THE VICTORIAN BAR INCORPORATED

SUBMISSION ON
ACCESS TO JUSTICE

1 MARCH 2016
INTRODUCTION

1. The Victorian Bar (the Bar) welcomes the opportunity to provide a submission to the Department of Justice and Regulation on Access to Justice.

2. The Bar is a not-for-profit organisation proud of its expertise, professionalism and commitment to the delivery of excellence in the provision of legal services, access to justice and service to the community.

3. The Bar supports the community by delivering services of a high standard to promote the better administration of justice and the rule of law.

TERM OF REFERENCE 1

THE AVAILABILITY OF EASILY ACCESSIBLE INFORMATION ON LEGAL ASSISTANCE SERVICES AND THE VICTORIAN JUSTICE SYSTEM, INCLUDING ADVICE ON RESOLVING COMMON LEGAL PROBLEMS

THE VICTORIAN BAR

4. The Productivity Commission found that a lack of knowledge of most legal assistance services contributes to people not taking action or consulting non-legal advisers.¹

5. Improving access to justice begins with enhancing peoples’ ability to understand the legal nature of their problems and identify the different services on offer to resolve those problems.²

6. When members of the community are aware of the legal assistance options for resolving common legal problems, they are better positioned to select the most suitable form of assistance for their matter. A well-informed decision from the outset ensures the matter is dealt with in a timely and cost-effective manner, resulting in the better administration of justice.

7. Besides the Bar’s website, there is little information available to the public concerning how to access a barrister, and the specialist skills a barrister brings to a legal dispute.³

8. Members of the community are generally unaware they can engage a barrister by going through a solicitor, or in appropriate matters, engage a barrister directly through a Direct Access Brief.

9. The Bar has developed a Direct Access Portal - an access to justice initiative allowing members of the community to directly access a barrister for legal advice and representation.⁴

10. Currently, a number of criminal matters in the Magistrates’ Court are suitable for a Direct Access Brief, including: pleas of guilty, pleas of not guilty and bail applications. The next phase of the Bar’s project is to expand the service into other areas of the law, allowing more Victorians to access affordable legal advice and representation.

11. The rules governing Direct Access Briefs allow a barrister to reject a brief if she or he is of the view that the matter will require the assistance of an instructing solicitor.

⁴ See: www.barristerconnect.com.au
TERM OF REFERENCE 3

WHETHER AND HOW ALTERNATIVE DISPUTE RESOLUTION MECHANISMS SHOULD BE EXPANDED SO THAT MORE VICTORIANS CAN MAKE USE OF THEM

MEDIATION

INTRODUCTION

12. The Bar has been a national leader in mediation for more than 30 years, with particular experience and expertise in areas significant in this review: ADR in the courts, mediator education and training; and ADR policy discussion with government.

13. The Productivity Commission Report, out of which this Review arises, recommends that “courts and tribunals should endeavour to expand the use of alternative dispute resolution processes.”

14. The first framework for court referral to mediation in Australia was in the County Court (Building Cases) Rules 1983, established and implemented by Judge Leo Lazarus working with members of the Bar. The Bar has worked with Victorian courts and tribunals on ADR ever since then and has developed particular experience and expertise.

15. Since 2009, the Bar representative on the Magistrates’ Court Dispute Resolution Committee worked on that Committee to establish what is now the Single List of External Mediators (SLEM) Scheme, launched in April 2011 – another significant court referral to mediation program, and a significant access to justice initiative.

16. Pursuant to this scheme, the Court of its own initiative may order SLEM mediation or the parties may obtain consent orders to appoint a SLEM nationally accredited mediator to undertake a mediation in which the mediator’s fees are capped at a total cost of $1,320.00 (GST inclusive), no matter how long the mediation takes. The mediators’ fees are split between the parties, usually equally, in which case, the fee to a party will be not more than $660. A SLEM order may be made at any time once the proceeding has commenced.

17. The Productivity Commission Report noted the importance of mediators’ skills and qualifications: “the independence, professionalism and skill of the [mediator] may be the most important factor in

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ensuring a fair and effective process.”

18. This also is an area in which the Bar has long experience and significant expertise. The Bar began mediator training workshops in Melbourne in the very early 1990s, in association with the Bond University Dispute Resolution Centre. Members of the Bar spearheaded the 1992 Victorian Supreme Court “Spring Offensive” in which a massive backlog of Supreme Court cases was cleared by court referral of 280 cases to mediation, in which 104 cases settled.

19. The Bar’s first system for mediator accreditation was in 1996. In February 2006, some two years before the establishment of the National Mediator Accreditation System (NMAS), the new Bar system anticipated much of what was later introduced in the NMAS.

20. Members of the Bar Dispute Resolution Committee were active, contributing members of the National Mediator Accreditation Committee who worked to establish, implement and develop the NMAS. Since it began in 2008, the Bar has been a Recognised Mediator Accreditation Body in that system.

21. The Bar conducts, and is the only Bar in Australia which does, a Lawyers Certificate in Mediation course, which is recognised and accepted as a training programme which meets the requirements of the NMAS. A number of interstate lawyers come to Melbourne to take this Victorian Bar NMAS mediator training course. Judges have also taken the course.

22. The Bar has actively engaged in ADR policy discussion with government, both State and Commonwealth. It made very substantial written submissions in response to the Victorian Parliament Law Reform Committee ADR Discussion Paper in December 2007; and members of the Bar Dispute Resolution Committee gave oral evidence to the Committee.


24. In recognition of the particular experience and expertise of the Bar in these areas, the National Alternative Dispute Resolution Advisory Council came to Melbourne and met with representatives of the Victorian Bar for oral submissions and discussion arising out of the Bar’s very substantial written submissions.

25. It is this experience that the Bar brings to the responses to the specific questions in this Review that follow.

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ARE THERE CIRCUMSTANCES WHERE IT WOULD BE APPROPRIATE TO EXPAND THE USE OF ADR IN VICTORIA? IF SO, HOW SHOULD THAT BE DONE?

26. Mediation in Victoria is used extensively in dispute resolution in the courts and in tribunals. In most civil proceedings, a proceeding will not proceed to trial without the parties attending one or more mediations.

27. Both within the court and tribunal system and in the broader community, there is room for expansion of mediation by encouraging and facilitating the use of mediation to resolve disputes before they get out of hand or the parties embark on legal proceedings. This could be done by improving knowledge and understanding of mediation among the public at large, disputants and professionals. In Chapter 4 of its 2009 report, the National Alternative Dispute Resolution Advisory Council (NADRAC), sets out and discusses and analyses at some length possible ways to increase awareness, knowledge and understanding. All this is as relevant today as it was then.

28. The background paper to Term of Reference 3 on Alternative Dispute Resolution notes that the scope of Term of Reference 3 engages, in particular, with issues in Term of Reference 1 (easily accessible information); Term of Reference 2 (diversion and triage); and Term of Reference 9 (self-represented litigants).

29. There is an obvious connection between Terms of Reference 1-3 in that they all relate to information, diversion and triage, and ADR in relation to the population at large. On the other hand, the issues relating to self-represented litigants and their support are distinct because the self-represented litigant is a discrete class within the general population that is in litigation and is, for whatever reason, proceeding without representation.

30. Chapter 4 of the 2009 NADRAC Report The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction referred to in numbered paragraph 27 above relates squarely to Term of Reference 1 in the ADR context.

31. Term of Reference 2 (diversion and triage) raises different issues because it involves not merely the provision of easily accessible information to raise awareness, understanding and knowledge in relation to ADR. Diversion and triage involve the next step from providing information to educate the public to that of direction and perhaps referral in the diversion and triage.

32. The distinction is significant to private providers, such as the private legal profession, because the most likely candidates for triage and diversion are government entities such as the State’s Magistrates’ Courts and VCAT, where members of the public may come with their disputes and, in appropriate cases, have Registrars or other appropriately trained court staff direct them to persons and

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organisations able to provide assistance in resolving their disputes by mediation and other ADR processes.

33. Significantly, almost all the ADR Service Providers and Complaints Handlers in Attachment B to the Term of Reference 3 ADR background paper are government or related bodies (such as the Industry Ombudsmen), with just a few private providers and professional bodies, the Law Institute of Victoria, the Victorian Bar, the Victorian Association for Dispute Resolution and the Resolution Institute (the amalgamation of LEADR and IAMA) tacked on at the end of the list.

34. It is one thing for government services, bodies and databases to provide information about ADR and about ADR providers that include private providers. It is quite another for government services, bodies and databases to refer the public to private providers.\(^9\)

35. One quality of the SLEM Scheme referred to in numbered paragraphs 4 and 5 above is that it is an initiative of the Magistrates’ Court, as well as of the Victorian Bar and the Law Institute of Victoria, and that it involves the provision of information, rather than the active and specific referral involved in diversion and triage – a resource of private practitioners at “access to justice” rates negotiated by the Court and made available at the earliest stage of the proceedings through the SLEM Scheme sponsored by the Court, but which the parties can take or leave.

36. Through SLEM, the parties have access to an NMAS-qualified mediator and the parties bear the cost, unlike mediation by a Judicial Registrar where the Court or, effectively, government bears the cost.

37. The Bar remains strongly opposed to any sort of “judicial” mediation – mediation by a Judge or Associate Judge or Judicial Registrar – or, for that matter, any officer or staff of the Court.

38. NADRAC, in its landmark September 2009 Report, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, said very clearly and emphatically, “NADRAC does not support the practice of judicial mediation.”\(^10\)

39. The relevant recommendation is Recommendation 7.2: “Except in exceptional circumstances, judges should not mediate and, if they do so, they should not hear the case. Moreover, any judge who mediates should be accredited under NMAS.”\(^11\)

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\(^9\) This point was made in the Victorian Bar 22 May 2009 submission to NADRAC in response to its ADR in the Civil Justice System Issues Paper March 2009 – numbered paragraphs (57) – (59).

\(^10\) *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, NADRAC Report September 2009 at paragraph 7.56. The whole of paragraph 7.56 reads: “Whilst NADRAC accepts that (subject to constitutional considerations) ADR processes other than mediation may be acceptable forms of judicial dispute resolution, NADRAC does not support the practice of judicial mediation.” Please see explanation in the above text that follows the absolute statement that “NADRAC does not support the practice of judicial mediation.”

\(^11\) Recommendation 7.2.
40. One really has to read the whole section on judicial dispute resolution and judge-led mediation, paragraphs 7.30 – 7.60, to understand the subtlety in the clear and absolute statement, “NADRAC does not support the practice of judicial mediation” that is qualified by the conditional clause that begins paragraph 7.56 (quoted in full in footnote 10 of this submission) and the qualification in Recommendation 7.2: “Except in exceptional circumstances, judges should not mediate . . . .”

41. In a nutshell, the subtlety is in how one defines “mediation” and “judicial mediation”.

42. To quote the final paragraph in this section, paragraph 7.60: “Nevertheless, NADRAC does support judge-led mediation if that term means that judges adopt a ‘facilitative role’, actively manage cases, and refer cases which are suitable for mediation at an appropriate time. NADRAC supports increased active case management in the courts and believes that government and the courts should continue to explore options and identify solutions to make proceedings more efficient, less expensive, and quick – provided that litigants are not disadvantaged and receive better or at least similar outcomes. In that sense, NADRAC sees potential for the use of some ADR techniques by the judiciary to improve court processes.”

43. The Bar’s arguments, which we see as having found favour in the NADRAC Report section on judicial dispute resolution and judge-led mediation are set out in numbered paragraphs (3) – (24) and (64) – (87) in the Bar 22 May 2009 written submissions in response to the NADRAC Issues Paper on ADR in the Civil Justice System – out of which the NADRAC Report arose.

44. Another suggestion arising out of the Productivity Commission Report that sparked this Review is pre-action protocols or requirements12 – the introduction of schemes such as was provided for in Chapter 3 of the Civil Procedure Act 2010(CPA), which was later repealed13 – to require that, save in those few circumstances where it may be inappropriate14, parties attend a mediation before commencing proceedings; and to impose sanctions/penalties should they fail to do so.

45. The Bar opposed pre-action protocols in our 22 May 2009 written submissions in response to the NADRAC Issues Paper on ADR in the Civil Justice System, numbered paragraph (180) – which refers also to numbered paragraphs (179) and (151) – (156).

46. Schedule 4 to the NADRAC Report on the “Lord Woolf Reforms – Pre-action Protocols” concluded that such pre-action protocols did not work: “the evidence is that prospective litigants may not be better off, and that those who would previously have settled without proceeding to hearing may now be spending considerably more for a similar outcome” and that “The evidence suggests that there has been little or no increase in the use of ADR, particularly mediation.”

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13 Subsequently repealed by No. 1/2011 s. 7 (Vic).
47. In any event, the experience of Victorian Bar mediators is that, without the need for pre-action protocols or requirements, an increasing number of people are simply initiating private mediation before issuing proceedings anyway.

WHAT COULD BE DONE TO IMPROVE (MEDIATION), INCLUDING MECHANISMS TO ADDRESS THE POWER IM BALANCE THAT MAY EXIST IN SOME SITUATIONS?

48. Mediators play an important role in steering the mediation process and can influence the power dynamic played out during mediation. The mediator can influence the power balance by encouraging respectful communication, facilitating equal talking time, and adopting an even handed approach to the parties.

49. The use of Online Dispute Resolution (ODR) may have particular value in helping parties participate in circumstances where the threat of violence is present and to reduce harmful gender and racial bias.

50. The Farm Debt Mediation Act 1994 (NSW) imposes obligations upon the parties to participate in mediation ‘in good faith’ and otherwise attempts to level the playing field. That scheme requires the mediator to report to the scheme administrator, whose certificate is required before the issue of proceedings.

51. The CPA imposes overarching obligations upon parties, which obligations are intended to encourage parties and their lawyers to resolve legal proceedings, with sanctions for non-compliance or inadequate compliance.

52. So far as any certification or reporting by the mediator is concerned, the Bar is strongly opposed. The mediator’s role is as a neutral facilitator. That, and confidentiality in mediation, are cornerstones. The mediator cannot be put in the position of having to judge the “good faith” of a party in the conduct of the mediation; and then of being required to report on that to the Court for the purpose of sanctions being imposed.

53. In any event, “good faith” may not be capable of proper assessment – the mediator may not have the relevant information. For example, a party may take an apparently uncompromising position in the mediation negotiations, which may, once all facts become known, turn out to be wholly justified. Any “good faith” assessment is also likely to be subjective.

54. NADRAC, in its September 2009 Report The Resolve to Resolve, records that it had “previously said that it opposes a requirement for mediator certification as it could raise questions of the protection of confidentiality, and may undermine his/her neutrality”. However, in the September 2009 Report, it resiled from that position, saying that “it believes it is an issue that warrants further and deeper consideration.”
55. The Bar believes strongly that any reporting by the mediator to a court should be confined to whether the dispute, or part of the dispute, has been resolved. Unless applicable legislation explicitly requires it, no other information should be supplied.

WHAT CAN BE DONE TO IMPROVE KNOWLEDGE AND AWARENESS OF THE AVAILABILITY AND BENEFITS OF ADR?

56. It goes without saying that the best ADR framework is of little avail if people don’t know about it. As noted above, in Chapter 4 of its 2009 report,15 NADRAC sets out possible ways to increase awareness, which remain as relevant today as they were then.

HOW COULD THE RESOLUTION OF DISPUTES WITH GOVERNMENT AGENCIES BE IMPROVED?

57. As noted by the Productivity Commission,16 at the Commonwealth level, all government agencies are required to act in accordance with the Legal Services Direction 2005 and the Civil Dispute Resolution Act 2011 (Cth). These require agencies to take genuine steps to resolve disputes early, and to act as model litigants by trying to avoid, prevent and limit the scope of legal proceedings wherever possible.

58. The Commission noted that it would be beneficial for all agencies, particularly those with high numbers of disputes, to finalise and release tailored dispute resolution plans as a priority. The Bar agrees with the Commission’s conclusion that as part of the development of dispute management plans, agencies need to be cognisant that clear and appropriate communication with disputants can significantly reduce the number of appeals and, as a result, the time and costs associated with dispute resolution.17

59. The Bar supports the submission made by LEADR (as it then was) to the Productivity Commission that the current emphasis on government agencies ought be broadened from just being a ‘model litigant’ to being a ‘model dispute resolver,’ which would emphasise the expectation that agencies should aim to resolve disputes as early and as quickly as possible, using litigation as a final rather than first resort.

60. The Bar maintains on its public website a list of its members who hold NMAS accreditation as a mediator – and a related search is possible of NMAS-accredited barrister-mediators, who are also Victorian Bar Advanced Mediators. That list is a resource available to government agencies to assist in the resolution of their disputes – and direct-briefing as the mediator is possible.

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ARE THERE OPPORTUNITIES TO EXPAND THE USE OF ADR MECHANISMS BY EMPLOYING ONLINE TECHNOLOGIES?

61. Chapter 5 of the NADRAC report\(^{18}\) considered that ODR was an important addition to the existing ADR field and a valuable mechanism to overcome many barriers that exist in relation to the use of ADR.\(^ {19}\)

62. Benefits noted by NADRAC include low cost and convenience, while the loss of images, and non-verbal cues can reduce physical and emotional reactions.\(^ {20}\)

63. In other circumstances, where appropriate, visual cues can be retained by the use of Skype and video links. Regional courts and government offices often have these facilities which could be utilised for this purpose.

WHAT RESOURCES OR SUPPORTS WOULD BE REQUIRED TO ASSIST PEOPLE WHO MAY FACE BARRIERS ACCESSING AN ONLINE DISPUTE RESOLUTION PROCESS?

64. As noted above, local and regional courts and government offices often have online, Skype and video facilities which could be utilised, in conjunction with the triage system based at Magistrates’ Courts and VCAT as suggested above, to assist those who might otherwise face such barriers.

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\(^{18}\) The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction - 2009  
\(^{19}\) The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction – 2009 [5.50].  
ARBITRATION AND EXPERT DETERMINATION

THE LEGAL FRAMEWORK ENABLING ARBITRATION AND EXPERT DETERMINATION

65. The main determinative forms of dispute resolution that avoid recourse to litigation are commercial arbitration and expert determination.

66. Commercial arbitration is a private dispute resolution procedure agreed by parties, usually at the time they enter into contractual relations or after a dispute has arisen between them. Commercial arbitration is final and binding subject to only very limited avenues for judicial appeal.

67. Commercial arbitration in Victoria is governed by the Commercial Arbitration Act 2011, which legislation is based closely on the UNICITRAL Model Law on International Commercial Arbitration 1985 as amended. The Act sets the legal framework as to where and how the arbitration is permitted and conducted. Section 1 of the Act refers to domestic arbitration essentially as being one where the parties have their places of business in Australia. The term ‘commercial’ is given a very wide interpretation so as to apply to all relationships of a commercial nature.

68. If there is a dispute concerning the conduct of a commercial arbitration or the enforcement of an award, the Act provides for the courts to support the conduct of arbitration and gives certain very limited bases for judicial review. On the other hand, expert determination is defined by the contract between the parties. On the suit of a party, the role of the courts is essentially limited to one of contractual construction and the enforcement of the reference to expert determination.

THE POSSIBLE EXPANSION OF ARBITRATION AND EXPERT DETERMINATION

69. Access to arbitration is open to any parties who jointly agree in writing for a commercial dispute between them to be determined by arbitration. It is a private dispute resolution procedure for commercial disputes.

70. However, from an access to justice point of view, could disputes of a non-commercial nature be suitable for arbitration (or expert determination) beyond the legislative prescription of the Act? In the United States of America, there is authority that a civil controversy, whether constituting a cause of action or not, can be submitted to arbitration: Continental Bank Supply Co v International Brotherhood of Bookbinders 201 SW 2d 531 (1947).

71. Any expansion of the ability to conduct binding private arbitration to improve access to justice and reduce the claims on the government purse for judicial litigation must of course be examined against public policy constraints and present restrictions on the ability to refer private disputes to arbitration. Such policy constraints and present restrictions include, for example, the Victorian Domestic Building Contracts Act 1995 which prevents domestic building dispute being referred to arbitration.
72. From a public policy point of view, if private arbitration were to be expanded into new dispute areas beyond commercial arbitration disputes as presently covered by the Act, consideration would be required of whether and if so how a party's right to judicial review should be addressed, perhaps in a similar way to that under the Act.

RECOMMENDATION

73. Expanded use and access to commercial arbitration (the subject of the Act) and expert determination can be best achieved through public education and the promotion of these dispute resolution mechanisms to parties in commercial disputes.

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74. Expansion of the use of commercial arbitration the subject of the Act and expert determination may be achieved through increased promotion of the Victorian Bar Commercial Arbitration and Expert Determination Appointment Services. This could include a series of “road shows” or other information sessions targeted at government funded legal assistance providers, industry associations, consumer complaints bodies and Ombudsmen services.

75. Insofar as the Review holds concerns about access to ADR services for those based in regional Victoria, the education and promotional activities considered above may be enhanced by increased awareness of the Victorian Bar’s “regional reach.” Whilst it may be that the vast majority of members of the Victorian Bar are based in Melbourne’s CBD, very many of our members frequently travel regionally on court circuit, and are ready and willing to do the same for appointment as arbitrators or expert determiners.

OPPORTUNITIES TO EXPAND THE USE OF ARBITRATION AND EXPERT DETERMINATION BY EMPLOYING ONLINE TECHNOLOGIES

76. Some commercial arbitration disputes under the Act and expert determination disputes, where appropriate, are dealt with “on the papers.” However, the large majority take place through the conduct of hearings with the parties attending personally or sometimes by telephone. Scope exists to provide for on-line mechanisms in place of hearings so that parties disadvantaged by remoteness or time limitations may have an alternative.

77. Whilst examination of new technologies for arbitration and expert determination is beyond the scope of this submission, on-line dispute resolution does provide a viable additional means to resolution of commercial disputes in other jurisdictions. One example is from the United Kingdom. There, an on-line portal has been successfully established for the resolution of minor debt matters via the website: www.moneyclaim.gov.uk. The Money Claim website channels disputes on-line for judicial determination at far less expense than traditional court based litigation. Additionally, parties using
the service are referred to telephone based mediation at an early stage in the on-line proceedings, together providing the opportunity for (a) resolution of disputes at a greatly reduced cost, and (b) greater access to justice for those based regionally.

78. Another example is the resolution of domain name disputes where a fully on-line dispute determination procedure of a final and binding nature has been in successful operation for many years.

79. Investigation of new technologies certainly warrants further exploration by the Review.
TERM OF REFERENCE 4

POTENTIAL REFORM TO THE JURISDICTION, PRACTICES AND PROCEDURES OF VCAT TO MAKE THE RESOLUTION OF SMALL CIVIL CLAIMS AS SIMPLE, AFFORDABLE AND EFFICIENT AS POSSIBLE

INTRODUCTION

80. Members of the Bar regularly appear in the VCAT, including, subject to permission from the presiding member in small claims (that is, claims under $10,000).

81. Three issues which can potentially inhibit access to justice have been identified in relation to the small claims list at VCAT. They are:

   a. the rule limiting legal representation;
   b. the rule preventing awards of cost; and
   c. the lack of procedure to allow respondents to understand the case against them when not properly set out in the application.

LEGAL REPRESENTATION

82. Section 68 of the Victorian Civil and Administrative Tribunal Act (VCAT Act) sets out the rules with regards to representation in standard hearings.

83. Clause 4C of Schedule 1 to the VCAT Act provides an exception to the rule in s 68(2) in the situation of small claims. The relevant test is:

   A party to a proceeding relating to a small claim may be represented by a professional advocate only if—

   (a) the Tribunal is satisfied that no other party to the proceeding will be unfairly disadvantaged if the representation is allowed; and
   (b) either—
       (i) all parties to the proceeding agree; or
       (ii) the Tribunal directs that the representation be allowed.

84. However, the fact that a claim is worth less than $10,000 does not necessarily mean that either the evidentiary or legal basis of that claim is simple.

85. The Bar is of the view that the Tribunal and parties appearing before it would be assisted by a broader test for allowing legal representation in a wider range of circumstances. It notes that the test
of “unfairly disadvantaged” does not provide sufficient and clear guidance to parties as to when they may be able to have representation.

86. The current test unreasonably focuses on the effect of representation on the other party and does not take into account or consideration issues of:

a. disadvantages such as an inability to speak English, literacy, mental health or issues by the person seeking representation; or
b. the complexity of the claim; or
c. whether the issues could be narrowed, or the Tribunal assisted to identify the substantive issues, by the presence of legal practitioners or other professional advocates.

87. The VCAT Practice Note currently provides:

in the Civil Claims List, the Tribunal will not ordinarily permit a party to be represented by a professional advocate in proceedings where the claim is $10,000 or less, and parties should be prepared to present their own case.

88. It is the common experience of members of the Bar as well as members of the Tribunal that the presence of lawyers (be they solicitors or barristers) assists in narrowing the issues in dispute, the evidence led and provides great assistance to the Tribunal to ensure that the matters raised by the parties are those relevant to the Tribunal’s final determination. Any concern regarding unfair advantage to one party or the effect of cross examination or other processes can be dealt with by way of the Tribunal managing the conduct of the hearing or placing appropriate limits on the scope of questions, submissions or evidence to ensure it remains relevant and fair. The Tribunal has such powers pursuant to section 98 of the VCAT Act which allows the Tribunal to regulate its own procedure (s98(3)) and inform itself as it sees fit (98(1)(c)).

89. Consideration should be given to:

a. allowing legal representation in a wider collection of cases;
b. amending clause 4C of Schedule 1 to give the Tribunal a wider discretion to allow legal representations when circumstances demand it;
c. VCAT providing guidance, by way of practice note or other publication, as to the factors that will be considered in allowing legal representation. This would assist to ensure that parties are not disadvantaged by spending money on representation that is disallowed by the Tribunal or presuming that representation will not be allowed and being forced to present their own case in circumstances where both they and the Tribunal would have being assisted by the presence of legal representation.
THE RULE ON COSTS

90. Section 109 of the VCAT Act sets out a general assumption that each party bear their own costs, save in certain circumstances set out within that section.

91. Sections 112 – 114 put in place a system whereby a party can make an offer of compromise and rely on that offer of compromise to seek costs in the event that they recover more than what was offered in the offer of compromise.

92. However, an exception applies for small claims as set out in Clause 41 of Schedule 1 to the VCAT Act:

The Tribunal cannot order costs in a proceeding relating to a small claim, except in a review of a determination under section 120 in respect of such a proceeding.

93. Whilst the rationale behind s 109 of the Act is clear, the current restrictions for small claims raises the following issues:
   a. the inability to claim costs even against where a party is required to respond to an unmeritorious claim;
   b. the inability to rely on the offer of compromise provisions set out in ss 112 – 114 where the case is worth less than $10,000 creates an unfair burden on respondents who are required to respond to unmeritorious or otherwise misconceived applications and also provides little incentive to respondents to act reasonably or attempt to settle at an early opportunity for claims under $10,000, even in circumstances where reasonable offers to resolve are made by the applicant.

94. Whilst not supporting a move to a costs follow-the-event costs regime, the Victorian Bar considers that a reassessment of the no costs provisions should be undertaken to allow, at the very least, the provisions of ss 112 – 114 to apply. A test which allowed the Tribunal to award costs where one party had acted unreasonably or persisted with an application or defence that was without merit should be considered.

95. It may be that a capped cost, in line with those set out in regulation 2.8 and Appendix AA of the Magistrates Court (Miscellaneous Civil Procedure) Regulations 2010 is appropriate to ensure that there is no inducement to parties to make unreasonable claims for costs nor use the threat of significant costs awards to undermine access to justice.
INABILITY TO UNDERSTAND CLAIMS BROUGHT AGAINST A PARTY

96. Small claims are generally brought to VCAT by way of the lodgement of an application form. VCAT is not a forum where “pleadings” are required. The current “civil claims” form provides that applicants should:

Briefly describe the problem. Be clear and include enough information to enable the respondent to understand the claim.
If claiming payment of money, you must include details of each amount claimed.
If you do not provide enough information the hearing may be adjourned to allow the respondent to prepare a defence.
If the hearing is adjourned you may need to pay a hearing fee for any adjourned hearing.

97. Most claims progress straight to hearing without further steps from the parties. The difficulty arises in circumstances where the respondent to the claim cannot understand the claim brought against them. Whilst VCAT can, of its own motion, request further information from an applicant where the claim is unclear on its face, the difficulty occurs when, notwithstanding that the claim does not appear patently defective, it nonetheless is unclear to the respondent. The only current option is for a respondent to attend the hearing and seek an explanation and then an adjournment. This is unnecessarily burdensome for respondents.

98. Consideration should be given to a mechanism allowing respondents to request further information regarding the claim, without the need for an appearance before the Tribunal. The mechanism need not have the formality of “pleadings” and should be limited to relevant requests for clarification.

21 Noting however that “points of claim” and “points of defence” are nonetheless utilised in larger, more commercial claims in the Real Property List.
TERM OF REFERENCE 5

THE PROVISION AND DISTRIBUTION OF PRO BONO LEGAL SERVICES BY THE PRIVATE LEGAL PROFESSION IN VICTORIA

99. The Bar makes a significant contribution to the provision of pro bono legal services to members of the community. It does so through the Victorian Bar Pro Bono Scheme which is administered through Justice Connect; the Victorian Bar Duty Barristers’ Scheme, which is administered through the Victorian Bar Office; and the Court of Appeal Duty Barrister’s Scheme, which is also administered through the Victorian Bar Office.

100. Through these avenues Victorian barristers provide members of the community with a range of pro bono services including legal advice, assistance in preparing court documents including pleadings, applications, affidavits and submissions, and representing litigants at mediations and in court. This assistance is provided to litigants appearing in the Magistrates Court, County Court, Supreme Court and Federal Court and across all areas of law including criminal law, family law, immigration law, employment law and commercial law.

101. The number of members at the Victorian Bar who participate in the provision of pro bono legal services is significant. There are currently 1,137 barristers registered with Justice Connect as eligible to take on referrals, 455 barristers participating in the Duty Barrister’s Scheme, and 172 barristers participating in the Court of Appeal Duty Barristers Scheme.

102. The process of capturing data to determine the value of pro bono services provided by members of the Bar is an evolving and challenging process. Not all barristers who provide pro bono legal services make known or seek public recognition of their contribution. Such statistics as exist seriously underestimate the value of the pro bono services provided. With that in mind, the available statistics show that in 2014/2015 at least 1,573 hours of pro bono services were delivered via the Duty Barristers Scheme at an approximate value of $316, 984. During the same year Justice Connect made a total of 254 referrals to barristers which can be safely assumed to have involved, on average, 5 hours of work or a value $2,000 per referral. Such referrals spanned across a broad range of disputes. The main areas of dispute in respect of which referrals were made by Justice Connect in 2014/2015 were Criminal (15%), Immigration (15%) and Tenancy (10%).
**THE WAY FORWARD - POSSIBLE WAYS TO ENHANCE DELIVERY**

103. There is little that needs to be done to improve the participation rate of members of the Victorian Bar in the provision of pro bono legal services. As is readily apparent from the matters previously discussed, the willingness of the Bar to contribute is not wanting.

104. There are some possible areas where efficiency gains may be achieved.

105. First, the provision of additional resources to Justice Connect to enable better promotion of the Victorian Bar Pro Bono Scheme to the public so that the public gains a clearer understanding of the service on offer and the eligibility criteria. Referrals to Justice Connect are received from multiple sources, including Community Legal Service Centres, Legal Aid, Courts and Tribunals and private practitioners. However, the most significant number of requests to Justice Connect come directly from members of the public. Often persons making such requests do not meet the eligibility criteria or have not exhausted other avenues available to them including, for example, Legal Aid. Accordingly, unnecessary resources are devoted to assessing such requests that may be better used elsewhere.

106. Secondly, the provision of additional resources to Justice Connect to enable it to develop a web based portal which will enable barristers to register their interest in a matter which is eligible for referral. Currently, Justice Connect assesses requests and if it deems a request suitable for referral it will look to its database of registered barristers and make requests for assistance from suitable barristers. With such a large database, this may sometimes have the unintended consequence that barristers who are keen to assist and who have the capacity to do so may be overlooked. To ensure that pro-bono referrals from Justice Connect are spread evenly, it may therefore be advantageous if a web based portal was available which listed the matters for referral, including information about those matters, and allowed barristers to register their interest in taking the matter.

107. Thirdly, improving the flow of information between the Bar and private legal firms so that the latter have a better awareness of those members of the Bar who may be willing and able to assist on pro bono work undertaken by private legal firms which is not sourced via Justice Connect.
TERM OF REFERENCE 8

THE RESOURCING OF VLA TO ENSURE THAT GOVERNMENT FUNDING IS USED AS EFFECTIVELY AND EFFICIENTLY AS POSSIBLE AND SERVICES ARE DIRECTED TO VICTORIANS MOST IN NEED

INTRODUCTION

108. In responding to Term of Reference 8, the Bar has focused on the following five areas:

   a. the Bar’s assurance of quality;
   b. comparison of costs;
   c. conflicting roles;
   d. concerns about current practices; and
   e. diversity.

RECOMMENDATIONS

109. The Bar calls on the government to:

   a. require full disclosure by VLA of justifications for in-house advocacy practice including financial aspects as well as the level of skill and experience deployed in-house compared with that available at the Bar; and
   b. ensure that the VLA Board includes suitably experienced practitioners or ex-judicial officers with experience of practice in the areas in which VLA is active, particularly in criminal proceedings.

THE BAR PROVIDES THE REAL ASSURANCE OF QUALITY

110. The public interest in an independent Bar is obvious. An independent barrister is reliant on their reputation, demonstrated in open court, for ethically and efficiently dealing with the issues in a given case. She has no interest in directives given by a manager or any other person. Her reputation and livelihood depend on the quality of her work alone.

111. In indictable criminal cases, the Bar has implemented even greater protection against failing standards with its Indictable Crime Certificate. The Certificate includes exams, advocacy assessment and continual monitoring and training in all aspects of indictable crime work. It includes an accountability mechanism whereby any concerns about a barrister’s knowledge or performance can be raised with a specialist committee who will oversee further training and improvement. Certification must be renewed every 3 years. It is important to note that VLA, in its preferred counsel list, relies on the ICC certification for quality control. There is no comparable certification for in-house advocates or other private solicitor advocates (whom VLA continues to fund to appear in trials despite the lack of quality assurance).
112. A further significant aspect of quality assurance at the Bar is found in the chambers system. The culture at the Bar includes being mentored (generally and on specific issues) by peers and senior counsel. The Bar has an open door policy whereby any brief to a junior barrister has the benefit of input from senior barristers who are expected to assist upon request.

113. The split profession in this way provides the best mechanism for cost effective expert advocacy. Barristers are able and encouraged to hone their expertise, often in specific subject areas, taking briefs from multiple sources. Solicitors are able to identify barristers with the skills and experience necessary for a specific case. Working with a limited in-house pool of advocates does not offer this advantage.

COMPARISON OF COSTS

114. Public Defenders are full time employees of the VLA. Their salaries and on-costs conservatively amount to $200,000 - $250,000 per Public Defender. This takes account of salary, annual leave, sick leave, superannuation, accommodation and the cost of support staff. These costs across some 16 Public Defenders mount to $3.2m - $4m. There are major problems with this model.

115. VLA solicitors are required to brief Public Defenders if a Public Defender is available. This limits the choice of Barristers for the case to the pool of about 16 Public Defenders, of which 8 are Senior Public Defenders. Clearly this pool of choice is further reduced by availability within that group at any particular time. By contrast, there are about 236 Barristers on the VLA preferred list available to be briefed. Many of them are significantly more experienced and more specialised than the Public Defenders. As things are currently administered, the client is not necessarily getting the best person for the job.

116. The cost of briefing a Public Defender can be as much as 40% more than the cost of briefing a barrister. For example, VLA pays a Barrister $1468.00 to do a one day, stand-alone plea in the County Court. That fee includes all preparation. Preparation for a one day plea will, on average, take at least another day. VLA is getting two days for the price of one out of a Barrister.

117. By contrast, a Public Defender costs VLA $833 - $1041 per day (based on a 240 working day year), whether the Public Defender is in court or not. For the Public Defender to do the one day plea and one day preparation, the cost to VLA would be ($833 x 2 = $1666) - ($1041 x 2 = $2082). If the plea goes into a second day, as commonly occurs for purposes of obtaining a Corrections Report, the gap widens. The barrister is paid only $514 while Public Defender receives $833 - $1041.

118. It is also more costly to use Public Defenders for trials. Trials average about 7 days in length. A seven day trial would cost VLA $8975.00 to brief a Barrister. That includes preparation for the trial. Typically a straightforward seven day trial would require two to three days preparation. VLA effectively only pays barristers for one day. It is not uncommon for two public defenders to appear as counsel in trials.
119. Realistically, a barrister could only appear in court on about 160 days of an average year. For barristers
to do 20 trials and 20 pleas in a year, it would cost VLA just under $200,000. No single barrister could
do that many cases in a single year. The sheer volume of work, the timing of cases, adjournments,
people becoming sick, etc. would make that unrealistic. Hence, VLA could purchase far more trials and
pleas from the independent bar for the $200,000 - $250,000 than any single Public Defender could
provide.

120. In almost every case, Barristers do far more days of preparation than they are paid. The Public
Defenders are paid for every day at work.

121. VLA does not pay Barristers for down-time between cases. Although Public Defenders’ down-time
can be used providing advice and compulsory professional development teaching, those services can
also be purchased from Barristers at less cost (or in the case of continuing professional development,
Barristers provide seminars at no cost to VLA).

122. Further, we note the comments of Michael De Young in his submission to this Reference in which he
notes that it soon became apparent to VLA that it would be difficult to justify the cost of VLA
Chambers, ‘which would only be viable if all counsel were in court virtually full time.’ It seems that
upon this realisation VLA took steps to ensure that this occurred which has resulted in even more less
experienced representation being engaged. If Public Defenders are in court virtually full time then the
case in which they appear will be less than adequately prepared and they will be doing their client, the
courts, other participants and the public a disservice.

CONFLICTING ROLES

123. The principles in section 4 of the Legal Aid Act 1978 (Vic) underpin the competitive nature of the
 provision of services in the legal assistance sector. Competition ensures that members of the
 community in need of legal assistance are able to obtain the highest quality of lawyer at the lowest
 price.

124. VLA is tasked with promoting the balance between quality and cost. Indeed, this is the stated goal of
 recent initiatives such as the Criminal Trial Preferred Barrister List.

125. There is an inherent risk to this balance when the funding body is also a provider of those services.
 Such a risk may only be avoided (and seen to be avoided) with full disclosure of the costs and quality
 of services that are provided in-house. It is in the public interest that this be transparent.

126. The establishment of VLA Chambers is a case in point. There has been a lack of disclosure of the costs
 and benefits of this initiative. So much has been noted by the 2014 Ombudsman report. It is also the
 subject of criticism in the 2015 PricewaterhouseCoopers report.

127. The risks of moving work in-house are numerous and potentially very serious. The loss of
 independence and the briefing of junior and less skilled practitioners in serious cases has a direct
effect on the public interest. This is apparent in the risks of trials being run inefficiently, an increase in adjournments and appeals and the frustration of witnesses (and their families) who are treated inexpertly.

CONCERNS ABOUT CURRENT BRIEFING PRACTICES

128. A number of practices have emerged over recent years that give rise to concern.

129. Since the advent of the Public Defenders Unit, there has been a decline in the level of experience and skill of those appearing in the superior jurisdictions because of the preference to brief members of the Public Defender’s Unit. A Public Defender who might be considered ‘Senior’ within VLA would not necessarily be considered so at the Bar or by the Courts. A client informed of the market available at the Bar would very quickly sort out who would be preferred in terms of skill and experience. Cases which would previously have attracted funding for senior counsel (silk) are no longer receiving such funding, and similarly cases which would have attracted funding for senior and junior counsel are no longer receiving such funding.

130. This is to be contrasted with Public Defenders who regularly appear in cases with a junior, seemingly regardless of jurisdiction and complexity. This does not go unnoticed by those at the Bar, particularly when it is a case which would not attract funding for two counsel outside of VLA. There was some criticism by one Supreme Court justice last year when the Public Defender became ill during the course of a plea hearing and the solicitor appearing as his junior was not equipped to carry on in his absence.

131. In some cases VLA might offer the services of a junior from the Talented Junior Counsel program. The idea of this program is that a pool of junior barristers would be eligible to be briefed as junior counsel in cases which would not meet the normal guidelines for two counsel. Often senior counsel provide services at a reduced VLA rate in the program. The Bar is concerned that this program has moved from a training initiative to replacing junior work in trials which are legitimately deserving of the two best counsel available.

132. Further, it appears that there are more situations arising where private firms are encouraged by the funding arrangements to replace a junior from the Bar or an instructing solicitor with their own in-house advocate (who is answerable to her or his principal, and not bound by Bar Rules).

133. These matters all give rise to concerns about increasing appeals and adjournments, the client getting the best representation, the independence of advice given to the client. This is not to mention equality of arms. In almost every trial in the Supreme Court the prosecution will brief senior and junior counsel to appear.

134. Similar concerns abound in the County Court, which can often have more significantly complex issues given the preponderance of sexual offence cases and the development of the law in that area.
135. In more recent times in cases where VLA has determined that senior counsel is required in a particular case it has been noted that they have chosen to brief counsel other than members of the Victorian Bar. This has involved briefing silks from Queensland and Western Australia. We do not understand any enquiries to have been made as to the availability of local counsel to appear in those matters.

136. VLA’s function cannot be carried out effectively without knowledge of how the system works in reality – grounded in the effects of decisions made at that level.

DIVERSITY

137. A limited pool of advocates, such as provided by in-house advocacy units, restrict who appears in cases before the courts. This is a significant limitation when considering the interest to encourage the appearance of women and people from other culturally diverse backgrounds. The independent Bar permits a greater capacity to brief in an affirmative manner.

138. It has been reported that 75% of VLA appearance work is now being briefed in-house. If this is the case, then the capacity to respond to community expectations about increasing diversity is severely restricted. Briefing the Bar involves a far greater pool in terms of diversity as well as expertise. The community benefits by being able to fit an advocate with specific experience and/or background to the needs of a given case.

139. There is a knock-on effect arising from briefing barristers with specific expertise and greater experience – there are likely to be fewer appeals, adjournments and complaints due to any lack in expertise or experience of counsel.
CHILDREN’S COURT PERSPECTIVE

INTRODUCTION

140. The jurisdiction of the Children’s Court encompasses both criminal law, and family welfare matters - which involve fundamental human rights.

141. What is important when considering Access to Justice in the Family Division of the Children’s Court is that many parents and young people have complex cases. Personal circumstances that can limit their ability to participate in proceedings without legal representation include:

   a. violent and aggressive parties;
   b. clients either diagnosed (or undiagnosed) with a range of mental illnesses;
   c. intellectual disability;
   d. multiple litigants in any one matter;
   e. some files and matters of many years’ retrospective duration;
   f. numerous expert witnesses being involved;
   g. multiple options open to the Court up to and including permanent removal of the children on Permanent Care Orders; and
   h. two thirds of cases being considered ‘complex’.

VLA ELIGIBILITY CRITERIA

142. Previous changes to the guidelines of VLA for eligibility for funding has led to more self-represented litigants, and counsel often appear for parties who are ineligible for a grant of aid for a significantly reduced fee.

143. From 1 March 2016 the so called ‘permanency amendments’ to the Children Youth and Families Act 2005 (Vic)\(^2\)\(^2\) will have the following impacts:

   a. shorter timeframes available for parents to work constructively to achieve the return of their children to their care;
   b. strict legislative guidelines on the calculation on cumulative periods of out of home care;
   c. abolition of orders enabling the placement of children into the care of third parties (eg Interim Protection Orders; Custody to Third Party Orders, Supervised Custody Orders);
   d. conversion of conditions on orders into case planning administrative decisions;
   e. the hierarchy of permanency objectives moves from family preservation to family reunification to adoption to permanent care to long term of out of home care;

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\(^2\) Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014.
\(^2\) Ibid s 167(1).
f. the capacity of the Department of Health and Human Services to bring ex parte applications to Court for extension and variation of orders without notice to parents or young persons involved;\textsuperscript{24}

g. under the transitional provisions, some orders convert to an order without any conditions attaching to them\textsuperscript{25} which means that the DHHS has absolute administrative control over case planning decisions; and

h. children can now be placed on Long Term Care by Secretary Orders prior to being able to be legally represented.

**INITIATIVES**

144. The Bar calls on Victoria Legal Aid to consider as a matter of urgency and implement forthwith the following initiatives:

a. in the Criminal Division of the Children’s Court:

i. in light of the *Bail Amendment Act* 2016, and in particular those provisions relating to children, to commit to making legal representation available at a fair fee to each and every child - whether over or under the age of 10 years - to ensure that the child has at the very minimum the capacity to advance arguments on his or her behalf consistently with the provisions of s 3B(1) of the *Bail Amendment Act*. This should not preclude but should guarantee ongoing representation as appropriate for the circumstances of the case. Previous changes to the availability of a grant of aid has left many young people without access to legal representation. Having legal representation is important for young people to not only contest inappropriate charges, but to avoid convictions following a plea or finding of guilt, unduly burdensome fines or restitution orders, and forensic sampling orders; all of which can have enduring repercussions well into adulthood;

b. in the Family Division of the Children’s Court:

i. to review and reconsider the guidelines available to representation of parents who have one - or any combination of - difficulties, such as intellectual deficits, mental illness, cognitive impairment, substance addiction or transience and homelessness; such legal representation to be available both for conciliation conferences so as to prevent power imbalances as between the negotiating parties, and at mentions, directions hearings, and contests (whether interim or final) in the Children’s Court. In reviewing the guidelines, consideration should be given to a waiver of a caveat in

\textsuperscript{24} Ibid for example s 300A.

\textsuperscript{25} Ibid s 289.
circumstances where the sole asset of a person is the family home and their intellectual disability precludes them from being able to have the requisite understanding to validly enter into such an agreement;

ii. to expand and review the guidelines to enable representation of parties who would suffer injustice if case planning decisions of the Department of Health and Human Services went unchallenged at VCAT; this is now imperative if parents and children are to “Access Justice” following the recent changes to the power of the Children’s Court to place conditions on orders it makes in the Best Interests of Children;

iii. to expand the guidelines so as to enable effective, timely and ongoing representation of parents and young persons, given that their effective ‘chances’ under the new legislation are severely curtailed;

iv. to offer representation as a matter of course to parties involved in applications for final orders which transfer parental rights to the Secretary of the DHHS, and on which the Court cannot place conditions. This recommendation is made as such orders involve the interference with fundamental human rights, and can deprive children of guaranteed sibling, parental and extended family contact, which has a significant impact upon the maintenance of a child’s identity and relationships into the future;

v. to consider the introduction of a grant of aid for applications to the Supreme Court in its Parentis Patriae jurisdiction; and

vi. to increase the fees available to counsel from Legal Aid as there is likely to be more intense activity and scrutiny now of all protection applications brought to the Children’s Court. Counsel conduct cases which are complex and lengthy, and require detailed knowledge and understanding of the jurisdiction, the operations of the DHHS, have clients with additional needs that hamper their ability to participate, and do so in an environment that requires navigating extreme emotional distress of clients.
TERM OF REFERENCE 9

OPTIONS FOR PROVIDING BETTER SUPPORT TO SELF-REPRESENTED LITIGANTS THROUGHOUT THE VICTORIAN JUSTICE SYSTEM

145. The Bar operates in conjunction with the Supreme Court to assist in the representation of unrepresented litigants. This is nowhere better illustrated than in relation to the Court of Appeal Duty Barristers Scheme which has been an outstanding success. Requests to the Bar from the Court of Appeal to assist in the representation of unrepresented litigants are taken up expeditiously by members of the Bar and the representation of such litigants, often in a short space of time and often involving complex legal issues, is of the highest standard.

146. There is little that can be done from the Bar’s point of view to improve its assistance in this area.

147. One possibility of providing better support for unrepresented litigants is to encourage private legal firms to participate in the Court of Appeal Duty Barrister’s Scheme by acting as instructing solicitors. There is some reluctance on the part of some private legal firms to participate, not due to a lack of willingness, but because their contribution will not be recognized by government as part of their annual contribution to the provision of pro bono legal services. This potential barrier should be removed. The representation of unrepresented litigants by skilled professionals contributes significantly to the more efficient administration of justice. Hearings are conducted much more efficiently thus freeing up resources to be allocated to other waiting litigants.