



MONASH University

Access to Justice: A Comparative Analysis of Cuts to Legal Aid

Report of the *Monash Warwick Legal Aid Workshop*

Hosted by Monash University with the support of the University of Warwick

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1. Introduction

Since 2013, restrictions on the provision of legal aid and changes to social, legal and welfare services have significantly increased demand for legal services in Australia, while simultaneously increasing the extent of unmet legal need. In this climate of austerity, a robust debate over the allocation of resources is taking place with questions regarding the priorities that should be accorded to government-funded serious criminal cases, to criminal representation in the lower courts, and to serious civil and family law matters. This has raised some important questions for practitioners, recipients of legal aid, courts, academics and providers of legal aid funding and services: namely, who deserves legal aid? Should legal aid seek to provide more people with fewer services or should it spend more money assisting fewer vulnerable clients? Who are the core clients of legal aid services? And in the context of finite funding and expanding demands, on what criteria are priorities decided, and who decides those criteria?

These questions were the focus of a Monash University workshop organised by Dr Asher Flynn (Criminology, School of Social Sciences), Emeritus Professor Arie Freiberg (Faculty of Law), Professor Jude McCulloch (Criminology, School of Social Sciences) and Associate Professor Bronwyn Naylor (Faculty of Law) in July 2014. The workshop examined the implications of recent restrictions and changes to legal aid funding and services in Victoria. The workshop was part of a larger research project funded by the Monash Warwick Alliance, which involved an initial workshop in March 2014, held at the University of Warwick campus in England, organised by Ms Natalie Byrom (Centre for Human Rights in Practice, Law), Associate Professor James Harrison (Centre for Human Rights in Practice, Law) and Professor Jackie Hodgson (Centre for Criminal Justice, Law). The Monash research team participated in this event at which Dr Asher Flynn presented a paper outlining the contemporary climate and organisation of legal aid services in Victoria. Ms Natalie Byrom and Professor Jackie Hodgson attended and presented at the Monash workshop, providing an overview of the reductions to civil and criminal legal aid funding in the United Kingdom. A compendium of resources and further information about the project, including a full report on the first workshop can be found at: <http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice>.

This report summarises the key themes emerging from the *Access to Justice Workshop* held at the Monash University Law Chambers on 21 July 2014.¹ The report follows the structure of the event, providing a summary of themes and concerns identified in the five sessions held across the day. The workshop provided a forum for a discussion about the ways in which practitioners, academics, activists and stakeholders should or could respond to legal aid policy decisions. The discussion centred on three key themes:

- (1) Effects on Service Provision – which examined the implications and perceived conflicts in funding priorities, for example, the prioritisation of serious criminal cases above minor criminal or family/civil law matters, and the difficulties in responding to reduced funds in the face of a growing pool of unmet legal need;
- (2) Effects on the Legal Profession – which examined the implications for the legal profession, and court systems more generally, for example, considering how the changes are affecting lawyers and their relationship with clients; how the changes are affecting court processes, clearance rates and delays; and the role of the judiciary in these circumstances; and
- (3) Broader Social Consequences – which examined the effects of policy and financial changes on social welfare reform, policy decisions and incarceration rates.

A diverse range of persons and organisations were in attendance, including: Victoria Legal Aid, Victorian Aboriginal Legal Services, the Law Council of Australia, the Criminal Bar Association, the Law Institute of Victoria, the Women's Legal Service Victoria, the Federation of Community Legal Centres, legal

¹ The organisers would like to thank Rachael Burgin, Kate Burns, Mary Iliadis and Madeleine Smith for acting as rapporteurs during the workshop.

practitioners, members of the judiciary, a range of Victorian Legal centres, the Australian Productivity Commission, and academics from Australia and the United Kingdom. A list of participants is provided in Section Seven.

Abbreviations

- CLCs – Community Legal Centres
- VALS – Victoria Aboriginal Legal Service
- VLA – Victoria Legal Aid

2. The English Perspective

Presenters

- Ms Natalie Byrom, University of Warwick
- Professor Jackie Hodgson, University of Warwick

Civil context

Whilst the most devastating cuts to civil legal aid took place in 2013, the legal aid funded civil law sector has been beset by funding cuts since the mid-2000s. Between 2006 and 2009, legal aid was subjected to a new fixed-fee regime by the government. This was followed in 2011 by a 10% cut in fee rates across all legal aid services.

On 1 April 2013, the cuts imposed by *the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012* (UK) came into effect. These cuts were introduced with the aim of cutting the legal aid budget by £350 million – mainly in the areas of family law, immigration, welfare benefits, employment and clinical negligence – despite widespread opposition from many in the legal profession and organisations including the Law Society and the House of Lords. Shortly after the introduction of *LASPO*, further reforms to the sector were announced by the Justice Secretary in a consultation document: “Transforming Legal Aid- Next Steps”. Whilst these proposals mainly concerned criminal legal aid, they also included reforms which will affect the remaining areas of law funded through civil legal aid.

There are a number of consequences arising from the recent cuts to civil law funding including:

- The creation of geographic gaps in the availability of advice: the effect of the cuts has not been evenly distributed across England and Wales. Research has demonstrated that individuals in rural areas are particularly vulnerable.
- Changes in the types of legal assistance available under civil legal aid that have led to a shift in focus away from early intervention in civil law problems resulting in adverse outcomes for some individuals.
- Non-profit organisations have largely been forced out of the sector by the cuts, with those that remain operating at a vastly reduced capacity. It is estimated that the effect of the cuts on the non-profit sector has resulted in 120,000 fewer people receiving assistance for their civil law problems.
- The increase in unmet demand for services places further pressure on those services that remain and the individuals that provide them.

Reductions in civil legal aid are expected to detrimentally affect the degree of diversity and the level of expertise within the legal profession. Lawyers from Black and Ethnic Minority backgrounds are disproportionately represented amongst those who practice in the areas of law that have previously been funded by legal aid. Women are also more likely to practice in the areas of law funded by legal aid prior to *LASPO*. Furthermore, with an uncertain future, firms are less able to plan for the future and commit to training. This will restrict the development of expertise in areas of civil law previously funded through legal aid. Lack of training opportunities may deter graduates from entering the profession. A lack of training opportunities compounds other factors that may deter individuals from practising in the areas of law previously funded by legal aid, such as the lack of financial incentives and insecurity offered by a career in this sector. In addition, evidence has shown that the reductions in legal aid funding disproportionately

affect the most experienced practitioners in the sector (practitioners with 10 year plus experience have been found to be most at risk of redundancy). As a result, the retention of existing expertise in civil law will be affected.

Though yet to be fully realized, there are also a number of broader social consequences expected to emerge. For example, increased self-representation in family law has resulted in less participation in mediation. Since the cuts were introduced, 20,000 more parents went to court unrepresented. For the first time ever, over half (57%) of all parents who attended court in 2013/14 in private law children proceedings did so without a lawyer to represent them.

New provisions requiring applicants for legal aid in family violence proceedings to provide documentary proof in support of their application have been found to have a detrimental effect on victims. A survey carried out in 2013 by Rights of Women, Women's Aid and Welsh Women's Aid showed that half of all women surveyed who had experienced or were experiencing domestic violence did not have the prescribed forms of evidence to access family law legal aid. Of these, 61% took no action in relation to their family law problem as a result of not being able to get legal aid.

As qualified and experienced practitioners leave the immigration advice sector there is an increased risk of clients being taken advantage of by fraudulent immigration advice advisors. Additionally, evidence provided to a parliamentary select committee has highlighted the link between communicable diseases (such as tuberculosis) and poor housing. The removal of legal aid for challenges to landlords who allow their tenanted properties to fall into disrepair may threaten the health of individuals who are already at greater risk of contracting communicable diseases (due to poverty and overcrowding).

A lack of funding for representation at first instance results in many clients being left unaware of their right to appeal. A lack of funding for, and increased complexity around the procedures involved in seeking leave to appeal, renders the appeals process difficult even for those who are able to identify that they may have grounds to appeal.

Significantly, resistance to the cuts to civil legal aid was hampered by the inability of the legal profession to take collective action. The criminal bar and criminal solicitors have used collective strike action effectively to force the government to withdraw some of the most controversial proposed reforms to criminal legal aid (such as competitive price tendering). This option was unavailable to civil practitioners. A lack of public awareness of the value of advice and representation in civil law matters is also a contributing factor. This experience has highlighted the need for civil practitioners to collaborate to develop a robust evidence base regarding the value of civil legal advice in order to counter the Government's claims and to inform the public of the value of their work.

Criminal context

In the 1980s and 1990s, criminal defence lawyers were accused of manipulating aspects of a poorly regulated legal aid system. This led to a significant increase in regulation and compliance requirements without any commensurate increase in remuneration. To date, there has been £120million in cuts to criminal legal aid in England. This equates to 8.75% of the total 17% cuts forecast. As has been the experience in civil law sector, cuts to criminal legal aid funding have seen a reduction in expertise and fewer practitioners willing to enter the field. While opposition to the cuts has successfully reduced some of their effects – for example, the 250 duty lawyer contracts initially proposed has been increased to over 500 – consequences of the cuts specific to criminal sector include:

- A sharp increase in the number of unrepresented accused and an increased burden on the already congested court system.
- Increased difficulty for persons navigating the criminal justice system in the face of a growing trend toward the 'bureaucratisation' of criminal justice. As procedures and rules become more complex, accused persons increasingly need representation in order to understand their situation and rights and to resist the pressure to plead guilty.

- There is a risk that financial imperatives will push firms toward corporatization of policies and practices, undermining the individual professional lawyer-client relationship.

3. Effects on Service Provision

Presenters

- Mr Justin Hannebery, Criminal Bar Association
- Associate Professor Kathy Laster, Monash University
- Mr Anthony Smith, Australian Productivity Commission
- Ms Nicole Rich, Victoria Legal Aid

Key themes

- Devaluing the Magistrates' Court (summary jurisdiction) and Increased Pleading Pressures
- The Rise of Managerialism and the "Gifted Amateur"
- The Uncertainty of Funding
- Funding Priorities: Who is the Core Client?

Devaluing the Magistrates' Court (summary jurisdiction) and Increased Pleading Pressures

In the criminal context, a primary concern arising from changes to legal aid funding priorities was the seeming disregard of the effect of VLA policy decisions that prioritised more serious matters. Related concerns were the tightening of eligibility guidelines regarding representation in the lower courts, and what was perceived as a devaluing of the often serious matters dealt with in the Magistrates' Court, where the maximum penalty is five years imprisonment. The Magistrates' Court deals with a high volume of cases, and to operate efficiently, it relies heavily on VLA, CLCs, and the private sector. Given the high volume of cases, there is an emphasis on settling matters without proceeding to contest, and for accused persons to enter early guilty pleas. In light of this, numerous incentives and encouragements are provided to an accused person to enter a guilty plea, ranging from sentence and charge discounts, to plea negotiations and indications of the likely sentence they will receive from the Magistrate. The pre-trial process itself similarly involves multiple hearings to facilitate early disclosure, discussion and resolution.

Nonetheless, a policy decision was made by VLA to remove an accused person's access to legal aid in all matters deemed unlikely to result in a custodial sentence. This decision has been justified on the basis that those facing the most severe form of punishment should be prioritised when there is competition for limited funds. However in light of the incentives provided to accused persons to plead guilty, and the serious implications that arise from a guilty plea (e.g. registration on the *Sex Offender's Registry*), there are significant concerns arising from this policy decision, including a real risk of injustices occurring in the Magistrates court due to potentially induced guilty pleas being entered without appropriate advice.

Increasing numbers of self-represented accused persons are appearing in court, being left to navigate an increasingly complex legal system. There is also an increase in traffic matters where mental illness is identified as a concern. Increased pressures to resolve matters by guilty plea in circumstances that may not warrant it, coupled with a lack of representation, can have significant effect on an accused person and the integrity of the legal system. It is therefore vital that any changes to the provision of legal aid take into consideration how the current system encourages guilty pleas, and what this means when there is no lawyer to act as a final source of protection against the state.

The reduced attention given to the legal issues dealt with in Victoria's lower court due to changes in VLA funding priorities were criticised for limiting the opportunities for practitioners to develop advocacy expertise in the Magistrates' Court, in preparation for running cases involving more serious indictable offences in the higher courts. While this was a problem identified, a positive outcome arising from organisations having to respond to changes in VLA funding priorities includes the Criminal Bar Association approving an accreditation scheme for an indictable trial certificate. This program provides a constructive

environment for barristers to develop their experience and expertise in running pleas and summary hearings, before moving onto the more serious indictable offences. The program is still in the consultation phase, but it responds to the concerns that the opportunities available for young barristers to gain experience on their feet in the lower courts are effectively removed by the limitations on funding for many accused persons in this jurisdiction.

Rise of Managerialism and the “Gifted Amateur”

There were concerns identified that legal aid policy was being influenced by the prevailing business efficiency models and corporate trends. Within the private sector, there has been a growing trend in recent years toward the concept of co-production. Linked to this, is the notion of the “gifted amateur”; that is, the phenomenon that anyone can become a specialist and that individuals need to become more self-sufficient and capable of completing tasks independent of government or social welfare assistance. The difficulty with applying these concepts to the public sector and to the legal system in particular, is that they fail to accommodate the groups of people who are less capable of understanding, or engaging in certain tasks, for example, those with a non-English speaking background, individuals suffering from mental or cognitive disabilities, and individuals with low levels of education. This process also has the effect of devaluing the professional role and expertise of lawyers. In this way, the public can be led to accept stringent and arguably dangerous changes to basic legal service provisions on the basis that “you don’t need a lawyer”. This is despite the reality that the role of solicitors can be crucial in negotiating the criminal justice system, both within and outside court.

The rise of managerialism was also proposed as a factor adversely affecting legal aid policy decisions. Managerialism and increased efficiency are not only encouraged in the criminal justice system, but are key indicators of success for the courts, legal practitioners, the Office of Public Prosecutions and VLA. The focus on “drive-through justice” and the pressures of efficiency measures do not always align with the traditional values of the legal system. In light of some of the proposed and implemented changes to legal service provisions as a result of a limited pool of funding, there were concerns that at some point, the services or products themselves are at risk. In addition, once efficiency has peaked and cost burdens cannot be reduced, the focus may become about cost-shifting, in which administrative re-categorisation of entitlement and eligibility criteria becomes the primary technique of avoiding costs. This can play out by adding administrative compliance and requirements and/or hurdles, such as increased compliance costs for clients or making forms more difficult to fill out, which effectively works to sift people out of the system. Problematically, this process moves the focus from ‘need’ to ‘status’: once status becomes a fundable category, entire groups of people in need can more easily be cut from the system.

The Uncertainty of Funding

Government funding for legal assistance at both the Commonwealth and State level has not decreased in nominal terms, but it has not kept pace with demand for services or with the increased complexity of cases. It was noted that since 2007, there has been a net reduction in per capita funding for legal aid services. Accordingly, the pressures on VLA and CLCs have been amplified by increasing demand for services that are not matched by growing funding allocations.

In 2012, there was a promised cash injection from the federal government to increase legal aid services, enable exploratory pilot programs, and increase outreach programs. This planned injection of funding which was to commence on 1 July 2013 and roll out over a four year period, allowed 60 CLCs (across Australia) to plan for future initiatives. The funds were allocated variously by recipient CLCs. Some chose to introduce new initiatives and/or pilot programs to address new or increased need, whilst others chose to expand existing services. However, in December 2013, the Federal Government announced that it would not honour this funding agreement beyond 1 July 2015: the plans embarked upon by CLCs were thus no longer viable. In addition, there are further cuts to the CLC sector intended and a 25% or more reduction in Commonwealth funding to CLCs is expected. Because the details of the anticipated cuts remains uncertain, the CLC sector cannot predict how much their budgets will be reduced, and where the cuts will fall. This has created considerable budget and forecasting difficulties for the affected CLCs, with CLCs subsequently being forced to reduce staff numbers so as to re-direct existing funding to maintain existing operations.

Funding Priorities: Who is the Core Client?

There is healthy debate within the legal profession around how the legal aid system is running. However, it was commonly noted that a key focus of moving forward should not be the amount of funding, but what VLA should do with the funding it has. There were concerns that legal aid had become enmeshed in the economic discourse, with the focus on funding rather than about making a difference. This type of approach pushes the profession towards focusing on an individual client, rather than looking at wider policy and societal issues. In this way, discussions around legal aid decisions and priorities need to be re-contextualised within parameters of ethics and social justice.

VLA's present focus in relation to allocating funding includes:

- Prioritising legal representation for those with mental health problems;
- Reconsidering the means test with a view to achieving an appropriate balance between allocating funding to fewer high-need clients, as opposed to expanding the services to broader availability; and
- Taking a closer look at the indirect gender bias that results from certain funding priorities.

These priorities have been identified on the basis that increasing VLA's share of certain practice areas will enable it to have a more systemic effect in those areas. However there remains a tension in balancing needs: the conflict between expanding or getting services right, and prioritising who gets funding and who does not get funding. There are core questions that must be asked about VLA's clients relevant to its policy decisions, including who are VLA's core clients?; and whether it is more important to target the neediest and most complex cases, or ensure that every person has access to services/advice? It was agreed that clearer articulation of who VLA was established to serve will increase the transparency and understanding of its funding choices.

4. Effects on the Legal Profession

Presenters

- Ms Liana Buchanan, Federation of Community Legal Centres
- Ms Helen Fatouros, Victoria Legal Aid
- His Honour Justice Lex Lasry, Supreme Court of Victoria
- Her Honour Pauline Spencer, Magistrates Court
- Mr Sam Norton, Rob Stary & Associates

Key themes

- Retaining Due Process Protections
- Self-Represented Accused Persons
- Restrictions on the Types of Services Funded
- Pro-Bono Work and the "Flow-on Effect"
- Law and Order Agendas at Odds with Funding and Service Restrictions

Retaining Due Process Protections

Victoria has historically been regarded as a strong protector of due process values, such as the right to a fair trial in criminal matters, and as a result, Victorians have relatively strong levels of public confidence in the system. However, criminal trials are becoming more complex and longer, with preparation involving large amounts of material and increasingly complex evidential and procedural issues. For an accused to have a fair trial, there needs to be access to adequate legal advice.

In 2013, VLA introduced restrictions on trial funding that limited the funding available for an instructing solicitor to two half days. This decision was based on the practice of other Australian states where the presence of an instructing solicitor is not considered necessary in order to ensure a fair trial. A decision was made that not all criminal cases require an instructing solicitor to be in attendance all the time, as this was

regarded as duplicating roles and costs. Between February and May 2013, at least 47 applications were made to indefinitely stay criminal trial proceedings in Victoria's higher courts, on the basis that an accused could not receive a fair trial without a fully funded instructing solicitor. For four months, the courts accepted many of these applications, and it became a site for debating the definition of a "fair trial". The first case to be subject to an indefinite stay was *R v Chaouk* [2013] VSC 48 (10 February 2013), a murder trial overseen by His Honour Justice Lasry, which was due to commence shortly after the introduction of the more restrictive legal aid guidelines.

The effects of the policy decision to reduce funding for an instructing solicitor were immediately evident as defence counsel were unable to commence jury selection on short notice, given the necessity of rationing their limited instructor funding. Following prompting by the bench, defence counsel successfully sought a temporary stay of proceedings until such time as funding for an instructing solicitor for the duration of the trial was available.

In granting the stay, His Honour Justice Lasry considered the assistance he had needed from instructing solicitors in his time as a defence counsel, and determined that those trials that do not fall into the 'simple' category are matters that cannot be handled solely by a barrister. He also considered the assistance that he had needed, as a judge, from defence counsel. He reasoned that Supreme Court judges presiding over a criminal trial depend heavily on defence counsel. Accordingly, the transparency, accountability, and fairness of the system can only be upheld if judges receive the proper assistance of this counsel. His decision to stay the proceedings was later upheld following an attempted interlocutory appeal by the Crown (*R v Chaouk* [2013] VSCA 99).

In considering funding priorities, it was argued that the focus of changes to legal aid policy should take into consideration the need for accountability and transparency of the criminal justice system. It was also suggested that any changes take into account the 'fair trial test'; this does not mean a perfect trial, but it must be fair – the defence lawyer is the last protection for an accused from the power of the state. Accordingly, any changes to legal aid policies must consider the importance of maintaining the standards that exist in Victoria, particularly the right to a fair trial and transparent justice, and retaining public confidence in the system.

Self-Represented Accused Persons

There is a large gap in the VLA means test between those who receive legal aid, those that can afford private legal representation and the 'working poor' in the middle who have no affordable means of accessing legal assistance. The current means test does not capture everyone living in poverty. At the moment, only the lowest 10% of the community are eligible for legal aid, despite the fact that 14% of the community have been identified as living in poverty. The increase in self-represented accused persons is indicative, in part, of the gap between those who satisfy the means test, and those who do not meet the means test threshold and who need representation, but cannot afford it. Accordingly, there has been a significant increase in the number of unrepresented accused in the Magistrates' Court who would have been represented under the previous eligibility guidelines. The consequences of this increase include:

- Effects on the accused person and the community:
 - At present, representation in traffic related matters is not funded by VLA. Traffic offences might seem straightforward, but this is not true in all cases. Pleading guilty in driving-related matters can have a huge effect; for example, losing a driving licence can affect employment, housing and family life.
 - The consequences of even a very minor matter (e.g. fine and demerit point loss) can be significant for an accused, and can end up indirectly costing the community much more than is saved by denying funding that might lead to licence retention.
- Increases in delays and reducing the independence of the bench:
 - Matters involving a self-represented accused take longer and require the Magistrate to perform the "lawyer role" in providing advice. This places an increased burden on the judiciary, which is the most expensive resource in the system.

- There is a consequential effect on justice insofar as clearance rates are measured in court, whilst ‘just’ outcomes and the effect of the outcome on the accused and community are not measured. Pressures to clear cases could lead Magistrates to have swift and limited views of the case and focus on resolving cases quickly, rather than taking the time to ensure a just outcome.
- Removes a focus on therapeutic justice:
 - Therapeutic justice requires properly funded lawyers for identification of the broader social issues relating to the offender, referral to services, and so on. Without access to a duty lawyer, an accused may not realise what services are available to address drug and alcohol or similar issues which could have a profound effect on future offending behaviour.
 - There is also little time to look holistically at other interventions especially with first time offenders (e.g. drink drivers) to reduce recidivism.
- Effect on Family Violence Intervention Orders:
 - The high volume of Family Violence Intervention Orders matters places pressure on VLA and community lawyers to resolve matters at the earliest opportunity. This risks advice being given without sufficient time for consideration of the relevant factors.
 - There is evidence of increased frustration in violent men due to their inability to access court and engage in meaningful negotiations (a result of time and funding constraints).

Restrictions on the Type of Services Funded

As of 1 July 2014, CLCs cannot use Commonwealth funds for law reform and policy work. There are precedents for this approach when previous governments reduced funding for legal aid organisation and specifically prohibited the use of funds for policy work or strategic litigation. The ethos of the CLC sector has always been to focus not only on assisting the individual client, but also on the broader socio-economic factors underlying certain clusters of need. It is recognised that there is a need to not only service each individual client, but to also address systemic failures. This extends beyond front line services and is an integral component of justice and accountability in the system. The collective experience is that systemic work is often very effective and cost-efficient, but the Commonwealth funding restrictions will affect the ability of CLCs to maintain this focus. This is highly problematic, as it will limit the ability of CLCs to fund research that examines, critiques and advises how changes in government policy affects members of the community. This will affect, for example, the work of organisations such as Smart Justice who critique tough law and order policies (which have the effect of targeting and over-incarcerating people), and who promote evidence-based criminal justice programs. The removal of federal funding in this way is a greater issue in other states such as Queensland. In Victoria, CLCs will continue to work on systemic issues using State funding.

Pro-Bono Work and the “Flow on Effect”

There is an increasing expectation that practitioners will undertake more pro-bono work, despite the large gap that already exists in relation to what is funded and the actual workload involved. This may limit the ability of organisations and private practitioners to engage in this work. There has been an increase in pro-bono requests/referrals to Justice Connect since changes to legal aid guidelines and service provision, though it is unclear to what extent. In addition, looking to volunteers to fill the gaps that result from inadequate funding is problematic. Volunteers are invaluable contributors, but volunteer work still requires resources – both personal and economic – that affect the system as whole. There are also limitations on the role that volunteers can perform. Problems can arise where volunteers are not engaged in practice (e.g. insurance issues), are not totally up to date with existing laws, or are utilised to provide advice outside their main practice area. A key recommendation was thus that the government not rely on pro-bono work and volunteers to compensate for funding cuts.

Since the implementation of VLA’s funding amendments, CLCs have seen a growing demand for their services, including a referral increase from 10% to 80%. In order to respond to the current funding environments, CLCs are becoming more disciplined in who they assist. Thus a key consideration is whether service providers should take a targeted approach, focusing their limited resources on specific categories of

cases, or adopt a broader approach and provide services based on socio-economic criteria. Although CLCs were not explicitly expected to pick up the slack consequent upon VLA's funding amendments, they have effectively been forced to do so. This is having a two-fold effect: (1) it eliminates many people from its service who are in urgent need, whilst significantly affecting the quality of service that is provided to those obtaining it and; (2) the increased burden on the CLC sector affects stress levels and job satisfaction. CLC practitioners are generally in the sector as a result of their desire to assist people in need. Dealing with significant unmet need affects these practitioners. Indicative of this is the increased turnover in CLC sector over the last four years. CLC lawyers bring to the sector a valuable resource; they assist disadvantaged people through a holistic approach. This requires time and expertise, both of which are at risk if demand continues to increase without a matching increase in legal aid funds.

Law and Order Agendas at Odds with Funding and Service Restrictions

The failure of the Australian and State Governments to consider the far-reaching consequences of reduced funding and restrictive policy measures for the services provided by VLA and CLCs was a common issue identified across the day. In a law and order climate, changes are being made to sentencing practices, such as the introduction of baseline sentencing, and a stronger focus on punitive measures involving mandatory jail time. Policies aimed at increased law enforcement and more imprisonment requires a commensurate increase in resources for the defence, but this is not occurring. The principal response to crime by the Liberal government was to lock people up and to build more prisons. These policies are costly and have wider repercussions. Part of the problem thus arises from the refusal of successive governments to consider and acknowledge the downstream effects of law and order policies. Chronic underfunding, coupled with an increased demand for services and law and order agendas, makes future funding arrangements and access to basic legal protections a major concern. In this way, we are creating, what many of those practising law describe as "a perfect storm" of injustice.

5. The Broader Social Consequences

Presenters

- Ms Pasanna Mutha, Women's Legal Services Victoria
- Mr Wayne Muir, Victorian Aboriginal Legal Services
- Mr Dan Nicholson, Victoria Legal Aid
- Associate Professor Mary-Anne Noone, La Trobe University
- Ms Kristen Wallwork, Springvale Monash Legal Service

Key themes

- Effects on Vulnerable Groups
- Rebuilding Social Responsibility
- Conflicts in Funding Priorities

Effects on Vulnerable Groups

Concerns were expressed regarding the changes in VLA funding for vulnerable women, largely in the context of family relationship breakdowns and family violence. The reduced availability of legal resources to assist vulnerable women was identified as discouraging some women from seeking help to leave a violent relationship. Similarly, when a woman left a violent relationship but was unable to access legal aid, it is feared that they risk being unable to secure accommodation or an equitable property settlement. Women are the primary carer in 83% of single parent families. The broader economic and health consequences for women who cannot access timely legal advice and legal representation can result in:

- Serious risk for both women and children that they will remain in a violent relationship;
- Financial hardship and poverty, such as going without food in the first year after divorce; and
- Homelessness – if women do not have access to legal aid then it is more difficult for them to negotiate a bond for housing, access accommodation and obtain advice as to their entitlements.

Concerns were also raised in relation to reduced funds for VALS, which provides a holistic service response to its clients that considers the broader social and economic factors that affect their clientele. This includes looking beyond legal outcomes to community and social problems, such as financial services, housing and education. VALS is the first point of call for most Indigenous people who come into contact with the legal system. VALS deals with family, civil and criminal matters, but the majority of its work is criminal. VALS facilitates and supports its clients by providing referrals that are culturally appropriate and safe, but it is currently facing an increase in demand and shrinking resources. This places significant strain on the legal system, but also jeopardises its capacity to provide a culturally appropriate system of service and assistance for already marginalised members of the community.

Rebuilding Social Responsibility

Limited financial means is only one measure of disadvantage. There is a link between legal problems and life problems. Unresolved civil law matters, for example, have consequences that affect both the criminal justice and health systems. The *Legal Australia-Wide Survey* (Coumarleos et al 2013: 83) found that 44% of people with legal problems experience one or more adverse health and wellbeing consequences. Poverty, unemployment, lack of education and family problems have also been linked to crime. Similarly, youth crime is linked to involvement in family protection matters. The immediate effect of cuts to the availability and provision of legal services cannot be considered in isolation. In addition, while it was acknowledged that funding will always be an issue for legal service providers, because demand will usually outstrip supply, the current situation extends beyond the immediate implications of resource and service restrictions. It is the result of an unprecedented set of circumstances, principally major shifts in policy (restrictive and directive), funding cuts, and promotion of the idea of individual responsibility. The part played by the erosion of the sense of community in the current environment should not be underestimated, as it affects the wider community's concern for social welfare and related services. A key challenge is to address how we can re-build a sense of social responsibility within the broader community for any long-term changes to legal, social and welfare policy to be effective.

Conflict in Funding Priorities

A key theme of the workshop was the conflict between the relative funding of criminal and civil legal aid cases. In the past, there has been a prioritisation of criminal defence over other areas of legal representation. This has been criticised on the basis that it directly disadvantages women and prioritises males who are traditionally more likely to be criminal defendants. Unequal division of legal aid between the family law and criminal sectors means that men get more access to legal services and advice – this is a gendered issue. While the loss of liberty is traditionally recognised as being of greater value, it was proposed that a value judgment can no longer be made about what is more important – the loss of liberty versus the loss of children and other family law issues. One recommendation was to split VLA funding into two streams, so that civil and criminal legal aid did not come out of the same funding source. However concerns were raised around flexibility, and that separating the funds would create additional problems. For example, VLA may assist with the bail application but not be permitted to help with an eviction notice.

It was also noted that to some extent, the Commonwealth/State divide quarantines criminal and civil funding, preventing civil funding leaking into criminal matters. While separating funds may address some concerns, there was a general consensus that clients need to be dealt with holistically, which may require less separation of funding and more integration of different legal, social and welfare service providers. In the current climate, it is likely that multi-disciplinary clinics will be of increasing importance.

6. Conclusion

The current 'crisis' facing VLA is not just about funding. Government policy, the erosion of the sense of community and a decline in the wider community's concern for social welfare and related services, combined with an increased demand for said services all play a part. Even positive changes in government policy in relation to matters such as family violence have led to an increase in client demand. There are large questions regarding the broader social consequences of legal aid funding reductions that remain

unanswered and require attention. There is a clear need for qualitative research into the value of legal representation in the criminal and civil legal systems, beyond simple economic criteria. There is a value in legal representation that adds dignity and legitimacy to the process. There is also evidence that clients will be more content with the outcome of proceedings, even if adverse to the person, if they have had the benefit of representation. Some of the individual and collective benefits of legal services will always be intangible, but there remains a clear value to individuals maintaining access to legal services and advice. It is vital that the value of legal services is present in any negotiations around funding priorities or changes in legal service provisions.

It is of utmost importance that changes to legal aid funding and policies do not result in a three-tiered system of justice; one for those who can afford their own legal representation; one for those allocated legal aid; and one for the increasing middle group who are not eligible for legal aid, but cannot afford privately funded legal services. This concern is linked with the shift in government policy and declines in social regard for welfare and other service provisions to address community and individual needs. It is vital to highlight the importance of meeting legal need both on the front-line, and through funded research that examines, critiques and advises how changes in government policy affects all members of the community. Restrictions on front-line and holistic legal service provisions will lead to increased delays at every stage of the criminal, family and civil justice processes, and will ultimately increase financial and social costs for the community. A genuine concern exists within the legal sector that ill-considered, quick-fix resource and policy restrictions in the area of legal aid, combined with punitive law and order agendas, will damage fundamental understandings of due process and the rule of law.

It is imperative that a new narrative around the law is created. We need to challenge claims that legal advice is unnecessary, and that legal aid cuts are unavoidable, and reinvigorate public understanding and debate concerning the fundamental importance of procedural safeguards and due process. How people need, use and understand the law is integral to ensuring that any changes to funding priorities, services and programs avoid radically re-shaping legal values. Academics, practitioners and activists must continue to work together to rebuild a commitment to the value of law; to the importance of accessing and understanding law; and to the quality of law. If we publicly illuminate the importance of meeting legal need, we might be able to understand who the core legal aid client is, where priorities should be focused, and how we can best respond to changes in funding and service provisions.

Report written by

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7. List of Attendees

Name	Organisation	Position
Dr Renata Alexander	Monash University	Academic and barrister (former Legal Aid lawyer)
Ms Liana Buchanan	Federation of Community Legal Centres	Executive Officer
Ms Rachael Burgin	Monash University	Masters by Research Candidate
Ms Kate Burns	Monash University	PhD Candidate
Ms Natalie Byrom	University of Warwick	PhD Candidate
Ms Helen Fatouros	Victoria Legal Aid	Director, Criminal Law Services
Dr Asher Flynn	Monash University	Academic
Emeritus Professor Arie Freiberg	Monash University	Academic
Ms Fay Gertner	Monash Oakleigh Legal Service	Director
Mr Justin Hannebery	Barrister	Criminal Bar Association
Professor Jackie Hodgson	University of Warwick	Academic
Ms Mary Iliadis	Monash University	PhD Candidate
His Honour Justice Lex Lasry	Victoria Supreme Court	Justice
Associate Professor Kathy Laster	Monash University	Academic (former Executive Director, Victoria Law Foundation, and Institute of Public Administration Australia)
Commissioner Angela MacRae	Productivity Commission	Commissioner
Ms Helen Matthews	Women's Legal Service Victoria	Principal Lawyer
Professor Jude McCulloch	Monash University	Academic
Mr Wayne Muir	Victoria Aboriginal Legal Service	CEO
Ms Pasanna Mutha	Women's Legal Service Victoria	Policy and Campaigns Manager
Associate Professor Bronwyn Naylor	Monash University	Academic
Mr Dan Nicholson	Victoria Legal Aid	Director, Civil Justice, Access & Equity
Professor Mary Anne Noone	La Trobe University	Co-ordinator, Clinical Legal Education Program
Mr Sam Norton	Robert Stary and Associates	Barrister
Ms Nicole Rich	Victoria Legal Aid	Director, Family, Youth and Children's Law
Ms Meena Singh	Victoria Aboriginal Legal Service	Strategic Advisor
Mr Anthony Smith	Productivity Commission	Senior Research Officer
Ms Madeleine Smith	Monash University	PhD Candidate
Her Honour Pauline Spencer	Magistrates' Court Dandenong	Magistrate
Ms Kristen Wallwork	Springvale Monash Legal Service	Executive Director