

LEGAL AID CHANGES – SHIFTING THE BURDEN
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Thank you for asking me to come to speak. It is an absolute pleasure. Forty years is such a long time.

The Federation of Community Legal Centres has a lot to celebrate today. If you think about the CLCs back in the early days of Fitzroy and Springvale it was very much on the fringes of the legal community in the early seventies. The Fitzroy Legal Service played a very important part in ensuring people were appropriately treated upon arrest, and for those who were charged, were offered a proper defence in court. So at a very low community level right from the beginning the CLCs played a part and connected with the community.

The CLCs have not merely survived, however, they have flourished. Today there are approximately 200 centres operating across the country. Of course the main CLC funding is a joint program between the Federal and State governments who deliver almost \$50 million in funding. The staff here in Victoria are in the vicinity of 500 in number, 200 of those are lawyers. What a significant achievement and what a marvellous, superb service is provided to the community. The question must be asked, where

would the community be without the CLCs and that service and what sort of injustices would be rendered otherwise in the community?

Indeed, the CLCs have changed the tradition of the legal system. They have changed the way everyday people use the law and it has not just been about representation in courts. It has been about educating the community so that the community understands that they have rights and how to exercise those rights. The CLCs, particularly through the Federation, have played a key role in educating the wider community about the need to protect rights, in particular human rights, and ensuring governments understand the significance of those rights. We need only refer back a few years ago to the dialogue which occurred over the question of whether Victoria should have a Human Rights Charter. The Federation was a key player. Now, in Victoria we are in fact the national leader in the delivery of jurisprudence on human rights.

If we think about it, the big cases which have run nationally - protecting human rights and individuals - have more often than not emanated from Victoria and been run by Victorian lawyers. We might think of the big cases such as *Tampa* or recently the High Court immigration cases. It has been Victoria that has been at the

forefront. I understand that a senior government lawyer one day turned to a Victorian lawyer as the two of them were waiting for the High Court to come in, usually a nerve racking moment for advocates. The government lawyer turned to the Victorian lawyer who was appearing pro bono and said, 'what is it about Victoria and public law cases? Is there something in the water?' That Victorian barrister smiled and then proceeded to win the case. There is a very strong tradition in this state that is manifested in the way in which the Federation and all the centres present themselves now after forty extraordinary years. But of course, the forty years have never been without their challenges. It might be that at this very time the centres are facing their greatest challenge or certainly one of the greatest.

In the last year or so, the State of Victoria has seen a significant increase in demand for legal aid. Indeed it has occurred at a very difficult financial time. There is no choosing when the challenges arise. They come along, they impose themselves on those of us who work in the justice system and we have to find solutions.

Recently, the Law Institute of Victoria hosted a meeting concerned with Victoria Legal Aid proposed funding cuts. Let us understand the nature of the pressures presently upon VLA. External forces have come to bear. In Victoria, the Government, when elected,

resolved to increase the number of police. Up to 1700. As the numbers of police are progressively being increased it has been combined with a priority of Victoria Police: domestic violence, the prevention of it and the protection of victims of domestic violence. So, significantly extra police and a particular focus on a volatile area. At the same time, in both Federal and State governments, there has been a very laudable commitment to preventing domestic violence and protecting victims. Thus, increased funding has been channelled into these areas.

Increased funding has seen an increase in the number of Human Services workers. We have the Cummins Report which calls for the increased protection of children and thus the State government has responded, again in a laudable way. But all these changes have an impact on the justice system. They have an impact on what we all do and, in particular for the purposes of today's discussion, these changes by government and Victoria Police have an impact on the CLCs.

Let me give you an example. The increased number of police is now forecast, on Victoria Police data, to see an increase of 25% in criminal cases going through the courts. In the courts themselves, we anticipate that a large number, if not the majority of these cases, would present as sexual offences. That will have an impact

on the County Court and its case load and in turn there will be appeals against convictions in the County Court which will have to be dealt with in the Court of Appeal in the Supreme Court. So all these statistics and changes may occur but in a sense they create a sea in which the CLCs must swim. Ultimately, if there are changes in legal aid, it will trickle down and impact on the CLCs.

So, is it just a question of acknowledging unprecedented demand and pressure on VLA? There has been an increase in detected crime for the reasons I have explained. Historically, legal aid has always had to ration its funds. But the current problem as I understand it for VLA is that it has been called upon to spread its funds which were largely set at levels four years ago, with no real adjustment. Thus two factors have conflated. There has been increased demand arising from the various government and police policies I have averted to, together with an increase in the cost of private legal services. Lawyers are inevitably entitled to CPI increases – they must put food on the tables for their families just as all other professionals wish to do. However, It is not a matter of blame. It is a matter of trying to find a solution.

The impact is not just in the areas I have referred to. There is also an impact on the courts. Let me tell you a little about that. If Legal Aid is a shrinking resource and if there is greater pressure on

the CLCs, I anticipate that we will have an impact in the courts with self-represented litigants. We know in the courts that the numbers of self-represented litigants are increasing. I will speak first of all on the impact in the civil jurisdiction.

I can give you an example of an actual case that found its way from the County Court to the Supreme Court. Two individuals thought that they had mortgage insurance for their home loan. For various reasons they did not. The insurer denied the cover. One of the individual home owners became unemployed. Litigation occurred and they could not obtain any legal representation. They fought in the County Court to keep their home which they were at risk of losing and failed. Self-represented, they ran an appeal in the Court of Appeal of the Supreme Court. They succeeded and the individuals were able to have orders made by the court which saw their position being reinstated and compensation being ordered against the particular bank that had prevented them from the insurance to cover their mortgage. But, if we analyse the cost: there was a trial in the County Court, there were then three judges occupied in the Court of Appeal and all of this had to be sorted out with self-represented litigants. If only they had had the capacity to be legally represented the cost to the courts and therefore to the community may well have been saved.

We cannot underestimate the impact of self-represented litigants on the courts in the civil jurisdiction. Presently, around 26% of civil appeals in the Court of Appeal are brought by self-represented litigants. Each of these cases takes time and has to be dealt with carefully and thoroughly. In our duty court, called the Practice Court, over 11% of cases last financial year were brought by self-represented litigants. Each case again has to be dealt with carefully and thoroughly by the judge to ensure that no injustice is done. Last year the Supreme Court Registry assisted over 1300 self-represented litigants. We had one case in the last couple of years in the Supreme Court where a self-represented litigant sued the Victoria Police. That trial ran for over 100 days. Now that is 100 days of judge time. I make no criticism or comment upon the self-represented litigants but the fact is each of these cases involved considerable judge time - a very precious and expensive commodity in the community.

If I can switch now to the impact of self-represented litigants in the criminal jurisdiction. We have various contempt cases coming through the Supreme Court where individuals purport to self-represent. We then see in the lower courts the impact of the abolition of suspended sentences. It seems, anecdotally, that there are fewer pleas of guilty and there is a heightened need for

legal representation because the individual consequences are inevitably greater. If an individual faces the prospect of a custodial sentence then it is likely they want to be legally represented. This is another impact if Legal Aid is stretched too far.

We see this, particularly in appeals in the Court of Appeal, where a trial has been run by a less experienced, lower level lawyer who is representing accused persons. If Legal Aid briefs 'down' then there is inevitably a heightened risk of error in conviction. Those matters go on appeal and unfortunately some conviction appeals are successful and overturned as a result of the inexperience of defence counsel. Then there are other errors that are made at sentencing where judges are not alerted to matters under the *Sentencing Act* and relevant facts. What happens? There is an appeal and the cost of judge time in trying to rigorously review these matters on appeal. Then, if the appeal is successful and a retrial is ordered the whole matter has to go through the system again. Victims have to repeat their evidence and experience the trauma again and so there is this cumulative cost. There is also the cost of the prosecution, that is not compensable in anyway, but is a cost that the Office of Public Prosecutions must carry. In addition, if the conviction appeal is successful, the State carries the cost by virtue of the fact that there is a certificate directed under the *Appeal Costs Act*. There is a cumulative cost that could

potentially be avoided and minimised if there was appropriate legal representation at the beginning through adequate Legal Aid funding.

All these pressures on Legal Aid lead to a shifting of the cost across the system. Ultimately what we are talking about is the right of the individual to a fair trial. Provision of legal representation is a fundamental way of ensuring a fair trial. We know this from the High Court statements in *Dietrich*. In Victoria there is now the additional factor of the requirements under the *Human Rights Charter*.

All this discussion about the problem leads us to think of the various solutions. It is not for the courts to find the solution to this problem, ultimately it is a financial one for government and interested players. But, could I make a couple of suggestions?

Each day through the courts, particularly in our Practice Court, significant orders are made under the Confiscation legislation. Substantial amounts of money are retained by government as a result. These monies are spent in various ways and go into consolidated revenue. There might be an opportunity for a fixed amount of monies, achieved through the Confiscation legislation and orders by courts under it, for monies to be designated for

Legal Aid funding. There may be other opportunities. Perhaps there is a chance for Attorneys-General across the country to look at some kind of national fee levy which could be imposed in civil litigation. Desirably, it is not something to be done at a local level. It is best done at a national level so that forum shopping and fee avoidance is not encouraged. But as I say, it is not for the courts and those matters are ultimately no more than suggestions.

If I might return specifically to the Community Legal Centres, we cannot underestimate the impact on the centres with the reduction of legal aid. If legal aid is reduced there is a risk more people will come and knock on the doors of the centres. There will be more pressure. There will be more difficult clients; ultimately the centres are dealing with some of the most disadvantaged individuals in our community. The CLCs over the last forty years and most recently have played a very significant role in informing the community about the fundamental rights of the individual.

Thank you so much for the privilege for speaking to you this morning. I wish you well on this marvellous occasion and again congratulations on forty magnificent years.

(This is an edited version of a speech at the Federation of Community Legal Centres 40th Anniversary Forum, Wheeler Centre, Melbourne, Tuesday, 4 December 2012)