



**The Right to a Fair Hearing:  
The Relevance of the *Charter of Human Rights and  
Responsibilities Act 2006* (Vic) to Civil Justice**

**Submission to the Victorian Law Reform Commission  
Civil Justice Review**

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### **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the content, implementation, operation and review of the Victorian Charter of Human Rights and Responsibilities;
- (b) the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
- (c) the importance, interdependence, indivisibility and justiciability of economic, social and cultural rights; and
- (d) equality rights, particularly the right to non-discrimination, including on the grounds of race, religion, ethnicity, disability, gender, age and poverty.

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## 1. Introduction

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### 1.1 Impetus for Reform of the Victorian Civil Justice System

1. In May 2004, the Victorian Attorney-General, Rob Hulls MP, issued a Justice Statement outlining directions for reform of Victoria's justice system. As part of the reform program, the Victorian Law Reform Commission (**VLRC**) is conducting a review of the Victorian civil justice system (**Review**). The Review seeks, among other things, to reform the 'civil rules of procedure to streamline litigation processes, reduce costs and court delays'.<sup>1</sup>
2. The Review will encompass reforms which will facilitate greater access for people with civil claims with merit, the introduction of more procedural and economic disincentives to the pursuit of claims or defences without merit, and an improvement in alternative dispute resolution. As part of the Review, the VLRC has sought submissions from interested members of the legal profession and the public to identify key areas requiring reform and potential solutions.

### 1.2 Scope of this Submission

3. The VLRC has invited the HRLRC to make a submission to the Review on the implications of the introduction of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) on the process of civil justice reform. The Victorian Charter will partly come into force on 1 January 2007 and will come into full force on 1 January 2008.
4. The VLRC has indicated that it is concerned about the balance between providing access to the State's courts and the demands placed upon this limited public resource. In this context, the interaction between the rights set out in the Victorian Charter and any recommendation for reform which may be interpreted, at least to some extent, as limiting a party's right to pursue a civil claim in the State's courts should be considered.
5. This submission seeks to determine the impact that the Victorian Charter, specifically the right to a 'fair hearing'<sup>2</sup> enshrined in section 24, is likely to have on civil litigation in Victoria. Following the introduction of similar provisions in charters of human rights in other jurisdictions, in particular in the United Kingdom (**UK**) and the Australian Capital Territory (**ACT**), an analysis of the jurisprudence developed in these jurisdictions is useful for determining what is the content of the right to a 'fair hearing' and evaluating the implications of such a provision for civil justice in Victoria.

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<sup>1</sup> Victorian Law Reform Commission, Civil Justice Review, Consultation Paper.

<sup>2</sup> In these submissions, the terms 'fair hearing' and 'fair trial' are used interchangeably.

6. It is the intention of this submission to:
  - (a) firstly, provide a summary of international and comparative human rights law and jurisprudence to assist in determining what may be considered to be the minimum requisite elements of the right to a 'fair hearing' in civil proceedings; and
  - (b) secondly, to discuss the impact that the right to a 'fair hearing' in the Victorian Charter is likely to have on the civil justice system in Victoria by reference to experiences in other jurisdictions.
  
7. The HRLRC notes the submission of the Public Interest Law Clearing House (***PILCH Submission***) which focuses on the importance of access to justice, legal assistance and reform of other aspects of the civil justice system. The HRLRC strongly endorses the PILCH Submission.

## **2. Executive Summary**

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### **2.1 Content of the Right to a Fair Hearing**

8. The right to a fair hearing is an essential aspect of the judicial process and is indispensable for the protection of other human rights. In essence, the right to a fair hearing requires a party to be able to present his or her case and evidence to the court under conditions that do not place him or her at a substantial disadvantage when compared with the other party. The basic elements of the right to a fair hearing are:
- (a) equal access to, and equality before, the courts;
  - (b) the right to legal advice and representation;
  - (c) the right to procedural fairness;
  - (d) the right to a hearing without undue delay;
  - (e) the right to a competent, independent and impartial tribunal established by law;
  - (f) the right to a public hearing; and
  - (g) the right to have the free assistance of an interpreter where necessary.
9. While many of these principles are already embedded into the common law and specific legislation, the development of policies to guarantee the right to a fair hearing inevitably involves striking a balance between providing greater access to justice and reducing the number of unmeritorious cases brought before the courts that cause a strain on limited public resources.

### **2.2 Implications for Victoria**

10. While it is difficult to determine the impact that the fair hearing provision of the Victorian Charter will have on civil litigation in Victoria, experiences in the UK and the ACT provide a useful understanding on the likely implications that the Victorian Charter will have for the reform of the Victorian civil justice system. Since the introduction of the UK Act, there has not been the expected avalanche of litigation in the UK courts. Rather than concerns about the impact of the introduction of the UK Act on the resources of the courts, the UK experience has demonstrated the importance that policy and procedure plays in the management of an effective and efficient civil justice system.
11. International and comparative jurisprudence on the basic elements of the right to a fair hearing indicate that access to justice and equality before the law are fundamental values underpinning not just the right to a fair hearing, but also the civil justice system.

Although these values do not have great leverage in decision-making by the courts, they are a crucial foundation of the civil justice system and a powerful argument for arrangements such as legal aid and the impartial application of the law.

12. The role of procedure is often regarded as of secondary importance compared with substantive law. However, international and comparative jurisprudence indicates that procedure is essential in ensuring adherence to the basic elements of the right to a fair hearing. Consequently, civil justice policies and formal procedures must be compatible with the basic elements of the right to a fair hearing that are enshrined in the Victorian Charter.
13. This submission identifies the following issues relating to the likely impact of the Victorian Charter:
  - (a) Based on the experience in the UK, it is likely that the Victorian Charter will most often be used to supplement existing grounds for cases, rather than actually lead to an increase in the number of cases being brought in the courts.
  - (b) Access to justice is a fundamental requirement of a fair civil justice system. The Victorian Government must take steps to ensure greater equality in access to justice, including:
    - (i) providing adequate funding for legal aid, community legal centres and impecunious and disadvantaged litigants;
    - (ii) increasing accessibility to courts by simplifying rules of procedure and preventing the disproportionate impact of associated costs of litigation for certain individual litigants; and
    - (iii) providing adequate services to assist individuals in accessing the justice system, including legal aid and free interpreters.
  - (c) The courts, rather than policies concerned with cost and efficiency, are the best placed to differentiate between those claims deserving of access to justice and those claims that are without merit.

### 3. The Victorian Charter

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#### 3.1 Overview of the Victorian Charter

14. The Victorian Charter enshrines a body of civil and political rights derived from the International Covenant on Civil and Political Rights (*ICCPR*). The substantive rights recognised in the Victorian Charter include:
- (a) right to equality before the law;
  - (b) right to life;
  - (c) right to protection from torture and cruel, inhuman or degrading treatment or punishment;
  - (d) freedom from forced work;
  - (e) freedom of movement;
  - (f) right to privacy and protection of reputation;
  - (g) freedom of thought, conscience religion and belief;
  - (h) freedom of assembly;
  - (i) right to peaceful assembly and freedom of association;
  - (j) right to protection of families and children;
  - (k) right to take part in public life;
  - (l) cultural rights;
  - (m) property rights;
  - (n) right to liberty and security of person;
  - (o) right to humane treatment when deprived of liberty;
  - (p) right to a fair hearing;
  - (q) certain rights in criminal proceedings;
  - (r) right not to be punished more than once; and
  - (s) protection from retrospective laws.

15. The Victorian Charter establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements. The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities') and the courts — is facilitated through a number of mechanisms.
16. First, prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Victorian Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament.
17. Second, all legislation, including subordinate legislation, must be considered by the parliamentary Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights.
18. Third, public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process.
19. Fourth, so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.
20. Fifth, the Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation. The Government must respond to such a Declaration within six months.
21. Finally, the Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Victorian Charter and also for conducting community education regarding the Charter.
22. The Victorian Charter will commence on 1 January 2007, although the obligation of public authorities to consider and act consistently with human rights and the requirement that courts interpret and apply legislation in accordance with the Victorian Charter and issue Declarations where this is not possible do not become effective until 1 January 2008.

### **3.2 The Right to a 'Fair Hearing'**

23. The right to a 'fair hearing' is recognised in section 24 of the Victorian Charter:

#### **24. Fair hearing**

- (1) 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.
- (2) Despite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.
- (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

24. Section 24 applies to both criminal and civil proceedings.<sup>3</sup> However, no definition of a 'fair and public hearing' is set out in the Victorian Charter and no guidance is given as to the requisite elements of such a hearing. Accordingly, international and comparative jurisprudence may be useful in assessing how the fair hearing provision in the Victorian Charter is likely to be interpreted in Victoria.

### **3.3 Relevance of International and Comparative Jurisprudence**

25. Section 32(2) of the Victorian Charter states that:

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 provision.

26. The Explanatory Memorandum to the Victorian Charter suggests that section 32(2) of the Victorian Charter 'will operate as a guide' and goes on to state that

a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations.<sup>4</sup>

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<sup>3</sup> A civil dispute does not necessarily have to be in a court for the right to a fair hearing to apply. From the UK experience, if the procedure involves the decisive settlement of a genuine, serious dispute, for example concerning a right or obligation and not merely the exercise of a discretion, then section 24 may apply.

<sup>4</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

27. It also suggests that decisions of the International Court of Justice, the European Court of Human Rights (***European Court***), the Inter-American Court of Human Rights and United Nations treaty monitoring bodies (including the Human Rights Committee (***HRC***)) will be particularly relevant.<sup>5</sup> Judgments of domestic and foreign courts, particularly the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom, may also be relevant.<sup>6</sup>
28. The right to a 'fair hearing' under section 24 of the Victorian Charter mirrors provisions in other jurisdictions, although the wording used varies slightly. In international jurisprudence, the impact of the right to a 'fair hearing' in civil proceedings is still emerging. However, some clear guidelines have already been developed and these will be examined below in relation to fair hearing provisions in other jurisdictions.

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<sup>5</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

<sup>6</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

#### 4. Elements of the Right to a Fair Hearing

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29. The right to a fair hearing is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms.
30. The right to a fair hearing is embodied in the following instruments:
- (a) article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)*:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...
  - (b) article 6(1) of the *European Convention on Human Rights (ECHR)*:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
  - (c) the *Human Rights Act 1998 (UK) (UK Act)*, which incorporates the ECHR into domestic law; and
  - (d) section 21(1) of the *Human Rights Act 2004 (ACT) (ACT Act)*:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
31. The right to a fair hearing is also a norm of customary international law.
32. The concept of a fair hearing contains many elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected. At the very least, the minimum basic elements of the right to a fair hearing can be said to consist of:
- (a) equal access to, and equality before, the courts;
  - (b) right to legal advice and representation;
  - (c) right to procedural fairness;
  - (d) right to a trial without undue delay;
  - (e) right to a competent, independent and impartial tribunal established by law;
  - (f) right to a public hearing; and

(g) the right to have the free assistance of an interpreter where necessary.

33. Each of these elements of the right to a fair hearing is investigated below.

#### 4.1 Equal Access to Courts

34. Article 14 of the ICCPR has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to the justice system. The administration of justice must 'effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice'.<sup>7</sup> This is inherently linked with notions of equality before the courts and may raise issues of court fees, complexity of procedure, a right to legal aid, awarding of costs and discrimination.

35. Courts have determined that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.<sup>8</sup> However, this right is not unlimited and courts have generally recognised the following categories of exclusion from the court process:

- (a) litigants who bring cases without merit;
- (b) bankrupts;
- (c) minors;
- (d) people who fall outside a reasonable time-limit or limitation period for bringing a case; and
- (e) other people where there is a legitimate interest in restricting their rights of access to a court, provided the limitation is not more restrictive than necessary.<sup>9</sup>

Limitations on the right to equal access to courts are discussed in further detail below.

36. Equal access to courts has also been linked to the notion of equality before the courts. In *Olo Bahamonde v Equatorial Guinea*, the HRC stated that 'a situation in which an individual's attempts to seize the competent jurisdictions of their grievances are systematically frustrated runs counter to the guarantees of Article 14(1)'.<sup>10</sup>

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<sup>7</sup> UNHRC, *Draft General Comment No 32*, CCPR/C/GC/32/CRP.1Rev.2 (2006), [2].

<sup>8</sup> Department for Constitutional Affairs, *Human Rights: Human Lives* (2006) <[www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf](http://www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf)> at 21 December 2006.

<sup>9</sup> *Ibid* 20.

<sup>10</sup> *Olo Bahamonde v Equatorial Guinea*, UN Doc CCPR/C/49/D/468/1991, [9.4].

37. In *Graciela Ato del Avellanal v Peru*, the HRC was of the view that the preclusion of married women from bringing suits regarding matrimonial property breached article 14(1) of the ICCPR as it discriminated against litigants on the basis of sex and marital status.<sup>11</sup>
38. In light of the obligation to ensure equal access to, and equality before, the courts, the HRLRC strongly endorses Recommendation 1 of the PILCH Submission that the VLRC give priority to the importance of access to justice as a fundamental requirement of a fair civil justice system.

#### **4.2 Right to Legal Advice and Representation**

39. The jurisprudence regarding legal aid emphasises that the right to a fair hearing does not impose an obligation on the state to provide free legal assistance in civil matters. It does, however, require the state to make the court system accessible to everyone, which may itself entail the provision of legal aid. Indeed, the complexity of some cases may actually require legal aid to ensure a fair hearing.<sup>12</sup>
40. According to the HRC's recent Draft General Comment on article 14 of the ICCPR, availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way.<sup>13</sup> The HRC also encourages states to provide free legal aid in all types of cases where the individual cannot afford it, but observed that there may be situations where states are positively obliged to provide it.<sup>14</sup>
41. In *P C and S v UK*,<sup>15</sup> the European Court held that the failure to provide an applicant with a lawyer was a violation because, in the circumstances, legal representation was deemed to be indispensable. Lack of legal representation prevented the party from putting forward their case effectively because of the complexity, high emotional content and serious consequences of the proceedings.

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<sup>11</sup> *Graciela Ato del Avellanal v Peru*, UN Doc CCPR/C/34/D/202/1986.

<sup>12</sup> Department for Constitutional Affairs, above n 8, 20. See also *Airey v Ireland* [1979] 6289/73 ECHR 3 (9 October 1979).

<sup>13</sup> *Draft General Comment 32*, above n 7, [3].

<sup>14</sup> *Ibid.*

<sup>15</sup> 56547/00 [2002] ECHR 604 (16 July 2002).

42. A state's obligation to provide legal aid was further clarified in *Steel and Morris v UK* in which the European Court held that states 'enjoy a free choice of the means to be used in guaranteeing litigants the right to a fair trial.'<sup>16</sup> The European Court reiterated that legal aid schemes represent but one of those means. The Court added that the right of access to a lawyer is not absolute and may be subject to restriction provided that those restrictions pursue a legitimate aim and are proportionate. It may be acceptable to impose conditions on the grant of legal aid based on the financial situation of the applicant or on the prospects of their success in the proceedings. It is not incumbent upon the state to seek, through public funds, to ensure total equality of arms as long as each side is afforded a reasonable opportunity to present their case under conditions that do not put them at a substantial disadvantage.
43. The case of *Currie v Jamaica*<sup>17</sup> involved a prisoner on death row and his ability to launch a constitutional challenge. The HRC found that the state's denial of legal aid amounted to a denial of a fair hearing. Although the HRC did not regard provision of legal aid as an absolute right of litigants, it held that the state was under an obligation to make proceedings in the constitutional court available and effective. The complexity of constitutional proceedings was a significant factor in determining that legal aid was required. It was not the denial of legal aid itself that amounted to a breach but rather that its absence resulted in a denial of access to the courts, which the state did not rectify in any other way.
44. Similarly, in *Golder v United Kingdom*,<sup>18</sup> the applicant, a prisoner, was denied access to his solicitor to discuss the prospect of bringing a civil suit. This was held to violate his right to a fair hearing because although not preventing him from bringing a proceeding altogether, it did prevent him from commencing it at that time. The European Court held that the fair conduct of a civil proceeding is meaningless if one does not have the right to bring the proceeding in the first place and explained that the convention presupposes the right of access to the courts just as it presupposes the existence of the courts themselves.<sup>19</sup>

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<sup>16</sup> *Steel and Morris v UK*, 68416/01 [2005] ECHR 103 (15 February 2005).

<sup>17</sup> UN Doc CCPR/C/50/D/377/1989.

<sup>18</sup> 4451/70 [1975] ECHR 1 (21 February 1975).

<sup>19</sup> *Ibid.*

45. In *Airey v Ireland*,<sup>20</sup> the European Court held that fulfilment of a duty under the ECHR requires positive action by the state and thus it is a positive duty to ensure effective access to the courts. Likewise, in its Concluding Observations on Norway, the HRC noted that civil proceedings are serious enough to warrant an entitlement to legal aid when they concern the attempted enforcement of a right protected by the ICCPR.<sup>21</sup>
46. The jurisprudence indicates that an individual's access to the justice system should not be prejudiced by reason of his or her inability to afford the cost of independent advice or legal representation. Indeed, any failure to provide legal aid to those who may otherwise be unable to access legal representation is likely to contribute to significant inefficiencies and additional costs in the civil justice system. The HRLRC strongly endorses Recommendation 2 of the PILCH Submission that funding to community legal centres be continually increased to enable them to provide case work assistance to the community in civil justice matters. The HRLRC also strongly endorses Recommendation 4 of the PILCH Submission regarding extensions to the current civil law legal aid guidelines and Recommendation 5 of the PILCH Submission regarding the interpretation of those guidelines, which would ensure greater equality in access to justice and contribute to an efficient civil justice system.
47. Further, the cases of *Currie v Jamaica*<sup>22</sup> and *Golder v United Kingdom*,<sup>23</sup> discussed above, indicate the importance of the provision of legal assistance to prisoners in the prison system. The HRLRC strongly endorses Recommendation 4(iv) of the PILCH Submission that legal assistance to prisoners should be increased to enable them to bring legitimate claims before the courts.
48. The HRLRC notes that the provision of legal aid represents only one means by which a state can meet its obligation to ensure a fair hearing and that a state may increase accessibility to courts by simplifying procedure.

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<sup>20</sup> 6289/73 [1979] ECHR 3 (9 October 1979).

<sup>21</sup> *Concluding Observation on Norway*, UN Doc CCPR/C/79/Add. 112(1999). This was particularly so in the context of the discriminatory impact of high legal costs and the absence of legal aid on Sami protection of traditional livelihood from competing land uses.

<sup>22</sup> Above n 17.

<sup>23</sup> Above n 18.

### 4.3 Costs of Litigation

49. An important aspect of ensuring equal access to justice is the applicant's ability to pay the associated costs and the discriminatory effect this has on disadvantaged members of the community.
50. In *Kreuz v Poland*,<sup>24</sup> the requirement to pay court fees was held to be a violation of article 6 of the ECHR because it imposed a disproportionate burden on the individual. While the right to a fair hearing does not endow citizens with the right to free civil proceedings, the European Court said that the imposition of court fees must be balanced against the burden placed on the individual litigant. The relevant factors in this case were:
- (a) the level of court fees involved;
  - (b) the court had refused his application without taking into consideration any evidence; and
  - (c) under the relevant domestic law, an exemption from fees could be revoked when the circumstances of the individual changed, effectively suspending the fees temporarily and allowing the applicant to commence his proceedings.
51. In *Aarela v Finland*,<sup>25</sup> the HRC held that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing. The imposition of substantial costs against a disadvantaged claimant may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. The HRC held that there should be judicial discretion to consider individual circumstances on a case-by-case basis and that, without such a discretion, the imposition of indiscriminate costs acts as a strong deterrent to the whole community, particularly its disadvantaged members, in exercising their right to have their complaint heard.
52. Notions of fairness in matters relating to security for costs have undergone a case-by-case development. In *Ait Mouhoub v France*,<sup>26</sup> the requirement to pay 80,000 francs for proceedings against the gendarmes was held to be a disproportionate obstacle to the author's access to court. However, in *Tolstoy Miloslavsky v UK*,<sup>27</sup> the payment of 124,900 pounds was not considered an infringement of article 6 of the ECHR.

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<sup>24</sup> 28249/95 [2001] ECHR 398 (19 June 2001).

<sup>25</sup> *Anni Aarela and Jouni Nakkalajarvi v Finland*, UN Doc CCPR/C/73/D/779/1997.

<sup>26</sup> 22924/93 [1998] ECHR 97 (28 October 1998).

<sup>27</sup> 18139/91 [1995] ECHR 25 (13 July 1995).

53. It is clear that the availability of funding for the costs of litigation, including court fees, disbursements and awards of costs is critical to ensuring access to justice for impecunious litigants. In many cases, a lack of available funding creates a significant barrier to progressing claims and may result in an individual being unable to access justice effectively.
54. The HRLRC strongly endorses:
- (a) Recommendation 12 of the PILCH Submission that funding be provided for disbursements in certain pro bono matters;
  - (b) Recommendation 13 of the PILCH Submission that the guidelines for the Law Aid scheme be expanded;
  - (c) Recommendation 14 of the PILCH Submission that the Victorian Government adopt the model guidelines regarding pursuing costs in public interest proceedings; and
  - (d) Recommendation 15 of the PILCH Submission that Order 63 of the Supreme Court Rules be amended to incorporate provisions relating to costs and public interest litigants.

#### **4.4 Right to Procedural Fairness**

55. Article 14 of the ICCPR provides procedural guarantees as to the conduct of a hearing. Essentially, the right ensures litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party. However, the right to procedural fairness does not necessarily amount to a guarantee of a favourable outcome and errors of fact or law do not amount to a violation of the right.<sup>28</sup> The procedural guarantees include equal access to courts, fair and public hearings, and the competence, impartiality and independence of the judiciary.<sup>29</sup> The same procedural rights must be given to each party involved unless distinctions can be justified on objective and reasonable grounds.<sup>30</sup>

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<sup>28</sup> *RM v Finland*, UN Doc CCPR/C/35/D/301/1998. See also *BdB v Netherlands*, UN Doc CCPR/C/35/D/273/1988 and *Martinez Mercader et al v Spain*, UN Doc CCPR/C/84/D/1097/2002.

<sup>29</sup> *BdB v Netherlands*, UN Doc CCPR/C/35/D/273/1988.

<sup>30</sup> *Draft General Comment 32*, above n 7, [3].

56. More specifically, the interests of equality between parties demand that each side be given the opportunity to respond to evidence put forward by the other. This may include access to material held by the other side or an equal ability to cross-examine witnesses. In *Gertruda Hubertina Jansen-Gielen v The Netherlands*,<sup>31</sup> the HRC stated that there is a duty imposed on courts (in the absence of time limits) to ensure that each party has the opportunity to challenge the documentary evidence that the other has filed and that proceedings should be adjourned if necessary. The ECHR has also found that a fair hearing requires parties to have the opportunity to have knowledge of and comment on all evidence adduced.<sup>32</sup>
57. In *Anni Aarela and Jouni Nakkalajarvi v Finland*,<sup>33</sup> the authors were precluded from responding to a brief the other party had submitted and which was then relied upon to their detriment. The HRC held that justice required the ability of each party to contest the arguments and evidence of the other party. The HRC also determined that the onus of establishing unfairness lies on the author.<sup>34</sup>
58. In the case of *Daniels v Walker*,<sup>35</sup> the parties agreed on a joint expert in accordance with the UK Civil Procedure Rules. However, one of the parties was dissatisfied with the report but was denied permission to seek their own expert. They consequently argued a breach of the right to a fair trial because denial had 'barred the essential or fundamental part of [their] claim'. The court agreed and said that where there were sound reasons for a party wishing to obtain further evidence before deciding whether to challenge part or whole of a report, then the request to instruct another expert should be allowed at the court's discretion. If, however, the damages claimed are modest, the court may, in the interests of proportionality, refuse the request and merely allow the party to put questions to the expert who had already prepared the report.
59. In the case of *Pappas v Noble*,<sup>36</sup> the ACT Supreme Court held that a provision in another Act which had the effect of rendering evidence inadmissible that would otherwise be determinative in civil proceedings would be inconsistent with the right to a fair trial.

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<sup>31</sup> UN Doc CCPR/C/71/D/846/1999.

<sup>32</sup> *Van Orshoven v Belgium*, 20122/92 [1997] ECHR 33 (25 June 1997).

<sup>33</sup> UN Doc CCPR/C/73/D/779/1997.

<sup>34</sup> The HRC also stated that the procedural practice applied by domestic courts is a matter for the courts to determine in the interests of justice.

<sup>35</sup> [2000] 1 WLR 1382.

<sup>36</sup> [2006] ACTSC 39.

#### 4.5 Right to an Expeditious Hearing

60. According to the HRC's Draft General Comment No 32, an important aspect of a fair hearing is its expeditiousness. In fact, the most litigated requirement under article 6 of the ECHR is the obligation to ensure that proceedings do not exceed a reasonable time.<sup>37</sup> Delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties are not compatible with the right to a fair hearing.<sup>38</sup> It is clear from the jurisprudence that the level of expeditiousness required will depend very much on the circumstances of the case. Factors to be taken into account include:
- (a) the type and complexity of the case;
  - (b) the conduct and diligence of both sides of the dispute; and
  - (c) the conduct and diligence of the court.
61. Some examples of decisions on the reasonableness of delay include:
- (a) the European Court placed a greater emphasis on the need for an expeditious hearing in the case of a terminally ill AIDS patient in *X v France*<sup>39</sup> and in a case concerning the adoption of a child in *H v United Kingdom*,<sup>40</sup>
  - (b) the European Court held that an employment dispute which lasted nine years was unreasonable in the overall circumstances;<sup>41</sup>
  - (c) the HRC has held that a delay of seven years in a dismissal complaint was unreasonable, as was a further two and a half year delay in the implementation of the remedy.<sup>42</sup> Conversely, two years and nine months was considered reasonable for a dismissal complaint in *Casanovas v France*,<sup>43</sup>

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<sup>37</sup> Rosalind English, *Human Rights Update* (2005) One Crown Office Row <[www.humanrights.1cor.com/247/](http://www.humanrights.1cor.com/247/)> at 21 December 2006.

<sup>38</sup> *General Comment 32*, above n 7, [7]. See also *Yves Morael v France* UN Doc CCPR/C/36/D/207/1986 and *Ruben Turibio Munoz Hermoza v Peru* UN Doc CCPR/C/34/D/203/1986, which held that a fair hearing in civil proceedings required justice be rendered without undue delay.

<sup>39</sup> 18020/91 [1992] ECHR 45 (31 March 1992).

<sup>40</sup> 9580/81 [1987] ECHR 14 (8 July 1987).

<sup>41</sup> *Darnell v United Kingdom* 15058/89 [1993] ECHR 47 (26 October 1993).

<sup>42</sup> *Ruben Turibio Munoz Hermoza v Peru*, UN Doc CCPR/C/34/D/203/1986.

<sup>43</sup> *Casanovas v France*, UN Doc CCPR/C/51/D/441/1990.

- (d) the HRC held that four years in a case where a company's affairs had been placed under judicial supervision was a reasonable delay given the complexity of the case;<sup>44</sup>
  - (e) in *Fei v Colombia*,<sup>45</sup> a matter concerning the custody of children, the HRC considered the case to be a clear breach of article 14 of the ICCPR because custodial issues particularly require expeditious proceedings. Each matter took several years, there were inexplicable delays on the part of the state and the determination was handed down before the expiration of time to enter a defence;
  - (f) in the ACT, section 21 of the ACT Act was used to allow a civil action to proceed despite the expiry of time limitations and delay.<sup>46</sup> In the circumstances, the court considered that to deny the applicant would have been unjust and there was no prejudicial effect on the other party.
62. A lack of resources and chronic under-funding of the legal system generally cannot be an excuse for unacceptable delays.<sup>47</sup> In *Procurator Fiscal v Watson and Burrows*, the House of Lords (drawing on jurisprudence of the European Court) stated that it is generally incumbent on contracting states to organise their legal systems so as to ensure that the reasonable time requirement is honoured.<sup>48</sup>
63. In its Concluding Observations on Croatia,<sup>49</sup> the HRC highlighted concerns over breaches of article 14 arising from the suspension or discontinuance of cases because of the operation of statutes of limitations where there had been delays in the administration of justice through no fault of the litigants. The HRC stated that it is the obligation of the state to ensure compliance with all the requirements of article 14 and that in this case it was necessary for Croatia to accelerate reform of the judicial system through, among other things, the simplification of procedures and the training of judges and court staff in efficient case management techniques.

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<sup>44</sup> *Yves Morael v France*, UN Doc CCPR/C/36/D/207/1986.

<sup>45</sup> *Fei v Colombia*, UN Doc CCPR/C/53/D/514/1992.

<sup>46</sup> *Hanan Al-Rawahi v Mohammad Ali Niazi* [2006] ACTSC 84.

<sup>47</sup> Suzanne Lambert and Andrea Lindsay Strugo, *Delay as a Ground of Review* (2005) One Crown Office Row <[www.humanrights.org.uk/1030/](http://www.humanrights.org.uk/1030/)> at 21 December 2006.

<sup>48</sup> *Procurator Fiscal v Watson and Burrows* [2002] UKPC D1, 55.

<sup>49</sup> *Concluding Observations on Croatia*, UN Doc CCPR/CO/71/HRV(2001).

#### 4.6 Right to a Public Hearing

64. Article 14 of the ICCPR guarantees the right to a public hearing as one of the essential elements of the concept of a fair trial. It is a right belonging to the parties, but also to the general public in a democratic society.
65. The publicity of a trial includes both the public nature of the hearings and the publicity of the judgment eventually made in a case. The right to a public hearing means that the hearing should be conducted orally and publicly. The court or tribunal is obliged to make information about the time and venue of the hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits.
66. These concepts were considered in *G.A. Van Meurs v The Netherlands*,<sup>50</sup> where the HRC held that labour disputes argued in oral hearings before a court are subject to the requirement that they be held publicly. Importantly, the HRC noted that this is a duty imposed upon the state and is not dependent on any request by the parties.
67. The right to a public hearing may be limited in certain circumstances where the interests of morals, public order or national security, or the interests of those under 18 or the privacy of the parties, require an exclusion of the public and the press. Article 6 of the ECHR provides that:
- ... [The] public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
68. However, any exclusion of the public must only go as far as is necessary to protect those interests. Even where the public has been excluded from the hearing, the court must pronounce its judgment in public.

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<sup>50</sup> UN Doc CCPR/C/39/D/215/1986.

#### **4.7 Right to an Interpreter**

69. While the right to the free assistance of an interpreter is only guaranteed in criminal proceedings,<sup>51</sup> in certain circumstances, the right to a fair hearing in civil matters will include the right to an interpreter. In the UK, public authorities must ensure that any person who is subject to a decision-making process has access to an interpreter if required.<sup>52</sup>
70. In Victoria, the court plays no role in civil proceedings in organising an interpreter to be present or to ensure that the services of an interpreter are available where required. The unavailability of interpreting services in the courts presents a major barrier to access to justice. A party's ability to participate in the legal process is severely undermined where he or she is unable to afford to pay for an interpreter to attend a hearing.
71. The HRLRC strongly endorses Recommendation 10 of the PILCH Submission that interpreting services are made available in all civil proceedings in Victorian courts and Recommendation 11 of the PILCH Submission that funding be provided for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.

#### **4.8 Limitations on the Right to a Fair Hearing**

72. Any limitations placed on an individual's right to a fair hearing require consideration of a range of factors, including the proportionality between a legitimate aim and the impact on the party's access to the court.<sup>53</sup>
73. In *General Comment 31*, the HRC stated that, where limitations or restrictions are made to rights under the ICCPR,

States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.<sup>54</sup>

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<sup>51</sup> Article 14(3)(f) of the ICCPR. Similar provisions are contained in the UK Act, ACT Act and the Victorian Charter.

<sup>52</sup> Department for Constitutional Affairs, above n 8, 23.

<sup>53</sup> *Tinnelly & Ors v UK*, 20390/92 [1998] ECHR 56 (10 July 1998).

<sup>54</sup> UNHRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

74. The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. Those principles include that:
- (a) no limitations or grounds for applying them may be inconsistent with the essence of the ICCPR or the particular right concerned;
  - (b) any limitation must be provided for by law and be compatible with the objects and purposes of the ICCPR;
  - (c) limitations must not be arbitrary or unreasonable;
  - (d) limitations must be subject to challenge and review;
  - (e) limitations must not discriminate on a prohibited ground;
  - (f) any limitation must be 'necessary', which requires that it:
    - (i) responds to a pressing need;
    - (ii) pursues a legitimate aim; and
    - (iii) is proportionate to that aim.<sup>55</sup>
75. Determination of what is proportionate is heavily dependent on the individual circumstances of the case. In ensuring equal and uninhibited access to justice, courts have to balance the interests of individuals with the need to manage case load and avoid unnecessary delays. The avoidance of delay is, in itself, part of ensuring better access to justice for genuine litigants.<sup>56</sup> While restrictions impacting on the right to a fair hearing are allowed in some cases, courts have acknowledged that a restrictive interpretation of the right to a fair hearing should not be taken.<sup>57</sup>

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<sup>55</sup> UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

<sup>56</sup> Sir Anthony Clarke, *Vexatious Litigants and Access to Justice: Past, Present and Future*, First Keynote Address, Conference on Vexatious Litigants (30 June 2006) <[www.judiciary.gov.uk/publications\\_media/speeches/2006/sp300606.htm](http://www.judiciary.gov.uk/publications_media/speeches/2006/sp300606.htm)> at 21 December 2006.

<sup>57</sup> *Moreira de Asevedo v Portugal*, 11296/84 [1990] ECHR 26 (23 October 1990).

76. In *R v HM Attorney General, ex parte Andy Covey*,<sup>58</sup> the UK High Court made it clear that the process of declaring someone a vexatious litigant was not necessarily an unjustified interference with their right of access to the court. Restriction of a vexatious litigant was required for legitimate protection of the legal process as well as those against whom the respondent may decide to litigate in the future. The court held that exclusion was the only proper course in the circumstances and it did not amount to a denial of the respondent's access to a court under article 6. The European Court's jurisprudence recognises the need for the reasonable and proportionate ordering by the court of its processes, including the requirement of a filter in some cases to ensure that the court processes are properly used.<sup>59</sup>

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<sup>58</sup> [2001] EWCA Civ 254.

<sup>59</sup> Rosalind English, *Human Rights Update* (2000) One Crown Office Row, <[www.humanrights.org.uk/374/](http://www.humanrights.org.uk/374/)> at 21 December 2006.

## 5. Implications for the Victorian Civil Justice Review

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*'I am afraid this is almost an insoluble problem.'*

(Lord Woolf on the balance between offering a greater access to justice and avoiding an over-claims culture.)

### 5.1 Lord Woolf's Reforms and Lord Bowman's Review

77. In the UK in 1994, Lord Woolf was appointed by the Lord Chancellor to review the rules and procedures of the civil courts in England and Wales. The aims of the review were:
- (a) to improve access to justice and reduce the cost of litigation;
  - (b) to reduce the complexity of the rules and modernise terminology; and
  - (c) to remove unnecessary distinctions of practice and procedure.
78. The reports of the Woolf inquiry into the civil justice system proposed the introduction of a system where the courts would take greater responsibility for the progress of litigation.<sup>60</sup> The reports identified problems that arose due to the uncontrolled nature of the litigation process and the lack of clear judicial responsibility for managing cases. They focused on modifying the existing system through judicial case management and simplification of procedural rules. The reports also highlighted the need for a cultural and philosophical shift away from an adversarial culture and for a focus upon alternative dispute resolution processes.
79. Lord Woolf's reports contained over 300 recommendations and proposed a broad agenda for change to address problems of cost, delay and complexity in civil litigation. The proposals provided for the following features for civil litigation:
- (a) Litigation will be avoided wherever possible.
  - (b) Litigation will be less adversarial and more co-operative.
  - (c) Litigation will be less complex.
  - (d) The timescale of litigation will be shorter and more certain.

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<sup>60</sup> Lord Woolf, *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* (Lord Chancellor's Dept London, 1995); Lord Woolf, *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO London 1996); Lord Woolf, *Access to justice draft civil proceedings rules* (HMSO London 1996).

- (e) The cost of litigation will be more affordable, more predictable and more proportionate to the value and complexity of individual cases.
  - (f) Parties of limited financial means will be able to conduct litigation on a more equal footing.
  - (g) There will be clear lines of judicial and administrative responsibility for the civil justice system.
  - (h) The structure of the courts and the deployment of judges will be designed to meet the needs of litigants.
  - (i) Judges will be deployed effectively so that they can manage litigation in accordance with the new rules and protocols.
  - (j) The civil justice system will be more responsive to the needs of litigants.
80. At the commencement of UK *Human Rights Act* in 2000, it was anticipated that there would be a substantial increase in the number of claims being brought and in the administrative burden upon the court office and judges. In addition, it was also anticipated that the UK Act was likely to result in raised public awareness of rights against the state and therefore lead to a greater number of claims. As a result, many of the recommendation in Lord Woolf's reports were adopted in the new *Civil Procedure Rules 1999* (UK) (**Lord Woolf's Reforms**). The new Rules were aimed at speeding up pre-trial procedure and reducing the cost of litigation.
81. In addition to Lord Woolf's Reforms, the new Rules also incorporated many of the recommendations arising out of Lord Bowman's review of the operation of the Court of Appeal (Civil Division) (**Lord Bowman's Review**).<sup>61</sup> The terms of reference of Lord Bowman's Review required it to 'put forward costed recommendations for improving the efficiency of the Crown Office List...' that do 'not compromise the fairness or probity of proceedings, the quality of decisions, or the independence of the judiciary'.<sup>62</sup>

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<sup>61</sup> Lord Bowman, *Review of the Crown Office List: A Report to the Lord Chancellor* Lord Chancellor's Department, London, 2000.

<sup>62</sup> *Ibid* ii.

82. Lord Bowman's Review proposed two principal innovations in relation to judicial review of the decisions of public authorities:
- (a) firstly, the permission stage was to be made an *inter partes* procedure with the defendant authority being given full notice of the application; and
  - (b) secondly, consideration of permission applications was to be always, in the first instance, on paper.
83. The former proposal was intended to encourage pre-permission settlement between parties, while the latter was intended to enable the Court to deal more quickly with permission applications.
84. The proposals from Lord Bowman's Review that were implemented included:
- (a) a defendant must be given full notice of the application by the claimant and the claim form must include, or be accompanied by:
    - (i) a detailed statement of the claimant's grounds for bringing the claim for judicial review;
    - (ii) a statement of facts relied on;
    - (iii) a time estimate for the hearing (presumably the substantive hearing after permission has been granted);
    - (iv) any written evidence in support of the claim;
    - (v) copies of any document on which the claimant proposes to rely; and
    - (vi) a list of essential documents for advance reading by the court;<sup>63</sup>
  - (b) the claim form must be served on the defendant and, unless the court otherwise directs, any person the claimant considers to be an interested party, within 7 days of the date of issue;<sup>64</sup>
  - (c) any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service not more than 21 days after service of the claim form;

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<sup>63</sup> Rule 54.6(2) of the *Civil Procedure Rules 1999* (UK) and Practice Direction 54, [5.6, 5.7].

<sup>64</sup> Rule 54.7 of the *Civil Procedure Rules 1999* (UK).

- (d) if the defendant (or any other person acknowledging service of the claim form) wishes to contest the claim, he must set out a summary of his grounds for doing so in the acknowledgment;<sup>65</sup>
- (e) the court will generally, in the first instance, consider the question of permission without a hearing<sup>66</sup> and where it does so and refuses permission, or grants it only on certain grounds or subject to conditions, the claimant may request that the decision be reconsidered at a hearing.

85. Certain of the recommendations of Lord Bowman's Review show a real concern to improve the fairness of the system. However, in practice, Lord Bowman's Review was overwhelmingly concerned with matters of cost and efficiency. Many commentators have argued that the new reforms represent a further tipping of the scales in favour of defendant public authorities.<sup>67</sup> Some of the criticisms advanced include:

- (a) at the permission stage, the reforms were by and large driven by considerations of saving court time and protecting public authorities rather than of fairness or access to justice;
- (b) from the point of view of equality and fairness, the new Rules governing permission increase the disadvantages of the claimant vis-a-vis the defendant;
- (c) the process lacks the safeguards of the claimant's interests which one would expect in a procedure designed to put the parties on an equal footing; and
- (d) the claimant from the outset has to go to the trouble and expense of assembling all the relevant materials and must disclose its case in full to the defendant. The defendant need do no more than give its defence in outline. In the normal course of things, the claimant will have no opportunity to rebut the allegations made by the defendant because permission will be decided on the papers.

86. One measure proposed by Lord Bowman's Review but that was not implemented in the new Rules was to improve the claimant's position at the permission stage. It was recommended that a presumption in favour of granting permission where the test of arguability was satisfied should be spelt out in the new Rules, which was intended to improve the fairness to applicants of the permission stage. However, like the old Rules,

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<sup>65</sup> Rule 54.8 of the *Civil Procedure Rules 1999* (UK).

<sup>66</sup> Practice Direction 54, [8.4].

the new Rules say nothing about the criteria for the grant of permission and thus have left matters in the rather unpredictable state that they were in before.

## 5.2 Effect of the Reforms

87. Despite concerns about an avalanche of litigation following the introduction of the UK *Human Rights Act*, there has in fact been no evidence which suggests that there has been an increase in the number of cases brought in UK courts. Whilst the UK Act has been substantively considered in about one-third of cases before the House of Lords,<sup>68</sup> a study produced by the Public Law Project (*PLP Report*) found that 'there was little evidence that the introduction of the Human Rights Act has led to a significant increase in the use of judicial review'.<sup>69</sup> Further, the Annual Court Report for 2001-2002 stated that 'there is no evidence that the UK Act has increased the number of cases lodged, nor that hearing times have lengthened since the implementation of the Act'.<sup>70</sup> Indeed, some commentators even refer to the 'significant decline' in the number of cases filed since the introduction of the new Rules.<sup>71</sup>
88. The PLP Report also established that the UK Act is cited in just under half of all claims. When taken together with the evidence that the UK Act has not led to a major increase in case numbers, it appears that the UK Act is most often used to supplement established grounds for judicial review in cases that would have pursued in any event on such grounds prior to the introduction of the UK Act. Indeed, the UK Act does not introduce any new rights but rather gives further effect in UK law to the rights set out in the ECHR.
89. One major difference between the Victorian Charter and the UK Act is that the Victorian Charter does not provide for a free-standing ground or cause of action for bringing claims for breaches of its provisions. Based on the experience in the UK, it is likely that the Victorian Charter will most often be used to supplement existing grounds for cases, rather than actually lead to an increase in the number of cases being brought in the courts.

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<sup>67</sup> See, for example, Tom Cornford, 'The New Rules of Procedure for Judicial Review' [2000] 5 Web JCLI <<http://spade3.ncl.ac.uk/2000/issue5/cornford5.html>> at 21 December 2006.

<sup>68</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006.

<sup>69</sup> Public Law Project, *The Impact of the Human Rights Act on Judicial Review: An Empirical Research Study*, June 2003, 31.

<sup>70</sup> Administrative Court of England and Wales, *Report for the Period April 2001 to March 2002*, [4.2] <[http://www.hmcourts-service.gov.uk/docs/annual\\_review\\_0102.pdf](http://www.hmcourts-service.gov.uk/docs/annual_review_0102.pdf)> at 21 December 2006.

<sup>71</sup> Quinn Emanuel Urquhart Oliver & Hedges, LLP, *Business Litigation Report (Newsletter)*, June 2006.

90. Furthermore, many of the principles protected under the Victorian Charter are also embedded in the common law (such as the right to a fair hearing and the rule of law), whilst other rights, such as discrimination, privacy and criminal rights, are protected by specific legislation.
91. The UK Act is said to have substantially affected the result in about one-tenth of those cases.<sup>72</sup> One view is that the frequency with which the UK Act is cited by courts indicates that the publicity and training surrounding the UK Act has had an impact and that many practitioners are aware of, and are raising, human rights issues in matters before the courts. However, some critics argue that the decline in litigation poses some serious questions: Are some violations of rights going unchecked because of fear of litigation or lack of resources? How does this impact on the constitutional right of access to court? What is the long term impact on the rule of law and the development of the common law?
92. The UK Department for Constitutional Affairs' five-year review of the implementation of the UK Act<sup>73</sup> found that the impact of the UK Act upon the development of UK law has been 'significantly less, and significantly less negative, than many of the predictions made for it'. Most observers attribute the decline in the number of cases before the court to the reforms of the civil procedure rules adopted in 1999.<sup>74</sup> The PLP Report suggests that the reforms adopted from reports of Lord Woolf and Lord Bowman may indeed have led to an increase in early settlement of cases, and also to higher rates of refusal of permission.<sup>75</sup>
93. It is clear that any policy relating to access to the civil justice system must have regard to the need to reduce the large numbers of unmeritorious cases while preserving access to justice for cases with merit. The HRLRC's view is that it is fundamentally flawed for policy to determine which cases have merit and should therefore be provided with access to justice. It is the role of courts to differentiate between those claims deserving of access to justice and those claims that are without merit. The process of determining merit necessarily takes place on a case-by-case basis. Policies for reform of the Victorian civil justice system should therefore be guided by the need to preserve access to justice for *all*.

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<sup>72</sup> Department for Constitutional Affairs, above n 68.

<sup>73</sup> Ibid.

<sup>74</sup> Quinn Emanuel Urquhart Oliver & Hedges, LLP, above n 71.

<sup>75</sup> Public Law Project, above n 69, 31.

94. Further, there are existing provisions for applications to be struck out by Courts in the event that they are unmeritorious. For example, the Victorian Supreme Court Rules provide that an application may be stayed or dismissed by a Court where no reasonable cause of action is disclosed, the proceeding is frivolous or vexatious or the proceeding is an abuse of the process of the Court.<sup>76</sup>
95. The HRLRC submits that an increase in the availability of legal advice and representation and other reforms guaranteeing the basic elements of the right to a fair hearing would reduce the number of unmeritorious claims brought before the courts and also enhance the protection of the human rights of litigants, thereby ensuring a fair and effective civil justice system in Victoria. The development of policies and formal procedures that are compatible with the fair hearing provisions of the Victorian Charter would lead to better policy outcomes by ensuring that the needs of all Victorians are appropriately considered.

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<sup>76</sup> Rule 23 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*.