

# WEST HEIDELBERG COMMUNITY LEGAL SERVICE

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BACKGROUND PAPER

## **THE DISADVANTAGE OF THE COST OF LITIGATION EXPERT EVIDENCE FOR PEOPLE WHO ARE FINANCIALLY DISADVANTAGED**

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**A Report on the Effect of the Costs of Obtaining Expert Evidence  
Required in Court or Tribunal Cases on People who are Financially  
Disadvantaged, in terms of the Outcome of their Case and their  
Access to Justice**

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## Rationale

The term 'poverty' in Australia typically refers to people who are living in 'relative poverty', as opposed to living in the 'absolute poverty' of being without food and shelter.<sup>1</sup> People who are living in poverty due to their financial situation of having no or a low income, generally suffer from poorer health, limited access to education, fewer employment opportunities and greater social exclusion than those who are not suffering from financial disadvantage.<sup>2</sup> Such factors demonstrate that people who are living in poverty are not merely at an economic disadvantage, but are also disadvantaged in other areas of life. This includes the vital area – one that underpins a democratic society – of access to justice.

This has been recognised by the highest judicial officer in Australia, Chief Justice Gleeson of the High Court, who noted that the cost of litigation has increased in recent years and expressed his growing concern for litigants who are self-represented, due to their inability to pay for the costs of representation by a skilled professional or to obtain legal aid.<sup>3</sup>

In response to these concerns and the special needs of people who are financially disadvantaged, this report examines the effect on access to justice caused by an inability to fund expert evidence.

## Methodology

Two methods have been used in this research. In the initial stage, a literature review was conducted of the current legal aid and assistance schemes available to people who are financially disadvantaged in Victoria. This included both government and non-government schemes and studied policies in relation to funding disbursements, including expert evidence. Limitations of these schemes were examined.

The second research stage was comprised of interviews with two solicitors from a Community Legal Centre (CLC) in a disadvantaged area. Case studies extracted from these interviews that demonstrate the effect financial disadvantage has on access to justice were discussed, as well as key findings from the interviews. Recommendations ascertained from the two stages of research were then proposed.

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<sup>1</sup> Brotherhood of S<sup>t</sup> Laurence, *Information Sheets: Poverty* (2002), 1, see <<http://www.bsl.org.au/main.asp?PageId=130>>

<sup>2</sup> *Ibid*, 2

<sup>3</sup> Chief Justice Murray Gleeson, 'Current Issues for the Australian Judiciary' (Speech given at the Supreme Court of Japan, Tokyo, 2000), see <[http://www.hcourt.gov.au/speeches/cj/cj\\_Japanj.htm](http://www.hcourt.gov.au/speeches/cj/cj_Japanj.htm)>

## RESEARCH

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### **Part A – Literature Review of current legal aid and assistance schemes accessible by people who are financially disadvantaged in Victoria**

As the cost of litigation is a considerable barrier to access to justice for people who are financially disadvantaged, there are a number of organisations and schemes in Victoria that provide free legal assistance to those who could not afford to self-fund legal proceedings. These include Victoria Legal Aid (VLA), Community Legal Centres (CLCs), the Public Interest Law Clearing House (PILCH), Law Aid, the Law Institute of Victoria Legal Assistance Scheme, and the Victorian Bar Legal Assistance Scheme.

Although free legal assistance would appear to provide equitable access to justice in our democratic society, there still remain many people who are financially disadvantaged that fall through the cracks and do not qualify for Victoria Legal Aid (VLA) due to exclusionary criteria. VLA only provides legal assistance to people considered to be unable to afford the *full cost* of retaining the services of a legal practitioner.<sup>4</sup> In order to determine this, VLA uses a nationally applied 'means test'.<sup>5</sup>

The means test incorporates the applicant's income and assets, and is assessed against the estimated cost of the legal services that the applicant is seeking. If the applicant's weekly disposable income is less than \$255 per week (which equates to an annual disposable income of \$13,260), they qualify for VLA assistance. If the applicant's weekly disposable income is more than this, though they may still qualify, it is likely that they will be required to contribute to the legal costs in proportion to their income and the estimated total cost of litigation.<sup>6</sup>

While the foregoing qualifying process is evidentiary to the extent that it is clearly based on income, there are also less objective measures that can be used to determine – and restrict – the provision of free legal assistance. These are special provisions set out in the VLA Grants Handbook.<sup>7</sup> For example, the 'ability to borrow' is a special provision whereby if it is deemed that an otherwise eligible applicant could borrow the funds required for litigation from another source, then assistance

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<sup>4</sup> Victoria Legal Aid, *Grants Handbook* (28 May 2008), 19, see <<http://www.legalaid.vic.gov.au/xfw/handbook.htm>>

<sup>5</sup> Ibid

<sup>6</sup> Ibid, 70

<sup>7</sup> Victoria Legal Aid, *Grants Handbook* (28 May 2008), 80, see <<http://www.legalaid.vic.gov.au/xfw/handbook.htm>>

may be refused.<sup>8</sup> Another such provision is the 'lifestyle guideline', which dictates that if an applicant's lifestyle, activities, or even their interests suggest that the applicant has access to the required funds, without the infliction of undue hardship, then their application may be refused.<sup>9</sup>

These special provisions are more subjective than income assessment only and are open to interpretation by VLA grant division officers. For those applicants who are unhappy with VLA's decision, are aware of their right and feel capable of challenging that decision, the assessment may be reconsidered by another VLA grant division officer, and then by an Independent Reviewer.<sup>10</sup> VLA's stringent means test, and the inclusion of special provisions such as these in their qualifying process, can in effect exclude people who genuinely require financial assistance in order to conduct their legal action.

Fortunately, for those people who do not qualify for the provision of aid from VLA, an alternative source of assistance is available from one of fifty-two Community Legal Centres (CLCs) across Victoria, which collectively form the Federation of Community Legal Centres (Vic) Inc.<sup>11</sup> Victorian CLCs provide free legal advice and information to more than 100,000 people every year.<sup>12</sup> CLCs have been described as assisting, "...a broad cross section of the Australian community ... (including) clients who are on the margins."<sup>13</sup>

Unlike VLA's exclusive qualifying process that is applied to people seeking aid, CLCs adopt an inclusive policy, where it is deemed that all people have the right to equality before the law and the same rights to access legal services to protect their interests, regardless of their economic position or location.<sup>14</sup>

Other services that assist with legal aid for people who are financially disadvantaged include the Public Interest Law Clearing House (PILCH)<sup>15</sup> and the Law Institute of

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<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Victoria Legal Aid, *Grants of legal assistance: Guide and application form* (28 May 2008), see <<http://www.legalaid.vic.gov.au/fundingcases.htm>>

<sup>11</sup> Community Law, *About Us* (2008), see <<http://www.communitylaw.org.au/fedclc/>>

<sup>12</sup> Federation of Community Legal Centres (Vic) Inc, *Federal Justice Policy Platform* (November 2007), 2, see <[http://www.communitylaw.org.au/fedclc/cb\\_pages/our\\_policies.php](http://www.communitylaw.org.au/fedclc/cb_pages/our_policies.php)>

<sup>13</sup> Liz Curran, *Making the Legal System More Responsive to Community: A Report on the Impact of Victorian Community Legal Centre (CLC) Law Reform Initiatives* (Melbourne: West Heidelberg Community Legal Service, 2007), 2, see <<http://www.naclc.org.au/infopages/2181.html>>

<sup>14</sup> Stephen Bottomley and Stephen Parker, *Law in Context* (Sydney: Federation Press, 1997), 82, cited in Federation of Community Legal Centres (Vic) Inc, *Victorian State Justice Policy Positions* (December 2006), 3, see <[http://www.communitylaw.org.au/fedclc/cb\\_pages/our\\_policies.php](http://www.communitylaw.org.au/fedclc/cb_pages/our_policies.php)>

<sup>15</sup> PILCH, 'How to get Legal assistance', *PILCH services brochure* (2008), see <[http://www.pilch.org.au/html/s01\\_home/home.asp?dsb%3D22](http://www.pilch.org.au/html/s01_home/home.asp?dsb%3D22)>

Victoria Legal Assistance Scheme<sup>16</sup>, which facilitate referrals for pro bono legal assistance between the private legal profession and the community. The Victorian Bar also runs their own program, the Victorian Bar Legal Assistance Scheme, which provides barristers for legal advice and representation either for free or at a reduced cost, to those who are financially disadvantaged and are unable to obtain legal aid or assistance from another scheme.<sup>17</sup>

Additionally, the Law Institute of Victoria and the Victorian Bar Council manage the charitable trust Law Aid. Law Aid funds disbursements in cases where people have already retained legal representation on a pro bono 'no win, no fee' basis, though are still in need of financial assistance to meet the associated costs of their legal action. If the action is successful, the funds provided for disbursements must be repaid, as well as a percentage of the settlement reached.<sup>18</sup>

### **Limitations of current legal aid and assistance schemes**

Of all the schemes and organisations discussed that provide legal assistance to people who are financially disadvantaged, only Law Aid and VLA provide funding for the cost of disbursements. However, even this funding is extremely limited. Law Aid only provides assistance in civil law matters, where pro bono representation has already been secured, and VLA only provides aid for disbursements in accordance with its strict guidelines that take into account necessity and a 'cost/benefit analysis'<sup>19</sup>.

It appears that the provision of assistance for disbursements is an area that is largely overlooked and vastly under-funded. Unfortunately, disbursements are often required for litigation to occur, as they include such associated costs as court fees, jury fees, travelling expenses, witness costs, and expert evidence, typically in the form of reports. Usually, a party to a legal action pays for disbursements as a separate cost, in addition to fees for legal representation.

However, for people who are financially disadvantaged, the costs of both legal representation and disbursements are more often than not, unattainable. Some general disbursements like court fees – filing fees, court daily sitting fees and transcript fees – may be waived at the discretion of the court or tribunal on

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<sup>16</sup> Law Institute of Victoria, *Getting legal advice* (2008), see <<http://www.liv.asn.au/public/finda/legaladvice/legaladvice-The.html>>

<sup>17</sup> The Victorian Bar, 'Victorian Bar Legal Assistance Scheme', *About The Bar: Legal Assistance* (2008), see <<http://www.vicbar.com.au/b.7.asp>>

<sup>18</sup> Law Aid, *Scheme Outline* (2008), see <<http://www.lawaid.com.au/outline.htm#>>

<sup>19</sup> Victoria Legal Aid, *Medical Report Worksheet* (December 2005), see <<http://www.legalaid.vic.gov.au/83.htm?searchText=disbursement>>

application where a person is suffering from financial disadvantage,<sup>20</sup> but other types of disbursements, like expert reports, remain unaccounted for.

Hence, the issue of particular disbursements is a key issue in equitable access to justice because in order to mount a successful legal case, some form of expert evidence is often required. The problem is that these reports are invariably expensive, presenting a cost that the financially disadvantaged simply cannot afford. A proposed legal action may have merit, and even be a potentially strong case, but this can be difficult to ascertain without access to expert reports and evidence.<sup>21</sup>

## **Part B – Interviews with Community Legal Centre (CLC) solicitors**

In CLC clients' legal cases, the dilemma identified above commonly arises, where people who are financially disadvantaged are unable to secure the funds required for disbursements, such as expert reports. Being independent, not-for-profit organisations that rely mainly on funding from the state and federal governments<sup>22</sup> plus donations from various philanthropic associations,<sup>23</sup> CLCs' funding is limited and does not extend to financing disbursements.

As indicated previously, expert evidence can play a crucial role in the success or failure, or even viability, of a legal case. Two solicitors were interviewed<sup>24</sup> (see Appendix 1) from a CLC in an area of high disadvantage to more closely examine the effect that an inability to obtain expert evidence due to financial disadvantage has on a person's access to justice. The CLC, West Heidelberg Community Legal Service (WHCLS), is located in an area of predominantly public housing<sup>25</sup> identified by research as being among Victoria's 30 most disadvantaged postcodes.<sup>26</sup> The research used 14 indicators, including income, unemployment, criminal convictions, child abuse and mortality.<sup>27</sup>

The interviews highlighted the need for a scheme that provides funding for disbursements, such as expert reports. Both solicitors spoke of the importance and

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<sup>20</sup> PILCH, 'Services & Charges', *How to Obtain Legal Assistance: Public Interest Law Scheme*, see <[http://www.pilch.org.au/html/s02\\_article/article\\_view.asp?id=130&nav\\_cat\\_id=169&nav\\_top\\_id=60&dsb=907](http://www.pilch.org.au/html/s02_article/article_view.asp?id=130&nav_cat_id=169&nav_top_id=60&dsb=907)>

<sup>21</sup> Interview with Solicitor A (West Heidelberg Community Legal Service, 27 May 2008)

<sup>22</sup> Through Victoria Legal Aid and the Commonwealth Attorney-General's Department. See Community Law (2008) <<http://www.communitylaw.org.au/fedclc/>>

<sup>23</sup> National Association of Community Legal Centres, *What is a CLC?*, see <<http://www.naclc-qat.socialchange.net.au/topics/2000.html>>

<sup>24</sup> Interviews with Solicitors A & B (West Heidelberg Community Legal Service, 27 May 2008)

<sup>25</sup> Neighbourhood Renewal, *West Heidelberg* (2008), see <[http://www.neighbourhoodrenewal.vic.gov.au/projects/west\\_heidelberg](http://www.neighbourhoodrenewal.vic.gov.au/projects/west_heidelberg)>

<sup>26</sup> Tony Vinson, *Community Adversity and Resilience* (The Ignatius Centre, March 2004), cited in Community Builders NSW, *Identifying Needs and Strengths* (2006), see <[http://www.communitybuilders.nsw.gov.au/getting\\_started/needs/cav.html](http://www.communitybuilders.nsw.gov.au/getting_started/needs/cav.html)>

<sup>27</sup> Ibid

regular necessity of expert evidence in court, and the fact that the outcome of cases can be decided on the existence of such evidence, or the lack thereof. Each had also encountered numerous situations where a client's inability to fund expert reports had adversely effected the outcome of the client's case. Examples of such situations are outlined in the following case studies.

### **Case Study One<sup>28</sup>**

A client of Solicitor A, Ms X, was the victim of a brutal rape. The hospital where Ms X was taken for treatment following the attack neglected to conduct the necessary tests to retain forensic evidence, and admitted their failure to follow correct procedure, which is critical to the likelihood of the perpetrator being identified and successfully convicted.

The victim lost her job and could not work following the attack. She relocated to West Heidelberg to distance herself from the location of the attack and as her finances did not enable her to stay in one of Melbourne's most expensive suburbs. Solicitor A applied to the Victims of Crime Assistance Tribunal (VOCAT) on Ms X's behalf. Where there is a strong case, VOCAT will pay for the costs of a psychological assessment at the conclusion of the hearing. However, the victim needed urgent counselling and assessment prior to the hearing to prove she was raped, as the required material was not available from the hospital.

Unfortunately, Ms X's doctor was not prepared to give a report without \$900 payment pre-hearing. He thought the CLC could pay for the report, as he believed CLCs are publicly funded and so 'could afford it'. Solicitor A attempted to liaise with the doctor, explaining Ms X's critical need for the report for her VOCAT application, and wrote to the doctor explaining that costs would be paid by the tribunal at the conclusion of Ms X's hearing. As VOCAT is a statutory body, the doctor could be confident of being paid, but he still refused to compile a report without pre-payment. Eventually, Ms X's mother who lived interstate was able to obtain funds for the report, which unfortunately in this case, ended up being as unsatisfactory as the Doctor wrote a piecemeal report with typographical errors throughout.

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<sup>28</sup> Interview with Solicitor A (West Heidelberg Community Legal Service, 27 May 2008)

## Case Study Two<sup>29</sup>

Mr Y, a client of Solicitor B, was to have his infringement notices and penalties enforced and processed by the Infringements Court (formerly PERIN Court), a specialty venue of the Magistrates' Court that deals with such matters.<sup>30</sup> Mr Y had experienced a very serious drug problem, for which he had received treatment at Odyssey House for two and a half years and had recently graduated. In light of this history and the related 'special circumstances', Solicitor B sought to have Mr Y's outstanding fines that were registered at the Infringements Court considered by the Enforcement Review Program.<sup>31</sup>

'A serious addiction to drugs' is identified as special circumstances in Section 65 of the *Infringements Act 2006*.<sup>32</sup> However, in order to be recognised as having special circumstances, and subsequently considered by the Enforcement Review Program, an application is required that includes medical evidence.<sup>33</sup> Strict standards for the definition of medical evidence dictate that it must outline a formal diagnosis, current treatment and compliance, duration of illness, and how it impaired the client's judgement at the time of the offences.<sup>34</sup>

Mr Y was unable to afford a formal medical report that included all the requisite information, instead acquiring a 'note' from his doctor free of charge and one urine screen. This was deemed to fall short of the requisite standards for medical evidence by staff of the court, who refused to list Mr Y's hearing as a 'special circumstances' matter. Nonetheless, at Mr Y's trial in the Infringements Court, Solicitor B explained his client's situation to the Magistrate, who referred the case to be heard as a 'special circumstances' matter. Even though Mr Y's matter is to be heard in the specialty venue at a later date, Solicitor B believes that his client will still not have the proper documentation, without which, Mr Y could be imprisoned.

### Key interview findings

The case studies given by Solicitors A and B demonstrate how vital it is to access appropriate expert evidence in the interests of justice. These real-life examples illustrate the seriousness of the need for a source of assistance for the financially

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<sup>29</sup> Interview with Solicitor B (West Heidelberg Community Legal Service, 27 May 2008)

<sup>30</sup> The Magistrates' Court of Victoria, *Infringements Court* (2008), see <<http://www.magistratescourt.vic.gov.au>>

<sup>31</sup> The Magistrates' Court of Victoria, *Enforcement Review Program* (2008), see <<http://www.magistratescourt.vic.gov.au>>

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

disadvantaged to attain such reports. Victims of crime, like Ms X, and people with special circumstances, like Mr Y, are currently at the behest of whomever the report is being sought from, or the stringent guidelines that create a series of administrative hurdles. An inability to obtain expert evidence may not only result in a case having an undesirable outcome, but more disturbingly, an unjust one, which in the gravest of circumstances may result in the deprivation of liberty.

Previously, WHCLS was in the fortunate position of normally obtaining free medical reports due to its unique co-location with a health service that dates back over 30 years.<sup>35</sup> However, recent changes to Medicare policy dictate that doctors must now charge for medical reports.<sup>36</sup>

Solicitors A and B discussed the problem that this development has caused for many of WHCLS's financially disadvantaged clients, and a partial solution that they have developed. By liaising with the health service, an arrangement has been reached whereby if no compilation of data and substantiation of arguments is required in order to provide the medical information requested, but just a handwritten 'note' that is not referred to as a 'report', then doctors are more likely to be able to provide some documentation that can be presented to a Magistrate.

However, Solicitor B noted that although medical 'notes' are more often than not satisfactory, Judicial Officers and Magistrates usually express their dissatisfaction with the material presented. Solicitor A made the point that although the free material obtained from doctors is generally accepted by Magistrates, it is probably not a high enough standard for higher courts and tribunals. Indeed following Medicare's policy changes, Solicitor A wrote to the Chief Magistrate alerting him to this issue that affects many of WHCLS's impecunious clients, and explained a forthcoming proliferation of handwritten medical 'notes' (see Appendix 2).

## **Recommendations**

The following recommendations recognise the importance of funding and supporting access to justice for disadvantaged people in Victoria:

- Establishment of a publicly-funded scheme that provides funding to people who are financially disadvantaged for disbursement costs associated with obtaining expert evidence that is required for litigation;

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<sup>35</sup> Joanne Smith and Amanda Veit, *West Heidelberg Community Legal Service: Student Manual* (Melbourne: West Heidelberg Community Legal Service, 1995), 2.

<sup>36</sup> Interview with Solicitor A (West Heidelberg Community Legal Service, 27 May 2008)

- Establishment of a scheme similar to Law Aid, except that it should be available for all types of litigation, not only civil matters;
- That Medicare cover the cost of expert medical and allied health reports provided at the request of a legal representative whose client is financially disadvantaged and unable to self-fund the cost;

And in response to a suggestion by a Parliamentary Committee concerning legal aid and access to justice that, "...more needs to be done to encourage other professions to provide pro bono services to pursue the rights of disadvantaged people"<sup>37</sup>:

- To compile a resource directory listing various professionals, such as doctors, psychologists, psychiatrists, social workers, housing officers, drug and alcohol counsellors, engineers, information technology professionals, and so on, who are willing to provide pro bono assistance to people who are financially disadvantaged.

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<sup>37</sup> The Senate, Legal and Constitutional References Committee, *Legal aid and access to justice* (Canberra: Senate Printing Unit, 2004), 178, see <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/contents.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/contents.htm)>

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## **Appendices**

- *Appendix 1*: Email from Solicitor A to Chief Magistrate, sent 25 October 2006.
- *Appendix 2*: Question list from interviews with Solicitors A and B, conducted at the West Heidelberg Community Legal Service on 27 May 2008.