



homeless persons'
legal clinic



human
rights

law
resource
centre



24 September 2010

Dear President

Re: Draft VCAT Practice Note – Fair Hearing Obligation

Thank you very much for the opportunity to comment on the Draft VCAT Practice Note that you have released relating to the fair hearing obligation.

The PILCH Homeless Persons' Legal Clinic (**HPLC**) and the Human Rights Law Resource Centre (**HRLRC**) make this joint response in recognition of the importance of the right to a fair hearing and the role of the Victorian Civil and Administrative Tribunal (**Tribunal**) in facilitating access to justice in Victoria.

Both the HPLC and HRLRC have considerable experience advocating for improved access to justice for marginalised and disadvantaged individuals and consider that the Practice Note presents a significant opportunity to strengthen the way in which human rights and the rule of law are protected by the Tribunal.

1. Executive Summary

- 1.1 The draft Practice Note represents a welcome recognition by the Tribunal of the importance of the right to a fair hearing and the important role that the Tribunal plays in protecting the right.
- 1.2 In our view, the draft Practice Note could be enhanced by the inclusion of further information that:
 - (a) clarifies the source, scope and importance of the right to a fair hearing; and
 - (b) details the practical obligations encompassed by the right and how that relates to the effective and efficient operation of the Tribunal.
- 1.3 In particular, we consider that the Practice Note might include:
 - (a) specific reference to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) and clarification of its application and operation;
 - (b) detailed consideration of the right to access to legal advice and legal representation, including guidance on when litigants may be assisted by Members and when matters should be stood down or adjourned;
 - (c) practical examples of where aspects of a fair hearing may be relevant (including adjournments, referrals for advice/representation and access to evidence); and
 - (d) initiatives undertaken to train and measure the level of the Tribunal's engagement with the Practice Note.

2. Relevance of the Victorian Charter to the Tribunal

2.1 We consider that the Practice Note should include specific reference to the Victorian Charter. As you know, the right to a fair hearing is enshrined in section 24 of the Victorian Charter and imposes particular obligations on courts and tribunals. Accordingly, we consider that it would be useful for the Practice Note to acknowledge this and to address the following matters:

(a) VCAT is a “public authority”

2.2 As you know, Bell J’s decision in *Kracke* affirms that that VCAT is a “public authority” for the purposes of section 4 of the Victorian Charter. We therefore consider that the Practice Note should provide explicit reference to this and to the fact that VCAT therefore must comply with the obligations contained in section 38 of the Victorian Charter (see further below).

2.3 The HPLC and HRLRC note that this obligation also extends to registry staff. Staff of the Tribunal also have an important role to play in ensuring the right to a fair hearing for all parties. As the ‘face of the Tribunal,’ we note that Registry staff are well placed to:

- (a) promote and support access to the court;
- (b) provide information about VCAT processes;
- (c) facilitate access to legal advice and legal representation (for example, by making contact with duty lawyers and providing appropriate referrals);
- (d) arrange interpreters; and
- (e) provide Tribunal documentation to parties and/or representatives.

(b) VCAT’s obligations

2.4 In light of the Tribunal’s status and obligations under the Victorian Charter, we consider that the Practice Note should outline what obligations are imposed on VCAT by the operation of the Victorian Charter. As you know, section 38 requires public authorities:

- (a) to act compatibly with the human rights contained in the Charter; and
- (b) to give proper consideration to a relevant human rights when making decisions.

2.5 Section 24 of the Victorian Charter is relevant to VCAT not only because the Tribunal is a public authority, but also because section 24 applies to the operation of courts and tribunals by virtue of section s 6(2)(b) of the Victorian Charter, which provides that the Charter applies to courts and tribunals to the extent that they have functions under Part 2 of the Charter.¹

2.6 In addition, pursuant to section 32 of the Victorian Charter, VCAT must also interpret and apply legislation consistently with human rights. In this respect, we consider that the Practice Note should also explicitly provide that Members may have regard to international and comparative jurisprudence when considering the right to a fair hearing and making its decisions, as identified in the Explanatory Memorandum to the Victorian Charter.

¹ See, eg, *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) (Unreported, Supreme Court of Victoria, Court of Appeal, 3 April 2009).

3. Content of the Right to a Fair Hearing

3.1 Access to justice and equality before the law are fundamental values underpinning not just the right to a fair hearing, but also the entire civil justice system. In light of the paramount importance that the right to a fair hearing plays in ensuring these principles, the HPLC and HRLRC consider that the Practice Note could more explicitly acknowledge that the right to a fair hearing:

- (a) is an essential aspect of the judicial process;
- (b) serves as a procedural means to safeguard the rule of law; and
- (c) is indispensable for the protection of other human rights.

3.2 In essence, the right requires both that:

- (a) a person have effective access to the court; and
- (b) as 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.

3.3 The specific elements of the right to a fair hearing include:

- (a) Equal access to the Tribunal: The right to a fair hearing includes the right to access a court, which involves the right to institute proceedings before courts in civil matters and the need to remove barriers (such as costs, complexity, lack of legal advice) which prevent access;²
- (b) The right to legal advice and representation (discussed further below);³
- (c) The right to procedural fairness, or “equality of arms”: (discussed further below);⁴
- (d) The right to a public hearing: This right means the hearing should be conducted orally and publicly and may only be limited in certain circumstances;
- (e) The right to an interpreter: The unavailability of interpreting services in the courts may present a major barrier to access to justice;
- (f) Presence of parties at hearings: The requirement that the parties be present at the proceedings only extends to certain kinds of cases, such as cases which involve an assessment of a party’s personal conduct; and
- (g) Right to reasons: The right to a fair hearing generally includes a right to a reasoned decision, so that people know the basis for the decision sufficiently clearly to decide whether they can challenge it further.

3.4 We consider that the Practice Note could also usefully clarify that the right to a fair hearing applies not only to criminal proceedings but also to the determination of civil proceedings.

² See, eg, *Materials Fabrication Pty Ltd v Baulderstone Pty Ltd* [2009] VSC 405 (8 September 2009).

³ See, eg, *Kay v Victorian Attorney-General & Anor* (Victorian Court of Appeal, Unreported, 19 May 2009).

⁴ See, eg, *Ragg v Magistrates’ Court of Victoria and Corcoris* [2008] VSC 1 (24 January 2008).

4. Access to Legal Advice and Legal Representation

- 4.1 The draft Practice Note implicitly recognises that a major aspect of the right to a fair hearing is the issue of access to legal advice and representation. Paragraph 5 of the draft Practice Note refers to the obligations of Members to intervene in proceedings and to assist parties in certain circumstances.
- 4.2 The HPLC and HRLRC agree that access to advice and legal representation may be a critical aspect of a fair hearing. 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 legal advice or legal representation. All individuals must be able to meaningfully participate in legal proceedings.
- 4.3 Despite the importance of access to legal advice and representation, various cases demonstrate this aspect of the right is subject to a degree of ambiguity and may pose difficulties for Members attempting to navigate the boundaries of appropriate assistance.

(a) What is required?

- 4.4 As the draft Practice Note points out, in some circumstances a Member will have an obligation which includes:
- (a) intervening in proceedings to clarify uncertainty and identify issues, and
 - (b) assisting parties by explaining provisions and asking questions.
- 4.5 Although Tribunal Members play a significant role in ensuring that a hearing is fair, it should be noted that the role of a Member is different from that of an advocate lawyer. In this regard, we note that the draft Practice Note makes no mention of the Tribunal's boundaries in relation to intervention and assistance. Members currently have little guidance as to when intervention and assistance may be inadequate and where matters should be adjourned or stood down in order to enable parties to have access to independent legal advice and or representation. This issue is sometimes referred to as the "Judge's dilemma". As you will be aware, this has been dealt with extensively by Bell J in *Tomasevic v Travaglini & Anor* [2007] VSC 337.
- 4.6 The HPLC and HRLRC consider that boundaries surrounding the extent and nature of the assistance should clearly be influenced by the nature of the parties and the context of proceedings. In this respect, we consider that the Practice Note could acknowledge that access to independent 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.

(b) When is access to legal advice and representation particularly relevant?

- 4.7 We also recommend that the Practice Note pay specific attention to guiding Members and other Tribunal staff in relation to relevant considerations to access to legal advice and representation. Issues such as age, disability (including mental health and substance misuse), education, language and cultural background may all have a significant bearing on whether a party is able to participate meaningfully and equally in proceedings and place them in a position of "grave disadvantage".

- 4.8 Although all jurisdictions must provide a fair hearing, the need for fairness is particularly acute in circumstances where people may lose substantial freedoms and personal autonomy (such as in the Guardianship and Administration List) or potentially be made homeless as a result of Tribunal orders (such as in the Residential Tenancies List).
- 4.9 We imagine that Tribunal Members and registry staff may be assisted by a list of VCAT proceedings and special circumstances to take into consideration when determining whether to try and arrange for legal advice and representation.

5. Procedural fairness or “equality of arms”

- 5.1 The draft Practice Note makes reference to the VCAT Act and the requirement for the Tribunal to act fairly. The HPLC and HRLRC consider it would be helpful for the Practice Note to provide guidance about the need for the Tribunal to ensure procedural fairness.
- 5.2 A fair hearing requires the Tribunal to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice. Essentially, each side must be afforded a reasonable opportunity to present their case under conditions that do not put them at a substantial disadvantage compared to the other party.
- 5.3 In the experience of the HPLC, issues of procedural fairness can sometimes seem secondary to the goal of Tribunal efficiency. The Clinic has been concerned with Tribunal practice where:
- (a) administrative adjournment requests are often refused even when made in a reasonable time and for good reason (often based on late instructions); and
 - (b) evidence crucial to eviction proceedings was requested but withheld. Alternatively, evidence is often requested and not provided until the day of hearing. In the case of evidence provided on the day of hearing, parties are often required to proceed without any time in which to consider the evidence.
- 5.4 The ability to access evidence and to obtain an adjournment influences the ability to adequately prepare for a hearing. These issues take on particular significance where parties may lose substantial freedoms or be made homeless as a result of Tribunal orders. Of course there may be circumstances where adjournments are not required though it should be emphasised that legal advice and representation is necessary to ensure an individual can participate meaningfully in their hearing.

6. Making fairness a reality

- 6.1 Aside from the need to create a *practical* Practice Note about fairness, we consider the reality of fairness requires more than documentation. The draft Practice Note does not refer to the consequences of breaching the document and does not refer to efforts to improve fairness outcomes. We consider the relevance and import of this document will be minimal unless the Tribunal takes steps to ensure compliance with fairness obligations.
- 6.2 The Tribunal may wish to go further than identifying its commitment to fairness by seeking to train Tribunal staff about fairness, to monitor and report on compliance (possibly by random by hearing observation)

7. Conclusion

7.1 The HPLC and HRLRC response to the draft Practice Note has attempted to identify the major barriers to access to justice and fairness facing the Tribunal. We appreciate there is not a right to legal aid but note a fair hearing is an illusion for many vulnerable and disadvantaged individuals who cannot obtain access to legal advice and or representation.

We would be very pleased to discuss with you any aspect of this submission or provide you with further information.

Yours sincerely



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About the PILCH Homeless Persons' Legal Clinic

The HPLC is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.⁵ The HPLC is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. While the HPLC recently received confirmation of a one-off funding boost from the Federal Government, it does not currently receive recurrent funding from the Federal Government.

Free legal services are offered by the HPLC on a weekly basis at 15 outreach locations that are accessed already by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.⁶ Since its establishment in 2001, the HPLC has assisted over 4,000 people at risk of, or experiencing, homelessness in Victoria.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights.

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the Victorian Charter of Human Rights and Responsibilities; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

⁵ See <http://www.pilch.org.au>.

⁶ Host agencies include Melbourne Citymission, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Victorian Care and Resettlement of Offenders (VACRO), Koonung Mental Health Centre, St Kilda Crisis Centre, St Luke's (Bendigo) and Homeground Housing Service. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Baker & McKenzie, Blake Dawson, Clayton Utz, Mallesons Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth, Freehills, Stella Sutcliffe and Associates and Arnold Dallas McPherson.