

Fair and equitable access to legal aid

**VCOSS submission to the Victoria Legal
Aid means test review**

September 2016



About VCOSS

The Victorian Council of Social Service (VCOSS) is the peak body of the social and community sector in Victoria. VCOSS members reflect the diversity of the sector and include large charities, peak organisations, small community services, advocacy groups, and individuals interested in social policy. In addition to supporting the sector, VCOSS represents the interests of vulnerable and disadvantaged Victorians in policy debates and advocates for the development of a sustainable, fair and equitable society.

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VCOSS acknowledges the traditional owners of country and pays its respects to Elders past and present.

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Recommendations

Develop a flexible and fair income test

- Consider greater flexibility to examine complicated financial circumstances
- Review allowable cost of living deductions, including for medical expenses, debt repayments, out-of-pocket school costs and essential services

Allow modest and reasonable savings without penalty

- Modify the assets test so people with modest savings remain eligible, especially renters
- Include disability aids and other assets directly supporting health and wellbeing as allowable assets.

Limit the definition of 'financially associated persons'

- Only include a person's spouse or partner, or a family member specifically identified by the person themselves, in the definition of 'financially associated person'
- Consider the nature of the applicant's family relationship to protect the applicant from potential abuse or harm
- Consider the potential for financial hardship and harm to the applicant's family

Provide people with choice in contributions

- Amend the contributions policy to prevent sales of assets important to someone's health and wellbeing
- Review the method of calculating contributions based on income to address inconsistencies
- Review the evaluations in other states, to determine if compulsory contributions impede access to justice

Clarify guidelines about special consideration and discretion

- Develop simple special consideration guidelines
- Automatically trigger a special circumstances review when the person is a victim of family violence or a young person leaving the out-of-home care system
- Work with private practitioners and community lawyers to make sure the application process does not deter lawyers providing assistance

Reduce access barriers

- Work with the community sector to identify areas where the guidelines for types of legal issues covered can be reviewed
- Investigate options for more integrated legal and social services, and the provision of more holistic support

Introduction

VCOSS welcomes the opportunity to participate in Victoria Legal Aid's (VLA) means test. Legal assistance, delivered at the right time and the earliest possible opportunity can help prevent problems escalating, leading to more problems, greater disadvantage and higher costs.

VLA uses a means test to try and make sure people who need legal help do not miss out. The legal need burden falls particularly heavily on disadvantaged people and communities. People facing disadvantage are more likely to experience legal problems and often experience multiple legal problems at the same time.¹

People with disability, Aboriginal and Torres Strait Islander people, people experiencing homelessness and single parents experience legal problems at higher rates than the general community.²

In this submission VCOSS will advocate for a fair and flexible means test, recognising the complex financial circumstances people living in poverty may experience. The means test must reflect living costs in Victoria today and the financial risks experienced by low-income people.

The current means test thresholds are low, especially for the assets test. This means some people living on low-incomes miss out on legal aid grants, or must make a significant contribution to legal costs. A tight means test contributes to the growing justice gap between people who can identify and enforce their legal rights, and those who cannot. For example, about eight per cent of people are eligible for legal aid, without having to make a contribution to costs; significantly less than the 14 per cent of Victorians living in poverty.³

Similarly, many people living in financial stress (unable to raise \$2,000 within a week for something important⁴), will be ineligible for a aid grant or must contribute significant costs, as the assets test does not allow even a modest savings amount before requiring a contribution. People living in single parent families with children and younger people living alone are at particular risk of financial stress.

...restrictions on legal aid are now so severe that, in many jurisdictions, a substantial proportion of those living below the Henderson poverty line ... will not satisfy the means test for legal aid eligibility.⁵

¹ C Coumarelos et al. *Legal Australia Wide Survey; legal need in Australia*, Law and Justice Foundation of NSW, 2012, p. xxiii

¹ The Australia Institute, *Justice for All*, March 2012.

² C Coumarelos et al. *Legal Australia Wide Survey; legal need in Australia*, Law and Justice Foundation of NSW, 2012, p. xxiii

² The Australia Institute, *Justice for All*, March 2012.

³ Australian Council of Social Service, *Poverty in Australia 2014*, 2014, p. 29.

⁴ ABS, General Social Survey 2014 Cat No 4159, June 2015, Table 16.3.

⁵ Law Council of Australia, *Submission to Productivity Commission Inquiry: Access to justice arrangements*, 2013, p. 38.

Changes to the means test can put pressure on other parts of the legal assistance and community sector, including community legal centers, Aboriginal legal services, dispute resolution and family support services. It is important these services are informed and engaged in the review process.

VCOSS recognises VLA and the legal assistance sector are underfunded, relative to community need. Without significant additional funding, VLA, community legal centres and Aboriginal legal services cannot help everyone needing assistance. While funding levels are not in this review's scope, we await the Department of Justice and Regulation's Access to Justice Review, to which VCOSS made strong recommendations about the need for greater government legal assistance investment.⁶

⁶ Victorian Council of Social Service, *Narrowing the justice gap: VCOSS submission to the Access to Justice Review*, February 2016

Improve the means test

To be eligible for a legal aid grant, a person must satisfy the income test and the assets test. In some circumstances, family members who are considered ‘financially associated persons’ may also have to satisfy the income and assets test. These tests aim to help VLA understand a person’s financial circumstances, and assess whether they are able to afford a lawyer.

Develop a flexible and fair income test

Recommendations

- Consider greater flexibility to examine complicated financial circumstances
- Review allowable cost of living deductions, including for medical expenses, debt repayments, out-of-pocket school costs and essential services

Under the current income test, a person will be eligible for legal aid if their ‘net disposable income’ is under \$360 per week, after living cost allowances are deducted. Allowances include child care costs, housing (up to a \$400 maximum per week), and standard deductions for children and dependents. Some people with incomes above \$360 per week may be eligible for legal assistance if they make a financial contribution.

Poverty in Victoria is complex. People can move in and out of periods of poverty. They may face a relationship breakdown, unexpected unemployment or health crisis, tipping them into poverty. A strict income test is a particularly blunt and inflexible legal aid rationing method. Assessment based on income alone can exclude people with unusual, complicated or unexpected financial situations.

Not all Victorians living in poverty necessarily qualify for legal aid. While a person receiving the Newstart allowance maximum fortnightly rate meets the income test, wages are the main income for nearly one third of people living in poverty.⁷ This includes many single parent families, underemployed people, and people working part time for low wages.

VCOSS members, like Anglicare Victoria, report groups previously not usually seen by welfare agencies, such as low wage workers, are now seeking help from emergency relief and other services, as they experience financial insecurity and stress.⁸ The means test should be flexible enough to consider the circumstances of people experiencing financial insecurity and stress.

VCOSS is particularly concerned about the income test’s application to people with insecure or casual employment. Insecure work is characterised by:

⁷ Australian Council of Social Service, *Poverty in Australia 2014*, 2014, p. 32.

⁸ Anglicare Victoria, *Australia’s Rich and Poor Continuing to Move Apart*, 17 February 2016, <https://www.anglicarevic.org.au/australians-rich-and-poor-continuing-to-move-apart/> accessed 9 September 2016.

‘unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation.’⁹

People in insecure work may move between short-term employment and income support, or supplement their part-time or casual work with income support resulting in variable income from week to week. People in insecure work may also be at particular risk of legal problems relating to employment matters, discrimination and debt. The income test must accommodate fluctuating income, and not penalise people engaging in short-term work. VLA may need to exercise greater discretion in assessing the circumstances of people with irregular incomes.

VCOSS members strongly support the income test allowing more deductions. Examples of deductions for consideration include medication and pharmacotherapy costs, servicing debts, essential service costs such as electricity and out-of-pocket school costs. Having insufficient money to pay these costs can result in children being disadvantaged, or lead to illness and poor health.

Despite the difficulties in assessment and predictability, VLA can consider a more discretionary system by looking at whether applicants can meet their basic needs with the income they have. This would allow analysis of a person’s housing, education, health, family and debt related expenses.

Allow modest and reasonable savings without penalty

Recommendations

- Modify the assets test so people with modest savings remain eligible, especially renters
- Include disability aids and other assets directly supporting health and wellbeing as allowable assets

A person is ineligible for a legal assistance grant if they own assets exceeding the allowable limits. The allowable limits include assets (including bank savings) up to the value of \$1095. A person can also have up to \$500,000 equity in the family home and \$20,000 equity in a car without exceeding the allowable limits.

The assets test is particularly harsh for tenants. More Victorians are living in private rental housing for longer. Private rental is no longer a transitional housing option for many people, and the social housing shortage means many more low-income and vulnerable people live in private rental housing.

⁹ Lives on Hold, *Unlocking the potential of Australia’s workforce: Independent inquiry into Insecure work*, commissioned by the Australian Council of Trade Unions, 2012, p.14

There are now more than half a million rental households, 35 per cent more than in 1996.¹⁰ Of these, more than 275,000 are low-income Victorian households.

The means test must be fair for the large and growing percentage of applicants who rent. However, the means test allows substantial equity in the family home, but very limited 'allowable' savings for people who do not own a home. A person may be ineligible for a contribution-free legal assistance grant because they have modest savings, for a tenancy bond, medical expenses or a child's school costs. A person with a similar, or much higher, amount of equity in their home would be eligible without making a contribution.

VCOSS members recognise homeowners with no cash should neither be forced to sell their property, nor allow their equity to be reduced too far. However, options like property caveats or reverse mortgages mean they are likely to be in a less disadvantaged position than a person with a small amount of savings, living in rental accommodation.

The assets test does not account for the complexity of some people's lives. VCOSS members were concerned about how the assets test would apply to people who may have to rely on their savings for a significant periods, because they have limited capacity or employment prospects. Examples provided included people engaged in seasonal work, people with disability who have received a financial settlement from a parent but are unable to work, and single parents with a recent property settlement their family must live on for a period.

Some assets can directly support a person's health and wellbeing, by enabling them to participate in work, education or community life. The example given in the discussion paper is a person with a mobility scooter. No allowance is provided under the current assets test for mobility scooters or other disability equipment, meaning the person would be ineligible for legal assistance. If a person with disability is forced to sell their aids or equipment to afford private legal assistance, it could reduce their capacity to work or attend school or appointments, and leave them socially isolated. We see no justification for treating such assets differently to a motor vehicle.

VCOSS recommends the VLA increase the allowable savings threshold, to allow and encourage people to put aside money for unexpected or urgent expenses, or to budget for an upcoming expense. The VLA can also consider when people's special circumstances mean they have little future employment prospects or it is unreasonable to consider their modest bank savings.

¹⁰ Victorian Government, *Residential Tenancies Act Review: Laying the Groundwork - Consultation Paper*, 2015, p.16

Limit the definition of ‘financially associated persons’

Recommendations

- Only include a person’s spouse or partner, or a family member specifically identified by the person themselves, in the definition of ‘financially associated person’
- Consider the nature of the applicant’s family relationship to protect the applicant from potential abuse or harm
- Consider the potential for financial hardship and harm to the applicant’s family

‘Financially associated persons’ income and assets are included in the means test, where the person provides or ‘could reasonably be expected’ to provide the applicant with assistance. This can include parents, partners, children or siblings.

The ‘reasonable expectation’ test is extremely broad and difficult to administer. VCOSS is unclear if assessments are made on the actual relationship between family members, or on assumptions about their ‘usual’ nature. People living with multiple and complex disadvantages often have histories of abuse, neglect and family breakdown, resulting in relationships not fitting ‘usual’ expectations.

VCOSS members provided examples of when a relative’s financial circumstances should not be considered. For example, a young person living out of home may have received some financial assistance from their parents in the past, but is unable to rely on this assistance in the future. VCOSS members were concerned when people are experiencing economic abuse, elder abuse or other forms of family violence, requesting financial assistance may put them at greater risk of harm from the perpetrator.

The means test’s harshness can mean a family member can be impoverished by their relative’s legal problems. Where a family member is a victim of economic abuse or elder abuse, they can be at increased risk of harm or under pressure to contribute financially, despite the potential for hardship. This can be an unfair and unintended consequence of the means test.

If assessments are made on the basis of an actual relationship, they must consider its nature, including indications of abuse or relationship breakdown, financial support currently provided, and the potential financial hardship or harm. Wherever possible, this should precede advising the family member of the application, to protect both parties from any possible abuse or harm.

It is difficult to make assessments about family dynamics and relationships by looking at financial records and other documentation. VLA assessment staff cannot be expected to safely identify the potential risk of harm or abuse without extensive training in family violence.

VCOSS would prefer a system where only the financial situation of a person’s spouse or partner is considered. The assessment could also consider the circumstances of other family members identified by the applicant as appropriate financial supporters.

Provide people with choice in contributions

Recommendations

- Amend the contributions policy to prevent sales of assets important to someone's health and wellbeing
- Review the method of calculating contributions based on income to address inconsistencies
- Review the evaluations in other states, to determine if compulsory contributions impede access to justice

VLA may require legal assistance contributions by an up-front payment, installments, or a secured contribution (such as a caveat over a person's home).

In general, VCOSS members accept secured contributions as appropriate in some circumstances. A property caveat is a preferred legal assistance payment over a forced asset sale. It also helps convert home equity into a useable form of payment. However, VCOSS members noted some people were reluctant to do this. Other people already had several caveats, which hinders home sale and relocation for better housing, employment or education opportunities.

Contributions should not force asset sales for payment. The sale of a car or disability aid could reduce someone's ability to work, travel to school or medical appointments, or remain healthy. This can outweigh the benefit of legal assistance.

Contributions can also deter people from applying. If people believe they must contribute, they may not apply, and delay resolving their legal issue until it escalates.

However, several VCOSS members reported people would prefer making a small contribution to secure VLA assistance, if they would not otherwise be eligible. Many are reluctant to use private legal services, due to unfamiliarity or fear high costs, disreputable conduct or exploitation. Contributions should remain a choice for people who would otherwise just miss out on grants of legal aid.

VCOSS has identified some inconsistencies in how contributions based on income are calculated (Discussion paper Appendix 5). At each income level, a person with a category two or three matter is required to make a higher weekly contribution than a person with a category one matter.¹¹ The weekly contributions should be consistent, calculated on the basis of the person's ability to pay, not the cost of the matter.

¹¹ For example, at assessable income of \$395 per week, a person with a category 1 matter must make a contribution of \$30 per week. A person with a category 2 or 3 matter must make a contribution of \$47 per week.

Contribution calculations may also be unfair for a person who is just over the threshold of a category. For example, the total contribution is the same for a person with a matter costing \$1600 as a matter costing \$6500. It is much less for a matter costing \$1550. VLA should review the contributions levels to make the system fairer and more consistent.

Other Legal Aid Commissions have small compulsory contributions for all grants. Even a small upfront payment can be a burden for people with little disposable income. We do not support a mandatory up-front cost for everyone receiving a legal assistance grant. If the compulsory contributions policies in other jurisdictions have been evaluated, VLA should review their findings to understand any potential barriers to accessing justice.

Clarify guidelines about special consideration and discretion

Recommendations

- Develop simple special consideration guidelines
- Automatically trigger a special circumstances review when the person is a victim of family violence or a young person leaving the out-of-home care system
- Work with private practitioners and community lawyers to make sure the application process does not deter lawyers providing assistance

Children, war veterans and people subject to a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* are exempt from the means test and contributions policy. VCOSS strongly supports the continued exemption of children and young people.

A person may request VLA use discretion to approve an application not meeting the means test, but there is little guidance in considering these matters and applying discretion. This impedes VLA staff making fair and consistent decisions in applying discretion.

VCOSS supports developing simple guidelines to assist VLA staff in identifying people who require special consideration. For example, the Legal Aid Queensland guidelines provide for special consideration in many of the examples given.

VLA could also learn from the United Kingdom model, where a hardship or eligibility review application can be made when a person has higher than usual expenditure. This can include costs related to caring for a person with a disability, debt or fines, or where the estimated private legal costs will cause significant hardship.¹²

Legal Aid Queensland: Means test special circumstances guidelines¹³

- The applicant's assets exceed the limit set in the means test, but because of their special circumstances, they are unable to access their assets.
- The applicant has access to a modest amount of money in the bank, but because of their special circumstances, taking this money into consideration when assessing financial eligibility for aid is not justified.

¹² United Kingdom, *Criminal Legal Aid means testing*, <https://www.gov.uk/guidance/criminal-legal-aid-means-testing>, accessed 9 September 2016.

¹³ Legal Aid Queensland, *Means test: special circumstances guidelines*, <http://www.legalaid.qld.gov.au/Find-legal-information/Factsheets-and-guides/Factsheets/Means-test-special-circumstances-guidelines>, accessed 9 September 2016.

- The applicant owns substantial assets (other than cash) exceeding the means test limit but they have no prospect of being employed in the future because of their special circumstances.

Some circumstances should automatically trigger special consideration, due to their complex nature. This could include:

- Young people aged between 18 and 21 leaving out-of-home care;
- Victims of family violence.

At the same time, the system must not be so complex lawyers do not apply for grants. This is a particular concern in rural and regional areas where there are already fewer lawyers. Community lawyers report the application process is already long and complicated, and adding steps and evidence requirements may discourage already time poor practitioners. VCOSS encourages VLA to continue to engage with private practitioners, community lawyers and their representative bodies, as well as service users and community members, to find the appropriate balance between practicality and fairness.

Reduce access barriers

Review the issues covered by legal aid grants

Recommendation

- Work with the community sector to identify areas where the guidelines for types of legal issues covered can be reviewed

This review is not considering the types of legal issues covered by grants of legal assistance (the guidelines). To make sure the system is fair and equitable other barriers must also be examined. VCOSS members report many people are financially eligible for a grant, but their legal problem is not within the guidelines.

In recent years, VLA managed its chronic underfunding by restricting eligible legal matters. This meant more people faced court without representation, and some victims of violence were cross-examined by violent perpetrators. VCOSS commends VLA for responding to community need and making changes to address these issues in the family law, child protection and family violence areas.

However, the guidelines restrict grants of aid to people facing criminal charges likely to result in imprisonment. This leaves many people facing summary charges without access to aid grants. They also limit the availability of grants of legal aid in property related matters. VCOSS members report some people are using mediation services to try and resolve property disputes, because they cannot get grants of legal aid. Mediation is often unsuitable in situations of financial abuse or significant power imbalance.

VCOSS recommends VLA work with the community sector to identify areas where the guidelines can be reviewed to increase legal assistance access.

Provide people with more holistic support

Recommendation

- Investigate options for more integrated legal and social services, and the provision of more holistic support

Many people seeking legal help will have more than one legal problem, and multiple and complex economic, social or health related issues.

45 per cent of people surveyed who were experiencing legal problems reported one or more of income loss/financial strain, stress-related illness, physical ill-health, relationship breakdown or moving home.¹⁴

Strict guidelines mean VLA is only able to help with certain types of legal issues. Similarly, community legal centres are often restricted by their funding arrangements to certain areas of law or population groups. As a result, a person may need to go to several different organisations to get help with different problems. As well as being confusing, this requires people to tell their story multiple times. It can also lead to people becoming frustrated and possibly disengaging from the system altogether, or failing to follow up to make sure problems are finally resolved.

Aboriginal and Torres Strait Islander peoples are less likely than mainstream clients to follow through with referrals, especially to mainstream organisations or organisations with which they are unfamiliar.¹⁵

In its submission to the Access to Justice Review, VCOSS recommended the government investigate options for more integrated legal and social services (for example, health justice partnerships), and provide more holistic support.¹⁶ While outside the scope of the means test review, we recommend VLA focus on the lived experiences of people accessing their services and continue to provide more holistic and integrated support.

¹⁴ C Coumarelos et al. *Legal Australia Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, 2012, p. xxiii

¹⁵ NATSILS, *Submission to Senate Inquiry Access to Legal Assistance Services*, 2015, p. 6.

¹⁶ VCOSS, *Narrowing the Justice Gap: Submission to the Access to Justice Review*, 2016.

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