



Victorian
Law Reform
Commission

Civil Justice Review
Consultation Paper

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001
Australia
DX 144 Melbourne, Vic

Level 10
10–16 Queen Street
Melbourne Victoria 3000
Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
TTY 1300 666 557
1300 666 555 (within Victoria)
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

Contributors

Reference Team

Samantha Burchell
Dr Peter Cashman
Claire Downey
Mary Polis
Alison Hetherington

Editor

Victorian Law Reform Commission

Chairperson

Vacant

Full-time Commissioner

Dr Peter Cashman*

Part-time Commissioners

Paris Aristotle AM
Her Honour Judge Jennifer Coate
The Honourable Justice David Harper*
Her Honour Judge Felicity Hampel*
Professor Sam Ricketson*

Chief Executive Officer

Dr Iain Ross AO*

Operations Manager

Merrin Mason (acting from 18/09/06)

Policy and Research Team Leaders

Kathy Karlevski

Angela Langan

Mary Polis

Policy and Research Officers

Samantha Burchell

Claire Downey

Bronwen Jennings

Keren Murray

Priya SaratChandran

Research Assistant

Prue Elletson

Communications Officers

Alison Hetherington

Trish Luker

Project Officer

Simone Marrocco

Librarian

Julie Bransden

Administrative Officers

Vicki Christou

Lorraine Pitman

Failelei Siatua

*Civil Justice Division, constituted under section 13 of the *Victorian Law Reform Commission Act 2000*.

Civil Justice Review Background

In May 2004 the Attorney-General Rob Hulls issued a Justice Statement outlining directions for reform of Victoria's justice system. The commission's civil justice review is part of this reform program.

One of the Justice Statement's objectives is the reform of civil rules of procedure to streamline litigation processes, reduce costs and court delays, and achieve greater uniformity between different courts.

The Justice Statement identified the need for:

- modernisation, simplification and harmonisation of the rules of civil procedure within and across the jurisdictions of the Supreme Court, the County Court and the Magistrates' Court;
- reduction in the cost of litigation;
- promotion of the principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability in the civil justice system.

This will involve improving the civil justice system for the benefit of those who may customarily or occasionally use it and for those who administer it. It will also 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 mechanisms.

The Justice Statement identified potential areas of change, including:

- reform of the processes for commencing litigation;
- reform of pleadings and other procedures to require parties to provide greater disclosure, at an early stage, of information relevant to the merit of the claim and the defence of the claim;
- reform of the procedures for discovery of documents;
- relaxation of the restrictive rules on summary judgments to facilitate early resolution of claims or defences which have no substantial or realistic prospect of success;
- reforms designed to ensure that witnesses, and particularly expert witnesses, have a primary and overriding duty to the court and the administration of justice rather than to either of the parties;
- reforms which accelerate disclosure of information and evidence relevant to the claim or defence;
- reforms which seek to identify the key issues in dispute between the parties and to facilitate early resolution of these issues without the need for protracted and expensive litigation;
- reforms which seek to ensure that those in dispute and their legal representatives approach the dispute with a commitment to resolving it as quickly and as fairly as possible.

In September 2004 the Victorian heads of jurisdiction in their Courts Strategic Directions Statement also recommended a review of the cost of justice to litigants and a review of

procedural rules with the aim of simplifying and, where appropriate, harmonising court processes and court rules.

Terms of Reference

The Attorney-General Rob Hulls has asked the Victorian Law Reform Commission to examine, report and make recommendations on the civil justice system in Victoria in accordance with the following terms of reference:

1. To identify the overall objectives and principles of the civil justice system that should guide and inform the rules of civil procedure, having regard to the aims of the Attorney-General's Justice Statement: *New Directions for the Victorian Justice System 2004–2014*, and in particular:

- the modernisation, simplification and harmonisation of the rules of civil procedure within and across jurisdictions;
- the reduction of the cost of litigation;
- the promotion of the principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability.

2. To identify the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation;

3. To consult with the courts, the legal profession, business, government and other stakeholders on the current performance of the civil justice system as well as the overall objectives and principles of the civil justice system and potential options for reform;

4. The review should consider the operation of the rules of civil procedure in the Supreme Court, the County Court and the Magistrates' Court;

5. The review should have regard to recent reviews of civil procedure in other jurisdictions, both within Australia and internationally;

6. The review should also have regard to the impact of current policy initiatives on the operation of the civil justice system including the proposed increase in the jurisdiction of the County Court and investments in information technology such as an Integrated Courts Management System;

7. In presenting its report, the commission should identify areas of the civil justice system and rules of civil procedure that might form the basis of a later and more detailed review. Such areas may include, but are not limited to, the rules and practices relating to:

- pre-commencement options
- pleadings
- discovery
- summary judgment
- expert witnesses
- class actions
- abuse of process
- alternative methods of dispute resolution, including alternative dispute resolution undertaken by judicial officers
- judicial role in case management and listing practices, including docketing systems.

8. The commission should also identify the process by which the courts, the legal profession and other stakeholders may be fully involved in any further detailed review of the rules of procedure;

9. The Victorian Law Reform Commission should report in 12 months from the date of the commencement of the review.

These terms of reference comprise stage one of the civil justice review.

The scope of the review is very broad. The commission will be examining the objectives and principles underlying the civil justice system and factors influencing the operation of the system, as well as specific areas of civil procedure.

The commission will also examine the economic incentives, and disincentives, to the efficient conduct of civil litigation and economic and other sanctions for litigants and lawyers who engage in inappropriate conduct.

The reference is limited in that the commission will not be considering areas of substantive law (such as compensation schemes and limitations periods). As the project is focused on the operation of the Supreme, County and Magistrates' Courts, the operation of Victoria's tribunals is not within its scope.

How we will Conduct the Review

Dr Peter Cashman, formerly Associate Professor at the University of Sydney Law School, has been appointed as the commissioner in charge of the civil justice review.

A division of the commission has been established for the review, comprising Dr Cashman, Justice David Harper, Judge Felicity Hampel, Professor Sam Ricketson and Dr Iain Ross.

The review will involve active consultation with people involved in and affected by the civil justice system, including judicial officers, the legal profession, the insurance industry, the business community, consumer organisations and members of the community. An expert reference group will be established to provide ongoing input into the review as it progresses.

The commission will be examining recently introduced reforms and proposals for reform in other jurisdictions in Australia and in other countries, such as Lord Woolf's *Access to Justice* report and the reforms arising from it in the United Kingdom. The commission will also liaise with agencies in Victoria and elsewhere currently conducting their own reviews of aspects of the civil justice system.

The commission's report on stage one of the civil justice review is required to be submitted to the Attorney-General in September 2007.

Given the limited time frame, the commission will not be publishing a lengthier consultation paper. It may publish position papers on particular topics before delivering a final report.

Submissions are now being sought in response to this Consultation Paper to identify key areas requiring reform and potential solutions.

Tell us what you think

Consultation is crucial to the work of the Victorian Law Reform Commission.

Submissions and suggestions for reform of the Victorian civil justice system are now being sought.

How to Make a Submission

Submissions and suggestions for reform on any issue can be made in writing, by phone, or in person.

There is no particular form or format you need to follow, however, **we have prepared a document with questions for you to fill out on our website to make it easier: <www.lawreform.vic.gov.au>.**

We are interested in your ideas about how the following aims can be achieved:

- modernisation, simplification and harmonisation of the rules of civil procedure within and across the jurisdictions of the Supreme Court, the County Court and the Magistrates' Court;
- reduction in the cost of litigation;
- promotion of the principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability in the civil justice system.

We have identified numerous issues arising out of the terms of reference to help you prepare a submission. These issues are addressed in the questions in this paper. We also invite you to raise any other matters which you consider relevant.

When making a submission you may choose to answer the questions in this form, or only deal with those matters you have a particular interest or expertise in.

You may wish to indicate whether your experience relates to particular courts or areas of practice.

You may make a submission:

- by email to <law.reform@lawreform.vic.gov.au>
- by mail to the Victorian Law Reform Commission, GPO Box 4637, Melbourne, Victoria 3001, Australia
- via the Document Exchange, DX 144 Melbourne, Victoria
- by facsimile to (03) 8619 8600.

Deadline for Submissions

30 November 2006

Who are you?

It would help us to have information on the background of people making submissions. Please identify which one of the following categories best describes you when you make your submission:

Judge	Insurance industry representative
Magistrate	Consumer organisation
Court administrator	Business person
Barrister/solicitor	Member of the public
Legal academic	Government employee
Recent/current litigant in civil proceeding	Other—please specify

Confidentiality

Unless you specify otherwise, your submission will be treated as a public document and may be accessed by anyone. If you do not want your submission to be public you must clearly advise us whether:

- you wish your submission to be inspected, quoted or sourced to you, but your name not disclosed (anonymous); or
- you do not wish your submission to be inspected, quoted or sourced to you in a commission publication (confidential).

We also need to know whether you are making a submission as an individual or whether you are making it on behalf of an organisation.

Mailing List

If you make a submission we will add your contact details to our mailing list so you will be kept notified of developments in the reference. If you would like to be added to the mailing list, but do not wish to make a submission, please email us or complete the form on the inside back cover and return it to us.

Questions

General

1. Are there particular aspects of the civil justice system which you consider are in need of reform? What specific changes should be implemented?

Rules of Civil Procedure

The commission is required to consider the operation of the rules of civil procedure in the Supreme Court, the County Court and the Magistrates' Court.

2. Are there particular rules of civil procedure in these courts which need reform? What are the changes which should be implemented?
3. To what extent, if at all, is there a need for greater consistency or uniformity in the rules of civil procedure in these courts? Are you able to identify areas where the lack of uniformity is a problem?

Before Proceedings are Commenced

4. Are there any steps which you consider people should be required to take before being permitted to commence civil proceedings? If so, what steps should be required?
5. When people are notified or become aware that there is a civil legal claim against them, are there any steps which you consider they should be required to take before a civil proceeding is commenced? If so, what steps should be required?

Commencing and Defending Proceedings

6. Do the processes for commencing civil proceedings need reform? If so, what are the problems and what changes should be implemented?
7. When a person commences a civil proceeding and serves the initiating documentation on the person who is being sued, is there any further information or documentation which you consider he or she should be required to provide to that person before being permitted to proceed? If so, what information or documentation should be required to be provided at this stage?
8. When a person being sued in a civil proceeding has been served with the initiating documentation is there any information or documentation which you consider he or she should be required to provide to the person who has taken the action before proceeding further? If so, what information or documentation should be required to be provided at this stage?
9. When claimants wish to commence civil proceedings should there be any legal obligation on them (in addition to those which may already exist) to be satisfied of the

merit of the claim before they are permitted to commence the proceeding? If so, what steps should they be required to take?

10. When claimants wish to commence civil proceedings should there be any legal obligation on their lawyers (in addition to those which may already exist) to be satisfied of the legal merit of the claim before they are permitted to commence the proceeding? If so, what steps should lawyers be required to take?
11. When civil proceedings have been commenced, should there be any legal obligation on defendants (in addition to those which may already exist) to be satisfied of the merit of the defence to the claim before they are permitted to file a defence? If so, what steps should they be required to take?
12. When civil proceedings have been commenced, should there be any legal obligation on lawyers acting for defendants (in addition to those which may already exist) to be satisfied of the legal merit of the defence to the claim before they are permitted to file a defence? If so, what steps should lawyers be required to take?

Manner in which Proceedings are Conducted

13. Should there be any legal obligation (in addition to those which may already exist) requiring that civil proceedings be conducted in a manner which will minimise cost and delay, and get to the truth or the real issues in dispute?

If so, should such legal obligation be imposed on:

- (a) the court;
- (b) the party bringing the claim;
- (c) the legal representative of the party bringing the claim;
- (d) the party defending the claim;
- (e) the legal representative of the party defending the claim;
- (f) expert witnesses;
- (g) other witnesses;
- (h) anyone funding the person bringing the claim; and/or
- (i) anyone funding the party defending the claim?

If so, what is the nature of the legal obligation which should be imposed and by what means should it be imposed?

Is there a need to introduce or vary sanctions and enforcement powers in the event of a failure to comply with such legal obligations?

Pleadings

14. Do the rules about pleadings in civil proceedings need reform? If so, what are the problems and what changes should be implemented?

Summary Judgment or Dismissal

15. Do the rules about summary disposal (without trial) of civil proceedings need reform? If so, what are the problems and what changes should be implemented?

Obtaining Information and Documents

16. In civil proceedings is there a need for reform of the rules about:

- preliminary discovery;
- discovery from non parties;
- discovery of documents;
- interrogatories?

If so, what are the problems and what changes should be implemented?

17. In some overseas jurisdictions, civil procedure rules permit parties to require others (including the other party, the factual or expert witnesses or potential witnesses of the other party, or other people who may have relevant knowledge) to attend, at a convenient place (other than the court), to answer questions under oath. These questions investigate the facts in issue or assist in discovering relevant information or documents.

(a) Is there a need for such a procedure in Victoria?

(b) If so, should there be any constraints on the use of the procedure or the use of the information obtained through the procedure?

(c) What should be the nature of those constraints?

(d) Should such a procedure be available when people are unable to disclose information other than as witnesses at trial, because of confidentiality constraints?

Expert Evidence

18. Do the rules relating to the use of expert witnesses in civil proceedings need reform? If so, what are the problems and what changes should be implemented?

Representative Proceedings or Class Actions

19. Do the rules relating to representative or class actions need reform? If so, what are the problems and what changes should be implemented?

20. Is there a need for reform in relation to the funding of representative or class actions? If so, what are the problems and what changes should be implemented?

Non-parties

21. Is there a need for reform of the rules or procedures which allow non-parties to participate or intervene in civil proceedings? If so, what are the problems and what changes should be implemented?

Abuse of Process

22. Do the rules or laws relating to abuse of process need reform? If so, what are the problems and what changes should be implemented?

Alternative Dispute Resolution

23. Are there particular procedural changes that should be implemented for the purpose of facilitating early settlement of civil claims? If so, what should those changes be?
24. Are there any processes that parties should be required to engage in to facilitate early settlement of civil claims? If so, what should those processes be?
25. Is there a need for judicial officers, court officers or others to play a more proactive role in facilitating:
- resolution of pre-trial issues without the need for hearings and judicial determination of such issues;
 - early settlement of cases?
- If so, what particular changes should be implemented?

Case Management and Listing Practices

26. Is there a need for reform of practices, procedures or rules relating to:
- the judicial role in case management;
 - the listing of cases for pre-trial hearings or directions;
 - the listing of cases for trial?
- If so, what are the problems and what changes should be implemented?
27. In some jurisdictions, different 'lists' or 'tracks' have been implemented so that cases which differ in terms of complexity, subject matter or the amount in issue are dealt with by different procedural rules and are managed differently. Do existing procedural rules need reform to facilitate this? If so, what specific changes should be implemented?

Time Limits

28. Are there any time limits for taking procedural steps which should be introduced or varied?
29. Are there any sanctions for failure to comply with time limits which should be introduced or varied?

Conduct of Trials or Hearings

30. Is there need for reform of practices, procedures or rules relating to the conduct of trials or hearings? If so, what are the problems and what changes should be implemented?
31. In some jurisdictions, courts have conducted shortened hearings with strict limits on:
- the time allocated
 - the evidence permitted
 - the issues to be determined
- with a view to the dispute being resolved without the necessity for a final trial on all issues. Do the rules of procedure need to be amended to facilitate shortened hearings? If so, what specific changes should be implemented?

Juries

32. Do the rules about the use of juries in civil proceedings need reform? If so, what are the problems and what changes should be implemented?

Self-represented Litigants

33. Is there need for reform to deal with cases where parties do not have legal representation? If so, what specific changes should be implemented?

Enforcement

34. Do the rules about enforcement of judgments and orders need reform? If so, what changes should be implemented?

Appeals

35. Do the rules and procedures for appeals from pre-trial decisions need reform? If so, what are the problems with the current rules and what changes should be implemented?
36. Do the rules and procedures for civil appeals need reform? If so, what are the problems with the current rules and what changes should be implemented?

Cost and Delay

37. Are there reforms which would reduce delay between the commencement of a proceeding and readiness for trial?
38. Are there reforms which would reduce or eliminate the need for pre-trial hearings?
39. Are there reforms which would reduce the time taken to deal with pre-trial hearings?
40. Are there reforms which would reduce or eliminate the need for parties or legal representatives to attend court hearings to determine pre-trial issues?
41. Is there greater scope for pre-trial issues to be dealt with by means which do not require the parties or legal representatives to appear at a formal court hearing, for example, the use of telephone, facsimile, email or the electronic filing of draft orders, evidence or written submissions?
42. Are there reforms which would reduce delay between readiness for trial and the commencement of trial?
43. Are there reforms which would reduce the length and cost of trials?
44. Are there reforms which would reduce the time taken for the delivery of judgment after a trial?
45. Are there reforms which would reduce the time taken for appeals to reach hearing?

46. Are there reforms which would reduce the time taken to hear or determine appeals?
47. Are there reforms which would reduce the cost to parties of:
- commencing a proceeding;
 - pleadings;
 - discovery of documents in hard copy;
 - discovery of documents in electronic form;
 - interlocutory hearings;
 - expert evidence;
 - the preparation of other evidence;
 - conducting a trial;
 - conducting an appeal?
48. Are there any other reforms which you consider necessary or desirable to reduce costs and delays in civil proceedings generally?

Commercially Funded Litigation

49. Are procedural, regulatory or other reforms required for cases funded by commercial litigation funders? If so, what are the problems and what changes should be implemented?
50. Where parties are being financially supported by:
- commercial litigation funders; or
 - insurers
- should there be an obligation on those parties to disclose to the other parties the terms and conditions on which such financial support is being provided?

Legal Assistance

51. Do arrangements for pro bono representation in and/or legal aid funding of civil cases need reform? If so, what changes should be implemented?

Fees and Costs

52. Is the manner in which lawyers are able to charge or calculate fees in civil litigation in need of reform? If so, what are the problems and what changes should be implemented?
53. Should clients have the option of being able to agree to legal fees being calculated as a percentage of the amount recovered in civil proceedings:
- in individual cases;
 - in representative or class action proceedings (where such percentages would be calculated by reference to the total recovery on behalf of the represented group or class)?
54. Is there a need for a procedure whereby the court would be informed, at an early stage of the proceeding, of the parties' estimates of the likely costs of the proceeding?

55. Is there a need for reform in relation to the rules or procedures in relation to:
- security for costs;
 - offers of settlement or compromise;
 - the awarding of costs in favour of the successful party?
- If so, what are the problems and what changes should be implemented?
56. Should successful parties be entitled to recover a greater or lesser proportion of their costs from unsuccessful parties than is usually the case now? What are the problems and what changes should be implemented?
57. Is there a need for reform in relation to court and transcript fees in civil proceedings? If so, what are the problems and what changes should be implemented?
58. In making orders for costs or security for costs, should the court be required to have regard to:
- the financial resources of the parties;
 - whether the proceeding involves issues that affect or may affect the public interest?
59. Is there a need for reform of the law relating to the tax deductibility of legal fees and expenses incurred in civil litigation? If so, what are the problems and what changes should be implemented?
60. When a losing party is to be ordered to pay the legal costs of the successful party in circumstances where some or all of such legal costs are able to be claimed as a tax deduction by the successful party, is this something that can or should be taken into account by the court in making an order for costs?
61. Are there any reforms necessary for the costs recoverable by self-represented litigants:
- who suffer pecuniary loss (ie loss of income or loss of earning capacity) in preparing their case and attending court;
 - apart from any loss of income or loss of earning capacity;
 - who incur out-of-pocket expenses?
- If so, what changes should be implemented?

Incentives and Penalties

62. Are there any economic (or other) incentives which should be introduced to:
- (a) facilitate greater access to the courts;
 - (b) achieve greater fairness for the party that succeeds on disputed pre-trial issues;
 - (c) achieve greater fairness for the party that succeeds at a trial;
 - (d) provide greater encouragement for lawyers to represent clients who have claims with merit;
 - (e) encourage parties to settle disputes;
 - (f) increase the use of alternative dispute resolution mechanisms?
- If so, what incentives should be provided?
63. Are there any economic (or other) disincentives which should be introduced to:
- (a) deter parties from pursuing claims which are without merit;

- (b) deter lawyers from pursuing claims which are without merit on behalf of clients;
 - (c) deter parties from defending claims which have merit;
 - (d) deter lawyers from pursuing defences which are without merit on behalf of clients;
 - (e) deter expert witnesses from giving partisan evidence;
 - (f) encourage the parties to settle disputes;
 - (g) encourage the parties to use alternative dispute resolution mechanisms?
- If so, what disincentives should be provided?

Reform Mechanisms

64. Do existing mechanisms for the regular review and reform of the rules of civil procedure need reform? If so, what changes should be implemented?

Other

65. Are there any other aspects of the civil justice system which need reform? If so, what are the problems and what changes should be implemented?