

Impact of Legal Aid cuts.

A briefing by the Federation of Community Legal Centres (Vic) Inc.

August, 1997

The Federation of Community Legal Centres (Victoria) Inc. ("the Federation"), as the peak organisation for 41 Community Legal Centres throughout Victoria, has first hand experience of the impact of diminished legal aid funding and changes in legal aid arrangements on the community and, in particular, the impact on disadvantaged members of the community and persons in regional and rural areas. Further information about the Federation and work of Community Legal Centres is provided in **Attachment A**.

Access to justice is a human right and the availability of legal aid is essential for the maintenance of a just and democratic society.

Currently there is no research that provides an adequate measure of unmet legal need in the community. It is clearly erroneous to determine unmet need by the number of legal aid applications because, due to tightened guidelines many agencies and private legal practitioners decline to make applications. This is supported by the 1996/97 Victoria Legal Aid client survey which shows a 16% decrease in the number of legal aid applications. An adequate study of unmet legal need and the ability of the system to meet this need must take into account a range of factors including a measurement of those who, for various reasons, do not make applications for legal aid.

In relation to unmet legal need the Federation notes that some work is currently being undertaken through the Commonwealth Legal and Family Services by way of a Legal Assistance Needs Study.

It is only after a national study of unmet legal need is undertaken that the true impact of legal aid funding cuts and changes in legal aid arrangements can be assessed.

Nonetheless the Federation is aware, through the first hand experience of our member Centres, that diminished legal aid services are causing hardship in the community and exacerbating the hardship already endured by disadvantaged community members and persons in rural and regional communities.

The Federation has received many disturbing indications about the impact of the cuts to legal aid funding and the new arrangements and such anecdotal material is set out in **Attachment B**. Furthermore, the Federation has collected many case studies have been collected from Community Legal Centres and private practitioners and 46 of these case studies have been set out in **Attachment C**.

The material that the Federation has gathered display the disturbing realities of unmet legal need and the adverse impacts the legal aid funding cuts and changes in legal aid arrangements are having on the community. It is further evident that such impacts are compounding the disadvantage already endured by many members of our community and persons in rural and regional communities. The Federation considers that the legal aid system is in crisis and that steps must be taken as a matter of urgency.

For further information on this issue please contact Ms Pauline Spencer, Community Liaison/Policy Worker for the Federation on (03) 9602 4949 or 04177 41538.

Attachment A:
The Federation of Community Legal Centres (Vic) Inc.

The Federation of Community Legal Centres (Vic) Inc. (“the Federation”) is the peak organisation for 41 legal centres in urban and rural Victoria. Community Legal Centres include both specialist and generalist centres. Specialist centres exist for a range of disadvantaged groups including women, people with disabilities and refugees and in specialist areas including domestic violence, the environment, employment and welfare rights. Centre staff range from lawyers to financial counsellors, youth workers, social workers and other professionals. Centres are assisted by dedicated volunteers from both legal and non-legal backgrounds. Centres are also linked to many other community organisations who both refer and are referred clients.

Centres are dedicated to a preventative approach to solving client’s problems and are actively involved in community education and law reform.

Overwhelmingly, the people who use community legal centres are on low incomes. Most receive some form of pension or benefit. A considerable, albeit declining, percentage are employed. Centres are particularly successful in meeting the needs of persons from non-English speaking backgrounds. In summary, Community Legal Centres work with people who, but for the assistance of the centres, would have extremely limited access to justice.

In light of the above the Federation is in a position to assess the impact of diminished legal aid funding and changes in legal aid arrangements on the community and, in particular, disadvantaged members of our community and persons in rural and regional areas.

Attachment B: Anecdotal evidence of adverse impacts

Due to a lack of resources Community Legal Centres and the Federation, as the peak body, are unable to conduct the level of research necessary to study unmet legal need nor ascertain the precise impact of diminished legal aid services. We are nonetheless aware, through the first hand experiences of our member Centres, that diminished legal aid services are causing hardship in the community generally and exacerbating the hardship already endured by disadvantaged individuals and groups and persons in rural and regional communities. The Federation has received the following indications that present serious cause for concern:

1. With respect to equal opportunity/discrimination law, as a result of funding constraints Victoria Legal Aid altered guidelines on 12 December 1996 to provide that legal aid would not be granted for discrimination cases, except where there was a strong prospect of benefit being gained not only by the applicant but also by the public or any section of the public. In the experience of the Disability Discrimination Law Advocacy Service, Victoria Legal Aid refuses all applications for assistance for discrimination complaints, even where the application involves issues of public interest, affecting a large number of people with disabilities (**Refer Attachment C - Case Studies 1 & 2**). Due to the application of the guidelines the Service has basically given up on applying for legal aid for discrimination matters.

The nature of equal opportunity/discrimination cases means that even where the particular case involves the circumstances of one person, it is rare that the pursuit of such a case will not have any wide public benefit, for example, by bringing about a change in management practice or, through wider publicity, a change in community attitudes.

The inability of persons who face discrimination to remedy that discrimination because of economic disadvantage and lack of legal aid is of particular concern. The failure to provide legal aid compounds the disadvantage they already face and, on a human level, exacerbates the pain and suffering caused by the act of discrimination.

The Federation is further concerned that the amendments foreshadowed by the *Human Rights Amendment Bill 1997* to transfer the hearing powers under the various commonwealth human rights legislation from the Human Rights and Equal Opportunity Commission to the Federal Court, with the resultant filing fees and need for legal representation, coupled with the inability to obtain legal aid will significantly curtail legal redress for persons who have suffered discrimination.

2. One Centre dealing with clients with a disability have indicated that where applications for guardianship are made by a person other than the person with the disability the Guardianship Board orders a psychological assessment. Often, in the interests of justice, the representatives of the person with the disability require a further psychological report. Legal Aid is not available for such outlays.

3. There have been reports that increasingly clients are being passed from pillar to post in their search to obtain legal advice and assistance after being turned away from legal aid. One Centre reported that whilst previously they were able to refer people to other agencies in the area if the Centre was too busy, now all agencies in that area were working beyond capacity and significant waiting periods for appointments had become the norm. Reports indicate that such persons end up confused and frustrated with such feelings exacerbating the anxiety brought about by the substantive legal complaint. Such situations are of particular concern where persons are elderly or suffer from a mental illness. In this regard it is important to note that for persons seeking legal assistance through legal aid or community legal centres the legal problem with which they present is often the tip of complex difficulties involving health, housing, financial crisis. Not being able to access assistance can often be the breaking point.
4. There have been reports of increased demand for services provided by Community Legal Centres after persons have been turned away from legal aid offices. Community Legal Centres, operating on relatively low levels of funding, were already stretched and there is increasing concern in relation to the ability of Community Legal Centres to fill gaps in legal aid with their present levels of funding. Some Centres have reported increasing in waiting periods for appointments, for example, 3 weeks at one Centre. There have also been reports of Centres having to turn people away from sessions where volunteers are available to provide advice to those who present between certain hours. Furthermore, some Centres have indicated an increase in demand from people outside the Centre catchment area seeking assistance.
5. There are reports that defendants in criminal matters are often refused legal aid because they are unlikely to be able to successfully defend charges. Unfortunately, this may result in individuals receiving much harsher sentences for failing to plead mitigating circumstances, pleading guilty to more charges than necessary and other difficulties brought about by the person having to represent themselves. There is also anecdotal evidence of persons facing criminal charges who have meritorious defences pleading guilty because of an inability to obtain funding for legal aid.
6. In relation to public interest environmental cases such as planning appeals and proceedings to enforce environmental standards legal aid is non-existent. In fact, Victoria Legal Aid does not have any guidelines for the legal aid funding of public interest environmental matters. The lack of guidelines basically means that such matters will not attract a grant of legal aid. This is of particular concern given the constraints that have been placed on the Environment Defenders Office by the Commonwealth, namely, that funding cannot be used for the purposes of litigation. The Federation recommends that guidelines for the funding of public interest environmental matters should be developed in consultation with the Environment Defenders Office.
7. There have been numerous reports by Community Legal Centre workers of private lawyers indicating that they are unable to provide further pro bono or legally aid services because of their inability to sustain the significant levels of non-fee paying work they are performing. In such circumstances this often results in persons having to rely on already duty lawyers (who are often overworked or may not exist in rural and regional courts), represent themselves or not pursue legal remedies.

The Public Interest Law Clearing House, (which is the only formal pro bono scheme currently operating in Victoria) has noted that the changes to legal aid guidelines has impacted on the ability of lawyers to take on pro bono matters. This is particularly because of the financial impact on the junior bar, family and criminal law practitioners. There is marked tension in the expectation that lawyers will assist the community to access the legal system by taking on pro bono cases through a sense of professional, ethical and philosophical responsibility when the Commonwealth Government is failing to meet its responsibilities to ensure basic access to the legal system by people in need.

8. There have been reports of a noticeable increase in the number of people representing themselves in Family Court proceedings due to an inability to obtain legal aid funding. Often such persons attend at Community Legal Centres where workers and/or volunteers may be able to assist in the completion of documentation, however, are quite often unable to provide court representation due to a lack of resources. The Federation views that self representation in Family Court matters is undesirable and, in particular, may have adverse ramifications for persons who are at risk from domestic violence such as women and children.
9. There have been many alarming reports in relation to the operation of a ceiling or cap on grants of legal aid imposed by Victorian Legal Aid with respect to Family Law matters. Once the ceiling/cap is reached the legal aid is cut off. This system is resulting in many clients experiencing a sense of hopelessness as they feel that it is not worth embarking on a legal process when it is likely that legal aid will be cut off leaving the person without legal representation. The operation of the cap is often resulting in children and women in being placed at risk. It is important to note that if a parties' matter has exceeded the cap it is often because the case is complex. Such complex cases, whilst not the norm, do nonetheless arise and, due to their complexity, the parties and the court necessarily require legal representation to be involved. Further, due to their complexity these cases are the least likely to attract pro bono assistance. The Federation recommends that the cap on legal aid funding in Family Law matters be removed.
10. There are various reports of courts being choked because of unrepresented persons attempting to conduct matters and/or requiring adjournments. There are concerns that duty lawyer services at courts are being overstretched. In June, 1997 the Victorian Court of Appeal made a formal request to the Criminal Bar Association to work for no fee due to the influx of unrepresented litigants appealing to the criminal division. The Criminal Bar Association refused this formal request stating that whilst they would continue to do free legal work they would not alleviate problems caused by unwarranted legal aid cuts. Judiciary in Victoria at various levels including the Court of Appeal, Family Court and Supreme Court, and the Bar have criticised "unreasonable" legal aid guidelines (*The Age* 30.06.97)
11. There have been requests at the Federation for referral lists from organisations reporting an increase in persons with legal difficulties seeking their assistance, for example, electorate offices of members of parliament.

12. Many of the concerns raised by urban Centres are echoed by rural and regional Centres, however, the hardship for persons in rural and regional areas is often exacerbated due to the lack of community services in such areas including preventative programs, self help programs, legal education and advice services. Furthermore, various courts in rural and regional areas either do not have, or have limited, duty lawyer and/or court support programs.

**Attachment C:
Case Studies**

DISCRIMINATION LAW

1. A young man with a hearing impairment was refused employment with a government agency due to the blanket application of hearing standards. The young man had medical evidence to support the contention that he had compensated for his hearing deficiency in other ways and that he was capable of performing the inherent occupational requirements of the position. Despite this case having ramifications for other hearing impaired persons and the application of medical standards as a bar to employment, legal aid was refused. This person was unable to pursue his legal rights due to the lack of legal aid.
2. Deaf students complaining of discrimination in tertiary study because of a reduction in interpreter and note taker services was refused by Victoria Legal Aid were denied legal aid.

CIVIL MATTERS

3. An individual affected by a local council's inaction and failure to stop a nuisance affecting their lifestyle, sleep and safety was refused legal aid and because of this was unable to access an available legal remedy.
4. A client of non English speaking background had funds from a 1988 settlement fraudulently taken by her solicitor. She was then taken through bankruptcy proceedings by the solicitor in pursuit of his fees and lost her home and life savings. She was been refused legal aid.
5. A plaintiff was forced to withdraw from a meritorious professional negligence proceeding in the County Court proceeding due to legal aid being withdrawn a short time before trial.
6. A seventy -five year old plaintiff in a medical negligence case had good chances of success, however legal aid was withdrawn prior to the plaintiff entering Health Services Commission conciliation. The plaintiff was a pensioner and a nursing home resident and unable to pay to obtain necessary medical reports. The lack of legal representation at conciliation weakened the plaintiff's position and diminished the prospects of a successful conciliated outcome.
7. An infant was unable to contest a Wills and Estates case. There was a grant of Letters of Administration and the client wished to contest the distribution of the estate. However, because no legal aid was available, the case could not be commenced.

8. A person was unable to enforce the terms of a building contract due to a lack of availability of legal aid.
9. Several persons had claims against banks where documentation had not been adequately completed or false/ misleading representations had been made. Due to a lack of legal aid funding they were not able to pursue any remedies.

FAMILY LAW

10. A father of 8 year old boy is on \$4,800 per year as he is starting a gardening business. The mother denied him access and refused to go to counselling. Legal Aid was refused to the father and he has been told that he can afford to fund his own case.
11. A client was assaulted, raped and tortured by her partner, who received ten years' jail. She and her partner had five children, four of whom have severe behavioural problems. The father wanted custody (in jail). A court report suggests access/contact is a right of the children. Three weeks prior to the final hearing on the matter, legal aid imposed a retrospective ceiling imposed on mother and child's representation, therefore denying them representation at a crucial time in their case.
12. Until August 1995, a mother had sole custody and guardianship of her ten year old boy. Due to long-term harassment from her former partner she took her son interstate. The father found them and was able to obtain an interim continuing access of one to two hours per week supervised. The father sought further variation of custody and access arrangements. The child's representative supported the child staying with the mother. Four days before the final hearing legal aid was discontinued for the mother and child representatives, because of a \$15,000 "cap" on the grant of legal aid. The mother continued unrepresented for two and a half weeks in a case that should have taken three to four days and ends up with joint residence of child.
13. In 1993 a father sought custody of his daughters now aged thirteen and fifteen years. A child representative was appointed and a welfare report was ordered. On the strength of the welfare report and the child representative's recommendations the husband conceded custody and obtained liberal access at a final defended hearing in February 1994. Shortly after the final defended hearing the father again sought custody on the basis of one the child's wishes. A new child representative was then appointed. A second final defended hearing occurred in March 1995. On the strength of expert evidence (including that presented by the husband's witness) the husband was granted supervised access for six hours once every three months. It was the Court's view that the husband was highly manipulative and that the contact would result in the child being alienated from her mother and sister and that she was at some risk of being abused. Since the orders were made in March 1995 the child has run away on several occasions which has necessitated the issuing of warrants. The child is now residing in voluntary foster care. The husband has issued a further application seeking alternate weekend contact. Another welfare report is opposed to overnight contact and proposes restricted contact. The child's legal representative fully agrees

with this opinion. The husband is self-represented. The wife has been represented for the last twelve months on a pro bono basis. Her solicitor has advised the Court that she is unable to continue to act unpaid. The child's representative's costs have exceeded the \$15,000 maximum set by Legal Aid, therefore there will be no further funding. Given that both parents would appear unrepresented in such a complex matter, it is very important for the child representative to appear before the court to ensure the child's interests are properly considered. However the legal aid funding cut means this is not going to happen.

14. A legally aided client is favoured with an order for custody/residence of the children. The father has an order for access/contact. He lives interstate and the current arrangements are that the children will be with him for 25% of the year. Since the original order for custody was made for the mother with access given to the father in 1995, the mother has been before the court ten times. Issues prompting the matter being listed include:

- Two changes of venue applications by the respondent (father). Both of which have been unsuccessful.
- A proceedings before the Court where a child representative was appointed.
- A return date for an application of the mother seeking a warrant for the return of her children, as the respondent (father) refused to return them from interstate. The warrant was granted.
- When the mother returned to Court the father did not attend. Accordingly sole guardianship and custody orders were made in favour of the mother.
- In two hearings in early 1996 the father successfully applied to have the above order overturned on the basis that his previous solicitors did not notify him of the hearing date in February. The Court accepted this and reinstated the former access/contact arrangement.
- The matter was to return to Court and events during a previous contact period led an interstate Department of Community Welfare Services to assert that the children had been mistreated. The mother sought discharge of contact orders.

On numerous occasions the matter has appeared before the Court through no fault of the mother's. The \$15,000 cap meant that her legal aid would end at the conclusion of the hearing. She would have no representation to fight the final hearing and will be unrepresented in any further hearings that could arise.

15. A party denied legal aid and with no other means to obtain representation resorted to kidnapping the children.

16. In a case where there was alleged abuse by the father and assertions of child neglect, the child ran away from home and was in foster care. The husband was representing himself and the wife had a pro bono barrister. Since the matter first arose the separate child representation provided by legal aid ended and the wife no longer had pro bono representation leaving all parties (including the child) unrepresented.

17. In a long-standing contact dispute the father had a psychiatric condition requiring medication to regulate his obsessive-compulsive behaviour. The child had behavioural problems. Access and custody were being argued over and the mother was refused legal aid. If the contact was to work the mother needed assistance to ensure that all court requirements (such as the father's continuous medical treatment) were met.
18. There have been incidents of domestic violence because a refusal of legal aid has left women unable to properly negotiate matters or pursue them in court.
19. After nine years of abuse, a client left a marriage marred by serious domestic violence. The wife sought funding to apply for residency for the child from the marriage. But the application was refused on the grounds that the circumstances did not justify assistance.
20. A case involving child pornography, Child Protection Squad, Victoria Police, the Federal Police, several psychologists, psychiatrists, law witnesses and subpoenaing the Department of Health and Community Services file, was listed for a two week hearing in the Family Court. The father and the mother both exceeded their \$15,000 cap prior to the hearing of the case and the separate representative was terminated after exceeding the retrospective "cap".
21. A client has been unable to pursue a court case to pursue a variation of contact hours because of a recent change of family circumstances. The client believed that the children were substantially at risk because of the arrangements.
22. A family law client sought leave to institute property proceedings out of time on a needs basis. Legal Aid was refused.
23. In one family law case the client's child was kidnapped. The family law cap was applied by legal aid. The client was not able to represent herself. She lacked the educational and verbal skills to put her case before the court but there was no funding available for a solicitor to provide assistance. She lost contact with her children.
24. In one case the relationship between the parents deteriorated due to a lack of funding available for representation of the parties and the parties having to deal directly with each other about difficult and emotive issues.
25. One client wished to gain an order for residence of the children. Ongoing legal aid was necessary in order to build up the necessary evidence for contesting residence. However legal aid was withdrawn because of an imposition of the cap. Accordingly the case was unable to proceed.
26. One client had ongoing difficulties and disputes with the father of her child. The main problem causing the disputes was the fact that she was a lesbian. Accordingly the issues of contact and residence were a matter of ongoing dispute. This is a case where it could have been easily resolved through proceedings being issued in the Family Court. However legal aid was not available.

27. In one case a client sought legal aid so as to establish contact with her children. She was the non-custodial parent. Legal aid was refused. The mother was unable to regain contact with her children.
28. In one case where legal aid was refused there was an increase in domestic violence in the household and the woman was unable to escape the home and find alternative accommodation.
29. In one case a client's grant of legal aid was terminated two days before the final hearing because the cap of \$15,000.00 had been reached. The client's matter had been ongoing for over two years. The client's case had merit and involved complex issues in relation to the welfare of the children.
30. In one case, the client was unable to pursue a case for a Residence Order for the children due to the unavailability of aid. The client alleged that his wife had been harming the children after Health and Community Service involvement had ceased. The client was concerned for the ongoing welfare and safety of his children.

CRIMINAL MATTERS

31. An intellectually disabled man on bond was charged with burglary of \$3,500 worth of goods and was refused legal aid.
32. A defendant had a valid defence to assault charges by police, namely self-defence from police harassment. He was refused legal aid and yet still wished to contest the charges. A community legal centre tried to help him prepare the case but due to resources' shortage could not be in court on the day. An inarticulate man, he panicked about his inability to represent himself and eventually pleaded guilty.
33. A lack of any legal aid or duty lawyer representation at a court necessitated a community legal centre lawyer to be required without warning to rush downtown to represent someone in a criminal matter.
34. An individual appeared in the Melbourne Magistrates Court over a charge arising from possession of a substantial quantity of cannabis. Legal aid was refused because of funding guidelines on the likely penalty. Unexpectedly, the defendant received a jail sentence, because he had been unable to convince the court the drug was for personal use (not trafficking). Legal aid funding was granted for an appeal. An expert drug counsellor presented evidence that through his substantial contact with the defendant and work experience generally he was of the view that the quantity found was similar to that which an addicted person could reasonably be expected to consume over a relatively short period of time. Whilst the client was successful on appeal he had served time in jail unnecessarily. Had the aid not been provided, the client could still be languishing in jail. It would have been more efficient and cost effective for the matter to have been properly dealt with at the first instance in the Magistrates Court.

35. Restricted legal aid funding and restricted availability of aid for expert report has curtailed the ability of practitioners to properly represent clients.
36. Applications for assistance in summary matters has been refused even where there is an arguable defence.
37. A client pleaded guilty because legal aid was not available to fund a contest a criminal matter.
38. Because legal aid funding available for committal hearings is so limited, some clients are not electing to have a committal even though one is warranted on the facts.
39. One client remained in custody because the duty solicitor did not have time to prepare a bail application due to an overload of cases.
40. A person was convicted of car theft and had his licence suspended for four months wished to appeal to the County Court. Legal aid for an appeal was declined even though he had no prior convictions and an arguable case for overturning the conviction on appeal.
41. No assistance of a duty lawyer has been available for probationary licence holders charged with careless driving or other minor traffic offences and people charged with a first offence of possession and use of cannabis.
42. Many clients have had applications for legal aid refused for matters where they are charged with summary offences. Many clients have as a result have had no choice but to represent themselves.
43. A 37 year old man with serious drug and alcohol problems was refused aid for minor traffic offences (careless driving and failing to stop at the scene of an accident). This caused increased anxiety and perhaps increasing problems with drug and alcohol because of the lack of available legal aid.
44. A 37 year old woman was charged with theft from her employer. She had no prior convictions. She was refused legal aid and unable to pay for private representation. Accordingly she was unable to contest the charges and had to plead guilty despite the presence of an arguable defence.
45. In one case, because legal aid was refused and his solicitors were unable to provide representation, the client did not attend court. He went into hiding whilst he was on bail. Obviously this will have serious repercussions when he is later arrested.
46. A person was unable to proceed with an application for a retrial although he had good legal grounds for doing so due to unavailability of legal aid.