

22 February 2016

Ms Kerin Leonard
Project Manager
Access to Justice Review
Department of Justice and Regulation
Level 24, 121 Exhibition St
Melbourne VIC 3000
accesstojusticereview@justice.vic.gov.au

Dear Ms Leonard,

We welcome the opportunity to provide a submission to the Review Panel in relation to the Victorian Department of Justice and Regulation's *Access to Justice Review* ("the Review").

Having regard to the Terms of Reference, this submission will seek to respond to the following terms of reference:

- *Term of Reference 2*: options for diverting people from civil litigation and into alternative services where appropriate, such as a 'triage' model;
- *Term of Reference 3*: whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them; and
- *Term of Reference 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; and
 - options for expanding existing incentives for law firms within the Victorian Government Legal Services Panel.

Please do not hesitate to contact me or our General Manager of Public Policy and Strategy, Ben Hubbard if we can further assist with your inquiries.

Yours faithfully,



Greg Tucker
CEO
MAURICE BLACKBURN



**Maurice
Blackburn**
Lawyers
Since 1919

**SUBMISSION TO THE
VICTORIAN DEPARTMENT
OF JUSTICE AND
REGULATION'S
ACCESS TO JUSTICE REVIEW**

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout Victoria, New South Wales, Queensland, South Australia, Western Australia, the Australian Capital Territory and the Northern Territory. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1,000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge. The firm also has a national social justice practice.

The firm has a small will and estate practice, but otherwise the legal services we provide generally concern advice about rights and assisting people to claim compensation for loss and damage suffered by another's negligence or other allegedly wrongful conduct.

Response to Term of Reference 2: Diverting Victorians from Civil Litigation and facilitating the Early Resolution of Disputes without Litigation

(a) Re Question One: How do organisations currently employ triage and diversionary strategies, and what referral mechanisms are the most effective?

Maurice Blackburn uses many extra-judicial strategies to achieve positive early outcomes for our clients if it is in their best interests to do so. As a rule, we encourage clients to attempt to resolve their issues before commencing formal proceedings and, once commenced, we will seize every possible opportunity to mediate or negotiate an acceptable resolution for our clients.

People come to Maurice Blackburn because they have identified that they have a legal problem and that the problem may be assisted by seeing a lawyer. We do not underestimate the difficulty that many of our clients had prior to recognising that they had a legal problem and that seeing a lawyer was the right thing to do. We expect that there are many thousands of people who are not able to identify when their problem is one that may be helped by seeing a lawyer.

Our advice service is typically provided first by paralegals through a telephone response centre and web based enquiry service. Through these advice services people are then referred to the service that is, in the opinion of the referrer, best for that person. If someone presents themselves to our Response Centre with a legal enquiry that does not fall within one of our key practice areas, for example, requiring assistance with conveyancing and property, family law or criminal law issues, Maurice Blackburn tries to provide referrals to an associate firm who are specialists in their field. If the person's problem is one that is best served by those working in a community legal centre, legal aid, an industry based dispute resolution scheme or corporate complaints service, then that referral will be offered.

For example, if a person has a complaint about a registered health practitioner's health, performance or conduct, where the conduct does not amount to medical negligence, the person may be referred to the Australian Health Practitioner Regulation Agency (AHPRA) to make a "notification".

If the enquiry is one best addressed by a lawyer employed by Maurice Blackburn then the referral will be made to the appropriate lawyer and again, in many cases, the first consultation will be conducted without charge.

(b) Re Question Three: What possibilities exist to improve the way in which people are diverted from civil litigation prior to commencing proceedings, to alternative services, at the earliest opportunity?

Motor Vehicle Accident Claims and the Transport Accident Commission (TAC)

One of Maurice Blackburn's areas of specialisation is motor vehicle accident claims. Our specialised lawyers assist Victorians through the complex claims process and ensure damages entitlements are maximised. This work necessitates working closely with the TAC.

The TAC is a Victorian Government-owned organisation whose role is to promote road safety, improve the State's trauma system and support those who have been injured on our roads. The TAC administers the statutory comprehensive no-fault and common law damages compensation scheme for people who are injured or die as a result of a transport accident within Victoria or interstate involving a Victorian registered vehicle. Administrative decisions made by the TAC are all reviewable by VCAT. The TAC itself acknowledged that in the years leading up to 2004, the number of contested disputes at VCAT had reached significant numbers and was still steadily increasing.¹

In response to this, negotiations were commenced in early 2004 between key stakeholders, including representatives of the Law Institute of Victoria (LIV), the Australia Plaintiff Lawyers Association (now the Australian Lawyers Alliance (ALA)) and the TAC itself. As a result of these negotiations, three protocols were developed to deal with no fault dispute resolution, impairment benefit claims and common law claims.² These protocols apply to disputes where the claimant has retained a lawyer, who is a member of either the LIV or ALA, to provide advice about the consequences of the accident injury.³ The protocols are *voluntary*; however the LIV and ALA have agreed that they and their members will comply with them.⁴

The protocols have been hugely successful at diverting claimants from embarking on civil litigation at the earliest opportunity. Importantly, the protocols streamline and seek to expedite the various procedures and processes involved in dispute management.⁵ They also seek to facilitate the early mutual disclosure of relevant information and documentation which reduces the time taken to resolve disputes and damages actions and also reduces the cost of disputation.⁶ The protocols also contain provisions relating to costs, reflecting agreements between the key players as to the legal costs to be paid by the TAC to claimant's lawyers in connection with disputes resolved according to the various protocols and as recognition of the value the Plaintiff lawyer contributes to ensuring appropriate benefits are paid to injured road users and to resolving disputes.⁷

The *No Fault Dispute Resolution Protocols* apply to the resolution of no-fault compensation disputes arising subsequent to a TAC decision. Although a claimant has the ability to apply to VCAT for a review of the decision, the protocols provides that the claimant may not issue an application for review to VCAT until a *pre-issue review* has been completed. A *pre-issue review* involves the exchange of prescribed material by the claimant and the TAC followed by a *pre-issue conference*. In recognising the different dispute resolution pathways that should be available to reflect the parties' needs and expectations, the parties may agree to appoint a mediator, facilitator, joint expert or special referee, with the TAC agreeing to pay the costs of the same.⁸ Upon conclusion of the *pre-issue review* the TAC must either affirm or vary its decision, or set it aside and make a new decision.⁹ If the dispute is not resolved only then can the complainant proceed to litigation.

The *Common Law Dispute Protocols* apply where the claimant requests the TAC to provide a serious injury certificate in order to allow them to bring proceedings for the recovery of damages. The rules pertaining to applications for a serious injury certificate seek to facilitate the mutual early exchange of relevant information and documents,¹⁰ to help ensure quality decision making by the TAC. Should the TAC refuse the granting of the serious injury certificate under the Protocols, the injured person is able to issue proceedings in the County Court of Victoria.

If the claimant chooses to issue proceedings, there is an option to participate in a *voluntary* pre-trial conference (1 month before the trial date). This voluntary process was established in 2007, as a result of an agreed method of conducting the conferences being reached between representatives of the TAC, the ALA and the LIV. The TAC is able to meet the injured person and ask questions as to the impact of the injuries upon the person's life. In return, the TAC must disclose all credit material (including surveillance material) and is prohibited from gathering any further material from that time onwards. Since 2007, between 60% - 70% of litigated matters were resolved at these pre-trial conferences. This has the impact of a vast reduction of contested Originating Motions proceeding to trial, thereby reducing the pressures on the County Court.

One of the greatest advantages of the TAC protocols is the flexibility afforded by their status as protocols rather than legislation or sub-ordinate legislation. The protocols can easily be amended by agreement between the key stakeholders. The protocols incorporate mechanisms for regular review and modification, reflecting an acknowledgement that the protocols may require adaption in light of experience to remedy unintended consequences. These "review forums" are attended by the LIV, ALA and TAC and are held at least once every six months.

As noted above, these protocols have been highly successful in reducing the number of VCAT applications for review, County Court Originating Motions and Supreme Court / County Court damages trials. They have not, as some critics alleged, resulted in increased costs and delay. Before legislative changes in 2013 curtailed their operation, 80% of common law claims were resolved within the Protocols and without the need to litigate. Not all rejected serious injury claims proceed to litigation (due to the Plaintiff electing not to issue Court proceedings) but of the litigated Originating Motions, 60% - 70% resolved the matter during the pre-trial conference, leaving a very small proportion of claims actually proceeding to trial. Maurice Blackburn perceives the success of such protocols to be predicated upon the fact that both the creation of the protocols and the availability of pre-trial conferences was and is done by way of negotiation and compromise between the key players, rather than being arbitrarily imposed without adequate consultation.

In 2014, the LIV, ALA and TAC re-entered into negotiations to rewrite the protocols to allow them to continue to operate due to the 2013 amendments. These new protocols are set to be introduced on the 1st July this year, utilising similar concepts as the previous protocols. The TAC, LIV and ALA all agree that these protocols recognise that appropriate mechanisms to resolve disputes are important for ensuring the claimant's legal rights and obligations are being observed and are "not abandoned" for the lack of opportunity to enforce them.¹¹ Although hugely successful at diverting claimants from civil litigation, one of the most important features of the protocols is that they do not restrict access to litigation if required.

The 3 protocols work effectively as a package, and thus it is contended that it is almost impossible to remove one protocol without affecting the remaining two.

Workers Compensation Claims and the Accident Commission Conciliation Service (ACCS)

Maurice Blackburn's experienced Workers Compensation team seeks to help Victorians claim the compensation they deserve and this includes assistance with the lodgement of Workers Compensation claims with WorkSafe. WorkSafe administers the statutory Victorian Workers

Compensation Scheme for people who are injured at work. If the claim is rejected the worker can seek internal review of that decision and then refer the matter to the ACCS, or proceed directly to the ACCS.¹² The ACCS is an independent body corporate under the *Accident Compensation Act 1985 (ACA)* and the *Workplace Injury Rehabilitation and Compensation Act 2013 (WIRC)*. Its function is to provide conciliation services to resolve disputes for the purposes of the *ACA* and the *WIRC*. It is a free independent service offered by the Victorian Government.

In practice, most matters are referred directly to the ACCS, by-passing the request for internal review.

Pursuant to the Ministerial Guidelines, conciliation should:

- assist the parties to achieve durable resolutions and agreements wherever possible;
- be even handed and fair, and address matters on their merits;
- maximise flexibility and informality;
- facilitate early return to work opportunities;
- enhance on-going employee/employer employment relationships;
- be prompt and timely in the conduct of conciliation processes and in dealings with the parties; and
- reduce cost implications for the parties and the scheme and ensure that matters do not unnecessarily proceed to the Courts.¹³

As such, it provides an ADR mechanism and diversionary strategy, attempting to reduce the number of disputes proceeding to Court. While the ACCS has not been as successful as the TAC Protocols have proved to be in resolving disputes without the need for litigation, it has reduced the number of disputes that have required Court proceedings to be issued.

Based on our observations, there are a number of possible explanations for the difference in the success rates:

- 1) The WorkSafe model of outsourcing their decision making to Authorised Agents (Insurers) rather than retaining the function in-house. In our experience, the TAC representatives approach conferences with a view to resolving them, rather than a compliance based approach to participating in a compulsory conference. In contrast, WorkSafe Authorised Agent Claims Officers often approach the conference on the basis that they are there to 'defend' their decision, rather than try and reach a sensible settlement of the dispute;
- 2) WorkSafe Authorised Agents can lack a "commercial" approach to dispute resolution;
- 3) WorkSafe Authorised Agents Claims Officers conclude their responsibility and accountability for the ultimate outcome of the claim at the conclusion of the ACCS process. If the worker chooses to issue Court proceedings following the Conciliation process, the carriage of the file is handed over to a WorkSafe Panel law firm (other than in the case of those employers who are Self-Insured);
- 4) There is an over-reliance on the use of Independent Medical Examiners (IME's) to inform decision making rather than treating practitioners. While there is a place for IME's, they should be used selectively;
- 5) Late service of IME reports or other material upon which an Authorised Agents decision is based. Anecdotally we have been told that this material can be served as late as the day of the ACCS conference, leaving the Conciliation Officer and the worker without proper time to digest the contents and if necessary obtain further opinion;
- 6) Failure of the Authorised Agent to provide material that has been relied upon in making their decision by the time of the Conciliation Conference that is later relied upon at Court;
- 7) Limited powers of Conciliation Officers. While they can issue a direction in cases where they are satisfied that there is no genuine dispute with respect to the liability to make weekly payments, the directions are for a limited period and are often overturned at the Court. In our experience, this power is rarely relied upon by Conciliation Officers.

We note that the Victorian Ombudsman has commenced an own motion investigation into the handling of workers compensation claims by WorkSafe Agents. The media release of the Ombudsman dated 5 November 2015 stated that:

*The investigation will look at whether WorkSafe agents have unreasonably denied liability or terminated entitlements for people who have suffered injuries in the workplace; and whether agents did this for financial incentives offered by WorkSafe. The investigation will focus on agents' use of Independent Medical Examinations. Whether WorkSafe is providing effective oversight of agents and their claims management will also be reviewed.*¹⁴

The previous Victorian Ombudsman also initiated an own motion investigation on the back of rising complaints regarding the handling of WorkCover claims.¹⁵ He recommended that WorkSafe:

- take immediate action to ensure agents comply with their contractual obligations regarding record keeping;
- introduce a modern IT system for its agents, to address the issues identified in this report;
- audit its agents' record keeping as a priority and then review compliance each year;
- introduce a central registry for all accounts, invoices or medical certificates received by its agents;
- require that any written correspondence leaving the agents is double checked or peer reviewed prior to despatch;
- create and implement standardised procedures and rules for document creation, storage and handling in consultation with PROV;
- ensure that its agents introduce a formal handover procedure when claim files are allocated to new case managers; and
- ensure that all documents created electronically in relation to a claim are maintained together on the central claim file.

All of these recommendations were accepted by WorkSafe. We are unable to comment on the progress of the implementation of these changes.

In addition, CGU was fined \$2.8 million by and made restitution of \$2.5 million to WorkSafe after being found to have artificially manipulated financial incentives relating to payment of invoices.

While these matters of themselves do not go to the question of providing claimants with access to ADR, they do highlight areas of potential concern with respect to the culture and practice with the WorkSafe model of claims management.

Medical Negligence Claims and the Office of the Health Services Commissioner (OHSC)

Our Medical Negligence team assists clients to make claims for physical, psychological or financial harm which is caused by negligent medical treatment. Part of this assistance involves an initial evaluation as to which legal avenue will produce the best outcome for the client. Where it is deemed to be in the client's best interests, Maurice Blackburn will refer a client to the Office of the Health Services Commissioner (OHSC), an independent body established to receive and solve complaints about health service providers.¹⁶ Such referrals are usually made where the client's claim is small, such that the legal costs associated with pursuing a cause of action would outweigh any potential damages claim. Further, referrals are made where there is clear negligence but no injury, and in situations where the client has little information and it is not clear whether there is any basis for a claim.

Maurice Blackburn also ensures that advice about the availability of OHSC services is routinely provided to clients – so that clients can pursue the most appropriate avenue. It is worth noting that it is

not uncommon for clients to use the services offered by the OHSC as a first port of call, as a number of clients, whilst having good grounds for a cause of action, are motivated primarily out of a desire for greater knowledge and an apology and would prefer to participate in a non-adversarial process, at least initially. Importantly OHSC services are free and confidential, making them an attractive and important means of seeking redress for some Victorians.

For those claims which are referred to the OHSC, the experience for clients is generally an adequate one. The OHSC guidelines provide that after first attempting to resolve their complaints directly with the health service provider, the complainant can make a written complaint to the OHSC. The complaint is then sent to the health services provider for a response. The OHSC then forwards a copy of the response to the claimant to consider. If the complainant is not satisfied with the response, the OHSC will discuss the complainant's unresolved issues with them to see if anything more can be done. If the complaint remains unresolved, an OHSC officer will make a decision about what should happen next.¹⁷ The OHSC officer can choose to take no further action, make a referral to the Australian Health Practitioners Regulation Agency (AHPRA) (in cases of unprofessional conduct) or offer conciliation services.

With regard to its conciliation function, some similar concerns that attend the conciliation process of the ACCS attend the OHSC. In 2012, the Health Services Commissioner commissioned a study entitled a "*Study of people lodging complaints with the Victorian Health Services Commissioner*".¹⁸ This report examined, among other things, the extent to which complainants received a satisfactory outcome through the assessment and conciliation process. The report noted that of the 383 assessment and conciliation group respondents, 234 (61%) indicated that they had achieved a negative outcome, which was frequently reported as having achieved nothing.¹⁹ Whilst there are a number of likely reasons for this, it is worth highlighting that, similar to the ACCC, the OHSC lacks the power to compel parties and therefore requires the parties to constructively engage in the conciliation process. As such, the extent to which a positive outcome for all parties can be conciliated is heavily reliant on the health services provider coming to the table, which does not always eventuate. Consequently, it could be argued that the lack of determinate power of the OHSC hinders its ability to resolve disputes in situations involving an unco-operative party.

(c) Re Question Five: Is there a culture of people wanting to 'have their day in court' that creates a barrier to diversion for civil litigation? If so, how could this change?

While some clients find the experience of sharing their story a cathartic one, it is our experience that most clients will readily choose a meaningful ADR diversion if available for the following reasons:

- 1) very few clients relish the opportunity to give evidence in a courtroom. They find the environment, behaviours and practices intimidating and stressful;
- 2) the cost risk associated with proceeding to court, particularly in the event of an adverse outcome, is daunting and overwhelming; and
- 3) there is often a long delay in obtaining resolution of the case if Court proceedings need to be issued.

Response to Term of Reference 3: Expansion of Alternative Dispute Resolution (ADR) Mechanisms

(a) Re Question One: Are there circumstances where it would be appropriate to expand the use of ADR in Victoria? If so, how should that be done?

Whilst preferable in a number of situations, ADR is not an appropriate mechanism for resolving *all* disputes. The Victorian Law Reform Commission acknowledged this fact in their 2008 *Civil Justice Review Report*, and more recently so did the Productivity Commission in their 2014 *Access to Justice Final Report*.²⁰ Both Commissions recognised the fact that different dispute resolution mechanisms

may be better suited for different matters, depending on their size, complexity and importance. As such any attempt to expand ADR processes must refrain from operating under the assumption that ADR is appropriate and desirable as a means of resolving disputes in all circumstances.

Drawing from the success of the TAC protocols, Maurice Blackburn suggests that one way in which ADR could be expanded in Victoria, would be to consider whether the conditions that have led to the success of the TAC protocols could be replicated elsewhere. An important lesson to be learnt from the success of the TAC protocols is the need to collaboratively develop such protocols by agreement between key stakeholders. Importantly, input from key stakeholders brings with it insights and knowledge gathered through numerous years of experience navigating existing and former statutory regimes. The fact that such protocols are developed by way of negotiation and compromise also increases the likelihood that key stakeholders will adhere to them. As noted above, a further advantage of such protocols is the flexibility afforded by their status as protocols rather than legislation or sub-ordinate legislation, with the protocols themselves containing mechanisms for regular review and modification and thereby easily adapted to remedy unintended consequences.

In the context of the TAC regime, such protocols have been successful in providing an alternative means of disputes resolution and diverting claimants from civil litigation at the earliest possibility. Protocols can be utilised to streamline processes and facilitate the early mutual disclosure of relevant information. They can also provide opportunities for the parties to meet in an informal setting, without prejudice. Importantly, such protocols are voluntary and further do not restrict access to litigation if it is deemed to be required. Whilst not necessarily appropriate for resolving all forms of dispute, the protocols do appear to work well in the context of transport accidents in Victoria.

(b) Re Question Two: What could be done to improve ADR, including mechanisms to address the power imbalance that exists in some situations?

When granting statutory bodies exclusive jurisdiction over resolving certain types of disputes, Government has a responsibility to ensure that these statutory bodies operate as efficiently and effectively as possible. It is for this reason that the Victorian Government must take seriously the concerns already outlined regarding the effectiveness of existing Victorian ADR mechanisms in order to best serve Victorians. Early resolution of disputes is clearly a good thing, but the reality is that inadequate and misplaced early resolution practices may simply accentuate the disadvantage of the less powerful and less resourced person resulting in dispute resolution without just outcomes.

As discussed above, the potential for power imbalances to affect ADR processes is a real concern. Particularly in situations where the other party in the dispute is the agent of a Statutory Authority or an insurer representative, the likelihood for a power and knowledge imbalance to exist is high. It is for this reason that Maurice Blackburn strongly disagrees with any suggestion that legal representation at any level of the dispute resolution process should be restricted. Even making access to legal representation in ADR processes contingent on the consent of all parties and the Statutory Authority officer can be problematic.

It is well established that legal representation helps those less able to present their case. Maurice Blackburn acknowledges that if the value of a dispute is low, it may be uneconomical for a complainant to retain a lawyer or a lawyer's role may be necessarily limited. However, it is Maurice Blackburn's experience that resolutely restricting the use of lawyers does not benefit the complainant who is fighting an injustice but merely empowers the perpetrator. In practice, defendants are often represented by a person with more sophisticated advocacy skills than the complainant, such as in-house counsel, a landlord, a company director or public sector advocate. If the goal is to prevent defendant corporations from overwhelming poorer complainants, the solution is not to restrict the use of lawyers but to ensure that the relevant Statutory Authority appropriately case manages matters before it. Further, one must be careful of relying heavily on published success rates as indicators of

the effectiveness of existing Victorian ADR processes, when, as the Productivity Commission noted, “success rates may be high because some parties are inappropriately pressured into settlements, perhaps because of a power imbalance”.²¹ The need to help to rectify the power balance in these contexts is therefore essential.

Further, as already stressed, ADR is not an appropriate means of resolving *all* disputes. Effective ADR requires both sides to constructively engage in the process, and therefore in order for ADR to work, both parties must have a genuine interest in attempting to reach a resolution prior to litigation.²² In reality, this is not always the case. If there is any possibility that substantial claims are open to sensible extra-judicial resolution, Maurice Blackburn will always facilitate such a resolution, but if not, the requirement to negotiate before commencing proceedings with a recalcitrant and possibly manipulative defendant merely adds to the cost and the time that it takes to resolve the dispute.

Response to Term of Reference 5: Provision and Distribution of Pro Bono Services

(a) Re Question One: What is your experience of pro bono work?

As noted in our submission to the Productivity Commission’s inquiry into Access to Justice Arrangements, Maurice Blackburn and its lawyers give many hundreds of hours of pro bono work per year to the community and our clients. This is done by:

- Community involvement, such as volunteering in community legal centres, participating in Management Committees and Boards of NGOs, and assisting welfare groups through a Community Social Responsibility Program;
- Free legal advice and assistance through our Response Centre and by our “first consultation for free” policy in many areas; and
- Our substantial Social Justice Practice and innovative partnership clinics.

Social Justice Practice

Maurice Blackburn is Australia’s leading social justice law firm. At Maurice Blackburn, our work is based on the view that Australian and international law should support the notion of justice and reflect community values. The firm’s Social Justice Practice challenges the excesses of government and business, and champions the rights of those who are disadvantaged.

Below are details of a few examples of pro bono work undertaken by Maurice Blackburn’s nation-leading Social Justice Practice:

- *Breast cancer gene patent case and preventing the commercialisation of human genetic material* - In 2010, Maurice Blackburn began legal action to challenge a patent over human genetic material on behalf of a Brisbane woman with cancer, on a pro bono basis. On 7 October 2015, the Australian High Court ruled that the gene BRCA1 cannot be patented, ending a year legal battle. The case raised philosophical and ethical issues about the commercialisation of the human body.
- *Ferouz Legal Action and release of Australian-born babies from detention* – In 2013, Maurice Blackburn began to fight for more than 100 children and babies living in detention centres around the country, including Baby Ferouz, who was born in Australia in 2013 to an asylum seeker family from a persecuted minority group in Myanmar. For over a year, Maurice Blackburn fought on a pro bono basis, for Australian-born babies living in detention, including running matters in both the Federal and High Courts of Australia. On 18 December 2014, in light of this campaign and more than a year after legal action first commenced for Ferouz and other Australian-born babies living in detention, the former Minister for Immigration announced that the remaining 31 babies would also be released from detention and be allowed to remain in Australia to have their protection claims processed.

- *Stolen Generation Compensation Payments* - Maurice Blackburn has assisted members of the Stolen Generation to make applications for compensation under the statutory regimes and has assisted claimants to make Freedom of Information requests for records relating to their removal and housing. This contribution is just one part of a series of ways in which Maurice Blackburn seeks to actively assist Indigenous communities with public interest litigation. Maurice Blackburn works in the courts and in the community to address injustices and to help close the reconciliation gap in health, income and living standards between Aboriginal and non-Aboriginal Australians.

ASRC/MB Legal Clinic

Maurice Blackburn has commenced an initiative with the Asylum Seekers Resource Centre (ASRC) to assist eligible people in applying for refugee visas. Changes to migration laws has meant that there are thousands of asylum seekers that need to apply for refugee visas under the new Federal 'FastTrack System' within limited time frames. To meet this demand, Maurice Blackburn's Social Justice Practice has set up a joint ASRC/MB clinic where Maurice Blackburn employees can volunteer to lend their assistance after hours. The work involves interviewing clients, working with interpreters and helping some of the most vulnerable and diverse people in our community access their rights.

HeLP Patient Clinic

As part of a health and legal partnership, Maurice Blackburn is providing free legal advice to patients at the Alfred Hospital. The HeLP clinic is a joint undertaking between Maurice Blackburn, the Alfred Hospital and the Michael Kirby Centre for Public Health and Human Rights at Monash University. Maurice Blackburn provides lawyers to the clinic 2 days a week on a pro bono basis. Patients and their families are referred to the clinic by their social worker, doctor, nurse or any other health professional. Importantly, all advice is provided free of charge. The clinic typically provides a referral service, which means that preliminary legal advice is usually provided. If further assistance is required, the patient is then referred to other public and private legal services that can provide ongoing support. The focus has been on making "hot" referrals, which means that the clinic calls the community legal centre or firm, gets preliminary advice and actually arranges the appointment. The utilisation of "hot" referrals has been vital to the Clinic's success, increasingly the likelihood that patients will follow up on the referral. Since commencing over two years ago, over 500 patients have been assisted.

(b) Re Question Four: What are barriers for small and medium firms, sole practitioners and in-house counsel in undertaking pro bono legal work? What strategies and support would be most effective in overcoming these barriers? What other options are there to promote the delivery of pro bono services by all sectors of the legal profession?

One of the most effective means of promoting the delivery of pro bono services is to recognise when it occurs. The Australian Pro Bono Centre acknowledges that pro bono can become an important part of how law firms "define and present themselves externally".²³ It has increasingly been used as a way to distinguish law firms from other competitors, demonstrating a desire to "give back" to the community and a commitment to corporate social responsibility. In fact the Australian Pro Bono Centre readily admits that some potential clients are directly influenced by the extent to which a firm embraces pro bono work when determining which firm to engage.²⁴ For this reason, public recognition of the pro bono services provided by the private legal profession in Victoria has become increasingly important.

Maurice Blackburn contends that providing greater recognition is an important way for the Victorian Government to promote the delivery of pro bono services, particularly for those law firms who do not tender for Victorian Government legal work and thus aren't already given platform and recognition by their inclusion in the Victorian Government Legal Services Panel.

Further, Maurice Blackburn has increasing concerns regarding the calculation methods used when comparing pro bono contributions between law firms, with the current methods employed not giving sufficient credence to the variety of ways in which pro bono services are delivered. Maurice Blackburn argues that the per-lawyer metric is an inappropriate comparator. This is because the mix of pro bono work done by Maurice Blackburn is significantly different to that of other firms, and is focussed on clients whose demand would not be met by the pro bono legal services offered by other firms. Maurice Blackburn's pro bono work is also almost exclusively litigious, unlike many other firms whose pro bono work consists mostly of advice and transaction work.

Our pro bono contribution calculations for the 2014-2015 financial year do not adequately reflect the extent of Maurice Blackburn's contributions. Whilst we have determined that approximately \$2,329,200 worth of fees and \$461,408 worth of disbursements were incurred, the actual value of fees is probably higher because not all lawyers who undertake pro bono work record time for their ordinary fee-earning activity and therefore the time spent by those lawyers on pro bono work is not recorded. In addition, there are fees and disbursements which are not included in these figures because of financial assistance received under the *Commonwealth Public Interest and Test Case Scheme Guidelines*. The figures outlined also do not include the expense of staffing Maurice Blackburn's Social Justice Practice, with the equivalent of 2.2 full time lawyers and one full time legal assistant exclusively dedicated to pro bono work.

Importantly, a meaningful pro-bono per-lawyer average is not able to be calculated for the firm as a whole. Maurice Blackburn has 10 key practice areas and time recording is not standard practice in seven of those areas, since their clients are not charged by time. Thus the time spent by those lawyers on pro bono work is often not recorded. Further, current calculation methods do not allow Maurice Blackburn to include the pro bono services provided by its Response Centre service nor its first consultation for free service in a number of practice areas. Hours are only recorded in three practice areas, one of which – Class Actions – is the provider of more pro bono work than any other practice area. In the Class Actions department, we have calculated that approximately 109 hours per lawyer of pro bono work was undertaken in the 2014-2015 financial year, approximately 5823 hours in total.

The way in which Maurice Blackburn provides pro bono legal services is different from other law firms, and for the reasons outlined above it is not realistic for us to produce the same monetary or time figures as other firms. As Government and legal community acknowledgement of pro bono contributions relies so heavily on these calculations and figures, the Maurice Blackburn model will not be given adequate recognition for doing things differently. Maurice Blackburn believes reform in the way Government and the legal community acknowledge significant pro bono contributions, without any government purchasing obligations, needs to be considered.

(c) Re Question Six: Which (if any) of the strategies outlined would support lawyers to undertake pro bono work in areas of unmet need? What other options are there to encourage and support lawyers to undertake pro bono work in areas of unmet need?

Maurice Blackburn supports the reform of Continuing Professional Development (CPD) requirements and the introduction of pro bono costs orders, as suggested in the Review's "Pro Bono Legal Services – Background Paper".

Pro bono Costs Orders

Maurice Blackburn supports the Department's suggestion of expressly providing for pro bono costs orders to encourage lawyers to undertake pro bono cases in areas of unmet need. This suggestion clearly builds upon the Productivity Commission's Draft Recommendation 13.4 that parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs

rules of the relevant court, and that the amount to be recovered should be a fixed amount set out in court scales. When this Draft Recommendation was made, Maurice Blackburn supported it and noted that whether pro bono representation be provided by private lawyers, Community Legal Centres or Legal Aid, if the claim is successful, full costs should be recoverable whether the services are provided pro bono or not. The workings of the indemnity principle, in relation to legal costs, create complexity in this area. Clear legislated rules regarding the recovery of legal costs by litigants, who are assisted by representatives acting pro bono, would be likely to encourage more lawyers to take on pro bono work.

Continuing Professional Development Requirements

Maurice Blackburn supports the Department's suggestion to allow specified types of pro bono activities to count as a CPD activity for the purposes of a lawyer's yearly CPD requirements. Maurice Blackburn is of the view that this change would help to increase pro bono efforts made by individual lawyers.

Contingency fees

Although we note that contingency fee arrangements are beyond the scope of the Terms of Reference, we believe that discussion regarding the merits of percentage based contingency fee arrangements is important in the context of broader discussions regarding notions of access to justice. For this reason, we felt it important to take this opportunity to make our views on this issue clear - enabling lawyers to charge percentage based contingency fees will help more people to have their claims for compensation heard and determined than is possible at present.

Contingency fees align the interests of the lawyers with those of their clients. The incentive for both parties is for the largest payout in the shortest possible time. Time billing becomes irrelevant, while inefficiencies and delay become the enemy of the lawyer as well as the client, whereas in traditional litigation, lawyers who are paid by the hour benefit from the convoluted road taken to resolve disputes.

As noted above, in an environment where concerns are raised that legal costs are disproportionate to the amounts involved in civil disputes it is counterintuitive to ban the one form of charging which ensures proportionality.

The availability of contingency fees will complement the legal services assistance sector and the litigation funding industry by providing an additional model by which complex and substantial claims, such as consumer and commercial class actions, can be funded.

Arguments against contingency fees usually boil down to two propositions:

- 1) Contingency fees will prompt an increase in frivolous and unmeritorious “US style” litigation; and
- 2) Contingency fees create an insuperable conflict between the lawyer’s fiduciary duty to the client and their financial interest in the outcome of a case.

There is no necessary link between contingency fees and unmeritorious and frivolous litigation. The greatest disincentive to such litigation is the loser pays costs rule. Jurisdictions such as Ontario in Canada and more recently the United Kingdom demonstrate that the introduction of contingency fee arrangements together with the retention of a loser pays costs rule will see an increase in access to justice without an explosion of frivolous claims. The US, on the other hand, does not have a loser pays costs rule, and has a more activist judicial culture and a greater willingness to award exemplary (as opposed to compensatory) damages; all of which provide considerable incentives to potential litigants to “chance their arm”.

Under conditional costs arrangements the vast bulk of plaintiff litigation in Australia is already conducted in circumstances where the lawyer has a financial interest in the outcome of the case. The scale of that interest in a large unfunded class action can be tens of millions of dollars. The economic incentives of such arrangements are worse than they would be if contingency fees were charged because the lawyer’s financial interest is to accept an offer which is made at whatever level of offer would justify their fee. Yet, in practice, lawyers routinely recommend the rejection of offers which would be in their financial interest to accept because they do not regard the offers to be in the best interests of the client. In the many thousands of conditional costs cases run and settled every year by private lawyers the financial interest of the lawyer in the outcome of the litigation does not present any insuperable difficulty in relation to conflict of interest, nor is there evidence of such difficulties in those jurisdictions which permit contingency fee arrangements.

Contingency fees will also introduce much needed competition into the litigation funding market where barriers to enter that market are substantial. Currently funding commissions are in the range of 25% to 40% with lawyer’s fees (in class actions) averaging 12%. If lawyers are permitted to charge contingency fees the overall costs to the consumer are likely to be substantially less than the combined costs of a third party funder and lawyer. Commercial litigation funders, driven by their desire for high margins to cover their substantial risks, are constrained to fund actions that are predicted to

recover at least 3 times their estimated outlay. If a class action, for example, is likely to cost a funder \$4m to conclude, it will not be underwritten by a commercial litigation funder unless the recovery is likely to be greater than \$30m. A law firm considering an action for which costs and disbursements may total \$4m, should be willing to conduct a meritorious claim on a contingency fee basis if the expected recovery is greater than \$16m, as party and party costs should also be recovered on success.

The legal assistance sector is starved of funds and unable to assist any but the most marginalised. Lawyers acting on a conditional fee basis help a lot of people but the risks associated with larger cases, such as class actions, are too much to expect a law firm to carry without a proper upside. Contingency fees offer this. As well, litigation funders operate outside of the legal regulatory system whereas lawyers acting on a contingency fee basis are well and truly in it and, for class actions at least, the arrangements will be subject to supervision of the court.

If contingency fees were to be introduced in Australia it could be done with the loser pays costs rule (as in Ontario and the UK) and constraints on percentage recoveries (as in the UK). As well, limits can be imposed on the sort of actions in which such fee arrangements may be used. It would also be sensible for the courts to have a supervisory role in the approval of contingency fees in substantial actions, such as class actions.

As noted in the LIV's recent position paper on "Percentage-Based Contingency Fees",²⁵ both the Productivity Commission and the Victorian Law Reform Commission have considered the current legislative prohibition on contingency fees. The Victorian Law Reform Commission recommended the current legislative prohibition on percentage contingency fees be reconsidered, whilst the Productivity Commission recommended the removal of the prohibition on contingency fees, subject to certain exceptions and restrictions.²⁶

Maurice Blackburn supports the exceptions and restrictions highlighted in the Productivity Commission's Recommendation 18.1. Namely that, at least initially:

- The prohibition on damages-based billing for criminal and family matters, in line with restrictions for conditional billing, should remain;
- Comprehensive disclosure requirements – including the percentage of damages, and where liability will fall for disbursements and adverse costs orders – should be made explicit in the billing contract at the outset of the agreement;
- Percentages should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients; and
- Damages-based fees should be used on their own with no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).

Maurice Blackburn also supports the additional safeguards suggested by the LIV, including:

- Prohibition of contingency fees for family law, criminal law and migration law matters;
- A cap on contingency fees of 35% of damages for personal injury matters; and
- A prohibition on charging additional legal fees in conjunction with contingency fees for work done by the law practice on the same matter.²⁷

Allowing lawyers to charge contingency fees would substantially improve access to justice and ensure a proportionality of fees to risk and outcomes. Current conditional costs arrangements constrain lawyers' rewards regardless of the risk they undertake in a given case. This has the impact of imposing restrictions on the number of cases that can be undertaken on this basis. In an environment where concerns are raised that in some instances costs are disproportionate to recoveries in the civil justice system it seems entirely counter intuitive that the one means of charging which would ensure proportionality is currently prohibited.

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- ¹ Letter from Andrew Ford (Operations Manager at Transport Accident Commission) to Professor Tania Sourdin, 16 July 2012, 2 <<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1007&context=access>>
- ² Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 130.
- ³ Transport Accident Act, *No Fault Dispute Resolution Protocols* (amended August 2008) s 3.2.
- ⁴ *Ibid* s 1.4.
- ⁵ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 132.
- ⁶ *Ibid*.
- ⁷ *Ibid* 131.
- ⁸ Transport Accident Act, *No Fault Dispute Resolution Protocols* (amended August 2008) ss 7.6-7.10.
- ⁹ *Ibid* s 8.1.
- ¹⁰ Transport Accident Act, *Common Law Dispute Protocols* (amended March 2010) s 4.
- ¹¹ *Transport Accidents Act 1986* (Vic) s 93(4)(c).
- ¹² WorkSafe Victoria, *Reviewing A Decision* <<http://www.worksafe.vic.gov.au/injury-and-claims/workers-the-claims-process/after-the-claim-has-been-assessed/reviewing-a-decision>>
- ¹³ Ministerial Guidelines for the Arrangement of the Business of Conciliation Officers (April 2011) <http://www.conciliation.vic.gov.au/__data/assets/pdf_file/0007/58669/ministerial_guidelines_arrangement_business_COs.pdf>
- ¹⁴ Ombudsman Victoria, *Ombudsman launches investigation into handling of workers compensation claims* (November 2015) <<https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Ombudsman-launches-investigation-into-handling-of>>
- ¹⁵ Ombudsman Victoria, *Investigation into Record Keeping Failures by WorkSafe Agents* (May 2011) 9.
- ¹⁶ Office of the Health Services Commissioner, *Information for Complainants* <<http://www.health.vic.gov.au/hsc/resources/infosheet.htm>>
- ¹⁷ *Ibid*.
- ¹⁸ Office of the Health Services Commissioner, *Victorian Health Services Commissioner's Response to the Final Report: Study of people lodging complaints with the Victorian Health Services Commissioner* <<http://www.health.vic.gov.au/hsc/resources/lodgingacomplaint.htm>>
- ¹⁹ Department of Health & Human Services, "Study of people lodging complaints with the Victorian Health Services Commissioner" (Final Report, August 2014) 40.
- ²⁰ Productivity Commission, *Access to Justice Arrangements*, Report No. 72 (2014) 12; Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 242.
- ²¹ Productivity Commission, *Access to Justice Arrangements*, Report No. 72 (2014) 288
- ²² *Ibid* 289.
- ²³ The Australian Pro Bono Centre, *Promoting a Pro Bono Culture* <<http://www.nationalprobono.org.au/probonomanual/page.asp?sid=1&pid=20>>
- ²⁴ *Ibid*.
- ²⁵ Law Institute of Victoria, "Percentage-Based Contingency Fees: Position Paper" (February 2016) 4.
- ²⁶ *Ibid*; Productivity Commission, *Access to Justice Arrangements*, Report No. 72 (2014) 12; Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 629; Victorian Law Reform Commission, *Achieving Greater Access to Justice: A New Funding Mechanism* (2008) 687.
- ²⁷ Law Institute of Victoria, "Percentage-Based Contingency Fees: Position Paper" (February 2016) 13.