



Law  
Institute  
Victoria

**FINAL REPORT**

---

**INTERPRETING FUND  
SCOPING PROJECT**

LAW INSTITUTE OF VICTORIA



# Contents

Abbreviations .....	IV
<b>Executive Summary</b>	<b>1</b>
Introduction .....	1
<b>Part One – Findings On Current Australian Practice For The Provision Of Interpreters In Criminal And Civil Matters</b> .....	<b>2</b>
<b>Part Two – Findings On Demand And Unmet Demand For Civil Justice Interpreters</b> .....	<b>2</b>
Demand for civil justice interpreters in Victoria.....	2
Unmet demand for civil justice interpreters in Victoria .....	3
Unmet demand for civil justice interpreters based on specific population groups.....	3
<b>Part Three – Recommendations For The Establishment Of An Interpreting Fund</b> .....	<b>4</b>
Rationale for the establishment of an Interpreting Fund.....	4
Benefits of an Interpreting Fund.....	4
Modes of interpreting .....	5
Implementation of the Interpreting Fund .....	5
Structure of the Interpreting Fund.....	5
Eligibility for access to the Interpreting Fund.....	5
Funding of the Interpreting Fund .....	6
Pro bono interpreting.....	6
<b>Part Four – The Interpreter Profession</b> .....	<b>6</b>
<b>Introduction</b>	<b>7</b>
<b>Interpreters In Victoria’s Civil Justice System</b> .....	<b>7</b>
Victorian Law Reform Commission’s Civil Justice Review .....	8
LIV Interpreting Fund Scoping Project .....	9
Acknowledgements.....	9
<b>Part One – Findings On Current Australian Practice For The Provision Of Interpreters In Criminal And Civil Matters</b>	<b>11</b>
<b>1.1 Common Law</b> .....	<b>11</b>
1.1.1 Criminal matters .....	11
1.1.2 Civil matters .....	11
<b>1.2 Victoria</b> .....	<b>12</b>
1.2.1 Victorian government policy.....	12
1.2.2 Department of Justice policy.....	12
1.2.3 Current Victorian practice – Criminal matters.....	13
1.2.4 Current Victorian practice – Civil matters .....	13
<b>1.3 Other Jurisdictions</b> .....	<b>14</b>
1.3.1 Criminal matters .....	14
1.3.2 Civil matters .....	14

**Part Two – Findings On Demand And Unmet Demand For Civil Justice Interpreters 15**

**2.1 Evidence And Data On Victorian Interpreters 15**

2.1.1 Lack of evidence about interpreters..... 15

2.1.2 Statistical data obtained about demand for civil justice interpreters ..... 16

2.1.3 Other sources of information and evidence ..... 17

**2.2 Demand For Victorian Civil Justice Interpreters 18**

**2.3 Unmet Demand For Victorian Civil Justice Interpreters..... 19**

2.3.1 Definition of “unmet demand” ..... 19

2.3.2 Overview of unmet demand for Victorian civil justice interpreters ..... 20

**2.4 Legal Advice Stage Of The Civil Justice Process ..... 21**

2.4.1 Community legal centres ..... 21

2.4.2 Victoria Legal Aid ..... 27

2.4.3 Pro bono work of the private legal profession ..... 29

**2.5 Alternative Dispute Resolution Stage Of The Civil Justice Process ..... 30**

2.5.1 Increased emphasis on ADR in Victoria..... 30

2.5.2 Language barriers to accessing ADR..... 31

2.5.3 Cultural issues and ADR ..... 31

2.5.4 Dispute Settlement Centre Victoria and Victorian Equal Opportunity and Human Rights Commission ..... 31

2.5.5 Evaluation of unmet demand for civil justice interpreters..... 33

**2.6 Courts And Tribunal Stage Of The Civil Justice Process ..... 34**

2.6.1 Magistrates’ Court..... 34

2.6.2 County Court..... 37

2.6.3 Supreme Court and Court of Appeal..... 38

2.6.4 Victorian Civil and Administrative Tribunal ..... 39

**2.7 Categories of People Impacted by Unmet Demand For Civil Interpreters ..... 41**

2.7.1 Culturally and linguistically diverse people ..... 41

2.7.2 Deaf people ..... 41

2.7.3 Indigenous people ..... 43

**2.8 Population Groups That Face Additional Barriers to Accessing Justice ..... 45**

2.8.1 People who are self-represented ..... 46

2.8.2 Older people..... 47

2.8.3 People from rural, regional and remote areas..... 48

2.8.4 People who speak new and emerging languages..... 49

**Part Three – Recommendations For The Establishment Of An Interpreting Fund 53**

**3.1 Rationale For The Establishment Of An Interpreting Fund..... 53**

3.1.1 Achieving access to justice through the establishment of an Interpreting Fund ..... 53

3.1.2 Addressing increasing unmet demand for civil justice interpreters ..... 55

3.1.3 The role of the Victorian Government in funding interpreters in civil proceedings..... 56

**3.2 Implementation Plan For The Interpreting Fund..... 57**

3.2.1 Modes of interpreting ..... 57

3.2.2 Staged approach ..... 62

<b>3.3 Stage One Of The Implementation Of The Interpreting Fund</b> .....	<b>62</b>
3.3.1 Focus of Stage One.....	62
3.3.2 Structure and management of the Fund .....	63
3.3.3 Eligibility for assistance.....	64
3.3.4 Funding .....	65
<b>3.4 Stage Two Of The Implementation Of The Interpreting Fund</b> .....	<b>66</b>
3.4.1 Focus of Stage Two .....	66
3.4.2 Eligibility test – court fee waiver .....	67
3.4.3 Timing .....	67
3.4.4 Funding .....	68
<b>3.5 Stage Three Of The Implementation Of The Interpreting Fund</b> .....	<b>69</b>
3.5.1 Establishment of an ongoing, independent body to manage the Interpreting Fund.....	70
3.5.2 Grants program.....	70
3.5.3 Funding .....	70
<b>3.6 Other Interpreter Fund Implementation Issues</b> .....	<b>71</b>
3.6.1 Pro bono interpreting .....	71
<b>Part Four – The Interpreter Profession</b> .....	<b>73</b>
<b>4.1 Standards For Legal Interpreting</b> .....	<b>73</b>
<b>4.2 Increasing The Use Of Competent Interpreters</b> .....	<b>74</b>
4.2.1 Use of professionally accredited interpreters.....	74
4.2.2 Career structure and remuneration of interpreters.....	75
4.2.3 Shortage of legal interpreters .....	77
<b>Appendix One – Access To Interpreters In Other Australian Jurisdictions</b> .....	<b>79</b>
Australia Capital Territory.....	79
Commonwealth.....	79
New South Wales.....	82
Northern Territory .....	82
Queensland.....	83
South Australia .....	84
Tasmania.....	85
Western Australia.....	85
<b>Appendix Two – List Of Organisations Consulted During The Project</b> .....	<b>87</b>

# Abbreviations

<b>AAT</b>	Administrative Appeals Tribunal
<b>ABS</b>	Australian Bureau of Statistics
<b>ADR</b>	Alternative (alternate) dispute resolution
<b>AE</b>	Aboriginal English
<b>ALRC</b>	Australian Law Reform Commission
<b>ATIS</b>	Automated Telephone Interpreting Service
<b>CAGD</b>	Commonwealth Attorney-General's Department
<b>CALC</b>	Consumer Action Law Centre
<b>CALD</b>	Culturally and linguistically diverse
<b>CCLSP</b>	Commonwealth Community Legal Services Program
<b>CLC</b>	Community legal centres
<b>CLE</b>	Community legal education
<b>CRC</b>	Community Relations Commission
<b>DOJ</b>	Department of Justice
<b>DRI</b>	Deaf Relay Interpreters
<b>DSCV</b>	Dispute Settlement Centre Victoria
<b>FCLC</b>	Federation of Community Legal Centres
<b>LIV</b>	Law Institute of Victoria
<b>LOTE</b>	Languages other than English
<b>MRT</b>	Migration Review Tribunal
<b>NAATI</b>	National Accreditation Authority for Translators and Interpreters
<b>NJC</b>	Neighbourhood Justice Centre
<b>OPP</b>	Office of Public Prosecutions
<b>PILCH</b>	Public Interest Law Clearing House
<b>PPF</b>	Public Purpose Fund
<b>RRT</b>	Refugee Review Tribunal
<b>SAE</b>	Standard Australian English
<b>SMLS</b>	Springvale Monash Legal Service
<b>SRV</b>	Senior Rights Victoria
<b>SSAT</b>	Social Security Appeals Tribunal
<b>TIS</b>	Telephone Interpreting Service
<b>VALS</b>	Victorian Aboriginal Legal Service
<b>VCAT</b>	Victorian Civil and Administrative Tribunal
<b>VEOHRC</b>	Victorian Equal Opportunity and Human Rights Commission
<b>VITS</b>	Victorian Interpreting and Translating Service
<b>VLA</b>	Victoria Legal Aid
<b>VLF</b>	Victoria Law Foundation
<b>VLRC</b>	Victorian Law Reform Commission
<b>VOCAT</b>	Victims of Crime Assistance Tribunal
<b>VOMA</b>	Victorian Office of Multicultural Affairs (now called Victorian Multicultural Commission)
<b>VMC</b>	Victorian Multicultural Commission
<b>VPLRC</b>	Victorian Parliamentary Law Reform Committee

## Executive Summary

### Introduction

- In Victoria, civil law matters range from small consumer disputes to large contractual claims between businesses. A 2007 survey conducted for the Department of Justice (DOJ) (the 2007 DOJ survey) found that 35% of adult Victorians are involved in around 3.3 million disputes each year.
- Victoria also has a large culturally and linguistically diverse (CALD) population. According to the 2006 Census, Victorians originate from more than 230 countries and over 20% of Victorians speak more than 200 languages other than English (LOTE).
- English is the main language used in Victoria. However, many Victorians have English communication difficulties. The 2006 Census indicated that over 186,000 Victorians of CALD backgrounds speak English “not well” or “not at all”. Of the over 20% of Victorians who speak a LOTE at home, the Victorian Government has indicated that approximately one in five are likely to need an interpreter.
- People from the Deaf community, Indigenous people and others with a speech or hearing difficulty may also experience problems communicating with others.
- Victorians involved in civil disputes face substantial barriers to accessing justice and resolving those disputes if they have difficulties communicating in English. They cannot participate or speak on an equal basis with others, adequately access legal services or courts and may not even be aware that a legal issue has arisen.
- Professional, competent interpreters for civil justice matters are the key to overcoming this communication gap. Within the civil justice system, these interpreters help facilitate access to justice by enabling people to communicate in a language they can speak and understand.
- However, achieving access to justice through an interpreter is dependent on several factors, including the current policy and practice towards providing interpreters in the relevant jurisdiction. Practical considerations are also important. If people require an interpreter (interpreter demand) but cannot utilise one because, for instance, the interpreter is not available at the time, they lack the means to pay or cannot access funded interpreting services (interpreter unmet demand), their difficulties are further compounded.

## Part One – Findings On Current Australian Practice For The Provision Of Interpreters In Criminal And Civil Matters

- Current Victorian government policy acknowledges the importance of using interpreters to enable Victorians with English communication difficulties such as people from CALD backgrounds and the Deaf community to make informed, significant decisions about their lives.
- Despite this policy, there is currently limited funding of, and therefore access to, interpreters in Victorian civil legal matters, especially for those who do not have the means to pay. Generally, the onus is on parties to provide and fund an interpreter if one is required.
- Of all Victorian courts and tribunals, currently only the Victorian Civil and Administrative Tribunal (VCAT) provides civil interpreters at no cost to the user. In comparison, the Commonwealth, South Australia, Tasmania, Western Australia all provide greater access to civil interpreters than Victoria.
- By contrast, for criminal matters, access to interpreters is available at all stages of the Victorian criminal justice process – generally, at no cost to the user. These rights are reinforced through statute, including under the Victorian Human Rights Charter. Consistent with Victoria, all other Australian jurisdictions provide statutory rights for interpreters in criminal proceedings but the extent of these rights differs.

## Part Two – Findings On Demand And Unmet Demand For Civil Justice Interpreters

### Demand for civil justice interpreters in Victoria

- Statistical data about the use of civil interpreters in Victoria is currently limited in both its nature and extent.
- A key problem is that existing indicators of demand only measure cases where a person seeks third party assistance through civil justice processes such as legal advice, alternative dispute resolution (ADR) or courts and tribunals. However, the 2007 DOJ survey has indicated that only a small proportion of Victorians seek such assistance. This means that looking at existing statistics risks significantly understating the scale of the actual demand for civil interpreters.
- Nevertheless, the LIV has reviewed existing interpreter statistics for the purposes of this Report. The DOJ recently commenced compiling data (the DOJ data) about the use of interpreters by its business units and associated agencies. The DOJ provided the LIV with access to data from the Dispute Settlement Centre Victoria (DSCV), the County and Magistrates' Courts, Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and Victoria Legal Aid (VLA) (including Community Legal Centres (CLCs)).
- Review of the DOJ data indicates that these agencies sought a total of approximately 16,000 interpreting services for the 2008-09 year.
- The LIV considers that the DOJ data provides useful information about interpreter usage in Victoria but it has several limitations – it does not distinguish between interpreters used for civil and criminal proceedings and data was not available from all the sources requested, including the Supreme Court and VCAT. In the LIV's view, these limitations, together with the more fundamental problem that interpreter statistics only look at cases involving third party assistance, make it difficult to use this data as a basis to assess the overall demand and unmet demand for interpreters in Victorian civil matters.

- Therefore, the LIV has attempted to obtain a better sense of the potential scale of demand for civil interpreters by applying the results of the 2007 DOJ survey to overall population data. The 2007 DOJ survey concluded that 35% of the Victorian adult population were involved in around 3.3 million disputes annually. The 2007 DOJ survey based its estimate on a representative sample of the Victorian population and extrapolated that to the broader Victorian population based on 2001 Census figures.
- If this finding is applied to adult Victorians who speak a LOTE that require the assistance of an interpreter, this would suggest that at least 30,000 adult Victorians may require the assistance of an interpreter in around 80,000 civil disputes each year. As there are some conservative assumptions built into this figure, the LIV considers that it should be treated as indicative only, and the figure may be significantly greater in practice.
- The LIV submits that, while there are limitations with the current data, it is clear there is significant unmet demand for interpreting services in the Victorian civil justice system, and that the potential scale of unmet demand requires a significant extension of existing interpreting services. The LIV recommends more detailed demand modelling as part of the package of proposed reforms to civil justice interpreting services.

## Unmet demand for civil justice interpreters in Victoria

- “Unmet demand” for civil interpreting services is where people or organisations seek but do not receive interpreting services. This may be because the interpreter is unavailable, a person does not have the means to pay or is unable to access funded interpreting services. Unmet demand may also be “hidden”. That is, not everyone who needs interpreting services will be aware of that need or necessarily come forward to seek those services.
- The LIV has been able to identify specific areas where it believes that there is indicative evidence of unmet demand at the legal advice, ADR and court / tribunal stages of Victoria’s civil justice system. This evidence is mostly qualitative in nature, including research reports, submissions, feedback from focus groups and case studies and is sourced from people working within the interpreter and legal professions.
- In situations where lawyers provide civil legal advice to clients who require the assistance of an interpreter, the evidence suggests key areas of unmet demand for interpreters are:
  - in CLCs, in circumstances that involve the provision of complex legal advice and the preparation and review of court forms or documents;
  - where a legal aid panel lawyer sees a client before the application for legal aid has been made; and
  - where lawyers provide legal advice on a pro bono basis to their clients. Often, these clients are referred to them, for example, through a pro bono scheme.
- In the area of civil ADR, the LIV considers that the evidence suggests that there is hidden unmet demand for civil interpreters due to the lack of awareness of ADR services by CALD communities.
- For all Victorian courts, the evidence suggests that there is unmet demand for civil interpreters given the current general court practice that parties are responsible for the provision of their own interpreters if one is required. There is specific evidence to indicate substantive unmet demand for civil justice interpreters in the Magistrates’ Court, especially for people who are represented on a pro bono basis and defendants in default judgment matters.
- At VCAT, the LIV considers that the level of unmet demand is likely to be less significant as VCAT currently provides access to civil interpreters at no cost to the user

## Unmet demand for civil justice interpreters based on specific population groups

- According to the 2006 Census, over 20% of Victorians speak a LOTE, meaning that this population group is the most likely to be affected by the unmet demand for civil interpreters. However, there are other groups that are also affected, including Deaf people and Indigenous people. In relation to these groups, the LIV considers that:

- for Deaf people, there is unmet demand for civil interpreters in Auslan or Australian sign language interpreters and there is also likely to be unmet demand for Deaf people from CALD backgrounds who have specific interpreting needs; and
- for Indigenous people, there is unmet demand for Indigenous cultural interpreters of Aboriginal English (AE).
- Further, the LIV also considers that a person who has English language difficulties will face additional barriers to justice if they fall into one of the additional population groups:
  - People who are self-represented;
  - Older people;
  - People from rural, remote or regional locations; and
  - People who speak new and emerging languages.

Combined with the evidence that suggests unmet demand for civil justice interpreters in each of the above population categories, the LIV believes that these people face particularly significant difficulties in accessing interpreters to assist with the resolution of their civil disputes.

## Part Three – Recommendations For The Establishment Of An Interpreting Fund

### Rationale for the establishment of an Interpreting Fund

- The LIV believes that the provision of interpreters is a fundamental pre-condition for access to justice in Victorian civil matters for people with limited English skills.
- In the LIV's view, the combined effect of current Victorian Government practice and the unmet demand for civil justice interpreters as indicated by the evidence makes it imperative that the provision of these interpreters be addressed.
- The LIV also submits that the creation of an Interpreting Fund will enable the Victorian Government to address the current imbalance in the provision of civil justice interpreters in Victoria where:
  - funding and access to interpreters in criminal matters is extensive but, in civil matters, is limited;
  - there are unequal access rights to civil justice interpreters. For example, currently in Victorian courts, witnesses have statutory access rights to interpreters but plaintiffs and defendants do not; and
  - in comparison to other jurisdictions such as the Commonwealth, Tasmania, South Australia and Western Australia, Victoria offers limited access to civil justice interpreters.
- Therefore, the LIV recommends that the Victorian Government establish an Interpreting Fund to fund the provision of interpreters in Victorian civil proceedings.

### Benefits of an Interpreting Fund

- In the LIV's view, an Interpreting Fund would make a major and immediate contribution to access to justice in Victoria. By funding the provision of interpreters in civil matters for people who have English language difficulties, the Interpreting Fund would:
  1. enable people who are in need of interpreters to be placed on an equal footing in terms of language with other participants in the civil justice process;
  2. help address the likely future growth of unmet demand for Victorian civil justice interpreters;
  3. directly benefit a wide range of people from across Victoria who are in need of interpreting services, including older people, people from CALD backgrounds and people from rural and regional areas; and
  4. enhance the efficiency and effectiveness of Victoria's civil justice system by:

- i. providing opportunities for Victorians to resolve civil legal disputes more quickly and for less cost;
- ii. increasing its procedural fairness through the provision of interpreters; and
- iii. improving access to justice at multiple stages of the civil legal process.

## Modes of interpreting

- The LIV believes that the Interpreting Fund should provide monies for all forms of interpreting – on-site, telephone or videoconference interpreting as there is no one style of interpreting to fit all situations.
- The LIV recognises that, as videoconference interpreting is not yet widely utilised in Victoria, the current focus on providing interpreting services will generally involve choosing between on-site and telephone interpreting services. However, the LIV supports further investigation into videoconferencing interpreters for legal advice and court purposes and believes it would have a positive impact on access to justice.
- Determining the appropriate form of interpreting is a pragmatic decision, which will need to be determined by the provider of legal services at the time an interpreter is required. The Victorian government has already established an interpreting policy which provides guidance about what kinds of matters are suited for particular modes of interpreting. These guidelines would be used to help guide any future extension of interpreting services in the civil jurisdiction.

## Implementation of the Interpreting Fund

- Given the extent of current unmet demand for civil justice interpreters, the LIV believes that an Interpreting Fund should focus on more than just the litigation stage of civil proceedings.
- The complexity of the unmet demand for civil justice interpreters also means that there is no one model that can comprehensively address the different kinds of unmet demand at the same time.
- Therefore, the LIV recommends that the Victorian Government take a staged approach to the establishment of the Interpreting Fund and that this occur in a three stage process as follows:
  - **Stage One:** A 12 month pilot program to address the unmet demand for interpreters at the legal advice stage of civil proceedings, targeting the unmet demand for interpreting services at CLCs and for practitioners who provide pro bono services.
  - **Stage Two:** A 12 month pilot program to address the unmet demand for interpreters at the court stage of civil proceedings, particularly focusing on the Magistrates' Court. Stage Two could be undertaken concurrently with Stage One.
  - **Stage Three:** Building on Stages One and Two, Stage Three involves targeting the unmet need for civil justice interpreting services in a more specific and sophisticated way through the establishment of a grants program.

## Structure of the Interpreting Fund

- To enhance the transparency and accountability of the Interpreting Fund, the LIV recommends that it be established as a statutory trust and that it be managed by an independent, statutory body.
- However, to reduce initial administration costs, the LIV proposes that it be established as an adjunct to an existing organisation such as VLA.

## Eligibility for access to the Interpreting Fund

- Consistent with the Interpreting Fund's purpose to increase access to justice, the LIV recommends that, under Stage One, the presumption should be that all people who require to civil justice interpreters should have access to one. This is intended to encourage the resolution of civil disputes at the earliest stage possible.

- Under Stage Two, the LIV recommends that eligibility for the Interpreting Fund be more restricted, and be determined through a means test. This is to ensure that monies from the Interpreting Fund are delivered to where they are needed the most – to those who cannot afford to pay for an interpreter. The LIV proposes that this means test could be the equivalent of a court fee waiver test.

## Funding of the Interpreting Fund

- The LIV recommends that Stages One, Two and Three of the Interpreting Fund be funded through government revenue. This is consistent with the Victorian Government’s existing role as a funding source for the provision of civil justice interpreting services in Victoria.
- However, if government revenue is not available to meet some or all of the costs of the Interpreting Fund, the LIV proposes that alternative funding sources could be:
  - a court fee filing levy or party-party cost orders (Stage 2); and
  - Public Purpose Fund or Justice Fund (Stage 3).
- The LIV notes that the issue of how much funding is required is a matter best addressed in a separate business case exercise following a Victorian Government decision about the core threshold issues such as the scope, nature and timing of the implementation of the proposed Interpreting Fund.

## Pro bono interpreting

- The LIV recommends that the Interpreting Fund should not seek to use interpreters on a pro bono basis.

## Part Four – The Interpreter Profession

- The LIV considers that the availability of competent, professional legal interpreters is essential to the success of the Interpreting Fund.
- However, there is currently a strong demand for, but lack of supply of, such interpreters due to factors such as remuneration, career structure and reluctance to be involved in the legal environment.
- The LIV notes that there are Victorian Government and industry initiatives currently underway to try and address some of these broader issues facing the interpreting industry.
- To help address some of the issues specific to legal interpreting, the LIV recommends that:
  - all Victorian courts and VCAT develop policies about the use of interpreters. This is also consistent with the VLRC’s *Civil Justice Review* recommendations;
  - lawyers who work with interpreters undertake training on how to work appropriately with them; and
  - a Victorian publication aimed at improving lawyers’ understanding about working with interpreters, similar to the NSW Law Society’s *A Guide to Best Practice: Lawyers, Interpreters and Translators*, be produced.

## Introduction

### Interpreters In Victoria's Civil Justice System

Many Victorians are involved in civil law<sup>1</sup> disputes. These can range from fencing disputes and consumer complaints to large contractual claims between businesses.<sup>2</sup> In Victoria, a 2007 survey conducted for DOJ (the 2007 DOJ survey)<sup>3</sup> showed that:

- of all adult Victorians, 35% had at least one dispute<sup>4</sup> in the last 12 months;
- there were around 3.3 million disputes among Victorians – of which 1.8 million involved business or government and 1.5 million involved family, neighbourhood or the community; and
- the total cost to Victorians of resolving disputes was estimated at \$2.7 billion, including the amount of dollars and number of hours spent.<sup>5</sup>

Victoria also has a large culturally and linguistically diverse (CALD) population. People originate from more than 230 countries and speak over 200 languages. The 2006 Census indicated that 44% of Victorians, or over 2 million people, were either born overseas or had at least one parent who was; that 73% of those born overseas came from countries where English was not the main language spoken; and over 20% of Victorians, or over 1 million people, spoke a LOTE at home.<sup>6</sup>

Many Victorians of CALD backgrounds have English language difficulties. As shown by the 2006 Census, over 186,000 of Victorians spoke English “not well” or “not at all”.<sup>7</sup> According to the Victorian Government, of the over 20% of Victorians who speak a LOTE at home, approximately one in five are likely to need an interpreter.<sup>8</sup> Commentators also argue that the Census’s limitations lead to a clear under-estimate of the numbers and use of LOTE in Victoria.<sup>9</sup>

- 
- 1 “Civil law” here is given a broad definition to refer to all areas of law within the Victorian jurisdiction that are not covered by criminal law or that involve offences against the State of Victoria.
  - 2 Victorian Department of Justice (DOJ), *Attorney-General’s Justice Statement 2*, p. 39. Accessed December 2009 at <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Vision/JUSTICE+--+Interactive+Justice+Statement+2>.
  - 3 Ipsos Australia, *Dispute Resolution in Victoria: Community Survey 2007: Prepared for the Department of Justice*. Accessed March 2010 at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Reports\\_and\\_Guidelines\\_2/\\$file/cav\\_report\\_dispute\\_resolution\\_community\\_survey\\_2007.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_dispute_resolution_community_survey_2007.pdf).
  - 4 The 2007 DOJ survey defines “a dispute” as a conflict or disagreement between two or more people, businesses or organisations. This definition falls within the LIV’s definition of civil law.
  - 5 *Ibid*, p. i.
  - 6 Victorian Government, *All of Us: Victoria Multicultural Policy*, p. 10. Accessed January 2010 at <http://www.multicultural.vic.gov.au/images/stories/pdf/MulticulturalPolicy09-res.pdf>.
  - 7 Australian Bureau of Statistics (ABS). *2006 Census of Population and Housing – Victoria (State), Proficiency in Spoken English / Language by Age for Time Series*. Cat. No. 2068.0. Accessed in January 2010 at: <http://abs.gov.au/websitedbs/D3310114.nsf/home/Census+data>.
  - 8 Victorian Office of Multicultural Affairs (VOMA), *Improving the Use of Translating and Interpreting Services: A Guide to Victorian Government Policy and Procedures*, p. 20. Accessed December 2009 at <http://www.multicultural.vic.gov.au/images/stories/pdf/improving-the-use-of-translating-and-interpreting-services.pdf>.
  - 9 The only Census language questions address the English proficiency levels of household members and the language(s) they speak at home. However, many second and third generation CALD community members may speak English at home but make extensive use of LOTE with extended family members and in a range of other areas. Members of the first generation who live alone or with people who do not share the same first language cannot report the use of that language in the Census. See further: Victorian Interpreting and Translating Service (VITS), *Victoria’s Languages: Gateway to the World*, p. 9. Accessed February 2010 at <http://www.vits.com.au/documents/561VITS-MonashgatewayreportLowres.pdf>.

Further, English communication difficulties are not confined to Victorians of CALD backgrounds. People from the Deaf community, Indigenous people and others with a speech or hearing difficulty may also experience communication problems.

English is the main language spoken and used in Victoria. However, Victorians who have difficulties communicating in English face substantial barriers to resolve their civil disputes. The ability to understand language is especially crucial when people's legal rights and obligations are at stake.<sup>10</sup> Yet, without English language skills, people cannot participate and communicate with others on an equal basis in Victoria's civil justice system. They cannot develop an understanding of Victorian law, adequately access legal services or courts and may not even be aware that a legal issue has arisen.<sup>11</sup>

The key to overcoming this language barrier and bridging the communication gap is an interpreter. An interpreter "takes information from an oral or sign language and converts it accurately and objectively into another language to enable communication between two parties who use different languages".<sup>12</sup> Often, interpreters also engage in "sight translation" of documents, which is where the interpreter verbally provides an insight into a document's content.<sup>13</sup> Within Victoria's civil justice system, interpreters help achieve access to justice by providing people with the means to communicate in a language they can speak and understand.

However, achieving access to civil justice through the provision of interpreters is dependent on several factors. There is no absolute entitlement to an interpreter in Australia; it depends on the jurisdiction. Even if one has the "right" to an interpreter through jurisdictional statute or practice, "that is of little significance if a suitable interpreter cannot be found or, even, if available, is of poor quality".<sup>14</sup> This means practical considerations are just as important to obtain access to interpreters. "Access" in this context presupposes both the availability of, and funding for, a competent, professionally accredited interpreter. However, interpreters may not always be available at the time or for the appropriately accredited or available at the time or for the language required. Funding is another complication. If people require an interpreter but cannot utilise one because they lack the means to pay or are unable to access appropriate funding services, their difficulties are further compounded.

## Victorian Law Reform Commission's Civil Justice Review

In 2008, the Victorian Law Reform Commission's (VLRC) *Civil Justice Review* examined the use of interpreters in Victorian civil litigation. The VLRC identified that a language barrier or hearing impairment can detrimentally impact on the basic communication required between a litigant and the court, affecting access to court services and the efficient and proper disposition of court business. A language barrier may also dissuade a person from bringing an otherwise meritorious claim or pursuing a valid defence.<sup>15</sup>

To address these issues, the VLRC proposed the establishment of an Interpreting Fund, which could be drawn on to fund interpreters in civil proceedings in Victorian courts in appropriate cases. The *Civil Justice Review* also recommended that all Victorian courts develop detailed policies about the provision of interpreters and that the Department of Justice (DOJ) should provide funding for telephone interpreting services for legal practitioners acting on a pro bono basis through a Victoria pro bono referral scheme.<sup>16</sup>

<sup>10</sup> Australian Law Reform Commission (ALRC), *Multiculturalism and the Law*, Report No. 57, 1994, paragraph 3.4.

<sup>11</sup> George Lekakis, Chairperson, Victorian Multicultural Commission (VMC), *Speech at the Victorian Legal Assistance Forum*, 5 June 2009. Accessed December 2009 at <http://www.vlaf.org.au/docs/A%20speech%20for%20George%20Lekakis.doc>.

<sup>12</sup> *Ibid.*, p. 8.

<sup>13</sup> However, "sight translation" should not be confused with standard translation, which is where a translator converts *written* material from one language to another. The translation may be from English into any other language or from any language into English. Sight translation is not necessarily as accurate or at the level of complexity of communication and style as a proper written translation. See further: VITS, *We Speak Your Language: A Guide to Cross-Cultural Communication*, p. 9. Accessed February 2010 at <http://www.vits.com.au/downloads/guide.pdf>.

<sup>14</sup> Ian Dobinson & Thomas Chiu, *Access and Equity: The New South Wales Court Interpreter Service*, 2005, 17(1) *Current Issues in Criminal Justice*. 30, p. 43.

<sup>15</sup> Victorian Law Reform Commission (VLRC). *Civil Justice Review Report*, March 2008, p. 583. Accessed December 2009 at <http://www.lawreform.vic.gov.au/wps/wcm/connect/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf?MOD=AJPERES>.

<sup>16</sup> *Ibid.*, p. 590.

## LIV Interpreting Fund Scoping Project

Following the VLRC's recommendations, the Access to Justice Committee of the Law Institute of Victoria (LIV) sought and received a grant from the Victoria Law Foundation (VLF) to undertake an Interpreting Fund Scoping Project (the Project).

The aims of the Project were to:

- examine the problem of unmet demand for interpreters in Victorian civil proceedings;
- ascertain the extent and nature of the evidence available about that problem; and
- make recommendations to the Victorian Government about how that unmet demand could be addressed through the establishment of an Interpreting Fund.

The Project commenced in August 2009. In order to accumulate evidence about the extent and nature of unmet demand for Victorian civil interpreting services, the LIV pursued a range of qualitative and quantitative information sources, including analysis of demographic and statistical material on the use of interpreters. In-person and telephone interviews were also conducted with a variety of government and non-government stakeholders, private practitioners and community legal centres (CLCs).<sup>17</sup>

It became evident early on that there was little available statistical information about the use of interpreters in Victorian civil proceedings or about interpreters more generally. In an attempt to address this, the LIV created and disseminated a survey on the current demand for interpreting services to interpreting agencies, legal advice providers and Victorian government bodies. However, insufficient responses were received to utilise this material as part of the Project.

During the course of the Project, the LIV also became aware that the DOJ had been collecting statistical material from interpreter agencies about its current use of interpreters. The LIV sought and subsequently received access to current usage data about the County Court, DSCV, the Magistrates' Court, VLA and VEOHRC.

As the research progressed, it also became clear that the unmet demand for interpreting services in the civil justice system extended beyond just litigation. Consequently, the LIV expanded its research to examine unmet demand for interpreting services at other stages of the civil justice process.

Based on its research, the LIV prepared an Options Paper, which set out ideas about the proposed structure and resourcing of the Interpreting Fund. The LIV disseminated the Options Paper for comment in October 2009. On 12 November and 30 November 2009, the LIV held focus groups (the Focus Groups) to discuss the ideas set out in the Options Paper. Subsequently, the LIV prepared a Final Report (the Report) on the Project, which was completed in March 2010.

## Acknowledgements

The LIV wishes to thank and acknowledge all those people who contributed to the Report and shared their time, insights and information about the use of interpreters in Victoria. We especially acknowledge the extensive contribution of Project Consultant Elissa Campbell in compiling the Final Report. The LIV also wishes to thank the VLF for their financial and ongoing support throughout the Project.

.....  
 17 A list of the organisations consulted as part of the Project is available at Appendix Two.



# Findings On Current Australian Practice For The Provision Of Interpreters In Criminal And Civil Matters

Part One of the Report examines the current policy and practice regarding the provision of interpreters in criminal and civil legal matters in Australia.

## 1.1 Common Law

### 1.1.1 Criminal matters

Under the common law, there is no absolute right to an interpreter for a person who cannot communicate in English when being interviewed by the police or in court. In court proceedings, the decision about whether an interpreter should be used for a party or witness to the proceedings is left up to the judge's discretion.<sup>18</sup>

Nonetheless, case law has highlighted the importance of providing access to interpreters in criminal cases, especially for defendants. In particular, there is a strong presumption in favour of permitting defendants to have interpreters so that they may understand the case against them.<sup>19</sup> The High Court case of *Dietrich v R* (1992)<sup>20</sup> also emphasised that interpreters were critical for ensuring fair trials in criminal proceedings.<sup>21</sup>

In all Australian jurisdictions, the common law position about access to interpreters in criminal matters has now been modified by legislation to provide for statutory access rights to interpreters.<sup>22</sup>

### 1.1.2 Civil matters

Consistent with the position at common law for criminal proceedings, there is no "right" of a party or a witness in a civil trial to an interpreter. Instead, the matter is left to the discretion of the individual judge.<sup>23</sup>

---

18 Ludmilla Robinson, *Handbook for Legal Interpreters*, The Law Book Company: 1994, pp. 106-7.

19 *R v Lee Kun* [1916] 1 KB 337; *Gradidge v Grace Bros Pty Ltd* (1998) 93 FLR 414.

20 177 CLR 292.

21 Kathy Laster & Veronica Taylor, *Interpreters and the Legal System*, 1994. The Federation Press, p. 78.

22 For more information, see 1.2.3, 1.3.1 and Appendix One of the Report.

23 *Dairy Farmers Co-op Milk Co Ltd v Acquilina* (1963) 109 CLR 458; *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; Laster & Taylor, *op. cit.*, p. 77.

Matters relevant to the exercise of the judge's discretion include whether an interpreter is required for a fair hearing, whether a party may be disadvantaged by the absence of an interpreter, the time at which the application for the interpreter is made and if there is any extraneous or ulterior motive for the request.<sup>24</sup>

While it is ultimately up to the individual judge or decision maker to determine whether an interpreter is required, nonetheless "courts should strive to ensure that no person is disadvantaged by the want of an interpreter if that person's first language is not English and he or she requests that facility to ensure that justice is done".<sup>25</sup>

## 1.2 Victoria

### 1.2.1 Victorian government policy

Victorian government policy regarding the use of interpreters is set out in *Improving the Use of Translating and Interpreting Services: A Guide to Victorian Government Policy and Procedures*. Under this policy, Victorian government clients who are not able to communicate through written or spoken English such as people who speak a LOTE or use Auslan should have access to professional interpreting services:

- when required to make significant decisions concerning their lives; or
- where essential information needs to be communicated to inform decision making.<sup>26</sup>

Further, this policy acknowledges that the Victorian Government has a legal responsibility to provide an interpreter to protect the state from legal liability arising from language difficulties or to ensure that a prosecution is not compromised.<sup>27</sup> In civil and administrative situations, this includes scenarios where employees or agents of the Victorian Government need to obtain people's informed consent, such as where a person consents to the release of personal information concerning their affairs or enters into a contract.<sup>28</sup>

### 1.2.2 Department of Justice policy

DOJ policy regarding interpreters is consistent with general Victorian government policy. In 2006, DOJ developed the *Language Services Policy and Guidelines for Working with Interpreters and Translators*, which sets out DOJ's legal responsibility to provide interpreters and the minimum standards<sup>29</sup> for providing language services throughout DOJ.

DOJ's *Cultural Diversity Plan 2009-11* also highlights the importance of interpreters. This document outlines a range of strategies that will enable DOJ to continue to "provide improved access to justice services for Victoria's CALD communities and to ensure their right to equality before the law".<sup>30</sup> One of DOJ's objectives under the Plan is to "provide quality language services to CALD communities".<sup>31</sup>

<sup>24</sup> See further: *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75.

<sup>25</sup> *Ibid.*, p. 78, per Kirby P.

<sup>26</sup> *VOMA, op. cit.*, p. 9.

<sup>27</sup> *Ibid.*, p. 10.

<sup>28</sup> *Ibid.*, p. 12.

<sup>29</sup> DOJ's two minimum language services standards are:

1. Clients who are not able to communicate through written or spoken English should be given access to professional interpreting and translating services when required to make significant decisions concerning their lives; or where essential information needs to be communicated to inform decision making; and
2. Interpreters and translators should be professionally accredited. See further: DOJ, *Language Service Policy Guidelines for Working with Interpreters and Translators*, 2006, p. 7. Accessed December 2009 at: [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebf244099f0c07c/Language\\_Service\\_Policy\\_Guide\\_2006.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebf244099f0c07c/Language_Service_Policy_Guide_2006.pdf).

<sup>30</sup> DOJ, *Cultural Diversity Plan 2009-11*, Message from the Ministers, p. 1. Accessed January 2010 at [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eba00b08508fa0f/Cultural\\_Diversity\\_Plan2009\\_2011.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eba00b08508fa0f/Cultural_Diversity_Plan2009_2011.pdf).

<sup>31</sup> *Ibid.*, p. 23.

### 1.2.3 Current Victorian practice – Criminal matters

Victorian legislation provides for extensive statutory rights to interpreters in criminal matters. In any criminal procedure, an interpreter must be provided if a person is charged with an offence punishable by imprisonment and the court is satisfied that that person does not have a sufficient command of the English language to understand and participate in that court proceeding.<sup>32</sup>

Section 25(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Human Rights Charter) also provides “minimum guarantees” for a person charged with a criminal offence. These include the free assistance of:

- an interpreter in criminal proceedings if a criminal defendant cannot understand or speak English; or
- assistants and specialised communication tools and technology if a criminal defendant has communication or speech difficulties that require such assistance.<sup>33</sup>

These minimum guarantees apply only to a person charged with a criminal offence. The Victorian Supreme Court has indicated that section 25(2) of the Victorian Human Rights Charter does not create independent rights that are exercisable outside of criminal proceedings. Therefore, a person is not entitled to a free interpreter in civil proceedings simply because they happen to have been charged with a criminal offence.<sup>34</sup>

Victorian legislation also provides for a right to an interpreter when a person is being questioned or investigated for a criminal offence<sup>35</sup>, when giving evidence as a witness<sup>36</sup> or when appearing as a party to a proceeding in the Children’s Court.<sup>37</sup>

Therefore, in practice, it is mandatory for people appearing in any Victorian court in a criminal proceeding to be provided with an interpreter if they have need of one. There is no cost involved to the person needing the interpreter. In the Magistrates’ Court, the interpreter is organised and paid for by the Court itself. In the County and Supreme Courts, the interpreter is organised and paid for the Office of Public Prosecutions (OPP). A person is also entitled to an interpreter if they receive a grant for legal representation from VLA or receive legal advice through CLCs.<sup>38</sup>

### 1.2.4 Current Victorian practice – Civil matters

In contrast to criminal matters, the current general practice of all Victorian courts is that it is the responsibility of the parties or their representatives to organise and pay for an interpreter if one is required.<sup>39</sup> A successful litigant may, however, claim the costs of an interpreter from the other side as part of a party-party costs order.<sup>40</sup>

The main exception to this practice is the Victorian Civil and Administrative Tribunal (VCAT). VCAT will arrange for an interpreter as required in civil disputes at no cost to any party. This position has legislative backing.<sup>41</sup>

<sup>32</sup> *Criminal Procedure Act 2009* (Vic), s. 355.

<sup>33</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 25(2)(i) & (j).

<sup>34</sup> See, for instance, *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 at 139, per Hollingworth J.

<sup>35</sup> *Crimes Act 1958* (Vic), s. 464D.

<sup>36</sup> *Evidence Act 2008* (Vic), s. 30. This section also applies to witnesses giving evidence in civil matters.

<sup>37</sup> *Children, Youth and Families Act 2005* (Vic), s. 526.

<sup>38</sup> However, there are limits to interpreters provided through CLCs. See further at 2.4.1.

<sup>39</sup> For example, the Victorian County Court website states that the “onus is on the solicitors for the parties to book and pay for interpreters, when required, in civil matters”. See further: County Court FAQs at: <http://www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Listing-Utility+Buttons-FAQs?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=0-FAQs~>.

<sup>40</sup> *Supreme Court (General Civil Procedure) Rules 2005* (Vic), Chapter 1, Appendix B, items 1 and 2; *County Court Civil Procedure Rules 2008* (Vic), Appendix A, “Interpreter Allowances”. While the Magistrates’ Court’s cost scale does not have a specific item for interpreters, the LIV understands that the forthcoming uniform court rules will adopt the Supreme Court model.

<sup>41</sup> Section 63 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) states that: “Unless the Tribunal directs otherwise, a party may be assisted in a proceeding by an interpreter or another person necessary or desirable to make the proceeding intelligible to that party.”

There are other limited exceptions. Despite its general practice, the Magistrates' Court does provide interpreting services for either party involved in applying for, or responding to, a family violence intervention order.<sup>42</sup> Such orders are considered to be a civil matter between the parties.<sup>43</sup> The Magistrates' Court also provides interpreters for Victims of Crime Assistance Tribunal (VOCAT) applications.<sup>44</sup>

Victorian legislation also provides that a witness may give evidence through an interpreter in civil proceedings unless that witness can understand and speak the English language sufficiently.<sup>45</sup>

In practice, the LIV considers that access to interpreters for Victorian court matters is limited and uneven. There are statutory provisions for interpreters at VCAT and for witnesses in any civil proceedings, yet plaintiffs and defendants must generally meet the cost of interpreters themselves. The Magistrates' Court also provides interpreters for family violence intervention orders and VOCAT matters but no other civil cases.

Similarly, people may also access interpreters to obtain legal advice about civil matters through the VLA and CLCs. However, VLA guidelines restrict the amount of civil matters for which the VLA will provide grants of legal assistance and resource limitations inhibit access to interpreters at CLCs.<sup>46</sup>

## 1.3 Other Jurisdictions

### 1.3.1 Criminal matters

Consistent with Victoria, all Australian jurisdictions provide statutory rights for interpreters in criminal proceedings but the extent of these rights differs.<sup>47</sup>

### 1.3.2 Civil matters

In civil matters, other jurisdictions compare favourably with Victoria in terms of providing access to interpreters. South Australia (SA), Western Australia (WA) and Tasmania all offer access to interpreters in court proceedings for parties and witnesses at no cost to the user. The Commonwealth also provides interpreters without cost in the Federal Court, Federal Magistrates Court and Family Court. In New South Wales (NSW), the courts will generally assist parties with the arrangement of an interpreter but – except in cases of financial hardship – parties will have to meet the cost of the interpreter themselves. If successful, parties can seek reimbursement for the costs of an interpreter when costs are determined.<sup>48</sup>

There is also a trend towards providing access rights to civil interpreters in tribunals at both the Commonwealth and State levels. Since VCAT was introduced in 1998, NSW, WA and most recently Queensland (QLD) have established their own tribunals with statutory access rights to interpreters.<sup>49</sup> The Commonwealth also has a long history of providing statutory rights for interpreters at tribunals, including the Administrative Appeals Tribunal (AAT), Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and Social Security Appeals Tribunal (SSAT).

<sup>42</sup> Magistrates' Court website. *Intervention Orders – Applying for an order – FAQs*. See further: <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/magistrates+court/home/intervention+orders/magistrates+-+intervention+orders+-+applying+for+an+order+-+faqs>.

<sup>43</sup> However, if a family violence order is breached, the person in breach may be charged by Victoria Police with a criminal offence. See further: <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Intervention+Orders/>.

<sup>44</sup> The Victims of Crime Assistance Tribunal is part of the Magistrates' Court. See further: *Victims of Crime Assistance Act 1996* (Vic).

<sup>45</sup> *Evidence Act 2008* (Vic), s. 30. This section also applies to criminal proceedings.

<sup>46</sup> See further at Part 2.4.1 about interpreter provision at CLCs and Part 2.4.2.1 about the VLA restrictions on grants of legal assistance in civil matters.

<sup>47</sup> More details are available in Appendix One.

<sup>48</sup> More details are available in Appendix One.

<sup>49</sup> Of these, the Queensland Civil and Administrative Tribunal (QCAT) legislation provides the broadest statutory access rights to civil interpreters. Section 44 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) has a similar provision to the VCAT legislation but section 29 goes further, imposing a positive duty on QCAT to take all reasonable steps to assist all parties to understand QCAT's practices, procedures and decisions. This may involve conducting proceedings in a way that recognises the cultural diversity of parties and witnesses (s. 29(1)(c)(i)) or having an interpreter or other person able to communicate effectively with a person to explain QCAT matters as appropriate (s. 29(2)(b)). The recent *President's Review of VCAT* proposed that the VCAT legislation adopt a similar section. See Part 2.6.4.3.

# Findings On Demand And Unmet Demand For Civil Justice Interpreters

## 2.1 Evidence And Data On Victorian Interpreters

### 2.1.1 Lack of evidence about interpreters

In order to evaluate the extent and nature of demand for interpreters in civil justice proceedings, the LIV attempted to gather statistical data about the current demand for, and use of, interpreters in Victorian civil matters. However, it became clear that there was little such information about civil interpreters or the use of interpreters more generally.

This has been an ongoing issue. In 2001, the Victorian Government commissioned Allen Consulting Group to prepare *A Needs Analysis of Language Services*<sup>50</sup> (the Needs Analysis). The Needs Analysis focused on the use of interpreting services by three Victorian government departments, including DOJ. However, the Needs Analysis identified that there was a:

*lack of meaningful data and information collected on the performance of the [interpreting] industry. Simple descriptive data and information on the current operation of the industry is relatively piecemeal, highly decentralized and often inconsistent. Subsequently, more sophisticated information on the outcomes of language services provision, including the quality of services provided and the accountability of both government and language services providers in delivering these outcomes, is not available.*<sup>51</sup>

For example, some information about Victorian government use of interpreters is available under the *Multicultural Victoria Act 2004* (Vic). This Act requires each Victorian government department to report annually on their achievements in multicultural affairs over the past financial year, including their use of language services such as interpreters. Each year, the Victorian Multicultural Commission (VMC) compiles this information into a report, which is published on its website. The LIV, however, found the reported information to be fragmentary and inconsistent,

<sup>50</sup> Allen Consulting Group. *A Needs Analysis of Language Services: Executive Summary*. February 2002. Accessed December 2009 at <http://www.multicultural.vic.gov.au/images/stories/pdf/needs%20analysis%20language%20services.pdf>.

<sup>51</sup> *Ibid*, p. 2.

making it difficult to discern trends or draw comparisons.<sup>52</sup> Therefore, the LIV used this information to supplement the data that it received from other sources.

## 2.1.2 Statistical data obtained about demand for civil justice interpreters

### 2.1.2.1 Department of Justice data

In an attempt to address some of the issues about the lack of interpreter data, DOJ recently commenced piloting detailed tracking of the use of interpreters by DOJ business units. The pilot originated out of the DOJ's *Cultural Diversity Plan 2009-11*, which identified a need to improve DOJ interpreter data collection processes and that DOJ did not always use interpreters as efficiently or effectively as required.<sup>53</sup>

In 2009, the Diversity Issues Unit (DIU) of DOJ collected information about the interpreter use of all areas of DOJ and associated agencies for the 2008-09 financial year. DIU received the data from 5 interpreter agencies – the Victorian Interpreting and Translating Service (VITS), the Commonwealth Telephone Interpreting Service (TIS), All Graduates, On-Call Interpreting Services and Connect Interpreting Services.

The LIV requested access to the interpreter data from government bodies and agencies that utilised interpreters in civil matters. Subsequently, the LIV received data for the County Court, Dispute Settlement Centre Victoria (DSCV), Magistrates' Court, VEOHRC and VLA. The VLA data also included information about the interpreter usage of CLCs. The LIV also sought information about the Supreme Court and VCAT but these were not available. The data provided by the DIU of DOJ is referred to throughout the Report as the "DOJ data".

Data was provided about the following categories of information:

- DOJ Client/Business Unit;
- Location of the interpreter request – suburb (if on-site interpreter), Victorian government region;
- Service type (telephone, on-site service);
- Languages;
- The cost of the interpreter service;
- Total number of interpreting services;
- If no interpreter was provided, the reason why no interpreter service was provided. These were:
  - interpreter not available at the time of the job;
  - short notice (<24 hours);<sup>54</sup>
  - requested interpreter/gender not available;
  - incorrect language of interpreter allocated;
  - interpreter did not attend; and
  - job cancelled.<sup>55</sup>

The DOJ data was provided in aggregate form so there were no identifying details about the interpreting companies or the individual clients who received the interpreting services through DOJ.

<sup>52</sup> For example, in the 2007-08 report, DOJ reported that its Program Strategy (Courts) spent \$1,100,537 to provide on-site interpreters to court users but did not identify how much was spent by each court. By contrast, in the 2006-07 report, DOJ reported that the Melbourne Magistrates' Court spent \$994,393 for qualified interpreters in 63 languages on 1,499 occasions but there was no further information about other Victorian courts and tribunals. See further: Victorian Multicultural Commission (VMC), *Victorian Government Achievements in Multicultural Affairs 2007-08*, p. 27. Accessed December 2009 at <http://www.multicultural.vic.gov.au/images/stories/pdf/vmc-wovg-report-final.pdf>. Also VMC, *Victorian Government Achievements in Multicultural Affairs 2006-07*, p. 35. Accessed December 2009 at <http://www.multicultural.vic.gov.au/images/stories/pdf/vmc%20multicultural%20affairs%202007-08.pdf>.

<sup>53</sup> DOJ, *Cultural Diversity Plan 2009-11*, *op. cit.*, pp. 13, 30.

<sup>54</sup> This data category was for when a DOJ client made a booking for an interpreter but the booking was subsequently cancelled by the DOJ client within the 24 hours before it was due to take place. Depending on the cancellation policy of the relevant interpreter agency, the DOJ client may have had to pay some or all monies for the cost of the interpreter.

<sup>55</sup> This category was used when there was no identified reason given for the cancellation of the interpreting service.

In summary, the DOJ data indicated that in 2008-09:

- the DSCV, Magistrates' Court,<sup>56</sup> County Court, VEOHRC and VLA (including CLCs) sought a combined total of 16,026 interpreting services at a total cost of \$1,901,382;
- interpreters were sought for 94 different languages and dialects, reflecting Victoria's multicultural population. The language of highest demand was Vietnamese where 3310 interpreters were sought. There were several languages that had only one request for interpreting services each;<sup>57</sup>
- the top 10 languages sought for interpreting services were, in order: Vietnamese, Mandarin, Arabic, Turkish, Cantonese, Greek, Dinka, Serbian, Macedonian and Spanish. Combined, these made up 69% of the total requests for interpreting services;
- 76% of the requests for interpreting services originated from metropolitan Melbourne, centring on Broadmeadows, the Melbourne CBD, Dandenong and Sunshine. Outside the metropolitan area, the strongest demand for interpreting services was in Geelong and Ballarat;
- there was a distinct preference for on-site interpreters: 11,749 on-site interpreters were sought compared to 4,277 telephone interpreting services; and
- the total cost of on-site interpreters was \$1,766,152. Costs for on-site interpreters varied significantly, ranging from \$11 for an on-site visit at a CLC to \$2300 for an on-site interpreter at the Mildura Magistrates' Court. The overall average cost of an on-site interpreter was \$150 per interpreting service. The total expenditure on telephone interpreter services was \$135,230 with the average cost being \$32 per interpreting service.

### 2.1.2.2 Victoria Legal Aid data

VLA provided the LIV with separate data about its expenditure on interpreting services and the telephone and on-site interpreter usage of CLCs. Some of the VLA information on interpreter expenditure varied from the equivalent information provided in the DOJ data. The LIV believes that this variation can be attributed to the different methods and processes used to record interpreter information in the DOJ data and within VLA. These variations are noted where appropriate.

### 2.1.2.3 Other organisations

Other organisations also separately provided the LIV with data about their interpreter usage. These included the Consumer Action Law Centre (CALC), DSCV, Senior Rights Victoria (SRV) and Springvale Monash Legal Service (SMLS).

## 2.1.3 Other sources of information and evidence

Where appropriate, the LIV also drew on additional demographic and statistical data sources to assist with its assessment of the demand and unmet demand for civil justice interpreting services. However, given the lack of comprehensive quantitative data in this area, much of the evidence the LIV used to assess this demand came from qualitative sources, including anecdotal evidence, research reports, submissions, focus groups, case studies and in-person and telephone interviews.

<sup>56</sup> The DOJ data included information from the Federal Magistrates Court. As this is a Commonwealth court, the LIV did not use this information when calculating interpreter usage in the Victorian jurisdiction.

<sup>57</sup> These were Acholi, Georgian, Hazargai, Hmong, Krio, Kurdish (Sorani), Marathi, Pidgin-PNG, Teo Chiew and Visayan. Of these, interpreters were unable to be provided for in Acholi and Visayan (interpreters not available at the time of the job) and Teo Chiew (cancelled at short notice).

## 2.2 Demand For Victorian Civil Justice Interpreters

The LIV considers that the statistical data about the use of interpreters in Victorian civil legal matters is currently limited in both its nature and extent.

A key problem is that existing indicators of demand only measure cases where a person seeks third party assistance through civil justice processes such as legal advice, ADR or courts and tribunals. However, most civil justice disputes are not resolved through these means. As noted by the Commonwealth Government in relation to civil matters, “most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms. Similarly, legal assistance programs are just one part of a complex system”.<sup>58</sup> In Victoria, the 2007 DOJ survey also illustrates this point. In around 15% (484,000) of all disputes, adult Victorians involved a third party in an attempt to achieve resolution.<sup>59</sup> This means that looking at existing statistics risks significantly understating the scale of the demand for civil justice interpreters.

Nevertheless, the LIV has examined existing interpreter statistics for the purposes of the Report. As indicated at 2.1.2.1, the DOJ data indicated that the DSCV, County and Magistrates’ Court, VEOHRC and VLA (including CLCs) sought a combined total of approximately 16,000 interpreting services for the 2008-09 year.

While the LIV considers that the DOJ data provides useful information about interpreter usage in Victoria<sup>60</sup>, it has several limitations. The DOJ data does not distinguish between interpreters used for civil and criminal proceedings and data was not available from all the sources requested, including the Supreme Court and VCAT.

In the LIV’s view, these limitations, together with the more fundamental problem that existing interpreter statistics only look at cases that receive third party assistance, make it difficult to use this data as a basis to assess the overall demand and unmet demand for civil justice interpreters.

Therefore, the LIV has attempted to obtain a better sense of the potential scale of demand for civil justice interpreters by applying the results of the 2007 DOJ survey to overall population data. The 2007 DOJ survey indicated that 35% of all adult Victorians were involved in around 3.3 million disputes in the previous 12 months. The 2007 DOJ survey’s findings were based on a representative sample of the Victorian population aged 18 years or over, which were then extrapolated to apply to the broader Victorian population based on 2001 Census figures.

To determine the potential scale of demand for Victorians who require the assistance of civil justice interpreters, the LIV has assumed that the proportion of Victorian adults who speak a LOTE are involved in civil disputes to the same extent as the broader Victorian adult population.

Therefore, the 2007 DOJ survey indicated that around 35% of the Victorian adult population are involved in civil disputes each year. On the basis of the 2001 Census figure for the adult population of Victoria (3.52 million), this represents 1.23 million adult Victorians who are involved in civil disputes each year. The LIV notes that 12% of the participants in the 2007 DOJ survey spoke a LOTE. If this 12% figure is applied to the overall Victorian adult population involved in civil disputes, this further suggests that around 148,000 adult Victorians who speak a LOTE are involved in civil disputes each year.

According to the Victorian Government, approximately one in five Victorians who speak a LOTE are likely to need an interpreter.<sup>61</sup> On this basis, the LIV projects that around 30,000 adult Victorians who require the assistance of an interpreter are involved in civil disputes each year.

58 Commonwealth Attorney-General’s Department (CAGD), *A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action*, September 2009, p 2. Accessed February 2010 at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~A+Strategic+Framework+for+Access+to+Justice+in+the+Federal+Civil+Justice+System+-+A+guide+for+future+action..pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~A+Strategic+Framework+for+Access+to+Justice+in+the+Federal+Civil+Justice+System+-+A+guide+for+future+action..pdf).

59 Ipsos Australia, *Op. Cit.*, p. i.

60 The DOJ data relevant to individual bodes is reported and analysed in Parts 2.4 through 2.8 of the Report.

61 VOMA, *op. cit.*, p. 20.

The 2007 DOJ survey also indicated that Victorians were involved in around 3.3 million disputes each year. If 35% of Victoria's population (1.23 million) are involved in around 3.3 million disputes each year, this suggests that the average number of disputes per person is around 2.7.

If it is assumed that the same proportion of people who speak a LOTE are involved in the equivalent average number of civil disputes as the broader Victorian adult population, then this suggests that adult Victorians who speak a LOTE are involved in around 400,000 civil disputes each year. If 1 in 5 of those adult Victorians require the assistance of an interpreter, then this further suggests that these adult Victorians are involved in around 80,000 civil disputes each year.

Therefore, the above analysis suggests that around 30,000 adult Victorians who require the assistance of an interpreter are involved in around 80,000 civil disputes each year.

However, the LIV considers this to be a conservative estimate as it is based on 2001 Census population figures and 12% of the total Victorian adult population speaking a LOTE to be consistent with the 2007 DOJ survey. The LIV notes that the 2006 Census indicated that 20% or over 1 million Victorians spoke a LOTE at home. Therefore, as there are some conservative assumptions built into this figure, the LIV considers that it should be treated as indicative only, and the figure may be significantly greater in practice.

On this basis, the LIV submits that, while there are limitations with the current data, it is clear there is significant unmet demand for interpreting services in the Victorian civil justice system, and that the potential scale of unmet demand requires a significant extension of existing interpreting services. The LIV recommends more detailed demand modelling as part of the package of proposed reforms to civil justice interpreting services.

## 2.3 Unmet Demand For Victorian Civil Justice Interpreters

### 2.3.1 Definition of "unmet demand"

In this Report, "unmet demand" for civil justice interpreting services refers to people or organisations that seek but do not receive these interpreting services. This may be because interpreters are unavailable, people do not have the means to pay for an interpreter or lack access to funded interpreting services.

Unmet demand for interpreting services may also be "hidden". That is, not all those who need interpreting services will necessarily come forward to seek that service or be aware that such services exist. Hidden unmet demand may involve existing clients of a service who need an interpreter but are not asking for one; or potential clients not seeking services because they are not confident the agency will be receptive to their needs.<sup>62</sup>

Examination of the extent of hidden unmet demand is beyond the scope of the Report.<sup>63</sup> However, the LIV has identified where it believes that hidden demand for civil justice interpreters exists and where, in its opinion, further investigation is required.

<sup>62</sup> *Ibid*, p. 9.

<sup>63</sup> Allen Consulting Group, *op. cit.*, p. 6. This publication refers to the LIV's "hidden unmet demand" as "unrevealed demand". It also noted that further investigation was required into the courts and tribunals area to establish the extent of unrevealed demand in this area (at pp. 14-15).

## 2.3.2 Overview of unmet demand for Victorian civil justice interpreters

### Unmet demand for civil justice interpreters based on stages of the civil justice system

The LIV has been able to identify specific areas where it believes that there is indicative evidence of unmet demand at the legal advice, ADR and court / tribunal stages of Victoria's civil justice system. This evidence is mostly qualitative in nature, including research reports, submissions, feedback from focus groups and case studies and is sourced from people working within the interpreter and legal professions. This is examined further at Parts 2.4 through 2.6.

In summary, the LIV considers that:

- in situations where lawyers provide civil legal advice to clients who require the assistance of an interpreter, the evidence suggests key areas of unmet demand for interpreters are:
  - in CLCs, in circumstances that involve the provision of complex legal advice and the preparation and review of court forms or documents;
  - where a legal aid panel lawyer sees a client before the application for legal aid has been made; and
  - where lawyers provide legal advice on a pro bono basis to their clients. Often, these clients are referred to them, for example, through a pro bono scheme.
- in the area of civil ADR, the evidence suggests that there is hidden unmet demand for civil justice interpreters due to the lack of awareness of ADR services by CALD communities. It is also likely that this unmet demand will increase over time given the Victorian Government's ongoing expansion of ADR services to resolve civil disputes;
- for all Victorian courts, the evidence suggests that there is unmet demand for civil justice interpreters given the current general court practice that parties are responsible for the provision of their own interpreters if one is required. There is specific evidence to indicate unmet demand for civil justice interpreters in the Magistrates' Court, especially for self-represented litigants, people who are represented on a pro bono basis and defendants in default judgment matters; and
- at VCAT, the level of unmet demand is likely to be less significant as VCAT currently provides access to civil justice interpreters at no cost to the user.

### Unmet demand for civil justice interpreters based on specific population groups

According to the 2006 Census, over 20% of Victorians speak a LOTE, meaning that this population group is the most likely to be affected by the unmet demand for civil justice interpreters. However, there are other groups that are also affected by this unmet demand, including Deaf people and Indigenous people. These issues are examined further at Part 2.7.

In summary, the LIV considers that:

- for Deaf people, there is unmet demand for Auslan civil justice interpreters. There is also likely to be unmet demand for civil justice interpreters for Deaf people from CALD backgrounds who have additional specific interpreting needs; and
- for Indigenous people, there is unmet demand for Indigenous cultural interpreters of Aboriginal English (AE).

Further, the LIV also considers that a person who has English language difficulties will face *compounded* barriers to justice if they fall into one of the additional population groups:

- People who are self-represented;
- Older people;
- People from rural, remote or regional locations; and
- People who speak new and emerging languages.

Combined with the evidence that suggests unmet demand for civil justice interpreters in each of the above population categories, the LIV believes that these people face particularly significant difficulties in accessing interpreters to assist them with the resolution of their civil justice disputes. These issues are examined further at Part 2.8.

## 2.4 Legal Advice Stage Of The Civil Justice Process

In civil justice matters, the availability of legal assistance is crucial to both facilitate access to justice and ensure that disputes are resolved. As noted by the VLRC's *Civil Justice Review*, an essential element of a fair legal system is the ability to access legal assistance and to obtain a fair hearing. Accessibility of the law depends on awareness of legal rights and of available procedures to enforce such rights. Consequently, when access to legal assistance is not available, meritorious civil claims or defences may not be pursued or may not be successful.<sup>64</sup>

In the LIV's view, these ideas also apply to civil justice interpreters. For people with limited English skills, an interpreter is critical at this stage of the civil justice process to enable them to obtain equitable access to legal services and, in turn, access to justice. An interpreter overcomes the language barrier by facilitating communication between lawyer and client, enabling lawyers to take proper instructions and clients to be fully advised about the merits of their case. Conversely, if an interpreter is not available at this stage of the civil justice process, the LIV submits that it is unlikely that a person will proceed with their legal claim or even seek legal advice in the first place.

In Part 2.4, the LIV evaluates the unmet demand for civil justice interpreting services for

- CLCs;
- VLA; and
- members of the private legal profession who provide pro bono legal services.

### 2.4.1 Community legal centres

#### 2.4.1.1 Civil law work of CLCs

CLCs are independent, community organisations that provide free legal advice, information and representation to more than 100,000 Victorians each year.<sup>65</sup> CLCs may be generalist or specialist. Generalist CLCs provide services on a range of legal issues to people in their local geographic area. Specialist CLCs focus on groups of people with special needs or particular areas of law such as disability or consumer law. There are currently over 50 CLCs across Victoria.

CLCs provide advice and casework services across a broad range of civil law areas.<sup>66</sup> Of these, most work is done in the areas of credit and debt, government and administrative law, which covers infringements and ombudsman issues, consumer law and complaints, motor vehicle accidents, neighbourhood disputes and wills and probate.<sup>67</sup>

<sup>64</sup> VLRC, *op. cit.*, p. 607.

<sup>65</sup> Federation of Community Legal Centres (FCLC), *Annual Report 2008-09*, p. 3. Accessed January 2010 at [http://www.communitylaw.org.au/public\\_resource\\_details.php?resource\\_id=1425](http://www.communitylaw.org.au/public_resource_details.php?resource_id=1425).

<sup>66</sup> These include motor vehicle accidents, credit and debt matters, fines and infringement notices, complaints, victims of crime compensation, work-cover, medical negligence, personal injuries, social security matters, tenancy issues, employment law, neighbourhood disputes including fencing issues, wills and probate, powers of attorney, planning law and environmental law matters. See further: FCLC, *Submission to the VLRC Civil Justice Review*, December 2006, p. 4.

<sup>67</sup> *Ibid.*, p. 4.

CLCs provide the majority of their work in civil law. For instance, in 2008-09, Victorian CLCs provided 50,265 pieces of information gave 56,634 advices and opened 21,636 cases.<sup>68</sup> Of these, around 57% involved civil law matters.<sup>69</sup> Over a 10 year period from 1996 to 2006, the civil law work of CLCs has more than doubled.<sup>70</sup>

CLCs use both on-site and telephone interpreting services to meet their interpreting needs.

### 2.4.1.2 Use of on-site interpreting services at CLCs

Victorian CLCs have a credit facility with VITS for the provision of on-site interpreting services at CLCs. This fund is administered by VLA and the Federation of Community Legal Centres' (FCLC) Access to Interpreters Working Group (the Working Group). The Working Group is responsible for making specific allocation of funds to individual CLCs and monitoring the use of those allocations. VLA is responsible for holding the funds and paying invoices.

Each year in May, the Working Group determines the allocation of funds for individual CLCs based on their expenditure and usage of interpreters from the previous financial year. CLCs are asked to judge whether their need for their allocated funds will increase or decrease from the previous year. Funds are then distributed between CLCs in accordance with their identified need. At times, these amounts may be adjusted during the year if CLCs determine that they do not need their allocation of funds and return them to the Working Group, which will then distribute them to other CLCs in need.<sup>71</sup>

### 2.4.1.3 On-site interpreting services at CLCs

As part of the VLA data provided by DOJ, the LIV obtained information about the interpreter usage of 29 CLCs. While this is not a comprehensive overview,<sup>72</sup> it is nonetheless a good representative snapshot of CLC usage of interpreters. As indicated, no data was available to specify whether an individual matter was criminal or civil in nature. However, given that over 57% of current CLC work is civil related, the LIV presumes that a similar amount was also civil in nature.

The DOJ data indicates that CLCs expended \$64,802 on on-site interpreting services in 2008-09.<sup>73</sup> Victorian CLCs sought a total of 930 services. The top 5 CLCs seeking interpreting services were in order: Casey/Cardinia (96), Peninsula (92),<sup>74</sup> Springvale (83), Broadmeadows (81), and Monash Oakleigh (65).

Of the 930 interpreting services sought by CLCs, 685 were supplied, meaning that in 26% of cases interpreters were not available. The reasons for interpreter unavailability varied. In more than half (136) of the cases, the interpreter was cancelled at short notice. Interpreters were also not available at the time of the job (46 cases) or because the booking was cancelled (54 cases). The requested interpreter or an interpreter of a particular gender was not available in 9 cases.

This interpreter unavailability had a clear impact on the top 5 CLCs that had the highest demand for on-site interpreting services. Combined, these CLCs sought 417 interpreting services but did not receive 302 or 72% of them. This particularly affected Casey/Cardinia CLC, which had 64 undelivered interpreting services, and Broadmeadows CLC, which had 62.

The VLA also provided the LIV with separate data about the expenditure and usage of on-site interpreting services in CLCs, indicating that CLCs had spent \$61,316 on interpreting services on 686 cases in 2008-09.

<sup>68</sup> Here, "information" includes referrals to another provider or providing a client with legal information such as a legal brochure; "advice" is a discrete legal advice with no follow up; and "casework" is an ongoing legal matter. See FCLC, *Annual Report 2008-09*, *op. cit.*, p. 4.

<sup>69</sup> Family law constituted 37% and criminal law 9%. As family law is a federal matter, the LIV has not counted it towards the total of CLC civil law work in the Victorian jurisdiction. FCLC, *Annual Report 2008-09*, *op. cit.*, p. 4.

<sup>70</sup> FCLC, *Submission to the VLRC Civil Justice Review*, *op. cit.*, p. 4.

<sup>71</sup> FCLC Access to Interpreters Working Group. *Victorian CLC Access to Interpreters and Translations Kit*. 2nd edition. September 2006, Chapter 3, p. 2

<sup>72</sup> There are currently 52 CLCs in Victoria – 28 generalist and 24 specialist.

<sup>73</sup> However, it is important to realise that this figure does not represent the true or total amount of expenditure by Victorian CLCs on interpreting services as it does not include CLCs' use of TIS telephone interpreting services. See further at 2.4.1.4.

<sup>74</sup> The Peninsula CLC figure includes the interpreter information for the Bentleigh branch of Peninsula CLC. These were listed separately in the DOJ data.

The LIV notes that there were some differences between the interpreter expenditure and usage figures provided by DOJ and VLA. Primarily, these variations were because the DOJ data, which was sourced from the interpreter agencies, identified all the requests for on-site interpreters made by CLCs in 2008-09. However, as the DOJ data indicates, not all of these interpreting services were actually provided. By contrast, the VLA data - which was based on invoices received by VLA - only relates to interpreting services that were actually supplied to CLCs. Additionally, the DOJ data included expenditure from circumstances where CLCs sought interpreting services, subsequently cancelled them at short notice (for an unspecified reason) and were charged some or all of the interpreter's fee by the interpreter agency. The VLA data does not include this information. Allowing for these differences, the LIV notes that there were still some slight variations in the expenditure<sup>75</sup> and usage figures<sup>76</sup> but these were minor and can be attributed to the way in which VLA records its financial expenditure.

#### 2.4.1.4 Telephone interpreting services at CLCs

While the DOJ data identifies indicative information of unmet demand for on-site interpreting services in Victorian CLCs, in the LIV's view, this does not reflect the full or true extent of the unmet demand for interpreting services in CLCs. This is because CLCs actually conduct the majority of their interpreting services through the Commonwealth Telephone Interpreting Service (TIS). TIS also provides an Automated Telephone Interpreting Service (ATIS) that enables English speaking clients to directly access an interpreter in 18 high demand languages.

TIS is offered on a fee for service basis. However, the 41 Victorian CLCs that are funded under the Commonwealth Community Legal Services Program (CCLSP) are eligible to access TIS services on a fee free basis. These services are paid for by the Commonwealth Attorney-General's Department (CAGD).

VLA figures highlight the high use of telephone interpreting by CLCs in recent years – a figure that has increased over time. For example:

- in the 2006-07 financial year, CLCs used telephone interpreting services 3823 times (ATIS 79 times; TIS 3744 times) at a cost of \$127,968 (ATIS \$2,158; \$125,810);
- in the 2007-08 financial year, CLCs used telephone interpreting services 3836 times (ATIS 1249 times; TIS 2,587 times) at a cost of \$136,570 (ATIS \$42,372; TIS \$94,198); and
- in the 2008-09 financial year, CLCs utilised telephone interpreting services 4047 times (ATIS 1,170 times; TIS 2,877 times) at a cost of \$146,326 (ATIS \$40,913; TIS \$105,413).<sup>77</sup>

By contrast, the VLA data indicated that CLCs expended \$53,942 in 2006-07, \$52,752 in 2007-08 and \$61,316<sup>78</sup> in 2008-09 for 686<sup>79</sup> on-site interpreting services through VITS. Based on this information, in the last financial year, CLCs used telephone interpreting services over 3,300 more times than on-site services - a significant difference.<sup>80</sup>

<sup>75</sup> The VLA data indicated that VLA spent \$61,316 (ex-GST) for on-site VITS interpreting services at CLCs in 2008-09. The LIV also received separate figures from VLA about its overall interpreter expenditure for 2008-09, which indicated that \$61,518 (ex-GST) had been spent on on-site interpreting services for CLCs. This difference can be explained on the basis that the \$61,316 figure was based on invoices received by VLA whereas, to the LIV's understanding, the overall VLA financial information is calculated on an accrual basis. Further, the LIV notes that the DOJ data was provided on a GST-inclusive basis and it is unknown on what basis the interpreter agencies – the source of the DOJ data – calculated their expenditure. Notwithstanding these issues, the LIV considers that the expenditure data from the two different sources is broadly consistent and does not affect the LIV's assessment of unmet demand in this area.

<sup>76</sup> The VLA data indicated that CLCs had 686 on-site interpreting services in 2008-09. The DOJ data indicated that the equivalent figure was 685. It is unclear which figure is correct. However, as the difference is only minor and makes no real difference to the LIV's calculations, the LIV has used the DOJ data for consistency in this instance.

<sup>77</sup> Information supplied by VLA – on file with the author.

<sup>78</sup> The VLA figure for CLC expenditure for 2008-09 is used here for the sake of consistency. As noted at 2.4.1.3, there are differences between this figure and the DOJ data figure of \$64,802.

<sup>79</sup> Again, the VLA figure of 686 is used here for the sake of comparison. As noted at 2.4.1.3, the figure from the equivalent DOJ data is 685.

<sup>80</sup> Information provided by VLA – on file with the author. Data about the number of interpreting services utilised by CLCs was not available for the 2006-07 or 2007-08 financial years. As some of the figures were provided on a GST exclusive basis, the LIV has calculated them on a GST inclusive basis for comparison purposes.

The strong reliance of Victorian CLCs on telephone interpreting services was also demonstrated when the funding responsibility for CLCs' use of TIS recently shifted from the Commonwealth Department of Immigration and Citizenship to CAGD. Due to the high demand for TIS services in Victoria, the FCLC and National Association of Community Legal Centres successfully advocated for increased budgets in Victoria, which were implemented in 2007-08.<sup>81</sup>

Based on stakeholder feedback received by the LIV, there is also strong anecdotal evidence that Victorian CLCs are strong users of TIS and ATIS.<sup>82</sup> While CLCs value their access to funds for on-site interpreters, their limitations mean that CLCs tend to utilise telephone interpreters much more often than face to face interpreters in order to save money. This might occur even when clients are physically present.

There are several reasons for CLCs' use of telephone interpreting over on-site interpreting. Most CLCs hold their legal advice sessions after business hours. However, it is more difficult to organise an on-site interpreter after hours, in particular, if dealing with an urgent or emergency case. Without sufficient advance warning, it can be difficult to obtain an on-site interpreter at all. In other circumstances, CLCs may wish to use a particular interpreter due to gender or cultural issues or because the CLC has a good working relationship with them. However, if that interpreter is not available at the time or only works for a particular agency, the CLC will need to seek an alternative interpreter or use their own funds to pay for the interpreter they seek.

Another factor is the expense of on-site interpreters compared with telephone interpreters. As indicated, many CLCs have the greatest need for interpreters after business hours when interpreters are more expensive. Additionally, the large number of CLCs that use interpreters means that each individual CLC often receives a funding amount from the VITS allocation that is not reflective of the true extent of its interpreting needs. Yet, CLCs must aim to keep within that amount as any overspent amount outside the allocation must be met by the relevant CLC.<sup>83</sup>

For all these reasons, Victorian CLCs carefully monitor, and are cautious about, expending their VITS allocations. CLCs tend to prioritise this funding for certain types of cases such as when a client has very poor English or has to swear, declare or affirm important documents such as court applications. However, even these face to face appointments will often only be organised after an initial consultation via a telephone interpreting service.

The current funding arrangements for on-site interpreters can have several consequences for CLCs and their clients. Due to the budgetary restrictions, access to interpreters may depend on the time of day a person attends a CLC rather than the nature of their matter. Generally speaking, telephone interpreters are used for the night legal advice service and on-site interpreters are used during the day. The Footscray CLC's website illustrates this. If a person attends the CLC evening service, people have access to TIS or, during the day, the CLC can book an on-site interpreter. However, even then, the Footscray CLC notes that it "does not have the money to provide interpreters at short notice, unless your problem is urgent, you may have to wait two weeks for an appointment at the day service".<sup>84</sup>

<sup>81</sup> FCLC, *Annual Report 2006-07*, p. 8. Accessed January 2010 at [http://www.communitylaw.org.au/public\\_resource\\_details.php?resource\\_id=233](http://www.communitylaw.org.au/public_resource_details.php?resource_id=233).

<sup>82</sup> Based on discussions with several CLCs, including St Kilda Legal Service, Springvale Monash Legal Service, Darebin Community Legal Service; VLA; LIV Focus Groups. Transcripts on file with the author.

<sup>83</sup> FCLC Access to Interpreters Working Group. *Victorian CLC Access to Interpreters and Translations Kit*. 2nd edition. September 2006, Chapter 3, p. 2

<sup>84</sup> See Footscray Community Legal Service website at: [http://www.communitylaw.org.au/clc\\_footscray/cb\\_pages/legal\\_services.php](http://www.communitylaw.org.au/clc_footscray/cb_pages/legal_services.php).

There are also budgetary consequences for CLCs with a high demand for interpreting services. This may mean that such CLCs regularly exceed their interpreter budget and have to make up the remaining cost difference themselves. SMLS is an example of this. SMLS has many CALD clients as over 50% of the population in its local area were born overseas, making it “one of the largest uses of interpreters in Victoria”.<sup>85</sup> SMLS has estimated that, based on its interpreter usage in 2009, it currently requires at least 147 interpreters per month for civil matters or 1764 per year.<sup>86</sup> As SMLS has high demand for interpreters but limited funds, it has in previous years significantly exceeded its VITS budgetary allocation despite developing policies aimed at minimising its interpreter expenses.<sup>87</sup>

More commonly, CLCs who use large amounts of interpreters will under-utilise their VITS budgetary allocation because they are conducting most, if not all, of their interpreting needs via the telephone. However, this means that the true extent of the CLCs’ demand for on-site interpreting services is not reflected in their VITS expenditure. For example, in the last ten financial years, CLCs have underspent their VITS budgetary allocation eight times.<sup>88</sup>

#### 2.4.1.5 Evaluation of unmet demand for civil justice interpreters

On the basis of the above evidence, the LIV considers that there is significant unmet demand for civil justice interpreting services in CLCs. The DOJ data demonstrates that there is existing unmet demand for on-site interpreter services in CLCs, especially for those CLCs that use interpreters the most. While the DOJ data does not distinguish between criminal and civil proceedings, FCLC statistics show that 57% of Victorian CLC work was civil related in 2008-09, suggesting that it is likely that many of those cases where interpreters were not provided in the DOJ data were for civil matters.

The strength of demand for interpreting services in CLCs is also shown through the extensive use of telephone interpreting services by CLCs. However, in the LIV’s view, it would be inaccurate to view this pattern as evidence that the civil justice interpreting needs of CLC clients are being met or that sufficient monies are being provided generally for civil justice interpreters in CLCs. From the LIV’s perspective, the high use of telephone interpreting services by Victorian CLCs actually means that the opposite is the case. In effect, the existing restrictions on funding for, and use of, on-site interpreters in CLCs has led to a very high use of telephone interpreter services.

As the Fitzroy Legal Service noted in its submission to the Commonwealth’s recent *Inquiry into Legal Aid and Access to Justice*:

*Clients of community legal centres have serious difficulties getting access to face-to-face interpreters and translators. It should be a basic right for all people to access free legal information and advice in a language that they can understand...the current interpreter arrangements are confusing, arbitrary, and cause grave injustice to people from non-English speaking or hearing-impaired communities. Interpreters should be available to CLCs for free on a needs basis: that is, available on request for all legal matters and for all community legal education sessions.*<sup>89</sup>

<sup>85</sup> Springvale Monash Legal Service (SMLS), *Submission to the Civil Justice Review*, as quoted in VLRC, *op. cit.*, p. 587.

<sup>86</sup> Information supplied by SMLS – on file with the author. SMLS estimated that for the 2009 calendar year, it had approximately 350–400 new advices per month, of which 60% needed interpreters and, of that, between 60% and 70% of these were civil matters. Based on this, SMLS estimated it had 147 civil uses of interpreters each month or 1764 per year. SMLS considers this to be a conservative estimate.

<sup>87</sup> SMLS’s interpreter policy indicates that, due to the expense of on-site interpreters, they should only be used for interviews where documents are required to be read or signed such as affidavits and court documents. These appointments need to be booked 2-3 weeks in advance. The same approach applies to SMLS’s use of telephone interpreting services. To save money, SMLS specifies that ATIS should be used over TIS for telephone interpreting services as ATIS is the cheaper option. Information provided by SMLS.

<sup>88</sup> Information provided by VLA – on file with the author.

<sup>89</sup> Fitzroy Legal Service, *Submission to the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice*, pp. 13-14. Accessed January 2010 at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/submissions/sub48.doc](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/submissions/sub48.doc).

The LIV believes that telephone interpreting is, and will remain, important for Victorian CLCs but, as indicated by Victorian government interpreter policies, telephone interpreting is most effective in certain situations such as establishing the initial nature of a legal query or to make an appointment. On-site interpreting, on the other hand, is preferable in situations where complex legal matters need to be discussed or important decisions need to be made.<sup>90</sup>

However, feedback from CLC stakeholders indicates two common situations involving legal advice where on-site interpreters would be appropriate and beneficial but – due to the lack of funding for such services – are not generally available. One situation is where a client attends a CLC with a complex legal problem. While the CLC can use telephone interpreting services to at least identify the problem, often this is not sufficient to gain a full understanding of the relevant issues and, therefore, how it should be addressed. Sometimes, the CLC determines that the client needs to return for a subsequent appointment to discuss their legal matter further or, alternatively, decides to refer the matter to a private solicitor – often on a pro bono basis. In either case, an on-site interpreter will not be readily available.<sup>91</sup> In the LIV's view, on-site interpreters are needed in these circumstances to enable CLCs to obtain a better understanding of their clients' legal problems.

Another common scenario involves self-represented litigants. People who wish to represent themselves in court often initially attend a CLC for advice and assistance. Generally, these people are seeking an explanation about the court documents and assistance with filling out court forms. As this is something that is very difficult to explain using a telephone, CLCs report that on-site interpreters are particularly needed in this situation to provide a "sight translation" of the relevant documentation.

For both the above situations, the provision of on-site interpreters is the preferable option as indicated by Victorian government policy.<sup>92</sup> Yet, the opposite is happening in practice. As telephone interpreting cannot replace the level of service provided by on-site interpreting, the LIV views this as a significant area of unmet demand for civil justice interpreting services as well as a major barrier for CLC clients to access justice – one that is occurring on an everyday basis.

The LIV also believes that another area of unmet demand for civil justice interpreters in CLCs is for community legal education (CLE) purposes. This was also identified as an area of unmet demand by Fitzroy Legal Service in its submission to the *Inquiry into Legal Aid and Access to Justice* in 2004.<sup>93</sup>

In theory, the VITS funding allocation may be utilised to fund on-site interpreters for CLEs but, in practice, it is prioritised for on-site interpreters for legal advice sessions. The Working Group suggests that CLCs use the VITS funding for urgent or unplanned CLE sessions or where a CLC believes it would be more effective to provide a CLE session in a particular area of law than offer a one-to-one advice session.<sup>94</sup>

CLE is a key element of the CLC service delivery model and is also important in addressing local community need. CLE can "increase the profile of a CLC within its community and thus lead to an increase in the numbers of clients seeking assistance".<sup>95</sup> This is reflected by the recent experience of SRV. In the past twelve months, SRV reported that it has increased its CLE presentations to CALD groups on the issue of elder abuse, a significant part of the SRV's program. Consequently, it has noticed an increase in the number of CALD clients accessing its services. The SRV envisages this number continuing to rise.<sup>96</sup>

<sup>90</sup> DOJ, *Language Service Policy: Guidelines for working with Interpreters and Translators*, *op. cit.*, p. 5. These issues are examined further at 3.2.1.

<sup>91</sup> See further at 2.4.3 regarding the unmet demand for civil justice interpreters for providers of pro bono legal services.

<sup>92</sup> See further at 3.2.1.

<sup>93</sup> Fitzroy Legal Service, *op. cit.*, pp. 13-14.

<sup>94</sup> FCLC Access to Interpreters Working Group, *op. cit.*, p. 13.

<sup>95</sup> CAGD, *Review of the Commonwealth Community Legal Services Program*, March 2008, p. 73. Accessed January 2010 at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~A00Community+Legal+Services+Program+-+Review+-+Final+Report.pdf/\\$file/A00Community+Legal+Services+Program+-+Review+-+Final+Report.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~A00Community+Legal+Services+Program+-+Review+-+Final+Report.pdf/$file/A00Community+Legal+Services+Program+-+Review+-+Final+Report.pdf).

<sup>96</sup> Information provided by SRV to the author via email dated 1 March 2010.

## 2.4.2 Victoria Legal Aid

### 2.4.2.1 Civil Law and VLA

VLA is an independent statutory authority and Victoria's largest legal aid service provider. "Legal aid" includes legal information and education, legal advice, duty lawyer services and grants of legal assistance for people to obtain legal representation either from a private practitioner or a VLA lawyer.<sup>97</sup>

The VLA Civil Law Program provides services in the areas of refugee and migration law, social security law, guardianship and administration, mental health, fines and anti-discrimination law.

However, the VLA guidelines for grants of legal representation in civil matters are restrictive. The VLA provides these grants only where the claim is more than \$5,000. The VLA also provides grants of legal assistance in cases that do not have a monetary value such as guardianship or mental health matters if there are reasonable prospects of success. In addition, applicants must also satisfy the VLA of the merits of their case and that the benefit of providing a grant of legal assistance will be outweighed by the cost of providing such a grant. Grants may also be limited to investigating the merits of the case or for mediation.<sup>98</sup>

People can also attend VLA clinics to talk to a lawyer if they need detailed legal advice. People who speak English as a second language are given priority for appointments.<sup>99</sup>

### 2.4.2.2 VLA's use of interpreters

VLA has a statutory duty to endeavour to secure the services of interpreters to assist with legal aid matters.<sup>100</sup>

The VLA's *Interpreter and Translator Policy* recognises its responsibility to use professional interpreters when providing information and legal services to the community. This policy must be followed by VLA employees when they are in contact with any person who cannot communicate effectively in English, not just people under grants of assistance.<sup>101</sup>

Specifically, VLA employees *must* arrange for and use a professionally accredited interpreter when:

1. providing legal advice or legal assistance;
2. clients are swearing court documents, e.g. affidavits;
3. working with clients at court; and
4. providing people with an explanation of VLA policies, forms or correspondence.

VLA employees *may* arrange for and use a professionally accredited interpreter for people who are not able to communicate effectively in English when:

1. providing legal information;
2. arranging a legal advice or other appointment; and
3. providing people with any other help that is related to VLA's functions and services.<sup>102</sup>

<sup>97</sup> VLA, *Grants Handbook*, 12th edition, Chapter 1, p. 1. Accessed December 2009 at [http://www.vla.vic.gov.au/gr.handbook\\_ch1.pdf](http://www.vla.vic.gov.au/gr.handbook_ch1.pdf).

<sup>98</sup> *Ibid.*, pp. 23-24. Accessed December 2009 at [http://www.vla.vic.gov.au/gr.handbook\\_ch2.pdf](http://www.vla.vic.gov.au/gr.handbook_ch2.pdf). For the complete details about the grounds upon which VLA provides grants of legal assistance for civil matters, see further: VLA, *Grants Handbook*, 12th edition, Chapter 2, Appendix 2B at [http://www.vla.vic.gov.au/gr.handbook\\_ch2.pdf](http://www.vla.vic.gov.au/gr.handbook_ch2.pdf).

<sup>99</sup> See further: VLA, *Human Rights & Civil Law Service*. Accessed February 2010 at [http://www.vla.vic.gov.au/cor.civil\\_div.pdf](http://www.vla.vic.gov.au/cor.civil_div.pdf).

<sup>100</sup> *Legal Aid Act 1978* (Vic), s. 7(h).

<sup>101</sup> It is unclear whether the VLA *Interpreter and Translator Policy* also applies to lawyers providing legal aid services through a VLA panel arrangement. While such lawyers are providing services on behalf of VLA, they are not VLA employees.

<sup>102</sup> VLA, *Interpreter and Translator Policy*, p. 3. Accessed January 2010 at [http://www.legalaid.vic.gov.au/ks.pol\\_interpreters\\_translators.pdf](http://www.legalaid.vic.gov.au/ks.pol_interpreters_translators.pdf).

### 2.4.2.3 Current and unmet demand for civil justice interpreters

Overall, the DOJ data indicated that VLA sought interpreting services on 6,718 occasions in the 2008-09 financial year at an overall cost of \$381,265.<sup>103</sup> 3,209 were for on-site interpreters and 3,509 were for telephone interpreters.

6273 interpreting services were provided and 7% or 445 were sought but not delivered. Mostly, this was due to interpreters not being available at the time the service was required (154 cases).

The LIV notes that it was difficult to identify which of the VLA cases were civil matters. While “Family Law” and “Criminal Law” were separately identified in the DOJ data, civil law cases appeared to fall within the broad category of “Family, Youth and Civil.” In this category, VLA sought 591 interpreting services at a cost of \$36,842. There was a preference for on-site interpreting services (480 cases) over telephone interpreters (111 cases) and the main language for which interpreting services were sought was Vietnamese in 14% of cases. Overall, 141 interpreter or 24% of services were not provided. The main reason for the non-delivery was that an interpreter was not available at the time of the job (65 cases).

VLA also provided separate information regarding its overall interpreter expenditure. In 2008-09, VLA spent \$392,001 on interpreting services. This included \$240,093 for payments direct to suppliers for telephone interpreters, advice and minor work and \$151,908 for interpreter disbursements under legal grants of assistance.

There were some differences between the expenditure data provided by VLA and the equivalent data provided by DOJ but the LIV considers that this makes no significant difference to its assessment of unmet demand of VLA’s civil justice interpreting services.<sup>104</sup>

### 2.4.2.4 Evaluation of unmet demand for civil justice interpreters

The DOJ and VLA data both illustrate that VLA uses a substantial amount of interpreting services. Overall, the DOJ data showed that there was a small amount of unmet demand for interpreting services – 7% - but unmet demand was more pronounced in the “Family, Youth and Civil” category where 24% of services were not provided. However, the LIV notes that it is difficult to make an accurate assessment about the extent of unmet demand for civil justice interpreters in this context without knowing how much of the “Family, Youth and Civil” category constitutes civil matters.

Nevertheless, if people have English language difficulties and fall within VLA’s guidelines for civil legal assistance, the LIV considers that the combination of VLA’s statutory duty to use interpreters and its comprehensive *Interpreter and Translator Policy* means that their interpreter needs will be generally well provided for. The problem is, however, that most people with civil legal issues do not qualify for VLA assistance and this is when difficulties arise, particularly if people do not have the means to fund their case. The current restrictions on VLA’s funding of civil legal matters have contributed to increased demand for legal assistance elsewhere in Victorian’s civil justice system.<sup>105</sup> Given that many of VLA’s current and prospective clients are from CALD backgrounds,<sup>106</sup> the LIV considers that this development has also contributed to an increased demand for interpreters in the wider civil justice system to enable people not qualifying for VLA assistance to receive proper legal advice. However, this is a demand that, in the LIV’s view, is often unmet.

<sup>103</sup> While the VLA data provided by DOJ included information about CLCs, the LIV has extracted this and analysed it separately at 2.4.1.

<sup>104</sup> The VLA’s overall interpreter expenditure figure of \$392,001 (ex-GST) varies from the DOJ data expenditure total of \$381,265 (GST-inclusive). The LIV attributes this variation to the VLA’s accrual accounting method for its expenditure. The LIV is unaware on what basis the interpreter agencies calculated their expenditure data. It is also difficult to directly compare the two datasets as the DOJ expenditure data is organised according to where the interpreter service was delivered, for example, VLA’s Sunshine office. The VLA interpreter expenditure data, however, is organised according to the purpose for which it was paid, for example, grants of legal assistance.

<sup>105</sup> See further at 3.1.2.

<sup>106</sup> For example, in 2008-09, 11% of VLA grants of legal assistance were given to people born in a non-English speaking country and 3213 calls were made to the VLA’s free telephone Legal Information Service seeking legal advice in a LOTE. See further: VLA, *Annual Report 2008-09*, p. 14. Accessed January 2010 at [http://www.legalaid.vic.gov.au/cor.ar\\_08-09.pdf](http://www.legalaid.vic.gov.au/cor.ar_08-09.pdf).

Further, VLA has identified one specific area of unmet demand for civil justice interpreters. Situations may arise where no interpreter is provided at the first consultation with a private lawyer who is on a legal aid panel (before the application for legal aid has been made). In some instances, where VLA has referred the client due to a conflict, VLA arranges for and pays for an interpreter. However, many other people are forced to rely on a friend or their own limited language skills in this first session, which is inappropriate in terms of achieving access to justice.<sup>107</sup>

### 2.4.3 Pro bono work of the private legal profession

#### 2.4.3.1 Pro bono civil work of private legal profession

In Victoria, the private legal profession offers legal advice and representation for civil matters. Often, lawyers will advise and represent their clients on a pro bono basis.<sup>108</sup>

Lawyers may receive pro bono work through a formal pro bono referral scheme such as the Public Interest Law Clearing House (PILCH). A CLC, PILCH acts a facilitator for pro bono legal assistance between the community and the private legal profession. It assists people who satisfy legal means and merits tests and who are ineligible for legal aid.<sup>109</sup> Currently, PILCH coordinates the delivery of pro bono legal services through six different schemes.<sup>110</sup>

Alternatively, lawyers may undertake civil pro bono work outside formal pro bono schemes. As reported by the National Pro Bono Resource Centre, the “majority of pro bono work being done in Australia is done by lawyers in their private capacity. Small firms account for a large proportion of pro bono work conducted in Australia, but perform this work outside formal schemes.”<sup>111</sup>

According to the *Civil Justice Review*, it is difficult to assess the amount of civil pro bono work undertaken by the Victorian legal profession due to the ad hoc nature of the majority of that assistance.<sup>112</sup> Nevertheless, a recent survey of pro bono legal providers in Victoria provides some indication about this. Of the 200 Victorian lawyers surveyed, 85% had undertaken pro bono legal work in the last 12 months and, of these, civil matters accounted for the majority of work undertaken. Debt and consumer law alone accounted for 66% of the work undertaken by these solicitors.<sup>113</sup>

#### 2.4.3.2 Evaluation of unmet demand for civil justice interpreters

In the LIV’s opinion, there is unmet demand for civil justice interpreters at the time when providers of pro bono legal services are taking instructions from their clients. Feedback from the LIV Focus Groups confirmed this gap in the provision of interpreting services. As their clients cannot afford to employ interpreters, often pro bono legal advisers will ask staff or family members to interpret for the client instead.<sup>114</sup>

<sup>107</sup> VLA, *Comments on LIV Interpreting Fund Scoping Project: Options Paper*, 22 December 2009, p. 1.

<sup>108</sup> According to the LIV’s *Pro Bono Policy*, pro bono work includes situations where a lawyer:

1. without fee or at a substantially reduced fee, advises and/or represents a client in cases where
  - a. the client has no other access to the courts or the legal system, or where such access is inadequate; and or
  - b. the client’s case raises a wider issue of public interest;
2. is involved in free community legal education and/or law reform; and
3. is involved in the provision of free legal advice and/or representation to charitable and community organizations. See further: LIV, *LIV Policy Statement: Pro Bono Work*. Accessed February 2010 at <http://www.liv.asn.au/PDF/About/Governance/2008JanProBonoLIVPolicy.aspx>.

<sup>109</sup> Public Interest Law Clearing House (PILCH) website, *About PILCH*. Accessed February 2010 at <http://www.pilch.org.au/about>.

<sup>110</sup> These are: (1) the Public Interest Law Scheme; (2) the Victorian Bar Pro Bono Scheme; (3) the LIV Legal Assistance Scheme; (4) the Homeless Persons’ Legal Clinic; (5) PILCH Connect – a specialist service for community organisations; and the Seniors Rights Legal Clinic. For more information on these, see PILCH’s website at <http://www.pilch.org.au>.

<sup>111</sup> National Pro Bono Resource Centre, *Submission to the Civil Justice Review* as quoted in VLRC, *op. cit.*, p. 611.

<sup>112</sup> *Ibid.*, p. 611.

<sup>113</sup> National Pro Bono Resource Centre, *Report on the pro bono legal work of individual Australian Solicitors*, December 2007, Appendix V, Responses to Survey Questions; Victoria. Accessed January 2010 at <http://www.nationalprobono.org.au/ssl/CMS/files/cms/AppendixV-SurveyResponsesVic.pdf>.

<sup>114</sup> The LIV considers that it is preferable to always use professional interpreters – if available – rather than family members or staff in this situation. See further Part 4, 4.2.1.

Evidence given to the Commonwealth Senate's recent *Inquiry into Access into Justice* indicated that some of the larger firms that do pro bono work allocate a small amount of funds of around \$300 to \$500 to meet the costs of disbursements such as interpreter fees. These funds, however, disappear very quickly if used solely for the cost of interpreters. Also, this kind of arrangement does not exist in smaller firms that provide pro bono services.<sup>115</sup>

PILCH has also identified that there is an unmet demand for civil interpreting services when it makes pro bono referral requests to the legal profession. While PILCH itself has access to interpreting services when assisting people to make applications for pro bono legal services, it has indicated that there is no current funding available to enable private practitioners who receive pro bono referrals from PILCH to pay for interpreter fees. On many occasions, therefore, PILCH has been unable to refer matters to pro bono practitioners in circumstances where clients would need an interpreter. While the lawyers were willing to provide their own legal services for free, they were unwilling or unable to meet the out-of-pocket expenses of the interpreting services.<sup>116</sup> In PILCH's view, this creates a "significant barrier to progressing the matter further and may result in a client not pursuing a meritorious claim".<sup>117</sup>

In the LIV's opinion, there is strong evidence to indicate that there is unmet demand for civil justice interpreters in situations where pro bono legal advisers are seeking instructions from clients who have limited English. It may often be the sole reason why some civil matters do not progress very far or are abandoned altogether, leading to inequitable and unjust outcomes for the parties concerned. Indeed, the consequences for pro bono clients who seek but are denied access to civil justice interpreters due to lack of funds are one of the reasons that the VLRC proposed the establishment of the Interpreting Fund in the first place.

## 2.5 Alternative Dispute Resolution Stage Of The Civil Justice Process

### 2.5.1 Increased emphasis on ADR in Victoria

ADR<sup>118</sup> can be a means of resolving civil disputes quickly and cheaply without the need to resort to litigation, saving time and money and reducing stress. ADR is also often more satisfying for the participants than other dispute resolution methods.<sup>119</sup>

In recent years, the Victorian Government has placed increasing emphasis on ADR to reduce the cost, time and expense of civil disputes and potentially avoid litigation. Consequently, the government has embarked on programs to expand ADR capacity in Victoria. Courts are also expanding their ADR capacity through programs of voluntary and compulsory mediation attached to particular lists in order to assist with the earlier resolution of civil matters.<sup>120</sup>

<sup>115</sup> Senate Legal and Constitutional Affairs Reference Committee Access to Justice Inquiry, *Transcript of evidence from Mr John Corker, President, National Pro Bono Resource Centre*, Friday 11 September 2009, Sydney, p. 60. Accessed January 2010 at <http://www.aph.gov.au/hansard/senate/commtee/S12430.pdf>.

<sup>116</sup> PILCH, *Submission to the Victorian Law Reform Law Commission Civil Justice Review*, 15 December 2006, p. 24. Accessed December 2010 at <http://www.pilch.org.au/Assets/Files/PILCH%20Submission%20to%20Civil%20Justice%20Review.pdf>.

<sup>117</sup> PILCH, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into Access to Justice*, 30 April 2009, pp. 11-12. Accessed January 2010 at <http://www.pilch.org.au/Assets/Files/PILCH%20Submission%20on%20the%20inquiry%20into%20Access%20to%20Justice.pdf>.

<sup>118</sup> ADR can be defined in various ways. The National Alternative Dispute Resolution Advisory Council (NADRAC) has defined ADR as an "umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them". Some methods, such as mediation, involve seeking resolution by agreement reached between the parties. Other methods for resolving disputes, such as arbitration, may involve binding determination by a third party. There are also a variety of "alternative" means by which judicial officers may involve independent third parties to assist in the resolution of cases that are being litigated. See further: VLRC, *op. cit.*, p. 212.

<sup>119</sup> VLRC, *op. cit.*, p. 214.

<sup>120</sup> See, for example, DOJ, Justice Statement 2, *op. cit.*, pp. 39-42.

## 2.5.2 Language barriers to accessing ADR

The diverse nature of Victoria's population means that people from different backgrounds and cultures are increasingly more likely to be involved in ADR processes. Yet, as noted by the recent Victorian Parliament Law Reform Committee's (VPLRC) *Inquiry into ADR Services and Restorative Justice*:

*Both the academic literature and evidence from stakeholders in this Inquiry suggest that language can be a significant barrier to some members of the community accessing ADR services. Language barriers may be a problem for both native English speakers as well as people from non-English speaking backgrounds.*<sup>121</sup>

While the VPLRC acknowledged that Victorian ADR service providers had already implemented a range of strategies to assist people from CALD backgrounds with language issues, it also indicated that "evidence received suggested that language barriers may still prevent significant segments of the community from accessing ADR services".<sup>122</sup>

Therefore, the VPLRC proposed that the Victorian Government should require all government ADR providers, and encourage all other ADR providers, to provide support for people with limited English language or literacy skills; and, in consultation with relevant community organisations, develop resources to assist ADR practitioners to work with people who have language and literacy issues.<sup>123</sup>

The Victorian Government is considering its response to these proposals as part of the government's response to the *Civil Justice Review* report and through the work of the DOJ's ADR Directorate.<sup>124</sup>

## 2.5.3 Cultural issues and ADR

ADR processes are increasingly seen as useful to address situations where conflict has a cultural component.<sup>125</sup> For instance, ADR can play a valuable role in dealing with some of the tensions arising in recently arrived CALD communities. The VMC, for example, identified that African-Australian communities who have recently arrived under the Federal Government Humanitarian Program have experienced issues regarding acute dislocation of their traditional social and community values and practices which may, in turn, give rise to additional tensions. People within these communities may find themselves in dispute, for example, over the establishment and direction of their community organisations. In these circumstances, ADR can play a valuable facilitative role to resolve a dispute that might otherwise lead to litigation.<sup>126</sup>

However, involving members from CALD communities may require addressing misconceptions about ADR from within the community that it is intended to benefit. For instance, research indicates that some African community members viewed mainstream mediation as inappropriate because it did not take account of traditional community roles or concepts of family.<sup>127</sup>

## 2.5.4 Dispute Settlement Centre Victoria and Victorian Equal Opportunity and Human Rights Commission

The LIV has examined unmet demand for civil interpreting services for the following legal service providers:

- Dispute Settlement Centre Victoria (DSCV); and
- Victorian Equal Opportunity and Human Rights Commission (VEOHRC).

<sup>121</sup> Victorian Parliament Law Reform Committee (VPLRC), *Inquiry into ADR and Restorative Justice*, May 2009, p. 89. Accessed January 2010 at <http://www.parliament.vic.gov.au/lawreform/inquiries/ADR/ADR%20final%20report.pdf>.

<sup>122</sup> *Ibid.*, p. 92.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Government Response to Parliament of Victoria Law Reform Committee Inquiry into Alternative Dispute Resolution and Restorative Justice*, 10 November 2009, p. 5. Accessed January 2010 at <http://www.parliament.vic.gov.au/lawreform/inquiries/ADR/govt%20resp.pdf>.

<sup>125</sup> Tania Sourdin, *Alternative Dispute Resolution*, 3rd ed., 2008, Lawbook Co: New South Wales, p. 316.

<sup>126</sup> VMC, *Alternative Civil Dispute Resolution: A submission to the Victorian Parliament's Law Reform Committee*, p. 2. Accessed January 2010 at <http://www.parliament.vic.gov.au/lawreform/inquiries/ADR/submissions/ADR-34-VMC.pdf>.

<sup>127</sup> *Ibid.*, p. 10.

The LIV notes that Victorian courts and VCAT also provide ADR services, which may use interpreters. The Magistrates' Court civil court mediation pilot program is examined under the DSCV at 2.5.4.1, as DSCV is the provider of interpreting services for this program. VCAT mediation services are examined at 2.6.4. The LIV has not examined interpreter usage in civil ADR services in the County or Supreme Courts as no information was available about this.

### 2.5.4.1 Dispute Settlement Centre Victoria

#### Use of interpreting services

The Dispute Settlement Centre Victoria (DSCV) is one of Victoria's main providers of ADR services. Its role is to provide an informal, low cost dispute resolution service to all Victorians, to assist people to be responsible for the resolution and outcome of their own disputes and to provide an alternative to legal action.

DSCV deals with a wide range of civil disputes, including civil actions before the Magistrates', County and Supreme Courts, neighbourhood disputes including problems with fences, trees and noise, disputes involving bodies corporate, clubs and incorporated associations.

The DOJ data indicates that in 2008-09, there were 451 requests for interpreting services, at a total cost of \$22,886.18. 81 involved on-site interpreting services and 370 were for telephone interpreters. Of these, 417 interpreting services were delivered. The main reason for non-delivery was that the interpreting services were cancelled by DSCV in 18 cases and the interpreter was not available at the time of the job in 13 cases.

The DSCV also separately provided the LIV with statistics about its use of interpreters in matters referred to mediation.<sup>128</sup> From 2004–2009, 9162 matters were referred to mediation.<sup>129</sup> Of these, in 630 or 7% of matters, parties were from a CALD background. 557 parties required interpreters and 65% of these were for the party seeking the mediation. In 2008-09, 109 or 5% of people referred to mediation were from CALD backgrounds.

In 2008-09, established language communities such as Italian and Greek were high users of telephone interpreting services whereas newer language communities such as Arabic, Dinka and Spanish sought to use interpreters on a face to face basis for mediations. The most common languages for which interpreters were sought were: Italian, Vietnamese, Dinka, Arabic, Macedonian, Cantonese, Turkish and Mandarin.

While there is some variation between the DOJ data and DSCV's figures, this can be explained on the basis that the DOJ data applies to all DSCV interpreting service requests in 2008-09 and the data supplied by DSCV applies only to cases referred to mediation in 2008-09. The DSCV data, therefore, does not identify all the people who phoned DSCV and required telephone interpreting services to access general information about DSCV's services. As indicated by the DOJ data, telephone interpreting services represented 82% of the total in 2008-09 – a substantial proportion of DSCV's use of interpreting services.<sup>130</sup>

#### Court annexed mediation in the Magistrates' Court

In 2007, the Chief Magistrate introduced a new pilot program in the Broadmeadows Magistrates' Court where all defended civil claims under \$10,000<sup>131</sup> were referred to compulsory mediation. Under this program, interpreters – if required – were arranged by the DSCV at no cost.<sup>132</sup>

<sup>128</sup> This information was supplied separately to the DOJ data.

<sup>129</sup> However, because participation in DSCV mediation is voluntary, not all these matters proceeded to mediation. The number which did not proceed is unknown.

<sup>130</sup> It is unknown how many of these requests for general information about DSCV services led to actual mediations.

<sup>131</sup> This was increased to \$40,000 from 2 April 2009.

<sup>132</sup> Magistrates' Court of Victoria. *Practice Direction No. 6 of 2007. Mediation Pilot Programme*, p. 4.

The Broadmeadows pilot program was a success. It had a settlement rate of 86%, reduced the need for magistrate hearing time and provided speedier turnaround times for civil disputes. The evaluation of the project pilot recommended expansion across Victoria and for all civil cases, estimating it would save the time of up to 9 magistrates.<sup>133</sup> The Magistrates' Court is now expanding the scheme to Sunshine, Werribee and the Latrobe Valley.<sup>134</sup>

It is unknown if interpreters were actually utilised during the trial of the Broadmeadows pilot scheme.<sup>135</sup> However, the LIV submits that it is highly likely that interpreters will be needed in these mediation schemes on an ongoing basis due to their expansion to demographic areas such as Sunshine where interpreting services are commonly sought by the Magistrates' Court.<sup>136</sup>

#### 2.5.4.2 Victorian Equal Opportunity and Human Rights Commission

The VEOHRC is an independent body set up to eliminate unlawful discrimination and promote equal opportunity. VEOHRC investigates complaints lodged under the *Equal Opportunity Act 2005 (Vic)* and *Racial and Religious Tolerance Act 2001 (Vic)* and, as part of that process, offers a confidential and free conciliation process. If conciliation is unsuccessful, VEOHRC may refer a complaint to VCAT's Anti-Discrimination List.<sup>137</sup>

The DOJ data shows that VEOHRC requested 117 interpreting services in 2008-09 at a cost of \$9526. 52 were on-site services and 65 were by telephone. All interpreting services were provided as requested. The languages in order of priority were Vietnamese, Mandarin, Dinka, Japanese and Auslan.<sup>138</sup>

### 2.5.5 Evaluation of unmet demand for civil justice interpreters

Victoria has a large LOTE population – the 2006 Census indicated that over 20% of Victorians or over 1 million people speak a LOTE.<sup>139</sup> Yet, based on the above information, there is limited evidence of unmet demand for civil interpreters in the ADR context. The DOJ data indicated that VEOHRC received all the interpreting services that it requested and the DSCV data suggested an overall low rate of demand for interpreting services – 7% over 6 years. However, as noted, this figure does not reflect the number of people who sought general information about DSCV's services.

The LIV considers that these low figures may be attributed to several factors: the specific nature of VEOHRC disputes and, for both DSCV and VEOHRC, that the relevant ADR process is generally voluntary. More particularly, the LIV believes that the low participation rate of CALD communities in the above ADR services is due to their limited awareness of them. For instance, DSCV statistics show that 70% of people learn about its services through their local council.<sup>140</sup> In the LIV's view, if people have difficulty speaking English, they are unlikely to learn about services such as the DSCV through this source.<sup>141</sup> The VPLRC has also identified a lack of awareness of ADR services, and of DSCV specifically, as a barrier to people accessing those services. Given the Victorian Government's ongoing expansion of DSCV, the VPLRC indicated that increasing Victorians' knowledge of DSCV's services is especially important.<sup>142</sup>

<sup>133</sup> Transformation Management Services. *Court-Annexed Mediation: Broadmeadows Pilot – Evaluation*, October 2008, p. 2. Accessed December 2009 at [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb974205f31aa2a/Broadmeadows\\_Evaluation\\_%20Report.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb974205f31aa2a/Broadmeadows_Evaluation_%20Report.pdf).

<sup>134</sup> See further: Mediation Pilot at Broadmeadows, Sunshine, Werribee and Latrobe Valley Magistrates' Courts at <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Civil+and+Money+Matters/Procedural+Information/MAGISTRATES+-+Mediation+Pilot+-+Broadmeadows+Sunshine+Werribee+Latrobe+Valley>. All these mediation schemes currently have a limit of \$10,000.

<sup>135</sup> For example, there was no mention of interpreters in the evaluation of the Broadmeadows civil mediation pilot program.

<sup>136</sup> In 2008-09, the DOJ data indicated that the Magistrates' Courts in Sunshine, Latrobe Valley and Werribee sought a combined total of 1175 interpreting services.

<sup>137</sup> At the time of writing, the Equal Opportunity Bill is due to be tabled in Parliament. The Bill is expected to change the emphasis in service provision at the VEOHRC to ADR generally and to allow people to initiate proceedings in VCAT directly without using ADR services at VEOHRC. VCAT is expected to continue, however, to refer disputes to mediation.

<sup>138</sup> However, not all languages were recorded for VEOHRC in the DOJ data.

<sup>139</sup> Victorian Government, *All of Us: Victoria Multicultural Policy*, *op. cit.*, p. 10.

<sup>140</sup> DSCV, *Information Kit 2009*, p. 22. Accessed January 2010 at <http://www.justice.vic.gov.au/wps/wcm/connect/12a7e500404a539a98a0fbf5f2791d4a/Dispute+Settlement+Centre+Information+Kit+2009.pdf?MOD=AJPERES>.

<sup>141</sup> The VPLRC's *Inquiry into ADR and Restorative Justice* made recommendations about increasing awareness of ADR in the CALD community. These were accepted by the Victorian Government. See further: *Government Response to VPLRC's Inquiry into ADR and Restorative Justice*, 10 November 2009, p. 18 at <http://www.parliament.vic.gov.au/lawreform/inquiries/ADR/govt%20resp.pdf>.

<sup>142</sup> VPLRC, *Inquiry into ADR and Restorative Justice*, *op. cit.*, p. 95.

On this basis, the LIV believes that there is unmet demand for civil interpreters in Victorian ADR matters but, at this stage, it represents hidden unmet demand - that is, it appears that CALD people are not generally aware of the availability and potential benefits of ADR services.

The LIV also considers that there is likely to be ongoing unmet demand in the future for civil justice interpreters in ADR. This is due to the Government's ongoing emphasis on ADR with the expansion of ADR schemes in Victorian courts and tribunals. There is also an increased focus on expanding ADR to regional areas.<sup>143</sup> Nevertheless, the LIV also notes the current lack of available interpreter data for both these areas, making it difficult to assess the current and future need for these interpreting services.<sup>144</sup>

Another factor that may influence future ADR provision will be the potential introduction of mandatory ADR. One of the VLRC's recommendations in the *Civil Justice Review* was for Victorian courts to have the power to order the parties to non-binding ADR with or without the parties' consent.<sup>145</sup> Commentators have raised concerns, however, that this proposal has the potential to be detrimental to people who already lack access to justice through communication difficulties, such as people with limited English. For instance, the FLC has submitted that if "mandatory ADR is introduced, it must be accompanied by appropriate legal and related support for low-income parties, to allow them to participate on equal terms with better resources and more legally sophisticated opponents...CALD parties must have access to interpreting services...if they are to participate on an equal footing."<sup>146</sup>

## 2.6 Courts And Tribunal Stage Of The Civil Justice Process

### 2.6.1 Magistrates' Court

#### 2.6.1.1 Use of interpreters

Currently, the Magistrates' Court will provide and pay for an interpreter for criminal proceedings.<sup>147</sup> It is generally up to the parties to provide an interpreter as needed for civil proceedings.<sup>148</sup>

However, as noted in Part One, the Magistrates' Court does in practice provide interpreters for family violence intervention orders and victims of crime compensation applications, which are – at law – civil matters. VLA will also provide an interpreter for the Magistrates' Court if a party has obtained legal aid.

<sup>143</sup> *Government Response to PVLRC's Inquiry into ADR and Restorative Justice*, 10 November 2009, pp. 7-8 at <http://www.parliament.vic.gov.au/lawreform/inquiries/ADR/govt%20resp.pdf>.

<sup>144</sup> All courts and VCAT provide general information about their use of ADR processes such as mediations in their annual reports and on their websites. However, there is no specific information available about the use of interpreters in these ADR processes.

<sup>145</sup> VLRC, *op. cit.*, p. 284.

<sup>146</sup> FLC, *Submission to the National Dispute Resolution Advisory Council*, May 2009, p. 2. Accessed January 2010 at [http://www.communitylaw.org.au/public\\_resource\\_details.php?resource\\_id=1364](http://www.communitylaw.org.au/public_resource_details.php?resource_id=1364)

<sup>147</sup> However, the Magistrates' Court website is misleading on this point as it indicates that the Magistrates' Court will "provide you with, and pay for an interpreter at your hearing. Before your hearing, you must contact the Court where your hearing will be to request an interpreter. The Court will then book an interpreter to be at your hearing." The website does not specify that this is only for criminal matters. A person might assume that this practice applies equally to Magistrates' Court civil matters. See further: <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/magistrates+court/find/translations/magistrates+-+translations+and+interpreters>.

<sup>148</sup> See Part 1.2.4.

### 2.6.1.2 Current demand for civil justice interpreters

Based on the DOJ data, the Magistrates' Court sought interpreting services on 8039 occasions in 2008-09 for a total cost of \$1,422,295. Of these, 96% were for on-site interpreters and 4% for telephone interpreters.<sup>149</sup> The greatest language of demand was Vietnamese, for which 1,747 interpreting services were sought. Demand for interpreting services was greatest at the Melbourne Magistrates' Court (2096 cases), Dandenong Magistrates' Court (1,246 cases) and Sunshine Magistrates' Court (1,049 cases). Outside of Melbourne, demand for interpreting services was strongest at Geelong (130 cases) and Mildura (40 cases).

Although the DOJ data does not state whether the matters were criminal or civil in nature, it is probable that most of the interpreters provided for the Magistrates' Court were for criminal matters, given the Court's current practice regarding interpreters.

However, the DOJ data did indicate that, in 2008-09, there were 13 interpreting services sought specifically for Victims of Crime Assistance Tribunal matters, which are civil matters. All the interpreting services sought were for telephone interpreting services. 2 were not delivered due to the short notice of the interpreter request.

### 2.6.1.3 Evaluation of unmet demand for civil interpreters

According to the DOJ data, the Magistrates' Court did not receive 523 of the 8039 interpreting services that it sought – a non-delivery rate of 7%. The main reasons for this non-delivery were that an interpreter was not available at the time of the job (233 cases), that the interpreter was cancelled (216 cases) or that the interpreter was cancelled at short notice (67 cases).

On the basis of the DOJ data, the unmet demand for interpreting services in the Magistrates' Court does not appear significant. However, the LIV considers that the DOJ data does not illustrate the true extent of unmet demand for civil justice interpreters. While there were only 13 VOCAT matters that could be specifically identified as civil from the DOJ data, it is possible to attribute this low number to people from CALD backgrounds being unaware of their rights rather than there being no unmet demand at all for interpreters in this area.<sup>150</sup>

Notwithstanding this, from the LIV's perspective, other sources of evidence combine to demonstrate that there is unmet demand for civil justice interpreters in the Magistrates' Court, which has the heaviest civil court workload in Victoria.<sup>151</sup>

## Default judgments

One source of evidence is default judgments made against defendants in the Magistrates' Court.<sup>152</sup> Default judgments are commonly issued in matters involving motor car accidents and money matters, many of which only involve small amounts of money.<sup>153</sup> Default judgments constitute a significant part of Magistrates' Court civil court business. In 2008-09, of the 69,259 claims that were issued or filed in the Magistrates' Court, 55% or 38,128 claims were finalised through a default judgment.<sup>154</sup>

<sup>149</sup> The DOJ data included information from the Federal Magistrates Court as part of its dataset for the Victorian Magistrates' Court. Given this is a Commonwealth court, the LIV did not include this information when analysing the data for the Victorian Magistrates' Court.

<sup>150</sup> Jelena Popovic, *Migrants and Crime – A Magistrates' Perspective, Multiculturalism and the Law*, Australian Institute of Criminology, 1995, p. 3. Accessed March 2010 at [http://www.aic.gov.au/events/aic%20upcoming%20events/1993/~/\\_media/conferences/multiculturalism/popovic.ashx](http://www.aic.gov.au/events/aic%20upcoming%20events/1993/~/_media/conferences/multiculturalism/popovic.ashx).

<sup>151</sup> In 2008-09, there were 69,259 civil complaints filed in the Magistrates' Court. This number will be higher still if family violence orders – which the Magistrates' Court treats as civil applications – are included. In 2008-09, there were 28,635 family violence applications, making a total of 97,894 civil matters. See further: Magistrates' Court of Victoria, *Annual Report 2008-09*, p. 22. Accessed January 2010 at <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/magistrates+court/home/about+the+court/magistrates+-+annual+report+2008-09>.

<sup>152</sup> A plaintiff is entitled to request a default judgment if a Notice of Defence has not been filed within 21 days from the original date of service of the claim.

<sup>153</sup> Of the 30,814 complaints for civil consumer debt matters finalised in 2005-06, over 98% were finalised by way of default judgment. Of the 25,885 civil consumer debt claims for less than \$10,000, again over 98% were finalised by default judgment. This represented 61% of all default orders made by the Magistrates' Court in 2005-06 and 50% of all civil matters finalised by the Magistrates' Court during this period. See further: Louis Schetzer, *The legal needs of people facing civil consumer debt problems*, July 2008, Department of Justice, Victoria, pp 40-41. Accessed January 2010 at <http://www.justice.vic.gov.au/wps/wcm/connect/984d0700410b77b7988ede0ffb994a81/CourtingDebt.pdf?MOD=AJPERES> pp. 40-1.

<sup>154</sup> Magistrates' Court of Victoria, *2008-09 Annual Report*, p. 23. Accessed February 2010 at [http://www.magistratescourt.vic.gov.au/wps/wcm/connect/a18fc50040bf03e6b464bd55d2030319/Annual\\_Report\\_08-09.pdf?MOD=AJPERES](http://www.magistratescourt.vic.gov.au/wps/wcm/connect/a18fc50040bf03e6b464bd55d2030319/Annual_Report_08-09.pdf?MOD=AJPERES).

Feedback from CLCs indicates that, in their experience, many of these default judgments are likely to involve defendants with English language difficulties who do not necessarily have any experience of court or an understanding of the matter in which they have become involved. Most of these people are also not represented and, due to current Magistrates' Court practice, do not have access to an interpreter.<sup>155</sup> The case study of Ms S below demonstrates the kinds of difficulties that default judgment matters can present for litigants with limited English.

To fully understand the extent to which people from CALD backgrounds are involved in civil default judgment matters and the impact it has upon them, the LIV submits that further investigation into this area is needed.

### Case studies

Another source of evidence is case studies. The following three case studies illustrate some of the difficulties that arise for both Magistrates' Court litigants and their representatives when people do not have the means to pay for an interpreter. The case studies also illustrate the range of people affected by the lack of an interpreter, such as people from CALD backgrounds, older people and people who are legally represented on a pro bono basis.

The first case study is that of Mr X, which was provided by SMLS to the LIV as part of the Project. Mr X was an elderly CALD client with little money. Mr X was unable to afford an interpreter for his Magistrates' Court matter and ultimately had to borrow money from friends to have access to one.

*Mr X was a Korean national, approaching 80 years of age and had no English communication skills. Mr X came to Australia to visit his daughter who was seriously ill. Mr X was on a pension from the Korean Government, which was the equivalent of \$300 AUD a month.*

*While visiting his daughter, Mr X sought to recover an earlier loan made to his daughter's ex husband. He engaged a local Korean speaking solicitor. The solicitor obtained a decision in Mr X's favour but, as Mr X was unable to pay his legal costs, a costs dispute subsequently developed between Mr X and his solicitor.*

*Mr X's solicitor then issued proceedings against Mr X in the Magistrates' Court and Mr X (as a defendant) then had to find an appropriate interpreter for all his appearances. Due to his lack of money, Mr X relied on pro bono interpreters but this was problematic, as from time to time, these interpreters would pull out. In the end, Mr X had to borrow money from family friends to pay for professional interpreters at short notice.*

The second case study of Mr C was provided by PILCH to the VLRC's *Civil Justice Review*:<sup>156</sup>

*Mr C was the defendant in civil proceedings arising from a car accident. He did not speak any English. However, VLA determined he was not eligible for assistance. He was referred to a pro bono solicitor and barrister to represent him at the hearing in the Magistrates' Court. The barrister paid for an interpreter to be present in court out of his own pocket as the court would not provide an interpreter.*

In the LIV's view, Mr C's case study illustrates the unmet demand for civil justice interpreters where CALD clients are being represented by lawyers on a pro bono basis. Generally, these clients cannot afford to pay for an interpreter at the Magistrates' Court hearing. However, this may mean that pro bono legal provider may withdraw their services at this stage, preventing the matter from progressing any further. In its submission to the *Civil Justice Review*, PILCH stated that it had "dealt with many parties to court proceedings whose ability to participate in the legal process [was] undermined because they cannot afford to arrange for the services of an interpreter to attend court hearings".<sup>157</sup>

<sup>155</sup> Based on interviews conducted with SMLS and Darebin Community Legal Centre; Transcripts on file with the author.

<sup>156</sup> VLRC, *op. cit.*, pp. 587-8.

<sup>157</sup> PILCH, *Submission to the Victorian Law Reform Law Commission Civil Justice Review, op. cit.*, p. 23.

The third case study of Ms S<sup>158</sup> was provided by CALC to the VLRC's *Civil Justice Review*:

*Ms S was a client represented by CALC. Ms S did not fully understand English and had a complaint issued against her in the Magistrates' Court, claiming a \$300 debt. Ms S was also required to pay \$293 costs in a default judgment. Failing to understand the nature of the judgment and the direction to pay, Ms S did not pay. The plaintiff took further action to enforce the claim, leading to a large increase in the amount of legal costs. A warrant for seizure and sale of Ms S's home was made to satisfy the amount of \$2,315.20. Consequently, a \$300 claim led to legal costs of over \$2000 under the present system.*<sup>159</sup>

As pointed out by CALC, the case of Ms S illustrates the undesirable financial consequences that can occur for defendants involved in Magistrates' Court civil debt matters. Often the legal cost of debt matters may exceed the amount of the claim, resulting in litigants being liable for large legal bills.<sup>160</sup> In the LIV's opinion, if an interpreter had been available at the Magistrates' Court to explain the nature of the default judgement to Ms S, this outcome would not have occurred.

On the basis of the above evidence, the LIV submits that there is clear unmet demand for civil justice interpreters in the Magistrates' Court. However, as the full extent of this demand is unknown at this stage, the LIV recommends that further investigation be undertaken into this area.

## 2.6.2 County Court

### 2.6.2.1 Current demand for civil justice interpreters

The DOJ data indicated that the County Court sought interpreting services 15 times for a total cost of \$508.20 in 2008-09. All the interpreting services were delivered as required and were conducted by telephone.

However, this figure does not represent the total number of interpreting services utilised in the County Court in 2008-09. This is because the Office of Public Prosecutions (OPP) books and pays for interpreters when required for criminal matters.<sup>161</sup> The LIV did not seek information about the OPP's use of interpreters for the purposes of this Report.

The DOJ data does not indicate whether the County Court's use of interpreters related to civil or criminal matters but, as all the interpreting services were for the telephone, it is likely that they all involved telephone inquiries to the County Court registry.

### 2.6.2.2 Evaluation of unmet demand for civil justice interpreters

Even assuming that all 15 inquiries are civil in nature, there is insufficient evidence for LIV to evaluate the extent of unmet demand for civil justice interpreters in the County Court.

Nonetheless, the evidence suggests that there is unmet demand for civil justice interpreters. Current County Court practise means that parties are responsible for the provision of their own interpreters if one is required.<sup>162</sup> If parties do not have the means to pay for their interpreters, this may lead to access to justice issues. This is demonstrated by the case study of Mr H, which was provided by PILCH in its submission to the *Civil Justice Review*:

<sup>158</sup> The LIV has adapted this case from CALC's submission to the VLRC's *Civil Justice Review* (see note 154). CALC did not refer to its client by name in the submission but the LIV has referred to the client concerned here as "Ms S" to be consistent with the other Magistrates' Court case studies.

<sup>159</sup> CALC, *Submission to Victorian Law Reform Commission's review of civil justice system*, p. 10. Accessed January 2010 at <http://www.consumeraction.org.au/downloads/SubmissiontoVLRCreviewofciviljustice-2ndexposedraft011007.pdf>.

<sup>160</sup> *Ibid.*

<sup>161</sup> County Court, Website FAQs. Accessed February 2010 at <http://www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Listing-Utility+Buttons-FAQs?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=0-FAQs~>.

<sup>162</sup> County Court, Website FAQs, op. cit. Accessed February 2010 at <http://www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Listing-Utility+Buttons-FAQs?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=0-FAQs~>.

*Mr H, an elderly man who speaks limited English, had a fruit and vegetable stall at a primary school. Proceedings were brought against him in the County Court by a plaintiff who alleged that he fell over a box of vegetables at the stall and suffered injuries. The school did not have public liability insurance. Mr H was referred to a pro bono practitioner for representation in the County Court who advised Mr H that he had reasonable prospects of success in defending the matter. Mr H was unable to afford the cost of an interpreter to be present during court proceedings, the court would not provide an interpreter, and Mr H had to rely on his daughter to interpret for him. It is unclear at this stage who will pay for an interpreter in the event that Mr H needs to be cross-examined.<sup>163</sup>*

In the LIV's view, the case study of Mr H illustrates the negative consequences of lack of access to funded interpreters in the County Court for those who have no means to pay. Mr H had a meritorious civil defence. While an interpreter was essential for Mr H to participate and communicate on an equal basis with the court and other parties in his civil matter, Mr H lacked the means to pay for one. The County Court also would not provide an interpreter under its current policies. Therefore, Mr H had to rely on his daughter to be an interpreter, which is inconsistent with both current Victorian Government policy and best practice that indicates that professionally accredited interpreters should be used.<sup>164</sup> In the LIV's opinion, County Court litigants such as Mr H who need an interpreter but lack the means to pay are at a substantial disadvantage in comparison with other civil litigants.

In addition to not being able to access funded interpreter services, another barrier to justice for people with limited English skills may be an inability to access legal information. The LIV notes that the County Court website presents difficulties in this regard. Currently, there is no information on the website for people who speak a LOTE or any details about how people who require the assistance of interpreters can contact the Court.

## 2.6.3 Supreme Court and Court of Appeal

### 2.6.3.1 Current demand for civil justice interpreters

There was no DOJ data available on the demand for civil justice interpreters in the Supreme Court or Court of Appeal. However, the LIV understands that Supreme Court judges may order interpreters in civil proceedings on an ad hoc basis but this practice appears rare.<sup>165</sup>

### 2.6.3.2 Evaluation of unmet demand for civil justice interpreters

There is insufficient evidence for the LIV to judge the extent of unmet demand for civil justice interpreters in the Supreme Court or Court of Appeal.

Notwithstanding this, the LIV suggests that unmet demand is likely to exist but on a smaller scale than other Victorian courts given the nature of the Supreme Court's civil jurisdiction. Consistent with other Victorian courts, the Supreme Court does not provide interpreters for civil matters, meaning that litigants with English language difficulties who are, for example, self-represented or do not have the means to pay for an interpreter will face substantial access to justice issues if they have a meritorious civil case or defence that falls within the Court's jurisdiction.

The LIV also notes that people with English language communication difficulties are likely to have problems accessing the Supreme Court website as there is currently no information available in a LOTE or to advise people who require the assistance of interpreters about how to contact the Court.

<sup>163</sup> PILCH, *Submission to the Victorian Law Reform Law Commission Civil Justice Review*, op. cit., p. 24.

<sup>164</sup> See Part 4.2.1 for more information regarding this.

<sup>165</sup> PILCH identified this practice in its submission to the VLRC's Civil Justice Review (p. 22) but indicated that it occurred on an ad hoc and discretionary basis. This was also confirmed by the LIV's research. A search of AustLII could only locate one instance of this occurring – *Chan & Ors v Chen & Ors (No 2)* [2007] VSC 24. This case involved unrepresented defendants who had each made unsuccessful applications to Legal Aid and PILCH for civil assistance. The Supreme Court judge in this case organised an interpreter for the duration of the hearing.

## 2.6.4 Victorian Civil and Administrative Tribunal

### 2.6.4.1 Current demand for civil justice interpreters

VCAT was created in 1998 following the amalgamation of 15 boards and tribunals to offer Victorians a one stop shop for dealing with civil disputes.

VCAT has an extremely busy civil jurisdiction. In 2008-09, 85,993 cases were lodged, 81,186 finalised and 14,584 pending.<sup>166</sup> VCAT deals with many types of civil disputes, including about the purchase and supply of goods, credit, discrimination, domestic building works, guardianship and administration, disability services, legal profession services, owners corporations (body corporate), residential and retail tenancies.<sup>167</sup>

VCAT is the largest user of interpreters in Victorian civil proceedings. It arranges interpreters at no cost to any party. Under its *Customer Service Charter*, VCAT indicates that it respects clients' rights to receive fair and helpful assistance, including for an interpreter if necessary.<sup>168</sup>

No information was available from the DOJ data to reflect the current usage of interpreters at VCAT. However, some insight can be gained through VCAT's expenditure on civil interpreting services. In 2007-08, VCAT spent \$191,530 providing access to telephone and on-site interpreting services<sup>169</sup> and an estimated \$225,000 in the 2008-09 financial year.<sup>170</sup>

Feedback from VCAT indicates that interpreters are most commonly used in the Civil Claims, Residential Tenancies and Guardianship Lists.<sup>171</sup> These are also VCAT's busiest Lists. Combined in 2008-09, they received 91% of VCAT business.<sup>172</sup> They are also the Lists with the most self-represented litigants. In 2008-09, the top 8 languages in demand at VCAT were: Greek, Cantonese, Mandarin, Vietnamese, Russian, Spanish, Italian and Arabic.<sup>173</sup>

VCAT also uses interpreters in mediations. In 2008-09, across VCAT, 74 cases were finalised prior to mediation and 704 at mediation, an overall success rate of 69%. 350 matters were not successfully resolved at mediation and proceeded to the hearing stage. Matters were most commonly mediated in the Domestic Building, Planning and Environment and Anti-Discrimination Lists.<sup>174</sup> While no specific information was available about the number of interpreters used in VCAT mediations, the LIV understands that if an interpreter is required, one will be provided in accordance with current VCAT practice.

The importance of the availability of interpreters at VCAT and the direct link between interpreters and access to justice is shown through a case study provided by the Consumer Action Law Centre (CALC) for the purposes of the Project. CALC is a specialist CLC focusing on consumer matters. Given the consumer focus of its practice, CALC reported that "it has many examples where clients have been provided with the capacity to prosecute meritorious claims and access to the justice system, as a result of the ready availability of interpreters". The following case study of Mr and Ms A illustrates this point:

166 VCAT. *2008-09 Annual Report*, p. 7. Accessed January 2010 at [http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual\\_report\\_vcat/\\$file/2008-09\\_complete\\_annual\\_report\\_low\\_res.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2008-09_complete_annual_report_low_res.pdf).

167 See further: VCAT website at <http://www.vcat.vic.gov.au>.

168 VCAT. *2007-08 Annual Report*, p. 63. Accessed January 2010 at [http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual\\_report\\_vcat/\\$file/2007-08\\_complete\\_annual\\_report.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2007-08_complete_annual_report.pdf).

169 Victorian Government Achievements in Multicultural Affairs 2007-08, p. 27.

170 Feedback from VCAT representative, LIV Interpreting Fund Focus Group, 30 November 2009.

171 Information provided by VCAT by email 3 December 2009.

172 VCAT. *2008-09 Annual Report*, p. 7. Accessed January 2010 at [http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual\\_report\\_vcat/\\$file/2008-09\\_complete\\_annual\\_report\\_low\\_res.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2008-09_complete_annual_report_low_res.pdf).

173 Feedback from LIV Interpreting Fund Focus Group, 30 November 2009.

174 VCAT. *2008-09 Annual Report*, p. 7, 55. Accessed January 2010 at [http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual\\_report\\_vcat/\\$file/2008-09\\_complete\\_annual\\_report\\_low\\_res.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2008-09_complete_annual_report_low_res.pdf).

*CALC acted for two elderly pensioners, Mr A and Ms A, who alleged that they had lost their home – their sole asset after a lifetime of work – as a result of unconscionable conduct by a finance broker and lender. The couple required an interpreter for all but the most rudimentary communication in English. As a result of their financial dealings with the broker and lender Mr A and Ms A were left on the margins of the private rental market, struggling to pay for their daily living expenses and unable to pay for disbursements, including interpreter fees.*

*CALC acted for the couple with the assistance of two barristers retained on a pro bono basis through the Victorian Bar Legal Assistance scheme. The conduct of the case required the services of interpreters for many hours to allow for the taking of instructions, provision of advice, conferences with counsel, and attendances at the VCAT. Interpreters were obtained through VITS and TIS by Consumer Action and, importantly, VCAT made interpreters available at all VCAT dates where it was necessary for the clients to attend.*

*Mr A and Ms A ultimately obtained a significant amount through settlement of the claim, which alleviated their financial difficulty and allowed them a sense of redress. Without access to interpreters through Consumer Action and VCAT, Mr A and Ms A would have been precluded from prosecuting their case.*

#### 2.6.4.2 Evaluation of unmet demand for civil justice interpreters

The LIV is unable to judge the extent of demand and unmet demand for civil justice interpreting services at VCAT as the DOJ data on VCAT was unavailable. However, given current VCAT practice to provide civil interpreters to all parties and witnesses at no cost to the user, the LIV assumes that there is unlikely to be a large amount of unmet demand in practice.

Nevertheless, the LIV submits that there are areas of improvement for VCAT in terms of the provision of its interpreting services. One is access to VCAT interpreters in regional and rural areas. The recent *President's Review of VCAT* (President's Review) identified that there was poor utilisation of VCAT by CALD communities, especially in outer suburban Melbourne and rural Victoria. In these areas, CALD communities did not consider VCAT accessible and "had no knowledge of VCAT at all".<sup>175</sup> There was strong support for on-site VCAT visits and hearings when it was appropriate. While the President's Review noted the importance of greater engagement with CALD communities, it also indicated that this was hard to achieve with VCAT's present metro-centric model of service delivery.<sup>176</sup>

Therefore, to help address the systemic barriers to accessing VCAT faced by CALD communities, the President's Review recommended the regionalisation of VCAT and the establishment of VCAT branch offices in outer-suburban Melbourne and country Victoria.<sup>177</sup> Further, the President's Review also proposed that the VCAT legislation should be amended to impose a positive duty on VCAT to ensure that all parties understand VCAT practices, procedures and decisions and to give due assistance to those people who need it. Such assistance might involve the provision of an interpreter.<sup>178</sup> The LIV welcomes and supports both these proposals.

Another issue involves accessibility of information on interpreters on VCAT's website for people who have limited English skills. For instance, information about interpreters does not appear on VCAT's contacts page but does appear in the FAQ page. It is also challenging to find information in easy English.<sup>179</sup> Feedback from the LIV Focus Group also indicated that, as VCAT's forms are all in English, a person who cannot communicate well in written English and needs the assistance of an interpreter may need help in filling them out.<sup>180</sup>

<sup>175</sup> The Hon. Justice Kevin Bell, *One VCAT: President's Review of VCAT*, 30 November 2009, p. 22, 25. Accessed February 2010 at [http://www.vcatreview.com.au/images/president\\_s\\_review\\_of\\_vcat\\_report.pdf](http://www.vcatreview.com.au/images/president_s_review_of_vcat_report.pdf). For example, at Justice Bell's community consultation with Greater Shepparton City Council, councillors indicated that there could be a better use of interpreting services to overcome language barriers. See: [http://www.vcatreview.com.au/images/stories/rev/Shepparton\\_cc\\_300409.pdf](http://www.vcatreview.com.au/images/stories/rev/Shepparton_cc_300409.pdf).

<sup>176</sup> *Ibid.*, p. 22.

<sup>177</sup> *Ibid.*, pp. 71-72.

<sup>178</sup> *Ibid.*, p. 75.

<sup>179</sup> VEOHRC, *Submission to Justice Kevin Bell – Victorian Civil and Administrative Tribunal – President's Review*, 8 June 2009. Accessed February 2010 at <http://www.humanrightscommission.vic.gov.au/pdf/SubmissionsToVCATPresidentsReview.doc>.

<sup>180</sup> Feedback from LIV Focus Group, 30 November 2009.

## 2.7 Categories of People Impacted by Unmet Demand For Civil Interpreters

### 2.7.1 Culturally and linguistically diverse people

Given the diversity and extent of Victoria's CALD population, the LIV considers that people from this background are the most affected by the lack of access to interpreting services. As noted by the 2006 Census, over 20% of Victorians speak a LOTE. Their experiences in terms of unmet demand for civil justice interpreting services have been examined at Parts 2.4 through 2.6. Issues regarding people from CALD backgrounds who speak new and emerging languages are also examined at Part 2.8.4.

However, the LIV believes that there are additional categories of people – Deaf people and Indigenous people – who are also affected by the unmet demand for civil interpreting services but who have issues specific to them. These issues are examined below.

### 2.7.2 Deaf people

#### 2.7.2.1 Australian Deaf community

The Australian Deaf<sup>181</sup> community is an identifiable community and culture in which deafness is seen as a source of pride and cultural identity rather than as a disability.<sup>182</sup>

The Deaf community uses a range of distinct forms of communication. These include fingerspelling, lipreading and more formally structured “languages of sign” such as Auslan or Australian sign language – the native language of the Australian Deaf community.<sup>183</sup>

#### 2.7.2.2 Unmet demand for Auslan interpreters

Auslan interpreters are very important to the Deaf community. They enable “equal participation by Deaf persons in the wider community. Often it is the Deaf person’s principal means by which they access the wider community in which they live.”<sup>184</sup>

Consequently, there is much demand for Auslan interpreters. This demand, too, is growing and changing as Deaf people increasingly seek to have an Auslan interpreter available to them in more kinds of situations.<sup>185</sup> At the same time, there is also a supply shortage. Few Australians are competent in Auslan or combinations of other forms of signed communication.<sup>186</sup>

Due to the strong demand and shortage of supply of Auslan interpreters, there are often issues of unmet demand, especially when bookings are cancelled for appointments. If no replacement interpreter can be found, a Deaf person has no option but to cancel their appointment or attend it without an interpreter. As interpreters are often booked weeks in advance, if the agency cannot supply a replacement interpreter, Deaf people may have to wait a long time for appointments.<sup>187</sup>

181 By contrast, hard of hearing people commonly view hearing loss as a sensory deficit within the body. For them, hearing loss can be appropriately described as a disability for which aids and devices are necessary. Generally, hard of hearing people are not fluent in sign language and tend to still communicate in spoken English. See further: Access Economics, *Listen Hear! The Economic Cost and Impact of Hearing Loss in Australia*, February 2006, p. 21.

182 *Ibid.*

183 Laster & Taylor, *op. cit.*, p. 144.

184 Deaf Australia, *Policy on Sign Language Interpreters in Courts of Law*. Accessed January 2010 at [http://www.deafau.org.au/info/policy\\_courts.php](http://www.deafau.org.au/info/policy_courts.php).

185 Karen Lloyd, *Position Paper on the Supply and Demand for Auslan Interpreting: the Deaf Perspective*, November 2007, Australian Association of the Deaf (AAD), p. 3. Accessed January 2010 at <http://www.deafau.org.au/download/InterpretingPositionPaper.pdf>.

186 Laster & Taylor, *op. cit.*, p. 144.

187 *Ibid.*, p. 23.

The 2004 *Report on Supply and Demand for Auslan interpreters* confirmed this demand for, and lack of supply, of Auslan interpreters across Australia. The survey found that 86% of Deaf Auslan users who had been to a legal or financial appointment in the last 12 months said they needed a professional interpreter. Of these people:

- 46% said they were always able to get an interpreter;
- 2% were able to get an interpreter more than half the time;
- 8% were able to get an interpreter less than half of the time; and
- 44% were never able to get an interpreter.<sup>188</sup>

The main reasons given by respondents who did not always obtain an interpreter for legal and financial appointments included lack of available interpreters, lack of awareness that they could ask for an interpreter and interpreters being too expensive or not funded. As a consequence of people not being able to obtain a professional interpreter for a legal or financial meeting, about half went without an interpreter; around one third went with a friend or family member to interpret; around 15% postponed or delayed the meeting until a professional interpreter was available; and 5% cancelled the meeting.<sup>189</sup>

### 2.7.2.3 Unmet demand for Auslan interpreters in Victoria

In the LIV's view, there is indicative evidence of unmet demand for Auslan interpreters in Victoria. Sign Languages Communication Victoria is the largest provider of Auslan interpreters for the Deaf in Victoria but it also acknowledges that there is a shortage of qualified Auslan interpreters in Victoria. A request at short notice – less than one to two weeks – can make it difficult to secure an interpreter. Therefore, clients are advised to book early to increase the likelihood of an interpreter being available.<sup>190</sup>

The DOJ data provides some further evidence of unmet demand for Auslan interpreters. In 2008-09, Auslan interpreters were sought for VLA, the Magistrates' Court and CLCs. 57 services were sought and 45 or 75% were delivered, at a cost of \$13,949.35. Reasons for the non-delivery of services included cancellation (4 cases); the client cancelled within 24 hours before the booking was to take place (5 cases), and the interpreter was not available at the time of the job (2 cases).

While the DOJ data provides evidence of unmet demand for Auslan interpreters, the LIV notes that the size of the unmet demand does not seem to reflect the extent of the supply and demand crisis demonstrated elsewhere. However, as the DOJ data is only from one financial year, it may be that data gathered from future financial years will be more consistent with this trend.

Another potential area of unmet demand for interpreters is Deaf people from CALD backgrounds. Victorian Auslan interpreters have reported that they have often been called upon to interpret for people from CALD backgrounds who know only basic Auslan and use a gesture or home sign system to communicate.<sup>191</sup> The problems this can present are illustrated by the following case study provided by the Australian Deaf Association:

<sup>188</sup> Commonwealth Department of Families, Community Services, *Report on Supply and Demand for Auslan interpreters*, 2005. Accessed January 2010 at [http://www.fahcsia.gov.au/sa/disability/pubs/policy/Documents/auslan\\_report/section6.htm#65](http://www.fahcsia.gov.au/sa/disability/pubs/policy/Documents/auslan_report/section6.htm#65).

<sup>189</sup> *Ibid.*

<sup>190</sup> Vicdeaf, *Vicdeaf Auslan and Interpreting Information*, April 2009, Issue 16, p. 1. Vicdeaf Auslan is the former name of Sign Languages Communications Victoria.

<sup>191</sup> Louisa Willoughby, *Catering to a diverse community: the situation and needs of deaf people from migrant backgrounds living in Victoria*, 2008, p. 81. Accessed December 2008 at <http://www.vicdeaf.com.au/files/fullreportcateringtoadiversecommunity.pdf>.

*The interpreter was asked to support a deaf Iraqi man at a hearing at the Refugee Appeals Tribunal. She spelt out that as the client did not speak her language she would not be able to interpret for him appropriately (a particular concern given the high stakes of the occasion) and could not accept the job. The response she got back was that as far as the person making the booking was concerned it didn't matter whether the man could understand the interpreter – it was simply a legal requirement that he be given an interpreter and whether he could understand that interpreter was seen as irrelevant. The interpreter declined to take the job and the outcome of the case is unknown.<sup>192</sup>*

While the above case study relates to a federal civil matter, the LIV considers it probable that Deaf people from CALD backgrounds have accessed – or at least tried to access – Victorian civil justice institutions. A person who is unable to sufficiently communicate in either English or Auslan is likely to face substantial barriers to accessing justice when compared with other participants in the civil justice process. Therefore, the LIV recommends that further research be undertaken into this area to assess the extent of this unmet demand and how it could be addressed.

One way of communicating with Deaf people from CALD backgrounds is through Deaf Relay Interpreters (DRIs). DRIs work together with hearing Auslan interpreters to interpret for Deaf people who use a foreign sign language; are Indigenous and use a variety of Auslan or a community-based sign system; or have a mental illness or physical disability.<sup>193</sup> Generally, a DRI forms the Deaf person's utterances into Auslan for the Auslan interpreter, who in turn renders the message into English for the hearing person and vice versa. While using DRIs adds extra time and cost to interpreting services, anecdotal evidence suggests that they work "very effectively to enhance levels of communication with migrant clients who have limited Auslan skills".<sup>194</sup>

## 2.7.3 Indigenous people

### 2.7.3.1 Lack of demand for Indigenous language interpreters

In other Australian jurisdictions, there is extensive unmet demand for interpreting services in Indigenous languages. The *National Indigenous Languages Survey Report* found that, of the 145 indigenous languages still spoken in Australia, 110 are critically endangered. The Commonwealth Government is currently working with the States and Northern Territory to introduce a national framework for the effective supply and use of Indigenous language interpreters.<sup>195</sup>

While there is extensive unmet demand for Indigenous interpreters in other Australian jurisdictions where English may be a second, third or even fourth language, the LIV considers that there is not such an evident demand in Victoria. The 2006 Census indicated that of the 30,142 Indigenous persons in Victoria, 27,518 spoke English only. 284 people stated that they spoke Australian Indigenous languages and, of these, only 20 indicated that they could not speak English not well or not at all.<sup>196</sup> Further, the LIV is not aware of any Indigenous interpreter service operating in Victoria<sup>197</sup> and no data received by the LIV during the Project identified any demand or unmet demand for interpreters in specific Indigenous languages.

<sup>192</sup> *Ibid.*

<sup>193</sup> Australian Sign Language Interpreters Association (ASLIA), *ASLIA Legal Interpreting Policy*. Accessed January 2010 at <http://aslia.com.au/o/content/view/169/167/>

<sup>194</sup> Willoughby, *op. cit.*, p. 82.

<sup>195</sup> Commonwealth Government. Department of the Environment, Water, Heritage and Arts. *Indigenous Languages – A National Policy*. Accessed February 2009 at [http://www.arts.gov.au/indigenous/languages\\_policy](http://www.arts.gov.au/indigenous/languages_policy).

<sup>196</sup> ABS, *Language Spoken at Home by Proficiency in Spoken English/Language for Indigenous Persons – Victoria*, *op. cit.*, Additionally, 1,186 people stated that they spoke another language apart from an Australian Indigenous one or did not state what that language was. A further 1,154 people did not indicate either their English proficiency level or whether they spoke another language.

<sup>197</sup> Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Attorney-General's Department. *Questions on Notice, Inquiry into Access to Justice*, 27 October 2009. Accessed January 2010 at <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a5ae9dd3-f9cd-48ce-8515-c7f0b3e81b2f>.

### 2.7.3.2 Unmet demand for interpreters of Aboriginal English

However, the LIV considers that there is an unmet demand for Indigenous cultural interpreters to increase understanding of Aboriginal English (AE). While most Indigenous people are assumed to speak Standard Australian English (SAE), many speak a mixture of both AE and SAE. The differences in grammar and meaning between AE and SAE are “not immediately obvious to the average speaker of either language. Their apparent similarities mean that AE, in any of its forms, does not lend itself to formal interpretation.”<sup>198</sup>

However, there are important pragmatic differences between the two languages. For example, in many varieties of AE, people do not use questions to seek out important information but use more indirect ways of finding things out such as hinting or triggering statements. Silence is also important in AE interactions and does not necessarily mean that communication has broken down.<sup>199</sup>

A recent Victorian Aboriginal Legal Service (VALS) research report indicated that these differences can present problems in a legal environment such as when solicitors try to gather evidence or take instructions from their Indigenous clients.<sup>200</sup> The VALS report also investigated how often AE was used in the Magistrates’ Courts and Koori Courts of regional and metropolitan Victoria. It found that there were many examples of AE used in Victorian courts – especially in the Koori Courts – but that the understanding and utilisation of AE varied across different groups and in different settings.<sup>201</sup> The study highlighted the importance of training people in the legal system about AE and continuing to research how people use AE in this setting.

The use of AE by Indigenous Victorians has implications for access to justice. As noted by the Queensland Government’s publication *Aboriginal English in the Courts*:

*It is easy to mistake an AE speaker for a speaker of SAE. In legal proceedings, whether for civil or criminal matters, such a mistake can mean that evidence can be misinterpreted or lost. This can reduce access to justice. It is in the interests of both sides of a dispute that their witnesses and defendants are clearly understood. It is also in the interests of the court, and therefore the community, that this occur because it makes a just outcome more likely.*<sup>202</sup>

There is no system for accrediting AE interpreters. One reason is that people unfamiliar with AE may think they can understand what an AE speaker is saying and find it hard to believe conflicting evidence given by a person interpreting the AE speaker’s statements. Another factor is that, due to the range of grammatical and cultural meanings that form part of AE, an interpreter would have to interpret meanings that go beyond the spoken word. Further, a training and testing regime must be established in a language before accreditation can be given. The National Accreditation Authority for Translators and Interpreters (NAATI) has previously indicated that it would not set up accreditation for AE “as most of the work of the interpreter would be dealing with cultural issues rather than purely linguistic ones.”<sup>203</sup>

To overcome these issues and address the needs of AE speakers, the Queensland Government has proposed the idea of “communication facilitators.” These are people with fluency in a particular form of AE and a good knowledge of Aboriginal culture plus an understanding of court procedure and terminology. In the courtroom, communication facilitators could assist in two ways. They can assist lawyers by indicating where there is a communication breakdown, for instance in cross-examination, so that the lawyers can take action to remedy the situation. Or, they

198 Queensland Government, *Aboriginal English in the Courts*, p. 8. Accessed March 2010 at <http://www.courts.qld.gov.au/Factsheets/M-MC-AboriginalEnglishHandBook.pdf>

199 Diana Eades, *Language Varieties: Aboriginal English*, University of New England website. Accessed February 2010 at <http://www.une.edu.au/langnet/definitions/aboriginal.html>.

200 Fiona Roberts, *A Report on Aboriginal English in the Courts*, 2007, Victorian Aboriginal Legal Services, p. 5.

201 *Ibid*, p. 4.

202 Queensland Government, *Aboriginal English in the Courts*, *Op. Cit.*, p. 6.

203 *Ibid*, p. 8.

could sit with the AE speaker and explain proceedings in terms that they will more readily understand. Facilitators are not intended to be interpreters as they do not attempt to discern what a witness means or otherwise give evidence to the court. Rather, the facilitator advises counsel of communication clues that the AE speaker may have misinterpreted and suggests ways in which they may be able to understand the court proceedings.<sup>204</sup>

On this basis of the above, the LIV considers that there is little, if any, unmet demand for interpreters of traditional Indigenous languages in Victoria. However, there is arguably a hidden unmet demand for Indigenous cultural interpreters for AE in Victoria. The need for Indigenous cultural interpreters in Victoria “in the sense of interpreting what is happening in the court process and interpreting for the judiciary what the Indigenous client is wanting to say”<sup>205</sup> has been previously identified but the full extent of it is unknown. The LIV recommends further investigation into these issues, especially for civil matters.

## 2.8 Population Groups That Face Additional Barriers to Accessing Justice

As previously noted, the LIV considers that a wide range of people may be affected by unmet demand for civil justice interpreters, including people from CALD backgrounds, Deaf people and Indigenous people.

However, the LIV believes that people’s lack of access to civil justice interpreters is *compounded* if they fall into one or more of the following categories:

1. people who are self-represented;
2. older people;
3. people from rural, regional and remote areas; and
4. people who speak new and emerging languages.<sup>206</sup>

Based on stakeholder feedback provided during the Project, the LIV believes that it is common for people who are in need of interpreting services to fall within one or more of the above categories, for instance, an older person from a CALD background who lives in a rural area. People may also fall into one or more categories as their personal circumstances change over time. For instance, they might be self-represented or represented on a pro bono basis for the same or different civil legal matters as those matters progress.

In the LIV’s view, the more categories that a person in need of civil interpreting services falls into, the more difficulties that they will have in obtaining access to those services. Consequently, the LIV considers that the civil interpreting needs of each of the above groups require further investigation.

<sup>204</sup> *Ibid*, p. 9.

<sup>205</sup> Testimony of Mr Hans Bokelund, Senate Legal and Constitutional Affairs References Committee. *Inquiry into Access to Justice*, 15 July 2009, Melbourne, p 83. Accessed January 2010 at <http://www.aph.gov.au/hansard/senate/commtee/S12261.pdf>

<sup>206</sup> While the LIV does not intend this list to be exhaustive and is aware that there are likely to be other population groups that face additional barriers to accessing justice, the LIV notes that stakeholder feedback provided during the Project consistently identified these four groups as having particular access to justice issues when seeking interpreting services.

## 2.8.1 People who are self-represented

### 2.8.1.1 Access to justice issues

People who represent themselves in Victorian courts or tribunals may face many barriers to access to justice. In particular, their substantive rights are undermined when they do not have legal assistance and they try to represent themselves in the court system but are without the skills and knowledge to effectively do so.

In recent years, there has been an increase in Victorian litigants appearing in court without legal representation. This increase has been mainly attributed to the cost of engaging private legal representation and the unavailability of government funded legal aid for most civil cases.<sup>207</sup>

While no comprehensive study of self-represented litigants has been undertaken in Victoria, the trend of a growing number of such litigants has been observed at all levels of the Victorian court system.<sup>208</sup> The VLRC's *Civil Justice Review* also noted that the "increasing level of self-representation in courts at all levels has been observed and documented in a range of contexts".<sup>209</sup>

### 2.8.1.2 Evaluation of unmet demand for civil justice interpreters

The LIV believes that there is unmet demand for interpreters for self-represented civil litigants as current Victorian court practice means that self-represented litigants do not have access to an interpreter if they cannot afford one. Most self-represented litigants, in the LIV's view, would lack the means to pay for an interpreter as they are usually self-represented on the basis that they cannot afford to pay for a lawyer.

This contrasts with SA, for example, where interpreting services are provided for all parties in civil court proceedings, including self-represented litigants. Occasionally, these litigants are also referred to the SA Government's Interpreting and Translating Centre for assistance in understanding court processes.<sup>210</sup>

It is difficult to gauge the extent of the unmet demand for civil justice interpreters by self-represented litigants, however, as there is limited information available. Nevertheless, anecdotal evidence suggests that there has been a large increase in self-represented litigants coming to CLCs for assistance, particularly at complex stages of court proceedings.<sup>211</sup> Additionally, CLC stakeholder feedback received during the Project also reported an increasing number of self-represented litigants who are in need of civil justice interpreters presenting themselves to seek legal advice and assistance before they attend court.<sup>212</sup>

The LIV suggests that further research into this area is needed to determine the full extent of unmet demand for civil justice interpreters for self-represented litigants.

<sup>207</sup> Courts Strategic Directions Project, 2 September 2004, p. 102-3. Accessed February 2010 at [http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Publications\\_Reports/\\$file/Courts\\_Strategic\\_Directions\\_Document.pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Publications_Reports/$file/Courts_Strategic_Directions_Document.pdf).

<sup>208</sup> *Ibid.*

<sup>209</sup> As quoted in FCLC, *State Budget Submission 2009-2010*, p. 4. Accessed January 2010 at [http://www.communitylaw.org.au/cb\\_pages/images/Federation%20of%20CLCs%20State%20Budget%20Submission%202010-11.pdf](http://www.communitylaw.org.au/cb_pages/images/Federation%20of%20CLCs%20State%20Budget%20Submission%202010-11.pdf).

<sup>210</sup> Multicultural SA. 2006–2007 *Multicultural Access and Equity Report*, p 59. Accessed January 2010 at <http://www.multicultural.sa.gov.au/documents/MulticulturalAccessandEquityReport2006-07.pdf>.

<sup>211</sup> FCLC, *Submission to the Senate and Constitutional References Committee: Inquiry into Legal Aid and Access to Justice*, 22 September 2003, p. 30. Accessed January 2010 at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/submissions/sub50.doc](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/submissions/sub50.doc).

<sup>212</sup> Feedback from Fitzroy Legal Service and Darebin Community Legal Centre. Transcripts on file with the author.

## 2.8.2 Older people

### 2.8.2.1 Access to justice issues

Older people may potentially face a number of access to justice issues, including accessing legal information and advice and a lack of confidence about enforcing their legal rights. In terms of accessing legal advice, older people may encounter technological barriers, especially for telephone and web based services and lack knowledge about where to obtain that advice. There may also be potential conflicts of interest when legal practitioners for older people are arranged by family members. Older people may also have a general perception of the law as disempowering and be reluctant to initiate legal action.<sup>213</sup>

### 2.8.2.2 Evaluation of unmet demand for civil justice interpreters

The LIV considers that there is a strong, current demand for interpreting services for older people. The 2006 Census indicated that of the 186,519 people who spoke a LOTE and spoke English not well or at all, 47% or 88,211 were 55 years or older. 12% of the total population of older people aged 65 to 74 years who have come to Australia were from CALD backgrounds.<sup>214</sup>

This need is confirmed by the work of the CLC Senior Rights Victoria (SRV). SRV was established in April 2008 to address the legal and advocacy needs of older people in circumstances of elder abuse. Studies have confirmed financial abuse as the most common form of elder abuse, including in CALD communities.<sup>215</sup>

Since its establishment, SRV has received 1360 calls, undertaken 121 advocacy cases, opened 120 legal cases, provided 334 advices and held 36 community education sessions with 1,150 older people. The LIV notes that most of the people using SRV services were from CALD backgrounds.<sup>216</sup>

Currently, there does not appear to be a large amount of unmet demand for civil justice interpreting services for older people. For instance, the DOJ data indicates that, in 2008-9, SRV sought on-site interpreting services on 17 occasions in 7 different languages at a cost of \$1,313. Of these, only one was not delivered due to the interpreter not being available at the time of the job.

Given that SRV has only been in operation for a short time, though, the LIV suggests that the DOJ data may not be reflective of the true extent of unmet demand for civil justice interpreters for older people. One reason may be that older people are accessing CLCs other than the SRV. For example, in 2008-09, 9% of CLC clients in 2008-09 were aged 65 and over.<sup>217</sup> However, as the DOJ data does not provide this information, this is difficult to assess.

Further, the LIV notes other indicative evidence that there is unmet demand for civil justice interpreters for older people. While there is the general trend of an ageing population, Victoria's CALD population is ageing faster still.<sup>218</sup> At the 2006 Census, of the nearly 675,000 people aged 65 years or over in Victoria, 26% were from a CALD background and 22% spoke a LOTE at home. One-third of the latter group were not proficient in English. The Australian Institute of Health and Welfare estimates that by 2011, 31% of Victoria's population aged 65 or over and 38% of Melbourne's population aged 65 or over will be from a CALD background.<sup>219</sup>

213 See further: S. Ellison et. al., *The legal needs of older people in NSW*, Law and Justice Foundation of NSW, Sydney, 2004.

214 House of Representatives. Standing Committee on Legal and Constitutional Affairs. *Older people and the law* September 2007, p. 2. Accessed February 2010 at <http://www.aph.gov.au/house/committee/LACA/olderpeople/report/fullreport.pdf>.

215 *Ibid.*, p. 15. See also the case study of Mrs S at 3.1.1.

216 Victorian Council on the Ageing. *Annual Report 2009*, November 2009, p. 8. Accessed January 2010 at [http://www.cotavic.org.au/\\_\\_data/assets/pdf\\_file/1576/cota\\_victoria\\_annual\\_report\\_2009.pdf](http://www.cotavic.org.au/__data/assets/pdf_file/1576/cota_victoria_annual_report_2009.pdf). However, as these figures were published in November 2009, the numbers will have increased since then.

217 FCLC. *Victorian State Budget Submission 2010-2011*, Appendix 3. [http://www.communitylaw.org.au/cb\\_pages/images/Federation%20of%20CLCs%20State%20Budget%20Submission%202010-11.pdf](http://www.communitylaw.org.au/cb_pages/images/Federation%20of%20CLCs%20State%20Budget%20Submission%202010-11.pdf).

218 Victorian Government, *All of Us: Victoria Multicultural Policy*, *op. cit.*, p. 13.

219 *Ibid.*

As Victoria's CALD population ages, demand will increase for interpreting services since ageing and illness often result in the loss of second language skills.<sup>220</sup> It has been shown that the English skills of people from CALD backgrounds who have lived in Australia for more than 30 years decrease significantly after retirement. For example, the demand for Hungarian and Dutch interpreters has noticeably risen in the past five years as a consequence of ageing CALD communities.<sup>221</sup>

Yet, while the demand for interpreters for established migrant communities will increase, the number of available interpreters in those languages is likely to decrease due to their retirement.<sup>222</sup> This trend is already impacting on the delivery of interpreting services in Victoria. As noted by VITS, "recruitment of practitioners from older, established languages continues to be a problem, as there are limited options available for replacing retiring practitioners. As demand for established languages increases, the recruitment pool continues to shrink as fewer young interpreters opt to enter the profession. This issue... is one that significantly affects the language services industry as a whole."<sup>223</sup>

In the LIV's view, these factors combined with the ongoing trend of unmet demand for legal assistance in civil law<sup>224</sup> means that there will be ongoing, growing unmet demand for civil justice interpreters in this area.

## 2.8.3 People from rural, regional and remote areas

### 2.8.3.1 Access to justice issues

People in rural and remote areas potentially face numerous barriers to accessing justice. These may include a lack of available legal services, problems in accessing legal information websites and difficulties of privacy and confidentiality in smaller rural communities with conservative attitudes.<sup>225</sup> The Attorney-General's *Justice Statement* also identified that people who live in regional and rural Victoria sometimes face particular difficulty in accessing court services.<sup>226</sup>

The LIV submits that these issues are compounded further when people also experience language difficulties. This was confirmed by the VPLRC's *Inquiry into Legal Services in Regional and Rural Victoria*, which found that language barriers that impact on people's enjoyment of legal rights and access to legal services are exacerbated in rural and regional Victoria. This was due to factors such as distances from services as well as cultural and geographic isolation.<sup>227</sup>

### 2.8.3.2 Evaluation of unmet demand for civil justice interpreters

In particular, the VPLRC found that there was a significant unmet need for interpreting services in rural and regional Victoria. In turn, this negatively impacted on the ability of CALD persons to access appropriate legal information, advice and representation. Consequently, the VPLRC recommended that DOJ undertake a comprehensive study on the use of interpreters in the legal system, focusing on unmet need especially in rural and regional Victoria. As far as the LIV can determine though, this evaluation never occurred.

Evidence of unmet demand for interpreting services in rural areas is illustrated by the DOJ data for Magistrates' Courts based outside Melbourne. Here, there was a tendency for there to be a high number of undelivered interpreting services in comparison with the number of interpreting services actually sought – close to half or greater. Bendigo Magistrates' Court, for instance, in 2008-09 had 18 interpreter service requests. Only 4 of these were actually delivered. 8 were cancelled (for unidentified reasons), 5 were because the request was cancelled within 24 hours and

220 VOMA, *op. cit.*, p. 4.

221 VPLRC, *Review of Legal Services in Rural and Regional Victoria*, May 2001, pp. 195-197.

222 Commonwealth Department of Immigration and Citizenship, *Access and Equity in Government Services 2006-8*, 2009, p. 15. Accessed January 2010 at <http://www.immi.gov.au/about/reports/access-equity/2008/access-equity-report-2008.pdf>.

223 VITS, *Annual Report 2008-09*, p. 20. Accessed February 2010 <http://www.vits.com.au/documents/VITSAnnualReport0809.pdf>.

224 See more about this at 3.1.2.

225 Louis Schetzer & Judith Henderson, *Public consultations: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Access to justice and legal needs vol. 1, 2003, Law and Justice Foundation of NSW, Sydney, p. 74. Accessed January 2010 at [http://xml.lawfoundation.net.au/lj/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/\\$file/public\\_consultations\\_report.pdf](http://xml.lawfoundation.net.au/lj/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf).

226 DOJ, *Attorney-General's Justice Statement*, *op. cit.*, p. 41.

227 VPLRC, *Review of Legal Services in Rural and Regional Victoria*, *op. cit.*, p. 195.

3 were because the interpreter was not available at the time of the job. Similarly, Bairnsdale (4 sought; 2 delivered); Latrobe Valley (23 sought; 14 delivered); Mildura (40 sought; 27 delivered); Seymour (7 sought; 2 delivered) and Swan Hill (10 sought; 5 delivered) all support this trend. The LIV notes that there were also high non-delivery rates within Melbourne and this trend did not occur within all regional Magistrates' Courts – Bacchus Marsh, Castlemaine and Wangaratta received all interpreting services requested in 2008-09.

However, based on the current DOJ data, the trend does appear to be more prominent in rural areas. CLCs based in outer Melbourne or outside Melbourne had similar rates of non-delivery of interpreting services: for example, Geelong CLC (42 sought; 15 delivered), Peninsula CLC (92 sought; 53 delivered) and Whittlesea (45 sought; 25 delivered).

The expense of non-delivered interpreting services can also be magnified in rural areas. If a CLC sought legal interpreting services but ended up cancelling that service (for whatever reason), depending on the cancellation policy of the interpreter service provider, the CLC may still have to pay the full cost of the interpreting service. The DOJ data shows this occurred, for example, when Gippsland CLC requested but then cancelled an Auslan interpreter but still had to pay the full fee of over \$300 because it was within the 24 hours before the service was due to be delivered.

Based on the above, the LIV considers that there is evidence of unmet demand for civil justice interpreters in rural and regional areas of Victoria. Frequently, in many cases, only around half or less of the interpreting services that are being sought are delivered – clearly an unsatisfactory result and one that would lead to unjust outcomes. While the Magistrates' Court data presumably relates to criminal matters, it is indicative – in the LIV's opinion - of what is happening outside of Melbourne in terms of the supply and demand of all interpreting services. It is also likely that the majority of non-delivered CLC interpreter matters mentioned above were civil in nature, given that this constitutes around 57% of CLC work.

The LIV notes that the current unmet demand for civil justice interpreting services in rural and regional Victoria is likely to be due to a combination of factors as different reasons for the non-delivery of interpreting services featured more prominently in varying locations. However, as noted by the Needs Analysis, there are common factors likely to affect the delivery of interpreting services in regional Victoria. These are:

- the scarcity of professional interpreters used locally, particularly in emerging languages;
- supply shortages which are co-related with seasonal employment fluctuations; and
- the significant time and cost involved in accessing Melbourne-based, professional interpreters.<sup>228</sup>

The LIV considers that further investigation into these issues is important and supports the VPLRC's previous recommendation that DOJ undertake a comprehensive study on the use of interpreters in the legal system, focusing especially on the unmet need in rural and regional Victoria.

## 2.8.4 People who speak new and emerging languages

### 2.8.4.1 Access to justice issues

A small and emerging community has been defined by the Commonwealth Government as a community that has an Australia-wide population of less than 15,000 and of whom 30% or more have arrived in the past five years.<sup>229</sup> Such communities may also have all or a combination of the following characteristics:

- lack established family networks, support systems and resources relative to more established communities;
- can be more vulnerable than established communities as they are often from a refugee background and have experienced displacement due to civil unrest; and
- comprise individuals who do not have English language skills and may have low levels of education and skills.<sup>230</sup>

<sup>228</sup> Allen Consulting Group, *op. cit.*, p. 8.

<sup>229</sup> Department of Immigration and Multicultural Affairs, *Settlement Grants Program 2006-07: Victoria Settlement Profile* as quoted in Ethnic Communities' Council of Victoria (ECCV), *Language Service Provision for New and Emerging Communities in Victoria*, p. 3.

<sup>230</sup> New and Emerging Communities Committee, Federation of Ethnic Communities Council of Australia website. Accessed February 2010 at [http://www.fecca.org.au/Policy\\_Committees\\_Communities.cfm](http://www.fecca.org.au/Policy_Committees_Communities.cfm).

The LIV notes that people from CALD backgrounds can face significant barriers to accessing justice. In addition to the language and interpreter issues already identified, these obstacles may include a lack of knowledge about how to access legal services and information, a lack of understanding of legal systems and processes, a lack of access to computers and low literacy levels.<sup>231</sup> There is also a general concern among CALD communities about the cost of legal services and, due to their low income, people may avoid seeking legal assistance.<sup>232</sup>

However, in the LIV's view, people from new and emerging CALD communities may face additional barriers to accessing justice. Often, people from these communities are migrants from war affected areas and may come from places where legal assistance was non-existent and authority figures could not be trusted. Given these negative experiences, many refugees and migrants are understandably wary of the law and its enforcers in Victoria. Therefore, people from these CALD communities may be reluctant to report legal issues or to voluntarily seek legal services - despite knowing that they exist.<sup>233</sup>

New and emerging communities also face specific language issues. It is common for new and emerging community groups to have multiple ethnic groups and languages. People's ability to speak English may depend on whether English was their country of origin's trade language and the degree of formal education they received. Additionally, literacy levels in a person's first language may be low.<sup>234</sup>

Another issue is that members of newly arrived communities such as humanitarian and refugees typically have more intense and complex settlement needs.<sup>235</sup> Yet, the language services required for these communities generally exceeds the level of language services available. In contrast to more established CALD communities, new and emerging communities often have difficulty in accessing professionally accredited interpreters due to the community's small size and the lack of bilingual members. The problems of language service delivery may be further complicated by social issues that affect a person's willingness to accept interpreting services such as gender or cultural issues. People may also be concerned about confidentiality and be reluctant to discuss personal and sensitive legal matters through an interpreter from their community for fear that the interpreter may disclose this information to other community members.<sup>236</sup>

#### 2.8.4.2 Evaluation of unmet demand for civil justice interpreters

In Victoria, new and emerging communities are generally comprised of people who enter Australia and settle in Victoria under the humanitarian entrant scheme. In recent years, African countries such as Sudan have been the most significant source area of humanitarian entrants in Victoria although there is also a noticeable recent increase in people from Asia, especially Burma / Myanmar. In the five years from 2002 to 2007, 82% of people settling in Victoria under the humanitarian scheme has either nil or poor levels of English.<sup>237</sup>

Research indicates that there is substantial demand that is not currently being met by interpreters for the following new and emerging languages: Assyrian, Burmese, Sudanese Arabic, Hmong, Fanti, Tetum, Tigrinya, Amharic and Oromo.<sup>238</sup> There is also some unmet demand for the African languages of Maay and Harari, with growing demand for Rundi and for the regional *lingua franca* Swahili. Current services in both these languages are reported to be scarce.<sup>239</sup>

231 Schetzer & Henderson, *op. cit.*, p. 15.

232 Lekakis, *op. cit.*, p. 5.

233 *Ibid.*, p. 4.

234 *Ibid.*, p. 6.

235 Victorian Government, *All of Us: Victoria Multicultural Policy*, *op. cit.*, p. 12.

236 ECCV, *op. cit.*, p. 6.

237 Department of Immigration and Citizenship, *Victoria: Settlement trends and needs of new arrivals 2007*, pp. 12-15. Accessed February 2010 at [http://www.immi.gov.au/living-in-australia/delivering-assistance/government-programs/settlement-planning/\\_pdf/trends\\_needs\\_vic.pdf](http://www.immi.gov.au/living-in-australia/delivering-assistance/government-programs/settlement-planning/_pdf/trends_needs_vic.pdf).

238 ECCV, *op. cit.*, p. 17; Helen Borland & Charles Mphande also identify Oromo and Tigrinya as languages with high unmet demand. See further: Helen Borland & Charles Mphande, *The Numbers of Speakers of African Languages Emerging in Victoria: a Report for the Victorian Office of Multicultural Affairs*, Department for Victorian Communities, May 2006, p. viii. Accessed December 2009 at <http://www.multicultural.vic.gov.au/images/stories/pdf/AfricanLanguages.pdf>.

239 Helen Borland & Charles Mphande, *op. cit.*, p. viii.

The DOJ data provides some illustration about the current demand for the languages of Amharic, Assyrian, Burmese, Hmong, Oromo, Sudanese Arabic, Swahili, Tetum and Tigrinya. There were no requests for interpreting services in Fanti, Harari, Maay or Rundi.

Combined, in 2008-09, the number of requests for interpreters in these languages totalled 853 at a cost of \$47,263. The greatest number of requests was for interpreters in: Amharic (286 cases), Sudanese Arabic (185 cases) and Burmese (118 cases). The demand for these languages was concentrated at the VLA (497 cases) and the Magistrates' Court (354 cases). 86 people requesting interpreters in these languages attended CLCs.

In terms of the languages where the most interpreting services were sought but not delivered, these unsurprisingly tallied with those in high demand – Amharic (25 cases), Sudanese Arabic (16 cases) and Burmese (11 cases). The main reasons for this unmet demand were that the interpreter was not available at the time of the job (17 cases), the appointment was cancelled (28 cases) or there was insufficient notice (23 cases).

Based on the DOJ data, the current unmet demand for new and emerging languages in Victoria does not appear to be large. However, the LIV believes that the DOJ data does not provide a sufficient sample size to make any conclusive judgements about the extent of the unmet demand in this context. The LIV also suggests that the small gap between the number of services identified and delivered is reflective of the small population sizes of these groups within the Victorian community rather than the extent of their actual unmet demand for interpreting services.

In fact, based on the small size of these population groups, they have a high number of interpreter requests. According to the 2006 Census, there were 1537 people who spoke Amharic and 841 people who spoke Burmese at home living in Victoria.<sup>240</sup> Considering the number of interpreter requests – 185 and 118 respectively – that suggests a high proportion of these population groups are in need of an interpreter when seeking legal assistance. This is consistent with the access to justice issues outlined at 2.8.4.1. Conversely, if such groups do not receive interpreting services, there is likely to be greater negative outcomes in terms of their access to justice.

Therefore, the LIV submits that there is current unmet demand for civil justice interpreting services in this area. Again, although much of the DOJ data would relate to criminal matters, in the LIV's view, it is indicative evidence of what is occurring in the wider justice system.

.....  
 240 ABS, *Language Spoken at Home – Full Classification List*, *op. cit.*. "Sudanese Arabic" was not defined as a language group in the ABS Census.



# Recommendations For The Establishment Of An Interpreting Fund

Part Two of the Report identified the nature and extent of the unmet demand in Victoria for interpreters in civil proceedings. Part Three of the Report sets out the LIV's recommendations to the Victorian Government on how to respond to that demand through the establishment of an Interpreting Fund.

## 3.1 Rationale For The Establishment Of An Interpreting Fund

### 3.1.1 Achieving access to justice through the establishment of an Interpreting Fund

The LIV considers that the establishment of an Interpreting Fund is fundamentally about providing and enhancing access to justice in Victoria's civil justice system.

Without access to interpreters in civil matters, people with limited English language skills are on an unequal footing – in terms of communication – with other participants in the civil justice system, particularly if they are unable to pursue their legal rights for that reason. This was recognised by the VLRC when it originally proposed the creation of the Interpreting Fund, noting that the Fund was “fundamental to the proper administration of justice and essential for ensuring a person a fair hearing”.<sup>241</sup>

However, the LIV notes that the Interpreting Fund model proposed by the VLRC is to achieve the “proper provision of interpreting services in Victorian courts”.<sup>242</sup> Yet, from the LIV's perspective, unmet demand for civil justice interpreters is not confined to the courts. As illustrated by Part Two of the Report, there is unmet demand at other stages of the civil justice process, particularly the initial legal advice stage.

---

<sup>241</sup> VLRC, *op. cit.*, p. 589.

<sup>242</sup> *Ibid.*

While the LIV agrees that funding the provision of interpreters in civil court proceedings is important, the LIV believes that the focus of the Interpreting Fund should be broader than that proposed by the VLRC. Focusing just on the provision of interpreters in the courts conceals the need for interpreters in other areas of the civil justice process, particularly prior to or outside any court appearance.<sup>243</sup> Further, the LIV considers that having access to civil interpreters at earlier stages of the civil justice process is equally, if not, more critical. It is often the failure to provide access to interpreters at earlier stages of legal disputes or negotiations with government agencies when people are seeking legal advice or assistance that leads people from CALD backgrounds to pursue subsequent litigation to enforce their rights through law.<sup>244</sup>

A recent DOJ research investigation into the legal needs of people facing civil debt problems substantiates the idea that the earlier a person has access to assistance to resolve a civil legal dispute, the more positive their outcome from, and experience with, the civil justice system is likely to be. The DOJ research found that there were several benefits of early access to legal advice and assistance to enable people to resolve their legal problems at an early stage. These benefits included the prevention of the escalation of their dispute into formal court proceedings, the alleviation of stress and anxiety and a feeling of empowerment. However, when people resolved their civil legal debt problems themselves or there were delays in seeking assistance, they often felt they had very limited options available to them.<sup>245</sup>

In the LIV's view, these ideas apply equally to the provision of interpreters. If Victorians with English language difficulties cannot access an interpreter – especially if they do not have the means to pay – they may be unable to obtain legal advice, pursue a meritorious legal claim or defence or may have to abandon an existing one. People in this situation, in the LIV's opinion, are relegated to the periphery of the Victorian civil justice system.

In turn, this impacts on the broader community. As noted by the FCLC, people who cannot resolve their legal problems often end up in cycles of decline. If problems are not resolved early, they can escalate and become compounded by further legal issues. The failure to resolve legal problems in a timely manner can also lead to loss of employment and income, stress-related illnesses and relationship breakdown and, over time, represent a significant cost to the government and community.<sup>246</sup>

On the other hand, the LIV considers that providing people who have English language difficulties with access to interpreters through an Interpreting Fund prior to court will help achieve positive outcomes for themselves and the Victorian civil justice system. The LIV believes that Victorians will be able to resolve their civil disputes more quickly, for less cost and at an earlier stage of the civil justice process than they may have otherwise been able to. Such an approach is also consistent with the Victorian Government's civil justice dispute resolution policy, which is to "prevent and minimise disputes, and to provide a system that resolves disputes at the lowest possible level of intervention, with the courts being the last resort".<sup>247</sup>

The LIV also believes that the establishment of an Interpreting Fund would enhance the overall procedural fairness of the civil justice system. Justice requires not only "fair" results but also outcomes arrived at by fair procedures.<sup>248</sup> The Victorian Human Rights Charter supports this idea. Section 24(1) of the Charter provides that a person charged with a criminal offence or a party to a civil proceeding has the right to a fair hearing. Under section 24(1), the hearing must be "fair". Commentators consider that this idea of fairness is concerned with procedural fairness rather than the substantive merits of a person's case. It requires, in

243 Dobinson & Chiu, *op. cit.*, pp. 30, 43.

244 Laster & Taylor, *op. cit.*, p. 103.

245 Schetzer, *op. cit.*, pp. 100-101.

246 FCLC, *Victorian State Budget Submission 2009-2010*, December 2008, p. 1. Accessed in January 2010 at [http://www.communitylaw.org.au/cb\\_pages/images/Federation%20of%20CLCs%20State%20Budget%20Submission%2009-10.pdf](http://www.communitylaw.org.au/cb_pages/images/Federation%20of%20CLCs%20State%20Budget%20Submission%2009-10.pdf).

247 DOJ, *Attorney-General's Justice Statement 2*, *op. cit.*, p. 40.

248 James J Spigelman, 'Seen to be Done: The Principle of Open Justice,' Speech delivered at the 31st Australian Legal Convention, 9 October 1999, 74 *Australian Law Journal* 290 as quoted in VLRC, *op. cit.*, p. 94.

essence, that parties have a reasonable opportunity to put their case under conditions that do not place them at a substantial procedural disadvantage relative to their opponent.<sup>249</sup> Fair procedures, in the LIV's view, include the provision of interpreters in civil proceedings for people with English language difficulties. Without access to interpreters, such parties would be at a distinct procedural disadvantage – unable to fully communicate or participate in civil proceedings.

In the LIV's view, the importance of having access to funded interpreting services at all stages of the civil justice process is illustrated by the case study of Mrs F, which was provided by PILCH to the LIV. Mrs F was involved in a civil matter where she faced the loss of her home. As she spoke no English, Mrs F required the assistance of an interpreter on multiple occasions – in order to seek assistance from PILCH, to obtain legal advice, for the preparation of legal documents and to attend mediation. The matter was successfully resolved at mediation. However, due to the lack of availability of interpreter funding for civil matters, PILCH incurred significant out of pocket expenses to enable Mrs F to achieve a successful outcome to her case.

*Mrs F, an elderly non-English speaking women, took out a mortgage on the home in which she lived in order to loan money to a family member. Failure of this family member to repay the loan meant that Mrs F, who had no income apart from her pension, could not repay the mortgage and entered into default in the mortgage on the home. A victim of financial elder abuse, Mrs F came to PILCH without the resources to afford a lawyer and in danger of losing her home. With the help of her son who did speak English, she obtained PILCH's assistance and was referred to a barrister and a law firm that agreed to provide pro bono representation in a civil claim against the family member who incurred the loan. There was specific urgency to the situation as Mrs F was in ill health.*

*In order to bring a claim for repayment of the loan so that Mrs F would not default on her mortgage, Mrs F's pro bono solicitors had to draft an Affidavit. Mrs F could not do this without the assistance of an interpreter. While PILCH as a CLC had access to a limited amount of funding for interpreting services, these were not sufficient to meet all of Mrs F's requirements for an interpreter at this stage of proceedings. Due to the complexity of the matter and the need to obtain instructions and a detailed account of the matter from Mrs F, more than one session between Mrs F and her pro bono lawyers was necessary. An interpreter was required for each session.*

*When the case went to mediation, Mrs F required the further use of an interpreter present with the pro bono barrister and solicitor. The amount of time required was for the entire duration of a court day on two separate occasions. PILCH did not have access to any interpreter fund to cover this amount and neither Mrs F nor her son could afford to pay the cost for this. The referred lawyers who were acting on Mrs F's behalf were doing so for free and had already incurred costs on behalf of their client. Therefore, PILCH was forced to carry these expenses to ensure that Mrs F could understand and participate in the mediation. These expenses were significant and impossible to budget for as the amount of time required for an interpreter in each case cannot be predicted.*

*Mrs F's matter was settled at mediation. Without the support of PILCH and her pro bono lawyers, Mrs F would have had no recourse to participate in this process – indeed could not have brought her case and might have lost her home.*

### 3.1.2 Addressing increasing unmet demand for civil justice interpreters

From the LIV's perspective, the importance of establishing an Interpreting Fund to address the existing problem of unmet demand for civil justice interpreters is emphasised by the likelihood that this unmet demand will only increase over time.

<sup>249</sup> Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities*, 2008. Lawbook Co, Sydney, p. 169.

Current Victorian Government projections indicate that Victoria's population will increase by 1.58 million people to 6.71 million people by 2026. A major component of this population increase – 969,000 people – is projected to be due to overseas migration, especially from non-English speaking countries.<sup>250</sup> Additionally, there will also be an increased number of older people from CALD backgrounds whose English skills are likely to decrease as they age. This suggests a growing need for interpreters in the Victorian population.

Combined with this is the ongoing trend of unmet demand for legal assistance in civil law that, in Victoria, “continues to be the greatest area of unmet legal need”.<sup>251</sup> The *Attorney General's Justice Statement 2* has recognised that the assistance available for civil justice matters was dramatically reduced in 1996 after the Commonwealth reduced its contribution to legal aid. In its submission to the VLRC's *Civil Justice Review*, DOJ also recognised that the impact of this reduction:

*was severe. It included the almost complete abolition of legal aid for civil matters so that now grants of legal aid are very rarely made for matters such as discrimination, consumer protection, tenancy law, social security law, contract law and personal injuries. Some of these matters have been picked up by the private profession... but substantial areas of law, particularly poverty-related law, have not been picked up.*<sup>252</sup>

The LIV considers that the combination of these two Victorian trends – an ongoing unmet demand for civil legal services and a growing population with limited English skills – means that unmet demand for civil justice interpreters is highly likely to increase in the future if it remains unaddressed. Therefore, the LIV views the establishment of an Interpreting Fund as an important risk management strategy and tool to address that future growth.

### 3.1.3 The role of the Victorian Government in funding interpreters in civil proceedings

If an Interpreting Fund were established, a preliminary issue is how the costs of the interpreting services will be met.

Currently, in civil cases, interpreting costs are generally borne by the parties themselves. The traditional rationale for this was that – compared with criminal proceedings – civil proceedings were seen as private matters in which the state played no part other than as adjudicator.<sup>253</sup>

However, the LIV submits that this idea represents an outdated characterisation of the role of the state in civil proceedings. In Victoria, the state is not merely an adjudicator in civil proceedings; it is an active participant and funding body. In the civil interpreter context, there is existing precedent for the Victorian Government playing a direct funding role through its funding of interpreters in civil matters at VCAT.<sup>254</sup>

Therefore, the LIV recommends that the Victorian Government expand its current funding role through financially supporting the provision of civil justice interpreters through an Interpreting Fund. As outlined at 3.1.1 and 3.1.2, the LIV considers that the Interpreting Fund will have the combined effect of increasing access to justice for Victorians as well as helping to address the likely future growth of the unmet demand for civil justice interpreters.

<sup>250</sup> Victorian Government, *Victoria in Future 2008: Melbourne*, pp. 2, 7. Accessed February 2010 at [http://www.dse.vic.gov.au/CA256F310024B628/0/BA5A4969545C9A2CCA2576D9007DC70C/\\$File/Final+VIF08+Melbourne+booklet.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/BA5A4969545C9A2CCA2576D9007DC70C/$File/Final+VIF08+Melbourne+booklet.pdf).

<sup>251</sup> FLC, *State Budget Submission 2009-2010*, op. cit., p. 5.

<sup>252</sup> As quoted in VLRC, op. cit., p. 608..

<sup>253</sup> Laster & Taylor, op. cit., p. 23.

<sup>254</sup> VCAT is also partly funded through monies from industry trust funds such as the Residential Tenancies Fund. As monies from these funds must be spent on cases in the relevant area, it is likely that some of these funds are used to pay for interpreters. Notwithstanding this, the LIV submits that direct government revenue plays a substantial role in the funding of civil interpreting services at VCAT as the trust fund monies will not meet all the costs of VCAT's interpreter expenses. There are other VCAT Lists that use a large amount of interpreters such as the Guardianship and Administration List, which are only partially funded through trust fund monies and others such as the Civil Claims List, which are not funded through trust fund monies at all. See further: VCAT, *President's Review*, op. cit., p. 15 and VCAT's *Annual Report*, op. cit., p.69.

The LIV further submits that the creation of an Interpreting Fund will enable the Victorian Government to address the current imbalance in the provision of interpreting services in Victoria. Currently, funding for the provision of interpreters in criminal matters is extensive and interpreters are available as required right across the criminal justice process. By comparison, funding of, and access to, civil interpreters is limited, leading to unequal provision of interpreters across the Victorian civil justice system depending on whether a party is a plaintiff, defendant or witness and the forum they are seeking to utilise. In Victorian courts, for example, witnesses have statutory access rights to interpreters yet plaintiffs and defendants do not. VCAT provides civil justice interpreting services for all parties and witnesses in need of them yet none of the Victorian civil courts do so.

An Interpreters Fund would also help make Victoria more consistent with other Australian jurisdictions. Currently, the Commonwealth, South Australia, Tasmania and Western Australia all provide greater access to funded civil interpreters than Victoria.

## 3.2 Implementation Plan For The Interpreting Fund

### 3.2.1 Modes of interpreting

In the LIV's opinion, the unmet demand for civil justice interpreters can be addressed through an Interpreting Fund. However, a key, practical challenge of the Interpreting Fund will be funding, and providing access to, the most appropriate form of interpreting.

However, the LIV considers that there is no one form of interpreting that best suits all circumstances. Determining what is the most suitable mode or modes of interpreting is effectively a pragmatic assessment based on a combination of factors such as the nature of the client's query and the resources available to a legal provider at the time an interpreter is required. It also involves an understanding of the advantages and disadvantages of the different modes of interpreting – on-site interpreting,<sup>255</sup> telephone interpreting and video-conference interpreting. In practice, it will be up to the relevant legal service provider to determine what should be the most appropriate mode or modes of interpreting to suit each individual set of circumstances.

Therefore, in the LIV's view, it would be inappropriate to rely exclusively on just one type of interpreting mode through the Interpreting Fund. Consistent with the diversity of Victoria's CALD population, communicating with that population requires multiple methods of interpreting service delivery.

#### 3.2.1.1 On-site interpreting – advantages and disadvantages

On-site interpreting involves an interpreter attending a meeting in-person to conduct face to face interpreting. On-site interpreters provide the highest standard of interpreting quality. As on-site interpreters are physically present, they can assess and assist with both non-verbal and verbal communication, resulting in a better understanding of the matter being discussed.<sup>256</sup> On-site interpreting is preferable in situations where important decisions need to be made, complex or lengthy matters need to be discussed or where "sight translation" of documents is required.<sup>257</sup>

.....  
 255 DOJ identifies sight translation – which is part of on-site interpreting – as a fourth type of interpreting. This involves an interpreter reading information from a document and interpreting its meaning in another language. This does not serve as a detailed translation but rather an indication of what is contained in the documents. See further: DOJ, *Language Services Policy and Guidelines for Working with Interpreters and Translators*, *op. cit.*, p. 5.

256 VOMA, *op. cit.*, p. 26.

257 DOJ, *Language Services Policy and Guidelines for Working with Interpreters and Translators*, *op. cit.*, p. 5; VLA, *VLA Guide to Interpreting and Translating*, *op. cit.*, p. 23. VOMA, *op. cit.*, p. 26.

On-site interpreters may be used as required or on a more permanent basis. An example of the latter is in-house interpreters who are located at particular locations or organisations on certain days. These interpreters work well if there is a demonstrated need from the local community. For example, Footscray CLC has a Vietnamese interpreter that attends its office every Thursday afternoon. The African Legal Centre – also based at the Footscray CLC – has Sudanese and Ethiopian interpreters based on-site one afternoon a week.<sup>258</sup> Due to current demand for the Vietnamese language, the Sunshine Magistrates' Court has a permanent Vietnamese interpreter on-site. The Neighbourhood Justice Centre also uses a Vietnamese interpreter on-site. This service was recently expanded from two to three days a week.<sup>259</sup>

However, on-site interpreters are generally more expensive than other interpreting options. On-site interpreters also often require advance notice, especially where interpreters are required to travel long distances. This can limit the availability of interpreters, particularly after business hours or in rural and regional areas.<sup>260</sup>

Also, in-house interpreters will not be appropriate in all cases. As many legal service providers will require interpreters for multiple languages rather than just one or two, there may not be sufficient demand to justify the cost of using an in-house interpreter for a particular language. Further, the way that the interpreting industry is structured means that interpreters may be able to earn more from casual, freelance work rather than fixed term or full time work, leading to difficulty attracting them to in-house positions.<sup>261</sup>

### 3.2.1.2 Telephone interpreting – advantages and disadvantages

A telephone interpreter provides an interpreting service over the telephone. The client may attend in-person at the legal service provider or the interpreting service may be via a 3-way telephone hook-up.

Telephone interpreting is especially useful where a client needs emergency, urgent or after hours assistance when an on-site interpreter is not readily available. It can be used to quickly determine the nature of an enquiry, to establish the relevant language spoken or to make an appointment for when an on-site interpreter is needed. Telephone interpreting is less expensive and more anonymous than on-site interpreting. It is also more widely used in remote or regional areas.<sup>262</sup>

However, telephone interpreting is not generally suitable for lengthy or complex interviews. The quality of interpreting will also not be as good as that of on-site interpreters as telephone interpreters cannot take non-verbal signals into account.<sup>263</sup>

Telephone interpreting is best suited for discussions over the telephone with clients for up to 15 minutes in duration. If an interpreting matter will involve complex discussions or take longer than 15 minutes, it is preferable to use an on-site interpreter.<sup>264</sup> Some people, such as the elderly, may also not be comfortable using the telephone. Telephone interpreting is also not suitable for Auslan users or other people with hearing difficulties or where forms need to be filled in. In these situations, it is also preferable to use on-site interpreters.<sup>265</sup>

### 3.2.1.3 When is it appropriate to use on-site or telephone interpreting services?

Current Victorian government interpreter policies provide guidance about when it is most suitable to use different modes of interpreting. However, the LIV is concerned that the current insufficient funding of civil justice interpreting services undermines the effect of these policies, particularly for on-site and telephone interpreting.

<sup>258</sup> Katie Fraser, *Out of Africa and into Court: The Legal Problems of African Refugees*, June 2009. Footscray Legal Centre, p. 14.

<sup>259</sup> Discussion with Neighbourhood Justice Centre (NJC), 5 January 2010. Transcript on file with the author.

<sup>260</sup> VOMA, *op. cit.*, p. 26.

<sup>261</sup> The NJC reported difficulty in finding, and employing, an in-house interpreter for this reason. Meeting with NJC, 7 January 2010. Transcript on file with the author.

<sup>262</sup> VOMA, *op. cit.*, p. 26; VLA, *VLA Guide to Interpreters and Translators*, *op. cit.*, p. 23. DOJ, *Language Services Policy and Guidelines for Working with Interpreters and Translators*, *op. cit.*, p. 5.

<sup>263</sup> VOMA, *op. cit.*, p. 26.

<sup>264</sup> VITS, *op. cit.*, p. 21.

<sup>265</sup> VOMA, *op. cit.*, pp. 26-27; VLA, *VLA Guide to Interpreters and Translators*, *op. cit.*, p. 23.

For example, at the legal advice stage of civil proceedings, CLCs, providers of pro bono legal services and the VLA have all identified specific situations where there is existing unmet demand for interpreters. These involve circumstances where there are clients with English language difficulties who require:

- an initial assessment of a legal problem;
- more complex and detailed legal advice;
- an explanation about court or financial documents,
- swearing or affirming an affidavit or other court documents; and
- assistance with filling out legal forms.

In the LIV's view, situations involving an initial assessment of a legal problem are most appropriately addressed through telephone interpreting services. This is supported by the Victorian government policies as outlined at 3.2.1.2. The other situations outlined above – which involve the provision of more detailed legal advice or explanations about court or other documents – are, in the LIV's opinion, more suited to on-site interpreting services. Again, this is supported by the Victorian government policies outlined at 3.2.1.1.

There are also insufficient interpreters available in Victorian civil courts, as identified by the VLRC's *Civil Justice Review*, providers of pro bono legal services and CLCs. Here, telephone interpreting would be most appropriate for initial enquiries to the court registry or to make arrangements for an on-site interpreter. However, in most cases, the LIV believes that it would be preferable to provide on-site interpreters, especially at court hearings where significant legal rights and obligations would be at stake.

However, for both the legal advice and court stages of the civil justice process, the current reality of the provision of interpreters is inconsistent with Victorian government policy. This indicates that clients with English communication difficulties should be given access to professional interpreting services when making significant decisions concerning their lives or where essential information needs to be communicated to inform decision making. The LIV submits that the provision of interpreting services for civil legal advice and civil courts falls within both these categories.

In practice, what is occurring due to the current lack of funding for Victorian civil interpreters is that telephone interpreting services are being used as a substitute in situations more suitable for on-site interpreting services. In the LIV's view, this is inappropriate, particularly when there are substantive legal issues at stake or detailed explanations required.

This is a particular problem at CLCs where, due to the current limitations of their interpreter funding, there is extensive reliance on telephone interpreting. While telephone interpreting may be viewed as an easy and cost-effective interpreting solution, the LIV submits that it provides detrimental outcomes when used in the wrong type of situation. Anecdotal feedback received from CLCs indicates that when the sorts of situations more appropriate for on-site interpreters are conducted via telephone interpreting, they tend to take twice as long. This is due to the complexity of the matters under discussion. Sometimes, items need to be repeated or clarified several times. Also, simultaneous interpreting<sup>266</sup> cannot be conducted over the telephone. From the LIV's perspective, this outcome consumes already scarce CLC resources that could be utilised to assist other CLC clients.

For VLA and providers of pro bono legal services, there is also no current funding available for the provision of civil interpreting services for the situations they identified. Therefore, a person with English language difficulties must either rely on family or friends or go without an interpreter altogether – neither of which is an acceptable alternative in the LIV's view.

<sup>266</sup> Simultaneous interpreting is where the interpreter listens to the first words uttered by the speaker, then proceeds to interpret the speaker's speech or concepts immediately and continuously as they are expressed so that the speaker and the interpreter are speaking simultaneously. This style of interpreting is commonly used in court with the interpreter whispering to the CALD client to keep them informed of discussion taking place within the body of the court such as the legal deliberations between the parties, evidence of other witnesses and so on.

### 3.2.1.4 Videoconference interpreting – advantages and disadvantages

Videoconference interpreting uses an interpreter to deliver a service through video. This type of interpreting service enables large groups of people to take part in a discussion and can be organised at short notice. Videoconferencing can be used in metropolitan or regional areas or both at the same time.<sup>267</sup>

Videoconference interpreting offers particular advantages in terms of time and expense for organisations in rural and regional locations that find it difficult to access, or meet the travel costs associated with, on-site interpreting services.<sup>268</sup> Enabling a Melbourne-based interpreter to interpret via videoconference also avoids the problem of potential conflicts of interest where locally-based interpreters in small, regional communities know the relevant person who requires an interpreter. Often, such interpreters may refuse some bookings in order to preserve long-term relationships within their community.

On the other hand, videoconferencing has its limitations. It may be difficult to arrange and the technology could be intimidating for some people. Charges for videoconference interpreting are similar to those for on-site interpreters but there may be additional telecommunications costs.<sup>269</sup> Videoconference interpreting may also require special training and equipment to ensure high quality service. Further, for optimal interpreter performance, research suggests that videoconferencing technology should only be used for around 20 minutes at a time.<sup>270</sup>

### 3.2.1.5 When is it appropriate to use videoconference interpreting services?

In the LIV's opinion, videoconferencing would also be an appropriate form of interpreting to address the unmet demand for civil justice interpreting services, particularly in rural and regional communities. As noted by the VPLRC's *Inquiry into Legal Services in Rural and Regional Victoria*, videoconferencing has a significant role to play in improving access to interpreters in rural and regional Victoria. The VPLRC viewed videoconferencing as the ideal alternative to on-site interpreting and consequently recommended that the Victorian Government encourage the uptake of the use of videoconference interpreting by training interpreters in its use, making access points available in rural and regional areas and actively promoting the availability of these facilities to people of CALD backgrounds.<sup>271</sup>

Videoconferencing can also facilitate sign language<sup>272</sup> and is viewed by many in the Deaf community as an answer to the current problems surrounding the provision of Auslan interpreters.<sup>273</sup>

Feedback from the LIV Focus Groups and interviews with interpreter service providers indicated strong support for videoconferencing as an interpreting option. For instance, the LIV Focus Group indicated that the availability of videoconferencing interpreting could make the difference about whether a client receives access to an interpreter as often interpreters may not be paid travel money and will refuse to take a job if there are significant travel costs involved.<sup>274</sup> The Focus Group also agreed that centrally located videoconferencing facilities are essential, noting that many major law firms have videoconferencing facilities available. If these firms had a pro bono service, the Focus Group considered that such law firms might be willing to allow interpreters provided through the Interpreting Fund to use this service. It was also noted that it would be important to educate clients and interpreters about the videoconferencing services that are available. There would be an initial expense of training interpreters in videoconferencing but, in the Focus Group's view, this would reduce expenses in the long-term.<sup>275</sup>

<sup>267</sup> VOMA, *op. cit.*, p. 27; VLA, *VLA Guide to Interpreters and Translators, op. cit.*, p. 23.

<sup>268</sup> For example, based on the DOJ data, the current cost of sending an on-site interpreter to the Magistrates' Court in Mildura, including their accommodation and travel costs, is \$1540.

<sup>269</sup> VOMA, *op. cit.*, p. 27; VLA, *VLA Guide to Interpreters and Translators, op. cit.*, p. 23.

<sup>270</sup> Barbara Moser-Mecer, *Remote interpreting: Assessment of human factors and performance parameters*. Accessed January 2010 at <http://www.aiic.net/ViewPage.cfm/article879.htm#results>.

<sup>271</sup> The government response to this recommendation is unknown. See further, VPLRC, *Legal Services in Rural and Regional Victoria, op. cit.*, p. 206.

<sup>272</sup> Christopher Jay, 'Translating via video,' *Australian Financial Review*, Friday 5 February 2010, p. 49.

<sup>273</sup> Karen Lloyd, *op. cit.*, p. 14.

<sup>274</sup> Feedback from LIV Focus Group, 12 November 2009.

<sup>275</sup> *Ibid.*

The LIV notes that the infrastructure for videoconference interpreting exists in Victoria – especially in Victorian courts – but the exact extent of its use is unknown.<sup>276</sup> However, the LIV notes that the VMC is currently investigating the use of videoconferencing technology for interpreters. As part of this, the VMC is currently undertaking a pilot of videoconferencing interpreters in conjunction with the Sunshine Magistrates’ Court (the Sunshine Pilot). Sunshine Magistrates’ Court was chosen because it had the second highest usage of interpreters in metropolitan Melbourne. The Sunshine Pilot involved criminal matters, mainly licence restorations. During those hearings, the interpreter was located off-site at an interpreting service provider. However, an on-site interpreter was always present as a back-up in case the technology failed.

Although the Sunshine Pilot is not yet concluded and relates to criminal matters, the VMC and Sunshine Magistrates’ Court provided useful feedback that the LIV considers could also apply to the use of videoconference interpreting for civil proceedings.<sup>277</sup>

One is the type of matters suitable for videoconference interpreting. To a large extent, these were determined by the technological set-up. The Sunshine Pilot focused on licence restoration matters because these were generally short, uncomplicated matters. Other types of general legal matters that were considered suitable for videoconference interpreting in this context were matters that involved direct interaction between the interpreter and the litigant, such as where the parties represented themselves.

By contrast, matters that involved interactions with third parties, such as clients consulting with their lawyers, were not considered suitable. This was because the videoconferencing technology used in the Sunshine Pilot was fixed into position in two courtrooms and there were no additional videoconferencing facilities available in private rooms. Effectively, everyone heard what everyone else was saying during proceedings, meaning that there was no opportunity for confidential discussions and that simultaneous interpreting – which is the preferred method of many court interpreters – would have been inappropriate as the interpreter would have been talking over the top of other people.<sup>278</sup>

The technology infrastructure set up also limited the Sunshine Pilot’s flexibility. As one videoconferencing codex line was shared across two courts, the matters heard under the Sunshine Pilot had to compete with other court users to obtain access to the technology.

Overall, while the video technology operated well and there was positive feedback from users, the Sunshine Pilot does not appear to have specifically benefited the Sunshine Magistrates’ Court. Sunshine is a busy, Melbourne-based court with many CALD litigants and interpreters coming and going on a daily basis. The Court also has a permanent on-site Vietnamese interpreter five days a week. Therefore, the Court had strong demand for interpreting services but little unmet demand because it was relatively easy for the Court to obtain an interpreter when one was required.<sup>279</sup>

However, it is likely that there would be more explicit and greater benefits available through the provision of videoconference interpreting in a rural or remote location in Victoria. In the future, the VMC would like to extend its investigation of videoconferencing technology in courts to a rural location.<sup>280</sup> The LIV supports this idea and believes it would have a positive impact on access to justice.

<sup>276</sup> The LIV notes the Attorney-General’s *Justice Statement* referred to the roll out of videoconferencing facilities to regional courthouses and that urgent applications, interlocutory hearings and evidence of remote witnesses can all be undertaken using resources in Melbourne or other locations if a magistrate or judge is not available at the venue. See further: DOJ, *Attorney-General’s Justice Statement. op cit.*, p. 41. However, no mention was made of utilising this infrastructure for interpreters.

<sup>277</sup> Based on discussions with the Sunshine Magistrates’ Court on 23 January 2010 and VMC on 5 February 2010.

<sup>278</sup> However, the LIV notes that the videoconferencing technology to enable private discussion between litigants who need interpreters and third parties such as their lawyers does exist and is regularly utilised by the Community Relations Commission in NSW, particularly in rural and regional locations.

<sup>279</sup> The DOJ data confirms this lack of unmet demand for interpreting services. In 2008-09, Sunshine Magistrates’ Court sought 1049 interpreting services and, of these, only 11 were not delivered due to them being cancelled at short notice.

<sup>280</sup> Based on discussions with VMC, 5 February 2010.

### 3.2.2 Staged approach

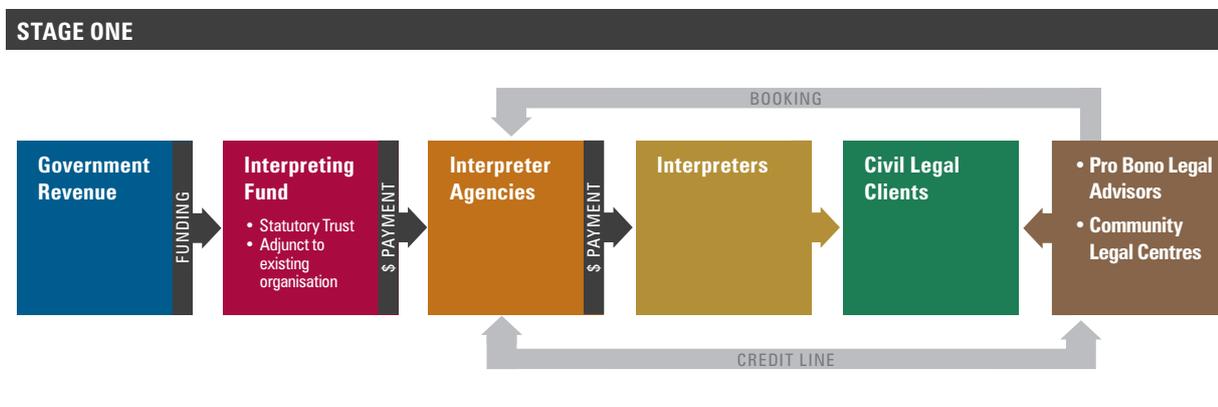
The LIV considers that the complex nature of unmet demand for civil justice interpreting services means that there is no one “best-fits” model for the Interpreting Fund. That is, there is no one model or a structure that can comprehensively address all the different kinds of unmet demand for civil justice interpreting services at the same time.

Therefore, the LIV recommends that the Victorian Government take a staged approach to the establishment of the Interpreting Fund. A staged approach means that the Victorian Government can take immediate, positive steps towards addressing what the LIV considers to be the most serious areas of unmet demand for interpreters in civil proceedings, that these measures can be appropriately identified and evaluated and then the knowledge and data gained from this can be used to assess and address the unmet demand for civil interpreters more broadly.

Therefore, the LIV proposes that the establishment of the Interpreting Fund occur in a three stage process as follows:

1. **Stage One:** A 12 month pilot project to address the unmet demand for interpreters at the legal advice stage of civil proceedings;
2. **Stage Two:** A 12 month pilot project to address the unmet demand for interpreters at the court stage of civil proceedings, particularly focusing on the Magistrates’ Court; and
3. **Stage Three:** Building on Stages One and Two, Stage Three involves targeting unmet need for civil interpreting services in a more specific and sophisticated manner through the establishment of a grants scheme.

## 3.3 Stage One Of The Implementation Of The Interpreting Fund



### 3.3.1 Focus of Stage One

Stage One of the Interpreting Fund is a 12 month pilot. It focuses on addressing the unmet demand for interpreting services at the initial legal advice stage of the civil justice process, especially for people who seek advice through CLCs and pro bono legal advisers.

Stage One focuses on addressing the unmet demand for civil justice interpreters at the legal advice stage first because, in the LIV’s view, that is the area where there is the strongest evidence for, and greatest extent of, unmet demand. Stage One is also intended to help prevent the escalation of civil disputes. As previously noted, the earlier a person has access to legal advice and assistance to resolve their civil dispute, the more positive their outcome and experience with the civil justice system is likely to be.<sup>281</sup>

<sup>281</sup> See further at 3.1.1.

Stage One particularly focuses on interpreter service provision in CLCs. The LIV notes that, in the *Attorney-General's Justice Statement 2*, DOJ indicated that – as part of developing a framework for civil legal advice and assistance – it was important to identify those population groups most in need and developing needs such as senior Victorians and newly arrived communities. DOJ identified CLCs as having an important role to play in this framework given that “they are often located in disadvantaged communities or they address particular types of disadvantage”.<sup>282</sup> The LIV considers that this idea equally applies to the provision of interpreting services. Additionally, CLCs aim, wherever possible, to assist their clients through early intervention strategies to prevent the escalation of legal problems.<sup>283</sup> One way of doing this is by providing legal advice. Another is through the delivery of CLE programs, which provide people with direct access to legal information and enable them to build up their knowledge of legal issues.

It is the LIV's view that funding provided to CLCs through the Interpreting Fund should be used for on-site interpreters – for the provision of legal advice in appropriate situations as identified at 3.1.2.3 and – if relevant - for the delivery of CLE programs, for example, to new and emerging CALD communities with common legal problems.

By enhancing the provision of interpreters to CLCs, the LIV considers that Stage One will have an immediate impact on people who fall into one or more areas of unmet demand for civil justice interpreters. For instance, CLC client demographics show that many clients originate from CALD backgrounds or are aged 65 and over.<sup>284</sup> Feedback from CLCs received during the Project also identified self-represented litigants as another common category of persons seeking legal assistance. In the LIV's view, funding the provision of civil justice interpreters in CLCs will also encourage CLC clients to resolve their civil disputes at an earlier stage than they might otherwise have done and to help themselves as much as possible with their legal problems.

Stage One also addresses another identified area of unmet demand for civil justice interpreters – that is, lawyers who provide legal advice on a pro bono basis. The LIV notes the VLRC's recommendation that the Victorian Government provide funding for the provision of telephone interpreting services for pro bono practitioners who provide legal services through a pro bono referral scheme.

The LIV supports this recommendation but believes it should be expanded. A telephone interpreting service will complement existing pro bono assistance and enable private practitioners who receive pro bono referrals to more efficiently and quickly determine the nature of the legal assistance sought. However, given the practical problems identified with the use of telephone interpreters in CLCs in Part Two, the LIV believes that this recommendation should be expanded to cover the provision of on-site interpreters as well. In practice, the most appropriate form of interpreting service will need to be determined by the relevant legal service provider as outlined at 3.2.1.4.

To help address additional identified areas of unmet demand for civil justice interpreters, the LIV also recommends that consideration be given to providing funding for:

- lawyers who provide pro bono legal services outside of a pro bono referral scheme; and
- lawyers who are on a legal aid panel but are asked to give advice to clients with limited English before the application for legal aid has been made.

### 3.3.2 Structure and management of the Fund

To enhance the transparency and accountability of the Interpreting Fund, the LIV recommends that it be established as a statutory trust and managed by an independent statutory body.

Initially, however, the LIV recommends that the Interpreting Fund be established as an adjunct to an existing organisation to minimise its administration and establishment costs under Stage One. This is also what the VLRC recommended for the establishment of the Justice Fund in the *Civil Justice Review*.<sup>285</sup> An appropriate organisation could be the VLA.

.....  
 282 DOJ, *Attorney-General's Justice Statement 2*, *op. cit.*, p. 38.

283 National Association of Community Legal Centres. *Why Community Legal Centres Are Good Value*. September 2008, p. 2. Accessed January 2010 at [http://www.nacclc.org.au/multiattachments/2287/DocumentName/NACCLC\\_value\\_web.pdf](http://www.nacclc.org.au/multiattachments/2287/DocumentName/NACCLC_value_web.pdf).

284 FCLC. *Victorian State Budget Submission 2010-2011*, Appendix 3.

285 VLRC, *op. cit.*, p. 44.

Under the LIV's proposal, the Interpreting Fund would become an independent body under Stage 3 of the Implementation Plan.

### 3.3.3 Eligibility for assistance

The purpose of the Interpreting Fund is to enhance access to justice for all participants in the civil justice process who have limited English language skills and are in need of interpreters. More broadly, the Interpreting Fund is intended to be a mechanism to help people resolve their civil disputes as early as possible. Consistent with this approach, the LIV recommends, that in Stage One, the presumption should be that all people who require an interpreter in civil proceedings should have access to one. In practice, this means that the Interpreting Fund should, in the LIV's opinion, provide monies to fund interpreters in circumstances where the client has requested an interpreter or the CLC or pro bono lawyers have assessed that there is a need for one.

Having an open eligibility policy towards accessing the Interpreting Fund may lead to concerns about excessive demands on the Interpreting Fund's resources. However, research suggests that it is unlikely that people will actively seek to use an interpreter if they do not need one. Instead, it is more likely that people will go out of their way to avoid having to use an interpreter. People may be reluctant to seek out the services of an interpreter for reasons such as sensitivity about their proficiency in English; confidentiality or privacy issues; gender of the interpreter; cost or delay of the interpreting service or religious/ethnic background of the interpreter.<sup>286</sup>

#### 3.3.3.1 Proposals for restrictions on access to the Interpreting Fund

The LIV's Options Paper proposed several ways that eligibility for access to the Interpreting Fund could be restricted. These were a means test, a merits test, and restrictions on the basis of languages or certain types of civil cases.<sup>287</sup> However, based on stakeholder feedback on the Options Paper, the LIV does not consider that any of these tests would be appropriate for Stage One.

A means test, which would restrict access to the Interpreting Fund on the basis of a person's finances and assets, presents several difficulties. The LIV Focus Groups queried the practicality of a means test, noting that it is difficult for someone to properly assess a person's means or finances if they are unable to properly communicate with that person in the first place. An interpreter would be required for this purpose. Another issue is that a means test may breach human rights principles. As noted by the VLA, "other litigants are not required to pay for the ability to communicate with the court".<sup>288</sup>

In the view of the LIV Focus Groups, a merits test also presented problems. As with the means test, no initial assessment of the merits of a person's case can be easily made without the assistance of an interpreter. Without this consultation, there is no easy way of assessing whether a person's case has merit and whether they should be entitled to interpreting services through the Interpreting Fund. A further difficulty is on what basis to judge the merits of the case as one lawyer's view would be different to that of another.

Similarly, the LIV does not consider it appropriate for an Interpreting Fund to restrict access on either the basis of language or type of civil claim. People with English language difficulties already face enough barriers when participating in the civil justice system. An Interpreting Fund set up to assist such people should not, therefore, present them with even more obstacles simply because they do not speak the "correct" language or have the appropriate

<sup>286</sup> VLA, *VLA Guide to Interpreters and Translators*, *op. cit.*, p. 19; Ross Barnett, *Presentation to the Victorian Legal Assistance Forum*, 5 June 2009, p. 2. Accessed January 2010 at <http://www.vlaf.org.au/docs/Ross%20Barnett's%20%20presentation.doc>.

<sup>287</sup> LIV, *Interpreters Fund Scoping Project, Options Paper*, pp. 4-6.

<sup>288</sup> VLA, *Comments on LIV Interpreting Fund Scoping Project: Options Paper*, *op. cit.*, p. 1.

type of case. Even if the Interpreting Fund did, for example, arguably restrict access to common languages, the changing nature of Victoria's population means its language needs are continually evolving, particularly in the area of new and emerging languages. The languages required for interpretation will be as individual as people's legal disputes and the reasons they are seeking legal assistance or attending court.

### 3.3.4 Funding

Consistent with the aims of the Project, the LIV has provided recommendations in Part 3 of the Report to the Victorian Government about potential sources of funding for the Interpreting Fund, the rationale for these sources and how they could be administered in practice.

The issue of how much funding is required for the Interpreting Fund is an area that requires further investigation. The LIV considers that this is a matter best addressed in a separate business case exercise following a Victorian Government decision about the core threshold issues such as the scope, nature and timing of the implementation of the proposed Interpreting Fund.

The Report can serve as a basis for these determinations.

#### 3.3.4.1 Source of funding

Consistent with the Victorian Government's existing role of funding the provision of civil justice interpreting services, the LIV proposes that Stage One of the Interpreting Fund be funded through direct government revenue.<sup>289</sup> This is also consistent with the VLRC *Civil Justice Review's* recommendation that DOJ should provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis through a Victorian pro bono referral scheme.<sup>290</sup>

The amount of funding for Stage One of the Interpreting Fund must strike a balance. On the one hand, it needs to be large enough to last for the term of the 12 month pilot and provide for the resourcing and establishment costs of the Interpreting Fund. On the other, it should not be so small that CLCs and pro bono legal service providers struggle to access funds for interpreting services as they do now. That would defeat the purpose of the pilot.

A starting point might be the FCLC's 2009-2010 Budget submission to the Victorian Government, which recommended that, as part of the minimum core funding for each CLC, there should be an \$8000 interpreter allowance (100 interviews per annum at \$80 per interview) for every 2 solicitor positions. This represents \$16,000 per CLC.<sup>291</sup>

However, unlike the FCLC submission that applies to all Victorian CLCs, the LIV submits that under its proposal, the suggested amount of funding would be delivered directly to the areas where it would have the most benefit – the unmet demand for civil justice interpreting services.

#### 3.3.4.2 Funding administration

The LIV recommends that the funding for Stage One be structured as a "credit line" with one or more interpreter agencies. A "credit line" is a centrally funded and administered contract for language services.

A credit line arrangement has several benefits. It is in line with how existing civil justice interpreting services are sought and supplied – that is, through an interpreter agency and it minimises administration for the organisation or person seeking interpreting services. Both these factors are important as feedback from the LIV's Focus Groups indicated that people would be unlikely to utilise an Interpreting Fund if it were too complex to access or overly bureaucratic.

.....  
**289** The LIV intends that the monies being provided under Stage One of the Interpreting Fund would replace the current government monies being provided for the provision of on-site interpreters in CLCs.

**290** VLRC, *op. cit.*, p. 590.

**291** FCLC, *2009-10 Budget Submission, Op. Cit.*, p. 2.

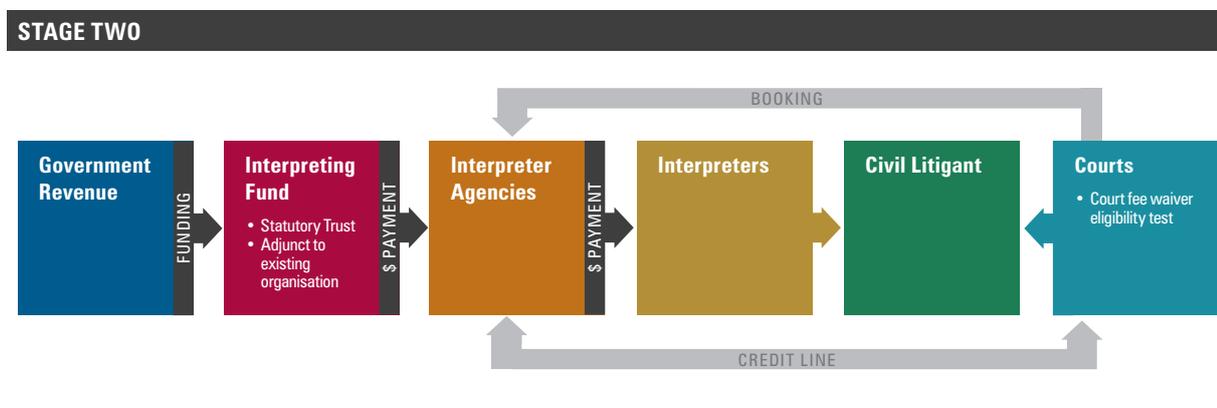
Further, a credit line will facilitate efficient and equitable access to interpreters and enable people to apply for interpreter provision on a needs basis. As shown by the activities of Victorian CLCs, some CLCs utilise interpreters more than others depending on their location, casework load and even time of day. By using a central credit line, it will also be easy to track and analyse the use of interpreting services during the Stage One pilot.

At the same time, the credit line funds will not be infinite. As there is a risk that Interpreter Fund monies could be used up overly quickly if they are not monitored, the LIV recommends that effective processes and resources be put into place to manage this.<sup>292</sup>

### 3.3.4.3 Timing

The LIV understands that the VLRC's Civil Justice Review's recommendations on the Interpreting Fund are yet to be considered by DOJ. If the proposals in this Report were adopted, normally money would be sought through the Expenditure Review Committee process. However, the LIV notes that the normal process for 2010 will be impacted by the forthcoming Victorian election in November. As part of this process, both political parties will be developing electoral platforms. Therefore, in the lead-up to the election, the LIV proposes engaging with both parties to obtain a funding commitment for the establishment of the Interpreting Fund as part of their access to justice policy. To achieve this, the LIV will advocate and highlight the Interpreting Fund as a key area of reform that will accomplish real improvement in terms of access to, and quality of, the Victorian civil justice system over the term of the next government.

## 3.4 Stage Two Of The Implementation Of The Interpreting Fund



### 3.4.1 Focus of Stage Two

Stage Two of the establishment of the Interpreting Fund involves a second 12 month pilot. It focuses on funding the provision of on-site civil justice interpreting services<sup>293</sup> for all Victorian courts and is intended to target those people who do not have the means to pay for an interpreter, such as people who are self-represented or are represented on a pro bono basis.

<sup>292</sup> One idea is to adopt the practice of the Department of Human Services credit line system, where the credit line budget is broken down into monthly allocations. Bookings can be made up to 30 days in advance and up until the monthly limit is reached. Once the available funds for the month have been used for a particular credit line, no more bookings can be made against that credit line. If the monthly limit has been reached, a booking cannot be made using credit line funds. However, there are two options – you can make a booking for the following month or; you can go ahead with the booking but your agency will need to pay for the service. See further: Victorian Government, *Department of Human Services Guidelines for the Department of Human Services Language Services Credit Line*. Accessed February 2010 at <http://www.dhs.vic.gov.au/multicultural/downloads/guidelines-applications-use-creditline-dec09.pdf>.

<sup>293</sup> Telephone interpreting is not considered as part of Stage Two of the Interpreting Fund as all Victorian courts already have access to telephone interpreters through the Commonwealth TIS.

The LIV's Stage Two proposal is particularly aimed at addressing unmet demand for civil justice interpreters in the Magistrates' Court. This is where the LIV considers the unmet demand for civil justice interpreters to be most concentrated based on the evidence received during the Project and given that the Magistrates' Court has the heaviest civil case load of all the Victorian courts.

The LIV does not intend that Stage Two applies to VCAT. VCAT's policy of providing civil interpreters at no cost to all users means that, in the LIV's opinion, there is unlikely to be much, if any, unmet demand in practice.

### 3.4.2 Eligibility test – court fee waiver

Under Stage One, the LIV proposed an open eligibility policy for access to Interpreter Fund monies in order to facilitate the resolution of civil disputes as early as possible. However, as the intention under Stage Two is to address the unmet demand for people who cannot afford an interpreter in civil court proceedings, the LIV considers it appropriate to adopt some kind of means or hardship test so that the Interpreter Fund monies benefit those directly in need of them.<sup>294</sup>

The LIV proposes that the means test be the equivalent of a court fee waiver.<sup>295</sup> Currently, Victorian courts and tribunals have the discretion to waive a prescribed fee where, in the opinion of the relevant officer, payment of that fee will cause financial hardship. However, as different Victorian courts and tribunals have different fee waiver models, this could lead to inconsistencies in approach for people in need trying to access the Interpreting Fund.

To make matters more efficient, the LIV recommends that the Victorian courts adopt a common court fee waiver policy in line with a proposal recently put forward by the LIV, PILCH and the FCLC. Adopting a common court fee policy would arguably significantly reduce time spent on applications and ensure more efficient use of resources.<sup>296</sup>

In the LIV's view, an appropriate court fee waiver model for adoption is that of the Family, Federal and Federal Magistrates Courts, which have express exemption categories from court fees for individuals who, for example, have been granted Legal Aid, are in receipt of certain government benefits or aged under 18. Additionally, these courts have the discretion to waive fees in cases of financial hardship. They have also developed a single application form for the court fee waiver.

The LIV notes that Stage Two would also be consistent with the policy of other jurisdictions – SA, Tasmania and WA – which already arrange and pay for an interpreter to be present in their civil court systems. The cost of the interpreter is not passed on to the parties.

### 3.4.3 Timing

As with Stage One, Stage Two of the establishment of the Interpreting Fund is intended to be a 12 month pilot program. For maximum impact on the unmet demand for civil justice interpreting services, the LIV recommends that Stage One and Stage Two operate concurrently.

If Stage One is in operation but Stage Two is not, there is a risk that people with English language difficulties and who have meritorious legal claims or defences, particularly unrepresented litigants, may miss out on access to civil interpreting services at the court stage of civil proceedings because they have chosen – as they are entitled to do – to take their matter straight to court rather than seek legal advice about its merits.

<sup>294</sup> The LIV does not intend the Stage Two eligibility test to be a barrier for those who are in genuine need of funded interpreter assistance in civil matters. However, it may be that people who receive funding for interpreter assistance when receiving legal advice under Stage One are, for some reason, not able to demonstrate their eligibility for interpreter assistance at Stage Two if they subsequently decide to bring their matter to court. A way to overcome this is for people to be automatically entitled to funded interpreter assistance at court if they can demonstrate that they are represented by a CLC or receiving legal representation through a registered pro bono scheme. The Federal Court has a similar arrangement for pro bono matters under its current scheme. If the Interpreting Fund is implemented, this is an issue that would need further consideration.

<sup>295</sup> FCLC, *Attorney-General's Justice Statement 2008*. May 2008.

<sup>296</sup> Law Institute of Victoria, Federation of Community Legal Centres and PILCH, Letter to Chief Justice Marilyn Warren, Streamlining of processes for waiver of court fees in *pro bono* matters and other similar contexts. Accessed December 2009 at <http://www.pilch.org.au/Assets/Files/PILCH%20Submission%20Waiver%20of%20Court%20Fees.pdf>.

### 3.4.4 Funding

#### 3.4.4.1 Victorian government revenue

Consistent with Stage One and the government's existing role in funding the provision of civil interpreters, the LIV proposes that Stage Two should also be funded through government revenue. The appropriate amount of the funding would be a matter to be determined in consultation with the Victorian courts.

If this option is adopted, the Interpreting Fund could be administered through the "credit line" arrangement proposed for Stage One of the Interpreting Fund.

#### 3.4.4.2 Filing fee levy

However, if the Victorian Government takes the view that it is appropriate for civil litigants to contribute to some of the cost of civil interpreting services provided through an Interpreting Fund, the LIV proposes that this could be accomplished through the establishment of a filing fee levy.

This idea was originally proposed in the CAGD's *Access to Interpreters in the Australian Legal System* to fund access to interpreters at no cost to the user in Commonwealth civil proceedings. The CAGD proposal was based on a filing fee levy operating in South Australia, which was included as part of the total court filing fee. The money collected from this levy was then used to subsidise the costs of providing interpreting services for both criminal and civil proceedings.<sup>297</sup>

A filing fee levy arrangement has the advantage of spreading the cost of court interpreting services across all court users instead of placing the financial burden on the litigants who are least able to pay.<sup>298</sup>

If introduced, a Victorian filing fee levy would involve including a small levy as part of the filing fee for all Victorian courts. A component of each filing fee could be set aside by individual Victorian courts and transferred into the Interpreting Fund for use as required to provide interpreting services at no charge to the user.

If the filing fee levy model is adopted, one issue would be establishing the appropriate amount of the levy. The LIV considers that this is a matter that should be determined in consultation with the courts. However, while the LIV notes the Victorian general government policy that fees and levies should be set on a full cost recovery basis, it does not consider it desirable to establish a full fee recovery of interpreting services. The provision of interpreting services provides broader benefits to society – such as the quicker and more efficient resolution of disputes – that are unrelated to the individual provision of the interpreter service.<sup>299</sup> Imposing a reduced cost fee would also be consistent with the South Australian model. In 1991, the SA filing fee levy was only a small component of the total court filing fee – \$1 of the total \$300 fee.<sup>300</sup>

#### 3.4.4.3 Party-party costs order

Another potential source of funding for the Interpreters Fund is the VLRC's recommendation that Victorian courts be given the power, subject to judicial discretion in relation to costs, to order that interpreting services should be the subject of a party-party costs order and that any funds recovered should be reimbursed to the Interpreting Fund.<sup>301</sup> Effectively, this would mean that an unsuccessful civil litigant would pay the interpreting service costs of the successful party.

<sup>297</sup> CAGD, *Access to interpreters in the Australian Legal System*, *op. cit.*, 8.3.14. The LIV notes that the filing fee levy is no longer operating in South Australia following a policy decision by the SA Courts Administration Authority to rationalise all court lodgement fees into one fee, which is notional in nature and does not equate to cost recovery. Interpreters are now paid for through Government appropriation.

<sup>298</sup> Laster & Taylor, *op. cit.*, p. 24.

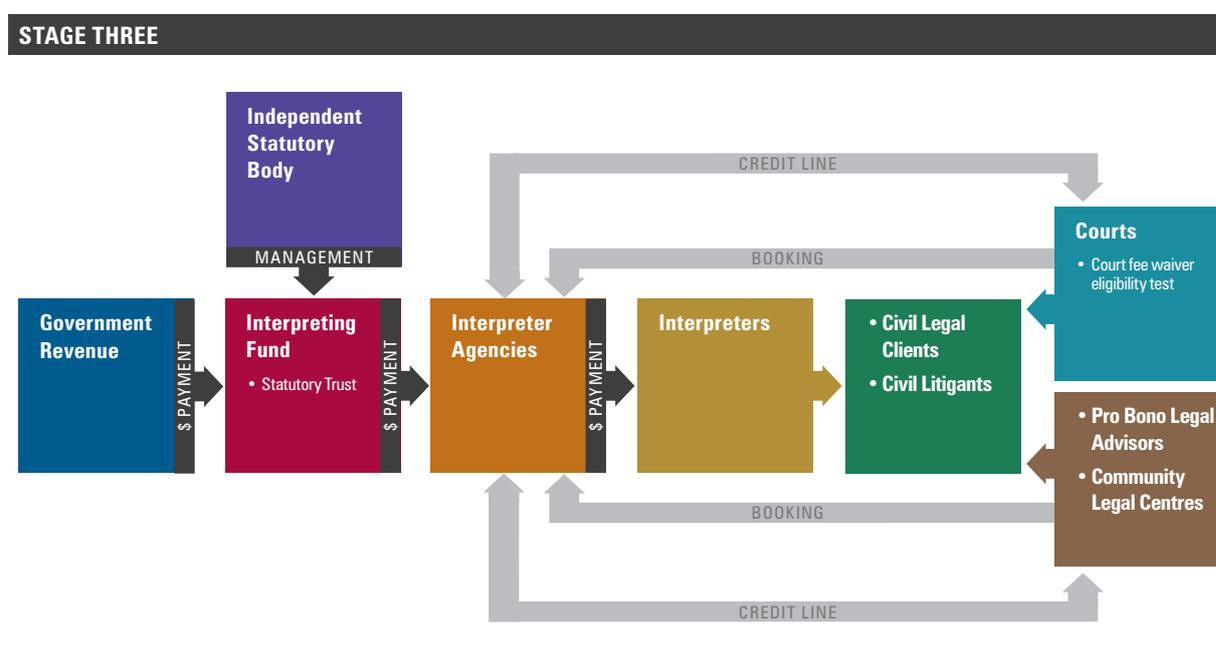
<sup>299</sup> Cost recovery on this basis is most often adopted when government services do not directly benefit all Victorians. See further: Victorian Department of Finance and Treasury: *Cost Recovery Guidelines*, 2007, p. 21. Accessed January 2010 at [http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/CostRecoveryGuidelines-September2007-FinalVersion--Website/\\$File/Cost%20Recovery%20Guidelines%20-%20September%202007%20-%20Final%20Version%20--%20Website.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/CostRecoveryGuidelines-September2007-FinalVersion--Website/$File/Cost%20Recovery%20Guidelines%20-%20September%202007%20-%20Final%20Version%20--%20Website.pdf).

<sup>300</sup> CAGD, *Access to Interpreters in the Legal System*, 8.3.14.

<sup>301</sup> VLRC, *op. cit.*, p. 589.

While the LIV supported this proposal in a previous submission to the *Civil Justice Review*,<sup>302</sup> the LIV believes that this kind of funding arrangement would not address the full extent of unmet demand for civil interpreting services, which has become evident during the course of the Project. In the LIV's view, it is preferable that an Interpreting Fund that aims to address multiple areas of unmet demand for civil interpreting services has a single source of funding rather than several sources. Otherwise, the Interpreting Fund may become overly complex to establish and administer. Nevertheless, if the Victorian Government takes the view that court users should fund some or all of the costs involved for civil courts interpreters, then this represents another source of funding.

### 3.5 Stage Three Of The Implementation Of The Interpreting Fund



Assuming the successful completion and evaluation of Stages One and Two, the LIV recommends a third and final stage for the implementation of the Interpreting Fund.

Stage Three involves the establishment of:

- an independent statutory body to manage the Interpreting Fund; and
- a grants scheme to enable the Interpreting Fund to address the unmet demand for civil justice interpreters in a more structured and sophisticated way.

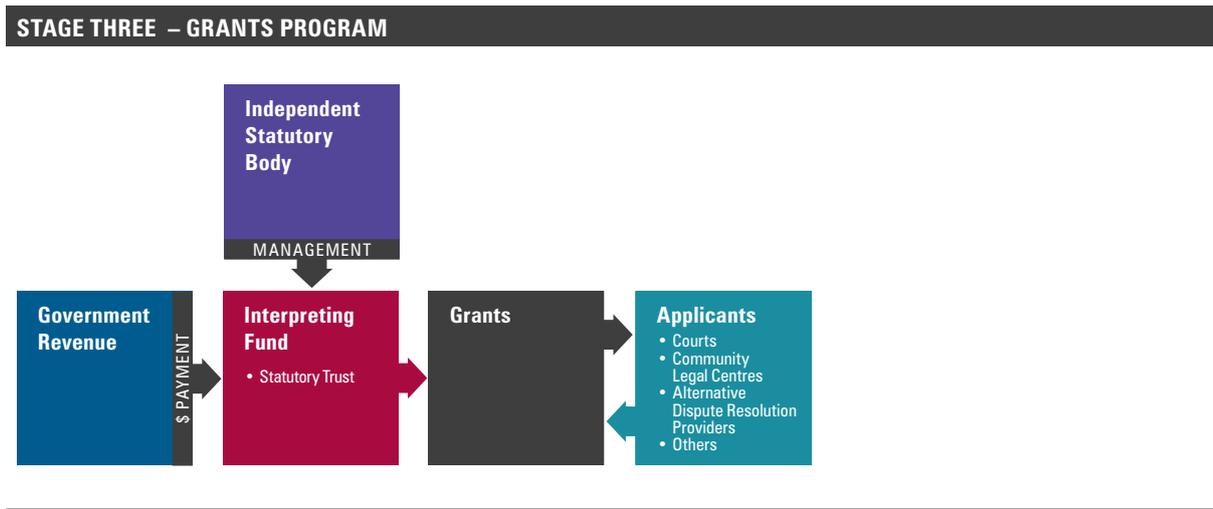
The LIV intends that, under Stage Three, the arrangements set up to address unmet demand for civil justice interpreters in terms of legal advice and civil litigation would continue to operate as previously described above, except with the following change to Stage One as outlined at 3.5.1.

<sup>302</sup> LIV, *Submission to the VLRC's Civil Justice Review: Second Exposure Draft*, October 2007, p. 13. Accessed at <http://www.liv.asn.au/getattachment/8b43f5f9-7241-49ab-bdca-514211a9e862/Civil-Justice-Review--Second-Exposure-Draft.aspx>.

### 3.5.1 Establishment of an ongoing, independent body to manage the Interpreting Fund

Under Stage One, the LIV proposed that the Interpreting Fund be established as an adjunct to an existing organisation such as the VLA. Under Stage Three, the LIV now recommends that the Victorian Government create an independent, statutory body to manage the monies in the Interpreting Fund statutory trust.

### 3.5.2 Grants program



Under Stage Three, the LIV recommends that the Interpreting Fund statutory body establish a grants program. This grants program could be similar to that operated by the Legal Services Board and aim to provide funding to organisations that increase access to justice and inform and educate the community about legal services through the provision of interpreters.

Following the completion and evaluation of Stages One and Two of the Interpreting Fund, the LIV considers that all the participating bodies will be in a better position to understand and quantify their own needs and the extent of their unmet demand for civil justice interpreting services.

A grants process, therefore, will offer these organisations the opportunity to build upon that knowledge by developing business cases for appropriate interpreter service delivery models and applying for funding for interpreter service delivery models that will best suit their particular situations. Potential applications could be for projects to expand ADR interpreting services, for the trial of videoconferencing technology or the use of DRIs for Deaf people from CALD backgrounds.

However, before the Interpreter Fund monies are paid out, it will be necessary for the Interpreter Fund statutory body to independently and rigorously assess the costs and benefits of each grant.

### 3.5.3 Funding

#### 3.5.3.1 Sources of funding

Consistent with Stages One and Two, the LIV proposes that the source of funding for Stage Three of the Interpreting Fund is direct revenue from the Victorian Government in recognition of the government's existing funding role for civil interpreters.

However, if an alternative view is taken, the LIV notes that additional sources of revenue for Stage Three could be the Public Purpose Fund (PPF) or the Justice Fund.

Under the *Legal Profession Act 2004* (Vic), the Legal Services Board is required to maintain the PPF. PPF monies largely originate from the interest on clients' funds held in trust accounts by solicitors. In addition, earnings from investments, fines as a result of hearings by the VCAT Legal Practice List, practising certificate fees, and money transferred from the Legal Practitioners' Fidelity Fund are paid into the PPF. Consistent with this, an amendment could be made to the *Legal Profession Act 2004* to require annual payment to an Interpreting Fund.

Another potential source of funding for the Interpreting Fund is the proposed Justice Fund. The VLRC recommended the establishment of the Justice Fund in its *Civil Justice Review*. One of the purposes of Justice Fund was to provide financial assistance to parties with meritorious civil claims. Such financial assistance could include the cost of supplying interpreting services. As noted by the VLRC, "a number of the commission's recommendations (e.g, the proposed Justice Fund) are intended to remove some of the economic disincentives to the pursuit of meritorious claims".<sup>303</sup> In the LIV's opinion, the current lack of funding for the provision of interpreters in Victorian civil matters represents such an economic disincentive.

### 3.5.3.2 Funding administration

Under Stage Three, the LIV recommends maintaining the "credit line" arrangement of Stages One and Two for consistency and stability.

## 3.6 Other Interpreter Fund Implementation Issues

### 3.6.1 Pro bono interpreting

The LIV's Options Paper considered whether Victorian interpreters could provide services on a pro bono basis for the Interpreting Fund.<sup>304</sup> This idea has the potential benefits of reducing the inappropriate use of non-professional interpreters and could help reduce the costs of interpreters provided through the Interpreting Fund.

However, consistent feedback from government and non-government stakeholders during this Project was that this proposal would be inappropriate. For instance, VLA submitted that seeking interpreting services on a pro bono basis is not appropriate as the profession is already being tested by increasingly high standards expected of interpreters, poor rates of pay and other issues leading to difficulties in retaining experienced interpreters and attracting new ones.<sup>305</sup> Interpreter agencies were also concerned that providing pro bono interpreting services would be detrimental to the profession and affect service quality.

From the LIV's perspective, pro bono interpreting cannot be relied upon to deliver effective and consistent results as part of the introduction of the Interpreting Fund. Therefore, the LIV recommends that the Interpreting Fund does not seek to use interpreters on a pro bono basis.

<sup>303</sup> VLRC, *op. cit.*, p. 77.

<sup>304</sup> LIV, *Interpreters Fund Options Paper*, *op. cit.*, pp.10-11.

<sup>305</sup> VLA, *Comments on LIV Interpreting Fund Scoping Project: Options Paper*, *op. cit.*, p. 1.



# The Interpreter Profession

In the LIV's view, the establishment of the Interpreting Fund is an important way to improve access to justice through meeting the unmet demand for civil justice interpreters in Victoria. Nevertheless, the Interpreting Fund is not enough on its own to fully address that demand. There are ongoing, systemic issues such as remuneration and accreditation that impact on the interpreter profession and that, in turn, could affect the quality of interpreting services provided through an Interpreting Fund.

Therefore, the LIV considers that the Victorian Government should do its utmost to address some of these issues and notes below some of the initiatives that are currently underway.

The LIV also believes that the legal profession has a role to play, for example, by participating in training for interpreters about the legal system, by supporting the development of interpreter policies in Victorian courts and tribunals and undertaking training themselves on how to work with interpreters.

The LIV considers that the importance of competent, professional interpreters should not be underestimated. In legal situations, people with poor English skills are potentially highly vulnerable and, if interpreters misinterpret important information or convey the wrong impression about a person, there can be severe legal and financial consequences.<sup>306</sup>

## 4.1 Standards For Legal Interpreting

Interpreting is not a straightforward, mechanical process. Instead, it is a highly complex interaction with another person, requiring interpreters to have a thorough knowledge of their subject language/s in terms of grammar and linguistics and an understanding of cultural factors about that language.

The necessary skills for legal interpreters are higher still. According to the CAGD's *Access to Interpreters in the Australian Legal System*, competent legal interpreters must have a "high level of linguistic and interpreting skills, an understanding of legal procedures and terminology and an awareness of his or her role and ethical responsibilities".<sup>307</sup> It is unclear how many current legal interpreters might fit this definition. However, commentators suggest that there is significant variation in the quality of legal interpreting. There is also concern that the standard of interpreting is getting lower.<sup>308</sup>

<sup>306</sup> Recent University of Western Sydney (UWS) research, for example, indicates that in a court of law, when people cannot speak English, the impression they create within the court is completely within the hands of their interpreter and may lead to unjust legal outcomes. See *UWS research reveals the importance of accurate court interpreting*, Media release, 12 January 2010. Accessed February 2010 at [http://pubapps.uws.edu.au/news/index.php?act=view&story\\_id=2613](http://pubapps.uws.edu.au/news/index.php?act=view&story_id=2613).

<sup>307</sup> CAGD, *Access to Interpreters in the Australian Legal System*, op. cit., p. 92.

<sup>308</sup> Michael Barnett, *Mind Your Language – Interpreters in Australian Immigration Proceedings*, 2006, 10 UWCLR 109, p. 113.

## 4.2 Increasing The Use Of Competent Interpreters

The lack of competent interpreters in the legal system has been attributed to:

- users in the legal system such as lawyers and courts failing to insist on the use of qualified interpreters, allowing unqualified interpreters to gain work at their expense;
- inadequate remuneration, inability to obtain regular work and lack of career structure for practising interpreters; and
- the unwillingness of many interpreters to work in the legal setting, due to lack of experience, training and understanding of the legal system.<sup>309</sup>

### 4.2.1 Use of professionally accredited interpreters

NAATI oversees accreditation for Australian interpreters. Interpreters obtain NAATI accreditation by passing a NAATI test or by completing studies at an approved Australian institution. NAATI has a number of accreditation levels. A “professional” level of accreditation means that the interpreter’s skills have been assessed as sufficient to convey complex information, including legal information and advice. Professionally accredited interpreters are bound by a code of ethics<sup>310</sup>, which requires them to convey information accurately and impartially and respect confidentiality.<sup>311</sup>

As far as the LIV is aware, lawyers and courts who regularly use interpreters generally seek to employ professionally accredited interpreters over unqualified ones. Indeed, Victorian government policy is to use NAATI accredited “professional” or Level 3 interpreters.<sup>312</sup> This is also the minimum level of competence for interpreting within DOJ<sup>313</sup> and VLA.<sup>314</sup> The LIV understands that the courts and VCAT also seek to engage professional level interpreters.<sup>315</sup>

Instead, the real issue is about the availability of professional interpreters. In practice, situations often arise where professional interpreters are not available.<sup>316</sup> Common reasons for this include: the request for the interpreter is made at short notice; the only professionally accredited interpreter is a person the client knows; or a booked interpreter does not attend.<sup>317</sup>

Locating a professionally accredited interpreter can be a particular problem for new and emerging languages. There may simply be no interpreters who are accredited to the professional level in that language. There may, however, be NAATI accredited Recognised Practitioners – people who have experience interpreting in a new or emerging language for which there is currently no accreditation training available.

As far as is possible, the LIV considers it inappropriate for lawyers to use friends or family members of clients as interpreters. Doing so does not necessarily serve the best interests of the person requiring an interpreter. Family members or friends may breach confidentiality, misinterpret legal words or become emotionally involved in the matter under discussion. As noted in the *Access to Interpreters in the Australian Legal System*:

*[T]he major difficulty with respect to the use of interpreters in the legal system is not that of finding someone willing to interpret but the use of untested or incompetent interpreters. The consequences are too grave to allow them to operate in the legal system.*<sup>318</sup>

309 CAGD, *Access to Interpreters in the Australian Legal System*, op. cit., p. 87.

310 See further: Australian Institute of Interpreters and Translators, *Code of Ethics* at <http://server.dream-fusion.net/ausit2/pics/ethics.pdf>.

311 NAATI has also announced its intention to introduce a re-accreditation system for interpreters. For professional interpreters, re-accreditation would occur every 3 years. However, the introduction of the NAATI re-accreditation system has been postponed at the current time. See further: <http://www.naati.com.au/pdf/revalidation/Notice%20re%20revalidation%20-%20Jan%202010%20update.pdf>.

312 VOMA, op. cit., p. 14.

313 DOJ, *Language Services Policy and Guidelines for Working with Interpreters and Translators*, op. cit., p. 7.

314 VLA, *VLA Guide to Interpreters and Translators*, op. cit., p. 25.

315 Feedback from the LIV Focus Group, 30 November 2009.

316 DOJ, *Language Services Policy and Guidelines for Working with Interpreters and Translators*, op. cit., p. 15.

317 VLA, *VLA Guide to Interpreters and Translators*, op. cit., p. 27.

318 CAGD, *Access to Interpreters in the Australian Legal System*, op. cit., p. iii.

The LIV, though, also acknowledges that sometimes there may be no other option for lawyers but to use family members or friends as interpreters, particularly in urgent or emergency situations, but considers this should only occur as a last resort.

#### 4.2.1.1 Initiatives to address these issues

One way the legal profession and Victorian justice system can reinforce the importance of professional interpreters is to develop policies and minimum standards about their use.

Currently, no Victorian court has an interpreter policy. Consequently, the VLRC's *Civil Justice Review* recommended that "all Victorian courts should develop detailed policies about the provision of interpreters and such policies should be made publicly available". The VLRC also recommended that "interpreter" be defined as "an interpreter accredited with the National Accreditation Authority for Translators and Interpreters Limited".<sup>319</sup>

The LIV supports this VLRC proposal. It also considers it important that VCAT develops an equivalent policy. Such policies are critical, in the LIV's view, to serve as a basis for providing high quality legal interpreting services to the broader community, enabling both users and providers of interpreting services to be clear about what is involved.

The LIV notes that most of the Commonwealth courts and tribunals have interpreting policies. The Federal Magistrates Court policy, in particular, provides detailed, relevant information about the use and funding of interpreting services.<sup>320</sup> However, interpreting policies are not consistent across Australia – an issue that is currently being examined further in a University of Western Sydney research study. The purpose of the study is to review current policies about interpreting practices in Australian courts and tribunals and then use the study results to recommend the establishment of a national protocol for the use of interpreting services in Australian courts and tribunals.<sup>321</sup> Once completed, the study results could inform the development of any interpreter policies developed by Victorian courts and tribunals.

## 4.2.2 Career structure and remuneration of interpreters

### 4.2.2.1 Career structure of interpreters

According to NAATI, the Australian interpreting industry is fragmented due to the focus on part time or contractual work. There are a limited number of full time interpreting jobs and most interpreting work is done on a freelance, casual or seasonal basis. For this reason, a lot of qualified interpreters have other jobs and are often only available for limited interpreting outside their normal working hours.<sup>322</sup>

These issues are highlighted by a recent Victorian survey of interpreters, which confirmed that the majority of Victorian interpreters are freelancers. In this survey, 95% of the respondents were freelancers, a small number also had full time or part time employment as interpreters and nearly 20% also directly serviced clients (i.e. not through an agency). Of those freelancing with agencies, only 8% worked for one agency alone; the majority (52%) worked for 2–4 agencies while 38% worked for 5 or more agencies.<sup>323</sup>

There is also a high turnover of practitioners within the interpreter industry. People come into the profession, work for a year or two, leave the profession for other employment, but may also re-enter the profession at a later date. This can mean that people have difficulty in maintaining their interpreting skills at the level of the time when they were first accredited, which in turn may affect service delivery.<sup>324</sup>

319 VLRC, *op. cit.*, p. 590.

320 See Appendix One for more information.

321 University of Western Sydney, *Research Matters: A "Fair Go" – Interpreter Protocols in Courts and Tribunals*. Accessed in February 2010 at [http://www.uws.edu.au/\\_data/assets/pdf\\_file/0006/116619/190110\\_InterpreterProtocolsInAustralianCourts\\_Hale.pdf](http://www.uws.edu.au/_data/assets/pdf_file/0006/116619/190110_InterpreterProtocolsInAustralianCourts_Hale.pdf).

322 NAATI, *Revalidation of Accreditation: Second Discussion Paper*, 31 October 2005, p. i. Accessed January 2010 at <http://www.naati.com.au/pdf/news/Revalidation%20Second%20Discussion%20Paper%20September%202005.pdf>.

323 Dr Uldis Ozolins, *A survey of interpreting practitioners in Melbourne, Australia, undertaken as part of the VITS Language Link Good Corporate Citizenship Program*, March 2004, p. 24. Accessed January 2010 at <http://www.vits.com.au/downloads/VITS%20Survey%20Report-Final.pdf>.

324 NAATI, *op. cit.*, p. i.

#### 4.2.2.2 Remuneration of interpreters

The lack of remuneration for interpreters is a long-standing issue. Concerns were expressed about this in the *Access to Interpreters in the Australian Legal System Report* nearly twenty years ago.<sup>325</sup> This has had a detrimental impact on the interpreter profession. In its *Language Services Report*, Peat Marwick Management Consultants reported that:

*The remuneration structure available to [interpreters]...is a major inhibitor to the maintenance of levels of expertise and in attracting additional personnel to the profession. The lack of financial inducement is effectively 'deprofessionalising' the profession. There appears to be a destructive cycle in operation where the inability of professional personnel to earn a reasonable living in language services is making the profession less attractive to potential linguists, thus reducing enrolment in tertiary education courses with a type of language skills courses provided. The net effect of this is while demand seems to be increasing for professionally trained and skilled interpreters...the supply of professional trained personnel is reducing. This in turn is resulting in more unaccredited staff having to be used.*<sup>326</sup>

Since that time, there has been little improvement in terms of interpreter remuneration. The LIV understands that the current rate for a professionally accredited interpreter is around \$63 for 90 minutes.<sup>327</sup> This amount includes interpreter agency fees. The LIV notes that interpreter fees may vary between interpreter agencies, levels of accreditation and the type of work undertaken. Nevertheless, as the Australian Institute of Interpreters and Translators has noted, it can be generally said that while the fees available for commercial interpreter work are reasonably good, the pay for work in the government or community domain – which includes law and the courts – is “deplorably poor”.<sup>328</sup> Based on the 2006 Census, a typical interpreting practitioner is said to work 25 hours per week for a gross annual income of \$25,000.<sup>329</sup>

In Victoria, these issues have a particular impact on the supply and demand of interpreters for new and emerging languages. Research shows that the current interpreter pay levels and employment modes mean that often trained interpreters move on to better paid, more reliable employment as soon as they can. There are also ongoing difficulties in attracting, training and then retaining appropriately competent interpreters. This is a particular problem for emerging African languages because of the disrupted education of many in the relevant communities and the lack of a critical mass of people with English and literacy capabilities.<sup>330</sup>

#### 4.2.2.3 Initiatives to address these issues

Recent initiatives are underway to address some of these issues. For example, the VMC has recently undertaken a *Workforce Development Strategy* for interpreters, which explored ways to attract and retain interpreters in languages spoken by both long-standing and newly arrived communities. It also examined a range of short to long-term measures to facilitate an adequate supply of appropriately qualified and skilled interpreters to meet the language needs of Victoria's CALD communities.<sup>331</sup>

Some organisations have also trialled using in-house interpreters and bi-lingual workers to assist with their interpreting needs, especially for new and emerging languages. Nevertheless, there were similar issues with retaining these bi-lingual aides as there had been with interpreters. Once they had become more confident about seeking locally based employment and were able to pursue a broader range of employment opportunities, these aides moved on to other positions.<sup>332</sup>

<sup>325</sup> CAGD, *Access to Interpreters in the Australian Legal System*, op. cit., p. 96.

<sup>326</sup> As quoted in CAGD, *Access to Interpreters in the Australian Legal System*, op. cit., p. 96.

<sup>327</sup> Information provided during discussion with VMC, 7 December 2009.

<sup>328</sup> Australian Institute of Interpreters and Translators. *Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce: Response to the House of Representatives Standing Committee on Employment and Workplace Relations*, August 28 2008, p. 8. Accessed January 2010 at <http://www.aph.gov.au/house/committee/ewr/payequity/subs/sub61.pdf>.

<sup>329</sup> *Ibid.*, p. 9.

<sup>330</sup> Helen Borland and Charles Mphande, *The Numbers of Speakers of African Languages Emerging in Victoria: a Report for the Victorian Office of Multicultural Affairs*, May 2006, Department for Victorian Communities, p. 44. Accessed December 2009 at <http://www.multicultural.vic.gov.au/images/stories/pdf/AfricanLanguages.pdf>.

<sup>331</sup> VMC, *Annual Report 2008-09*, p. 22. Accessed February 2010 at [http://www.multicultural.vic.gov.au/images/stories/pdf/vmc\\_annual\\_report\\_2008to09%20for%20web.pdf](http://www.multicultural.vic.gov.au/images/stories/pdf/vmc_annual_report_2008to09%20for%20web.pdf).

<sup>332</sup> Borland & Mphande, op. cit., p. 45.

Therefore, commentators argue that it is important to re-evaluate employment and remuneration arrangements for interpreters. If employment and remuneration mechanisms can be developed to guarantee a steady, fair income for interpreters over a reasonable period such as a three year contract, then it may be possible to develop a pool of interpreting professionals who will then be committed to the profession in the longer term.<sup>333</sup>

### 4.2.3 Shortage of legal interpreters

Despite the clear demand for legal interpreters, there is also a shortage of supply. In the legal area, there is an ongoing reluctance for interpreters to undertake legal interpreting, particularly in court or as part of the criminal investigation process. Reasons for this include: a lack of understanding and even fear of the legal system, particularly with respect to interpreting for police; stressful and demanding working conditions; and a reluctance to be perceived as co-operating with the authorities against other members of their ethnic community.<sup>334</sup>

This attitude was also confirmed by the recent Victorian survey of interpreting practitioners. Of the total interpreter respondents, 80% worked in the area of “legal other than court” and 74% worked in “court”. Of these, 4% and 18% respectively of the total respondents indicated a preference not to work in these areas. Reasons for aversion to working in courts included poor pay for hours put in, stress, uncertainty of schedules, which affected ability to take on other work, attitudes of other court and legal personnel, that courts were intimidating or people felt that they were insufficiently trained or prepared to do the work.<sup>335</sup>

#### 4.2.3.1 Initiatives to address these issues

##### (1) Training for interpreters

The LIV notes that there are many factors involved in interpreters being unwilling to work in the legal area but training is one way to address them. In the LIV’s view, the availability of appropriate training is essential to increase current or future interpreters’ knowledge of the legal system and a crucial factor in increasing the supply of competent, legal interpreters.

VMC and Monash University recently commenced a two year program of interpreter professional development training, which is running in January–February and June–July 2010 and 2011. The program offers modules at two levels – entry level modules for interpreters, for which there is currently a high demand in Victoria, and modules for more experienced interpreters. These modules provide an introduction to interpreting in various community domains, including the law.

Monash University recently held the first Legal Interpreting Module. This four week course for experienced interpreters covered topics including: introduction to the legal system and the role of the interpreter; interpreting lawyer-client interactions; interpreting for the police; and interpreting in tribunals. Currently, this is the only legal specific interpreter training available in Victoria.

Participants provided positive feedback about the content and quality of the program. Nearly all participants agreed or strongly agreed that the course had enabled them to improve their knowledge of the Australian legal system and the role of various participants, taught them appropriate techniques for interpreting in legal settings, improved their knowledge of legal terminology and provided information on how to respond to ethical dilemmas in legal interpreting.<sup>336</sup>

Due to the high demand, Monash University intends to run this module again in June–July in addition to Legal Interpreting 2, which will focus on court interpreting.

333 *Ibid.*

334 CAGD, *Access to Interpreters in the Australian Legal System, op. cit.*, p. 98.

335 Ozolins, *op. cit.*, pp. 25-6.

336 Information provided by Monash University via email on 2 March 2010; on file with the author.

## (2) Training for lawyers about the use of interpreters

The LIV also considers that another appropriate area of training is for the legal profession on how to work appropriately with interpreters. Stakeholder feedback during the Project suggested that lawyers often do not understand the inherent complexities and difficulties of an interpreter's role. Lawyers may also make common mistakes when working with interpreters such as indirect speech or idiosyncratic language that is difficult for interpreters to understand.<sup>337</sup>

Training sessions for lawyers or organisations who work regularly with interpreters could be funded by the grants scheme, which the LIV proposed under Stage Three of the Interpreting Fund.

## (3) Publication about lawyer – interpreter relations

In 1996, the NSW Law Society produced *A Guide to Best Practice: Lawyers, Interpreters and Translators*, which aimed to improve lawyers' understanding about working with interpreters. It includes information about assessing the need for an interpreter, situations where an interpreter must be used, facilities to be provided for an interpreter and ethical considerations.<sup>338</sup> The LIV considers that an equivalent publication would be useful in Victoria.

---

<sup>337</sup> L Roberts-Smith, *Address*, AUSIT Conference Perth, 25-27 October 2002, p. 7 as quoted in Michael Barnett, *op. cit.*, p. 132.

<sup>338</sup> The Law Society of New South Wales, *Guide to Best Practice: Lawyers, Interpreters and Translators*, 1996, Sydney.

# Access To Interpreters In Other Australian Jurisdictions

## Australia Capital Territory

In any ACT proceedings, if a party or witness is unable to communicate effectively in English or unable to hear or speak effectively, the court shall permit them to be assisted by a competent interpreter unless the court considers that it would not be in the interests of justice to do so.<sup>339</sup>

For criminal proceedings, an interpreter will be provided by the prosecutor. In any other case, the party requiring the assistance of the interpreter or the party whose witness requires that assistance must provide that interpreter.<sup>340</sup>

Anyone charged with a criminal offence is also entitled to certain minimum statutory guarantees. This includes having the free assistance of an interpreter if he or she cannot understand or speak the language used in court.<sup>341</sup>

There is also a right to have access to an interpreter for bail purposes after a charge is laid<sup>342</sup> and for a young person admitted to youth detention to receive information through an interpreter about their entitlements and obligations.<sup>343</sup>

## Commonwealth

### Government policy

In 1998, the *Charter of Public Service in a Culturally Diverse Society* was published with principles to guide public service agencies in their delivery of services to CALD communities. This was subsequently replaced in 2006 by the current Access and Equity Framework, which encourages Australian government agencies to take a greater leadership role on diversity issues and promotes a whole of government approach.<sup>344</sup> The Framework supports open and effective communication with all government stakeholders, including from CALD communities. Government agencies are also encouraged to recruit and train staff who have appropriate linguistic and cultural skills to enable effective communication with government clients.<sup>345</sup>

339 *Evidence Act 1971* (ACT), s. 63A(1)&(2).

340 *Evidence Act 1971* (ACT), s. 63A(3).

341 *Human Rights Act 2004* (ACT), s. 22(2)(h).

342 *Bail Act 1992* (ACT), s. 13(1)(c).

343 *Children and Young People Act 2009* (ACT), s. 159(3).

344 Commonwealth Ombudsman, *Use of interpreters: Australian Federal Police, Centrelink, Department of Education, Employment and Workplace Relations and Department of Immigration and Citizenship*, March 2009, p. 2. Accessed January 2010 at [http://www.ombudsman.gov.au/files/investigation\\_2009\\_03.pdf](http://www.ombudsman.gov.au/files/investigation_2009_03.pdf).

345 Commonwealth Department of Immigration and Citizenship, *Access and Equity Report 2006-08*. Accessed February 2010 at <http://www.immi.gov.au/about/reports/access-equity/2008>.

## Criminal matters

Commonwealth legislation provides for the use of interpreters in criminal matters. Where an investigating official believes on reasonable grounds that a person under arrest or a protected suspect is unable to communicate in English, the official must arrange for the presence of an interpreter before questioning that person.<sup>346</sup>

Further, if the police believe on reasonable grounds that a suspect is unable to communicate in English, they must arrange for an interpreter before undertaking certain procedures. These include asking a suspect to consent to a forensic procedure, carrying out a forensic procedure on a suspect and cautioning a suspect.<sup>347</sup> Police must also seek an interpreter where they are carrying out forensic procedures on a suspect not in custody.<sup>348</sup>

## Civil matters

### Legislation

Commonwealth legislation also provides for the use of interpreters in civil matters. A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.<sup>349</sup>

### Courts

#### Federal Court

The Federal Court will provide professional interpreting services to those people who need them but cannot afford to pay.<sup>350</sup> In practice, this means that the Federal Court will provide an interpreter for:

- unrepresented litigants who cannot afford interpreting services;
- litigants who are represented but have exemption from, or have been granted a waiver of, fees under the Federal Court of Australia Regulations<sup>351</sup>; and
- people who are represented under a referral for pro bono assistance under the Order 80 referral scheme.<sup>352</sup>

#### Family Court

The Family Court's policy regarding interpreters is that no client should be disadvantaged in court proceedings or in understanding court business because of a language barrier.

The Family Court's *Interpreter and Translator Policy* establishes guidelines to ensure uniform access to interpreter and translator services for court users.<sup>353</sup> The Court will arrange for both telephone and on-site interpreting services as appropriate. There is no charge to the parties for the use of this service.

346 *Crimes Act 1914* (Cth), s. 23N

347 *Crimes Act 1914* (Cth), s. 23YDA.

348 *Crimes Act 1914* (Cth), s. 23WLA.

349 *Evidence Act 1995* (Cth), s. 30.

350 Federal Court, *Annual Report 2008-9*, pp. 34-5. Accessed January 2010 at [http://www.fedcourt.gov.au/pdfs/rfts\\_a/annual\\_report\\_2008/annual\\_report\\_0809.pdf](http://www.fedcourt.gov.au/pdfs/rfts_a/annual_report_2008/annual_report_0809.pdf)

351 The *Federal Court of Australia Regulations 2004* (Cth) authorise registrars to remit or waive fees payable where a person:

- has been granted legal aid by a body approved by the Attorney-General; or
- is the holder of a health care card, a pensioner concession card or a Commonwealth seniors health card; or
- is the holder of any other card issued by the Department of Families, Housing, Community Services and Indigenous Affairs or the Department of Veterans Affairs certifying entitlement to Commonwealth health concessions; or
- is an inmate of a prison or is otherwise lawfully detained in a public institution; or
- is a child under the age of 18 years; or
- is in receipt of a youth or AUSTUDY allowance; or
- is in receipt of an ABSTUDY allowance.

Registrars also have the discretion to waive or remit a fee where payment would cause financial hardship to a person, taking into account the person's assets, day-to-day living expenses, income and liabilities. In 2008-09, the Federal Court waived fees in 2724 cases, totalling \$2,343,398. See further: Federal Court of Australia, *Annual Report 2008-09*, p. 94.

352 Federal Court of Australia, *Annual Report 2008-09*, *op. cit.*, pp. 34-5..

353 Family Court of Australia. *Interpreter Policy*. Accessed January 2010 at <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Business/Plans/Interpreters/>.

## Federal Magistrates Court

The Federal Magistrates Court aims to ensure equitable and uniform access to interpreting services throughout the Court. Its *Interpreter and Translator Policy* details when interpreting services should be available and how they should be funded. If there is any doubt, the Court should exercise its discretion in favour of using an interpreter's services. Under this policy, the registry also cannot refuse to fund access to interpreters for the reason that sufficient funds are not available.<sup>354</sup>

## Tribunals

### Administrative Appeals Tribunal

If an interpreter is needed, the AAT will provide one free of charge to the user.<sup>355</sup> The AAT's *Service Charter* details its policy on interpreters, their procedure for attendance at the AAT and professional requirements.<sup>356</sup>

### Migration Review Tribunal and Refugee Review Tribunal

The *Migration Act 1958* (Cth) provides for the appointment of interpreters for people appearing before the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT).

A person appearing before the Migration Review Tribunal (MRT) may request the MRT to appoint an interpreter. The MRT must comply with that request unless it considers that the person is sufficiently proficient in English. Alternatively, if the MRT considers that a person appearing before it is not sufficiently proficient in English, the MRT must appoint an interpreter even if that person has not made such a request for an interpreter.<sup>357</sup>

If a person appearing before the RRT is not proficient in English, then the RRT may direct that an interpreter be appointed to facilitate communication between that person and the RRT.<sup>358</sup>

While there is no automatic right to an interpreter under the *Migration Act 1958* (Cth) for the MRT and RRT,<sup>359</sup> in practice both will appoint an interpreter if an applicant is not sufficiently proficient in English. The RRT and MRT may also appoint an interpreter if an applicant has hearing or speech difficulties.<sup>360</sup>

### Social Security Appeals Tribunal

When required, the Social Security Appeals Tribunal (SSAT) provides interpreting services to facilitate a fair and accurate hearing. There is no cost to applicants and other parties for this service. It is the SSAT's policy not to permit a friend or family member of a party to be an interpreter. Interpreters are required to be appropriately qualified – usually NAATI Level 3. The SSAT also offers sign interpreters at appeal hearings and flexible hearing options such as hearings by telephone or video-conference.<sup>361</sup>

<sup>354</sup> Federal Magistrates Court website, *Interpreter and Translator policy*. Accessed January 2010 at <http://www.fmc.gov.au/services/html/printpage.asp?ref=http://www.fmc.gov.au/services/html/interpreters.html>.

<sup>355</sup> Administrative Appeals Tribunal (AAT), *Service Charter*. Accessed January 2010 at <http://www.aat.gov.au/CorporatePublications/Charter.htm>.

<sup>356</sup> AAT, *Information for interpreters*, Accessed January 2010 at <http://www.aat.gov.au/ApplyingToTheAAT/InformationForInterpreters.htm>.

<sup>357</sup> *Migration Act 1958* (Cth), s. 366C(1)-(3).

<sup>358</sup> *Migration Act 1958* (Cth), s. 427(7).

<sup>359</sup> See further: Michael Barnett, *op. cit.*, pp. 117-119.

<sup>360</sup> Migration Review Tribunal and Refugee Review Tribunal, *Interpreters Handbook*, 2007, p. 8. Accessed January 2010 at <http://www.mrt-rrt.gov.au/docs/InterpreterHandbookNov07.pdf>.

<sup>361</sup> See further: Social Security Appeals Tribunal website at <http://www.ssat.gov.au/iNet/ssat.nsf/pubf/accessibility.91#Translating%20and%20Interpreting>.

## New South Wales

### Government policy

In order to provide all clients with access to government services, it is NSW government policy that government agencies fund the provision of interpreting services. Qualified and trained interpreters are to be utilised where a person exhibits hesitation or difficulty understanding and communicating in English or if the person requests an interpreter.<sup>362</sup>

### Criminal matters

In NSW legislation, there are statutory rights to interpreters for witnesses in court proceedings<sup>363</sup> or in situations involving the taking of forensic samples from suspects<sup>364</sup> or for a person in custody for questioning.<sup>365</sup>

The NSW Local Court will also supply interpreters for no fee in a number of criminal related matters.<sup>366</sup>

### Civil matters

#### Courts

In NSW, the courts will generally assist an applicant arrange for an interpreter to attend a civil proceeding. However, except in cases of financial hardship, the applicant will usually have to meet the cost of the interpreter in civil proceedings themselves.

For example, in the NSW Local Court, clients need to meet the cost of an interpreter themselves but, if their claim is successful, they may seek reimbursement for the cost of the interpreter when costs are determined. Fee exemptions are also available for the provision of an interpreter in civil claims matters in some situations of financial hardship.<sup>367</sup>

#### Tribunals

Any person appearing before the NSW Administrative Decisions Tribunal may use the services of an interpreter unless the person can understand and speak English sufficiently. This is reinforced by statute.<sup>368</sup> However, the ADT does not arrange for interpreters in its Retail Leases Division. Parties are required to make their own arrangements for an interpreter in this case.<sup>369</sup> An "interpreter" includes a person who interprets signs or other things made or done by a person who cannot speak adequately for the purposes of giving evidence in proceedings.<sup>370</sup>

## Northern Territory

Commonwealth legislation for interpreters generally applies in the Northern Territory for criminal and civil matters.

A person who is subject to a review by the Mental Health Tribunal must, so far as is reasonably practicable, have access to an interpreter to assist that person to prepare for the hearing; and assist the person at the hearing where the person does not speak English to a level that will enable the person to understand the proceedings.<sup>371</sup>

<sup>362</sup> See further: *M1998-22 Interpreter Budget Requirements in Contracting out Services and Funding Services Delivered by Non-Government Organisations, Government Trading Enterprises and State Owned Corporations*. Accessed January 2010 at [http://www.dpc.nsw.gov.au/publications/memos\\_and\\_circulars/ministerial\\_memoranda/1998/m1998-22](http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/1998/m1998-22).

<sup>363</sup> *Evidence Act 1995* (NSW), s. 30.

<sup>364</sup> *Crimes (Forensic Procedures) Act 2000* (NSW), s. 98.

<sup>365</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 128.

<sup>366</sup> These include defendants in criminal matters, all domestic violence matters, interviews with Chamber Registrars relating to criminal or apprehended violence order matters, parties in care proceedings and criminal proceedings in the Children's Court, appeals for family law matters and appeals relating to driver's licences.

<sup>367</sup> See further: [http://www.agd.nsw.gov.au/lawlink/local\\_courts/ll\\_localcourts.nsf/pages/lc\\_interpreters](http://www.agd.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_interpreters).

<sup>368</sup> *Administrative Decisions Tribunal Act 1997* (NSW), s. 71(6).

<sup>369</sup> See Administrative Decisions Tribunal website at [http://www.lawlink.nsw.gov.au/lawlink/adt/ll\\_adt.nsf/pages/adt\\_faq#faq9](http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/pages/adt_faq#faq9).

<sup>370</sup> *Administrative Decisions Tribunal Act 1997* (NSW), s. 71(7).

<sup>371</sup> *Mental Health and Related Services Act* (NT), s. 134(1) & (2).

# Queensland

## Government policy

The QLD Government recognises that a significant number of people do not speak English at all or well enough to communicate adequately with QLD government agencies. Generally speaking, agencies should provide an interpreter in situations where a non-English speaking client has difficulty communicating in English. When a client requests an interpreter, he or she should be provided with one.

Engaging a qualified interpreter is important in certain circumstances such as obtaining “informed consent”, raising a record of interview or for the swearing of affidavits or statutory declarations. Mistakes leading to complaints or litigation may result from an agency not providing an interpreter in these situations.<sup>372</sup>

The QLD Department of Justice and Attorney-General’s *Languages Services Policy* indicates that the department will generally provide an interpreter in situations where a non-English speaking client has difficulty communicating in English or where they produce a QLD Interpreter Card.<sup>373</sup>

However, the policy also states that under QLD legislation, the QLD government is only required to provide an interpreter for court proceedings if ordered by the court in criminal and domestic violence related matters. This does not include civil matters such as small claim proceedings. However, a judicial officer may order an interpreter if they believe natural justice is not being served.<sup>374</sup>

## Criminal matters

In a criminal proceeding, the court may order the QLD government to provide an interpreter for a complainant, defendant or witness if it is in the interests of justice.<sup>375</sup>

A person also has a right to an interpreter if being questioned or investigated by police,<sup>376</sup> about to undergo a forensic procedure<sup>377</sup> or in order to understand a Children’s Court proceeding.<sup>378</sup>

Care must also be taken when a child is administered with a caution,<sup>379</sup> appearing in proceedings before a court where a child is charged with an offence,<sup>380</sup> or when a court makes an order sentencing a child<sup>381</sup> for an offence, to make sure the child understand the purpose, nature and effect of the proceedings. Such steps may involve having an interpreter or other person able to communicate with the child effectively.

## Civil matters

### Courts

In a civil trial, the provision of an interpreter, either for a witness or a party, is generally considered to be the responsibility of each party. A successful party may recover its costs of an interpreter as part of the costs order at the end of the trial.

<sup>372</sup> Queensland Government. *Multicultural Queensland – making a world of difference. Queensland Government Multicultural Policy 2004*, December 2004, p. 9. Accessed January 2010 at [http://www.multicultural.qld.gov.au/media/maq\\_making\\_world\\_difference\\_policy.pdf](http://www.multicultural.qld.gov.au/media/maq_making_world_difference_policy.pdf).

<sup>373</sup> Queensland Department of Justice and Attorney-General. *Language Services Policy*, October 2009, 5.1, 6. Accessed December 2009 at [http://www.justice.qld.gov.au/files/Publications/language\\_service\\_policy.pdf](http://www.justice.qld.gov.au/files/Publications/language_service_policy.pdf).

<sup>374</sup> *Ibid*, 5.1.

<sup>375</sup> *Evidence Act 1977* (QLD), s. 131A.

<sup>376</sup> *Police Powers and Responsibilities Act 2000* (QLD), s. 433.

<sup>377</sup> *Police Powers and Responsibilities Act 2000* (QLD), s. 512.

<sup>378</sup> *Child Protection Act 1999* (QLD), s. 106.

<sup>379</sup> *Juvenile Justice Act 1992* (QLD), s. 18.

<sup>380</sup> *Juvenile Justice Act 1992* (QLD), s. 72.

<sup>381</sup> *Juvenile Justice Act 1992* (QLD), s. 158.

In QLD, there is no provision equivalent to section 30 of the *Evidence Act 1995* (Cth), which provides for an interpreter for witnesses in any proceeding. This means that the common law position regarding interpreters in civil matters applies<sup>382</sup> – that is, an interpreter is at the judge’s discretion.<sup>383</sup>

## Tribunals

The Queensland Civil and Administrative Tribunal (QCAT) provides that a party to a proceeding or a witness may be helped by an interpreter or another person necessary or desirable to make the proceeding intelligible to the party or witness, including, for example, a person with appropriate cultural or social knowledge and experience.<sup>384</sup> QCAT may arrange for an interpreter or another person to help a party or witness.<sup>385</sup>

Further, QCAT also has a positive statutory duty to take all reasonable steps to assist parties to understand QCAT’s practices, procedures and decisions. This may involve conducting proceedings in a way that recognises the cultural diversity of parties and witnesses or having an interpreter or other person able to communicate effectively with a person to explain QCAT matters as appropriate.<sup>386</sup>

# South Australia

## Government policy

It is SA government policy that language services – interpreting and translating – are provided to people of CALD backgrounds in all SA government agencies. This is in accordance with SA’s *Access and Equity* principles and strategies.<sup>387</sup>

## Criminal and civil matters

### Statutory rights

In SA, there are statutory rights to an interpreter for a witness who is not proficient in English in any court proceedings<sup>388</sup> or when being questioned by police.<sup>389</sup> A person on whom a forensic procedure is to be carried out and who is not reasonably fluent in English is entitled to be assisted by an interpreter.<sup>390</sup>

### Courts

The SA courts provide interpreting services during court hearings for parties to, and persons required to give evidence as witnesses in, criminal and civil proceedings. This service is provided at no charge to the user. The interpreting service is provided by the SA Government’s Interpreting and Translation Centre.<sup>391</sup>

<sup>382</sup> Supreme Court of Queensland. *Equal Treatment Benchbook*, p. 74. Accessed February 2010 at [www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf).

<sup>383</sup> See further: Part One of the Report, 1.1.2.

<sup>384</sup> *Queensland Civil and Administrative Tribunal Act 2009* (QLD), s. 44(1).

<sup>385</sup> *Queensland Civil and Administrative Tribunal Act 2009* (QLD), s. 44(2).

<sup>386</sup> *Queensland Civil and Administrative Tribunal Act 2009* (QLD), s. 29(1)(c) & s. 29(2)(b).

<sup>387</sup> Multicultural SA. *Working with Interpreters: A Short Guide*. Accessed January 2010 at <http://www.multicultural.sa.gov.au/documents/Working%20with%20Interpreters%20Guide.pdf>.

<sup>388</sup> *Evidence Act 1929* (SA), s. 14.

<sup>389</sup> *Summary Offences Act 1953* (SA), s. 83A.

<sup>390</sup> *Criminal Law (Forensic Procedures) Act 2007* (SA), s. 22.

<sup>391</sup> Supreme Court of South Australia. *Practice Direction No. 10. Interpreters in Court*. 1 November 1993. Accessed December 2009 at [http://www.courts.sa.gov.au/lawyers/practice\\_directions/civil\\_pd/civil\\_pd\\_pdfs/civil\\_pd\\_10.pdf](http://www.courts.sa.gov.au/lawyers/practice_directions/civil_pd/civil_pd_pdfs/civil_pd_10.pdf).

This service also applies to self-represented litigants. From time to time, unrepresented litigants are referred to the Interpreting and Translating Centre for assistance in understanding court processes.<sup>392</sup> Unrepresented litigants are also advised about the availability of interpreting services for themselves and their witnesses if required.<sup>393</sup>

However, the interpreter service does not apply to providing interpreters for solicitors taking instructions from clients or for parties in proceedings wishing to communicate with their solicitors.<sup>394</sup>

## Tasmania

### Criminal and civil matters

Under Tasmanian legislation, a person is entitled to an interpreter when they are a witness in any court proceedings,<sup>395</sup> or during questioning or investigation by police,<sup>396</sup> or to give informed consent to the carrying out of a forensic procedure.<sup>397</sup> A youth sentenced under a court order is also entitled to have an interpreter present to give an explanation of that order.<sup>398</sup>

In Tasmania, the courts will arrange for an interpreter to be present at either criminal or civil proceedings. If the interpreter is arranged by the court, there will be no cost to the person who needs the interpreting service. This is in accordance with the government's policy for *Tasmania's Culturally Diverse Society*.<sup>399</sup>

A person may also use an interpreter at a conciliation conference<sup>400</sup> or an inquiry<sup>401</sup> at the Tasmanian Equal Opportunity Tribunal.

## Western Australia

### Government policy

The WA Department of the Attorney General's *Language Services Policy* applies to all Western Australians who require assistance with communicating effectively in spoken or written English, including Indigenous people, people from CALD backgrounds and people who are Deaf or hearing impaired.

Determining when professional interpreters should or may be used depends on:

- the client's ability to communicate in English;
- the purpose of the communication and the kind of information, including its complexity, that needs to be conveyed;
- the client's ability to effectively communicate in a stressful or unfamiliar environment;
- whether the client prefers to communicate in his/her own language, even though he/she can communicate in English; and

<sup>392</sup> Multicultural SA. 2006–2007 Multicultural Access and Equity Report, p. 59. Accessed January 2010 at <http://www.multicultural.sa.gov.au/documents/MulticulturalAccessandEquityReport2006-07.pdf>.

<sup>393</sup> See *Guide for Unrepresented Litigants (Higher Courts)*, September 2007, p. 11. Accessed January 2010 at [http://www.courts.sa.gov.au/community/going\\_to\\_court/guide\\_self\\_rep/Guide\\_for\\_SRL.pdf](http://www.courts.sa.gov.au/community/going_to_court/guide_self_rep/Guide_for_SRL.pdf).

<sup>394</sup> Supreme Court of South Australia. *Practice Direction No. 10. Interpreters in Court*. 1 November 1993. Accessed December 2009 at [http://www.courts.sa.gov.au/lawyers/practice\\_directions/civil\\_pd/civil\\_pd\\_pdfs/civil\\_pd\\_10.pdf](http://www.courts.sa.gov.au/lawyers/practice_directions/civil_pd/civil_pd_pdfs/civil_pd_10.pdf).

<sup>395</sup> *Evidence Act 2001* (Tas), s. 30.

<sup>396</sup> *Criminal Law (Detention and Interrogation) Act 1995* (Tas), s. 5.

<sup>397</sup> *Forensic Procedures Act 2000* (Tas), ss 8, 29.

<sup>398</sup> *Youth Justice Act 1997* (Tas), s. 50.

<sup>399</sup> See further: *Courts and Tribunals Tasmania – Interpreters* at [http://www.courts.tas.gov.au/about\\_us/services/interpreters](http://www.courts.tas.gov.au/about_us/services/interpreters).

<sup>400</sup> *Anti-Discrimination Act 1998* (Tas), s. 75.

<sup>401</sup> *Anti-Discrimination Act 1998* (Tas), s. 85.

- the risks of miscommunication to the customer and the potential for legal liability or legal consequences for the WA Government.<sup>402</sup>

## Criminal matters

In criminal cases, WA Court and Tribunal Services will pay for interpreting services that have been booked through them for any client or party.<sup>403</sup>

There are statutory rights for interpreters in criminal proceedings. If a police officer is required to inform a person under criminal investigation about any matter relating to that investigation, the officer must – if it is practicable to do so – use an interpreter if that person is unable to understand or communicate in spoken English sufficiently.<sup>404</sup>

An arrested person has the right to an interpreter if unable to understand or communicate in English sufficiently.<sup>405</sup> Additionally, if arrested persons are unable to understand or communicate in English sufficiently, they are not to be interviewed until the services of an interpreter are available.<sup>406</sup>

In summary proceedings, a court has the power to adjourn a charge at any time, including for the purpose of allowing an interpreter to be obtained.<sup>407</sup>

If the Children's Court is satisfied that a party has difficulty understanding or communicating in English that prevents a party from understanding or participating in proceedings, the Court must take reasonable steps to ensure that interpreting services are made available to that party.<sup>408</sup>

## Civil matters

### Courts

In WA civil matters, where a request has been made by a judicial officer or a booking has been made for an interpreter through the court, WA Court and Tribunal Services will pay for that service in some circumstances.<sup>409</sup>

Parties may also arrange and pay for any interpreters that they require for themselves or their witnesses. At the end of the trial, the successful party may at the discretion of the judge seek to recover any interpreting costs.

### Tribunals

The WA State Administrative Tribunal will arrange for an interpreter at no cost to the parties. The Tribunal's legislation provides for a statutory access to an interpreter. Unless the Tribunal directs otherwise, a party or the representative of a party may be assisted in the course of a proceeding by an interpreter or another person necessary or desirable to make the proceeding intelligible to the party.<sup>410</sup>

<sup>402</sup> Department of the Attorney-General WA, *Department of Language Services Policy: Policy Statement*. Accessed January 2010 at [http://www.department.dotag.wa.gov.au/\\_files/Language\\_Services\\_Policy.pdf](http://www.department.dotag.wa.gov.au/_files/Language_Services_Policy.pdf).

<sup>403</sup> Department of the Attorney-General WA, *Equality Before the Law Benchbook*, 7.3.1.4. Accessed January 2010 at [http://www.supremecourt.wa.gov.au/publications/pdf/equality\\_before\\_the\\_law\\_benchbook.pdf](http://www.supremecourt.wa.gov.au/publications/pdf/equality_before_the_law_benchbook.pdf).

<sup>404</sup> *Criminal Investigation Act 2006* (WA), s. 116.

<sup>405</sup> *Criminal Investigation Act 2006* (WA), s. 137(2)(d).

<sup>406</sup> *Criminal Investigation Act 2006* (WA), s. 138(2)(d).

<sup>407</sup> *Criminal Procedure Act 2004* (WA), s. 75.

<sup>408</sup> *Children and Community Services Act 2004* (WA), s. 153(2).

<sup>409</sup> Department of Attorney-General WA, *Equality Before the Law Benchbook*, *op. cit.*, 7.3.1.4.

<sup>410</sup> *State Administrative Tribunal Act 2004* (WA), s. 41.

# List Of Organisations Consulted During The Project

All-Graduates Interpreting Services  
Australian Institute of Interpreters and Translators  
Clayton Utz  
Community Relations Commission (NSW)  
Connect Interpreting Services  
Consumer Action Legal Centre  
County Court of Victoria  
Darebin Community Legal Centre  
Dispute Settlement Centre Victoria  
Ethnic Communities' Council of Victoria  
Federation of Community Legal Centres  
Fitzroy Legal Service  
Law and Justice Foundation (NSW)  
Magistrates' Court of Victoria  
Monash University  
National Accreditation Authority for Translators and Interpreters  
Neighbourhood Justice Centre  
North Melbourne Community Legal Service  
On-Call Interpreting Services  
Public Interest Law Clearing House  
Senior Rights Victoria  
Slater & Gordon  
Springvale Monash Legal Service  
St Kilda Community Legal Service  
Supreme Court of Victoria  
Telephone Interpreting Services  
Victoria Legal Aid  
Victoria Legal Assistance Forum  
Victorian Civil and Administrative Tribunal  
Victorian Multicultural Commission





*This project is supported by the*

**Victoria  
Law Foundation**

Grants  
Publications  
Education



**Law  
Institute  
Victoria**

**CONTACT**

**Laura Helm** Policy Adviser

Law Institute of Victoria

470 Bourke Street, Melbourne VIC 3000

**P:** 9607 9380

**E:** [lhelm@liv.asn.au](mailto:lhelm@liv.asn.au)

**W:** [www.liv.asn.au](http://www.liv.asn.au)