

# **LEGAL AID IN DIFFICULT TIMES**

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## ***Making the hard decisions: Victoria's legal aid funding crisis***

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*This week we announced stricter eligibility guidelines to ensure our services remain financially sustainable, in the face of record demand for legal help from the community without an increase in government funding and very little indexation of funding for population growth and inflation. The current economic climate as well as federal and state government commitments to making the community safer, including to eliminating family violence and to improving child protection, mean that more people need our help than ever before.<sup>1</sup>*

## Introduction

A significant budgetary shortfall, caused by increased demand for legal aid services, has led to a dramatic curtailment of services at Victoria Legal Aid (VLA).<sup>2</sup> Unremarkably, the increased demand can be directly related to shifts in government policy. No allowance has been made for the 'downstream' impact of these policy changes on demand for legal aid services. Despite the recognition of the need for impact statements in many other areas of policy development, it is still not standard when formulating government justice sector policy to conduct a legal aid impact statement. More interestingly the approach taken by VLA to this current dynamic funding 'crisis'<sup>3</sup> has seen VLA clearly define priority groups and legal issues as well attempting to alter the practices of legal aid practitioners in an attempt to reduce costs. Predictably, the legal profession is concerned and highly critical of the changes. This resonates with decades old debates about the purposes of legal aid.

This paper provides the background and context to current situation. It details the priorities set by VLA and summarises the changes that have caused so much concern. The response of the legal profession and judiciary is examined.

## BACKGROUND

### Australian Legal Aid System

Australia is a federation comprised of seven States and Territories. Legal aid is funded both by the federal government (the Commonwealth) and state governments. There is no national legal aid scheme. Instead there are a variety of legal aid organisations providing

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<sup>1</sup> Warner B., *Managing Director's message – Increased demand forces guideline changes* 13 December 2012 <http://www.legalaid.vic.gov.au/about-us/news/managing-director%E2%80%99s-message-%E2%80%93-increased-demand-forces-guideline-changes> accessed 6/5/13

<sup>2</sup> At the time of writing paper, there were State and Federal Budget announcements, Supreme Court rulings and retraction by VLA of a new guideline see: <http://www.legalaid.vic.gov.au/about-us/news/victoria-legal-aid-to-introduce-more-flexibility-for-criminal-trial-funding> and <http://www.legalaid.vic.gov.au/about-us/news/state-budget-maintains-services-current-levels> accessed 8/5/13.

<sup>3</sup> At the time of writing there were court decisions, a State Budget and Federal Budget all impacting on VLA's situation. For details of Federal Budget see: [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201213/LegalAid](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/LegalAid) ; State Budget

legal information, advice, assistance and legal representation for the poor and disadvantaged.<sup>4</sup> They include:

- State based statutory Legal Aid Commissions (LACs)<sup>5</sup>
- Independent, not for profit Community Legal Centres (both generalist and specialist)(CLCs)<sup>6</sup>
- Aboriginal and Torres Strait Islander Legal Services (ATSILS)
- Family Violence Prevention Legal Services<sup>7</sup>
- Range of Commonwealth Statutory schemes.<sup>8</sup>
- University run Clinical Legal Education Programs<sup>9</sup>

There are also a large number of pro bono schemes, where the private legal profession provide services for free or at reduced rate. These can be not for profit organisations like Public Interest Law Clearinghouses or be court related schemes. These schemes remain largely uncoordinated nationally.<sup>10</sup>

Although there is some overlap in the clientele and services provided by these organisations, the chronic underfunding of legal aid necessitates the imposition by legal aid organisations of restrictive guidelines and determination of priority areas of law to receive assistance.<sup>11</sup> Most State funded legal aid expenditure occurs in criminal law whereas most Commonwealth legal aid funding is directed to providing assistance in family law and there is little funding of civil law matters.<sup>12</sup>

## Victoria legal aid

This paper focuses on Victoria Legal Aid (VLA), the legal aid commission in State of Victoria.<sup>13</sup> VLA is an independent statutory body governed by a board of 5 appointed by the Attorney-General.<sup>14</sup> In 2012 it had 596.5 full time staff including 284 lawyers and funding of \$153,831,000.<sup>15</sup>

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<sup>4</sup> For further detail see: Gibson F. & Noone M.A., 'Going to Court: Access to Legal Assistance in Australia' in *Australian Courts: Serving Democracy and its Publics* The Australian Institute of Judicial Administration Incorporated (2013) ; For a history of Australian legal aid system see Noone & Tomsen *Lawyers in Conflict; Australian Legal Aid* Federation Press 2006.

<sup>5</sup> National Legal Aid <http://www.nationallegalaid.org/> accessed 2/5/13

<sup>6</sup> National Association of Community Legal Centres <http://www.naclc.org.au/> accessed 2/5/13

<sup>7</sup> Attorney-General's Department, Family Violence Prevention Legal Services accessed 2/5/13: <http://www.ag.gov.au/LegalSystem/IndigenousLaw/Indigenousjusticepolicy/Pages/Familyviolencepreventionlegalservices.aspx>

<sup>8</sup> Attorney-General's Department, Financial Assistance accessed 2/5/13: <http://www.ag.gov.au/LegalSystem/Legalaidprograms/Commonwealthlegalfinancialassistance/Pages/default.asp>

<sup>9</sup> Kingsford Legal Centre, University of NSW, *Clinical Legal Education GUIDE* 2012 accessed 2/5/13; [http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/eBulletins/CLE\\_GUIDE\\_2011\\_12.pdf](http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/eBulletins/CLE_GUIDE_2011_12.pdf)

<sup>10</sup> For details of various programs see National Pro Bono Resource Centre accessed 2/5/13 <http://www.nationalprobono.org.au/home.asp>

<sup>11</sup> See discussion in Ch 3 'The Adequacy of Legal Aid' in Senate Legal and Constitutional Affairs References Committee, *Access to Justice* December 2009 p 35 - 60

<sup>12</sup> Cunneen C. & Schwartz M., 'Civil and family law needs of indigenous people in New South Wales: The priority areas' (2009) 32 *University of New South Wales Law Journal* 725; Gibson F Article 13 of the Convention on the Rights of Persons With Disabilities- A right to legal aid? (2010) 15 (2) *Australian Journal of Human Rights* 123, Gibson F Extending Aid to the Unrepresented (2006) 80 *Law Institute Journal* 59, ; Hunter, R. and T. De Simone (2009). "Women, Legal Aid and Social Inclusion." *Australian Journal of Social Issues* 44(4): 379-398.

<sup>13</sup> See *Legal Aid Act* 1978 and <http://www.legalaid.vic.gov.au/>

## Services

VLA administers the Legal Aid Fund and provides legal practitioners (both in private practice through Judicare program and salaried lawyers at VLA and community legal centres) to enable people who cannot afford a lawyer to be legally represented in court proceedings (this is described as a grant of aid).<sup>16</sup> VLA also provides a range of other services including:

- duty lawyer services for people appearing at court on the day without a lawyer;
- family dispute resolution services
- legal advice
- information and referral services through telephone services and online.
- education programs to inform the community about a range of legal issues.<sup>17</sup>

## Funding

VLA receives funding from 3 main sources, state and federal governments and monies generated by interest earned on solicitor's trust accounts (Public Purpose Fund).<sup>18</sup> In 2011–12 the amounts received were:

- Victorian Government provided \$72.8 million (\$69.1 million in 2010–11);
- Public Purpose Fund provided \$25.7 million (\$25.8 million in 2010–11);
- Commonwealth Government provided \$43.6 million through the National Partnership Agreement on Legal Assistance Services (\$42.4 million in 2010–11).

Of the funds provided by the Victorian Government in 2011–12, \$12.4 million was allocated directly to the Community Legal Centre Funding Program (\$11.5 million in 2010–11).

In 2011–2012, \$79.6 million (67% of total budget) was spent on case-related private practitioner payments (\$67.1 million in 2010–11), an increase of 6%.<sup>19</sup> Fees to private practitioners were increased by 10% during this year.

## National Partnership Agreement on Legal Assistance Services

In July 2010, the Commonwealth Attorney-General, announced the commencement of a new National Partnership Agreement on Legal Assistance Services (NPA).<sup>20</sup> The objective of the NPA is stated in Clause 15 :

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<sup>14</sup> See *Legal Aid Act* 1978 and <http://www.legalaid.vic.gov.au/>. For a history of Victoria Legal Aid see Giddings J. & Noone M.A. (1998), 'Recent developments in legal aid in Victoria' in Giddings, J. (Ed), *Legal Aid in Victoria: at the Crossroads Again* Fitzroy Legal Service Inc

<sup>15</sup> Victoria Legal Aid, *Seventeenth Statutory Annual Report 2011-2012* p48 & 60.

<sup>16</sup> In the year 2008-2009, the eight state and territory legal aid commissions provided 14,579 grants of individual legal assistance in civil law matters (9% of all grants) and 41,195 grants in family law matters (25.95%). The previous year 2007-2008 the figures were 12,583 and 28,470 respectively. National Legal Aid Statistics Case Applications Received 2008-2009 <http://www.legalaid.tas.gov.au/nla/reports/20082009/html/Case%20law.html> accessed 14/2/11.

<sup>17</sup> For details of services see <http://www.legalaid.vic.gov.au/index.htm> and <http://www.legalaid.vic.gov.au/get-legal-services-and-advice> accessed 7/5/13

<sup>18</sup> For details of legal aid funding see Senate Legal and Constitutional Affairs References Committee, *Access to Justice* December 2009 pp35-60 .

<sup>19</sup> <http://www.legalaid.vic.gov.au/about-us/our-organisation/funding> accessed 2/5/13

<sup>20</sup> For a more detailed discussion of NPA see Noone M.A *Australia's New National Partnership Agreement on Legal Assistance* (2011) International Legal Aid Group Conference Paper [http://www.ilagnet.org/jscripts/tiny\\_mce/plugins/filemanager/files/Helsinki\\_2011/session\\_papers/Session\\_4\\_Paper\\_2\\_-\\_Mary\\_Anne\\_Noone.pdf](http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Helsinki_2011/session_papers/Session_4_Paper_2_-_Mary_Anne_Noone.pdf) and Warner, B., *Review of the National Partnership Agreement – an opportunity to iron out the creases* Conference Paper, National Access to Justice and Pro Bono Conference March 2013 p 9 [http://www.a2j13.com.au/getattachment/3cdcb6d6-0b31-436a-852e-e148c0b11692/WARNER\\_Bevan\\_NationalPartnershipAgreement.aspx](http://www.a2j13.com.au/getattachment/3cdcb6d6-0b31-436a-852e-e148c0b11692/WARNER_Bevan_NationalPartnershipAgreement.aspx)

A national system of legal assistance that is integrated, efficient and cost-effective, and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness.<sup>21</sup>

At the 2011 ILAG conference I wrote about the then new NPA<sup>22</sup> which sent a clear message that legal aid commissions were to increase the “delivery of preventative, early intervention and dispute resolution services” and provide a “comprehensive legal information services and seamless referral for preventative and early intervention legal assistance services”.<sup>23</sup> The performance benchmarks included a 30% increase in number of early intervention services; 25 % increase in the total number of services delivered by legal aid commissions; the number of referral arrangements identified and implemented, and the number of referrals, including warm referrals (where the initial contact was made by the referring organisation on behalf of the client) to another service.<sup>24</sup>

Although some additional federal funding was made available, to achieve the NPA targets VLA had to reassess its priorities and reviewed its strategic plan. The VLA 2011–14 Strategic Plan prioritised assistance for people who:

- are poor and cannot afford to access the protection of the law and face detention by the state or having decisions made for them;
- are exposed to risk of violence or harm; and
- are marginalised or vulnerable to exploitation or unfair treatment.

The services that were prioritised were those that: uphold rights and due process; focus on early intervention and prevention; build the capacity of clients to resolve their future problems without legal assistance; and deliver a wide benefit to the community.<sup>25</sup>

In response to the NPA during the last financial year, VLA helped 4.2% more people with civil law issues relating to fines, debt and tenancy, among them nearly 4,000 regional Victorians and delivered more preventative services including 43.6% more visits made to the website, 40,829 referrals made to external agencies, 688,813 publications distributed and 81,708 matters dealt with by the Legal Help phone service.<sup>26</sup>

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<sup>21</sup> *National Partnership Agreement on Legal Assistance Services*

[http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/Other/Legal\\_Assistance\\_Services\\_new.pdf](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/Legal_Assistance_Services_new.pdf) accessed 16/5/11

<sup>22</sup> Noone M.A *Australia's New National Partnership Agreement on Legal Assistance* (2011) International Legal Aid Group Conference Paper

[http://www.ilagnet.org/jscripts/tiny\\_mce/plugins/filemanager/files/Helsinki\\_2011/session\\_papers/Session\\_4\\_Paper\\_2\\_-\\_Mary\\_Anne\\_Noone.pdf](http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Helsinki_2011/session_papers/Session_4_Paper_2_-_Mary_Anne_Noone.pdf)

<sup>23</sup> Clause 17 NPA

<sup>24</sup> Clause 20 NPA

<sup>25</sup> Victoria Legal Aid, *Strategic Plan 2011-14* page 2

<http://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-strategic-plan-2011-14.pdf>

<sup>26</sup> Victoria Legal Aid, *Seventeenth Statutory Annual Report 2011-2012*

## Increased VLA demand

Demand for legal aid services can be affected by a range of factors. Recently, the Managing Director of VLA noted:

*An economic downturn, significant demographic changes, new policy initiatives and natural disasters carry dramatic impacts on demand on a legal provider and its ability to appropriately meet legal needs.<sup>27</sup>*

*The success of various federal and state government commitments to making the community safer, to eliminating family violence and protecting children, along with the current economic climate mean more people need our help than ever before. Victoria Legal Aid is experiencing unprecedented demand for its services due to the positive policing of family violence, increases in child protection and more detected crime in our community without a commensurate increase in funding.<sup>28</sup>*

VLA, like most legal aid providers in Australia, has experienced continued growth in demand for services. In 2011-2012, there was a 2% increase in numbers of people (91,000) helped by VLA and a 6 % increase in grants of legal assistance. The increase in demand for VLA services comes from several sources.

The first is that more individuals in community are in need of legal assistance, unable to pay for legal services and satisfy the means test eligibility. An indicator of increased demand is that more people are reliant on social security and are in low paid part time work.<sup>29</sup>

A second source of increased demand are changes to government policies and practices (see discussion below). For example, factors that influenced the increase in demand at VLA include continued strong demand for assistance with infringement notice matters ( the highest increase in grants of legal assistance was for civil law matters up by 35.5%)<sup>30</sup> and demand for assistance with child protection matters and for family violence intervention orders, which has also seen an increase in the number of interim orders dealt with by the Magistrates' Court of Victoria. Overall grants of legal assistance in family law increased by 11.5 per cent.<sup>31</sup>

As this current 'crisis' has unfolded these increases have also been revealed: 13% increase in child protection applications; 40% increase in family violence intervention order

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<sup>27</sup> Warner, B., *Review of the National Partnership Agreement – an opportunity to iron out the creases* Conference Paper, National Access to Justice and Pro Bono Conference March 2013 p 9

[http://www.a2j13.com.au/getattachment/3cdcb6d6-0b31-436a-852e-e148c0b11692/WARNER\\_Bevan\\_NationalPartnershipAgreement.aspx](http://www.a2j13.com.au/getattachment/3cdcb6d6-0b31-436a-852e-e148c0b11692/WARNER_Bevan_NationalPartnershipAgreement.aspx) ; see National Pro Bono Resource Centre, *Emergency Preparedness and Disaster Planning for the Legal Profession in Australia* June 2011

<sup>28</sup> Warner B., 'Statement on demand for legal aid services' Media release Wednesday, 5 December 2012 <http://www.legalaid.vic.gov.au/about-us/news/statement-on-demand-for-legal-aid-services> accessed 2/5/13; Increased demand forces changes to legal aid eligibility guidelines Tuesday, 11 December 2012

<http://www.legalaid.vic.gov.au/about-us/news/increased-demand-forces-changes-to-legal-aid-eligibility-guidelines>

<sup>29</sup> Australian Council of Social Service, *Poverty in Australia: ACOSS Paper 194* 2012;

[http://acoss.org.au/media/release/one\\_in\\_eight\\_people\\_living\\_in\\_poverty\\_in\\_australia\\_new\\_report](http://acoss.org.au/media/release/one_in_eight_people_living_in_poverty_in_australia_new_report)

<sup>30</sup> For a range of reports and submissions on the negative of effect of Infringements on the poor see:

[http://www.communitylaw.org.au/resources.php?groups=true&category\\_id=252accessed](http://www.communitylaw.org.au/resources.php?groups=true&category_id=252accessed) 15/5/13

<sup>31</sup> Victoria Legal Aid, Seventeenth Statutory Annual Report 2011-12 p11

<http://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/seventeenth-statutory-annual-report-2011-12-narrative.pdf> accessed 1/5/13

contravention proceedings; drug offence prosecutions increased by 22%; and crimes against the person prosecutions increased by 12%.<sup>32</sup>

Victoria Legal Aid finished the 2011–12 financial year with an overall deficit of \$3.1 million, following two years of surpluses. The Annual Report (2011-12) noted this deficit was due to increased demand for services, particularly in child protection and family law matters, while funding levels have not increased at the same rate but had in real terms declined. The Report noted that the key drivers for planning into future remained:

- The number of police officers
- The number of child protection workers
- The incidence and severity of family breakdown
- The widening gap between the working poor and those able to fend for themselves
- Policies of government departments and prosecutorial agencies
- Population growth, particular in areas of disadvantage.

The Report predicted that “we anticipate that future budgets will continue to be crafted in difficult economic times and present many challenges”.<sup>33</sup>

## The VLA ‘crisis’

In the first half of the current financial year<sup>34</sup>, the increased demand for VLA services intensified and VLA began to curtail services in a number of ways. It is currently estimated that the deficit in 2012-13 will be between \$10-13million.<sup>35</sup> These changes included placing further limitations on types of legal matters and aspects of legal work that are eligible for assistance, the closure of a regional VLA office and internal staff reductions.

## Changes to VLA Eligibility Guidelines

Given the limited funding available, each legal aid commission establishes criteria to govern decisions about eligibility for services. These are a means test; guidelines that detail priority areas (both law type and category of person) of assistance; and the perceived merits of the case. Whereas grants of legal aid for legal representation are subject to means and merits tests, information, minor advice and duty lawyer services are generally available to all.<sup>36</sup>

The ability to vary guidelines for legal assistance and eligibility criteria are an integral aspect of budgeting for legal aid commissions.<sup>37</sup> Since the current National Partnership Agreement came into force, there have been more opportunities for legal aid commissions to vary their guidelines as necessary. This has been very evident in Victoria where in the last two years

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<sup>33</sup> Victoria Legal Aid, Seventeenth Statutory Annual Report 2011-12 p 57  
<http://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/seventeenth-statutory-annual-report-2011-12-narrative.pdf> accessed 1/5/13

<sup>34</sup> Australia’s financial years run from July to June.

<sup>35</sup> Wells R & Cook H, *Legal Aid crisis looms* 1/12/12 Herald Sun Newspaper

<sup>36</sup> For example see <http://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/grants-of-legal-assistance-guide-and-application-form> accessed 1/5/13

<sup>37</sup> For discussion of use of guidelines in 1990s see Giddings J. & Noone M.A. (1998), ‘Recent developments in legal aid in Victoria’ in Giddings, J. (Ed), *Legal Aid in Victoria: at the Crossroads Again* Fitzroy Legal Service Inc

VLA has been refining who should have priority to services and a narrowing of criteria for certain services.

For instance in July 2012, eligibility for the free duty lawyer service at Magistrates Courts was reduced in order to more clearly target the most disadvantaged. The service is now focused on people who:

- *can't afford a private lawyer*
- *have an intellectual disability, an acquired brain injury or mental illness*
- *are experiencing or at risk of homelessness*
- *are in a psychiatric in-patient unit with a Mental Health Review Board hearing*
- *a child or young person going to the Children's Court*
- *can't speak, read or write well in English*
- *are Indigenous Australians*
- *are at court for a family violence matter or are at risk of family violence*
- *are in custody or facing a serious penalty.*<sup>38</sup>

As well the type of services provided as part of duty lawyer scheme was altered. Depending on the nature of the charges and the individual circumstances of the accused, the duty lawyer service now provides:

- *information – factsheets about specific offences and what happens in court will be available to anyone charged with an offence*
- *advice about the law and how it applies will be given to people who meet the means test*
- *in-court advocacy for those that meet an income test, are facing a significant charge, or meet one of the priority client criteria.*<sup>39</sup>

However more dramatically, in December 2012, the Managing Director announced :

*stricter eligibility guidelines to ensure our services remain financially sustainable, in the face of record demand for legal help from the community without an increase in government funding and very little indexation of funding for population growth and inflation.*<sup>40</sup>

A range of eligibility guideline changes came into effect in 2013. The first round of changes affecting family, civil and criminal law services came into effect on 7 January 2013. The second round of changes came into effect on 8 April 2013. For further detail together with the reasons for changes see Appendix A.

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<sup>38</sup> These categories of disadvantage for priority in provision of legal services are supported by the recent LAW survey Coumarelos C, Macourt D et al, *Legal Australia-Wide Survey: Legal need in Australia* (2012); For access to all reports see <http://www.lawfoundation.net.au/publications>

<sup>39</sup> <http://www.legalaid.vic.gov.au/about-us/news/changes-to-duty-lawyer-services-will-target-those-most-in-need>

<sup>40</sup> Warner B., *Managing Director's message – Increased demand forces guideline changes* 13 December 2012 <http://www.legalaid.vic.gov.au/about-us/news/managing-director%E2%80%99s-message-%E2%80%93-increased-demand-forces-guideline-changes> accessed 6/5/13

### *Changes introduced from 7 January include:*

- Limiting funding of parents in family law matters to trial preparation, and providing representation at a trial only when the other party has a privately funded or pro bono lawyer.
- Lifting the threshold at which a grant of assistance may be made to help people with unpaid fines from fines exceeding \$1000 to \$5000. People facing total fines of less than \$5000 who would be otherwise eligible for legal aid will be supported by duty lawyers.
- Capping instructing solicitor fees in indictable crime trials to two half-days, with exceptions for some clients with complex needs.
- Stricter rules on funding criminal appeals, with no funding where the appeal does not have a reasonable prospect of changing a client's total sentence or non-parole period.
- Restricting funding in child protection matters to children and parents unless the Court determines that legal representation is essential and exceptional circumstances apply.
- Increasing the age at which children in child protection matters will generally be considered mature enough to be funded to instruct a lawyer from seven to 10 years.<sup>41</sup>

### *Changes introduced from 8 April include:*

- Family dispute resolution only provided to priority clients where there is a substantial issue in dispute. Priority clients include intellectually disability, cultural barriers, homelessness, Indigenous Australians<sup>42</sup>.
- Applicants for legal assistance who are found by the court within the last 12 months to have contravened court orders in the Federal Magistrates' Court, the Family Court and/or the Magistrates' Court without reasonable excuse not eligible for a grant of legal assistance.<sup>43</sup>
- Independent children's lawyers (solicitor advocates) to represent children in final hearings at the Family and Federal Magistrates' courts. Current practice of instructing barristers in these cases no longer allowed and instructing fees for independent children's lawyers in family law trials no longer available.<sup>44</sup>
- Family law parenting dispute duty lawyer service in the family law courts to target priority clients, introducing changes to who is assisted and the level of service provided:
  - Assistance no longer provided over multiple occasions to people who can afford their own lawyer.

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<sup>41</sup> <http://www.legalaid.vic.gov.au/about-us/news/increased-demand-forces-changes-to-legal-aid-eligibility-guidelines> accessed 1/5/13. For more detail of changes to guidelines see Appendix A.

<sup>42</sup> others as listed at <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-family-law-detailed-fact-sheet.doc> ; VLA Handbook for lawyers: 4 – Commonwealth family law and child support guidelines, Guideline 1.1

<sup>43</sup> More detailed information at <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-family-law-detailed-fact-sheet.doc> ; VLA Handbook for lawyers: applies to all guidelines except: Guideline 5 – independent representation of children ; Guideline 10 – special medical procedures involving children ; Guideline 12 – nullity of marriage; Guideline 16 – international child abduction matters.

<sup>44</sup> More detailed information at VLA Handbook for lawyers – Guideline 5.1; <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-icls-detailed-fact-sheet.doc> ;

- multiple duty lawyer services not provided to people eligible for a grant of legal assistance and have not sought one
- no assistance to people who have a lawyer to represent them in current proceedings .
- applicants, who are mostly women and children, continue to be represented by duty lawyers on all court dates.
- People seeking or responding to applications for personal safety intervention orders only receive representation in court by a duty lawyer or under a grant of legal assistance if they are children referred by the Children’s Court, people genuinely at risk of homelessness or applicants in matters involving 'obsessed stranger stalking'.<sup>45</sup>
- In adult summary crime matters, only people facing imprisonment eligible for a grant of legal assistance. Duty lawyers will still be available to those who are not eligible for legal assistance.<sup>46 47</sup>
- In youth crime, grants of legal assistance limited to:
  - people facing serious matters where a supervisory or detention order is likely
  - offenders who have a prospect of being diverted away from the criminal justice system.
  - Those who do not receive legal assistance still eligible to be represented by a VLA staff lawyer.<sup>48 49</sup>

## Cuts to internal and operational expenditure

Changes to eligibility criteria were not the only action taken by VLA to reduce its expenditure. It also flagged a range of measures to reduce expenditure on internal processes. Most dramatic was the announcement to close one of its regional offices by June 2013.

*“Victoria Legal Aid is facing record demand for its services without a commensurate increase in government funding. In addition to stricter eligibility guidelines announced late last year, VLA has made operational changes to ensure its financial sustainability. The decision to close the Preston office will contribute to savings without unduly compromising client services.”<sup>50</sup>*

The reasons given for this decision was the changed demographics of the area and loss of local court. It was acknowledged there are still pockets of disadvantage but these would be serviced in other ways. The details of this are yet to be provided.<sup>51</sup>

<sup>45</sup> More detailed information at VLA Handbook for lawyers: 6a – personal safety intervention order cases; <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-psio-detailed-fact-sheet.doc>;

<sup>46</sup> VLA Handbook for lawyers: 3- Criminal law guidelines, guideline 1.1, 1.2 & 7.1

<sup>47</sup> <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-summary-and-youth-crime-detailed-fact-sheet.doc>

<sup>48</sup> VLA Handbook for lawyers: 3- Criminal law guidelines, guideline 5.1

<sup>49</sup> <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-summary-and-youth-crime-detailed-fact-sheet.doc>

<sup>50</sup> Preston office closure Tuesday, 5 March 2013 <http://www.legalaid.vic.gov.au/about-us/news/preston-office-closure> accessed 2/5/13

<sup>51</sup> A consequence of this closure is also the likely end to La Trobe’s unique clinical legal education program focused on teaching of legal ethics based at this regional office. For more details on program see: Noone M.A & Dickson J. (2002) ‘Teaching towards a new professionalism: Challenging law students to become ethical lawyers’ 4 (2) *Legal Ethics* 127

Additionally, VLA claims to have already made cuts to capital and operating expenditure and is aiming to reduce staff by four per cent this financial year. There will be further savings made internally by consolidating office spaces, investing in cost-effective technology solutions and further cuts in corporate spending. There is no detail available on how this impacts on service delivery.

Specific changes include:

- making ATLAS (the online system for practitioners to lodge and track legal aid applications, extensions and invoices) compulsory for all legal practitioners by the end of March 2013
- introducing centralised digital dictation in the Melbourne office to improve work practices ahead of a state-wide rollout
- ceasing prison visiting services during the first half of 2013, replacing them with a dedicated Legal Help telephone service, except for cases that are being heard
- scaling back the Trial Counsel Development Program, including extending the time that the program takes to complete and redefining the criteria for completion.<sup>52</sup>

## Legal Aid Impact Statements needed

The impact of government policies on demand for legal aid is well recognised however governments are still reluctant to engage with the consequences of policy changes in justice sector. In 1990, the National Legal Aid Advisory Committee recommended that “all government policy proposals include consideration of the likely impact on the cost and need for legal aid programs”. At the time the Commonwealth government agreed to include the impact of legal services of any new policy proposal being considered by the Cabinet. It was also proposed that a legal aid impact statement protocol be adopted by the State and Territory governments at well.<sup>53</sup> The recent events in Victoria suggest that this never occurred or has been long forgotten.

As Warner notes a range of factors have impacted the services provided by Victoria legal aid system in the last decade:

*Resourcing early intervention, civil law and the CLC sector, a ten per cent compound growth in high cost child protection grants over the past five years, a near doubling of sexual assault matters that now proceed to a jury trial instead of being disposed of by way of a plea of guilty, the introduction of cautioning schemes, fines legislation, major appeals reform, an increase in trial length, family violence reforms, the rise of therapeutic jurisprudence and various other stimuli mean that what was offered five or ten years ago often bears little resemblance to what is offered today.*<sup>54</sup>

As listed by Warner, there are multiple government policies that have impacted on the demand for Victoria Legal Aid’s services. The following discussion looks at a few.

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<sup>53</sup> National Legal Aid Advisory Committee, *Legal Aid for the Australian Community* 1990 AGPS Canberra p 96

<sup>54</sup> Warner, B., *Review of the National Partnership Agreement – an opportunity to iron out the creases* Conference Paper, National Access to Justice and Pro Bono Conference March 2013 p 9

## Family Violence and Child Protection matters

As an example of the impact of government policy shifts, Warner highlights these increases in legal activity, a consequence of policies aimed at eliminating family violence and better protecting children:

- 45 per cent increase in substantiations of child abuse and neglect nationally since 1997-98
- 82 per cent increase in family violence incidents reported to Victoria Police between 1999-00 and 2009-10
- 341 per cent increase in the number of children identified as ‘affected family matters’ in court data relating to family violence matters between 1999-00 and 2009-10 in Victoria
- 89 per cent increase in the number of family violence intervention orders that have been finalised in the Victorian Magistrates’ Court over the last ten years.<sup>55</sup>

This has translated into increased demand for VLA of:

- 11.5 per cent increase in family law grants of aid last year in Victoria<sup>23</sup>
- 20 per cent increase in child protection substantiations
- 43.3 per cent increase in family violence related assaults.<sup>56</sup>

Both federal and state governments are concerned about level of family violence in the community and have implemented a range of new policies aimed at providing safety to women and children.<sup>57</sup> In 2008, the Australian Policing Strategy for Preventing and Reducing Family Violence was launched by police commissioners across Australia. The strategy aims to ensure that responses by Australasian jurisdictions are based on more consistent policies and practices; it outlines priorities for action to improve information and intelligence sharing between police, as well as between partner agencies.

Although there had been legislative reforms in late 1980s and 1990s that strengthened police powers to deal with domestic violence, it is only recently the trend towards pro-arrest policies has begun to influence operational policing in Australia. In general, Australian police agencies have adopted policies that promote arrest as the primary intervention where there is a belief on reasonable grounds that an offence has been committed.<sup>58</sup>

This increased focus on policing of family violence is replicated in Victoria. In August 2011 the then acting Chief Commissioner Ken Lay labeled domestic violence as an ‘insidious’ problem and said it would be a major focus for police over the next year. His comments were in response to statistics released that showed that even though total crime figures were down by 2.4%, crimes against the person (assault and rape committed by a relative of

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<sup>55</sup> Warner, B., *Review of the National Partnership Agreement – an opportunity to iron out the creases* Conference Paper, National Access to Justice and Pro Bono Conference March 2013 p10

<sup>56</sup> Warner, B., *Review of the National Partnership Agreement – an opportunity to iron out the creases* Conference Paper, National Access to Justice and Pro Bono Conference March 2013 p10

<sup>57</sup> For a detailed discussion see Mitchell L, *Domestic violence in Australia—an overview of the issues* Social Policy Section Parliamentary Library

[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/DVAustralia](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/DVAustralia) accessed 15/5/13

<sup>58</sup> Mitchell L, *Domestic violence in Australia—an overview of the issues* Social Policy Section Parliamentary Library p19

the victim) rose by 25% (2010/2011).<sup>59</sup> In February 2012, Victoria Police announced a doubling of existing family violence units over the next three years, an increase in the number of family-violence court liaison officers to help victims with police-initiated intervention order applications and expansion of civil advocacy unit which runs police intervention order applications at the Children's and Melbourne Magistrates Courts.<sup>60</sup>

### Criminal Matters

All state governments have an ongoing focus on the 'law and order' agenda which includes a focus on increasing the numbers of police and the severity of sentences. Across Australia, since 2001-03, expenditure on criminal justice has increased by 42% overall and by an average of 8% each year. Police services accounts for approximately 70% of total expenditure, corrective services 24% and criminal courts administration 6%.<sup>61</sup> In contrast in it was estimated that to restore per capita funding to Legal Aid Commissions to 1997 levels would require a \$43.2 million increase in the 2010-11 Commonwealth Budget.<sup>62</sup>

In Victoria, a conservative Coalition government came to power in November 2010. As part of its law and order agenda, it committed to adding an extra 1700 police officers to the force and 940 protective service officers (PSOs)<sup>63</sup> on train stations by November 2014.<sup>64</sup> This increase in police officers and the introduction of PSO's have been identified as two factors leading to an increase in demand for VLA services.

The 2011/2012 Victoria Police Crime Statistics showed a 10.3% increase in violent crime and 6.8% increase in crime overall. Assaults were up 41.3%, rapes by 39.6% and abduction and kidnapping by 31.8%. These figures were reported as reflecting the improved reporting of domestic violence and additional police resources dedicated to responding to complainants and investigating crime.<sup>65</sup>

The Victorian Acting Police Commissioner Lucinda Nolan noted in March 2013 an increase in the number of offenders proceeded against by police in Victoria over the last 3 years. This is compared to a 27% decrease in the rest of the country. She attributed this increase to more reporting of family violence. Detection of drug and public behavior offences are also factors relevant to the crime rise<sup>66</sup>.

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<sup>59</sup> The Age, 31 August 2011

<sup>60</sup> The Australian, 4 September 2012, Victoria Police Crime Statistics 2011/2012 pg 3 Herald Sun, 6 February 2012

<sup>61</sup> Australian Institute of Criminology, *Australian crime: Facts and figures 2011* Chapter 7

[http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/7\\_resources.html](http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/7_resources.html) accessed 13/5/2013.

<sup>62</sup> Law Council, Fact Sheet

[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=04D5725C-1E4F-17FA-D243-A98C4816477A&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=04D5725C-1E4F-17FA-D243-A98C4816477A&siteName=lca)

<sup>63</sup> Media release, 23 November 2012, Ted Baillieu *PSOs have the power to apprehend, detain, arrest and remove offenders or threatening individuals*

<sup>64</sup> Media Release, 24 August 2012, Peter Ryan MP, Minister for Police and Emergency Services stated by November 2014, allocation of a further 500 police (which totals the 1700 promised by the government) .

<sup>65</sup> Herald Sun, 1 March 2013

## Reaction to VLA crisis

In the last six months, the 'legal aid crisis' has been a regular feature in the media. VLA, the legal professional bodies (both solicitors and barristers), judges, Attorneys-General and community legal centres have all entered into the public arena about this issue. Apart from government, all other stakeholders agree that the underlying problem is a lack of adequate funding for legal aid. However there is no agreement on how the available funds should be spent and what should be the areas cut back.

## Government

Predictably, each government blames the other for lack of funding for legal aid. The State government supports the VLA guideline changes and keeps pointing out that Commonwealth funding has dropped. The State is providing \$400M over the next 4 years compared to \$236M from the Commonwealth. The State government says the Federal share of funding has dropped from 50 to 30% over last decade. The Commonwealth government has refused to increase funding (although small increase in recent budget).<sup>67</sup> They believe the State government should increase its funding to VLA as it is their policy changes that are responsible for the increase in demand of VLA services. For example - increase in police numbers, introduction of Protective service officers, minimum sentences for gross violence and proposed change to suspended sentences.<sup>68</sup>

## Legal Profession

*What I will say is this story represents a new low in the industrial campaign by some members of the legal profession in a bid to change our new guidelines on the funding of trials. What this is really about is lawyers who are concerned that they will miss out on access to the taxpayer dollar.....Last year we spent almost \$80 million through private lawyers representing legal aid clients. Not every trial requires two lawyers and we don't think every trial should automatically get two lawyers. We don't apologise for trying to make the lawyers more accountable for how they spend legal aid funds during trials.*<sup>69</sup>

The history of the legal profession's relationship with legal aid is a complex one.<sup>70</sup> Despite the legal professional bodies being key advocates and spokespeople for increased funding for legal aid, there is a latent tension about what the aims and objectives of legal aid should be.<sup>71</sup> In Victoria, since 1995, the private legal profession has had no formal part in the administration of Victoria Legal Aid.<sup>72</sup> However, they remain an integral aspect of the legal aid service provision model. They receive approximately 60 - 70% of legal aid funding in legal aid grants from legal aid commissions (through a judicare arrangement). Obviously any

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<sup>68</sup> *Legal aid: "State should pay for 1950s law and order policies"* The Age 19/4/13 (quoting Federal Attorney-General Mark Dreyfus).

<sup>69</sup> Bevan Warner All clients treated equally - Media Release Thursday, 28 February 2013

<http://www.legalaid.vic.gov.au/about-us/news/all-clients-treated-equally>

<sup>70</sup> Noone & Tomsen, *Lawyers in Conflict*- Australian Lawyers and Legal Aid (2006) Federation Press

<sup>71</sup> Noone & Tomsen, *Lawyers in Conflict* 2006 pp 158-166

<sup>72</sup> Giddings p 45p

changes to eligibility guidelines impact on their clients and often on their income. It should be noted that only a small proportion of lawyers rely on legal aid work – primarily those in criminal and family law areas.

The latest round of changes to VLA's eligibility guidelines has seen the latent conflict between the private profession and VLA revived. The Law Institute of Victoria (LIV), whilst calling for additional funding, has been heavily critical of VLA and the various guideline changes. At least since the announcement of the changes in September 2012, there has been a media battle going on between the 2 bodies. LIV has called for an independent review of VLA and questioned VLA's spending, in particular, funding a high profile criminal case (Mokbel), VLA staff pay agreement (11% increase over three years), VLA marketing department and increase in barrister fees. LIV has called for a representative spot on the VLA Board.

*"the private legal profession needs to be recognized by VLA as a partner, rather than as a 'cost centre' to be managed...I will be pursuing an entrenched VLA board position for the profession"* <sup>73</sup>

VLA responded with accusations that lawyers were only concerned with missing out on taxpayer dollars. It also claimed changes were intended to abolish abuse of legal aid funding. <sup>74</sup>

*"the profession's 'custom and practice' of automatically having two publicly funded lawyers for every trial had resulted in instances where law clerks and even law students had been paid with public money that had been intended for instructing solicitors.....We want legally aided clients to get quality representation.....that involves holding the assigned lawyer in the pre trial and trial preparation stage to a high standard of quality and holding the trial advocate ..to a high standard of advocacy".* <sup>75</sup>

Despite significant curtailment of services in family law area and summary crime, the change that has been most controversial is the restriction on funding instructing solicitor to 2.5 days of the trial. In particular, two criminal cases *R v Chaouk* and *MK v Victoria Legal Aid* have received a lot of judicial and media attention. <sup>76</sup> Both trials were stayed pending a request for additional legal representation. The two presiding judges were highly critical of the guideline change and did not believe that the trials would be fair to the defendants sighting *Dietrich v R* (1992) 177 CLR 292. Recently, the Supreme Court of Victoria, Court of Appeal

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<sup>73</sup> Tang, R., Legal Aid cuts put access to justice at risk, (2013) 87 (1/2) *Law Institute Journal* 4

<sup>74</sup> **Chris Merritt Funding stoush leads to duel by press release** *The Australian* March 01, 2013  
<http://www.theaustralian.com.au/business/legal-affairs/funding-stoush-leads-to-duel-by-press-release/story-e6frg97x-1226587938137>

<sup>75</sup> Merritt C,' VLA Dismisses funding row: students were being paid as 'instructing solicitors' *the Australian* 8 March 2013

<sup>76</sup> *R v Chaouk* [2013] VSC 48; *MK v Victoria Legal Aid* [2013] VSC 49 ; **Judge slams Legal Aid over "false economy"**

<http://www.abc.net.au/news/2013-02-26/judge-slams-legal-aid-over-22false-economy22/4540874>

**Vic Government backs Legal Aid over funding cuts**

<http://www.abc.net.au/news/2013-02-23/vic-government-supports-legal-aid-cuts/4535798>

ruled that Justice Lasry was correct to stay the trial (Chaouk)<sup>77</sup>. The extent of the controversy is illustrated by the number of Interveners in this application for leave to appeal: Attorney-General for the State of Victoria; The Victorian Equal Opportunity and Human Rights Commission; The Criminal Bar Association; the Law Institute of Victoria; and Victoria Legal Aid. The Office of Public Prosecution knew of 47 stay applications. Within days of the Court of Appeal decision, VLA retracted this particular guideline but in announcing this decision, the CEO, Bevan Warner, stated:

*The interim guideline provides a way of ensuring trials continue while we look more closely at how we will fund trials in the future,' he said. 'The reality is that the customary model in Victoria of an instructing solicitor available to attend court for every day of every trial is not considered necessary to ensure a fair trial in other Australian states and is not financially sustainable. 'It is also not the most equitable use of the legal aid fund when so much of our budget is directed towards jury trials at the expense of other vulnerable clients.'*<sup>78</sup>

## Judiciary

Judges from most of the courts (not the Supreme or High Courts) have made comment on the changes and the impact it will have on people and the courts.<sup>79</sup> As mentioned previously, Judge Lasry and Judge Forrest have been critical of the change to instructing solicitor guideline and responded by granting stays. In another criminal case, Judge King was highly critical and thought the changes were a public concern. The delays in criminal trials are costing the community money. She makes the point; a day wasted in the Supreme Court would pay for a trial lawyer for a month.<sup>80</sup> Comments from the Children's and Family Court have also been made.

## Conclusion

The recent VLA crisis highlights the challenge of decisions that involve weighing up factors affecting priority for services. The privileging of criminal law matters over family and civil law has ongoing impact on justice and social exclusion. The recent series of court cases also illustrates the difficulty confronting legal aid commissions who seek greater efficiencies in provision of legal representation whilst also aiming to improve quality of services. The task of reviewing the merits and efficiency of certain legal practices is warranted but this continues to cause significant tensions between legal aid commissions and the private legal profession.

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<sup>77</sup> R V Chaouk [2013] VSCA 99;

<sup>78</sup> Victoria Legal Aid *Victoria Legal Aid to introduce more flexibility for criminal trial funding Media Release* Tuesday, 7 May 2013 <http://www.legalaid.vic.gov.au/about-us/news/victoria-legal-aid-to-introduce-more-flexibility-for-criminal-trial-funding> accessed 9/5/13

<sup>79</sup> For example Chief Justice Hon Marilyn Warren, *Legal Aid Changes- Shifting the Burden* 4/12/2012 <http://www.supremecourt.vic.gov.au/home/library/speech+-+legal+aid+changes+-+shifting+the+burden> accessed 3/5/13

<sup>80</sup> 'Legal Aid a 'farce' *the Age* 2 March 2013

There is no likelihood of increased funding for Australian legal aid in the foreseeable future. As the state and federal budgets have recently indicated, the chronic underfunding of Australian legal aid system will continue.<sup>81</sup> The governing bodies of legal aid commissions including the board of VLA will continue to confront increasing demand with reducing resources. The recent LAW Survey confirms there are high levels of unmet legal need (particularly in civil law) experienced by the most disadvantaged. There are no easy solutions but if government continues to fund law and order initiatives without corresponding increases in legal aid funding then the crisis will escalate. The VLA board will have more hard decisions to make about who gets priority to legal aid services and what services are provided and funded.

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<sup>81</sup> Neal D., 'Continuing crisis in our legal aid' The Age 18 May 2013 <http://www.theage.com.au/comment/the-continuing-crisis-in-our-legal-aid-20130517-2js2m.html> accessed 19/5/13

## APPENDIX A

### Detail of changes to Victoria Legal Aid's eligibility guidelines and reasons for changes

#### Changes from 7 January 2013

##### *Family Law*

- Limiting funding of parents in family law matters to trial preparation, and providing representation at a trial only when the other party has a privately funded or pro bono lawyer.
  - The rationale for this change was that VLA is not funded to deal with the increase in family law court matters. Whilst recognising that not all matters are resolved through dispute resolution, VLA will continue to fund eligible parents to prepare for trial, which is a crucial step in ensuring that all vital matters are identified before going into court and can often result in resolution of matters before a final court hearing.<sup>82</sup>

##### *Civil Law*

- Lifting the threshold at which a grant of assistance may be made to help people with unpaid fines from fines exceeding \$1000 to \$5000. People facing total fines of less than \$5000 who would be otherwise eligible for legal aid will be supported by duty lawyers.
  - Reasons for increase - The \$1000 threshold has not increased since the guideline was first created in 2005, the real value of that amount and its conversion into equivalent penalty points has dropped and the infringement system has expanded<sup>83</sup>

##### *Child Protection*

- Restricting funding in child protection matters to children and parents unless the Court determines that legal representation is essential and exceptional circumstances apply.
  - Reasons: Funding for child protection services has not kept pace with demand and therefore funds are prioritised to assist parents and children. Also, a greater number of people involved in a case, prolongs the case.
- Increasing the age at which children in child protection matters will generally be considered mature enough to be funded to instruct a lawyer from seven to 10 years. This is in line with the recommendations of the recent Cummins Inquiry into the Protection of Vulnerable Children.<sup>84</sup>

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<sup>82</sup> Refer to 'Parenting Dispute Guideline Changes' for more detailed information.

<http://www.legalaid.vic.gov.au/information-for-lawyers/grants-guidelines/family-law-guideline-changes/parenting-dispute-guideline-changes>

VLA Handbook for lawyers - 4 – Commonwealth family law and child support guidelines, Guideline 17

<sup>83</sup> VLA Handbook for lawyers: 7- state civil law guidelines, guideline 1

<sup>84</sup> Increased demand forces changes to legal aid eligibility guidelines **Tuesday, 11 December 2012**

<http://www.legalaid.vic.gov.au/about-us/news/increased-demand-forces-changes-to-legal-aid-eligibility-guidelines>

- Reasons: in response to the recommendation in the Report of the *Protecting Victoria's Vulnerable Children Inquiry* (Cummins Inquiry) i.e. considered the age of 7 was too low a threshold.<sup>85</sup>

### **Criminal Law**

- Capping instructing solicitor fees in indictable crime trials to two half-days, with exceptions for some clients with complex needs.
  - Reasons: at trial stage, well prepared counsel has greatest impact on outcome and therefore prioritising resources to pre-trial preparation and early resolution in appropriate cases.
- Stricter rules on funding criminal appeals, with no funding where the appeal does not have a reasonable prospect of changing a client's total sentence or non-parole period.
  - Reasons: prioritising conviction and sentence appeals that would have a bearing on the overall period of imprisonment the client would be liable to serve. The change will bring the appeals guideline into line with recent amendments to the *Criminal Procedure Act 2009*, which enable the Court of Appeal to refuse leave to appeal where the appeal would have no impact on the total effective sentence.<sup>86</sup>

### **Changes from 8 April 2013**

#### **Family Law**

- family dispute resolution at RDM only provided to priority clients where there is a substantial issue in dispute. Priority clients include intellectually disability, cultural barriers, homelessness, Indigenous Australians<sup>87</sup>.
- applicants for legal assistance who are found by the court within the last 12 months to have contravened court orders in the Federal Magistrates' Court, the Family Court and/or the Magistrates' Court without reasonable excuse will not be eligible for a grant of legal assistance under this guideline or will have their grant removed.

Exceptions: This does not apply to Independent Children's Lawyers, special medical procedures involving children, annulments and international child abduction matters.<sup>88</sup>

#### **Independent Children's lawyers**

- Independent children's lawyers (ICLs) will represent children in final hearings at the Family and Federal Magistrates' courts. This is a change from the current practice of instructing barristers in these cases. For all grants of legal assistance that are put in place on or after 8 April, it is a condition of assistance that an independent children's lawyer act as a solicitor advocate at a family law trial unless one of the exceptions is met
- Instructing fees for independent children's lawyers in family law trials are no longer available. This includes matters that are listed for trial on or after 8 April 2013 where

<sup>85</sup> VLA Handbook for Lawyers : 6 – State Family Guidelines, Guideline 1

<sup>86</sup> VLA Handbook for lawyers: 3 – Criminal law guidelines, guideline 7.3, 7.4, 7.5, 7.6, 7.7

<sup>87</sup> others as listed at <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-family-law-detailed-fact-sheet.doc> ; VLA Handbook for lawyers: 4 – Commonwealth family law and child support guidelines, Guideline 1.1

<sup>88</sup> More detailed information at <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-family-law-detailed-fact-sheet.doc> ; VLA Handbook for lawyers: applies to all guidelines except: Guideline 5 – independent representation of children ; Guideline 10 – special medical procedures involving children ; Guideline 12 – nullity of marriage; Guideline 16 – international child abduction matters.

legal assistance was put in place before that date. Though, VLA may make a grant of assistance if a court orders separate representation and asks VLA to arrange an independent children's lawyer; and VLA decided it is reasonable in the circumstances.<sup>89</sup>

### **Parenting dispute duty lawyer service**

- Family law parenting dispute duty lawyer service in the family law courts will target priority clients, introducing changes to who is assisted and the level of service provided.
- Assistance will no longer be provided over multiple occasions to people who can afford their own lawyer.
- Will not provide multiple duty lawyer services to people who are eligible for a grant of legal assistance and have not sought one.
  - Reasons: encouraging people to apply for legal assistance frees up the duty lawyer to deal with urgent matters on any particular day, such as, seeking an airport watch list.
- People who have a lawyer to represent them in current proceedings will no longer receive assistance through our duty lawyer service.

### **Family Violence**

- applicants, who are mostly women and children, will continue to be represented by duty lawyers on all court dates. Respondents to these applications will face stricter guidelines after the first court date, and those ineligible for a grant of legal assistance will receive other forms of help and referral. They will not be represented in court at directions hearings.

### **Personal Safety Intervention Orders**

- people seeking or responding to applications for personal safety intervention orders will only receive representation in court by a duty lawyer or under a grant of legal assistance if they are children referred by the Children's Court, people genuinely at risk of homelessness or applicants in matters involving 'obsessed stranger stalking'.
  - Reasons: Large increases in PSIO and family violence intervention order matters have led to demand beyond VLA resources, which means priority to clients who need the most assistance.<sup>90</sup>

### **Criminal**

#### **Summary Crime**

- in adult summary crime matters, only people facing imprisonment will be eligible for a grant of legal assistance. Duty lawyers will still be available to those who are not eligible for legal assistance.<sup>91</sup>
  - Reasons: Finite Resources are targeted at those people facing imprisonment.<sup>92</sup>

<sup>89</sup> More detailed information at <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-icls-detailed-fact-sheet.doc>; VLA Handbook for lawyers – Guideline 5.1

<sup>90</sup> More detailed information at <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-psio-detailed-fact-sheet.doc>; VLA Handbook for lawyers: 6a – personal safety intervention order cases

<sup>91</sup> VLA Handbook for lawyers: 3- Criminal law guidelines, guideline 1.1, 1.2 & 7.1

<sup>92</sup> <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-summary-and-youth-crime-detailed-fact-sheet.doc>

## Youth Crime

- in youth crime, grants of legal assistance will be limited to:
  - people facing serious matters where a supervisory or detention order is likely
  - offenders who have a prospect of being diverted away from the criminal justice system.
    - Those who do not receive legal assistance will still be eligible to be represented by a VLA staff lawyer.<sup>93</sup>
- Reasons: Finite resources are targeted at the most vulnerable children and yet still ensure that all children are represented in court. Charges that result in a fine, good behaviour bond or a lesser penalty may be dealt with by a duty lawyer.<sup>94</sup>

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<sup>93</sup> VLA Handbook for lawyers: 3- Criminal law guidelines, guideline 5.1

<sup>94</sup> <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-summary-and-youth-crime-detailed-fact-sheet.doc>