

Victorian Government - Access to Justice Review 2016

SUBMISSION BY

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“The rule of law and a strong independent judiciary are empty ideals if people cannot access the courts.”

The Hon Kevin Lindgren AM QC, The Rule of Law and Some Current Aspects of the Legal Scene in Australia, Sydney University Distinguished Speakers Program 2013.

INTRODUCTION

I have looked into the issue of access to justice at ‘grassroots’ level at various points over many years and recently looked into this in even greater detail regarding legal services provided by The Law Institute of Victoria, The Victorian Bar, Legal Aid Victoria, The Federation of Community Legal Centres Victoria and Justice Connect (formerly known as PILCH).

Many of the matters I have been involved in (commonly on behalf of disadvantaged Victorians), actually involved unethical/unprofessional conduct by government agencies/staff and/or defective administration. My findings were that there is currently no access to legal assistance regarding most legal problems for the overwhelming majority of Victorians, *no matter how poor*. This undermines both democracy and social justice in Victoria.

It has already been acknowledged elsewhere that out in the Victorian community there is substantial, unmet legal need. The Law Foundation of NSW in its 2012 report “*Legal Australia-Wide Survey: Victoria*” wrote:

“Prevalence of legal problems: Victorian summary

In Victoria, legal problems were widespread and often substantial. Almost one-half of Victorian respondents (48.4%) reported experiencing one or more legal problems in the 12 months prior to interview. Furthermore, approximately one-quarter of all Victorian respondents (25.9%) reported experiencing a substantial legal problem — that is, a problem that had a moderate or severe impact on their everyday life. In addition, the experience of multiple legal problems was common, with just under one-fifth of Victorian respondents experiencing at least three legal problems.”¹

From experience, the Law Foundation of New South Wales’s findings do not appear to be in any way exaggerated.

¹ [http://www.lawfoundation.net.au/ljf/site/templates/LAW_Vic/\\$file/LAW_Survey_Vic.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_Vic/$file/LAW_Survey_Vic.pdf) on page 75.

James Farrell in *The Conversation* also reported:

“...Why change is needed...In its draft report, the Productivity Commission found that half of all Australians will experience a legal problem this year. Most won't get legal assistance or come into contact with our courts or other legal institutions.....As the commission concludes:

The ability of individuals to enforce their rights can have profound impacts on a person's well being and quality of life ... a well-functioning civil justice system serves more than just private interests – it promotes social order, and communicates and reinforces civic values and norms ... There can also be fiscal benefits.

Prompt, affordable and well understood dispute resolution arrangements can help avoid issues escalating into more serious problems that can place burdens on health, child protection and other community welfare services.”²

Groups with Poor Access to Justice/ Victims of Inadequate Legal Safeguards

Below the surface both in Victoria and in Australia generally there is a large section of the population whose problems and traumas have been exacerbated in various ways by detrimental or inadequate laws, regulations, legal safeguards and / or poor legal protection. A brief and thus not exhaustive example of those affected (in no particular order) follows:

- Victims of crime and their immediate families (e.g. Jill Meagher, Masa Vukotic);
- Victims of sexual and other assaults;
- Victims of drug and alcohol-related crime;
- Victims of domestic violence;
- Aboriginal & Torres Strait Islanders;
- The homeless (and more particularly, the 'roofless');
- Victims of gendered and religious discrimination;
- The Stolen Generation;
- The Fairbridge Children (& others under similar schemes);
- Migrants who have suffered racial and other discrimination;
- Victims of elder abuse;
- Victims of abuse in aged care facilities;
- Elderly residents in retirement villages and similar facilities who have been exploited financially by onerous termination fees;
- Victims of disability abuse and discrimination;
- Victims of mental health abuse and discrimination;
- Victims of child abuse by clergy (in the Catholic and other churches), teachers, members of the community, step and natural family members;
- Victims of institutional abuse;
- Refugees living with the aftermath of trauma prior to their arrival in Australia and multiple traumas after settlement in Australia;
- Victims of cyber-bullying (often, but not only, the young);

² <https://theconversation.com/extra-funding-for-legal-assistance-services-should-only-be-a-start-34843>

- Victims of medical negligence;
- Victims of road accidents (here in Victoria I and others have yet to encounter anyone seriously injured on the road in recent years whose TAC claim has been settled by the TAC);
- Victims of unconscionable and discriminatory work practices (including but not limited to bullying);
- Victims of workplace abuse by The Australian Defence Force, various police forces, the medical profession (e.g. surgeons), the legal profession and government (for example);
- Victims of exploitative workplace practices;
- Victims of fraudulent employers (non-payment of statutory superannuation contributions, for example);
- Expatriate Australians who have suffered discrimination in the employment market on their return to Australia owing to little or no recognition of overseas qualifications and experience; and
- Victims of misleading and deceptive business practices.

It can be readily appreciated that most families in Victoria would thus have at least one member who has experienced one or more of the above crimes and/or injustices. Most of the above groups are however poorly served when it comes to access to justice and private legal assistance is largely available only to the wealthy, as other legal resources are at best sketchy to non-existent, even for the poorest members of society.

TERMS OF REFERENCE

Term 1

The availability of easily accessible information on legal assistance services and the Victorian justice system, including advice on resolving common legal problems

A computer-literate Victorian (whose first language is English) with Internet access, telephone, time, transport and ability to explore legal options will find various resources available around metropolitan Melbourne and to a lesser extent regional and rural Victoria. On further enquiry, however, many of these resources deliver much less than they promise. A Victorian on a very low income is still considered by various services as being not needy enough. Many community legal centres prioritise their services for the homeless and mentally-ill, when those who have some sort of roof over their heads and are mentally-sound need to access legal assistance.

I cannot comment about the experiences of the homeless and mentally-ill when they attempt to access legal assistance, but I sincerely hope they are given assistance, rather than being turned away. As it is, if the law-abiding, mentally-sound community of educated, 'genteel poor' whose heritage is mainstream Australian can have such adverse experiences, how much worse must it be for the many diverse, disadvantaged minority groups in Victoria?

In many other areas of life today, citizens are able to access many web-based tools and services and legal services are slowly rising to the challenge. Melbourne Law School Dean Carolyn Evans was quoted as saying:

"University of Melbourne students will have a new subject in 2015: "Law Apps". Evans says students will create law-based apps for ordinary people, that will "help people understand a particular area of law and whether they have a case that might be worth bringing to a lawyer".³

The homeless and those who have no access to smartphones, computers, computer tablets, or who lack the skills to use such equipment if it were made available to them will continue to need to talk to a legal professional, but many others now have at least some access to technology and technology skills. Public libraries in Victoria offer some self-service computer access and that could also be used to augment access to web-based legal services. Some librarians also offer assistance for disadvantaged citizens, where capability and capacity exists.

Those of us who have worked in private law firms in Victoria know perfectly well that many formal legal documents are templates downloaded from a precedents database ready to be completed by the end-user. The legal profession is going to have to move more quickly towards set fees, rather than hourly rates to remain viable. Few Victorians can afford a law partner's time at say \$500 plus GST per hour (by no means the highest partner rate). If clients knew that a low-paid staff member would commonly do much of the work, they would balk even more at legal bills.

³ <http://www.smh.com.au/national/newscustom/law-of-the-jungle-lawyers-now-an-endangered-species-20141011-114u91.html#ixzz40g0ZLtNn>

The Sydney Morning Herald article already hyperlinked set out an example of new, competitive, set fees:

*“Business start-up advice, \$300
Contract reviews and advice, from \$350
Drafting of privacy and consumer policies, from \$100, or Terms and Conditions, \$250.
Dealing with a creditor, from \$250.
Last will and testament or Power of attorney, \$49.95
Pre-nuptial agreement, \$79.95
Property settlement agreement in a divorce, \$129.95
Employment contracts, \$79.95
Business partnership agreement, \$149.95”*

These examples are not relevant to many of the other serious, human predicament, legal issues for which there is unmet need in Victoria, but perhaps new, relevant, set cost services could be made available by law graduates who have completed their vocational training. Bright, ‘tech-savvy’ women law graduates may be very well-placed to set up such businesses, working outside the traditional law firm which is not always known for female-friendly workplace practices. Women have been the majority of law school entrants and graduates for many years now, but the profession needs to ‘get with the times’.

There are now many resources available online for members of the public with certain legal problems to access and complete with little or no professional, legal assistance, but only, I emphasise, with certain legal problems. There is still a huge unmet need for legally-trained professionals.

There is also a huge pool of under-utilised law graduates and students both in Victoria and Australia more generally. Between 2001 and 2012, the number of law graduates in Australia more than doubled (*“The total number of law graduates reached 12,742 in 2012, up from 6,149 in 2001, representing an increase of more than 100%.”*⁴).

Some law graduates choose to work in another sector, but many would take up positions in the law if the opportunities were there. There is thus, *unmet legal employment need*, as well as unmet legal service need by potential clients. It is here that innovative solutions are needed to try address these needs and improve access to justice, which has the spin-off of improving social justice and social harmony. For the ‘bean-counters’, there are productivity benefits, too.

An unjust legal landscape however can contribute to the strikingly high rates of depression in the legal profession. A few of the bright, eager law school entrants every year are attracted to law in the belief that they can help improve the world around them. Soon after starting their law degrees, they learn more and more how unjust many laws are and how people can suffer all sorts of discriminatory practices, often because they are poor and/or less powerful. As the years go by, the cynical and initially flippant-sounding comment from their elders that the legal system is there to serve the needs of the wealthy ends up appearing to be a disturbingly well-founded impression.

⁴ <http://www.lawyersweekly.com.au/news/16023-law-graduate-unemployment-hits-record-high>

Term 2

Options for diverting people from civil litigation and into alternative services where appropriate, such as a 'triage' model

Most people with a legal problem would prefer prompt and appropriate resolution. Going to court is certainly not a favoured option for the majority, i.e. most people (even if well-justified) do not want 'their day in court'. In personal injury cases, for example, insurance companies and other entities have often relied on the presumption that most will settle for a lesser sum than go through the risks, costs and stress of going to court.

Those who do want their day in court are a disparate group, but include citizens who have been left with such a sense of injustice that they are prepared to overcome their natural aversion to court appearances and will take this step.

Better-funded community legal centres could, in theory, participate in triaging people with legal problems. There are, however, other, newer and more innovative legal centres and resources cropping up which may show a way forward.

Only recently, for example, after following a cross-reference from an ABC report, I came across for the first time the [Consumer Action Law Centre](#)⁵. From my reading, it appears to offer a wide range of valuable services to those who cannot access private legal assistance, offers opportunities to law students and law graduates (another important role), is involved in policy and advocacy work including feedback to Victorian and other government entities.

It appears to have done excellent work in raising the issue of extortionate exit fees for residents of retirement villages, for example, and made a very comprehensive and cogent submission on *Access to Justice* in November 2013 to the Productivity Commission⁶.

Turning to its website, The Consumer Action Law Centre states:

The Consumer Action Law Centre is a campaign-focused consumer advocacy organisation. Based in Melbourne, Australia, it was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service. Consumer Action is primarily funded by the Victorian Government, through Victoria Legal Aid and Consumer Affairs Victoria, and the Commonwealth of Australia, through the Department of Social Services and the Attorney-General's Department.

As a community legal centre, Consumer Action provides free legal advice and pursues litigation on behalf of vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. As well as working with consumers directly, Consumer Action provides legal assistance and professional training to community workers who advocate on behalf of consumers.

*As a nationally recognised and influential policy and research body, Consumer Action pursues a law reform agenda across a range of important consumer issues at a governmental level, in the media, and throughout the community directly.*⁷

⁵ <http://consumeraction.org.au/>

⁶ <http://consumeraction.org.au/wp-content/uploads/2013/11/Consumer-Action-Law-Centre-submission-PC-access-to-justice-inquiry-November-2013.pdf>

⁷ <http://consumeraction.org.au/about/>

The ABC news report I referred to above 25 February 2016 mentioned on 25 February 2016:

“Parliament passed a motion calling for an inquiry into the operation and regulation of the sector, including retirement and residential villages, caravan parks and independent living units.

It will look at the adequacy of fair pricing issues including complaints about excessive entry and exit fees, dispute resolution procedures and management standards.

The Consumer Action Law Centre has been lobbying the Government about these issues. Campaigner Mick Bellairs said an ombudsman should be appointed to oversee the sector.

“Most of the people who come through our centre are pension-dependent or have a fixed income and they can't afford legal advice,” Mr Bellairs said.

“There's a real power imbalance when it comes to cases that have to go to VCAT in order to be resolved.

“We have a lot of experience with industry ombudsman schemes and they work because they provide quick, free and fair dispute resolution.”⁸

One of my concerns about the Consumer Action Law Centre is that it needs more public awareness, another is that its scope could be widened further, or that a similar centre (as in, offering legal and other assistance by various grades of professional staff including volunteers, who could also use their experience to provide valuable feedback to the Victorian government on recurring problems and propose remedies and legislative reforms to address them) could be set up to cover other areas of unmet legal service need.

Medical problems can have legal consequences and health problems can originate from legal issues. An example would be a socially-disadvantaged family living in cold, damp, rented accommodation contaminated by black mould, who suffer from a range of debilitating and serious health conditions. A legal solution – ordering the landlord to improve his or her property to bring it up to appropriate standards, is required here, but is not necessarily understood or targeted in the first instance.

Valuable research has been conducted by Linda Gyorki on integrating legal services in healthcare settings. Her 2013 report as Churchill Fellow is called: *“Breaking down the silos: Overcoming the Practical and Ethical Barriers of Integrating Legal Assistance into a Healthcare Setting”*⁹.

The impetus for undertaking the fellowship was based on Linda Gyorki's work in Victoria managing an Advocacy-Health Alliance (AHA) 2 called “Acting on the Warning Signs”, a partnership between [Inner Melbourne Community Legal](#) (IMCL) and the [Royal Women's Hospital](#).

I strongly recommend that anyone wishing to know more read Linda Gyorki's report. For several years she has been Senior Project Manager and Lawyer at Inner Melbourne Community Legal and her LinkedIn bio suggests a very good background from which to write with knowledge, insight and authority: <https://au.linkedin.com/in/linda-gyorki-843407b0>

⁸ <http://www.abc.net.au/news/2016-02-25/call-for-ombudsman-to-oversee-retirement-housing/7200570?section=vic>

⁹ https://www.churchilltrust.com.au/media/fellows/Breaking_down_the_silos_L_Gyorki_2013.pdf

Term 3

Whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them

It is clear from the Review’s ADR background paper, *Attachment B: ADR service providers and complaint handlers* there is quite a range of organisations that Victorians might turn to in the event of a variety of legal problems.

From the experience of many, however, the service provided varies both from provider to provider and, in some cases with the same provider, has varied over time. *Consumer Affairs Victoria* has in the past provided a very good service regarding a range of issues, but in recent times, it has performed as if it had a different view of the services to be provided. Checking its current webpages – “*Services We Provide*” and “*Our Role, Scope and Policies*” that does not appear to be the case¹⁰. Recent experiences suggested that it was there to gather information about problems and report back to the Victorian Government, rather than assist Victorians – the problems in question were however within its official scope.

Another ADR service provider, which falls far short of reasonable expectations, is the *Office of the Health Services Commissioner of Victoria* [“HSC”].

Although the Health Services Commissioner has some powers of investigation, in practice, the HSC’s highest level of activity is conducting conciliation between complainants and healthcare providers. When conducted professionally and appropriately, conciliation ought to assist parties to achieve durable resolutions and agreements wherever possible, be even-handed and fair, addressing matters on their merits. Healthcare complaints need to be handled in a prompt and timely manner, but commonly are not. If a matter then proceeds to VCAT or another legal forum, that represents a failure of conciliation.

If an important and meritorious complaint, which was not conciliated effectively, is abandoned as a result of inadequate professional legal assistance at VCAT or another legal court, harm has been done and opportunities to improve the healthcare system have been squandered.

If left unaddressed, serious problems in the healthcare system, whether relating to the complainant’s own healthcare and/or that of others, undermines the value of having such a healthcare complaints mechanism in the first place, not to mention the resulting, persisting harm to both the original patient and future patients.

The previous Victorian government invited submissions under its Review of the Health Services (Conciliation and Review) Act in 2012 on what the problems and experiences of Victorians accessing its services were and how they might be improved. Feedback was given to the Victorian Government by many (including by me), but the lasting impression is that no very useful action has been taken.

In 2012, the Health Services Commissioner commissioned a study entitled a “*Study of people lodging complaints with the Victorian Health Services Commissioner*”. It subsequently released its final report in June 2013 in which it stated on page 44:

“Overall, 65 per of the study population was either very dissatisfied or dissatisfied. Forty-six per cent of complainants were extremely dissatisfied with the outcome of their complaint, and another 19 per cent were dissatisfied.”¹¹

¹⁰ <https://www.consumer.vic.gov.au/about-us/services-we-provide> and <https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/our-role-scope-and-policies>

¹¹ *Study of people lodging complaints with the Victorian Health Services Commissioner - Final report*

Need for improvement of ADR services /regulatory & ombudsman services

The Health Services Commission of Victoria fails to deliver because too many of its key staff members lack the ability, training and background to perform their roles appropriately and efficiently. The HSC does not need more staff of similar calibre. Looking at its most recent organisation chart it is clear that valuable feedback in recent years to the Victorian Government has not been heeded as some of its least able performers have been retained and, in some cases, promoted, whereas more effective staff members have ceased to work there.

If a Victorian has suffered a calamitous series of avoidable events in the Victorian health system (as happens), a complaint brought on their behalf ought not to be strung out for several years without corrective action. It is also not appropriate to tell such a complainant that he or she must then take their case to VCAT where the other side may and does engage state-funded legal defence services. There is no question that there is yet another power imbalance at this point.

If a complainant has a sensitive matter (which also has implications for public safety), inadequately addressed by the HSC after several years, he or she ought to be able to present their unresolved case to The Ombudsman of Victoria without enduring yet another, drawn out process at VCAT, where they have no recourse to legal representation, but the other side does. This is a marked failure on the part of Victoria as a just state. It needs to be borne in mind that the complainant has commonly already exhausted multiple other avenues by this stage.

In stark contrast to the HSC, my impression of *The Office of The Public Advocate* is vastly better. Colleen Pearce has frequently spoken out appropriately about issues within the remit of her office and has left me with an impression of compassion and dedication in the performance of her role, showing appropriate public leadership.

In essence, legal problems are problems requiring solutions, so a problem-solving approach is required. Often, a remedy is required and/or an apology may be needed, and there is commonly – especially in the healthcare sector - a hope that similar problems will not recur in future, for the sake of others.

Complainants may perform a valuable public service in bringing a range of misunderstood or unknown problems to the attention of the government, which is often in a much better position to rectify such issues.

With appropriately-selected staff, these are not necessarily intractable problems. If, however, staff are under-equipped for their role as a result of lack of training and/or ability or under-resourced, problems escalate and tensions rise. These can give rise to a higher number of legal problems, a greater risk of unmet legal need and in those instances where Victorians are able to access private legal assistance, costs rise. Injuries and avoidable deaths also have a range of personal and social costs, so it would always be kinder and wiser to minimise these risks by using this feedback together with root cause analysis to improve systems and procedures, reforming legislation if need be.

Looking back over time, there have been opportunities wasted. In a sense, looking at unmet legal needs is a bit like *'putting the cart before the horse'* as, if legal problems were reduced, there would be less need for legal services. I thus consider it highly important to have legal reform together with improved accessibility of legal services.

https://www2.health.vic.gov.au/getfile/?sc_itemid={9280B357-FBEC-47DF-93A2-50345AFF531C}&title=Study%20of%20people%20lodging%20a%20complaint%20with%20the%20Victorian%20Health%20Services%20Commissioner

Term 4

Potential reform to the jurisdiction, practices and procedures of the Victorian Civil and Administrative Tribunal (VCAT) to make the resolution of small civil claims as simple, affordable and efficient as possible

The Victorian Civil and Administrative Tribunal itself is not a Court as it is a creature of statute and has no inherent jurisdiction or powers. It does, however, in sheer numbers, handle the overwhelming majority of legal cases in Victoria.

VCAT, when first established, was primarily a forum for self-represented litigants (or litigants-in-person) and the participation of lawyers or other legal representatives was not encouraged, substantially reducing the cost of litigation.

However, over the years, there has been an increasing number of cases which have involved unilateral legal representation. Any Victorian who is too impoverished to obtain legal representation is at risk of disadvantage if the other side has legal representation. This is a particular issue in the Human Rights Division, where some 'unconciliable' but serious HSC complaints may be referred.

VCAT's *Human Rights Division* deals with matters relating to:

- Guardianship and administration;
- Equal opportunity;
- Racial and religious vilification;
- Health and privacy information;
- The Disability Act 2006 (Vic); and
- Decisions made by the Mental Health Tribunal.

It may be appreciated that these can relate to very serious matters. VCAT staff (including its Human Rights Division), do not appear to be adequately informed about the role of VCAT in such matters. There is a very important need to improve resources for litigants at VCAT under the Human Rights Division as I know of cases where Victorians with very important issues were forced to abandon them as they were unable to access legal assistance.

VCAT has three other divisions: Civil, Administrative and Residential Tenancies. The latter division is, by number of cases, the busiest. According to the 2013-2014 VCAT Annual Report, about 69 per cent of the almost 89,000 applications lodged in 2013-14 were residential tenancy matters¹².

In brief, VCAT's performance is uneven, performing quite well in some areas, but failing others, despite the fact that these may be extremely sensitive and important matters for disadvantaged Victorians. Many of the latter are *not* assisted via *pro bono* services either, for a variety of reasons. Their cases may be complex (often so), there may be a perceived legal conflict between a Victorian agency legal panel firm offering *pro bono* services to Justice Connect, for example, but representing the Victorian government agency against the Plaintiff.

I cannot overstate how important improvement in legal service delivery is in this area. It is an area of unmet legal need, which is causing tremendous social harm to disadvantaged Victorians and reputational damage to the Victorian government.

¹² <https://www.vcat.vic.gov.au/>

Term 5

The provision and distribution of *pro bono* legal services by the private legal profession in Victoria, including:

- ways to enhance the effective and equitable delivery of *pro bono* legal assistance
- opportunities to expand the availability of *pro bono* legal services in areas of unmet need
- options for expanding existing incentives for law firms within the Victorian Government Legal Services Panel

From my experience and research, what comes through quite clearly is that the major part of *pro bono* legal services is provided to not-for-profit organizations, rather than disadvantaged and/or marginalised Victorians. This holds true whether one is looking at private law firms offering *pro bono* legal services, Victorian Government Legal Service Panel firms, and various other legal service providers.

I believe that the Victorian Government might be rather perturbed if it understood just how prevalent this issue is. This also holds true for public-spirited citizens of modest or low financial means wishing to pursue matters which raise important issues of public interest or broad public concern.

The Victorian Bar's Scheme describes itself as a last resort (and then only under limited eligibility criteria) when all other options have been exhausted.

It, like all other legal services for the poor/disadvantaged is not available for complex/time consuming cases, even if means-testing criteria are met.

Victorian legal professionals need to understand when expounding on the array of services available that some of the worst legal problems are indeed complex/time-consuming. In such circumstances, the only option left is to run a case as a self-represented litigant. A lack of professional legal training and (in some cases being disabled mentally and / or physically) militate further against a successful outcome. Language difficulties will also, certainly present problems.

At the community legal centres, it is not unusual to encounter the perception that only the disreputable would need recourse to such services. Melbourne's legal fraternity needs to realise that only one personal catastrophe may stand between them and the dispossessed, marginalised and poor, examples include:

- Domestic violence leaving a spouse without a home;
- A severe medical condition compounded by an earlier medical misdiagnosis, impairing prognosis and failure of private insurance to pay out (because insurance companies will often do anything to avoid settling claims, or string them out for years);
- Serious accident on the road (cyclist mown down by driver in a 4x4 – true example) high, functioning professional in the prime of her working life, left with permanent brain and permanent physical damage, now unable to work and with the TAC failing to settle the claim – far too common);
- Corruption in public hospital cancer services, favouring private patients in public hospitals and impairing the survival of public hospital cancer patients. Current

Minister of Health Jill Hennessy took decisive action with regard to the previous Board of Peter MacCallum Cancer Centre and its concerted action to have private floors in the new public cancer hospital, the VCCC.

- Discrimination in the recruitment industry blighting chances of finding work commensurate with qualifications and experience;
- Unscrupulous financial advice leaving people of retirement age without the funds they believed they would access.

Poor, minimal to non-existent regulation with ‘teeth’ makes it more likely that such predicaments may eventuate. They all cause social harm. Anyone who believes that only the disreputable and unworthy need access to community legal assistance ought to beware – they, too, might need such assistance one day. The legal profession is known to have extremely high rates of mental health problems (depression, suicide), and serious drug and alcohol problems are far from unknown. Members may also end up on a social slide.

Ben Oquist recently wrote in The Guardian:

*“...Sickness and disability can strike any of us, at any time. It is not just today’s poor that rely on meagre benefits, all of us are only ever a diagnosis of chronic disease away from never working again. Similarly, factory closures in regional towns are not caused by job snobs, but the unemployment that results often destroys individuals, families and sometimes whole communities. Government policy can play a major role in helping people and communities navigate their way around adversity. Or it can blame them for their circumstance....”*¹³

A kind-hearted lawyer with a keen sense of social justice would risk ending up homeless, down and out if he or she tried to meet many needs for *pro bono* services. Here and there, there are kind souls in the legal profession who do what they can, but it is not fair on them, their families or their clients.

In its 2013 Submission on Access to Justice to The Productivity Commission, Justice Connect mentioned:

*“However, for small firms of sole practitioners or for barristers, undertaking pro bono work may result in less capacity to undertake paying work. For example, Justice Connect is aware of a sole practitioner who closed their legal practice to any commercial work for several weeks while litigating a pro bono matter for a vulnerable client.”*¹⁴

Victorian Government Legal Services Panel – Model Litigant issues

As stated in the Review’s Pro Bono Services Background Paper, in broad terms, Victorian government departments and agencies seeking legal services are required to engage a law firm which is represented on the Panel (‘Panel Firms’). Each Panel Firm has a contract with the Government, under which the Panel Firm has committed to provide *pro bono* legal services to approved causes that enhance access to justice for disadvantaged individuals or organisations and/or promote the public interest.

It may surprise the Victorian Government Access to Justice Review that in my experience in acting on behalf of a disadvantaged Victorian (harmed by a metropolitan Melbourne health service) who made a justifiable claim for compensation, the Victorian public hospital’s insurers engaged the services of a panel firm whose professional conduct repeatedly flouted the Victorian Government’s Model Litigant Guidelines. To be more specific, the following:

¹³ **“Income inequality: trickle-down economics is alive and well in Australia”**

3 February 2016 <http://www.theguardian.com/commentisfree/2016/feb/04/income-inequality-trickle-down-economics-is-alive-and-well-in-australia>

¹⁴ On page 15, viewable at: <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub104-access-justice.pdf>

“2. The obligation requires that the State of Victoria, its Departments and agencies:

- (a) act fairly in handling claims and litigation brought by or against the State or an agency;
- (b) act consistently in the handling of claims and litigation;
- (c) deal with claims promptly and not cause unnecessary delay;
- ...
- (e) pay legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount paid;
- (f) consider seeking to avoid and limit the scope of legal proceedings by taking such steps, if any, as are reasonable having regard to the nature of the dispute, to resolve the dispute by agreement, including participating in appropriate dispute resolution (ADR) processes or settlement negotiations;
- (g) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:
 - (i) not requiring the other party to prove a matter which the State or the agency knows to be true;
 - (ii) not contesting liability if the State or the agency believes that the main dispute is about quantum;
 - (iii) taking such steps, if any, as are reasonable to resolve such matters as may be resolved by agreement and to clarify and narrow the remaining issues in dispute; and
 - (iv) monitoring the progress of the litigation and, where appropriate, attempting to resolve the litigation, including by settlement offers, offers of compromise and ADR;
- (h) when participating in ADR or settlement negotiations, ensure that as far as practicable the representatives of the State or the agency:
 - (i) have authority to settle the matter so as to facilitate appropriate and timely resolution; and
 - (ii) participate fully and effectively.
- (i) do not rely on technical arguments unless the State’s or the agency’s interests would be prejudiced by the failure to comply with a particular requirement;
- (j) do not take advantage of a claimant who lacks the resources to litigate a legitimate claim;
- ...
- (l) consider apologising where the State or the agency is aware that it or its representatives have acted wrongfully or improperly.”

When I read Maurice Blackburn’s submission of 8 November 2013 to the Productivity Commission’s Access to Justice Arrangements Issues Paper, I noted that their extensive experience echoed mine:

“Model Litigant Guidelines

11.2 Governments, government agencies and statutory authorities (and their lawyers) have been required, since 2005, to comply with ‘model litigant guidelines’.¹ The guidelines impose an obligation to, amongst other things, deal with claims promptly, to not cause unnecessary delay, to make an early assessment of prospects and to pay legitimate claims without litigation. As well, the obligation is to avoid, prevent and limit the scope of legal proceedings wherever possible and, where not possible, to keep the costs of litigation to a minimum. This includes:

- *Not requiring a party to prove something that the agency knows to be true;*

- *Not contesting liability if the dispute is really about quantum;*
- *Considering alternative dispute resolution;*
- *Not taking advantages of a claimant who lacks the resources to litigate a legitimate claim;*
- *Not relying on technical defences;*
- *Apologising where the agency has acted improperly.*

11.3 Maurice Blackburn has represented plaintiffs and applicants in a number of jurisdictions against Commonwealth, State and Territory agencies and yet it is the exception rather than the norm in which we see any evidence of compliance with the model litigant guidelines.

11.4 It is recommended that the model litigant guidelines be reinforced in a manner that gives opponents standing to complain that the guidelines have not been complied with. This could be done by an amendment to the Judiciary Act that imposes a sanction on a government agency if a court finds non-compliance.”¹⁵

Victorian TAC claimants also run up across the issue of lawyers engaged by the TAC failing to adhere to the Model Litigant Guidelines. Although the TAC is not a state but federal entity, in Victoria:

“It is expected that a barrister engaged by the TAC will comply with the State of Victoria Model Litigant Guidelines. Please refer to the Revised Model Litigant Guidelines (2011).

Reputational Risk

There is an expectation that a barrister will not engage in any conduct that is likely to damage the reputation of the TAC.”¹⁶

Failure to adhere to the Model Litigant Guidelines can also cause reputation damage, as Victorians (and their families) who have suffered as a result will come away with an extremely tarnished opinion.

Accordingly, I urge the Victorian Government to look into this and address these issues, as the repeated and casual disregard of the Model Litigant Guidelines undermines the Government’s credibility as a model litigant and its stated aim to improve access to justice in Victoria.

On another note, I would like to mention in all my experience spanning several decades of work in law firms I have never come across such shoddy legal work by a major law firm partner, so the Victorian Government and Victorian taxpayers were certainly not getting value for money. I am leaving out the name of the law firm in question in this submission, but it is available privately for the information of the Victorian Government. It is worth pursuing, as the firm has caused the Government reputational damage. A case study like this calls into question the suitability of such a firm to be selected as a Victorian Government-appointed panel firm. There are many law firms in Victoria, competition for panel services is quite stiff and the Victorian Government does not need to stoop to using the services of a firm such as this.

¹⁵<http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub059-access-justice.pdf>

¹⁶ <http://www.tac.vic.gov.au/providers/for-legal-professionals/engagement-of-counsel-guidelines>

Worse still, when trying to find out whether Justice Connect might be able to assist in this matter (where the relevant party was on an extremely low income – well under any means-test thresholds), assistance was declined by Justice Connect as that same firm was one of its *pro bono* firms. It was also suggested that the claimant ought to get an impoverished family member who was living on a Centrelink disability pension to sell their (only) modest and low-market value home to pay for private legal services – in essence this would carry the serious risk of making that family member homeless. This falls far short of what anyone might imagine when discussing what legal resources there are in Victoria for the disadvantaged.

The end result was that an important, meritorious case was abandoned without remedy, and the injured party lives with the trauma and sequelae of what caused the complaint in the first place. The Victorian Government Department of Health and the relevant hospital have also permitted their reputation to remain severely tarnished. This matter originated during the term of the Baillieu/Napthine Government, so the Andrews Government has the opportunity of remedying the injustices caused without losing face.

Term 6

The availability and distribution of funding amongst legal assistance providers by the Victorian and Commonwealth governments to best meet legal need

It is clear that current funding is very limited, so spreading it even more thinly is unlikely to address many unmet legal needs. A cost-effective option would be to carry out legal reform, tapping into the insight and experience of community legal centre lawyers, citizens making complaints and submissions, and other public-spirited parties.

Term 7

Whether there is any duplication in services provided by legal assistance providers, and options for reducing that duplication, including the development of legal education material

It could probably be said that there is some duplication among legal assistance providers, but considering that they are unable to meet current demand, duplication may not be the biggest issue.

Of greater concern is all the *lacunae* in the services being offered and the fact that many poor and disadvantaged Victorians are unable to access any more detailed assistance for a wide range of legal problems.

Term 8

The resourcing of Victoria Legal Aid (VLA) to ensure that Government funding is used as effectively and efficiently as possible and services are directed to Victorians most in need, including:

- within the total funding envelope, the types of matters funded by VLA, eligibility criteria for legal assistance and the level of assistance provided
- VLA's current service delivery model, including the use of panel arrangements and internal lawyers, and spending on allied support services

Looking at The VLA's most recent Annual Report, it appears total funding for the 2013-2014 was just under \$167 million, of which c. \$85 million was received from the Victorian Government. The *per capita, per annum* amounts are (based on the 2013 Victorian population of c. 5.791 million) \$28.83 and \$14.68 respectively. These amounts cover community legal centre payments, staff, administration and other payments. It is clear that the budget is modest.

Victoria is also Australia's fastest-growing state¹⁷, so that fact, together with declining government grants, necessarily means that the VLA's finances are increasingly strained from what was already a low baseline¹⁸.

Contrast this with over \$700 million spent by the Australian Government on its own legal advice and representation mentioned by James Farrell in his article on *The Conversation* in 2014: '*Slow, expensive, complicated' legal system must be improved*'¹⁹

Turning to how Victoria's scarce budget has been used, a significant part of has been disbursed in providing legal representation to dangerous, serial offenders such as Adrian Bayley and Sean Price (the former was out on parole, the latter was out under a supervision order, when their most recent and shocking crimes were committed).

On 1 October 2013, Hugh de Kretser, Executive Director of the Human Rights Law Centre wrote:

“There is a longstanding imbalance across Australia with the majority of legal aid funding being spent on serious criminal cases — and because most serious crime is committed by men, the majority of aid is spent on men.

It's right that someone facing jail gets free legal representation if they can't afford a lawyer. But it's not right that many other people in serious legal situations can't.

¹⁷ <http://www.smh.com.au/business/the-economy/abs-population-statistics-victoria-becomes-australias-fastest-growing-state-20150924-gjudy9.html>

¹⁸ <http://annualreport.vla.vic.gov.au/our-income-and-expenditure>

¹⁹ <http://theconversation.com/slow-expensive-complicated-legal-system-must-be-improved-25382>

There are gaping holes in the safety net of legal help for family and civil cases. Community legal centres, Indigenous legal services and others try to fill these gaps but, like legal aid commissions, are overwhelmed with demand.

This means that tenants facing eviction and homelessness, victims of family violence, people struggling with debt, people being underpaid or unfairly sacked at work often can't access the legal help they need.

This is where we should be asking questions and calling for greater funding from both state and federal governments.

Legal aid is a key part of ensuring people are equal before the law. We need to make sure it is available for all people who need it, not just those charged with serious crimes.”²⁰

Maurice Blackburn in its Submission to the Productivity Commission “Response to Access to Justice Arrangements Issues Paper” dated 8 November 2013 wrote:

“5. Is unmet need concentrated among particular groups?

5.1 It is quite obvious to those working in Maurice Blackburn’s Response Centre and lawyers and other staff in the firm who provide pro bono and volunteer assistance through an array of community legal services that unmet legal need is not limited to the marginalised but is a significant problem for all but the most wealthy. If it was not for the private legal profession being prepared to take substantial risks conducting cases on a conditional fee basis only the wealthy would have any meaningful access to the justice system.

5.2 As it is, those cases that can be properly conducted on a conditional fee basis represent a relatively small proportion of the legal problems that need addressing. Legal aid commissions, community legal centres, community justice centres, consumer organisations and NGOs all provide legal advice and assistant services but there are many who miss out as these services are underfunded.”²¹

In reality, the majority of disadvantaged and/or marginalised Victorians are not assisted by Victoria Legal Aid with regard to a wide range of serious legal problems, for some of the reasons alluded to above.

²⁰ *The Adrian Bayley case raises questions about who gets limited legal funding*
<http://www.heraldsun.com.au/news/opinion/the-adrian-bayley-case-raises-questions-about-who-gets-limited-legal-funding/story-fni0ffsx-1226730286334>

²¹ <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub059-access-justice.pdf>

Term 9

Options for providing better support to self-represented litigants throughout the Victorian justice system.

Who are self-represented litigants in Victoria?

Professor Tania Sourdin and her colleagues E Richardson and N Wallace at Monash University's *Australian Centre for Court and Justice System Innovation* (ACCJSI) conducted an extensive review concerning Self-Represented Litigants published in May 2012. She and her colleagues gave a summary of who self-represented litigants were in a Canadian context, but when I viewed it I considered it would be equally relevant in Victoria today, namely: -

- “1. SRLs with an overall lack of social resources.*
- 2. Low income SRLs with some social resources*
- 3. SRLs living with additional social barriers that interfere with accessing justice.*
- 4. SRLs unable to find an available lawyer and who wish to hire a lawyer.*
- 5. SRLs who were previously represented.*
- 6. SRLs in cases where representation is supposed to be unnecessary*
- 7. SRLs who could access representation but prefer to self-represent.”²²²³*

Out of all the courts mentioned in the background information, it was the Supreme Court of Victoria that appeared to have the best online resources for self-represented litigants when I looked into this.

In the main, self-represented litigants are a ‘side-effect’ of poor access to professional legal services.

If services were offered more widely, I strongly believe the trend towards more and more self-represented litigants would dissipate.

If flawed legislation, policy, procedures and practice were improved, that would also reduce the need for legal services.

²³ *Self-Represented Litigants - Literature Review*, page p.11
http://www.monash.edu/data/assets/pdf_file/0003/142068/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf

NEED FOR LEGAL REFORM & BETTER TRAINING

- *reducing the need for legal services and improving the experience of Victorians accessing government services.*

There is an ongoing need for serious law reform as more than a few laws have (because of inadequate drafting) unintended consequences.

Lawyers at Justice Connect, community legal centres, *pro bono* lawyers and social activists are more aware than many of where there are deficiencies in the system. There are laws which have unintended consequences, for example. It is very important that citizen's rights are not flouted by poorly-drafted legislation being misapplied to those never anticipated in its drafting. Community lawyers, citizen advocates and others need to have a communication channel to give important feedback to the Victorian Government with the expectation that such reports will be treated with the importance they deserve. An extreme example of this would be certain provisions of the Mental Health Act 2014 (Vic) which were never intended to be applied to people without an actual psychiatric condition. Unfortunately, there are cases out there and the harm caused can be catastrophic. Medical misdiagnosis is alarmingly frequent, but in this instance, the consequences can be even worse. Feedback has previously been given to the Victorian Government (under Napthine and Baillieu) and was never acted on appropriately.

Most Victorians will either have to endure unresolved legal problems, or take the risk of appearing in court as self-represented litigants battling against what may be well-armed defence or prosecution teams, and the risks of repeated injustices will only escalate.

On another note, many Australians, if not better informed, would be unaware that a percentage of the Commonwealth bill for the Disability Support Pension results from people harmed by medical negligence who are consequently no longer able to do paid work. DSP recipients are also implicitly people who are too young for the Age Pension and many of them were previously in the prime of their working lives and paying taxes (unlike more than a few major companies – including multinationals - in Australia).

Governments and politicians need to understand that poor social justice ultimately can have an impact at the ballot box, especially in a country like Australia where voting is compulsory. Taking voters for granted and perpetuating corruption can be 'punished' at the ballot box, when all else fails. Commentators have remarked on the shorter and shorter political cycles of state and federal governments in Australia in recent years, but a more careful look at what is happening in Australian society at grassroots level would give some answers.

Other harms in Victoria arise from the failure to act compatibly with the terms of Victoria's Charter of Human Rights and the failure to consider them when developing policies, drafting legislation and delivering services. Staff of Victorian government organizations and agencies (include public hospital staff, Victoria Police, PSOs) need some workplace training about their legal obligations. Some of the areas of inadequate knowledge, training and deficient practice include:

- the Victorian Charter of Human Rights;
- the Health Records Act 2001 (Vic); and
- Model Litigant Rules.

It is beyond the scope of this submission to give further details, but they are available to the Victorian Government upon request.

In 2015, the current Victorian Government announced (as I only recently learnt) that submissions were open for review of Victoria's Charter of Human Rights. It rightly stated:

*"The Charter requires the Victorian Government, public servants, local councils, Victoria Police and other public authorities to act compatibly with these human rights and to consider them when developing policies, drafting legislation and delivering services."*²⁴

The Victorian Charter still lacks some 'teeth', however.

Many citizens are unaware that Australia lacks a *national* bill of rights. Professor George Williams from the University of New South Wales wrote last December:

*"We are unique among Western nations in lacking a national bill of rights or human rights act."*²⁵

Back in 2006, Professor George Williams also wrote:

"Australia is now the only democratic nation in the world without a national bill or charter of rights. Some comprehensive form of legal protection for basic rights is seen as an essential check and balance in democratic governance around the world. Indeed, I am not aware of any democratic nation that has gained a new constitution in the last two decades that has not included some form of bill of rights, nor am I aware of any such nation that has ever done away with its bill of rights once it has been enacted.

Why then is Australia the exception? Why has Australia not gone down the rights protection path like other nations? The answer lies in our history. Although we like to think of Australia as a young country, constitutionally speaking, we are one of the oldest in the world. Our national constitution remains almost completely as it was enacted in 1901, while the constitutions of the Australian states go back as far back as the 1850s.

*By contrast, over 56 per cent of the member states of the United Nations made major changes to their constitutions between 1989 and 1999. Of the states making such changes, over 70 per cent even adopted a completely new constitution.[2] It is not surprising then that Australia was described by Geoffrey Sawer as far back as 1967 as 'constitutionally speaking ... the frozen continent'."*²⁶

If law reform were handled promptly and thoughtfully, there would be a reduced need for access to legal services. To cut back on law reform is therefore a false economy.

²⁴ <http://www.premier.vic.gov.au/submissions-open-for-review-of-victorias-charter-of-human-rights/>

²⁵ <http://www.theage.com.au/comment/the-growing-assault-on-the-democratic-rights-of-australians-20151223-qltv70>

²⁶ George Williams "Victoria's Charter of Human Rights and Responsibilities: Lessons for the National Debate, Papers on Parliament No. 46, December 2006

http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/~/_link.aspx?_id=A20FB46F919D44A68AF6D8CB54EE2076&_z=z

The Consumer Action Law Centre's 2013 Submission on Access to Justice Arrangements to the Productivity Commission (referred to under Item 2) summarised its key points and recommendations very well, viz.:

- *“The inquiry should focus on how the justice system can efficiently deliver just outcomes rather than only procedural access to justice.*
- *Access to justice creates broader community benefits, including by improving the efficiency of markets.*
- *Community legal centres are more efficient if they combine direct service provision with strategic work like policy, law reform and advocacy.*
- *Prevention and early intervention is important, but efforts in these areas must go much further than simply education or information campaigns.*
- *A combination of generalist and specialist community legal centres creates a far more efficient and effective legal assistance system than could be achieved with generalist centres alone.*
- *Appropriate linking of legal services with other community welfare services—for example, linking financial counselling and consumer credit legal services—is an efficient way of extending legal assistance services.*
- *ADR and mediation processes should be made more transparent, by being subject to regular and public evaluations, so as to contribute to quality outcomes and efficient resolution of common legal problems.*
- *Moves towards a ‘user pays’ approach for application fees in tribunals undermines the purpose of having tribunals and so reduces access to justice and creates inefficiencies.*
- *Court and tribunal fee waiver processes should be designed to remove barriers for applicants who have already been assessed as having a very low income.*
- *Any limitations on legal representation at tribunals should be flexible to ensure that limits do not inhibit efficiency or produce power imbalances between parties.*
- *Efficiencies in court processes that produce unjust outcomes, such as default judgment processes, can actually undermine efficiency by imposing social costs on individuals affected.*
- *Court rules or legislation should be introduced that expressly give courts discretion to provide protection against adverse costs orders to public interest litigants.*
- *Measures should be taken to encourage private funding of litigation, whether by class action lawyers or litigation funders, as an efficient means of providing access to justice by reducing the reliance on public funding for litigation.*
- *The tax deductibility of legal costs for business creates inequity between business and individual litigants and means business pays a smaller contribution towards the publicly funded legal system than do other litigants, despite being heavy users of that system.*
- *Funders should resource, enable and encourage community legal centres to develop evaluation tools best suited to the nature of their service.*
- *There are benefits of using social return on investment methodology to assess and track the social benefits and impact of the access to justice arrangements.”²⁷*

²⁷ <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub049-access-justice.pdf>

FINAL NOTE

I mentioned to Ms Kerin Leonard that this review was not well-publicised and that there would be many interested parties who might therefore miss out on the opportunity to make a submission. I took the trouble to alert many, including several journalists at *The Age* of the review and its impending deadline, as it is a public interest issue and the Victorian Government should not have to spend money on private advertising.

I have a suggestion to make which might ensure that Victorians have a better chance of making submissions in future, which would cost the Victorian Government \$nil. The Premier of Victoria's webpage could have the following hyperlink:

http://www.premier.vic.gov.au/new_submission_topics

On such a webpage, all invitations to make submissions could be listed and hyperlinked to relevant webpages. The media could be notified of this web address, to report it to the public, so that citizens are 'in the loop'.