

# Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VICTORIA) INC, IN CONSULTATION WITH MEMBER CENTRES

March 2014

## Response to VLA options paper

### 'Delivering high quality criminal trials'



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# About the Federation of Community Legal Centres (Victoria) Inc

The Federation is the peak body for 51 community legal centres (CLCs) across Victoria. The Federation leads and supports CLCs in pursuing social equity and access to justice.

The Federation:

- Provides information and referrals to people seeking legal assistance.
- Works for law reform to develop a fairer legal system that better responds to the needs of the disadvantaged.
- Works to build a stronger and more effective community legal sector.
- Provides services and support to CLCs.
- Represents CLCs' priorities and interests.

## About community legal centres and why a fair and efficient criminal justice system matters to us

Every year, community legal centres (CLCs) assist over 100,000 Victorians. Over 80% of our clients earn less than \$26,000 a year and around 60% receive assistance from Centrelink. CLC clients include people with mental illness and intellectual disability, homeless people, young people, Aboriginal and Torres Strait Islander peoples and people from culturally diverse backgrounds.

Many CLC clients have a range of complex needs, commonly including special needs arising from mental illness, cognitive impairment, trauma, limited literacy or limited understanding of English.

CLCs have a longstanding commitment to providing legal and related assistance to address the individual client's inter-related problems. They recognise that an individual's legal rights and well being are usually affected by far more than the facts of their legal case.

The CLC model of service is to provide, wherever possible, a holistic response.

In 2012–13, 7% of all CLC services in Victoria were in assisting clients charged with criminal offences. We do not collect information on the amount of assistance provided to those charged with indictable offences but we accept that these matters would represent only a very small amount of CLC's criminal law work. On the other hand, some of our members such as Victorian Aboriginal Legal Service (VALS) conduct over 90% of casework in criminal law matters.<sup>1</sup>

The majority of CLC services are in civil law (50%), family law (43%), with family violence, tenancy, debt, fines, family law issues relating to children and employment law among the most common legal issues CLCs assist with.

Acknowledging the overall majority of CLC work across Victoria is not in criminal law, our response to the options paper is from the perspective of organisations that work to increase access to justice and that have much experience working with people experiencing significant disadvantage.

In this submission, we recognise and accept the value of ongoing systemic review around key issues in the criminal justice system including trial procedure and effective ways to reduce trial delays. We submit that any changes to criminal procedure and the conduct of trials, and any changes to the way in which existing public funds for trials are allocated must be made in a manner that promotes both fairness and efficiency within the criminal justice system.

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<sup>1</sup> Calculation based on statistics in *Victorian Aboriginal Legal Service Annual Report 2012/13*, 10.

## Background

In January 2014, Victoria Legal Aid (VLA) released a consultation and options paper, 'Delivering High Quality Criminal Trials'. While this consultation occurs in a context in which VLA has been reviewing funding priorities and reducing expenditure across a number of areas, we note that the paper states that the consultation will not re-assess the extent to which criminal trials are funded against other Victoria Legal Aid priorities.<sup>2</sup>

The focus of the consultation is to examine how existing funding can be 'best spent through good quality, early trial preparation that enables appropriate early resolution of matters, skilled and focused trial advocacy and a reduction in appellable error and retrials'. It examines issues such as trial delays, late pleas at trial and increases in the duration of trials and puts forward 53 options for how these problems can be improved. Some of these proposals involve changing the existing legal aid service delivery model.

We welcome VLA's approach to consult broadly on the important issues in this review.

## Scope of this submission

The Federation's submission focuses on the following issues:

- The need for the principle of fairness to be included as a guiding principle in the review process.
- Some of the suggested options involving changes to the service delivery model have the potential to compromise the right to a fair trial by removing a person's right to choose their solicitor (options **33, 34, 35, 36** and **39**); and
- The need to ensure that extra reporting requirements to VLA achieves the desired results of increasing efficiency and does not impose an unreasonable administrative burden on lawyers that impacts either on the client service or on lawyers' capacity or preparedness to accept legally aided clients (options **1, 3, 6, 31**, and **40**).

## Guiding principles should include fairness

VLA has developed a set of principles to guide decisions on options for reform in this review process.<sup>3</sup> While we support these listed principles, we are concerned that they omit a critical consideration, namely the importance of ensuring an accused person receives a fair trial.

This principle is a fundamentally important legal concept in terms of ensuring an accused person's right to a fair trial and as such should be addressed in every criminal law policy making process including this consultation. We have therefore had regard to this principle in our submission and we encourage VLA to include it in its guiding principles in the remaining stages of this review process.

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<sup>2</sup> Victoria Legal Aid (2014) *Delivering high quality criminal trials: consultation and options paper*, 18.

<sup>3</sup> Victoria Legal Aid (2014) *Delivering high quality criminal trials: consultation and options paper*, 20-21.

## Accessing justice: the right to choose a solicitor

**Option 33: Victoria Legal Aid to decide how to fund individual major trials, either through tendering, funding packages, fixed fees for appearances at trial or funded as an ordinary trial.**

**Option 34: All major trials to be allocated to Victoria Legal Aid's staff practice, subject to conflict of interest check and staff capacity.**

**Option 36: All major trials (in-house or privately assigned) to be briefed to a public defender, subject to conflict of interest check and staff capacity**

**Option 39: Allocate sexual offence cases to Victoria Legal Aid's staff practice, subject to conflict of interest check and staff capacity.**

The Federation has concerns regarding these options for consideration to the extent they have the potential to exclude an accused person's right to choose and retain a lawyer of their choice.

### *Common law right to choose lawyer*

The right of an accused person to access an independent lawyer of their choice is a common law right that is recognised as one of the most basic tenets of the rule of law.<sup>4</sup>

The rationale for the right is summarised in the following judgement by O'Connor J:

There are sound reasons why this right was considered to be a fundamental component of the criminal justice system [...] The solicitor-client relationship is anchored on the premise that clients should be able to have complete trust and confidence in the counsel who represent their interests. Clients must feel free to disclose the most personal, intimate and sometimes damaging information to their counsel, secure in the understanding that the information will be treated in confidence and will be used or not used, within the boundaries of counsels' ethical constraints, in the clients' best interests.<sup>5</sup>

[...] the perception of fairness will be damaged, and in many cases severely so, if accused persons are improperly or unfairly denied the opportunity to be represented by the counsel they choose.

### *Position in law in Victoria*

In Victoria, the principle is recognised in section 8(2)(b) of the *Legal Aid Act (1978)* which since enactment has required VLA to make guidelines which have regard to the desirability of a person being entitled to choose a legal practitioner of their choice.

### *Human rights considerations*

VLA as a public authority is required to comply with the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter'). Section 38 requires public authorities to act compatibly with the human rights in the Charter and to give proper consideration to relevant human rights in making decisions.

A number of human rights in the Charter are relevant to the rights of a person accused of a crime.

The Charter recognises the right to a fair hearing which includes the right to *communicate* with a lawyer chosen by him or her.<sup>6</sup> However, the Charter does draw a distinction between an accused person's right to *defend* him or herself through legal assistance chosen by the accused **or**, if eligible, through legal aid provided by VLA under the *Legal Aid Act (1978)*.<sup>7</sup> While this distinction reflects that the Char-

<sup>4</sup> Law Council of Australia (2011) Policy statement: Rule of Law Principles, 3.

<sup>5</sup> R. v. McCallen 43 O.R. (3d) 56 [1999] O.J. No. 202.

<sup>6</sup> Sections 24 and 25(2)(b).

<sup>7</sup> Section 25(2)(d). See also *Hakimi v Legal Aid Commission* (ACT) [2009] ACTSC 48.

ter does not guarantee an absolute right to a legally aided person to choose their own lawyer, it must be read in conjunction with section 8(2)(b) of the *Legal Aid Act (1978)* which refers to the desirability of allowing a person to choose their lawyer.

We submit that any reform option that excludes the ability of all legally aided accused persons to choose their own lawyer in all instances would potentially breach Charter rights in sections 24 and 25.

We are particularly concerned about the impact such changes would have on CLC clients' ability to access a fair trial given that many of our clients have complex and time consuming needs resulting from mental illness, cognitive impairment, inter-generational trauma, discrimination, disadvantage, limited literacy or limited understanding of English. As VLA is aware, people with these needs and experiences are disproportionately represented in the criminal justice system.

#### *Impact of reforms on CLCs*

Under a modified service delivery model as outlined in some of the options above, we are also concerned that CLC clients may not get the specialised, time-intensive, expert legal representation that our lawyers and support workers are able to offer at specialist services such as Victorian Aboriginal Legal Service (VALS).

Community legal centres have a longstanding commitment to providing legal and related assistance to address the individual client's inter-related problems. They recognise that an individual's legal rights and well being are usually affected by far more than the facts of their legal case. The community legal centre model of service is to provide, wherever possible, a holistic response. Community legal centres' philosophy and practice means providers take the time and care, and develop the knowledge required, to provide access to justice for clients with more complex and time consuming needs. The result is that community legal centres such have developed expertise in working with clients experiencing a range of complex and inter-connected problems.

For example, VALS provides an important, culturally appropriate and holistic specialist legal service to Aboriginal and Torres Strait Islander peoples that no other legal service providers in Victoria can offer. Clients choose the legal service because they have a strong sense of cultural and historical connect-edness to VALS and it provides continuity in service. The Client Service Officers at VALS are part of the local Aboriginal and Torres Strait Islander communities and provide outreach and 24 hour logistical support, case planning, community liaison, as well as attending legal interviews and court with VALS clients.

Getting the balancing right: ensuring reporting requirements do not reduce capacity to provide legally aided services

**Option 1:** That the available pre-committal fee be amended to require a practitioner to prepare a documented analysis of the hand-up brief and formulation of a case strategy.

**Option 3:** That Victoria Legal Aid sets expectations as to the content of the brief to appear at the contested committal, including a description of the case strategy and the purpose of having the committal (e.g. whether it is intended to lay the groundwork for resolution, narrow the issues for trial, seek discharge or achieve a summary hearing).

**Option 6:** Victoria Legal Aid require more information from practitioners when completing an existing post-committal checklist, including an explanation as to the extent to which the committal narrowed the issues for trial, assisted in resolving the case or otherwise advanced trial preparation.

**Option 31:** Victoria Legal Aid to intensively manage major cases. Case management could include requiring the submission of case plans or introducing obligations to report on case progress.

We recognise and accept that there is merit in VLA increasing its ability to scrutinise the legal services provided by non VLA lawyers as a measure to ensure that expenditure on legally aided trials is delivering efficient and high level legal representation. While we do not make detailed comment on the options set out above, we submit that the measures eventually implemented will need to be carefully considered and tested to ensure that they do not impose an unreasonable administrative burden on lawyers that either impacts on the client service or on lawyers' capacity or preparedness to accept legally aided clients.

To help facilitate this, we request that VLA include our criminal law practice member centres in further consultations on draft compliance and case management measures so that our member centres can give feedback including indications of the estimated time it would take to respond to proposed reporting measures.

## Acknowledgements

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