f58f495/President-s-Review-of-the-Victorian-Civil-and-Admi.aspx >, pages 5-6.

DRAFT RECOMMENDATION 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

The LIV notes the current existence of legislative obligations to which legal representatives are under when commencing litigation in Victoria. Parties must personally certify that they have read and understood the overarching obligations and paramount duty contained in the *Civil Procedure Act* before commencing litigation.

The overarching obligations are concerned with assisting the court to achieve the overarching purpose of the *Civil Procedure Act* which is to - facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. In this regard, the obligations include:

- acting honestly;
- not making any claim or response that is frivolous, vexatious, an abuse of process or does not have any proper basis;
- only taking steps to resolve or determine the dispute;
- cooperating in the conduct of the civil proceeding;
- not misleading or deceiving;
- using reasonable endeavours to resolve the dispute; and
- narrowing the issues in dispute.

Failure to comply with the overarching obligations may result in the awarding of costs.

INFORMATION REQUEST 10.2

Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.

The LIV notes that the introduction and adoption of technology in Victorian tribunals has been disappointing and slow. Victorian courts and tribunals do not operate on consistent IT platforms, which duplicate expenditure and potentially limiting innovation. Despite this, the experience of LIV members is that where such technology has been adopted, the efficiency gains have been significant which has in turn enhanced the user friendliness of the tribunal.

By way of example, the LIV observes that VCAT's Small Claims and Residential Tenancy lists have benefited from the introduction of technology. However by contrast, in VCAT's General List, regional participants and their legal representatives do not always have the ability to appear by video link or by simple technology such as Skype. Further, the experience of LIV members is that up until 2013, regional practitioners and participants could not even obtain tribunal rulings or decisions by email and were required to collect them.

The LIV considers that useful benchmarks for improved information and communication technologies in tribunals are the current systems that operate in:

- the Federal Court;
- the Court of Appeal in Western Australia; and
- the Commercial Court of the Supreme Court of Victoria.

INFORMATION REQUEST 10.3

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

The LIV notes that in the Federal Budget 2014, the Federal Government announced its intention to consolidate the Commonwealth merits review bodies into the one Administrative Review Tribunal. It is noted that from 1 July 2015, the Administrative Appeals Tribunal (AAT), Migration Review Tribunal and Refugee Review Tribunal (MRT/RRT), Social Security Appeals Tribunal and the Classification Review Board will be amalgamated.[21]

While the LIV is not necessarily opposed to this proposal, the LIV recognises that there are already a confluence of matters that go to the AAT including: social security, tax, Comcare, and limited migration matters, therefore providing a commonwealth example of a consolidated tribunal.

The LIV considers that care needs to be taken in the consolidation process, in particular noting resourcing issues. The LIV observes that consolidated tribunals require funding that allows them to manage multiple lists, often with different procedures and practices. In this regard, the LIV believes that increasing the size and jurisdiction of a tribunal means that more systems and procedures need to be developed to ensure that information coming in and going out of such a tribunal is being properly managed, which will require investment in the necessary infrastructure.

The LIV holds the view that a consolidation in tribunals will not necessarily result in lower costs for users. The LIV refers to the example of VCAT, where fees have increased significantly, potentially resultingin reduced access to justice.

The LIV notes that detailed information will be required the from the Federal Government on how the proposed consolidated tribunal would operate before the LIV endorses the proposal. The LIV considers that any consolidation must clarify the right of representation for applicants and an applicant's right to documents relevant to the review. The Administrative Appeals Tribunal operates with adversarial advocacy which affords applicants the right to be represented. By contrast, the right of an applicant to be represented before the Migration Review Tribunal (MRT) is restricted by s366A of the *Migration Act 1958* (Cth). As previously argued the LIV supports the overarching right to representation (in line with comments provided with respect to Draft Recommendation 10.1), and submits that the consolidation should not dilute any existing rights to representation. Further, we note that s37 of the *Administrative Appeals Tribunal Act 1975* (Cth) requires the decision maker to lodge a number of prescribed documents including a statement of findings on material questions of fact and the reasons for the decision. This is not a requirement at MRT. Again, we argue that the higher standard should apply and any existing rights to statement of reasons and relevant documents not be restricted.

[21] More information available here: http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/SecondQuarter/13May2014-Streamlinedarrangementsforexternalmeritsreview.aspx

INFORMATION REQUEST 10.4

Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

In principle, the use of shared administration between courts and tribunals is supported by the LIV. In Victoria this already happens in regional cities and towns. However many regional and suburban courts are already under pressure to deal with their increasing case loads and physical sharing of courts for tribunal use is often impractical. In this regard the LIV queries whether there is any real financial gain associated with consolidations. The LIV considers that adequate levels of funding will be required to ensure that shared facilities can be used between the different lists/jurisdictions. Importantly, the LIV notes the need to consider the services required not just the physical facilities to house tribunals, for example, tribunals dealing with migration issues may need more interpreter services than others.

The LIV considers that the establishment of co-located services with shared administration and outreach needs to be well thought out and requires very good working relationships between the different relevant heads of jurisdiction. In addition, after establishment, adequate levels of funding need to be provided to ensure that individuals are receiving just outcomes.

INFORMATION REQUEST 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

VCAT is the busiest tribunal in Victoria. While the LIV is not currently advocating any changes to the appeal processes within VCAT, or from VCAT, the LIV would consider supporting any measures, approved by VCAT and the relevant appellate Court that effectively and fairly simplified or streamlined an appeal from a non-judicial member of VCAT to the Trial Division of the Supreme Court.

CHAPTER 11: COURT PROCESSES

DRAFT RECOMMENDATION 11.1

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- **the abolition of formal pleadings**
- **a focus on early identification of the real issues in dispute**
- **more tightly controlling the number of pre-trial appearances**
- **requiring strict observance of time limits.**

The LIV considers that there is a strong argument in favour of retaining pleadings to the extent that they assist to identify the issues in dispute and also constrain discovery.

DRAFT RECOMMENDATION 11.2

There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction.

The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).

The LIV supports this Draft Recommendation.

INFORMATION REQUEST 11.2

The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration.

The LIV suggests that one process does not suit every type of litigation, and needs to be specifically considered to determine what is to be resolved.

DRAFT RECOMMENDATION 11.5

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:

- **court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available**
- **courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly**
- **court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate**
- **courts should be expressly empowered to make targeted cost orders in respect of discovery.**

The LIV would oppose a requirement that a Court order must be obtained for all discovery. In the LIV's view, such a requirement will increase legal costs and add to delays which, in turn, will impact upon access to justice considerations.

DRAFT RECOMMENDATION 11.8

Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:

- **a requirement on parties to seek directions before adducing expert evidence**
- **broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.**

The LIV would oppose any requirement that leave be sought before adducing expert evidence. Anecdotal reports suggest that, in general terms, expert evidence is already the subject matter of directions hearings where orders for service of expert reports are made.

The LIV notes that the parties will usually already have obtained expert evidence in order to prepare their claim or defence generally. For example, in a professional negligence claim, an expert opinion in relation to liability would be required in order for a lawyer to determine and advise on the merits of the claim. The LIV considers that single joint and court appointed experts should only be appointed with the consent of the parties.

DRAFT RECOMMENDATION 11.9

Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether:

- **a single joint expert or court appointed expert would be appropriate in a particular case**
- **to use concurrent evidence, and if so, how the procedure is to be conducted.**

The LIV considers that single joint and court appointed experts should only be appointed with the consent of the parties.

DRAFT RECOMMENDATION 11.10

All courts should:

- **explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia**
- **facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.**

The LIV considers that court appointed and single joint experts should only be appointed with the consent of the parties.

CHAPTER 12: DUTIES ON PARTIES

DRAFT RECOMMENDATION 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

The LIV submits that pre-action protocols are not an appropriate mechanism for resolving all disputes and mandatory pre-action protocols may not be appropriate in all circumstances. The LIV is of the view that it would not be appropriate to adopt a 'one-size-fits-all' approach to pre-action requirements. The LIV believes that this would, in many cases, increase the cost of dispute resolution and add an unnecessary layer of complexity.

The LIV submits that there are a number of important categories of civil disputes which should not be subject to compulsory pre-action protocols. The categories the LIV submits should not be subject to compulsory pre-action protocols include the following:

- a limitation period is about to expire and the cause of action would be barred by statute if the civil proceeding is not commenced immediately;
- the civil proceeding involves an important test case or a public interest issue;
- a person involved in a civil dispute or civil proceeding has a terminal illness;
- the civil dispute involves allegations of fraud;
- expert opinion is required;
- multi party civil disputes and civil proceedings are contemplated;
- mediation or other alternative dispute resolution processes would result in personal or financial hardship;
- the subject matter of the dispute or proposed civil proceeding has been dealt with at arbitration pursuant to a contractual (or statutory) obligation and such arbitration was not successful, provided that the arbitrator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such arbitration despite the best efforts of the parties to resolve the dispute;
- the subject matter of the dispute or proposed civil proceeding has been dealt with at mediation pursuant to a contractual (or statutory) obligation and such mediation was not successful, provided that the mediator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such mediation despite the best efforts of the parties to resolve the dispute;
- civil disputes and civil proceedings involving allegations of medical negligence;
- mortgagee actions for possession of land;
- civil proceedings not involving a dispute;
- claims where there already exists a legislative or industry obligation to serve a notice or notices before taking action;

- civil proceedings in which additional parties are brought in subsequent to the commencement of the proceeding.

INFORMATION REQUEST 12.2

The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.

The LIV refers to and repeats the comments it made in response to draft recommendation 12.1 above.

DRAFT RECOMMENDATION 12.2

Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

The LIV is supportive of this Draft Recommendation.

INFORMATION REQUEST 12.3

The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?

In the LIV's view all local governments should be subject to model litigant requirements.

INFORMATION REQUEST 12.5

The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?

In the LIV's view, model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). The LIV considers that additional requirements should be implemented via the *Civil Procedure Act* or court rules.

INFORMATION REQUEST 12.6

The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on earlier intervention with more graduated responses to manage vexatious behaviour reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?

The Effect of Vexatious Litigants on the Justice System

The LIV submits that the main problem caused by vexatious litigants is the increased pressure on court and tribunal resources. Matters involving vexatious litigants by their very nature take up a significant amount of time and resources, both judicial and administrative.

The Effect on Individuals and Agencies who are Victims of Vexatious Litigants

The LIV submits that a significant problem caused by vexatious litigants is the effect that vexatious litigation has on the non-vexatious party. The non-vexatious party can lose faith in the justice system amid the often unreasonable and persistent legal proceedings. Further, the non-vexatious party is often left with the burden of legal costs as a result of vexatious litigation. Even where a costs order is made against the vexatious litigant in favour of the other party, such an order would not ordinarily cover the totality of that party's legal costs. Further, a vexatious litigant may not have sufficient means to satisfy a costs order.[22]

What processes are most appropriate for declaring an individual a vexatious litigant?

The LIV is of the view that access to the Court should only be denied in the most extreme circumstances and acknowledges that ultimately it should be for the Court to determine whether proceedings should be considered vexatious.

In a 2008 submission to the Victoria Parliament Law Reform Committee Inquiry into Vexatious Litigants, the LIV noted that there would be advantages in implementing a graduated system, similar to the model that operates in England and Wales.[23] The LIV noted that the introduction of a graduated system of orders 'would also ensure that the finite resources and time of courts and tribunals is not being wasted on applications that lack merit.'

Consistent with the submissions made in 2008 and the decision of the High Court in *Kirk v Industrial Court* (NSW),[24] the LIV submits that it would be necessary for each of the graduated orders proposed to be reviewable to protect the right to access to justice and a fair hearing under the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

There are a number of advantages in implementing a system similar to the model of civil restraint orders operating in England and Wales. Firstly, it is a flexible system allowing for a three stage approach in restricting access to the courts. Under such a system, an order can be tailored to be confined to only a particular court or tribunal proceeding, or can extend to any future proceedings in any court or tribunal depending on the number and extent of vexatious proceedings or applications brought by a litigant.

Secondly, imposing an expiry period of two years for a civil restraint order would ensure that a vexatious litigant's right to access justice is balanced against public interest considerations. The court would have an

[22] LIV, Submission to the Victoria Parliament Law Reform Committee Inquiry into Vexatious Litigants (27 June 2008) <http://www.liv.asn.au/getattachment/b2fdb74c-77a1-4d0b-b575-23349da67de7/Inquiry-into-Vexatious-Litigants.aspx> at 2.
[23] Ibid.
[24] (2010) 239 CLR 531.

opportunity to further extend a civil restraint order after a period of two years if appropriate in the circumstances, but such an extension could be only for a further period of no greater than two years at a time.

The introduction of a civil restraint order system would also ensure that the finite resources and time of courts and tribunals is not being wasted on applications that lack merit. Under a civil restraint order system, a vexatious litigant would be able to appeal a civil restraint order, but such appeals could be dealt with "on the papers" without the need for the parties to attend court. Groundless appeals or applications could be dealt with from an early stage and disposed of without causing financial burden and distress to the non-vexatious parties.[25]

[50] Ibid.

CHAPTER 13: COSTS AWARDS

DRAFT RECOMMENDATION 13.4

Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.

The LIV supports the Productivity Commission's draft recommendation that parties represented on a pro bono basis should be entitled to seek an award for costs.

The LIV acknowledges that the legal profession has a strong tradition of pro bono representation and the amount of pro bono work undertaken by the profession is a significant contribution to increasing access to justice.

The LIV has previously written to the Supreme Court of Victoria to show its support for a Victorian Bar proposal for such cost recovery on the basis that the ability for a legal practitioner to recover costs in pro bono matter is in the public interest. Given the amount of pro bono work undertaken by the legal profession, the LIV submits that the interests of justice and equality before the law necessitate changes to the Rules of Court to ensure that the Victorian legal sector's commitment to community service and strong tradition of pro bono representation can be maintained. Further, the LIV considers that litigant opposed to parties represented by pro bono lawyers should be under the same risk of an adverse order for costs, if they are unsuccessful or run ill-advised claims or defences.

Arising from the ability to recover costs in pro bono matters, the LIV recognises the need to prevent possible implications including a compromise of the virtuous motivations underlying pro bono representation and the need to recognise that pro bono matters stem from various sources such as community legal centres, legal assistance schemes or firms and the need to be able to categorise a matter has being undertaken on a "pro bono basis".

INFORMATION REQUEST 13.1

The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to:

- **the legal professional providing pro bono representation**
- **the not-for-profit body providing or coordinating the pro bono service**
- **a general fund to support pro bono services.**

The Commission is interested in any other options that could be examined.

The LIV would:

- Support option 1;
- Consider supporting option 2, provided that the lawyer employed by the not for profit body recovers only party and party costs and provided that the organisation does not profit from the representation; and
- Support in principle option 3 the establishment of a general fund to support pro bono services. However in an environment where there are cuts to public funding for legal assistance and other state and federal budget cuts in the provisions of services this option is considered to be unlikely to be either effective or sustainable.

DRAFT RECOMMENDATION 13.5

Unrepresented litigants should be able to recover costs from the opposing party, subject to the costs rules of the relevant court.

The LIV opposes this recommendation.

The draft recommendation misconceives the role and function of legal costs to reward lawyers for the professional services that they provide.

The value challenges presented in ascertaining the true economic value of the non-professional work actually done by a self-represented litigant in litigation are significant. Nor does the draft recommendation make it clear how the costs will be calculated or assessed to enable them to be incorporated into relevant court scales as proposed, or how the relevant costs court or legal costs assessors will determine the value of the work done by a self-represented litigant.

The court scales, for all of the criticisms levied against them, provide an objective measure for lawyers to value their professional work.

The LIV, nevertheless, does recognise that a self-represented litigant will incur disbursements for expert witnesses and court fees for example and that they should be entitled to claim the costs of these outgoings in the same way a represented litigant can.

DRAFT RECOMMENDATION 13.6

Courts should grant protective costs orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

The LIV holds the view that plaintiffs with meritorious cases should be able to bring claims against the government without being deterred by the potential of a costs order being made against them and therefore is supportive of the Draft Recommendation. The LIV rejects any contention that public interest applicants are not disadvantaged by the threat of a costs order and that even if people are impecunious at the time of proceeding, they may, for example, work in future or inherit money and be liable to deal with the effects of a costs order. The LIV notes further that impecunious litigants or those with low income and assets are more likely to face bankruptcy if a cost order is made and enforced.

In 2010, the LIV wrote to then Victorian Attorney-General advocating the Supreme Court be specifically conferred with power to make protective costs orders in relation to "public interest matters", by way of amendment to s 24 of the *Supreme Court Act* 1986 (Vic) in line with a proposal previously made to the Attorney-General by Justice Connect (formerly PILCH).[26] In its submission, the LIV considered that public interest litigants should be able to seek a PCO in appropriate cases, regardless of their socio-economic background or assets which is consistent with the fundamental principle of non-discrimination, protected in s 8 of the *Charter of Human Rights and Responsibilities* 2006 (Vic).

Justice Connect proposed amendments to empower courts to make a PCO in a proceeding at any time prior to judgment. Under the proposal, the court would be empowered to make orders that:

- a specified party will not be liable for costs, whether or not it is successful;
- one party's costs will be paid in whole or part by the other, regardless of the outcome of the proceeding; or
- the amount of costs for which a specified party may be liable will be capped.

Under the proposal, a PCO could be made on such terms and conditions as the court deems fit. Justice Connect also prescribed five matters that the court *must* take into account when considering making a PCO:

(a) whether it is in the public interest that the issues raised, or likely to be raised, in the proceeding be determined by the Court;
(b) the evidence before the Court as to the financial resources of the parties to the proceeding;
(c) the costs that are likely to be incurred in the usual course by the parties to the proceeding;
(d) the nature and extent of any private or pecuniary interest that the applicant for the order has in the outcome of the proceeding;
(e) any prejudice any other party to the proceeding may suffer if the order is made.

The LIV maintains the view that Justice Connect's proposal retains flexibility in creating and amending a PCO as it allows for the parties at any time to be able to return to the court to have the PCO reviewed. The LIV submits that this ensures a balance is always maintained between the parties, and that a plaintiff who is protected by a PCO cannot unfairly vex a defendant by, for example, causing them to incur unnecessary costs or delaying proceedings. The LIV strongly considers that the primary test for eligibility for a PCO should be whether the matter is in the public interest over the need for the party to lead evidence on their financial situation which could be used to deny a PCO if the party holds assets to a certain amount. The LIV notes that public interest litigation assists the development of the law, providing "greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law".[27] In this regard, the LIV considers that the threat of costs in public interest litigation should be characterised as a barrier to access to justice and not in economic terms of incentive or disincentive to litigation.

The LIV recognises a common criticism of PCOs is the fear that they might lead to a "flood" of litigation and we note that there has been significant media interest in this area.[28] Despite this, the experience of PCOs in England and Wales and Canada has not resulted in a flood of litigation.

[26] Submission available: http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Administrative-Law-Human-Rights/Submissions/Protective-Costs-Orders.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0
[27] Australian Law Reform Commission Report 75 *Costs shifting – who pays for litigation* (1995) [13.6].
[28] See e.g. *The Australian*, 19 June 2009 "Changes to court rules risks flood of litigation".

DRAFT RECOMMENDATION 13.7

Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.

These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.

The LIV considers that this proposal has merit and should be further explored. The LIV is concerned that the pool of funds accumulated as described would be inadequate to viably resource this complex and expensive litigation for the long term.

INFORMATION REQUEST 13.2

The Commission invites comment on the most appropriate arrangements for the governance and funding of a public interest litigation fund (PILF), including:

- **appropriate mechanisms and criteria to govern access to the fund**
- **whether the PILF should be established as a new entity, or integrated into existing legal assistance funds or bodies.**

The LIV observes that different models are likely to arise in state and Commonwealth jurisdictions. Conceptually economic efficiency principles, which are consistently referred to throughout the Draft Report, would support the integration of PILF into existing legal assistance funds or bodies.

However, given the fundamental importance of PILF to public interest litigation in the community, the LIV considers that there is merit in considering the establishment of an independent body to manage and govern PILF. The risk of incorporation is that these funds would ultimately be subsumed into the wider legal aid provision and not be available for the stated purpose.

CHAPTER 14: SELF-REPRESENTED LITIGANTS

DRAFT RECOMMENDATION 14.1

Courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case.

- **All court and tribunal forms should be written in plain language with no unnecessary legal jargon.**
- **Court and tribunal staff should assist self-represented litigants to understand all time-critical events in their case. Courts and tribunals should examine the potential benefits of technologies such as personalised computer-generated timelines.**
- **Courts and tribunals should examine their case management practices to improve outcomes where self-represented litigants are involved.**

This response is relevant to Information Request 14.1 and Draft Recommendation 14.1.

The LIV recognises that the legal system has traditionally been perceived as a complex system that could be accessed only through the specialist knowledge of a lawyer. The LIV notes that reform over recent decades has sought to break down the barriers to accessing the legal system, including enabling individuals to access the legal system directly. This is evident through reforms such as the creation of tribunals, government regulation of consumer affairs and increased transparency and knowledge of government services and processes which has meant that individuals can now apply for and access a range of government services and pursue small monetary and consumer claims without needing a lawyer. The LIV considers that these reforms were important and further reform should be encouraged as such change empowers individuals to participate in the legal system directly and with their own voice.

The LIV contends that increasing complexity of our society is inevitably reflected in the legal system being similarly complex, characterised by a knowledge and power imbalance between the groups identified above (ie. between members of society, its government and non-members of the society). There is a point at which self-help processes will be insufficient for most people or problems. For example, it will generally be inappropriate for people to be without assistance to resolve child protection matters, where the subject matter is clearly too personal for the litigant to pursue their case objectively.

At this stage, justice requires that there be a person or body who can determine the dispute, such as a court or formal tribunal, and the resources available to navigate the justice system. This will generally involve a lawyer or professional advocate. The need for representation will depend on the facts of each case and the circumstances of each litigant. Factors which indicate that self-help will be inappropriate include:

- The nature of the matter - the more personal the subject matter of the dispute, the less likely that a person will be able to pursue a resolution objectively or rationally;
- The complexity of the matter and/or the law - the more complex the issue, the less likely a lay person will be able to resolve it without expert assistance;
- The severity of the consequences – for example, the liberty of the subject is a matter that must be treated with the utmost care and consideration;

- The balance of power between the parties - the more unequal the parties, the more likely that assistance will be necessary to ensure justice.

The LIV recognises that 'cases involving people representing themselves take up to five times as long as those involving lawyers'[29] which is having adverse effects in the justice system and as noted by the Productivity Commission may lead to poor outcomes for the self-represented litigant[30] which is an undesirable outcome. Some difficulties faced by self-represented litigants include being unable to:

- follow proper court and tribunal processes,
- distil and get to the essence of their case; and
- present the required evidence properly or at all.

The result of this difficulty is that more intervention is required from the bench and poses great difficulty for the opposing party. Further, in some instances, self-represented litigants can cause undue delay and bring about unmeritorious cases.

Sharpe recognises that 'courts in their duty to ensure a fair hearing… have a positive duty to give assistance to a self-represented litigant to redress imbalance.'[31] Sharpe notes the case of *Abram v Bank of New Zealand*[32] which provides that 'what a judge must do to assist a litigant in person depends on the litigant, the nature of the case and the litigant's intelligence and understanding of the case.'[33] In this regard the LIV recognises that there are various complexities associated with courts and tribunals being able to assist self-represented litigants to clearly understand how to present their case.

In Victoria, each court and tribunal has developed information toolkits to assist self-represented litigants to understand court process and procedures. Similarly, many courts and tribunals utilise their websites to provide videos and other resources to help litigants familiarise themselves with the court or tribunal prior to attending a hearing. The LIV notes that in October 2012, the Fair Work Commission released its *Future Directions* publication[34] which outlines initiatives that the Commission was to introduce to amongst other things promote fairness and improve access to the Commission. The Commission recognised the need to cater for self-represented litigants and committed to improving the information provided for matters which could be brought to the Commission by employers and employees. The Commission committed to making a variety of material available in the form of multimedia and booklets which incorporate checklists to assist the parties.[35] The Commission has since updated and introduced various benchbooks on the topics of Unfair Dismissals, Anti-Bullying and General Protections matters.[36]

Each benchbook is designed to assist parties lodging or responding to applications related to unfair dismissal, bullying or general protections under the *Fair Work Act* 2009 (Cth). Each benchbook contains information to assist parties in the preparation of material for matters before the Commission including summary of the law, the relevant case law and questions to consider when making or responding to a claim. The LIV acknowledges that the depth and breadth covered by the benchbook cannot necessarily be replicated in all jurisdictions, but the benchbooks are a good example of trying to make the law and Commission procedures understandable for a self-represented litigant seeking to make or respond to an application.

[29] Liz Richardson and Liz Porter 'Self-representation piling pressure on justice system' The Age, 16 April 2014
[30] PC Draft Report pg 433
[31] Michelle Sharpe 'Dealing with a Self-Represented Litigant' LIJ April 2014, pg 54, 56
[32] (1996) ATPR 41-507.
[33] (1996) ATPR 41-507 at 43.
[34] Available here: https://www.fwc.gov.au/documents/documents/resources/FutureDirections.pdf
[35] Fair Work Commission, Future Directions pg 3
[36] Benchbooks available here: http://benchbooks.fwc.gov.au/benchbooks/

While the LIV commends work that has been undertaken by the courts and tribunals to develop information toolkits and benchbooks to assist self-represented litigants, the LIV holds grave concerns that self-represented litigants are likely to suffer disadvantage in trying to present their case to the court or tribunal, which is counterproductive and therefore court or tribunal funded resources are not achieving what they are intended to do. The overriding effect is that self-represented litigants are relying heavily on judicial guidance to run their case which poses significant issues when the opposing party is represented and there is a risk of jeopardising judicial neutrality.[37] In addition, the LIV submits that to require court and tribunal staff to assist self-represented litigants to understand all time-critical events in their case is a significant burden and will add to the already heavy workload of the courts and is again counterproductive.

To demonstrate this, in 2012-2013, the Supreme Court of Victoria's Registry assisted1,597 self-represented litigants, a 21 per cent increase from the previous financial year.[38] The Court has detailed in its 2012-2013 Annual Report that self-represented litigants made up 23 per cent of total initiations, which is a high percentage of the Court's caseload made even more onerous when considered in the context of the additional management such matters required.[39]

The County Court also recognised an increasing number of self-represented litigants and attributes this to the growing financial cost of litigation.[40] With this in mind, the LIV submits that continuing debate over increased legal funding, in addition to the more novel ideas such as; the provision of lay advocacy, the introduction of a Legal Expense Contribution Scheme and re-invigoration of Legal Expense Insurance should be regarded as ways in which the justice system will be able to provide just outcomes for self-represented litigants.

DRAFT RECOMMENDATION 14.2

Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.

Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.

To some extent the LIV supports this Draft Recommendation, however submits that the focus needs to be on providing representation to Self-Represented Litigants.

[37] Michelle Sharpe 'Dealing with a Self-Represented Litigant' LIJ April 2014, pg 54, 57
[38] Supreme Court Annual Report 2012-2013, pg 4
[39] Supreme Court Annual Report 2012-2013, pg 20
[40] County Court Annual Report 2012-2013, pg 29

INFORMATION REQUEST 14.2

There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?

The LIV considers that unbundled legal services should be more readily adopted as discussed in the response to Draft Recommendation 7.5.

The LIV queries the practicality of imposing a co-contribution arrangement on a Self-Represented Litigant when a decision has been made not to pay for a lawyer. Rather, conditional costs agreements can be put in place for meritorious cases, provided that early disclosure of this is made.

Further, it is queried whether Self-Represented Litigants should be referred to early neutral evaluation by court registries, which may assist to resolving unmeritorious cases and/or confining the issues in dispute therefore reducing the time and cost of litigation.

INFORMATION REQUEST 14.3

How widespread are problems around conflicts of interest for providers offering unbundled services? Do provisions that deal with conflicts of interest need to be refined so as not to prevent people benefitting from discrete, one-off forms of advice from assistance services and if so, how might this best be done?

Conflicts can be managed if appropriate protocols are in place to deal with them which could include the provision of information barriers.

DRAFT RECOMMENDATION 14.3

Governments, courts and tribunals should work together to implement consistent rules and guidelines on lay assistance for self-represented litigants

To some extent the LIV supports this Draft Recommendation, however submits that the focus needs to be on providing legal representation to Self-Represented Litigants.

CHAPTER 15: TAX DEDUCTIBILITY

DRAFT RECOMMENDATION 15.1

The Commission recommends that no change be made to existing tax deductibility of legal expenses.

The LIV submits that individuals generally do not commence litigation in order to receive a tax deduction and that not all expenditure on litigation is deductable in any event. Further, the LIV considers it inappropriate for any changes to laws relating to deductibility of appropriate legal expenses that are a cost of doing business. Therefore, the LIV is supportive of this Draft Recommendation.

CHAPTER 16: COURT AND TRIBUNAL FEES

The LIV reiterates concern that court and tribunal fees are a serious impediment to access to justice.

The LIV refers comments made in the Law Council's 2009 submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Access to Justice and subsequently in its response to the Regulatory Impact Statement for the proposed increase in Victorian Civil and Administrative Tribunal Fees 2013.[41] In those submissions the Law Council and LIV expressed concerns that charging people on a 'user pays' basis for the administration of justice is problematic and may potentially create a serious impediment to access to justice.

The LIV has previously raised concern over the recent fee increases in the Magistrates', County, Supreme and Federal Courts and VCAT. The LIV notes that the Government's justification for increases in the Regulatory Impact Statements for the proposed increases in Magistrates', County and Supreme Court and VCAT Fees was said to be the appropriateness of a 'user pays' model whereby the Courts and Tribunal operate on a 'fee for service' basis. The LIV raised serious concerns about justifying fee increases on this basis in its responses to the various Regulatory Impact Statements.[42]

The LIV is particularly concerned about the increase in administrative costs of courts being used to justify the increases in the County and Supreme Courts[43] and reiterates concerns raised in its November 2012 submission responding to the Regulatory Impact Statement for the proposed County Court (Fees) Regulations 2012 and Supreme Court (Fees) Regulations 2012.[44] Court users do not have any influence over administrative efficiencies or inefficiencies within the court system. The LIV is concerned that drawing a link between cost recovery from users and an increase in administrative costs of the courts is artificial. The LIV submits that the administrative burden of the courts could be reduced by implementing more 'self-service' options such as electronic filing.

The LIV observes that the fees and charges levied by VCAT are likely to increase dramatically in the next decade as it moves to a more 'user pays' model. In a Regulatory Impact Statement issued by the Department of Justice, it is apparent that VCAT fees and charges are to increase in most lists by an average of 56 per cent and in some cases up to more than 2500 per cent. This will have a significant negative impact on access to justice for the Victorian community, especially in planning and environment reviews. These increases will be indexed each year.

[41] LIV, *Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal (Fees) Regulations 2013* (15 February 2013) <http://www.liv.asn.au/getattachment/a3593364-b90d-45bc-9127-88159c789c72/Regulatory-Impact-Statement-for-proposed-Victorian.aspx>.
[42] Ibid at 4.
[43] Regulatory Impact Statement for proposed County Court (Fees) Regulations 2012 and Supreme Court (Fees) Regulations 2012 (October 2012) < http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/SupremeCourtandCountyCourtFeeRegulations2012-RegulationImpactStatement(PDF)/$File/Supreme%20Court%20and%20County%20Court%20Fee%20Regulations%202012%20-%20Regulation%20Impact%20Statement%20(PDF).pdf >.
[44] LIV, *Regulatory Impact Statement for proposed County Court (Fees) Regulations 2012 and Supreme Court (Fees) Regulations 2012* (November 2012) (not available online).

The LIV submits that structural reform and process efficiency by tribunals has a greater potential to reduce the incrementally increasing costs of participation in administrative reviews in tribunals and the cost of participation in review processes than the blunt response of simply reducing or fixing [45] legal costs.

DRAFT RECOMMENDATION 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

- **in cases concerning personal safety or the protection of children**
- **for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.**

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

The LIV opposes increased cost recovery. As outlined above, the LIV opposed to a 'user-pays' justice system.

DRAFT RECOMMENDATION 16.2

Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.

The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:

- **whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body**
- **the amount in dispute (where relevant)**
- **hearing fees based on the number of hearing days undertaken.**

The LIV raises concern over this Draft Recommendation, namely why tax payers should be required to pay extra for the privilege to have access to the courts.

With respect to fee allocation of indirect and capital costs, the LIV agrees with the relevant factors outlined above. The LIV notes that for individuals, non-for-profit organisations, small business, large corporations and government bodies, fees are recoverable as costs in the cause, similarly for the amount in dispute (where relevant). Further, in relation to hearings fees based on the number of hearing days, the LIV notes that an increase to the daily hearing fees may be considered, therefore imposing higher fees for longer cases.

The LIV considers that apart from paying a relatively nominal fee for accessing the courts, a party is likely to feel aggrieved if access to justice is denied because they are unable to pay the 'cost recovery fee'.

[45] Major Increases to VCAT fees proposed January 2013
http://www.edovic.org.au/downloads/files/law_reform/edo_vic_major_increases_VCAT_fees_proposed.pdf

The LIV also considers possible consequences arising from this proposal, namely a losing defendant being convinced that the judge was "taking sides". Further that the issue of judicial immunity may be raised, particular if a judge/court is being paid, and whether Australian Consumer Law would be applicable.

DRAFT RECOMMENDATION 16.3

The Commonwealth and State and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2

The LIV is supportive of this Draft Recommendation in so far as heavy court users will be required to pay more. In this context, a 'heavy user' is defined as a public company or statutory company. In addition, this could take into consideration the number of days of trial noting that in the Federal Court, a fee structure exists for matters that run for longer than five days.

DRAFT RECOMMENDATION 16.4

The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.

Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible party is successful in recovering costs or damages in a case.

Fee guidelines in courts and tribunals should also grant automatic fee relief to:

- **parties represented by a state or territory legal aid commission**
- **clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.**

Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.

INFORMATION REQUEST 16.2

The Commission invites comment on the relative merits and costs of automatically exempting parties from paying court fees based on:

- **the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card**
- **passing an asset test in addition to possessing a concession or health card**
- **the receipt of a full rate government pension or allowance.**

The Commission also seeks feedback on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.

This response addresses Draft Recommendation 16.4 and Information Request 16.2.

The LIV is supportive of the Draft Recommendation in which commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship.

Eligibility for Fee Waiver

In a joint submission with the FCLC and PILCH, the LIV submitted that Victoria's system for court fee waiver creates an administrative barrier to access to justice and we recommended streamlining processes to bring them in line with federal and other state governments.[46] To this end, the joint authors advocated that there should be a single fee waiver form for all Victorian courts and tribunals; and express exemption categories, based on Family, Federal and Federal Magistrates Courts of Australia fee waiver policies, to significantly reduce time spent on applications and ensure more efficient use of *pro bono* resources to streamline the process of waiving court fees, but suggested the issue is most appropriately the subject of regulations because it concerns the creation of automatic exemption categories which might have revenue implications.[47] To ensure more efficient use of *pro bono* resources, the joint authors proposed the promulgation of regulations which outline express exemption categories for exemption from liability to pay court fees in all Victorian courts and tribunals. Further, it was proposed that courts and tribunals should retain a discretionary power to waive fees in other cases of financial hardship.

The joint authors recommend that a single fee exemption and waiver application for Victorian courts and tribunals be based on former provisions of the *Federal Courts of Australia Regulations* 2004, prior to their amendment on 1 November 2010. The federal courts' previous system provided express exemption from paying court fees for individuals who:

- have been granted Legal Aid;
- hold a health care card;
- hold a pensioner concession card;
- hold a Commonwealth seniors health card;
- hold another card issued by the Department of Family and Community Services or the
- Department of Veterans' Affairs;
- are an inmate of a prison or are otherwise lawfully detained;

[46] LIV, *Streamlining of waiver of court and tribunal fees processes in pro bono matters in Victoria* (4 March 2011) < http://www.liv.asn.au/getattachment/5bc5b877-876b-47f8-b94b-a457234ac210/Streamlining-of-waiver-of-court-and-tribunal-fees-.aspx>.
[47] Ibid.

- are a child under the age of 18 years;
- are in receipt of Youth Allowance or Austudy; or
- are receiving benefit under ABSTUDY.[48]

In addition, the federal courts had discretionary power to waive fees in other cases of financial hardship.[49] Where an individual wished to be considered for a fee waiver, she or he was required to provide a more detailed financial statement.

Fee postponements

With respect to the use of fee postponements, the LIV submits that the use of fee postponements is preferable to the use of deferred payments which result in valuable court resources being spent on chasing up payments.

Partial Fee Relief

The LIV does not support a system that permits fee deferral. Notwithstanding this, the LIV considered that all waived fees (whether full or partial) should be collectable if a case is successful and costs are awarded in favour of the party who was eligible for the waiver. The LIV considers that this fee payment should be payable by the unsuccessful party.

[48] *Federal Court of Australia Regulations* 2004 (Cth), reg 11(1)(a)-(c)*; Family Law Regulations* 1984 (Cth), regs 11(7)(a)-(d), 16(3)(a)-(b); *Federal Magistrates Regulations* 2000 (Cth), reg 8 (as at 19 August 2010).
[49] *Family Law Regulations* 1984 (Cth), regs 11(7)(e), 16(3)(c); *Federal Magistrates Regulations* 2000 (Cth), regs 9 and 13; *Federal Court of Australia Regulations* 2004 (Cth), reg 11(1)(d) (as at 19 August 2010).

CHAPTER 17: COURTS — TECHNOLOGY, SPECIALISATION AND GOVERNANCE

DRAFT RECOMMENDATION 17.2

Australian governments and courts should examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, to reduce court administrative costs and to support improved data collection and performance measurement.

The LIV refers to the experience of the District Courts in California, United States of America.

CHAPTER 18: PRIVATE FUNDING FOR LITIGATION

INFORMATION REQUEST 18.1

The Commission is seeking evidence on appropriate percentage limits for conditional and damages-based fees. Specifically:

- **Is the 25 per cent limit on uplift fees for conditional billing appropriate? What are the benefits and costs of changing this limit?**
- **Is a limit on damages-based fees necessary? If so, what should this limit be or how should it be determined? And should consideration be given to adopting a 'sliding scale' (where the maximum percentage payable to the lawyer decreases as the amount recovered by the client increases)?**

This response addresses Draft Recommendation 18.1 and Information Request 18.1

The LIV supports damages-based (contingency) fees for matters excluding criminal, family and immigration matters, with a cap on the percentage costs to protect vulnerable clients such as personal injuries clients.

Limits on Uplift Fees

The LIV recognises that there is a 25 per cent cap on uplift fees for conditional billing. At the time the cap was introduced, 25 per cent was considered to be the uppermost amount that could be charged however, practitioners are able to charge a lesser fee – or no fee. There is little evidence that in practice a lesser uplift fee is charged. If the upper limit of the fee is increased it is more than likely that the increased amount will be what is typically charged. There is probably no appetite to increase the uplift fee, however, with the benefit of consumer understanding about the operation of the fee there remains the option for clients to negotiate the reduction of the fee. Thus, even a modest increase in the fee could be managed well by all parties.

Limits on Damages-Based Fees

To encourage access to justice and sharing of the risk between lawyer and client, the LIV would support consideration of no cap on percentage based fees on recovered amounts where such fees have been accepted by a sophisticated[50] or independently advised client.

[50] "Sophisticated client" is defined under s 3.4.2 of the *Legal Profession Act 2004* (Vic).

DRAFT RECOMMENDATION 18.2

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

The LIV's views are consistent with this Draft Recommendation as there must be community confidence in the operation of the third party litigation funding system. The LIV believes that this can be achieved through a combination of proper disclosure mechanisms, judicial supervision (as necessary) and appropriate corporate regulation. The detail of the regulation and the appropriate licence requirements, capital adequacy and professional quality could be monitored by a body such as ASIC and would likely prevent/minimise funder defaults or misconduct.

CHAPTER 19: BRIDGING THE GAP

DRAFT RECOMMENDATION 19.1

The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:

- **how to define the scope of retainers**
- **the liability of legal practitioners**
- **inclusion and removal of legal practitioners from the court record**
- **disclosure and communication with clients, including obtaining their informed consent to the arrangement.**

The LIV supports the proposal in this Draft Recommendation.

See also response to Draft Recommendation 7.5.

INFORMATION REQUEST 19.1

The Commission seeks feedback on the prospects of legal insurance being offered by private providers and whether there are any public policy impediments to such an offering.

The LIV recognises that access to justice is expensive and is presently unaffordable for some. The LIV considers that there are no public policy impediments to Legal Expense Insurance (LEI) and recognises that the concept of LEI has existed in the United Kingdom and in Europe more generally for several years. As detailed in the Productivity Commission's Draft Report, the LIV acknowledges the previous Australian experiences with LEI and it is noted that it has failed due to the following reasons:

- At the time LEI was introduced into the Australian Market, there was limited data for proper actuarial assessment of the financial feasibility of LEI;
- Further at introduction time, the financial services market was vastly different to what it is today. For example, superannuation was not compulsory and the use of credit cards was limited;
- Finally, LEI was considered as optional insurance and therefore coverage was not seen as a priority.

The LIV has been working with professional groups to develop an LEI policy. The policy:

- Covers areas of high legal need as identified in the Legal Australia Wide Survey;
- Allows access to a lawyer of choice which in turn provides for increased availability of access to justice regardless of location. Further, lawyers will be subject to appropriate accreditation to satisfy professional regulators and the insurance industry;
- Will provide a capped amount of money which will provide sufficient to fund any some litigation for affected average Australians.

The LIV considers the utility of current financial, industry and insurance service products offer appropriate vehicles to which LEI may be offered as a right or at an additional charge.

The LIV is confident that its work to date and future consultations will ultimately result in a product which will go some way to increasing access to justice for middle Australians. The LIV welcomes any input from the Productivity Commission or other interested stakeholders.

The LIV strongly advocates that the development of LEI should not in any way detract from the need for governments to provide funding for legal assistance, which would be a sentiment echoed by insurance providers.

INFORMATION REQUEST 19.2

The Commission seeks feedback on the strength of the case for a Legal Expenses Contribution Scheme and views on any relevant design features, including what legal expenses should be covered and whether it should be limited to particular matters.

The LIV recognises that a significant proportion of middle Australians are precluded from pursuing access to justice because their income level is insufficient to meet the financial costs of legal services at the time it is required. The LIV considers that the private legal profession is not structured in such a way as to act as a banker to its clients. In addition, it is the case that courts have consistently voiced the view that lawyers should not have a direct financial stake in the legal affairs of clients. From a policy perspective, the LIV observes that requiring lawyers to provide monetary credit to clients will significantly increase the cost of legal services and lead to a diminution of the role of a lawyer as an officer of the court and independent professional.

The LIV recognises that the Higher Education Contribution Scheme (HECS) has not impacted either on the quality of education or essentially the independence of academia. Further, the financing of the HECS is widely recognised as a modest investment by government in Australia's future. The LIV has submitted to governments on various occasions arguments for justice reinvestment. A report undertaken by PriceWaterhouse Coopers in 2009 (commissioned by National Legal Aid) ascertained that each dollar spent on legal assistance returns between $1.60 and $2.25 in downstream savings to the justice system.[51]

For government to establish and fund a Legal Expense Contribution Scheme (LECS) would be an appropriate investment on the basis of increased savings in relation to other government services which would be achieved downstream as identified in empirical evidence above. In this regard, the LIV supports the proposition that the introduction of LECS may result in increased access to justice. However, a caveat to

[51] PricewaterhouseCoopers, 2009, The Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law, report prepared for National Legal Aid, page 39. See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload15a6.pdf

the introduction of LECS is that it should not be available to low income earners to avoid further disadvantaging low income earners with a debt owed to the government.

The LIV strongly advocates that the development of LECS should not in any way detract from the need for governments to provide funding for legal assistance.

The LIV welcomes the opportunity to further discuss implementation of such a scheme that would include what would constitute 'triggers for repayment' including levels of taxable income, extent of realised assets, access to government entitlements and security for repayment.

CHAPTER 21: REFORMING THE LEGAL ASSISTANCE LANDSCAPE

The justice system functions most efficiently and fairly when legal assistance is appropriately funded and operating at its optimum level.

The LIV observes that the current legal assistance system was introduced on the basis that although Commonwealth, State and Territories share legislative responsibilities for areas most likely to attract legal aid funding, the Commonwealth with the significantly higher aptitude for revenue generation through taxation should provide a greater share of legal aid funds. Despite this, the Commonwealth's contribution to legal aid assistance funding has decreased over the last two decades from 55 per cent of costs to barely 35 per cent of costs. This abrogation of responsibility has in effect caused the current legal aid crisis.

The LIV has been leading advocacy over a number of years to highlight the crisis in legal aid funding in the State of Victoria, which now has the lowest per capita rate of legal funding in the Commonwealth. The reduction in funding has had a dire effect on access to justice for the most vulnerable in this State.

Victoria Legal Aid recorded a $9.3 million deficit in the past year due to increased demand and a decrease in recurrent funding from government. Because of the diminishing contribution to legal aid funding by the Commonwealth, the Victorian Government has increasingly been forced to find additional funding for legal aid from the Public Purpose Fund. As this fund is resourced by interest on investments and is subject to market fluctuations, the Public Purpose Fund is unlikely to be able to meet the continuing demands on it from various sectors.

The LIV reiterates its support of the mixed model of service delivery and acknowledges the important roles played by the private profession, Victoria Legal Aid and the community legal sector in Victoria's legal assistance landscape.

In reviewing the recommendations for possible reform of this landscape, we wish to highlight our concerns that current legal aid funding levels have resulted in vastly inadequate payments being made to private practitioners doing legally aided matters. The LIV submits that funding for private practitioners has fallen below a level that represents fair recompense for the work that is done. Some members report that it is no longer economically viable for them to take on legally aided matters.

The LIV submits that private practitioners play a vital role in Victoria's legal aid system. They provide high quality legal services to some of the most vulnerable and disadvantaged members of our society. VLA simply cannot meet the demand for case work services in-house[52]. Without the services provided by private practitioners at pro-bono and heavily discounted rates, the legal aid system would collapse.

The LIV has consistently voiced the opinion that there has been long-term, chronic underfunding across the entire legal assistance sector restricting access to justice and impacting on the enforcement and protection of fundamental rights.

The LIV has called on the Federal Government for several years to address chronic underfunding of the legal assistance sector. The LIV notes that VLA's Annual Report showed that VLA had a $3,000,000 deficit for the 2011-2012 financial year. The current shortfalls in funding limit the services provided to some of the most disadvantaged people in the community. As a result of inadequate funding, VLA has tightened the application of the 'means test', which assesses an individual's eligibility for legal aid assistance. Those who

[52] According to figures in Victoria Legal Aid's Annual Report 2012-13, out of 39,782 total grants of aid, 29,555 went to private practitioners: http://ar2013.vla.vic.gov.au/grants-legal-assistance

cannot afford legal representation or advice, but do not qualify for legal aid, add significant strain to the entire justice system, increasing the number of self-represented parties in courts. This increases the prospect of mis-trials, procedural delays and potential miscarriages of justice which is of grave concern to the LIV.

2014 State and Federal Budgets

In the 2014 Victorian State Budget, the LIV was disappointed to see that no additional funding was being allocated to Victoria Legal Aid, rather it was focussed on punitive measures.[53] Further, following the 2014 Federal Budget the LIV was critical of the $15 million cut to legal assistance by the Federal Government and voiced a failure of the Government to extend the basic human right of access to justice. The LIV noted that pre-budget funding for legal assistance was already too low to sustain a viable system to assist vulnerable citizens[54] and that $80 million in additional funding was required from the Government.[55]

In the lead up to the Victorian state election in November 2014, the LIV has called for the State Government to make an immediate one-off $10 million injection of legal aid funding and then provide appropriate ongoing recurrent funding.[56]

Community Legal Centres (CLCs)

The LIV holds the view that CLCs play a valuable and distinctive role in the legal assistance sector and that any recommendations that would have the effect of removing or reducing community legal services will ultimately reduce access to justice. The LIV recognises the need to draw attention to the differences between legal aid commissions and CLCs. The LIV notes the report prepared by the Institute for Sustainable Futures on the Economic Value of Community Legal Centres.[57] The report identified that, along with clear benefits to individuals, CLCs also provide broader public benefits to society. It was found that the work of CLCs acted to reduce the need or extent to which individuals could be involved in the legal system, which results in 'avoided' costs which the government would have been responsible for, but for the work of these centres. The report also identified intrinsic benefits to society in the form of a level of social service, welfare, assistance, protection or information to vulnerable citizens. As identified in the report, there are inherent difficulties in costing such benefits.

The LIV is supportive of the Federation of Community Legal Centres (FCLC) view that CLCs should retain the flexibility to respond to changing legal need among priority groups in their community, and should also retain the capacity to assist people who do not meet legal aid's strict means test but who would face substantial injustice if denied legal assistance.

Like the FCLC, the LIV submits that the Productivity Commission is well placed to conduct or commission detailed economic analysis in order to make recommendations about the quantum of additional resources required to address the access to justice crisis in this country, and is encouraged to do so. Without investment of additional resources to legal assistance services (legal aid, CLCs and Indigenous legal services) it will not be possible to significantly improve access to justice among disadvantaged Australians, even if other mechanisms are introduced to improve access for middle income Australians.

[53] LIV Media Release available here: http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/Cashed-up-prisons-but-no-money-for-Legal-Aid.aspx?rep=1&glist=0&sdiag=0
[54] LIV Media Release available here: http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/Federal-budget-denies-access-to-justice-for-Victor.aspx?rep=1&glist=0&sdiag=0
[55] Law Council of Australia Media Release available here: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1412_--_Chronically_underfunded_legal_aid_commissions_suffer_further_cuts_in_federal_budget.pdf
[56] LIV, Call to the Parties – State Election 2014 Key Issues, available here: http://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/CallToTheParties2014
[57] Institute for Sustainable Futures on the Economic Value of Community Legal Centres Report 2006 http://www.isf.uts.edu.au/publications/edgertonpartridge2006economicvalue.pdf

DRAFT RECOMMENDATION 21.1

Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

The LIV notes that legal aid funding allocation is administered by Victoria Legal Aid (VLA) via the Legal Aid Fund.[58] In 2013, VLA introduced funding cuts across all areas of law due to "unprecedented demand" for its services, which it said had not been met with proportionate increases in government funding. The LIV submits that some mechanism is required to ensure that there is an adequate amount of funding allocated to civil and criminal law matters.

The LIV does not support the demarcation of funding between jurisdictions.

INFORMATION REQUEST 21.1

The Commission seeks views on whether the above demarcation of funds would be sufficient to ensure that appropriate resources are directed towards non-criminal, non-family law matters.

While the LIV agrees that demarcation of funding is theoretically a logical recommendation, LIV submits that service demands in different jurisdictions will be difficult to predict as there are many variables that can impact on service delivery such as changes to Court practices and procedures, or the introduction of government policy or legislation which may lead to the increase of service demand in any particular jurisdiction. For example, recent legislation abolishing suspended sentences in Victoria will mean that there will be an increase in the demand for criminal appeals against sentences, which in turn will lead to increased costs in legal aid service delivery in these matters, and additional funding will be required to meet this demand.

DRAFT RECOMMENDATION 21.2

The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

The LIV supports this Draft Recommendation and considers that services must retain flexibility to develop their own criteria responding to priority groups and legal issues in particular communities.

[58] The Legal Aid Fund represents the allocation of money received, managed and controlled by Victoria Legal Aid in accordance with section 41 of the *Legal Aid Act 1978* (Vic).

DRAFT RECOMMENDATION 21.3

The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.

The LIV supports this Draft Recommendation. The LIV considers that CLCs and legal aid commissions should work together to ensure that criteria are complementary and operate together to provide maximum access to justice for the relevant community or client groups.

However, uniform criteria across CLCs and LACs are not supported as this would remove CLCs' capacity to:

- focus on community-specific needs or variations in the legal issues affecting a CLC's client group or community;
- respond to emerging issues and needs within a CLC's client group or community;
- assist people who do not meet the means test elements of legal aid eligibility criteria but who experience various forms of disadvantage and marginalisation and would face severe injustice if excluded from all legal service assistance.

INFORMATION REQUEST 21.2

The Commission seeks views on the appropriate relationships between legal aid rates and market rates for the provision of legal services. What might be the cost of altering the relationship between the two rates?

The LIV submits that, over time, legal aid funding has continued to decline in real terms and has not kept pace with inflation or with the increased costs involved in running a legal practice.

Although fees have not substantially increased, there has been a large increase in the complexity and seriousness of legally aided matters being conducted by private practitioners. This means that the work required for each aided matter has increased. A number of factors have contributed to this increasing complexity. The eligibility for legal aid in summary matters has been tightened to provide that aid is only available where there are serious consequences for the defendant[59]

Additionally, the summary jurisdiction of the Magistrates' Court has been expanded so that more serious cases are now heard there. The monetary jurisdictional limit has also been increased from $25,000 in 2007 to $100,000 today, vastly expanding the number of more complex and serious offences dealt with on VLA summary lump sum grant of aid. A contested matter in the Magistrates' Court will be paid at a far lower rate than a County Court trial but will often have a similar level of complexity and require the same amount of preparation. Matters have also increased in complexity due to the greater number of ancillary orders that can be made by the courts. In the area of sexual offences there have been a large number of legislative developments over the past few years, which have increased the complexity of these matters including registration of offenders, DNA sampling and ongoing supervision and monitoring orders.

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

Private practitioners have absorbed much of the work of administering legal aid grants with the introduction of s29A panels[60] and the simplified grants process. While this has resulted in a cost saving to VLA, it places an additional level of responsibility onto private practitioners. Private practitioners are required to assess applications for aid and to obtain and hold all relevant paperwork supporting an application. Practitioners are also subject to audits of their files. There are heavy consequences for practitioners if an error is made, even if that error was made in good faith.

In 2008 the Victorian Bar commissioned Price Waterhouse Coopers (PWC) to conduct *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases.*[61] The report found that on average, barristers undertaking legal aid work are paid approximately 50 per cent below the median salary of their contemporaries. In each group, VLA funded barristers' effective incomes are ranked lowest compared to other legal professionals.

In August 2008, the LIV surveyed LIV member criminal law practices, representing approximately 40 criminal law firms, to determine an average private rate for a range of different matter types as a comparison to VLA rates. This research indicated that private clients are effectively subsidising legally aided clients. While this may be manageable in the short-term it is not a viable long-term strategy and it cannot take the place of a properly funded legal aid scheme.

The rates that are paid by VLA for criminal law matters fall significantly below the market rate for equivalent matters. Traditionally legal aid fees have been set at approximately 80 per cent of fees charged to private clients. Criminal law practitioners have historically performed work at a discount for legal aid matters, however, it has been reported by our members that rates are now so low that practitioners are finding it very difficult to justify continuing to do legal aid work.

Legal aid matters are likely to be complex in nature and have serious consequences for the accused. Legally aided clients are also more likely to present with complicated personal histories including intellectual disability, mental health issues, drug and alcohol problems or illiteracy (and often a combination of these). Practitioners spend a great deal of time assisting their clients with logistical issues, and explaining the court process to them – which can often be a difficult task. Practitioners have also expressed concern that it is difficult to meet their professional obligations because they cannot afford to spend the time required on legal aid matters.

The table below shows the range of fees charged to private clients in each matter and the average private rate in comparison to VLA's payment for the same matter in the year 2008.

While there have been wide ranging changes to VLA's fees structure over the past 12 months, these figures demonstrate that legal aid fees have fallen far short of the 80 per cent that has been considered a fair proportion of private fees in the past.

At their highest, legal aid rates do not even reach 50 per cent of average private fees and in most areas fall significantly short of this.

[60] VLA section 29A panels are panels established for different classes of matters. Membership is by firm to one or more specialist panels: https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/panels
[61] http://www.aph.gov.au/DocumentStore.ashx?id=d7260048-61e2-4d53-88e4-15f7e7a53af3 - pg 17

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

Actual cost of conducting legally aided matters

LIV research establishes that legal aid rates do not adequately compensate private practitioners for the amount of work that is required on each legally aided matter. In 2008, the LIV had a number of randomly selected legally aided files professionally costed to provide an accurate view of the amount of work completed for a legally aided matter compared to VLA's lump sum payments. These figures deal solely with solicitor/ client costs and exclude counsel fees and other disbursements.

Type of matter	Actual cost as assessed by costs assessor	Amount paid by VLA	Percentage
Magistrates' Court plea	$4157	$721	17%
Bail application – Magistrates' Court (2 day hearing)	$4360	$745	17%
Consolidated plea in Magistrates' Court	$3090	$1405	45%
County Court trial A (10 day hearing)	$11789	$6632	56%
County Court trial B (13.5 day hearing)	$14502	$7919	55%

Legal aid fees are paid as a lump sum fee rather an hourly rate. This means that they are unable to account for the complexity of an individual matter. Additionally, legal aid fees do not take into account the seniority of the person conducting the work so that a recently admitted solicitor and a solicitor advocate with 20 years of experience are paid the same amount.

It is notable from the figures in both of the above tables that legal aid fees in Magistrates' Court matters are particularly low. This is of particular concern as the majority of matters are heard in the Magistrates' Court and these matters form the bulk of the work done by private practitioners.

The LIV also notes that in regional or rural areas, duty lawyer schemes in the Magistrates' Court are often provided by private practitioners. Duty lawyers play a vital role in providing access to justice for a broad range of Victorians, particularly those who may narrowly miss out on being eligible for legal aid but who cannot afford to pay for private representation. LIV practitioners providing duty lawyer services in regional areas are reporting an ever-increasing demand for duty lawyer services.

DRAFT RECOMMENDATION 21.4

The Commonwealth Government should:

- **discontinue the current historically-based Community Legal Services Program (CLSP) funding model**
- **employ the same model used to allocate legal aid commissions funds to allocate funding for the CLSP to state and territory jurisdictions**
- **divert the Commonwealth's CLSP funding contribution into the National Partnership Agreement on Legal Assistance Services and require state and territory governments to transparently allocate CLSP funds to identified areas of 'highest need' within their jurisdictions. Measures of need should be based on regular and systematic analyses in conjunction with consultation at the local level.**

The LIV supports the last recommendation to require state and territory governments to transparently allocate Community Legal Service Program funds to identified areas of 'highest need' within their jurisdictions. We agree that 'measures of need' should be based on regular and systematic analyses in conjunction with consultation at the local level.

INFORMATION REQUEST 21.3

The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.

The LIV and FCLC holds the view that competitive tendering is not necessary and would negatively impact sector productivity, capacity, performance, and therefore services to clients.

A collaborative model involving CLCs in the decision making process is a more appropriate and effective approach. There are already examples of Victorian CLCs working either with other CLCs or with Victoria

Legal Aid and other CLCs to jointly map legal need, plan and coordinate services and maximise efficiency and effectiveness.

INFORMATION REQUEST 21.4

The Commission seeks feedback on the extent of, and the costs associated with, meeting the civil legal needs of disadvantaged Australians, and the benefits that would result.

The LIV supports this Draft Recommendation.

DRAFT RECOMMENDATION 21.5

The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.

The LIV supports this Draft Recommendation.

CHAPTER 22: ASSISTANCE FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

DRAFT FINDING 22.1

Specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.

The LIV agrees with draft finding 22.1 of the Productivity Commission Draft Report that specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.

As noted by the National Aboriginal & Torres Strait Islander Legal Services (NATSILS) in their submission into this Inquiry in November last year, Aboriginal and Torres Strait Islander peoples experience higher levels of legal need compared to non-Aboriginal and Torres Strait Islander peoples and often experience clusters of legal needs.[62] In the Victorian context, this is reflected in the findings of the Indigenous Legal Needs Project Victorian report launched in November last year.[63] This report is part of the wider Indigenous Legal Needs Project which aims to identify and analyse the legal needs of Aboriginal and Torres Strait Islander communities in non-criminal areas of law and provide an understanding of how legal service delivery might work more effectively to address identified civil and family law needs of Aboriginal and Torres Strait Islander communities. The Victorian report identified significant civil and family law needs in the eight communities visited as part of the project, the priority issues being housing, credit/debt, discrimination and disputes with neighbours as well as child protection, social security, victims compensation and wills. The report also found that there is a complex interplay between civil, family and criminal law problems and that family violence can be connected to a number of civil and family law problems.

NATSILS concluded in its submission to the inquiry that the level of legal need faced by Aboriginal and Torres Strait Islander people combined with the chronic underfunding of culturally competent legal assistance services causes significant barriers to access to justice for Aboriginal and Torres Strait Islander peoples.[64] The LIV supports the recommendations made by NATSILS for:

- Provision of sufficient funding for Aboriginal and Torres Strait Islander legal services to expand their civil and family law services and meet demand, without diminishing funding available for legal assistance services for criminal matters; and
- Provision of sufficient funding for family violence prevention legal services to meet demand and expand service delivery to metropolitan areas.

[62] NATSILS, Submission to the Productivity Inquiry into Access to Justice Arrangements (November 2013), pg3, available at: http://www.natsils.org.au/portals/natsils/submission/NATSILS%20Submission%20-%20Productivity%20Commission%20Inquiry%20into%20Access%20to%20Justice%20Arrangements%208-11-13.pdf.
[63] Melanie Schwartz, Fiona Allison, Chris Cunneen, *The civil and family law needs of Indigenous people in Victoria: A report of the Australian Indigenous Legal Needs Project* (2013) available at: http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_131180.pdf.
[64] Above n 58, at pg 13.

CHAPTER 23: PRO BONO SERVICES

The LIV acknowledges that the legal profession has a strong tradition of pro bono representation and the amount of pro bono work undertaken by the profession is a significant contribution to increasing access to justice.

In 2008, the LIV adopted a policy statement on pro bono work.[65] The statement notes that the LIV does not consider pro bono work to be a substitute for government's responsibility to provide adequate funding for free and accessible legal services. However, the LIV supports the legal profession's ethical obligation to enhance access to justice for disadvantaged persons or charitable and community organisations, and promote the public interest, by encouraging the voluntary contribution of its members to undertake pro bono work.

The LIV operates the Law Institute of Victoria's Legal Assistance Scheme ('LIVLAS') which is administered by Justice Connect (formerly PILCH since 2002). LIVLAS operates as a referral service that acts as a facilitator of pro bono legal assistance between the community and the private legal profession. It provides access to justice to those members of the community who have a meritorious legal problem, do not have sufficient funds to retain a lawyer and cannot obtain appropriate legal assistance from government funded bodies or community based organisations. LIVLAS can assist in facilitating referrals for the following types of matters: administrative law, criminal law, equity/probate, employment law, civil law, commercial law, property law, media and entertainment law, family law and local government. As of October 2013, LIVLAS has 75 members which are predominately located in Melbourne CBD, but there are suburban and rural members available to assist. In the 2012/2013 financial year, there were 1770 requests for LIVLAS assistance.

The table below provides a summary of the top areas of law with the highest number of referrals made.

Area of law	**Number of referrals made**
Immigration	27
Property	9
Credit/Debt	7
Torts	7
Family Law/De Facto	5
Criminal	4
Employment/Industrial	2
Consumer complaints	2
Commercial	1

While the value of pro bono is recognised in all areas of law, information on the role of pro bono services in family law is available in the report prepared by the National Pro Bono Resource Centre into the limitations and opportunities for pro bono legal services in family law and family violence.[66] This report explores the unique nature of family law as a practice area and the unique nature of family law clients, and how this impacts on pro bono providers.

[65] LIV, Policy Statement on Pro Bono Work http://www.liv.asn.au/PDF/About/Governance/2009OctProBonoLIVPolicy

[66] National Pro Bono Resource Centre, *Pro Bono Legal Services in Family Law and Family Violence: Understanding the Limitations and Opportunities* (October 2013) available at: https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Family%20Law%20Report%20FINAL.pdf

DRAFT RECOMMENDATION 23.1

Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis.

Further, those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland.

- **For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the last three years (without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.**

The LIV is supportive of this Draft Recommendation.

DRAFT RECOMMENDATION 23.4

The provision of public funding (including from the Commonwealth, state and territory governments, and other sources such as public purposes funds) to pro bono service providers should be contingent upon regular, robust and independent evaluation of the services provided.

The LIV notes that in Victoria, scope exists for significant expansion of pro bono work by non-government panel firms if a tax deductible scheme was introduced for firms who undertook such pro bono work.

CHAPTER 24: DATA AND EVIDENCE

DRAFT RECOMMENDATION 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- **adopting common definitions, measures and collection protocols**
- **linking databases and investing in de-identification of new data sets**
- **developing, where practicable, outcomes based data standards as a better measure of service effectiveness.**

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

The LIV is supportive of this recommendation as more data is needed to properly evaluate the effectiveness of the justice system.

DRAFT RECOMMENDATION 24.2

As part of draft recommendation 24.1, existing data systems should be overhauled so that providers can track outcomes for intensive users of legal assistance services over time.

Whilst the LIV has no theoretical objection to this recommendation, questions about the funding of such an enterprise must be addressed.

The Productivity Commission's Draft Report refers to the Law Council of Australia's submission which highlights the financial burden incurred by collecting data. In this regard, the LIV recognises the need for funding to be allocated to enable and support effective data collection.

INFOMATION REQUEST 24.1

The Commission seeks feedback on where a data clearinghouse for data on legal services should be located. Such a clearinghouse needs to be able to coordinate data collection from multiple civil justice stakeholders and disseminate the information in a timely fashion. It should also have some expertise in linking, using and presenting data, especially administrative data. Ideally, the clearinghouse should also have experience in liaising with legal service providers and different levels of government, have an understanding of the operation of the civil justice system and understand the principles behind benchmarking.

The LIV again recognises the issue of funding for such a clearinghouse given the amount of work required to co-ordinate data collection and analyse the data. The LIV submits that there is likely to be little appetite for such a large project in the absence of clear funding provisions. In the short term, the LIV suggests that there might be a University which might further scope a possible larger data collection and analysis project.

DRAFT RECOMMENDATION 24.3

The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.

The LIV repeats the concerns about funding if the the LAW Survey is to be conducted in future, noting that such a project requires a significant investment of resources.

CONCLUSION

In conclusion, the LIV contends that increasing complexity of our society is inevitably reflected in the legal system being similarly complex. Further, there is a point at which self-help processes will be insufficient for most people or problems. In these circumstances, justice requires that there be a person or body who can determine the dispute, such as a court or formal tribunal, and the resources available to navigate the justice system. This will generally involve a lawyer or professional advocate. The need for representation will depend on the facts of each case and the circumstances of each litigant.

One of the LIV's primary objectives is to advocate for increased access to justice for individuals. In this regard, the LIV considers this Productivity Commission Inquiry extremely timely given the growing amount of unmet legal need identified in the *Legal Australia Wide Survey* and the significant decrease in legal assistance funding. The LIV strongly believes in the need for governments to properly fund the legal assistance sector so that individuals have access to the civil justice system. To bridge the current gap between eligibility of legal assistance through legal aid commissions and being able to afford legal assistance, the LIV considers that the legal profession needs to consider how it can contribute to increasing access to justice. In this regard, the LIV is supportive of lay advocacy to be more readily utilised in the justice system and has an increasing role to play increasing access to justice, subject to regulation. The LIV considers that the efficient of the administration of justice will be enhanced if lay advocacy was to be more openly permitted and accepted in the legal profession. Further, the LIV is also supportive of unbundled legal services as a vehicle for addressing unmet legal need as well as the development of Legal Expense Insurance. The LIV does not believe that these measures should not in any way detract from the need for governments to provide adequate legal assistance funding.

The LIV welcomes the opportunity to participate in the public hearings being held in June and to provide any other feedback as required by the Productivity Commission.

APPENDIX 1

LIV Submissions referred to in this submission

2014

Call to the Parties – State Election 2014 Key Issues (11 March 2014) < http://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/CallToTheParties2014>

2013

Fee Waiver at VCAT (1 October 2013) <http://www.liv.asn.au/getattachment/b2c3e19b-a24c-45a4-84f3-c3d9860d7ddc/Fee-Waiver-at-VCAT.aspx>

Legal Representation at the Fair Work Commission (17 September 2013) < http://www.liv.asn.au/getattachment/8dd08b3c-32a0-4534-9bbc-e4211cd324e0/Legal-representation-at-the-Fair-Work-Commission.aspx>

Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal (Fees) Regulations 2013 (15 February 2013) <http://www.liv.asn.au/getattachment/a3593364-b90d-45bc-9127-88159c789c72/Regulatory-Impact-Statement-for-proposed-Victorian.aspx>

Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the impact of Federal Court fee increases since 2010 on Access to Justice in Australia (28 March 2013) <http://www.liv.asn.au/getattachment/cb609474-383b-4a5a-9665-228f8245f27f/Impact-of-Federal-Court-Fee-Increases-Since-2010-o.aspx>

2012

Alternative Dispute Resolution and the Possible Role of Pro Bono Lawyers (13 December 2011) < http://www.liv.asn.au/getattachment/37e4f259-d0ad-4602-9be0-34732d8defe2/Alternative-Dispute-Resolution-and-the-Possible-Ro.aspx>

Regulatory Impact Statement for proposed County Court (Fees) Regulations 2012 and Supreme Court (Fees) Regulations 2012 (November 2012) (not available online).

2011

Streamlining of waiver of court and tribunal fees processes in pro bono matters in Victoria (4 March 2011) <http://www.liv.asn.au/getattachment/5bc5b877-876b-47f8-b94b-a457234ac210/Streamlining-of-waiver-of-court-and-tribunal-fees-.aspx>

2010

Interim report on Key Issues and Funding (National Legal Profession Reform Taskforce) (9 November 2010) <http://www.liv.asn.au/PDF/Practising/Reform/2010TaskforceInterimReportNov>

Transforming VCAT- Towards a three year Strategic Plan (28 June 2010) < http://www.liv.asn.au/getattachment/2a272f62-af4a-43f3-907e-95a7cee0ed3f/Transforming-VCAT--Towards-a-three-year-Strategic-.aspx>

2009

Senate Inquiry into Access to Justice (30 April 2009) <http://www.liv.asn.au/getattachment/842fb404-8779-46ee-a66f-0ccb14fb14d3/Senate-Inquiry-into-Access-to-Justice.aspx>.

2008

Victoria Parliament Law Reform Committee Inquiry into Vexatious Litigants (27 June 2008) <http://www.liv.asn.au/getattachment/b2fdb74c-77a1-4d0b-b575-23349da67de7/Inquiry-into-Vexatious-Litigants.aspx>