



Submission to the VCAT Review

Homeless Persons' Legal Clinic
and
Seniors Rights Victoria

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Table of Contents

1.	Executive summary	2
1.1	The role of VCAT in a changing world	2
1.2	A joint HPLC/SRV submission	2
1.3	Summary of Recommendations	3
2.	Introduction	5
3.	Disadvantaged clients & VCAT	5
3.1	The need for data and research	7
4.	Human Rights Implications – VCAT and the Charter of Human Rights and Responsibilities Act 2006 (Vic)	8
4.1	A case for case management	9
5.	The role of lawyers	10
5.1	Human rights of representation	11
5.2	The benefits of legal assistance	12
5.3	Legal representation and ‘special circumstances’	13
6.	VCAT procedures and operations	14
6.1	Quality of decision making	14
6.2	Improve and develop notification procedures	15
6.3	Limitations in VCAT powers in guardianship matters	17
7.	Reopen, review and appeal of VCAT decisions	17
7.1	Applications for re-opening	18
7.2	Appealing VCAT decisions	18
7.3	Transcripts	19
8.	Merits review of VCAT decisions	20
9.	Conclusion	23
	Annexure	24

1. Executive summary

1.1 The role of VCAT in a changing world

It is fortunate the 10 year review of Victorian Civil and Administrative Tribunal (**VCAT**) coincides with the appointment of a Tribunal President prepared to fully engage with human rights. As the Australian Government grapples with whether to enshrine human rights obligations in Federal legislation, VCAT has already demonstrated its commitment to human rights in both its decisions and decision making under the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**).

We consider VCAT has extraordinary potential to realise and protect human rights. Older Victorians and people with an experience of homelessness are at great risk of violation of their rights and face a range of obstacles in relation to exercise of their rights. Housing and guardianship are both jurisdictions in which there is the ability for the voices of disadvantaged people to be heard and respected. These are equally jurisdictions in which personal autonomy and homelessness are at risk. The rights to equality before the law and to a fair hearing are critical concepts in the process of reversing the cycle of disadvantage.

1.2 A joint HPLC/SRV submission

The PILCH Homeless Person's Legal Clinic (**HPLC**) and Seniors Rights Victoria (**SRV**) make this submission in response to the VCAT President's Review (the **Review**).¹ Further information about the HPLC, SRV and PILCH is contained in the annexure to this submission.

The lived experiences of HPLC and SRV clients are divergent in many ways. The broader issues and concerns experienced by older Victorians and people at risk of or experiencing homeless in relation to the general law will not always overlap. However, when it comes to the jurisdiction of VCAT there is a synergy with regards to the experiences of the two client groups. At VCAT, both older Victorians and people at risk of homelessness often require assistance with matters before the Residential Tenancies and Guardianship Lists of the Tribunal.

Access to justice and the ability to live their lives in accordance with the rights afforded all Victorians under the *Charter of Rights and Responsibilities Act 2006* (Vic) are often sorely lacking.

It in this light that the HPLC and SRV determined that a joint submission to the Review was the most appropriate mechanism through which to express our concerns with regard to

¹ Our submission draws on the knowledge, experiences and expertise of the HPLC and SRV (as well as PILCH more generally) as community lawyers, as a facilitator of pro bono legal services, and in law reform and policy work on human rights and access to justice issues. Further information about the HPLC, SRV and PILCH is contained in the annexure to this submission.

some of the current practices at VCAT and make recommendations to ensure greater equity and access for our clients.

1.3 Summary of Recommendations

The HPLC and SRV recommend:

Recommendation 1: that a full breakdown of VCAT statistics be made publicly available in order to improve transparency and facilitate a more comprehensive analysis of access to justice issues at VCAT.

Recommendation 2: that consideration be given to clearly measuring outcomes at VCAT for older Victorians and people with an experience of homelessness.

Recommendation 3: that equality before the law and the right to a fair hearing be a guiding principle in relation to the review of VCAT.

Recommendation 4: In accordance with the spirit of access to justice which lies at the heart of the right to a fair hearing, we recommend VCAT take action to assist disadvantaged individuals and actively promote this right in its programs, policies, training and initiatives.

Recommendation 5: that implementation of a Tribunal Integrated Services Program in order to improve access to justice for older Victorians and people with an experience of homelessness.

Recommendation 6: that VCAT make all necessary legislative and other arrangements in order to enable people meeting a definition of special circumstances to be represented by a professional advocate.

Recommendation 7: that a guideline be issued whereby, if Members become aware that an unrepresented party may come within the definition of 'special circumstances', the matter is stood down to enable a client to obtain representation or legal assistance.

Recommendation 8: that VCAT adopt a broad definition of 'special circumstances', taking age, disability, mental health, addiction, homelessness, language and socio economic factors into consideration.

Recommendation 9: that general consideration be given to other ways in which 'special circumstances' may be taken into consideration by VCAT, including the possibility of guidelines relating to adjournments and access to advice and professional advocacy.

Recommendation 10: that Members receive enhanced training, guidance and support in order to improve their therapeutic decision making skills.

Recommendation 11: in light of the difficulties experienced by older and disabled Victorians [and people with poor literacy skills, that VCAT improve the physical and visual characteristics of its forms, correspondence and all other documentation provided to users of the Tribunal.

Recommendation 12: that VCAT documentation be amended to clearly establish what a client needs to do in response to a document as well as where a client may go and who a client may contact for assistance in relation to the document.

Recommendation 13: that VCAT adopt a case management model in order to assist notify people with an experience of homelessness or older Victorians of VCAT proceedings.

Recommendation 14: that s 125V of the Instruments Act 1958 be amended to extend VCAT's powers powers of attorney, which have been revoked or alternatively, that VCAT rules or new guidelines set out the procedures relating to the Tribunal's use of these powers.

Recommendation 15: that the VCAT Act be amended to enable VCAT to award compensation against a defaulting attorney without requiring separate proceedings to be brought.

Recommendation 16: that VCAT permit a matter to be reopened where a person is able to establish that their failure to appear was in part due to 'special circumstances'.

Recommendation 17: that consideration be given to the ways in which older Victorians and people with an experience of homelessness may be disadvantaged by current requirements in relation to appeal of VCAT decisions.

Recommendation 18: that VCAT recommend and support moves to simplify appeal processes.

Recommendation 19: that VCAT install and operate recording facilities at all hearing venues.

Recommendation 20: that VCAT provide free transcripts to disadvantaged clients who satisfy a 'special circumstances' criteria.

Recommendation 21: that a system of merits review of VCAT decisions be implemented.

Recommendation 22: that an appeal tribunal be established within VCAT, constituted by three VCAT members, one of whom must be a presidential member, to hear appeals on questions of fact or law.

2. Introduction

It cannot be denied that VCAT is an international high point of the process of 'tribunalisation' and that the Tribunal has enhanced both the strength and capacity of the Victorian justice system.² It is staggering to consider that VCAT annually hears approximately 90,000 matters and over the past 10 years the number of jurisdictions, applications filed and matters heard has steadily increased.

Despite these gains, SRV and HPLC believe it is time to focus on the way in which, and ask the question of whether, VCAT provides access to justice. The primary focus of this submission is to recommend ways in which VCAT can enhance access to justice for all Victorians, in particular older Victorians and people with an experience of homelessness. These client groups often experience disadvantage and inequality when they engage with judicial bodies and tribunals, particularly where their personal circumstances include an intellectual and or sensory impairment, physical disability, addiction, literacy issues, extreme stress or financial hardship.

3. Disadvantaged clients & VCAT

SRV and HPLC consider it important to underscore the significance of VCAT orders for some users of the Tribunal.

For example, clearly, the appointment of a guardian by VCAT can have wide ranging implications in relation to personal autonomy. This includes the ability to make decisions about where and with whom a person is to live, the nature and location of a person's employment and the relationships a person may maintain. Similarly, the appointment of an administrator to control financial access and decision making abilities can have equally wide ranging impacts on personal autonomy.

Case Study

Doug had been friends with Jane for a number of years. As Jane's health declined she was moved into an aged care facility. Doug maintained contact with Jane after her move either visiting or speaking with her on a daily basis. On one visit to the aged care facility the staff refused to allow Doug to visit.

Doug contacted SRV to find out why he had been refused access to his friend. It transpired that some time earlier, VCAT had appointed Jane's daughter as her guardian. Jane's daughter did not like Doug and when she discovered that Doug was still in contact with Jane, she directed the aged care facility to deny Doug access.

The Order pursuant to which the guardian was purporting to act did not include the power to limit access to Jane. The limits of the Guardianship Order had not been explained or made clear to the guardian.

² Justice Bell, 'The role of VCAT in a changing world: the President's review of VCAT', p 1

A second example exists in the area of residential tenancies. An order for possession made by VCAT can have dramatic consequences for people with an experience of housing instability and older Victorians.

Eviction is an event that may start a cycle of homelessness. The Federal government's recent White Paper on Homelessness confirmed that eviction can lead to homelessness and noted that 'Homelessness removes stability and connection in people's lives. People who move away from their home and local community often leave behind important supportive relationships and networks.'³ A recent report from the Australian Housing and Urban Research Institute also stated that 'housing can make a difference to personal and family wellbeing, health, economic participation, social connectedness, community functioning and social cohesion.'⁴

Case study

Raj sought the assistance of the HPLC at a very late stage. After living for almost 4 years in rental premises, a possession order and warrant were issued by VCAT. Raj contacted the HPLC following a home visit from the police in which he was advised that in the following days the warrant would be executed to remove him from the premises.

Raj came from a non English speaking background and lived with a chronic health condition that limited his ability to work and his options in relation to alternative rental premises. At the time Raj sought assistance from the HPLC it was clear that this client had very few 'legal' options. It was also clear that this client was at risk of homelessness as a result of the possession order by VCAT.

In addition to these experiences, HPLC and SRV clients often require assistance in relation to tenancy compensation claims and matters in the civil claims and credit lists of VCAT. In this regard it is important to note that for clients experiencing financial hardship an award of even minor compensation can have a significant impact on ability to maintain housing and meet other household expenses.

The impact of some decisions can have a disproportionate impact on HPLC and SRV clients due to their baseline circumstances. VCAT decisions can compound a situation of existing disadvantage and poverty. For example determinations of VCAT can lead to eviction from Office of Housing premises for non-arrears tenancy breaches, which results in a person being banned from public housing for 12 months. Compensation claims in the Residential Tenancies List is another area where, in the HPLC's experience, clients can be overwhelmed and experience a feeling of hopelessness when confronted by an inflated claim by a landlord. Where the tenant does not attend or attends but has not received advice and is not represented, there is a risk that monetary amounts will not be scrutinised sufficiently. A resulting debt can operate to preclude a tenant or resident from receiving housing until that debt is repaid.

³ The Road Home: A National Approach to Reducing Homelessness, Commonwealth of Australia, 2008, p 10

⁴ Hulse and Saugeres, 'Housing insecurity and its link to the social inclusion agenda', AHURI Research & Policy Bulletin, Issue 113 May 2009, page 2

SRV and HPLC do not suggest that a landlord should not be able to apply for a possession order, nor do we suggest there is no place for guardianship and administration orders. Rather we consider that in light of the significant impact of decisions in these areas on our clients' lives and wellbeing, every effort should be made to provide them with access to justice.

3.1 The need for data and research

HPLC and SRV consider that significantly more information about the operations of VCAT should be made publicly available. This would provide for more transparency in respect of operations at VCAT and assist organisations to understand the ways in which people move through the Tribunal.

By way of example, in the Residential Tenancies List section of the VCAT Annual Report, there is a breakdown of applications by type and applicant. Unfortunately, the report does not contain analysis of the numbers of tenants or residents who attended the Tribunal and whether they were represented, nor are there any details of the nature of orders made. Further, from examining the Annual Report, it is not possible to determine how the work of the list was divided between private tenancies, public housing, rooming houses and caravan parks.

In the Guardianship List section of the VCAT Annual Report there is a breakdown of applications by type and 'initiation type'. Again, unfortunately the report contains no analysis of the number of represented people (or the respondents to applications in this list) who attended or were represented. There is also no indication of the number of guardianship or administration orders made.

In addition, based on currently available information, it is impossible to determine how matters in VCAT are finalised. Equally, VCAT's Annual Report does not go into any detail about important issues such as the quality of decision-making and provides no performance measures for that quality.⁵

On the other hand the Annual Report provides detailed information about VCAT's efficiency – for example, it states that the Residential Tenancies List finalised over 60,000 matters in the 2007 – 2008 financial year. Of this number, 80 per cent of cases were resolved within three weeks of an application being filed.⁶ Further, the Guardianship section of the Annual Report also refers to 'efficiency' and finalisation of significantly more cases than in the previous reporting period.⁷

HPLC and SRV consider that understanding what VCAT is doing and how it is

⁵ The annual report does indicate 61% of residential tenancy applications were initiated by real estate agents or property managers on behalf of landlords and 27% were initiated by the Director of Housing, p 23

⁶ VCAT Annual Report, 2007-08, p 22

⁷ Ibid, p 14

Recommendation 1: We recommend a full breakdown of VCAT statistics be made publicly available in order to improve transparency and facilitate a more comprehensive analysis of access to justice issues at VCAT.

Recommendation 2: We recommend consideration be given to clearly measuring outcomes at VCAT for older Victorians and people with an experience of homelessness.

4. Human Rights Implications – VCAT and the Charter of Human Rights and Responsibilities Act 2006 (Vic)

SRV and the HPLC note the recent decision of VCAT, *Kracke v Mental Health Review Board*⁸ (**Kracke**) in which Justice Bell confirmed that VCAT must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in doing so. We are encouraged by the President's public comments following *Kracke* that VCAT is seeking to ingrain respect for human rights within both its adjudicative and administrative functions.

It is a truism that '[p]oor people are particularly vulnerable to human rights violations by governmental authorities and private individuals'.⁹ This comment is supported by recent HPLC research which indicates that people experiencing homelessness consider a range of human rights protections to be either inadequate or very inadequate.¹⁰

We consider the 'equality before the law' right in section 8¹¹ and the 'fair hearing' right in section 24¹² of the Charter to be of great significance when considering the ways in which disadvantaged people access VCAT. We note the comments of Justice Bell in *Tomasevic v Travaglini & Anor* [2007] VSC 337, in which he states 'Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected'.¹³

VCAT has the potential to provide significant protection against a range of human rights violations and abuses. It is equally true, however, that in order to realise this potential, VCAT

⁸ [2009] VCAT 646 (23 April 2009)

⁹ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002), para 192, <http://www.unhchr.ch/development/povertyfinal.html> accessed 3 June 2009

¹⁰ The HPLC response to the National Human Rights Consultation 2009 resulted in a submission titled, *Righting the Wrongs of Homelessness*. The Clinic conducted 18 workshops and spoke to 145 people with an experience of homelessness and a majority of respondents found a range of rights protections to be inadequate or very inadequate. These including the rights to adequate housing, to the highest possible standard of health and health care, to an adequate standard of living, to an adequate standard of living and the right to a fair trial (among others).

¹¹ Section 8(3) states, 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination'

¹² Section 24(1) states, 'A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.'

¹³ *Tomasevic v Travaglini & Anor* [2007] VSC 337, at para 127

must ensure that all tribunal-users are equal before the law. Indeed, '[e]quality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians'.¹⁴ As such, SRV and the HPLC submit that VCAT's potential to remedy to human rights abuses rests on the ability to make equality before the law and the right to a fair hearing a reality for disadvantaged clients.

SRV and HPLC recommend that the rights to equality before the law and to a fair hearing be enshrined as guiding principles in relation to the VCAT Review. We note also that access to legal advice and representation are critical components of these rights. These components are discussed in detail in 5 below.

In accordance with the spirit of access to justice which lies at the heart of rights to equality before the law and to a fair hearing,, we recommend that a broad approach be taken to these rights. We consider that these rights and access to justice require appropriate and flexible legal and policy infrastructure and flexible procedural measures to protect the right to be heard. Equally, they require that disadvantaged individuals are encouraged to take part in matters before VCAT and have access to adequate support services to ensure this occurs.

Recommendation 3: We recommend equality before the law and the right to a fair hearing be a guiding principle in relation to the review of VCAT.

Recommendation 4: In accordance with the spirit of access to justice which lies at the heart of the right to a fair hearing, we recommend VCAT take action to assist disadvantaged individuals and actively promote this right in its programs, policies, training and initiatives.

4.1 A case for case management

SRV and the HPLC consider that 'States should *actively promote* the free access of poor people to courts, tribunals and other dispute resolution mechanisms as a remedy against human rights violations' [emphasis added].¹⁵

In light of the special disadvantage experienced by older Victorians and clients with an experience of homelessness, we consider additional measures are required to increase access to justice at VCAT.¹⁶

Specifically, in order to 'actively promote' and encourage the access of disadvantaged people to VCAT and for realisation of human rights, we recommend that VCAT consider implementing an initiative similar to the Magistrates Court - Court Integrated Services Program (CISP). The CISP program was established by the Department of Justice and the Magistrates Court Victoria to help defendants receive support and referral to social

¹⁴ Law Council of Australia, Legal Aid and Access to Justice Funding: 2009-2010 Federal Budget, p 3

¹⁵ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002), para 192, <http://www.unhcr.ch/development/povertyfinal.html> accessed 3 June 2009

¹⁶ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002), para 198-199, <http://www.unhcr.ch/development/povertyfinal.html> accessed 3 June 2009

services and reduce rates of re-offending.¹⁷ SRV and the HPLC consider that in light of the serious consequences of VCAT proceedings for older Victorians and people with an experience of homelessness, it is extremely important to have a program which can provide assistance and referrals for health/social/housing/legal and other needs. Ideally, this assistance would be provided through individual case management support.

Clearly in relation to residential tenancies, referrals to this program might be made where people in rooming houses, caravan parks or public housing are at risk of eviction.

An outcome of such a program may be improved security of tenure for tenants or improved rates of VCAT attendance by both represented persons and tenants.

Recommendation 5: We recommend implementation of a Tribunal Integrated Services Program in order to improve access to justice for older Victorians and people with an experience of homelessness.

5. The role of lawyers

The HPLC and SRV are aware that VCAT is considering whether it has become too legalistic and whether there are too many lawyers involved in the process.¹⁸ We consider any decision to *reduce* access to legal representation at VCAT may have a disproportionate impact on the homeless, elderly and disabled.

The Annual Report indicates that over 60,000 applications were dealt with by the Residential Tenancies List in the 2007 – 2008 period. The report indicates that 61 per cent of these applications were initiated by real estate agents or property managers on behalf of landlords and 27 per cent were initiated by the Director of Housing. In total, therefore, almost 90 per cent of applications to VCAT are made by ‘professional’ landlords or their representatives.

In section 3.1 of this submission, we discussed difficulties associated with obtaining adequate information regarding VCAT operations. Although there is no ‘longitudinal’ statistics about attendance before lists of the VCAT, information provided in relation to the VCAT SMS pilot indicates only 21.7% of tenants – or 1 in 5 tenants - attended landlord’s applications in the financial year 2007 – 2008.¹⁹ HPLC finds it hard to understand how equality before the law and the right to a fair hearing can be satisfied in light of the fact that a considerable majority of tenants and residents fail to attend applications made by their landlords.

Furthermore, any attempt to reduce representation would seem to be inconsistent with the Victorian government in their response to the Report of the Elder Abuse Prevention Project which recognised the importance of access for older Victorians to legal services. In

¹⁷ For further information contact the Magistrates’ Court

¹⁸ Ellen Whinnett, VCAT has ‘too many lawyers’, 10/05/09 <http://www.news.com.au/heraldsun/story/0,21985,25454276-2862,00.html>, accessed 4 June 2000

¹⁹ See <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Listing-Home+Page+News-VCAT+SMS+pilot+project?OpenDocument&1=Home~&2=~&3=~&REFUNID=~>, accessed 10 June 2009

recommendation 1 the government recognised that older Victorians have the right to ‘determine their own course of action, and where required, access practical assistance to support their needs to deal with situations of abuse and regain independence and control over their lives.’²⁰

5.1 Human rights of representation

Access to legal representation is a fundamental component of the right to equality before the law and the right to a fair hearing. In many instances, a person’s ability to access legal representation impacts on their overall ability to achieve a just resolution to their legal problems or to receive a fair hearing. The Human Rights Committee’s General Comment No 32 in relation to Article 14 (right to equality before the law) of the ICCPR states ‘The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way’.²¹

We note Justice Bell’s comments in the *Tomasevic* case that ‘most self-represented persons lack two qualities that competent lawyers possess – legal skill and ability, and objectivity. Self represented litigants therefore stand in a position of grave disadvantage in legal proceedings of all kinds’.²² Amongst the self represented litigant group, it must be said that older Victorians and people with an experience of homelessness encounter even greater difficulties than the average person when interacting with the legal system.

There are a number of barriers which reduce access of older Victorians and people with an experience of homelessness to legal assistance, representation and redress in courts and Tribunals. These barriers include:

- lack of awareness of rights and knowledge of the law and legal system;
- location and accessibility of legal services;
- confidence to access services
- limited funding of civil law matters by Victoria Legal Aid
- limited resources and funding of community legal centres.

It is also worth noting that the Charter, as affirmed in *Kracke*, affirms the relevance of international human rights law to disputes in Victorian courts and tribunals.²³ As such, decisions of the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and United Nations treaty monitoring bodies will likely bear increasing relevance to VCAT’s operations and decision-making processes.

²⁰ Victorian Government, Victorian Government Response to the Report of the Elder Abuse Prevention Project: Supporting the Safety and Dignity of Senior Victorians, recommendation 1, June 2006

²¹ Human Rights Committee, General Comment No. 32, para 10

²² *Tomasevic v Travaglini & Anor* [2007] VSC 337, at para 128

²³ Section 32(2) of the Charter states, ‘International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provisions.’

Although clients of SRV and HPLC will likely be assisted by human rights arguments, cogent submissions based on international human rights jurisprudence are not easy for lawyers to make, let alone clients with no legal training and potentially little formal education. This issue presents another important reason why access to legal representation at VCAT, particularly for vulnerable tribunal users, should not be restricted. Identification and protection of human rights and, in turn, effective implementation of the Charter requires cogent legal argument and decision-makers who are receptive to the application of these arguments.

5.2 The benefits of legal assistance

SRV and the HPLC contend that more must be done to ensure legal assistance is extended to otherwise self represented parties in VCAT, especially those who are disadvantaged as a result of their age or housing status.

Case Study

Henry sought the assistance of the HPLC in relation to an administration order which was sought in respect of his estate. A lawyer from the HPLC saw Henry two days before the hearing and was only able to access the client file on the day of the hearing. The lawyers sought an adjournment on the basis that they had insufficient time in which to prepare for the hearing. Ultimately the lawyer was required to send numerous faxes to VCAT and was unable to organise an adjournment 'on the papers', even though the lawyer had consent from the other party.

The lawyer was required to attend and ask for an adjournment in person. The adjournment was granted; however, an inordinate amount time had been wasted arguing about a legitimate request which was ultimately granted.

Fortunately Henry had access to legal representation in this matter. To someone unfamiliar with legal processes and who may have a disability, the requirement to engage in extensive communications for a straightforward adjournment by consent may constitute an additional and significant barrier to engaging with VCAT.

It is important to note that the role of lawyers extends beyond simply representing parties in proceedings held at VCAT. Lawyers assisting disadvantaged clients are crucial in order to:

- Enable clients to understand what is required to prepare for VCAT hearings;
- Remind clients of hearing dates and times;
- Advise clients about the prospects or merits of their matter²⁴;
- Ensure clients understand what they must do to comply with VCAT orders;
- Advise clients of the prospects of review or appeal of decision;
- Advise clients of the procedures and the legal and practical consequences of any non-compliance; and

²⁴ This is important in matters before the Residential Tenancies List where clients may need to seek emergency accommodation or make applications for housing where a valid notice to vacate and application has been made.

- Refer clients to appropriate emergency housing and social support services.

As such, legal representation and advocacy is critical to reversing the extraordinarily low attendance of tenants and residents at VCAT.

5.3 Legal representation and ‘special circumstances’

Currently there is a general expectation that parties will be self-represented before VCAT; however there are some exceptions to this rule. The VCAT Act provides 5 situations in which a party may be represented by a professional advocate.²⁵ Currently, the main situations in which an advocate is entitled to appear on behalf of a client before the Residential Tenancies or Guardianship Lists are when:

- another party is represented by (or is) a professional advocate²⁶
- all the parties agree²⁷
- a possession order is sought under the *Residential Tenancies Act 1997*²⁸

Generally, if a person does not fall within the above criteria, leave for the advocate to appear will need to be sought.²⁹ In general, applications for leave tend to be framed in terms of ‘special circumstances’ of the client; however it is unclear to what extent VCAT will be influenced by these special circumstances submissions.

SRV and the HPLC contend that the category of persons who have a right to be represented by a professional advocate must be expanded to include those who can establish they are subject to a specified list of criteria, similar to the ‘special circumstances’ definition in the *Infringements Act 2006 (Vic)*³⁰. The *Infringements Act 2006* provides that where any of these special circumstances are established, fines will be generally dismissed or adjourned on an undertaking of good behaviour.³¹

By contrast with the *Infringements Act 2006*, the HPLC and SRV consider that a broad and inclusive definition of ‘special circumstances’ is required to take into account age, disability, mental health, addiction, homelessness, language and socio economic factors.

Applying the ‘special circumstances’ system to VCAT, we recommend that section 62 of the VCAT Act be amended to provide that where special circumstances can be established, a party may be represented by a professional advocate. Further, we recommend that VCAT develop a guideline whereby if Members become aware that an

²⁵ Section 62(1)

²⁶ Section 62(1)(b)(ii)

²⁷ Section 62(1)(b)(iv)

²⁸ Clause 67 of Schd 1

²⁹ Section 62(1)(c)

³⁰ , The *Infringements Act 2006* defines ‘special circumstances’ as mental or intellectual disability, disorder, disease or illness, serious addiction to drugs, alcohol or a volatile substance and homelessness

³¹ As defined in section 3, a mental or intellectual disability, disorder, disease or illness; a serious addiction to drugs, alcohol or a volatile substance; homelessness

unrepresented party may have special circumstances (however defined), the matter is stood down so that the individual can obtain representation or, at the very least, legal advice. Taking this further, SRV and the HPLC consider that 'special circumstances' guidelines should apply across VCAT and to, for example registry staff, and for applications for adjournment.

Recommendation 6: We recommend VCAT make all necessary legislative and other arrangements in order to enable people meeting a definition of special circumstances to be represented by a professional advocate.

Recommendation 7: We recommend that a guideline be issued whereby, if Members become aware that an unrepresented party may come within the definition of 'special circumstances', the matter is stood down to enable a client to obtain representation or legal assistance.

Recommendation 8: We recommend VCAT adopt a broad definition of 'special circumstances' be adopted, taking age, disability, mental health, addition, homelessness, language and socio economic factors into consideration.

Recommendation 9: We recommend that general consideration be given to other ways in which 'special circumstances' may be taken into consideration by VCAT including the possibility of guidelines relating to adjournments and access to advice and professional advocacy.

6. VCAT procedures and operations

6.1 Quality of decision making

VCAT aims to have, amongst its Members, 'quality decision-makers' who make consistent decisions and provide cost-effective and timely service.³² In reality, SRV and HPLC clients have both experienced inconsistent decision making as well as situations in which efficiency appears to take priority over quality decision making.

On numerous occasions, SRV and HPLC have advised clients who were aggrieved because they believed their arguments and opinions were not listened to taken into account by a VCAT Member even though this is contrary to sections 97, 98 and 102 of the VCAT Act.

Case Study

After suffering a stroke, Terry's daughter Simone arranged for him to be moved to an aged care facility, even though he wanted to return home. Simone held a financial power of attorney (POA) upon which she relied to move Terry into the facility and also to limit his visitor and telephone contact.

Simone then submitted an application to VCAT requesting her appointment as Terry's guardian and administrator. During the hearing the VCAT Member appeared to accept much of the evidence

³² VCAT Annual Report 2007-08 p 8.

presented by the applicant's counsel without seeking any supporting documentation.

By contrast, the Member gave no impression that he was prepared to consider arguments raised by Terry's representatives. Furthermore, the Member appeared to give no weight to Terry's request that Simone not be guardian and administrator and paid no attention to the fact that his accountant was prepared to act in this role if necessary.

Ultimately the Member appointed Simone as administrator and guardian.

The above case study provides an example of circumstances in which a Member appeared to ignore the therapeutic aspects of his decision making role. Accordingly, we recommend Members are provided with enhanced training, guidance and support in order to improve therapeutic decision making skills.

Recommendation 10: we recommend that Members receive enhanced training, guidance and support in order to improve their therapeutic decision making skills.

6.2 Improve and develop notification procedures

VCAT documentation and notification procedures are extremely important to ensure attendance of all VCAT users, but particularly older Victorians and people with an experience of homelessness at the Tribunal. In our view, these procedures are currently inadequate to serve the interests of our clients, who are by consequence disadvantaged in the system.

Research has confirmed that people with complex communication needs require information to assist with decision-making and that a lack of information can be 'disabling'.³³ Research also shows that for people with complex communication needs, the ability to understand documentation often relies on factors such as formatting, font size, use of images and colour, 'chunking' of content and use of plain English.³⁴

In the experience of SRV and the HPLC, the language used on VCAT documentation can be incomprehensible, does not encourage clients to attend hearings and does not convey to the recipient the importance of attending hearings. As discussed above, it is critical that older Victorians and people with an experience of homelessness are motivated to at least seek assistance following receipt of VCAT documentation. In our experience, significant numbers of people do nothing at all after they receive VCAT documents. In our view VCAT documentation must clearly establish what a client needs to do in response to a document, as well as provide information about services the client can contact for assistance in relation to the document.

In addition, the current format of VCAT Notification Forms is problematic for many older Victorians. The form requires the tearing of three perforated edges is often very difficult for

³³ Owens, Accessible Information for People with Complex Communication Needs, Augmentative and Alternative Communication, September 2006 Vol 22(3), p 196

³⁴ Ibid, pp 200 - 205

older people to open. The font size used, along with the central watermark also makes the form difficult for many to read.

SRV and HPLC acknowledge, however, that even where VCAT documentation is appropriately designed for disadvantaged clients, further obstacles to attendance at the Tribunal may exist. We commend VCAT for its SMS pilot program, designed to encourage tenants to attend residential tenancy hearings. We recommend that VCAT develop further methods by which people with an experience of homelessness and older Victorians can be notified of Tribunal proceedings.

Case study

The HPLC was contacted by a housing worker in relation to Sandra who had been advised by Victoria Police. She was told a warrant of possession would be executed in 2 days and unless she moved immediately, she would be removed from her home. The prospect of being evicted from Director of Housing premises would have the likely result that Sandra would be made homeless.

The worker explained the client had recently started to obtain treatment for her addiction issues and was hoping to initiate contact with her children who had been removed by the Department of Human Services. Following the police visit, the client subsequently discovered the Director of Housing had obtained an order for possession on the basis of a large amount of arrears.

Both the Department of Housing and VCAT had sent the client correspondence by registered mail but the client had not taken the card to collect her mail and so was unaware of what had happened in relation to her tenancy. The client had previously attempted to set up a direct debit for rental payments to be taken directly from her Centrelink payment but through no fault of her own, this had been unsuccessful. In these circumstances, correspondence was insufficient and casework was required to assist this client to engage with Tribunal processes in place.

As the above case study demonstrates, clients who are experiencing significant personal stress from – for example - family law proceedings or substance abuse issues have considerable difficulty in responding to VCAT correspondence.

Despite VCAT's best efforts, it may be that a text message or carefully formatted and drafted documentation is still insufficient to overcome an individual's personal obstacles to attendance at VCAT. Further to our discussion of 'special circumstances' above, SRV and HPLC note that collection and publication of information about the ways in which disadvantaged clients access (or fail to access) VCAT is crucial to understand their specific obstacles to attendance. This information will also assist the VCAT to respond to these obstacles and measure the effectiveness of such responses.

Recommendation 11: In light of the difficulties experienced by older and disabled Victorians, we recommend VCAT improve the physical and visual characteristics of its forms, correspondence and all other documentation provided to users of the Tribunal.

Recommendation 12: We recommend VCAT documentation be amended to clearly establish what a client needs to do in response to a document as well as where a client may go and whom a client may contact for assistance in relation to the document.

Recommendation 13: We recommend VCAT adopt a case management model in order to assist notify people with an experience of homelessness or older Victorians of VCAT proceedings.

6.3 Limitations in VCAT powers in guardianship matters

SRV is particularly concerned that VCAT's powers are limited in two particular ways which are detrimental elderly to access to justice of elderly people. We note that although the discussion below falls outside the scope of the VCAT review, older Victorians will not be sufficiently protected through VCAT without the proposed changes.

Section 125V of the *Instruments Act 1958* (Vic) grants powers to VCAT to scrutinise the actions of an attorney under a financial power of attorney. As the provision expressly refers only to powers of attorney in the present tense, it is unclear whether VCAT's powers extend to situations where the power has already been revoked. This interpretation has implications in elder abuse cases, where it can be vital that there is an ability to take action against attorneys after the power of attorney is revoked.

Further, the VCAT Act currently does not afford VCAT the power to award compensation against a defaulting attorney without the need to bring a separate proceeding in court. Consequently older individuals are required to institute separate proceedings, or, alternatively, rely on criminal proceedings to pursue such compensation. This position is in contrast to the ability afforded by section 86 of the *Sentencing Act 1991* (Vic).

Recommendation 14: We recommend that s 125V of the Instruments Act 1958 be amended to extend VCAT's powers powers of attorney, which have been revoked or alternatively, that VCAT rules or new guidelines set out the procedures relating to the Tribunal's use of these powers.

Recommendation 15: We recommend the VCAT Act be amended to enable VCAT to award compensation against a defaulting attorney without requiring separate proceedings to be brought.

7. Reopen, review and appeal of VCAT decisions

SRV and HPLC reiterate that guardianship and residential tenancy proceedings can have dramatic personal consequences for older Victorians and people with an experience of homelessness. In light of the considerable obstacles experienced by these groups in relation to access to justice at VCAT, we submit that VCAT must consider enhanced means to reopen, review and appeal decisions made by its Members.

Elsewhere in this submission, we have commended VCAT for the enormous number of cases it succeeds in processing and finalising each year. Nevertheless, there remains a question mark over the ways in which VCAT assures, assesses and measures the quality of its decision-making.

We understand that VCAT is aware of the need for professional development and support comments made by Justice Bell that '[a] fundamental challenge facing VCAT in a changing world is the proper induction, education and support of members and mediators under a unified VCAT'³⁵. In this regard, we commend VCAT's inclusion as a partner in the Judicial College of Victoria.

7.1 Applications for re-opening

A VCAT order may be re-opened on substantive grounds if the person applying for re-opening did not appear and was not represented at the hearing at which the order was made: VCAT Act s 120(1). VCAT may then hear and determine the application if it is satisfied that the applicant had a reasonable excuse for not attending or being represented at the hearing, and if it thinks fit, may order that the original order be revoked: VCAT Act s 120(4). Such an application must be made within 14 days of the applicant becoming aware of the order: *Victorian Civil and Administrative Tribunal Rules 2008 (VCAT Rules)* r 4.19.

Currently there is no express provision for how an individual's special circumstances give rise to a 'reasonable excuse' or justification for not attending or not being represented at a hearing. We contend that this is another area in which the particular hardship or disadvantage experienced by older Victorians and Victorians at risk of homelessness could be afforded greater consideration.

Recommendation 16: We recommend VCAT permit a matter to be reopened where a person is able to establish that their failure to appear was in part due to 'special circumstances'.

7.2 Appealing VCAT decisions

Where an application for re-opening may not be made (or has been unsuccessful), an order of VCAT may only be challenged in accordance with section 148 of the VCAT Act. This section provides that an appeal may only be made on a 'question of law.' It is not possible to obtain a review of a VCAT decision where there is no error of law.³⁶

The VCAT Act provides that in order to appeal, an application for 'leave' must be made in accordance with the rules of the Supreme Court. This application is essentially a request for 'permission' to appeal a decision of VCAT.

³⁵ Justice Bell, *The role of VCAT in a changing world: the President's review of VCAT*, 4 September 2008, p 4

³⁶ Leaving aside the prospect of an appeal under Order 56 of Chapter 1 of the Supreme Court Rules and under the *Administrative Law Act 1978*

The VCAT Act provides a leave application must be made within 28 days of the order of VCAT. Practically speaking, however, this time limit is generally far shorter in residential tenancies matters where a warrant of possession may be executed within days of the VCAT decision at first instance.

An appeal is commenced by filing an originating motion. A sealed copy of the originating motion needs to be served on the registrar of VCAT as well as the other party to the appeal. The originating motion must be supported by an affidavit to be filed within 7 days of the originating motion. A draft notice of appeal establishing the error of law must be exhibited to the affidavit.

After filing the originating motion, a party must return to VCAT and apply for a stay of the Tribunal's order.

In short, appealing a decision of VCAT on the basis of an error of law is not a straightforward process. In a short period of time a litigant is required to organise all transcripts and reasons, determine the relevant error of law, organise all documents as required by the Supreme Court and appear at a 'leave' hearing to establish a *prima facie* case to be tried before the appeal is ultimately heard. It is important to note that, during this period, SRV and HPLC clients will also be required to deal with the immediate consequences of the VCAT decision. For example, an individual who appeared before the Residential Tenancies List may be required to urgently seek alternative accommodation at the same time as pursuing an appeal in the Supreme Court.

Recommendation 17: We recommend that consideration be given to the ways in which older Victorians and people with an experience of homelessness may be disadvantaged by current requirements in relation to appeal of VCAT decisions.

Recommendation 18: We recommend that VCAT recommend and support simplification of current appeal processes.

7.3 Transcripts

It is beyond the scope of this submission to discuss or define an 'error of law'; however it should be noted that this is a complex area that is the subject of considerable case law. Nevertheless, in practical terms, transcripts and reasons are critically important to establish any error of law at the Supreme Court. In the absence of this material, an applicant may struggle to establish the requisite error. VCAT acknowledged this in its Annual Report 2007-08, which states:

'Transcripts are an important source of information in the event of an appeal. The recordings protect the interests of users and Members participating in hearings, with the added benefit of monitoring and improving standards of conduct.³⁷

The HPLC is regularly contacted by clients who have not received legal advice or representation and have been unsuccessful at VCAT. Although these prospective clients

³⁷ VCAT Annual Report 2007-08 p 54.

need to establish an error of law, often they can't even get that far. Essentially, the issue of whether someone is able to access legal assistance and pursue an appeal regularly depends on whether they are able to provide either a transcript or reasons for the decision which they seek to challenge.

The Guidelines for Obtaining Transcripts of VCAT Proceedings states that while proceedings at King St are recorded, '[p]roceedings held at other venues are rarely recorded'. HPLC and SRV experience mirrors this guideline.

Even where hearings have been recorded, it can be both time consuming and expensive for an individual to obtain a transcript. The procedure for obtaining a transcript requires an individual to first make direct arrangements with an approved transcription service, before requesting the recordings be provided by VCAT.

This procedure is confusing and intimidating for older Victorians and people with an experience of homelessness. Further, in the absence of funding, the expense of obtaining transcripts makes the cost of appealing prohibitive for people in disadvantaged circumstances.

Recommendation 19: We recommend VCAT install and operate recording facilities at all hearing venues.

Recommendation 20: We recommend that VCAT provide free transcripts to disadvantaged clients who satisfy a 'special circumstances' criteria.

8. Merits review of VCAT decisions

We have already made reference VCAT's failure to measure the quality of decision-making and the absence of appropriate 'key performance indicators'. We have also discussed the incredible difficulties facing older Victorians and people with an experience of homelessness in appealing to the Supreme Court.

Unlike the Commonwealth Administrative Appeals Tribunal and the NSW Administrative Decisions Tribunal, VCAT does not publish in its Annual Report figures on the number of decisions appealed to courts or the outcomes of those appeals. The Annual Report contains only two mentions of Supreme Court appeals, in the Credit List and Land Valuation List sections.

Case study

An HPLC lawyer attended VCAT with Michelle in relation to an application for possession by her landlord for rental arrears. Michelle was a single mother who suffered anxiety and depression and had struggled with drug dependency in the past. This was the first time the client had been to VCAT due to rental arrears. When the notice to vacate was served, the tenant was more than 14 days in arrears. Since service of the notice, Michelle paid part of the outstanding amount and at the time of the hearing was approximately 8 days in arrears.

At the hearing, Michelle offered to pay all arrears plus one month's rent in advance. Her ex-husband had agreed to assist her with payment of this amount on the basis that the couple had a child who lived with Michelle. Accordingly, Michelle's lawyer submitted that satisfactory arrangements could clearly be made to avoid financial loss to the landlord and that a possession order should not be made. The VCAT Member rejected this request.

During the hearing Michelle's lawyer requested written reasons for the decision and the Member refused. The Member said that he would exercise his discretion and grant the order for possession on the basis that the warrant could not be purchased until after a certain date and only if the rental arrears are not paid by that date.

In reality the Member had issued a possession order. The order was not conditional upon arrears payment and it was unclear whether the Member was in fact capable of making such an order.

This case study demonstrates a situation in which a VCAT Member was not prepared to acknowledge or even consider legitimate arguments put forward on behalf of a disadvantaged individual.

The Member refused to provide reasons for his decision and therefore refused to justify the basis for issuing a possession order. It is unfortunate that the only way for the client to challenge this order was to appeal to the Supreme Court. For a single mother with mental health issues who is at risk of eviction, this was a huge gamble given the prospect of adverse costs orders and the need to secure alternative housing urgently. This case study reflects many situations in which disadvantaged clients are not able to pursue their rights due to other pressing needs in their lives.

SRV and HPLC recommend the introduction of a system of merits review of VCAT decisions. The SRV and HPLC consider that merits review could act as a basic performance measure and could provide a broad basis for assessment of the quality of VCAT decision-making as well as the development of guardianship and tenancy case law, in particular. In our view, this inexpensive and swift procedure of decision-review, instead of the current pathway to the Supreme Court, would have a dramatic and positive impact on access to justice for disadvantaged sections of the Victorian community.

There are a number of merits review models in operation in Australia. Merits review is available from decisions of the Commonwealth Social Security Appeals Tribunal (**SSAT**), the NSW Administrative Decisions Tribunal (**NSW ADT**) and the ACT Civil and Administrative Tribunal (**ACT CAT**) in a range of ways.

Applications for review of decisions by the Social Security Appeals Tribunal to affirm, vary or set aside certain social security decisions can be made to the Administrative Appeals Tribunal (**AAT**).³⁸

³⁸ *Social Security (Administration) Act 1999* (Cth) s 179(1); *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 142(1). The AAT may only review decisions already reviewed by the SSAT: *Social Security (Administration) Act 1999* (Cth) ss 181, 185; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 148. Examples of recent decisions include: *Secretary, DEEWR v Guild* [2008] AATA 92 (SSAT decision upheld by AAT); *Secretary, DEEWR v*

The 2007-07 Annual Report of the SSAT indicates that almost 2000 SSAT social security decisions were appealed to the AAT, representing approximately 18% of all appealable decisions. The AAT changed the SSAT's decision in just over a quarter of the appeals.

Appeals against certain decisions of the NSW ADT are generally allowed to the ADT Appeals Panel on questions of law, and can extend, with the leave of the Appeal Panel, to a review of the merits of the decision.³⁹ A review of the merits is only available if there is also an appeal on a question of law.⁴⁰ The Appeal Panel is made up of 3 members of the ADT: one presidential judicial member, one other judicial member and one non-judicial member. Appeals must be made within 28 days of receiving reasons for the decision being appealed unless the Appeal Panel allows additional time. In 2007-08, there were 83 appeals from decisions of the ADT to the Appeal Panel. Of those, 42 were dismissed, 5 were resolved by consent, 15 were withdrawn or discontinued, one did not proceed and 20 resulted in decisions which varied or set aside the decision under appeal.⁴¹

Decisions of the ACT Civil and Administrative Tribunal (**CAT**) can be appealed by a party to the proceeding on a question of fact or law.⁴² The appeal tribunal is made up of at least one presidential member, and must not contain a member who made the original decision. The appeal tribunal may choose to deal with an appeal either as a new application or as a review of all or part of the original decision. The appeal president may, upon giving 21 days' written notice, dismiss an appeal on the ground that the subject matter of the appeal is substantively similar to other appeals rejected by the Tribunal. The CAT commenced operation on 2 February 2009. As yet there are no figures available as to the outcomes of the appeal procedure.

Although we recognise the extra burden such a system of internal review would place upon VCAT, it would ensure a higher percentage of VCAT decisions are reviewed and that a level of quality decision making is maintained. If appropriate, such an internal review system could attach to certain lists, particularly those lists likely to be encountered by disadvantaged and marginalised individuals.

Recommendation 21: We recommend that a system of merits review of VCAT decisions be implemented.

Recommendation 22: We recommend that an appeal tribunal be established within VCAT, constituted by three VCAT members, one of whom must be a presidential member, to hear appeals on questions of fact or law.

Ghorbanpour [2008] AATA 101 (SSAT decision upheld by AAT); *Secretary, DEEWR v Payne* [2007] AATA 1745 (SSAT decision overturned by AAT).

³⁹ *Administrative Decisions Tribunal Act 1997* (NSW) (**ADT Act**) s 113(2).

⁴⁰ See for example *Commissioner of Police v Mooney (No.2)* [2003] NSWADTAP 67.

⁴¹ Examples of Appeal Panel decisions include: *Lloyd v TCN Channel Nine Pty Ltd* [1999] NSWADTAP 3 (ADT decision overturned by Appeal Panel); *Building Professionals Board v Hans* [2008] NSWADTAP 13 and *Building Professionals Board v Hans (No 2)* [2008] NSWADTAP 48 (ADT decision partly overturned by Appeal Panel).

⁴² *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 79.

9. Conclusion

People with an experience of homelessness and older Victorians are most likely to interact with VCAT processes and decision-making through the residential tenancies list and the guardianship and administration list. In both of these lists, the impact of VCAT orders on the lives of disadvantaged individuals can be far-reaching – leading to their eviction from stable housing or the removal of their day-to-day decision-making ability.

The HPLC and SRV are principally concerned to ensure that the rights of our clients are protected in their interactions with VCAT and that they can achieve access to justice. First and foremost, we are of the view that the Charter must form the basis for and the guiding principle behind the review of VCAT, particularly as it relates to equality before the law and the right to a fair hearing. Second, the HPLC and SRV consider that disadvantaged individuals appearing in VCAT would be well served by a service similar to that established in the Magistrates' Court – the Court Integrated Services Program. Although this type of model would have resource implications for VCAT, importantly, it would also assist a significant number of disadvantaged individuals to deal with the myriad of issues that often accompany tenancy and guardianship/administration proceedings.

The role of lawyers in VCAT is also an important issue given the significant number of barriers people with an experience of homelessness and older Victorians face when attempting to access justice. It is crucial that these individuals have the benefit of legal advice and representation when coming before VCAT, particularly in light of the increasing importance of human rights arguments in the jurisdiction. In addition to legal representation, SRV and the HPLC contend that VCAT must adopt a 'special circumstances' regime in which factors such as age, disability, mental health, addiction, homelessness, language and socio-economic circumstances can be taken into account by VCAT, particularly in relation to adjournments and rehearings. VCAT documentation and notification is another key area for reform – it is crucial that alternative methods of notification of hearings are developed to ensure attendance by people with an experience of homelessness and older Victorians.

Finally, SRV and the HPLC believe that access to justice for our clients in the VCAT jurisdiction would be substantially enhanced if VCAT were better able to measure and track the quality of its decision making and if there were broader means by which to reopen, review and appeal VCAT decisions.

There is no denying the value of the VCAT in the Victorian justice system – it has enhanced both its strength and its capacity. Nevertheless, SRV and the HPLC believe that with the recommendations put forward in this submission, VCAT's ability to provide access to justice to the vulnerable and marginalized in our society will be significantly improved – resulting in not only better legal outcomes, but better life outcomes for our clients.

Annexure

The Homeless Persons' Legal Clinic

The HPLC was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness. The HPLC has the following aims and objectives:

- to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

Free legal services are offered by the HPLC on a weekly basis at 13 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.⁴³ Since its establishment in 2001, the HPLC has assisted over 4000 at risk of, or experiencing, homelessness in Victoria.

In dealing with problems and issues associated with homelessness, the definition and concept of homelessness should not be restricted to the narrow traditional idea of living on the street. There is an emerging consensus around the definition of homelessness developed by Chamberlain and MacKenzie and adopted by the Australian Bureau of Statistics. Specifically, homelessness includes primary homelessness, which is 'sleeping rough', secondary homelessness, which involves moving around amongst transitional and emergency housing options, and tertiary homelessness, which is living in boarding houses without private facilities or security of tenure.⁴⁴ When considering homelessness, 'marginal housing', which includes those living in housing situations close to minimum standards, should also be considered. Importantly, hidden or housed homelessness must also be taken into account – this includes those who may lack economic and social support for independent living and therefore reside in suboptimal conditions, such as with aging parents. A

⁴³ Host agencies include Melbourne Citymission, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre, Homeground Housing Service, St Luke's Bendigo and Loddon Mallee Housing Service. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Arnold Dallas & Mcpherson, Baker & McKenzie, Blake Dawson, Clayton Utz, Mallesons Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth, Stella Stuthridge and Associates and the legal department of Goldman Sachs JBWere

⁴⁴ See Mental Illness Fellowship Victoria, Mental Illness and Housing, Preliminary Discussion Paper, Schizophrenia Awareness Week, 19-26 May 2008 at 7. See, also eg: Chris Chamberlain, Counting the Homeless: Implications for Policy Development (ABS)

number of people who experience secondary and tertiary homelessness have contact with VCAT through the residential tenancy list.

Seniors Rights Victoria

In April 2008 PILCH entered into a joint venture with Eastern and Loddon Campaspe Community Legal Centres, and the Council on the Ageing (**COTA**) to establish a new specialist community legal service, Seniors Rights Victoria.

SRV has been funded by the State Government and established to prevent elder abuse and safeguard the rights of older Victorians. Its mission is to empower older Victorians so they can take steps to live in safety, with dignity and independence. The service was officially launched by the Victorian Government on 27 April 2008.

The provision of specialised community legal services targeted to the needs of disadvantaged older people to improve access to justice was a key recommendation of the Report of the Elder Abuse Prevention Project, Strengthening Victoria's Response to Elder Abuse, in December 2005. The Commonwealth Standing Committee on Legal and Constitutional Affairs Report published in September 2007, Older Persons and the Law, also made several relevant recommendations to address the barriers to older Australians accessing legal services including specifically increasing funding for the expansion of community legal sector services to older people.

The focus of the legal work of SRV is on the capacity of the law to deal with and remedy the mostly hidden issues of elder abuse: social isolation, exclusion and discrimination. Elder abuse, as defined by the World Health Organisation is 'any act that causes harm to an older person that is carried out by someone they know and trust, such as family, friends or a carer'. It may include physical, financial, psychological or sexual mistreatment and neglect.

SRV commenced operation through its Central, Eastern and Bendigo offices in June 2008 and provides a range of services including a telephone helpline, referrals, legal advice, advocacy, community and professional education. These services are accessible to older Victorians (over 60 years of age).

PILCH Victoria

Both the HPLC and SRV are coordinated and supported by the Public Interest Law Clearing House (**PILCH**). PILCH is a leading not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights. PILCH does this by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

In carrying out its mission, PILCH specifically seeks to address disadvantage and marginalisation in the community, to effect structural change to address injustice, to foster a strong pro bono culture in Victoria and to increase the pro bono capacity of the legal profession.

PILCH acts as a facilitator for pro bono legal assistance between the community and the private legal profession. Its main role is to receive, assess and refer requests for pro bono legal

assistance. PILCH aims to work creatively to match clients with lawyers willing to give their services without charge.

PILCH is an innovative collaboration of private law firms, corporate legal departments, the Victorian Bar, the Law Institute of Victoria, community legal centres and university law schools. Members support PILCH in a variety of ways including financial and 'in kind' support and through participation in our pro bono legal assistance schemes.