

## WHAT IS THE COST OF NOT FUNDING LEGAL ASSISTANCE?

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### I INTRODUCTION

Legal assistance is a core component of justice systems and essential in maintaining the rule of law. Its primary purpose is to provide access to justice for people in contact with justice related systems. It ensures that people have access to legal assistance regardless of their ability to pay for private lawyers.<sup>2</sup>

In Australia, legal assistance is jointly funded by federal, state and territory governments. The legal assistance sector is comprised of legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander legal services, and private practitioners and barristers undertaking legal aid work. A small portion of legal assistance is provided on a pro-bono basis by the private profession.

Legal problems are widespread and there is undoubtedly unmet legal need. Socioeconomic factors, demographic and systemic issues contribute to the level of unmet legal need and the manner in which legal problems present for individuals.<sup>3</sup> Individual legal issues often come from social contexts such as housing, health, education or employment security.

A recent report commissioned by Australia's National Legal Aid on the value of providing access to justice showed that for every dollar spent by the federal Australian government on legal assistance, Legal Aid Commissions deliver \$2.25 in quantitative benefits. The report found these benefits relate to avoided costs to the justice and other systems, to individuals, and to wider government and societal outcomes that may arise, for example, from early intervention.<sup>4</sup>

To ensure that the justice and related systems operate effectively, policy makers should consider them holistically. When one part of the system is funded, any consequential or pipeline costs associated with this investment must also be available. A demand-based funding model, based on evidence of legal need, is also key to the health of any system.

### II LEGAL ASSISTANCE

The legal assistance sector is made up of legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander legal services, private practitioners and the private Bar. This is commonly known as the 'mixed model' of service delivery.<sup>5</sup> In order to effectively deliver services to people in the community, the sector aims to work cooperatively.

In particular, legal aid commissions are a key part of the legal assistance sector and deliver the largest number of services to vulnerable people in the community.<sup>6</sup> With their practice partners, they are fundamental to the health of the justice system and other systems they work within, such as child protection, health, housing, education, and disability.

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<sup>2</sup> PricewaterhouseCoopers (PwC) Australia, *The Benefits of Providing Access to Justice* (Final Report, January 2023) 1 <<https://www.nationallegalaid.org/resources/benefits-providing-access-justice/>>.

<sup>3</sup> Council of Attorneys-General, *National Strategic Framework for Legal Assistance* (Report, 2019) 2

<<https://www.ag.gov.au/system/files/2020-06/National-Strategic-Framework-for-Legal-Assistance.pdf>>.

<sup>4</sup> PwC (n 2) 7.

<sup>5</sup> Victoria Legal Aid, *Mixed Model Position Statement* (Statement, January 2022) <<https://www.legalaid.vic.gov.au/mixed-model-service-delivery>>.

<sup>6</sup> Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, December 2014) vol 2, 667.

Individuals accessing legal assistance are mostly vulnerable members of the community, with limited financial resources, and need to meet strict criteria to qualify. Generally, legal issues are prevalent amongst groups in society that experience economic, social and other forms of disadvantage.<sup>7</sup>

### A National Legal Aid

National Legal Aid (NLA) brings together the eight state and territory Legal Aid Commissions (LACs) across Australia. LACs are independent statutory authorities funded by the Australian government and their respective State or Territory governments. NLA plays a vital role in promoting the work of LACs and the importance of legal assistance for marginalised people. It acts as a national voice on legislative and policy issues and aims to provide a forum for collaboration at a national level between government, stakeholders, community and legal assistance providers. LACs are the main legal assistance service providers in Australia, and in 2021-22 LACs collectively delivered over 1.5 million services from their 78 offices across the country.<sup>8</sup> These services include representation, dispute resolution, legal advice, duty lawyer services, legal information and referrals, community legal education resources and presentations.<sup>9</sup>

### B Victoria Legal Aid

Victoria Legal Aid (VLA) is the second largest legal aid commission in the country. It provides statewide assistance to people every day in courts and tribunals across both federal and state jurisdictions. VLA provides legal and non-legal advocacy services<sup>10</sup> and coordinates the provision of legal information to improve access to justice, support people to develop stronger legal capability, and to have a voice in the legal problems they face. VLA uses its practice and evidence base to address systemic injustices and inequality for clients and communities through strategic litigation and advocacy, such as the Federal Court challenge to the national ‘robodebt’ scheme<sup>11</sup>, as well as policy and law reform. The organisational values of VLA are fairness, care, courage, and inclusion.

## III LEGAL NEED

In Australia, 13 per cent of the Australian population live below the poverty line and only eight per cent would qualify for a grant of legal assistance.<sup>12</sup> Legal problems are widespread and there is significant and unmet legal need.<sup>13</sup> Civil legal issues related to a person’s housing, fines, discrimination, education, mental health and access to social security can have an impact on a person’s social and economic participation and in some circumstances, escalate into contact with the criminal justice system.<sup>14</sup>

The Victoria Law Foundation (VLF) has undertaken a public understanding of law and legal need survey for the state. The purpose of the survey is to better understand legal capability and need, as well as attitudes and experiences of the law in the Victorian community.<sup>15</sup> This survey will highlight the demographic of people experiencing legal issues, prevalence of legal need in the community and legal capability to respond to these

<sup>7</sup> Council of Attorneys-General (n 3) 2.

<sup>8</sup> National Legal Aid, *NLA Booklet of Information* (Report, September 2022) 3 <[https://www.nationallegalaid.org/resources/strategic-plan-and-policies/#gdocs\\_preview\\_standalone](https://www.nationallegalaid.org/resources/strategic-plan-and-policies/#gdocs_preview_standalone)>.

<sup>9</sup> Ibid.

<sup>10</sup> In Victoria, non-legal advocacy services include the Independent Mental Health Advocacy (IMHA) and Independent Family Advocacy and Support (IFAS) service. IMHA provides non-legal advocacy and supports people who are receiving, or at risk of receiving, compulsory mental health treatment to make decisions and have as much say as possible about their assessment, treatment and recovery. IFAS provides non-legal advocacy and support to parents and primary carers who are involved in the child protection system at the early stages.

<sup>11</sup> In 2016, Australia’s social welfare system, Centrelink, introduced a new process which allowed the welfare system to automatically calculate debts through an averaging system, with little publicity or consultation. This was colloquially known as ‘robodebt’. The legal challenge and outcome are discussed later in this paper.

<sup>12</sup> Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, December 2014) vol 1, 20.

<sup>13</sup> Council of Attorneys-General (n 3) 2.

<sup>14</sup> Ibid.

<sup>15</sup> Victoria Law Foundation, *The Public Understanding of Law Survey* (Web Page, 2022) <<https://victorialawfoundation.org.au/research/puls>>.

challenges. This is the first survey of its kind in Australia in 11 years. At the time of writing, the VLF has completed all 6000 face to face interviews across the state and the analysis of the data has commenced. The results will be launched in the second half of 2023.

Early access to legal assistance with civil issues, together with social supports, plays a crucial role in preventing escalation of more complex problems for the community. This assistance also helps address factors that can contribute to a person's interaction with the criminal justice system.<sup>16</sup>

In recent years, some governments have primarily focused on the criminal justice system. The Victorian Government's Access to Justice Review reported that "civil justice is treated as 'the poor cousin' in the legal assistance family".<sup>17</sup> The Review found that unresolved civil legal problems were recognised as having far reaching consequences for both the individuals involved and the state.<sup>18</sup>

In constrained fiscal environments, it is even more important for governments to consider the costs and benefits of services and initiatives.

#### **IV COST-BENEFIT ANALYSIS**

In 2022, NLA commissioned a report from Price Waterhouse Coopers (PwC) which examined the economic benefit delivered by legal aid services funded by the Australian Government and related to Commonwealth law, and excluding services related to State and Territory laws and funding. The final report produced in early 2023 demonstrated that the provision of legal aid delivers more than \$600 million in savings to the community, government, and the justice system every year.<sup>19</sup> Every dollar spent delivers \$2.25 in quantitative benefits. The report also highlights the non-quantifiable benefits of investing in legal assistance.<sup>20</sup>

##### *A Benefits for the justice system*

LACs provide efficiencies to the justice system through the provision of legal representation, mediation, duty lawyer and early intervention services.<sup>21</sup>

In the absence of legal assistance, approximately 30 per cent of individuals represent themselves. This places an additional burden on the system as litigants need assistance in understanding court rules, procedures and legal issues. There is evidence to suggest that where a matter has at least one self-represented party, the matter takes at least 20 per cent longer to resolve.<sup>22</sup>

The benefits of mediation and early intervention services are well known –it allows parties to resolve their dispute without going through the court process, reduces demand on court services and provides a less adversarial approach to dealing with a dispute. This method is particular helpful in family law proceedings where often parties need to continue to co-parent their children and maintain a relationship after separation.

Duty lawyers assist individuals at court on a one-off basis by providing advice about legal matters, explaining court processes, negotiating, and appearing on the person's behalf as needed. Duty lawyers assist with on-the-day

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<sup>16</sup> Victorian Government, *Access to Justice Review* (Summary Report, August 2016) 4  
<<https://vgls.sdp.sirsidynix.net.au/client/search/asset/1293721>>.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> PwC (n 2) i.

<sup>20</sup> This report builds on earlier reports that explore the benefits of funding access to justice. See for example, PwC Australia; *Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters With A Focus on Family Law* (Report, 2009); Productivity Commission, (n 13); KPMG, *Economic Cost Benefit Analysis of Community Legal Centres* (Report, 2012); World Bank Group, *A Tool For Justice: The Cost Benefit Analysis of Legal Aid* (Report, September 2019).

<sup>21</sup> PwC (n 2) 8.

<sup>22</sup> Ibid.

resolution, and an evaluation of the service found that 12 per cent of matters were finalised by a court one day after receiving the assistance of a duty lawyer.<sup>23</sup>

### B *Benefits to individuals*

Legal assistance offers improved outcomes for individuals. The PwC report highlights that legal assistance improves livelihood and wellbeing for people by reducing domestic and family violence, as well as anxiety and stress from legal proceedings. Further benefits for individuals include avoided costs from early intervention and prevention, and by engaging with non-legal supports which can improve quality of life.

In Australia, legal aid commissions provide a specialist family advocacy and support service (FASS) which integrate legal and social work services to address the impact of family violence in a more holistic way.<sup>24</sup> This service connects participants with services they may need such as accommodation, financial counselling, drug and alcohol support, and mental health support.

### C *Benefits to government and wider society*

Legal assistance offers more than just benefits to the justice system and the individual. It has broader benefits for society and governments. These include improved outcomes for families, reduced need for out of home care, and improved mental health outcomes. Other societal benefits include support that is provided to victims of elder abuse and natural disasters, migrants and refugees, as well as people at risk of experiencing homelessness. This not only affects the individual involved, but also affects their family and carers. For example, legal assistance can assist in resolving disputes related to access to the National Disability Insurance Scheme for people who have significant disability. In the NDIS, if people with disability are 'included' and living 'ordinary lives', then people with disability and those who support them may often return to the workforce, in turn paying taxation.<sup>25</sup>

Lastly, there are non-quantifiable benefits to investing in legal assistance for the community. Unresolved legal issues can have long-term impacts on individuals and their families. It can expose people to violence, homelessness and reduce capacity to meaningfully contribute to society. There is a correlation between improved access to justice and reduced risk of conflict and violence.<sup>26</sup>

## V EFFICIENT AND EFFECTIVE LEGAL ASSISTANCE SECTOR: RISKS AND OPPORTUNITIES

### A *Essential advocacy*

There is a human cost to not funding legal assistance. A prime example is the impact that Centrelink's social security 'robodebt' scheme has had on some of the most marginalised people in our community.

In 2016, Australia's social welfare system, Centrelink, introduced a new process which allowed the welfare system to automatically calculate debts through an averaging system, with little publicity or consultation. The new system increased the number of debts from around 20,000 per year to 20,000 per week.<sup>27</sup> During this time, Victoria Legal Aid saw a 300 per cent increase in the number of calls to its help line service related to letters received claiming that they owed a debt.<sup>28</sup> It was not until November 2019 that a test case run by VLA in the Federal Court of Australia saw the Australian Government concede that the averaging method used in the scheme

<sup>23</sup> Ibid 9; Law and Justice Foundation of New South Wales, *An Evaluation of Legal Aid New South Wales Family Law Early Intervention Unit Duty Lawyer Service* (Report, November 2012) 26.

<sup>24</sup> PwC (n 2) 11.

<sup>25</sup> Ibid 38.

<sup>26</sup> World Bank Group, *A Tool For Justice: The Cost Benefit Analysis of Legal Aid* (Report, September 2019) 9, PwC (n 2) 16.

<sup>27</sup> Victoria Legal Aid, *An In-Depth Look At Our Robodebt Test Case* (Web Page, 14 April 2020) <<https://www.legalaid.vic.gov.au/depth-look-our-robo-debt-test-case>>; A Current Affair, 'Government pin hopes on automated welfare debt recovery system to claw back \$4 billion', 9 News (online, 5 December 2016) <<https://www.9news.com.au/national/government-pin-hopes-on-automated-welfare-debt-recovery-system-to-claw-back-4-billion/52230f5f-bfaa-4157-905a-973849d55c4f>>

<sup>28</sup> Victoria Legal Aid, *An In-Depth Look At Our Robodebt Test Case* (Web Page, 14 April 2020) <<https://www.legalaid.vic.gov.au/depth-look-our-robo-debt-test-case>>.

was unlawful. To date, over \$750 million has been repaid to individuals who were affected by the ‘robodebt’ scheme.<sup>29</sup>

LACs across the country did not receive any extra funding during this time to deal with the increase in people seeking assistance, and VLA’s test case was similarly unfunded. The cost of this scheme had very real impacts on clients’ mental and physical health and wellbeing, and eroded their trust in the integrity of the social security system. One client was diagnosed with post-traumatic stress disorder from the experience and felt like she was being treated as a criminal during a challenging time where she needed support.<sup>30</sup> In extreme cases, some individuals died by suicide.<sup>31</sup>

The cost of this scheme had a very real and devastating impact on lives and funding for legal assistance was not forthcoming. The legal assistance sector was not resourced to deal with the significant impacts that this scheme had on marginalised members of our community.

In August 2022, a Royal Commission was established by the federal government, led by Commissioner Ms Catherine Holmes AC SC, to enquire into the establishment, design and implementation of the ‘robodebt’ scheme as well as the concerns and outcomes arising from its implementation.<sup>32</sup> VLA gave evidence to this Royal Commission, as did several of VLA’s clients. The evidence highlighted stories of clients impacted by the scheme, and submissions on key areas of reform highlighted the need to avoid it occurring again in the future. The recommendations were informed by VLA’s practice, client experience and test case litigation, as well as its work with advocates and sector partners.<sup>33</sup> The Royal Commission’s final report is expected to be delivered on 30 June 2023.

### B COVID-19 innovations

The COVID-19 pandemic meant that court hearings were predominantly held online, and the usual way that legal assistance was delivered needed to adapt. For some time, there was thought given to reforming the Victorian ‘at court’ duty lawyer model. The ‘at court’ system can be an inefficient model as it means the client and duty lawyer meet for the first time at court with no prior contact or discussion about the legal matter.

‘Help Before Court’ was considered an innovative and cost-effective way to provide legal assistance and reduce pressures on the system. The online intake tool was implemented as part of COVID-19 justice system innovations and designed with client input.<sup>34</sup> The tool is limited to summary crime matters in the Magistrates’ Court of Victoria and is accessible on both the VLA and Court websites. It requires the court user to provide detail about their matter online, and allows a lawyer to review the material and contact the client in advance of their hearing. This service is limited to court users who fit eligibility criteria, including income.<sup>35</sup> There is a similar pre-court

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<sup>29</sup> Luke Henriques-Gomes, ‘Robodebt: Court Approves \$1.8bn Settlement For Victims Of Government’s ‘Shameful’ Failure’, *The Guardian* (online, 11 June 2021) <<https://www.theguardian.com/australia-news/2021/jun/11/robodebt-court-approves-18bn-settlement-for-victims-of-governments-shameful-failure>>.

<sup>30</sup> Victoria Legal Aid, Submission ANON-24KG-9BR4-S to Royal Commission into the Robodebt Scheme, *Royal Commission into the Robodebt Scheme* (2 February 2023) 23-24.

<sup>31</sup> Luke Henriques-Gomes, ‘‘Platitudes and False Words’’: Mother of Robodebt Victim Who Took Own Life Tells Inquiry of Government Stonewalling’, *The Guardian* (online, 20 February 2023) <<https://www.theguardian.com/australia-news/2023/feb/20/platitudes-and-false-words-mother-of-robodebt-victim-who-took-own-life-tells-inquiry-of-government-stonewalling>>.

<sup>32</sup> Royal Commission into the Robodebt Scheme, *About the Royal Commission* (Web Page, 2022) <<https://robodebt.royalcommission.gov.au/about>>.

<sup>33</sup> Victoria Legal Aid (n 28).

<sup>34</sup> The Incus Group, *Evaluation of Help Before Court (HB4C) Victoria Legal Aid* (Final Report, April 2022) 3-4 <<https://www.legalaid.vic.gov.au/sites/default/files/2022-06/vla-help-before-court-final-evaluation2022.pdf>>.

<sup>35</sup> Victoria Legal Aid, *Help Before Court – For Criminal Charges* (Web Page, updated 10 February 2023) <<https://www.legalaid.vic.gov.au/help-before-court-criminal-charges>>.

engagement service for family violence intervention order matters. The ‘Early Resolution Service’ links both respondents and applicants of family violence matters with a lawyer prior to their hearing date.<sup>36</sup>

An independent evaluation of the ‘Help Before Court’ pre-court service has found that it reduced the number of adjournments sought and thereby increased the efficiency of the Court. It found that clients with complex matters or those requiring extra support at Court, such as the need for an interpreter, benefited most from this service.<sup>37</sup>

### *C Disaster legal help and its role in early intervention and prevention*

Across the country, recent years have seen devastating bushfires, floods and cyclone conditions.<sup>38</sup> It is clear that climate change is affecting extreme weather events in Australia.<sup>39</sup> These events have displaced individuals and communities, leaving some homeless, in debt, and without any assistance. It is costly to cover the insurance premiums associated with natural disasters, and this gap is particularly felt in poorer communities.

The Royal Commission into National Natural Disaster Arrangements observed that it is critical to increase the capacity of communities to prepare for and recover from the impacts of these disasters.<sup>40</sup> The Royal Commission noted the government’s role in engaging with, and educating, communities about their role in managing the consequences of natural disasters.<sup>41</sup>

In Australia, disaster legal assistance models differ from state to state. In Victoria, Disaster Legal Help has been established as a partnership that brings together the local and broader expertise of the Victorian legal assistance sector to assist people with their legal issues after a disaster.<sup>42</sup> It not only focuses on recovery after disasters occur, but also on community preparedness and education. This targeted and proactive approach is key to early intervention and prevention of escalated legal issues in the aftermath of a disaster.

### *D Investment for improvement*

Recently, the Victorian public sector changed its approach to be client centred and focus on outcomes, impact and evidence, rather than looking only at outputs.<sup>43</sup> By continuing with the status quo, the focus remains on delivering the same services in the same manner. In the public service, there must be continual improvement.

An outcome focus provides a way to measure government activities, efficiencies and the impact that the service provides.<sup>44</sup> VLA’s outcomes framework aims to increase access to justice, improve legal understanding in the community, support partners in the legal assistance sector and influence justice and other services to make laws and systems fairer for people.<sup>45</sup> VLA also prioritises lived experience expertise in its work, particularly in the design of new services either through consultation or co-design. This provides critical opportunities to improve services based on user experience and expertise.<sup>46</sup> When people’s needs and experiences are understood, systems that address these needs can be designed and improved.

In this regard, it is crucial that resources are allocated to reviewing and improving services. For example, several years ago the former federal government funded the Federal Circuit and Family Court of Australia to improve its

<sup>36</sup> Victoria Legal Aid, *Early Resolution For Family Violence Matters* (Web Page, updated 14 September 2022) <<https://www.legalaid.vic.gov.au/early-resolution-service-family-violence-matters#what-is-early-resolution-service>>.

<sup>37</sup> The Incus Group (n 32) 54.

<sup>38</sup> National Emergency Management Agency, *Natural Hazards And Climate Change* (Web Page, 2023) <<https://knowledge.aidr.org.au/resources/natural-hazards-and-climate-change/>>.

<sup>39</sup> *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 55.

<sup>40</sup> *Ibid* 20.

<sup>41</sup> *Ibid* 247.

<sup>42</sup> Disaster Legal Help Victoria, *About Us* (Web Page, Updated 21 February 2023) <<https://www.disasterlegalhelp.org.au/about-us>>.

<sup>43</sup> Victorian Government, *Outcomes Reform in Victoria* (2019) 3 <<https://www.vic.gov.au/sites/default/files/2019-02/Outcomes-reform-statement.PDF>>.

<sup>44</sup> *Ibid* 4.

<sup>45</sup> Victoria Legal Aid, *Outcomes Framework 2022-26* (2022) 3 <<https://www.legalaid.vic.gov.au/outcomes-framework>>.

<sup>46</sup> Victoria Legal Aid, *Client First Strategy 2020-23* (2020) <<https://www.legalaid.vic.gov.au/client-first-strategy>>.

case management systems. The fact that LACs would be required to appropriately engage with, and respond to, the impact of enhanced case management arrangements for family law proceedings had not been considered as part of the reform agenda. NLA successfully advocated to government to fund the consequential costs associated with this reform. This was essential recognition that, in order for reforms to be effective and operate as intended, investment into the whole system needs to occur. Another relevant example is when governments invest in community safety by recruiting and expanding law enforcement. The rest of the justice system needs to be considered to derive the outcome and impact the government is seeking. This includes investing in pipeline costs associated with legal assistance, court services, prosecution and other holistic and non-legal supports.

## **VI CONCLUSION**

Over the years, many reports that go to the heart of the benefits of addressing legal problems early and their quantitative benefits for the community have been produced. Most recently, NLAs contribution in its 2023 PwC cost-benefit report further contributes to and builds this body of evidence.

When implementing reform, a ‘systems’ approach is required to improve the justice system for those who use it. It is clear that the system needs to be client-focused and client-centred. Only when the user is genuinely put at the centre of the work can effective and fit-for-purpose systems and services be created to meaningfully change people’s lives. Ultimately, it is incumbent on governments to see the value of investing in supports and services focusing on early intervention and prevention that can assist in how people deal with their legal and non-legal issues. The evidence is clear that addressing civil legal issues can reduce the escalation of legal problems and contribute to better outcomes for society as a whole.

In summary, legal assistance services and legal aid are core to a systemic approach. Neglecting to allocate appropriate resources means that ‘the whole’ cannot function as intended.

The cost of not funding legal assistance is a cost for us all.

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