



Preventing the escalation of legal problems during COVID-19

Submission to the Senate Select Committee on COVID-19

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Executive Summary

The COVID-19 crisis has presented an unprecedented challenge for the Australian Government to respond rapidly to prevent a public health catastrophe, while mitigating the impact of economic consequences for Australians.

We commend the Australian Government on a range of measures implemented within weeks to address both the public health and economic aspects of COVID-19. We welcome additional funding for family violence and mental health services, new JobSeeker and JobKeeper payments, and temporary holds on Centrelink debt enforcement and mutual obligations requirements. We welcome additional funding to address immediate legal issues related to COVID-19, but note that further resources are needed to meet the long-term impacts of COVID-19 on legal need.

VLA practices in a range of Commonwealth jurisdictions where the Australian Government's COVID-19 response has had a significant impact both for our service delivery and our clients' outcomes. During the COVID-19 period, we have seen changes in demand and service patterns that accord with reports more generally of the risk of an increase in family breakdown and family violence.

This inquiry provides an opportunity to reflect on the Australian Government's response to COVID-19 so far, and anticipate additional measures needed to address emerging issues arising through VLA's casework. Based on emerging trends through calls for legal assistance, and changes in ongoing legal matters, this submission highlights key issues where further responsive measures could prevent the escalation of legal problems and address the underlying causes of social disadvantage.

Our submission makes the following key recommendations (full list at Appendix A):

1. **Family violence and family law:** Implement further measures to address family violence and adequately resource the family law system to reduce delays and meet increased demand during COVID-19.
2. **Social security:** Further boost social security support during COVID-19 for vulnerable cohorts.
3. **National Disability Insurance Scheme (NDIS):** Increase flexibility in how NDIS plans can be used, responsiveness and timeliness of NDIA processes, and cooperation with state and territory governments to ensure there is a service safety net where the NDIS market fails.
4. **Migration:** Fast track the release of vulnerable people from immigration detention, improve healthcare arrangements in immigration detention, and ensure refugees living in the community can access healthcare and income supports during COVID-19.
5. **Discrimination and sexual harassment:** Provide protections from discrimination related to 'reasonable business grounds' to refuse flexible work arrangements, under JobKeeper dispute resolution powers, and indirect discrimination on the basis of family responsibilities.
6. **Access to legal assistance:** Provide adequate funding for legal assistance providers to meet increased demand in the aftermath of COVID-19.

The transition and recovery period out of the COVID-19 pandemic will be long and unpredictable. To ensure public health measures are successful and avoid unnecessary financial hardship and poverty, we encourage the Australian Government to respond to emerging community needs requiring urgent intervention. We have concerns that time limits on positive measures may need to be extended to prevent a sudden influx of people forced into poverty and homelessness, or forced to stay in family violence situations, who are more likely to experience legal problems.

1. Family violence and family law

VLA plays a leading role in the coordination of family law and family violence legal services in Victoria. We provide duty lawyer, legal advice, legal representation and information services in child support, parenting disputes, child protection and family violence matters across the state, to children and to parents. We also provide lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court through our Family Dispute Resolution Service (**FDRS**), and Independent Children's Lawyers (**ICLs**) who promote the best interests of children at risk. In the 2018-2019 financial year, we provided services to over 42,000 clients.¹

(a) Impacts of COVID-19 in family violence and family law

COVID-19 measures are likely to have an ongoing impact on legal demand in the family law system and courts for some time beyond the easing of lockdown restrictions. The changes in demand and service patterns we are observing accord with reports more generally of the risk of an increase in family breakdown in the context of increased economic stress and the negative impact of stay-at-home and social distancing directions on families.

During the COVID-19 pandemic response period, VLA has observed changes² in how people are seeking legal information and advice for family violence queries. VLA implemented a priority phone line for callers with family violence queries in late May 2020 due to the continuing number and type of family violence calls VLA's Legal Help service has been receiving and at time of writing we are preparing to implement a similar priority webchat channel.

VLA has also been seeing significant confusion and concern for the safety and wellbeing of children where family law parenting orders are in place. We observed a sharp change in the concentration of COVID-19-related queries around issues of spend time arrangements for children and overholding and withholding of children, leading to strong demand for advice on recovery orders and contravention applications.

While this has subsided, at the initial stages of lockdown parents and carers were concerned about supervised time and how this could be facilitated. Community based supervised contact centres closed and, at time of writing, there remain limited paid supervision services available. This has led to the use of alternatives such as supervision via video and the use of web-based technology. It has also led some parents to seek unsupervised time in circumstances where this is not appropriate.

ICLs have been called upon more in this current environment and the parties are looking to the ICL for direction with a view to resolving interim and final matters. There has been a sharp increase in the number of requests of ICLs to arrange family mediation via VLA's FDRS or to participate in private mediations to facilitate the resolution of cases.

VLA has concerns about the availability of ongoing support for vulnerable separating families, as many community agencies are closed or no longer offering face-to-face services. We note this particularly in relation to the risk of family violence. While many agencies are considering alternatives such as phone and video calls, there are limitations on these services, and these may not be a viable option for all families (e.g. access to phones or other technology is not necessarily available to all

¹ Victoria Legal Aid, *Annual Report 2018-19 – Access to Justice for Victorians* (Report, September 2019) 28 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-2018-19-annual-report.pdf>>.

² In early April 2020, this included an 11 per cent increase in calls to our Legal Help service from respondents and a 43 per cent decrease in calls to Legal Help from applicants while there was a 43 per cent increase in applicant inquiries to Legal Help via webchat and 23 per cent increase in respondent webchat inquiries.

families, and/or for safety reasons where a perpetrator and victim may be continuing to reside in the same home). This will likely be compounded by an expected increase in demand as lockdown stages ease and more victims are able to seek help.

FDRS provides legally assisted family dispute resolution services to vulnerable people. VLA's FDRS had already seen an increase in demand before COVID-19, but in March and April 2020 we have seen much larger increases (compared with the same month in the previous year). This is unsurprising as more families are seeking to resolve matters away from court given court delays.

FDRS mediators and case managers are reporting that clients are extremely stressed and anxious, with many raising concerns about spending time arrangements and the protectiveness of the other parent/carer while other clients have been presenting as more willing to participate in family dispute resolution, for the benefit of their children and to achieve some certainty. Both responses suggest there will be no reduction in demand.

FDRS had no service interruption, as it transitioned to delivering all dispute resolution services remotely (primarily by phone), but the ongoing high demand on our service will require further monitoring and close management to ensure families are not exposed to risks as a result of delays (earlier resolution can reduce risk and improve longer term outcomes for children).

(b) Australian Government response to date

We welcome the Australian Government's May announcement of funding to the justice sector including that 40 per cent is to be used for matters involving family violence.

We commend the rapid and constructive response by the family law courts – including in transitioning to virtual hearings, establishing a specialist COVID-19 list and making several practice changes that have simplified processes and forms. The introduction of this list is in response to an increase in the number of urgent applications filed in the Courts over a four week period in March and April, with a 39 per cent increase in the Family Court of Australia and a 23 per cent increase in the Federal Circuit Court. We have in turn moved quickly to provide a duty lawyer service for self-represented parties in these lists.

While this response has been important in enabling the courts' rapid response to the impact of COVID-19 on families, the likelihood of the family violence risk we have been observing during the lockdown period continuing will place more demand on a system that was already under great pressure. As such, further measures will be needed to give timely and appropriate prioritisation to dealing with family violence issues in cases before the family law courts and to respond to other issues arising in the family law system caused or exacerbated by COVID-19.

Recommendation 1

The Australian Government should build on changes being implemented in the family law courts to respond to COVID-19 to ensure an early and appropriate response to urgent family law matters, particularly those with family violence allegations by:

- (a) Sufficiently resourcing the COVID-19 list to avoid diverting resources from existing court matters
- (b) Transitioning the COVID-19 list into a specialist family violence list at an appropriate time, and
- (c) Providing funding for an expansion of pilots such as the risk screening and triage pilot (the Lighthouse project) into an ongoing process for the courts, taking into account any findings from the running of the pilot.

2. Social security

The COVID-19 pandemic has caused a surge in numbers of people struggling to pay for daily living costs. The Australian Government has recognised this by significantly increasing access to and amounts of social security payments during COVID-19, removing in-person mutual obligations, and pausing Centrelink debt recovery for 6 months. VLA is the leading provider of legal advice and advocacy to people seeking assistance with social security matters in Victoria.

VLA has seen the impact of the COVID-19 pandemic and the associated economic downturn, including the impact on certain cohorts of clients who are not eligible for payments (or additional benefits) made available by the Australian Government.

We have identified a number of groups that lack adequate income support to manage the impact of COVID-19 on their lives:

- People receiving Disability Support Pension (**DSP**) and Carer payments who have not received any additional payments compared with recipients of other social security payments (e.g. additional COVID-19 payments for people receiving JobSeeker payments)
- Migrant workers who have been left particularly exposed: unable to work, unable to leave the country, and unable to access any income support, and
- People seeking asylum living in the Australian community who are denied access to social security support (see *Migration* section 4 below).

Recommendation 2

The Australian Government should broaden access to social security supports during COVID-19 to people receiving Disability Support Pension and Carer's payments, migrant workers, and people seeking asylum living in our communities.

3. National Disability Insurance Scheme

VLA is the largest provider of legal services to people with disability in Victoria. During 2018-19, approximately 25,000 of our clients identified as having a disability or mental health issue. VLA receives funding from the Department of Social Services to provide legal representation in NDIS matters on review at the Administrative Appeals Tribunal (AAT).

(a) Positive NDIS changes in response to COVID-19

Many people experiencing disability are more severely exposed to the impacts of COVID-19 and associated economic effects than other members of the community. In recognition of this, the NDIA has made a number of changes, including:

- Automatically extending NDIS plans after their review date to ensure continuity of funding
- NDIS participants can access longer plans of up to 2 years
- Efforts have been made to contact participants whose health, disability or other circumstances could make them more vulnerable during the COVID-19 pandemic and increase accessibility of advice on changing plans, via web chat and telephone
- NDIS participants with a plan or agency-managed core support budget can use the funding categories within this budget flexibly, and
- Some participants may use funding flexibly to purchase low-cost assistive technology to ensure they can continue to access their funded supports until September 2020.

These recent NDIS changes are positive first steps in seeking to deal with some COVID-19 impacts.

(b) Risks for NDIS participants during COVID-19

Despite the positive changes identified above, VLA is also seeing that COVID-19 is creating acute unresolved issues for NDIS participants seeking our assistance, including because of existing systemic issues. Our clients report the acute impact and potential for crisis in their housing and supports because of the interaction of COVID-19 measures and delays in NDIA decision-making, plan and AAT reviews. We have seen unremedied challenges for NDIS participants and their families as a result of remote learning in Victorian schools, where greater assistance is required than is provided under existing supports for them to engage with online learning from home.

Despite ongoing concerns around “thin markets”,³ there is still no enforceable obligation on any government body to ensure an NDIS participant receives their funded supports and no systematised way of ensuring a person accesses the disability supports they need. We see how our clients with disability suffer the consequences caused by gaps between the NDIS and mainstream services, or

³ Joint Standing Committee on the National Disability Scheme, Parliament of Australia, *Market readiness for provision of services under the NDIS* (2018) 78. The Committee recommended that ‘the NDIA publicly release the outcomes of the Maintaining Critical Supports project and its policy on provider of last resort (PLR) arrangements as a matter of urgency’ (recommendation 24) in September 2018. See also, Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Transitional Arrangements for the NDIS* (2018) and Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition* (2017); Productivity Commission, Parliament of Australia, *National Disability Insurance Scheme – Costs* (2017) 36; Australian National Audit Office, *National Disability Insurance Scheme—Management of the Transition of the Disability Services Market*, Report No 24 (2016–2017) 27; McKinsey & Company, *Independent Pricing Review*, (Final Report, February 2018).

where the NDIS market does not meet people's support needs. During COVID-19, the NDIS' reliance on market-based support provision presents particular risks for our clients with complex needs.

The COAG Disability Reform Council acknowledged this need for "an integrated and holistic framework for maintaining critical supports for participants"⁴ and a "more flexible approach to address market challenges in the NDIS".⁵ We welcome the Council's recognition of the need for intergovernmental cooperation to ensure nobody is left to navigate the complexities of gaps in federal / state responsibility and market failure on their own. The following client story highlights some of the barriers our clients are facing around using NDIS supports for home schooling during COVID-19.

My son Lenny's NDIS supports to keep learning at home during COVID-19

The world is a confusing place for my son Lenny when plans change. I am his rock and guide. During COVID-19 I have become a teacher's aide and a therapy assistant on top of my usual roles as a carer and a single parent. To be honest, on some days I haven't been coping.

Lenny is seven and tall for his age. He loves playing with our two cats and going socially distanced scooting with his friend Sam. He has been diagnosed with Autism and sensory processing disorder, as well as ADHD and anxiety.

Being at home through COVID-19 has been hard. On the one hand Lenny has been much calmer and settled. But since school started, we've had some trouble because they've been providing the content without voiceovers. His speech therapist says he is dyslexic, so he has challenges with reading and he really struggles with handwriting. We keep falling further behind because he can't read the tasks, needs constant support and everything takes longer. He got really frustrated and fell behind because he just couldn't do the tasks that were set. Even though he'd qualified for a teacher's aide who was due to start helping him at school, when the school went to remote learning we didn't get any support until week 4. I felt like we were set up to fail.

Lenny has had weekly occupational therapy since 2018, funded by the NDIS since August 2019. It's been amazing to see how much improvement he's made. During COVID-19 I realised I needed a wide angled web-cam in order for the therapy to work, but even though we have money in Len's NDIS plan, the NDIS have been chopping and changing about whether you can spend money on a device. First it's 'yes you can buy a device', then they've put things on their website saying 'yes you can buy a device' and then they've removed it. People in the self-management Facebook groups have been totally freaking out not knowing if they can get what they need, there was no guideline. Just last week, the NDIA told me that I will need to withdraw my Tribunal appeal to get some urgent supports during COVID-19. This is scary and stressful.

I feel like I'm on a roller coaster. Some days it's ok, but on other days I'm drowning in tasks. I try so hard to stay on top of my financial issues so right now I feel in the dark and out of control of everything. I'm pretty much a bad tenant for the first time in my life, I always take

⁴ COAG Disability Reform Council, *Communiqué 9 October 2019* (Communiqué, 9 October 2019) 1.

⁵ COAG Disability Reform Council, *Communiqué 13 December 2019* (Communiqué, 13 December 2019) 2.

care of houses but I can't pay my rent on time because I can't afford it at the moment, so I'm worried I'll fall more behind and get evicted.

The lack of clarity around flexible use of funding and meeting urgent support needs during COVID-19 has left Lenny and his mother in crisis. Proactive, clear and consistent communication from the NDIA is needed to ensure they can realise the benefit of new flexible use of funding policies. The delay in the implementation of the recommendations of the *Tune Review*,⁶ which recommended important NDIS changes to make it more accessible and flexible, compounds the impacts of the pandemic.

Recommendation 3

The Australian Government should:

- (a) Increase further flexibility in how NDIS funding can be used, including clear communication about how NDIS supports can be accessed for urgent support needs during COVID-19
 - (b) Improve responsiveness and timeliness of NDIA processes by introducing temporary fast track mechanisms and bringing forward the implementation of the *Tune Review* recommendations, and
 - (c) Work with state and territory governments to ensure there is a service safety net where the NDIS market fails and market intervention is required,
- to ensure people with disability can continue to access reasonable and necessary supports during COVID-19.

4. Migration

VLA's Migration Program provides information,⁷ advice and assistance to asylum seekers and other vulnerable non-citizens in the Federal Court system. Demand for migration services has remained steady since the outbreak of COVID-19.

VLA clients have reported increases in their levels of anxiety and confusion about COVID-19 processes implemented by court and tribunal registries:

- Our clients in the community are experiencing income and job loss, housing insecurity, and distress caused by physical distancing and social isolation. These issues are often exacerbated by the fact that many have limited community connections and are ineligible for a wide range of financial and social supports (e.g. Centrelink, Medicare).
- Our clients in immigration detention are experiencing significant additional psychological distress by the fact of their detention in conditions that impede their ability to practice social

⁶ David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013: Removing red tape and implementing the NDIS Participant Service Guarantee* (Report, 2 December 2019) <<https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-national-disability-insurance-scheme/review-of-the-ndis-act-report>>. See also, National Legal Aid, Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee, *Putting people first: Removing barriers for people with disability to access NDIS supports* (4 November 2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-putting-people-first-removing-barriers-for-people-with-disability-to-access-ndis-supports-11-2019.pdf>>.

⁷ Victoria Legal Aid, *COVID-19 and protection visa reviews* (Web Page, 7 May 2020) <<https://www.legalaid.vic.gov.au/find-legal-answers/covid-19-coronavirus/protection-visa-reviews>>.

distancing, because of the known heightened risk of infection to those in institutional settings and in light of usual support avenues having been cut off to prevent the introduction of the virus.

(a) Unsafe conditions in immigration detention

VLA represents approximately 70 people in immigration detention centres, including a sizable proportion in the Melbourne Immigration Transit Accommodation. Since COVID-19, we have received an increased number of calls from this client group expressing a high level of anxiety and frustration. Some clients have expressed suicidal ideation and we have at least one client who has been hospitalised following an attempted suicide.

The Australian Government has itself confirmed that people in immigration detention facilities are among those most at risk of serious infection related to COVID-19.⁸ While in immigration detention, our clients are unable to comply with physical distancing guidelines. Some issues include:

- Shared rooms of up to six people, with insufficient space to physically distance
- Crowded meal areas
- Lack of easily accessible hand sanitiser or personal protective equipment, and
- Guards not wearing personal protective equipment (including gloves and masks).

Our clients are experiencing increased isolation as a number of external support services are suspended. Our clients have reported that external counselling services have been suspended, as have religious services and all visits from family and friends. This is having a significant impact on the mental health of VLA's clients during COVID-19, at the same time as their legal matters face delays through the courts.

VLA has been advocating for the release of individual clients from detention, particularly people with a pre-existing health condition and/or where it is accepted that continued detention is not for a protective purpose. Chetan's story highlights the heightened risk for VLA clients experiencing serious mental health issues, and with health conditions which heighten the risk of complications if they contract COVID-19 in immigration detention.

Chetan's story – More than 10 years in immigration detention

Chetan⁹ fled his home to escape persecution by state authorities. He arrived in Australia by boat in 2009 and was detained. He has been detained in immigration detention ever since – for more than 10 years. Chetan has been admitted to psychiatric facilities for acute mental health care twice during this time.

6 years ago, an International Treaties Obligation Assessment found that Chetan was owed non-refoulement obligations by Australia. A delegate of the Minister has subsequently also found him to be a refugee. ASIO has confirmed there are no security reasons preventing

⁸ Australian Government Department of Health, *What you need to know about coronavirus (COVID-19)* (Web Page, 22 May 2020) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19>>. The website relevantly states that: "In Australia, the people most at risk of getting the virus are: travellers who have recently been overseas; those who have been in close contact with someone who has been diagnosed with COVID-19; people in correctional and detention facilities; and people in group residential settings."

⁹ VLA clients have consented to us sharing their stories in this submission but have asked that we deidentify their names and identifying details to protect their rights to privacy.

the Australian Government granting Chetan a visa, and the Minister for Immigration has personally accepted that Chetan poses no risk to the Australian community.

Despite these findings, Chetan has been refused a protection visa, and he remains in detention.

The Commonwealth Ombudsman has made periodic reports to the Australian Parliament pursuant to section 486O of the Migration Act, noting the serious mental health consequences of prolonged detention. The Ombudsman has requested that Chetan's case be expedited and that the Australian Government consider releasing him into the community. During this time, multiple requests have also been made to the Minister to exercise his personal non-compellable power to release Chetan from detention. All have been refused.

VLA has recently lodged a further request for the Minister to release Chetan in light of the evolving COVID-19 situation in immigration detention, and the heightened risk of harm he faces due to his poor mental health and the risk of him developing post-viral asthma (based on previous respiratory issues following illnesses). VLA is waiting to hear from the Minister about his decision in Chetan's case, and for a number of other clients at high risk in immigration detention. There is no avenue to expedite the process for the Minister to use his non-compellable, discretionary power to make a decision about a person's migration matter in immigration detention.

Recommendation 4

The Australian Government should:

- (a) Fast track the release of vulnerable people from closed immigration detention by granting bridging visas or making appropriate residence determinations
- (b) Ensure people in immigration detention are able to physically distance in all areas (including sleeping quarters)
- (c) Ensure people who remain in detention have access to high quality health care (including psychological services), and
- (d) Ensure people in detention have access to adequate technology and phones to maintain connection with any community supports during COVID-19.

(b) Limited access to social security and healthcare

Many VLA clients who are asylum seekers have lost work and income as a result of COVID-19. Asylum seekers are not eligible for JobSeeker or JobKeeper allowances or the COVID-19 supplement. Without support, many are facing homelessness and poverty. Asylum seekers have lost access to financial and casework support under the Status Resolution Support Services as a result of reductions in income support under Australian Government policies over the past two years. NGOs and charities are overwhelmed with demand from vulnerable people including our client group and face the additional difficulty of maintaining frontline services because of the spread of COVID-19.

“I’m scared for my wife and children”

My name is Murali. I am an asylum seeker from Sri Lanka. I fled Sri Lanka with my wife and children as we feared for our lives. As a Tamil, I suffered greatly in Sri Lanka and was injured by the Sri Lankan authorities. My injuries inhibit my ability to do a lot of hard labour.

Before the pandemic, I was working 3-4 days a week for a rideshare company. My work was very badly impacted when COVID-19 hit – I was only getting one ride per day, business was incredibly slow. I was concerned for my health and catching COVID-19 and there was no money in working, only risk. Normally I look after my family which is all I ever want to do but after COVID-19 I have been unable to do so. I don’t receive Centrelink or any payments from the Australian Government.

I tried to negotiate a discount of rent with my landlord because I did not have enough money for rent. But the landlord is still asking me for the money. I do not know how I will pay rent this month. All my friends have lost their jobs and I cannot borrow money from them. The Red Cross and the Asylum Seeker Resource Centre have both said they have no money to assist me at this time. We get one food parcel from the ASRC every fortnight to live off. I’m scared for my wife and children.

Playing cricket was my outlet prior to COVID-19 and the way I used to relieve the stress of my situation. Because of my injuries, it is quite painful to play cricket but despite this, I have been a successful cricketer with the Victorian Turf Cricket Association and the Western Suburbs Churches & Community Cricket Association. My wife and children would come to watch and my trophies were a source of pride for the whole family. Now the competitions have stopped due to the pandemic.

Mentally I am in a very hard place. I was so upset with the situation recently that I destroyed my cricket trophies. My trophies meant so much to me, they were the result of my hard work for six years in Australia. I wish I had not done this, I just felt so helpless with my situation, it was a moment of sheer frustration after all my family and I had been through. All I want is the opportunity to provide for my family and for my children to be proud of me. At the moment there is so much doubt and uncertainty about how we can get by each day and week without any support from the government.

Asylum seekers without work rights, or evidence of a current bridging visa, have no access to Medicare. As a consequence, asylum seekers are often not able to access the medical care they need and have poor health outcomes. They may need to present at emergency centres to access medical treatment. This is of significant public health concern during the COVID-19 pandemic. VLA has been advocating for individual clients to access Medicare. However, we remain concerned about the impact of the limited access to healthcare during COVID-19.

Recommendation 5

The Australian Government should:

- (a) Ensure asylum seekers living in the community have valid bridging visas and access to Medicare
- (b) Allow asylum seekers and refugees to access superannuation, and
- (c) Increase funding for support services for people seeking asylum and refugees.

See also recommendation 2 in *Social Security* on ensuring social security payments are available to people seeking asylum and refugees during COVID-19.

5. Discrimination and sexual harassment

VLA's Equality Law Program provides a range of advice and representation services to clients who experience discrimination in all areas of public life. During the COVID-19 pandemic, VLA's Legal Help services have seen a significant increase in enquiries for employment law information and referral. VLA has also received enquiries from clients who have experienced discrimination in their employment due to their disability, family responsibilities, and sex.¹⁰

(a) Experiences of discrimination related to COVID-19

VLA has assisted clients who have reported workplace discrimination arising from employer decisions in response to COVID-19 and impacts on business. Employees with the attributes of sex, disability and/or family responsibilities have emerged as those most affected by workplace discrimination during COVID-19.

Enquiries from clients with a disability have included clients with underlying illnesses or conditions who are at higher risk of contracting COVID-19, and clients experiencing symptoms of (or presumed to have) COVID-19. Clients with disability seeking legal assistance have described being discriminated against in the following situations:

- Being selected over people who do not have a disability for redundancy and stand down directions
- Being dismissed or stood down for taking sick leave for COVID-19 symptoms
- Being refused requests to work from home or for reasonable adjustments where they have a higher risk due to their disability, and
- Having changes made to duties which have created a heightened health and safety risk (e.g. increased face-to-face contact and onsite work directions).

The following firsthand account describes the discrimination one client faced after following an employer's direction to work from home while feeling unwell when they were not eligible for COVID-19 testing.

¹⁰ See Victoria Legal Aid, *COVID-19 and discrimination at work* (Web Page, 20 April 2020) <<http://www.legalaid.vic.gov.au/find-legal-answers/covid-19-coronavirus/discrimination-work>>.

“During my sick leave, I was advised my contract had been terminated early.”

I was working at my workplace for just under 12 months as an independent contractor. Prior to COVID-19 my employer had indicated that my contract would be extended. During COVID-19, my employer requested that all staff work from home if anyone presented with any COVID related symptoms. I became unwell and requested to work from home in accordance with my employer’s direction. The first day was granted however permission for subsequent days were met with resistance and eventually I was not permitted to work from home even though I was unwell with COVID-19 like symptoms. Other employees were granted the ability to work from home with nearly 20% of the team working from home at the time.

I am also a single mother and not sure if this had something to do with my treatment in addition to my illness. My employer threatened not to pay me or allow me to work from home unless I could prove I actually had COVID-19 however I was not eligible for testing at the time. I was forced to take unpaid leave. During my sick leave, I was advised my contract had been terminated early. I was directed not to speak about my COVID-19 symptoms to other employees. I was too sick at the time to contest any decisions or actions taken by my employer during this time.

This has caused severe financial impact on my family due to the abrupt end to my employment. The stress was also aggravated by the shock of this behaviour from my workplace, as I had received assurance only days before I became sick that the whole team would be kept on.

Clients with the protected characteristics of sex and/or family responsibilities have made enquiries about employers refusing to implement flexibility arrangements or accommodations. These experiences of discrimination have included having requests to work from home refused (even where duties could be performed remotely), and employers refusing to modify the span of hours required to work to accommodate home schooling and other family responsibilities.

In our practice experience, women have been disproportionately subject to workplace discrimination due to family responsibilities during the COVID-19 pandemic. The following client’s experience describes an employer’s refusal to provide flexible working arrangements for a single mother who requested additional unpaid maternity leave after experiencing family violence.

“I needed more time at home to care and support my two young children”

I worked in real estate for nearly 5 years and was set to return from my maternity leave when I requested an extension to my unpaid maternity leave due to a domestic violence situation that occurred during my leave. I needed more time at home to care and support, now on my own, my two young children. My employer denied the extension request. I then made a different request to return part time with modified hours and days of work. This request was also rejected. My flexibility requests were rejected with limited consultation. I had to ask my employer multiple times for reasons for the refusal of my requests. Eventually my employer said they needed me back full time in the office face to face as I was a valuable member of the team and the business was suffering and short staffed because of COVID-19.

I sought legal help from VLA because I thought it was strange how they needed me to return full time when the business was downsizing during COVID-19. I thought that taking a further period of unpaid leave would not be a hardship for the business. This situation has affected me immensely mentally, physically and financially.

The immense stress of this situation made me feel like I was forced to choose between my family and earning a living, and during COVID-19 where even if I had to choose work over my children it would not have been possible to work as they would not allow me to work from home. I felt like there was no choice but to resign because I also needed to home school my daughter. I am confused and hurt by how this situation played out as I was an earnest, hardworking employee which did not seem to matter to my employer in the end.

Because of my employer's conduct to unreasonably refuse my flexibility requests, I had no other choice but to resign from my job to put my family first and care for them. This means I will now, when the time comes, have to find employment again which will be difficult in this current climate, all because my employer would not accommodate an extension of my unpaid maternity leave.

VLA clients have continued to seek assistance in relation to being sexually harassed at work since COVID-19, and sexual harassment remains a common topic for our phone advice clients.

(b) Impact of discrimination on VLA clients

While there are legal remedies available to employees in the above circumstances, these employees have been forced into precarious positions in the immediate term where they have been forced to either return to unsuitable working arrangements, take unpaid leave and/or end their employment.

Clients who have experienced workplace discrimination during COVID-19 have reported:

- Termination of employment
- Loss of flexibility in relation to using accrued entitlements
- Lost income
- Difficulty finding a job in the current environment
- Detrimental impact on mental health including symptoms of distress, anxiety and depression
- Detrimental impact on being able to meet family and caring obligations, and
- Worsened relationship with their employer.

VLA's Legal Help has seen a 124 per cent increase in legal queries about wages and other terms of employment (not including discrimination) between 16 March 2020 to 1 May 2020 compared to the previous year, with queries relating to rights in relation to 'stand downs' from work, eligibility for JobKeeper payments, wages and entitlements on termination, redundancy or where stood down from work, and rights in relation to working from home and other flexible work arrangements. VLA provides information and referral services for employment law matters involving discrimination, but does not provide advice and representation in these matters.

VLA has developed COVID-19 online information in collaboration with JobWatch on topics including losing work, being unable to work, caring for others, working from home and safety at work. There have been nearly 17,000 unique page views to date.

(c) Preventing workplace discrimination and sexual harassment

Challenging reasonable business grounds

The *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) (**Coronavirus Act 2**) has implemented temporary changes to allow employees to challenge unreasonable stand down directions and unreasonable directions to change of employee location, duties and/or hours of work. It follows that the Fair Work Commission could broaden its dispute resolution functions to deal with unreasonable refusals of requests for flexibility under section 65 of the *Fair Work Act 2009* (Cth) (**FWA**). Given increased uncertainty about what is 'reasonable' or 'unreasonable' in relation to requests for flexibility, it is important that employees and employers can access the dispute resolution function to resolve disagreements as efficiently and fairly as possible.

Recommendation 6

The Australian Government should implement an additional temporary amendment to the *Fair Work Act 2009* (Cth) to enable employees to challenge 'reasonable business grounds' in relation employer refusals of flexibility requests during COVID-19.

Clarify scope of JobKeeper dispute resolution powers

The Coronavirus Act 2 introduces a new Part 6-4C into the FWA which allows employers to give certain directions and make certain requests of employees. The Commission may deal with a dispute about the operation of the new Part 6-4C by mediation or conciliation. For example:

- Whether a JobKeeper enabling stand down is 'because of' changes to business attributable to the COVID-19 pandemic or the government's response to it
- Suitability of alternative workplaces
- The reasonableness of employee refusals to work different days or times, or to take annual leave, and
- Whether a direction is unreasonable in all of the circumstances.

Confirmation from the Australian Government that employees who have been discriminated against in relation to unreasonable JobKeeper directions or agreements can make applications to resolve disputes would provide certainty for affected employees and quick access to justice. Without this avenue, employees facing discrimination during COVID-19 only have the option of making an application for unfair dismissal or unlawful adverse action under the general protections provisions of the FWA. Achieving positive outcomes for employees who have been discriminated against by way of these ordinary provisions of the FWA are problematic in current circumstances where employers are relying on the blanket business impacts of COVID-19 as the operative reason for taking adverse action against employees with protected attributes.

Recommendation 7

The Australian Government should confirm that the Fair Work Commission's JobKeeper dispute resolution powers under section 789GV of the new Part 6-4C of the *Fair Work Act 2009* (Cth) include the power to resolve disputes where an applicant has been discriminated against or treated adversely because of the applicant's family or caring responsibilities, sex and/or disability.

Protections from indirect discrimination for parents and families

VLA clients have experienced discrimination during COVID-19 where employers have required them to attend work full-time and/or attend work on a full-time basis in a face to face, on-site capacity, even where working from home appears to be a reasonable option. These requirements disadvantage employees with family responsibilities who do not have access to childcare or other social and family supports as a result of COVID-19. The legal arguments to prove that such conduct constitutes unlawful indirect discrimination on the ground of sex is complicated. It would be clearer for both employers and employees if it were simply stated in the *Sex Discrimination Act 1984* (Cth) (**SDA**) that indirect discrimination on the ground of family responsibilities is unlawful.

Recommendation 8

The Australian Government should amend the *Sex Discrimination Act 1984* (Cth) to include a cause of action for indirect discrimination on the ground of family responsibilities.

6. Access to legal assistance

We welcome the Australian Government's funding injection for the justice sector with \$49.8 million for additional frontline legal services, 40 per cent of which is to be allocated to matters involving family violence. We understand that these funds will be distributed across state and territory Aboriginal and Torres Strait Islander legal services, legal aid commissions and community legal centres to address the surge in demand for legal information, advice and representation during the initial phase of responding to COVID-19.

The Victorian Government has also announced an addition \$17.5 million to deliver essential legal assistance during the COVID-19 pandemic. This will support frontline legal services in Victoria which are rapidly shifting to deliver services over the phone or using our webchat rather than face-to-face service delivery. It will also enable Victoria Legal Aid and our legal sector partners to provide access to legal information and advice about family violence, as a preventative factor to help mitigate risk.

People experiencing economic disadvantage (e.g. unemployment or insecure housing) are more likely to experience legal issues, but often do not recognise that they are issues that could be resolved with legal help. Early access to legal information and advice is essential for preventing the escalation of legal and social issues.

We welcome the new National Legal Assistance Partnership 2020-25 Agreement which provides funding over the next five years. We anticipate that legal need will significantly increase in the next 2-3 years as the social and economic impacts of COVID-19 continue to be felt by a large number of people experiencing unemployment, financial hardship, poverty, homelessness, family violence and

mental health issues. Legal assistance providers will be unable to maintain current service levels, and a greater proportion of people will be unable to access the legal help they need, which may result in the escalation of social problems with flow-on impacts for our community as a whole.

Recommendation 9

The Australian Government should provide further funding for legal assistance providers to meet increased legal need in the aftermath of COVID-19, when the full impacts of COVID-19 are known.

Appendix A: List of recommendations

#	Recommendation
<i>Family violence and family law</i>	
1.	<ul style="list-style-type: none"> (a) Sufficiently resource the COVID-19 list to avoid diverting resources from existing court matters (b) Transition the COVID-19 list into a specialist family violence list at an appropriate time, and (c) Provide funding for an expansion of pilots such as the risk screening and triage pilot (the Lighthouse project) into an ongoing process for the courts, taking into account any findings from the running of the pilot.
<i>Social security</i>	
2.	The Australian Government should broaden access to social security supports during COVID-19 to people receiving Disability Support Pension and Carer's payments, migrant workers, and people seeking asylum living in our communities.
<i>National Disability Insurance Scheme</i>	
3.	<ul style="list-style-type: none"> (a) Increase further flexibility in how NDIS funding can be used, including clear communication about how NDIS supports can be accessed for urgent support needs during COVID-19 (b) Improve responsiveness and timeliness of NDIA processes by introducing temporary fast track mechanisms and bringing forward the implementation of the Tune Review recommendations, and (c) Work with state and territory governments to ensure there is a service safety net where the NDIS market fails and market intervention is required,
<i>Migration</i>	
4.	<ul style="list-style-type: none"> (a) Fast track the release of vulnerable people from closed immigration detention by granting bridging visas or making appropriate residence determinations (b) Ensure people in immigration detention are able to physically distance in all areas (including sleeping quarters) (c) Ensure people who remain in detention have access to high quality health care (including psychological services), and (d) Ensure people in detention have access to adequate technology and phones to maintain connection with any community supports during COVID-19.
5.	<ul style="list-style-type: none"> (a) Ensure asylum seekers living in the community have valid bridging visas and access to Medicare (b) Allow asylum seekers and refugees to access superannuation, and (c) Increase funding for support services for people seeking asylum and refugees.

<i>Discrimination and sexual harassment</i>	
6.	Implement an additional temporary amendment to the <i>Fair Work Act 2009</i> (Cth) to enable employees to challenge 'reasonable business grounds' in relation employer refusals of flexibility requests during COVID-19.
7.	Confirm that the Fair Work Commission's JobKeeper dispute resolution powers under section 789GV of the new Part 6-4C of the <i>Fair Work Act 2009</i> (Cth) include the power to resolve disputes where an applicant has been discriminated against or treated adversely because of the applicant's family or caring responsibilities, sex and/or disability.
8.	Amend the <i>Sex Discrimination Act 1984</i> (Cth) to include a cause of action for indirect discrimination on the ground of family responsibilities.
<i>Access to legal assistance</i>	
9.	Provide further funding for legal assistance providers to meet increased legal need in the aftermath of COVID-19, when the full impacts of COVID-19 are known.

Appendix B: About Victoria Legal Aid

VLA is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession, community legal centres and Aboriginal and Torres Strait Islander legal services, we help people with legal problems such as criminal matters, family separation, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration and tenancy.

Our Legal Help telephone line is a resource for all Victorians to seek information, advice and assistance with legal problems. We also deliver specialist non-legal services, including our Family Dispute Resolution Service, Independent Mental Health Advocacy and Independent Family Advocacy and Support, as well as providing community legal education, and contributing to law reform.

In 2018–19, VLA provided assistance to over 100,000 unique clients.¹¹ Our clients are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three receive no income at all. Over 25,000 people disclosed having a disability or experiencing mental health issues and approximately 25 percent are from culturally and linguistically diverse backgrounds. Over 5,000 of our clients identified as Aboriginal or Torres Strait Islander.¹² Over 6,300 of our clients identified as being homeless or at risk of homelessness, which was an increase of 21 per cent since 2017–18.¹³

Almost 30 per cent of our clients – approximately 29,300 people – live in regional Victoria. In our Mildura, Shepparton and Morwell offices, our Aboriginal Community Engagement Officers work to reduce the barriers between Aboriginal and Torres Strait Islander communities and legal services.

¹¹ Victoria Legal Aid, above n 1, 11. Unique clients are individual clients who accessed one or more of Victoria Legal Aid's legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters or participated in community legal education.

¹² Ibid 10–11.

¹³ Ibid 2.