Law Institute Victoria

25 February 2010

The Hon James Wood AO QC
Chairperson
New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

By email to: nsw_lrc@agd.nsw.gov.au

Dear Mr Wood

Inquiry into Security for costs and associated costs orders

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector. The LIV is aware that the New South Wales Law Reform Commission has been asked *"to inquire into and report on whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation".*

The LIV is pleased to refer the Inquiry into Security for Costs and Associated Costs Orders to a recent submission made by the LIV to the Victorian Attorney-General on protective costs orders. In the submission, the LIV supports a proposal by the Public Interest Law Clearing House that Victorian courts be specifically conferred with power to make protective costs orders in relation to "public interest matters". The submission sets out the evidence of need and arguments for a protective costs orders regime in Victoria, as well as an overview of recent developments in other jurisdictions.

Our submission is attached for your reference.

If you have any queries in relation to this submission please contact Laura Helm, Policy Adviser, Administrative Law and Human Rights Section on (03) 9607 9380 or lhelm@liv.asn.au.

Yours sincerely

Steven Stevens
President
Law Institute of Victoria

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Law Institute Victoria

19 February 2010

The Honourable Rob Hulls, MP
Attorney General
Level 1, 55 St. Andrews Place
East Melbourne VIC 3002

By email to: rob.hulls@parliament.vic.gov.au

Dear Attorney

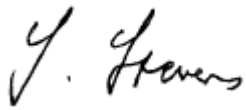
Protective Costs Orders

The Law Institute of Victoria (LIV) is pleased to make this submission in support of PILCH's proposal of September 2008 that Victorian courts be specifically conferred with power to make protective costs orders in relation to "public interest matters".

Our submission is attached.

Members of the LIV's Access to Justice Committee would be happy to meet with members of the Department of Justice Civil Law Reform Project team to discuss this submission further. Please contact Laura Helm on (03) 9607 9380 or lhelm@liv.asn.au in relation to this matter.

Yours sincerely,



Steven Stevens
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Cc: Mary-Anne MacCallum, Manager - Civil Law Reform Project
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The Law Institute of Victoria is a member of
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Protective Costs Orders

To: Victorian Attorney General

19 February 2010

Queries regarding this submission should be directed to:
Contact persons *Laura Helm*
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Email *lhelm@liv.asn.au*

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Introduction

In September 2008, the Public Interest Law Clearing House (PILCH) (Victoria) made a submission to you advocating that the Supreme Court be specifically conferred with power to make protective costs orders in relation to "public interest matters", by way of amendment to Section 24 of the *Supreme Court Act* 1986 (Vic) (the PILCH proposal). A protective costs order (PCO) is a court order that wholly or partially protects a party to a proceeding from an adverse costs outcome. PCOs may include orders that:

- a party will not be exposed to an order for costs if it loses at trial;
- the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; or
- that there will be no order for costs whatever the outcome of the trial.

It is envisaged that the same (or very similar) amendments could be made to the County Court Act 1958 and the Magistrates' Court Act 1989. PILCH has also written to the Commonwealth Attorney General proposing similar reforms in the High Court, Federal Court and Federal Magistrates' Court (in April 2009).

The Law Institute of Victoria (LIV) is pleased to make this submission on protective costs orders in support of PILCH's proposal (a copy of which is attached for your reference). We emphasise, however, that support for PCOs does not obviate the need for urgent increase of funding for legal aid in civil matters and we note the Law Council Australia submission to the federal government that matters that are truly in the public interest are properly the responsibility of Government's to fund.[1]

As you are aware, courts retain discretion as to costs in Australian jurisdictions and the general costs rule in civil proceedings is that costs follow the event. A successful party can therefore expect a costs award in his or her favour. No Australian jurisdiction has a specific public interest costs regime. However, some courts have been prepared to make orders protecting public interest litigants against adverse costs orders[2] and both the Commonwealth and NSW governments are currently considering whether to introduce public interest costs regimes (see further below).

You will be aware that in 2007, the Victorian Law Reform Commission (VLRC) *Civil Justice Review* final report recommended that "there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation".[3] We understand that the this recommendation is likely to be considered by the Civil Law Reform Project of the Department of Justice later this year and we hope that this submission will assist the government in this process

Evidence of need

In PILCH's experience, many meritorious public interest matters are not ultimately pursued because of the risk of an adverse costs order. In this way, the costs regime in Australia acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people. The PILCH submissions set out details of four case studies to demonstrate that reform of the costs regime is necessary to ensure that impecuniosity is not a bar to the vindication of peoples' rights or the pursuit of meritorious claims in the public interest.

[1] See Law Council of Australia submission to the Access to Justice Taskforce (2 December 2009), available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=66AC4613-1E4F-17FA-D2B0-81B95366B68A&siteName=lca (Law Council submission).
[2] In *Oshlack v Richmond River Council* (1998) 193 CLR 72 the High Court indicated that, in exceptional cases, it may be appropriate to make no order as to costs in public interest cases.
[3] Victorian Law Reform Commission, *Civil Justice Review, (2007),* recommendation 153.

In a 1995 report, the Australian Law Reform Commission (ALRC) noted that:

- the current discretion of courts to vary the usual order that costs follow the event where the matter is in the public interest is not often utilised,[4] and
- courts tend to take the view that a party should not be deprived of their right to seek costs if successful merely because the matter is in the public interest.[5]

The ALRC considered that a costs order will most effectively assist to facilitate public interest litigation if the order were made at the beginning of the proceedings, notwithstanding that doing so may lead to a "substantial dispute between the parties that might be more easily resolved" if the order was made at the conclusion of the proceedings.[6]

Recent developments

Commonwealth

The Commonwealth Attorney-General's Department Access to Justice Taskforce recently recommended that the federal government should consider "amending federal court legislation to provide a discretion for the court to make a public interest costs order, at any stage of the proceeding, where the court is satisfied that the proceedings concerned will be of benefit to the public because the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant section of the community, or affect the development of the law generally and reduce the need for further litigation".[7] The Attorney General's Department has undertaken consultation on the *Strategic Framework for Access to Justice* and the government is yet to respond on this issue.[8]

New South Wales

On 8 December 2009, the New South Wales Attorney General requested the New South Wales Law Reform Commission to inquire into "whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation".[9]

The reference to the Law Reform Commission followed a recent landmark judgement in the NSW Land and Environment Court, in which Justice Pain used his discretion to order a PCO.[10] In that case, Blue Mountains Conservation Society commenced proceedings against Delta Electricity under the *Protection of the Environment Operations Act* 1997 (NSW) for allegedly causing water pollution in breach of s120.

The Blue Mountains Conservation Society sought a PCO under rule 42.6 of the *Uniform Civil Procedure Rules* 2005, limiting to $10,000 the maximum costs that may be recovered by one party from another. It was estimated that, in the event that defendant Delta Electricity was successful, Blue Mountains Conservation Society would be liable to pay over $200,000 in legal costs. Justice Pain noted the following:

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[4] Australian Law Reform Commission Report 75 *Costs shifting – who pays for litigation* (1995) pp 143–4 ('ALRC (1995)').
[5] *Ruddock v Vadarlis (No. 2)* (2001) 115 FCR 229, [18–19].
[6] ALRC (1995),above n4, p 151.
[7] Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, rec 8.10 (p144) ('Access to Justice Taskforce report').
[8] See http://www.ag.gov.au/a2j
[9] NSW Law Reform Commission, Security for costs and associated costs orders Terms of Reference, see http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref126.
[10] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150.

- the matter was a test case involving novel questions of law in relation to the operation of the *Protection of the Environment Operations Act*;
- the case was in the public interest, having regard to Blue Mountains Conservation Society's object and interests, and the environmental protection issues the litigation was seeking to address;
- Blue Mountains Conservation Society had an arguable case (which was not disputed by the defendant);
- Blue Mountains Conservation Society would derive no financial benefit from the proceedings and its counsel were acting *pro bono*;
- the evidence suggested that Blue Mountains Conservation Society would be unable to continue the proceedings if the PCO were not granted to the amount of $20,000; and
- as a large state-owned corporation, Delta Electricity would not suffer financial hardship if the PCO were granted.

Taking into account these matters, Justice Pain made an order limiting the payment of costs to $20,000. However he cautioned that a PCO should not be made lightly at early stages of proceedings where all issues, and the result, are unknown. The PCO is currently on appeal (due to be heard in March this year).

England and Wales

In England and Wales, the courts have developed rules for the granting of protective costs orders. The leading decision is that of the Court of Appeal in *R (Corner House Research) v Secretary for State for Trade and Industry* [2005] 1 WLR 2600 (*Corner House*). In that case the Court of Appeal set out the principles governing the award of PCOs:

- the issues raised are of public interest and require determination by the court;
- the applicant has no private interest in the outcome of the case;
- it is fair and just, having regard to the resources of the parties and the costs likely to be incurred; and
- the applicant will probably discontinue the proceedings if the order is not made, and will be acting reasonably in doing so.

However, the Court refused to make a pre-emptive costs order on the basis that to do so would be an impermissible use of judicial power and a "trespass into judicial legislation".

A report by the Liberty Victoria considered the broad, discretion-based approach to determining whether proceedings were in the public interest adopted in *Corner House* to be reasonable.[11] However, several aspects of the decision in Corner House have been argued to present difficulties.[12]

In December 2009, the *Review of Civil Litigation Costs: Final Report* was released (the Jackson Review). The Jackson Review report aims to propose a "coherent package of interlocking reforms, designed to control costs and promote access to justice".[13] The report notes that concern was expressed by practitioners that PCOs are complex and expensive to obtain.[14] The Jackson Review proposes that "those categories of litigants who merit protection against adverse costs liability on policy grounds should be given the benefit of qualified one way costs shifting".[15] This proposal is accompanied by a recommendation to abolish recoverability of "after the event" (ATE) insurance premiums, which are relatively widely available in the United Kingdom to cover the risk of an adverse costs order.

[11] Liberty, *Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation* (2006), [75].
[12] See VLRC report, above n3, at p673.
[13] The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, December 2009, i.
[14] Ibid, p304.
[15] Ibid, p94.

The PILCH proposal

In its submission, PILCH has proposed amendments to empower courts to make a PCO in a proceeding at any time prior to judgment. The court would be empowered to make orders that:

- a specified party will not be liable for costs, whether or not it is successful;
- one party's costs will be paid in whole or part by the other, regardless of the outcome of the proceeding; or
- the amount of costs for which a specified party may be liable will be capped.

These orders can be made on such terms and conditions as the court deems fit. The PCO amendment proposed in Annexure A to their submission prescribes five matters that the court **must** take into account when considering making a PCO:

(a) whether it is in the public interest that the issues raised, or likely to be raised, in the proceeding be determined by the Court;
(b) the evidence before the Court as to the financial resources of the parties to the proceeding;
(c) the costs that are likely to be incurred in the usual course by the parties to the proceeding;
(d) the nature and extent of any private or pecuniary interest that the applicant for the order has in the outcome of the proceeding;
(e) any prejudice any other party to the proceeding may suffer if the order is made.

These five matters are derived from the *Corner House* decision (above) and from Australian case law (which generally follows *Corner House*).

Arguments for a protective costs order regime

Access to Justice

The LIV notes that the law reform commissions in numerous jurisdictions in Australia, including the ALRC and the VLRC, support protective cost orders because it is an access to justice issue. The ALRC noted that public interest litigation assists the development of the law, providing "greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law".[16] The LIV considers that the threat of costs in public interest litigation should be characterised as a barrier to access to justice and not in economic terms of incentive or disincentive to litigation.

Individuals are not exempt from security of costs rules

The LIV notes "the basic rule that a natural person who sues will not be ordered to give security for costs, however poor": *Pearson v Naydler* [1977] 1 WLR 899 at 902. The general rule is, therefore, "that poverty is no bar to a litigant": *Cowell v Taylor* (1885) 31 Ch D 34 at 38.

This general rule is not, however, absolute. In *Melville v Craig Nowlan & Associates Pty Ltd* (2001) 54 NSWLR 82 at 108 and *Morris v Hanley* [2000] NSWSC 957 at [11]–[21], the court has emphasised that the exercise of the power to order security for costs is a balancing process, requiring the doing of justice between the parties. The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the

[16] ALRC (1995), above n4 [13.6].

conduct of the proceedings: *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [47].[17]

Individuals are not, therefore, exempt. PILCH has identified to the LIV circumstances in which security for costs has been sought, including a parent of a child acting as litigation guardian in a public interest case.

Public interest litigants should be able to seek a PCO in appropriate cases, regardless of their socio-economic status or their assets

The LIV considers that costs orders are a bar to public interest litigation and that public interest litigants should be able to seek a PCO in appropriate cases, regardless of their socio-economic status or their assets. This is consistent with the fundamental principle of non-discrimination, protected in s 8 of the *Charter of Human Rights and Responsibilities* 2006 (Vic).

The LIV rejects any contention that public interest applicants are not disadvantaged by the threat of a costs order and that even if people are impecunious at the time of proceeding, they may, for example, work in future or inherit money and be liable to deal with the effects of a costs order. The LIV notes further that impecunious litigants or those with low income and assets are more likely to face bankruptcy if a cost order is made and enforced. We do not accept the contention that creditors may be unlikely to enforce a cost order where recovery is likely to be low, or that this provides any safeguard for public interest litigants.

Benefits outweigh costs

The Commonwealth Attorney-General's Department Access to Justice Taskforce noted in its *Strategic Framework for Access to Justice* that "although hearing an application for a costs order will add another interlocutory proceeding to the matter, the main benefit in removing the barrier to litigation is only achieved in practice if litigants are aware of where they will stand as regards costs before those costs are incurred".[18]

The LIV agrees with the VLRC and ALRC reports that the benefits of PCOs in increasing access to justice outweigh any additional costs which might be incurred, by ensuring that genuine public interest litigation is pursued.

Safeguards

The PILCH submissions propose safeguards, to guard against misuse of PCOs by guiding the court to relevant factors (sub-section 2 (a)-(e)). For instance, proposed sub-section (2)(d) enables the court to consider the nature and extent of any private or pecuniary interest that the applicant may have in the outcome of the proceeding, so that matters that are solely compensatory and which do not have implications for a broader group will be unlikely to attract a PCO.

The proposed amendment ensures the court retains flexibility in creating and amending a PCO. At any time the parties can return to the court to have the PCO reviewed. This ensures a balance is always maintained between the parties, and that a plaintiff who is protected by a PCO cannot unfairly vex a defendant by, for example, causing them to incur unnecessary costs, or delaying proceedings.

[17] See Judicial Commission for NSW, Civil Trials Bench Book, *Security of Costs*, available at http://www.judcom.nsw.gov.au/publications/benchbks/civil/security_for_costs.html.
[18] Access to Justice Taskforce report, above n7, at p112.

The proposed amendments may also have the effect of discouraging frivolous or vexatious claims. The PILCH submission notes that prudent legal advice would dictate that any potential public interest litigant should seek a PCO at an early stage in the proceeding. If the court refuses to grant a PCO in a particular case, this refusal may indicate the likelihood of an adverse costs order ultimately being made against the party who sought the PCO and thus act as a disincentive to continuing the claim.

The court is not limited by the proposed amendment in respect of matters it can take into account in the exercise of its discretion and will to have regard to any other factor it considers relevant, such as whether the plaintiff has an arguable case.

Unlikely to result in a flood of litigation

A common criticism of PCOs is the fear that they might lead to a "flood" of litigation and we note that there has been significant media interest in this area.[19]

The ALRC notes that "existing legislative provisions aimed at encouraging public interest litigation have not led to a significant increase in the number of litigants".[20] Since the ALRC report, PCOs have been developed in England and Wales (see above) and Canada[21] and we note that these developments have not resulted in a flood of litigation.

The *Strategic Framework for Access to Justice* agrees that a "flood" of litigation is not expected as a result of an explicit discretion to award public interest costs orders as:

- the appropriateness and limits of a costs order would be a matter for the judge to determine in any particular case
- case management rules would apply to keep costs proportionate
- the Court could still refer a dispute to ADR to limit the scope of litigation to the core issues requiring resolution, and
- the significant financial burden on litigants posed by meeting their own costs acts to limit the incidence and scope of litigation.[22]

Cost to business

Media interest has also centred on potential cost to business imposed by a PCO regime.[23] In this regard, the Law Council has been persuaded that "to broaden the discretion which already exists [in current legislation] would be to unfairly disadvantage respondents and reverse the fundamental principle of our legal system - that costs follow the event" and submits that it is an "appropriate use of public money to fund litigation that is in the public interest rather than enforcing 'corporate' civil legal aid".[24]

The LIV strongly supports increased funding for legal aid in civil legal matters. However, we consider that such funding will not address the problem which PCOs aim to cure, that is, that meritorious pubic interest matters are not pursued because of the threat of an adverse costs order. In addition, legal aid funding will not provide cost recovery for respondents and therefore will not address the "cost to business" argument made against PCOs.

[19] See e.g. *The Australian*, 19 June 2009 "Changes to court rules risks flood of litigation".
[20] ALRC (1995), above n4, at p147.
[21] See *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371.
[22] Access to Justice Taskforce report, above n7, at p133.
[23] See e.g. *The Australian*, 23 October 2009 "Tackling the cost spiral in dispute resolution".
[24] Law Council submission, above n1, [72].

We note that s48 of the *Legal Aid Act* 1978 (Vic) provides that where a court makes a costs order against and assisted person, "either the assisted person or that other party may request VLA to pay to that other party on behalf of the assisted person an amount representing the whole or a part of the costs that the assisted person was so directed to pay". However, under s48, VLA shall not pay costs requested in a proceeding in first instance unless it appears that the person making the request will suffer "substantial hardship" if that amount is not paid by VLA. In addition to s48, in exceptional cases the court can make a costs order against a legal aid body. However, this power will be exercised only where a legal aid body has "clearly acted unreasonably to the financial detriment of a self-funded party".[25]

While increased legal aid funding for public interest matters would assist impecunious litigants to bring meritorious public interest cases, it would not address the barrier to access to justice posed by the threat of an adverse costs order.

Additional Matters

VCAT

The PILCH submission does not discuss amendments to *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) (VCAT Act). Section 109 of the VCAT Act establishes a presumption that "each party is to bear their own costs in the proceeding", so that VCAT is often referred to as a no-costs jurisdiction. However, s109(2) provides a very wide discretion to award costs, only if the Tribunal is satisfied that it is fair and having regard to the factors listed in s109(3). The discretion under S109 must be exercised "judicially" (see *Martin v Fasham Johson Pty Ltd* [2007] VSC 54 at [27]). Justice Bell in *Martin* observed that VCAT cost orders differ from, and are not restricted to those commonly made by the courts. It is therefore unclear whether s109, without amendment, contemplates PCOs. A clear power to make PCOs for public interest litigation within s109 might affect interpretation of "vexatiously conducting the proceeding" in subs109(3)(a)(vi), where a litigant is agitating an unpopular public interest issue.

Test case funding

We understand that many government agencies, for example the TAC, as part of their model litigant obligations, provide test case funding to enable test cases to be run without cost risks to the challenger and to enable the issue in question to be properly articulated before a court or tribunal. We emphasise the importance of this funding and that any PCO regime should not affect test case funding.

Conclusion

The LIV supports the PILCH proposal to amend s24 of the *Supreme Court Act* 1986 (Vic) and similar amendments to the *County Court Act* 1958 (Vic) and the *Magistrates' Court Act* 1989 (Vic). We also welcome consideration of whether amendment is necessary to the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic).

Members of the LIV's Access to Justice Committee would be happy to meet with members of the Civil Law Reform Project team to discuss this submission further. Please contact Laura Helm on (03) 9607 9380 or lhelm@liv.asn.au in relation to this matter.

[25] *Marriage of Pagliarella* [No 3] (1994) 122 FLR 433 at 447 per Hannon J.

SUBMISSION TO THE ATTORNEY-GENERAL OF VICTORIA ON PROTECTIVE COSTS ORDERS

25 September 2008

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1. Introduction

1.1 Introduction

The Public Interest Law Clearing House (PILCH) proposes that the Victorian Supreme Court be specifically conferred with power to make protective costs orders in relation to 'public interest matters'. A protective costs order (***PCO***) is a Court order that protects a party to a proceeding from an adverse costs outcome. PCOs may include orders that: a party will not be exposed to an order for costs if it loses at trial; the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; and there will be no order for costs whatever the outcome of the trial.

PILCH proposes that this conferral of power be effected by a legislative amendment to section 24 of the *Supreme Court Act* 1986 (Victoria). It is envisaged that the same (or very similar) amendments could be made to the *County Court Act* 1958 and the *Magistrates' Court Act* 1989. Alternatively, the amendment could be limited to the *Supreme Court Act* and its impact evaluated prior to its extension to the other Victorian courts.

PILCH believes that the conferral of power on Courts to make PCOs will significantly improve access to justice for marginalised and disadvantaged Victorians and is necessary to promote and fulfil the rights contained in sections 8 and 24 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (***the Charter***).

PILCH's proposed amendment was drafted by Mr John Manetta of counsel and Mr Ron Merkel QC (both acting pro bono), and is attached at Annexure A.

1.2 About PILCH

PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

PILCH coordinates the delivery of pro bono legal services through six schemes:

i) the Public Interest Law Scheme (PILS);

ii) the Victorian Bar Legal Assistance Scheme (VBLAS);

iii) the Law Institute of Victoria Legal Assistance Scheme (LIVLAS);

iv) PILCH Connect (Connect);

v) the Homeless Persons' Legal Clinic (HPLC); and

vi) Seniors Rights Victoria (SRV).

PILCH's objectives are to:

i) improve access to justice and the legal system for those who are disadvantaged or marginalised;

ii) identify matters of public interest requiring legal assistance;

iii) seek redress in matters of public interest for those who are disadvantaged or marginalised;

iv) refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;

v) support community organisations to pursue the interests of the communities they seek to represent; and

vi) encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

In 2007-2008, PILCH assisted over 2000 individuals and organisations to access free legal and related services. Without these much needed services, many Victorians would find it impossible to navigate a complex legal system, secure representation, negotiate a fine, challenge an unlawful eviction, contest a deportation or even be aware of their rights and responsibilities.

2. Evidence of need

2.1 Costs as a disincentive

In its role as a pro bono referral service for public interest matters, PILCH has observed many meritorious public interest matters that are not ultimately pursued because of the risk of an adverse costs order. In this way, the costs regime in Victoria acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people. This is particularly the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the important test case.

The Victorian Law Reform Commission in its Civil Justice Review Report of May 2008 also considered that the risk of adverse costs orders was a significant deterrent to public interest litigation and concluded:

> *The commission believes that there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases. They could include orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.*[1]

Similarly, the Australian Law Reform Commission has recommended, '*if private citizens are to be able to [initiate public interest litigation], any unnecessary barriers erected by the law of costs should be removed*'.[2]

2.2 Case Studies

Below are 3 case studies of matters where the risk of an adverse costs order acted as a disincentive to litigants pursuing meritorious public interest litigation.

Case Study 1:

PILCH referred the *Tampa*[3] matter and undertook much of the preparatory work for the proceedings. Since the appropriate applicants (the asylum seekers) could not be contacted PILCH spent considerable time attempting to identify an alternative applicant to bring the claim on behalf of the asylum seekers. PILCH had real difficulties locating an applicant that would be prepared to bring the claim because they were concerned about the costs exposure. Ultimately Liberty Victoria was prepared to institute proceedings as the applicant despite this risk. In making a 'no costs' order in this matter, Black CJ and French J of the Federal Court said:

> *This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights.*

[1] Victorian Law Reform Commission, 'Civil Justice Review Report', May 2008, at p 676

[2] Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, 1995, 78

[3] *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229. Whilst this case was Commonwealth jurisdiction, the experience of PILCH is that the concerns about costs are common to Victorian litigants.

Case Study 2:

PILCH is aware of a matter in which an elderly woman with an acquired brain injury had a very strong discrimination and administrative law claim in respect of a failure to provide adequate medical treatment. Proceedings were not instituted by the person's guardian, appointed under the *Guardianship and Administration Act* 1986 (Victoria), because the guardian was concerned about his personal exposure to a costs order. Guardians appointed under the Act can be personally liable for costs in proceedings that they bring on behalf of a person with an impairment. This costs risk acts as a significant disincentive to meritorious claims being pursued on behalf of very vulnerable and disadvantaged persons.

Case Study 3:

In the case of *Schou v The State of Victoria*,[4] the plaintiff, a single mother, made a complaint against her employer of indirect discrimination in contravention of section 9 of the *Equal Opportunity Act* 1995 (Vic), in relation to her request to work from home to enable her to care for her ill son. The plaintiff succeeded at first instance but lost in the Court of Appeal. She was unable to make a special leave application to the High Court because of the significant risk of an adverse costs order. The decision of the Court of Appeal raised issues of importance for the development of the law in Victoria on indirect discrimination. Given that the majority and dissenting judgments in the Court of Appeal applied the High Court authority on indirect discrimination differently, it was a matter of considerable public interest that an application be made to the High Court to determine the issues in the *Schou* case.

These case studies demonstrate that reform of the costs regime in Victoria is necessary to ensure that impecuniosity is not a bar to the vindication of peoples' rights or the pursuit of meritorious claims in the public interest.

2.3 Victorian Charter of Human Rights and Responsibilities

Section 24 of the Charter provides that every Victorian has the right to a fair hearing. 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.

[4] [2004] VSCA 71 (30 April 2004)

The right to a fair hearing in s 24 of the Charter is modeled on art 14(1) of the *International Covenant on Civil and Political Rights*. International jurisprudence on the right to a fair hearing[5] has estabilised that the basic elements of the right 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.

An important aspect of ensuring equal access to, and equality before, the courts is the applicant's ability to pay the associated costs and the discriminatory effect this has on disadvantaged members of the community.

In *Aarela v Finland*,[6] the Human Rights Committee (***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.

It is also well established that costs and disbursements associated with litigation impact disproportionately on indigent persons and may be regarded as a restriction on the right of access to a court contrary to the right to a fair hearing.[7] Both the UN Human Rights Committee and the European Court of Human Rights have relevantly stated that the right to a fair hearing may require positive action by the state to ensure effective access to the courts,

[5] Section 32(2) of the Charter provides 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.

[6] *Anni Aarela and Jouni Nakkalajarvi v Finland*, UN Doc CCPR/C/73/D/779/1997.

[7] See, eg, *Kreuz v Poland* [2001] ECHR Application No 28249/95; *Kijewska v Poland* [2007] ECHR Application No 73002/01.

including the waiver of court fees and the abolition of any rigid principle that costs be borne by the unsuccessful party.[8]

3. Current law on protective costs orders

In common law jurisdictions, whilst the Courts retain a discretion as to costs, the general costs rule in civil proceedings is that costs follow the event. This means that the successful party can expect a costs award in his or her favour. However, in public interest cases, some Courts have been prepared to make orders protecting public interest litigants against adverse costs orders.

3.1 Australia

Australia does not have any specific public interest costs regime. In *Oshlack v Richmond River Council*[9] the High Court indicated that, in exceptional cases, it may be appropriate to make no order as to costs in public interest cases.

(a) The Oshlack decision

In *Oshlack* the plaintiff challenged the validity of a development consent granted by the Council in respect of a residential development on the basis that it contravened the *Environmental Planning and Assessment Act* 1979 (NSW). Stein J of the NSW Land and Environment Court dismissed the plaintiff's challenge but made no order as to costs on the basis that special circumstances existed in the case justifying a departure from the usual order as to costs.

The special factors that Stein J took into account included: the 'public interest' nature of the litigation; the relaxation of standing pursuant to section 123 of the *Environment Planning and Assessment Act* 1979 (NSW) (the EPA Act);[10] the fact that the plaintiff had nothing to gain personally from the litigation but rather sought to preserve the environment; the considerable public opposition to the development and hence public interest in the outcome of the litigation; and the fact that the plaintiff's challenge, although dismissed, was arguable.

The Court of Appeal overturned Stein J's decision on costs and the High Court (Gaudron, Gummow & Kirby JJ, with Brennan CJ and McHugh J in dissent) then restored Stein J's

[8] See, eg, *Airey v Ireland* (1979) 2 EHRR 305.

[9] *Oshlack v Richmond River Council* (1998) 193 CLR 72

[10] ie. To award costs may have the effect of denying Parliament's intention of relaxing the standing requirements.

decision. Kirby J was the only judge who made express reference to public interest matters. However, in upholding Stein J's costs decision, the majority of the High Court approved his reasoning.

(b) Victoria

In Victoria, the Supreme Court's power to award costs is set out in section 24 of the *Supreme Court* Act 1986 (Victoria):

> 24 (1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.

We are not aware of any case in which a Victorian Court has made a 'no costs' order on the basis of public interest considerations.

The Federal Court of Australia has made 'no costs' orders, but these are very rare.[11]

3.2 United Kingdom

The courts of England and Wales have developed rules for the granting of 'protective costs orders'. The leading decision is that of the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry*[12] (***Corner House***).[13] In that case the Court of Appeal set out the principles governing the award of PCOs and described their purpose as follows:

> '*the overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made*'.[14]

In summary the principles identified by the Court of Appeal are: [15]

(a) The issues raised are of public interest and require determination by the court;

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[11] *Ruddock v Vardalis (No.2)* (2001) 115 FCR 229

[12] [2005] 1 WLR 2600

[13] The House of Lords has not yet explicitly considered protective costs orders in public interest matters.

[14] *Ibid* at p [76]

[15] *ibid* at p 2625

(b) The applicant has no private interest in the outcome of the case;

(c) It is fair and just, having regard to the resources of the parties and the costs likely to be incurred; and

(d) The applicant will probably discontinue the proceedings if the order is not made, and will be acting reasonably in doing so.

However, the Court refused to make a pre-emptive costs order[16] on the basis that to do so would be an impermissible use of judicial power and a '*trespass into judicial legislation*'.[17]

It is noteworthy that the Court of Appeal observed that it anticipated that the principles set out in *Corner House* would be formalised and placed in the Civil Procedure Rules in the future. This does not appear to have occurred to date.

3.3 Other jurisdictions

The Canadian Supreme Courts have approved the making of PCOs in public interest matters. In South Africa, the specialist courts[18] adopt a rule that no costs orders will be made in public interest matters.

3.4 Need for law reform

The law in Australia in relation to PCOs in public interest matters requires confirmation and clarification. The Australian Courts have differed in their willingness to make PCOs in public interest matters and whilst the High Court has confirmed the courts' jurisdiction to do so, case law provides little guidance on what will constitute appropriate circumstances for making a PCO. Therefore, there is a need for law reform to:

i) confirm the courts' jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about 'judicial legislating'; and

ii) clarify what factors are relevant to the discretion to make a PCO in public interest matters.

[16] A pre-emptive costs order is an order that a party will have its costs paid by another party or out of a fund whatever the outcome of the proceeding.

[17] *ibid* at p 2626

[18] Such as the Land Claims Court, Constitutional Court and the Labour Court.

4. Explanation of the proposed amendment

The proposed amendment[19] empowers the court to make a PCO in a proceeding at any time prior to judgment. The court would be empowered to make orders that:

- a specified party will not be liable for costs, whether or not it is successful;
- one party's costs will be paid in whole or part by the other, regardless of the outcome of the proceeding; or
- cap the amount of costs for which a specified party may be liable.

The PCO amendment then prescribes 5 matters that the court must take into account when considering making a PCO. These 5 matters are derived from the *Corner House* decision (discussed at 3.2 above) and from Australian case law (which generally follows *Corner House*).

The PCO amendment does not fetter the court's discretion to make orders as to the costs in a proceeding. However, it does empower the court and guide the exercise of its discretion. It is intended that this will allay the type of concerns expressed by the Court of Appeal in *Corner House* that the making of a pre-emptive costs order would amount to the court engaging in 'judicial legislating' (see 4.2 above).

As the purpose of the provision is to protect public interest litigants, the proposed amendment contains mechanisms that guard against its misuse by guiding the court to relevant factors (sub-section (4)(a) – (e)). For instance, proposed sub-section (4)(d) enables the court to consider the nature and extent of any private or pecuniary interest that the applicant may have in the outcome of the proceeding, so that matters that do not have implications for a broader group, will be unlikely to attract a PCO.

5. Conclusion

In PILCH's experience the risk of adverse costs orders is a significant impediment to access to the courts for disadvantaged and marginalised litigants with meritorious public interest claims. This impediment to access to the courts is contrary to sections 8 and 24 of the Charter and specifically to the right to access to and equality before the courts. The Human Rights Committee has found 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. Therefore in

[19] See Annexure A

order to ensure effective access to the courts in accordance with the Charter right to a fair hearing, it is necessary that the courts are specifically conferred with power to make orders protecting public interest litigants from adverse costs awards in appropriate cases.

25 September 2008
Public Interest Law Clearing House (Victoria)

ANNEXURE A – Proposed legislative amendment to confer power to make protective costs orders

Section 24 of the Supreme Court Act 1986 (Vic) be amended by inserting the following sub-section:

'(3) The power of the Court to make an order in respect of costs shall include a power to make any of the following orders in a proceeding at any time prior to judgment:

(a) a party will not be liable to pay costs, whether or not that party is unsuccessful in the proceeding;

(b) there be no orders made as to the costs of the parties to the proceeding;

(c) a party's costs will be paid in whole or in part by another party, whether or not the first party is successful in the proceeding;

(d) the costs for which a particular party may be liable are not to exceed an amount specified in the order.

(4) Without limiting the matters the Court may take into account in determining whether to make an order under sub-section (3) the Court must take into account the following matters:

(a) whether it is in the public interest that the issues raised, or likely to be raised, in the proceeding be determined by the Court;

(b) the evidence before the Court as to the financial resources of the parties to the proceeding;

(c) the costs that are likely to be incurred in the usual course by the parties to the proceeding;

(d) the nature and extent of any private or pecuniary interest that the applicant for the order has in the outcome of the proceeding;

(e) any prejudice any other party to the proceeding may suffer if the order is made.

(5) An order made under sub-section (3):

(a) may be made on such terms and conditions as to the Court deems fit;

(b) is subject to any further or other order of the Court.'