



Victoria Legal Aid: Means Test Review Consultation Paper

September 2016



Jesuit
Social Services
Building a Just Society

Table of Contents

Who we are	2
Our recommendations	4
Introduction.....	5
Recognising disadvantage	6
Addressing disadvantage through Victoria Legal Aid reforms	9
1. Recognising disadvantage in means test exemptions and calculations	9
2. Responding to the geography of access to justice.....	10
3. Accessing Victoria Legal Aid - no wrong door approach	11
4. The importance of support for disadvantaged people during bail applications	12

For further information, contact:

Julie Edwards, CEO, Jesuit Social Services

T – 03 9421 7600

E – julie.edwards@jss.org.au

Who we are

Jesuit Social Services works to build a just society by advocating for social change and promoting the health and wellbeing of disadvantaged people, families, and communities.

Jesuit Social Services works where the need is greatest and where it has the capacity, experience and skills to make the most difference. Jesuit Social Services values all persons and seeks to engage with them in a respectful way, that acknowledges their experiences and skills and gives them the opportunity to harness their full potential.

We do this by working directly to address disadvantage and by influencing hearts and minds for social change. We strengthen and build respectful, constructive relationships for:

- **Effective services** – by partnering with people most in need and those who support them to address disadvantage
- **Education** – by providing access to life-long learning and development
- **Capacity building** – by refining and evaluating our practice and sharing and partnering for greater impact
- **Advocacy** – by building awareness of injustice and advocating for social change based on grounded experience and research
- **Leadership development** – by partnering across sectors to build expertise and commitment for justice.

The promotion of **education, lifelong learning and capacity building** is fundamental to all our activity. We believe this is the most effective means of helping people to reach their potential and exercise their full citizenship. This, in turn, strengthens the broader community.

Our service delivery and advocacy focuses on the following key areas:

- **Justice and crime prevention** – people involved with the justice system
- **Mental health and wellbeing** – people with multiple and complex needs and those affected by suicide, trauma and complex bereavement
- **Settlement and community building** – recently arrived immigrants and refugees and disadvantaged communities
- **Education, training and employment** – people with barriers to sustainable employment.

Currently our direct services and volunteer programs are located in Victoria, New South Wales and Northern Territory, and include:

- **Justice and crime prevention services:** supporting young people and adults in the justice system, and assisting them to make a successful transition from custody back into the community. Within the suite of services are Perry House, Dillon House and Youth Justice Community Support Services.
- **Jesuit Community College:** increasing opportunities for people constrained by social and economic disadvantage to participate in education, work and community life and reach their full potential.
- **Community and Settlement Programs:** working with newly arrived migrants across metropolitan Melbourne and in NSW, including the African Australian and Vietnamese communities.

- **Connexions:** delivering intensive support and counselling for young people with co-occurring mental health, substance and alcohol misuse problems.
- **Artful Dodgers Studios:** providing pathways to education, training and employment for young people with multiple and complex needs associated with mental health, substance abuse and homelessness.
- **The Outdoor Experience:** offering an alternative treatment service through a range of outdoor intervention programs for young people aged 15 – 25 years, who have or have had issues with alcohol and/or other drugs.
- **Support After Suicide:** supporting people bereaved by suicide, including children and young people.
- **Western Sydney Program:** delivering social enterprise and other community building that provide affordable food, training and employment opportunities to people living in the area of Mount Druitt, Western Sydney.
- **Just Leadership:** Working in partnership with community and corporate enterprises to foster leadership for a just society. This includes the African Australian Inclusion Program, a professional bridging program developed in partnership with the National Australia Bank.
- **Capacity building** activities in the Northern Territory and NSW with Aboriginal communities to improve their situation and to have more control over their lives.

Our recommendations

- **Recommendation 1:** That Victoria Legal Aid include more categories of disadvantage in its priority groups to be given access to a duty lawyer. Examples of categories that could be included are rural or remote residence, the elderly and those with a physical disability.
- **Recommendation 2:** That Victoria Legal Aid include more categories of disadvantage in its exempted groups, and that this reflects the thresholds for access to duty lawyers.
- **Recommendation 3:** That Victoria Legal Aid consider a broader range of asset and expense deductibles in the means test and, in particular, ensure that the test will be met by anyone living below the poverty line.
- **Recommendation 4:** That Victoria Legal Aid increase its access to legal aid for individuals who do not have access to specialist courts and services.
- **Recommendation 5:** That Victoria Legal Aid works with stakeholders to strengthen methods to ensure people who are disadvantaged are brought to, and assisted into, their services. This might include assertive outreach, an increase in support services, or assistance for people without access to technology (i.e. internet, mobile phones).
- **Recommendation 6:** That Victoria Legal Aid provides legal assistance for all bail matters.

Introduction

Jesuit Social Services welcomes the opportunity to respond to the Victoria Legal Aid *Means Test Review Consultation Paper*. Every Victorian should have the opportunity to access legal services so that they can appropriately exercise their rights in the face of a court or tribunal.

Our submission focuses on the difficulties some groups face in accessing legal aid under the current rules, and the consequences of this exclusion both for the individuals involved and the community as a whole. Specifically, we consider:

- Those with cognitive impairments and mental health problems
- Those who currently fail the means test and yet are living in poverty
- Those applying for bail
- Those who, for geographical or other reasons, are unable to access specialist courts and services
- Those who, as a result of complex disadvantage, are not proactive in accessing legal aid.

Our submission draws on our experience with vulnerable people and communities in Victoria and our '*Dropping of the Edge*' research series¹, which provides extensive information about the extent and geographical spread of disadvantage across Australia, and its entrenched nature. Our submission is also informed by our involvement in the Enabling Justice project, a collaboration with the Centre for Innovative Justice at RMIT to understand why people with an acquired brain injury (ABI) are so overrepresented in the criminal justice system, and identify opportunities for providing greater support to this group.

It is clear that vulnerable Australians – in particular people with cognitive impairment, indigenous people, the unemployed, those who have not completed secondary school, and those experiencing poverty – are over-represented in our prisons. This disadvantage becomes deeper embedded as people progress from early contact with the criminal justice system through to, in the most severe cases, imprisonment, with many vulnerable young people becoming caught in a lifelong pattern of cycling in and out of the justice system. Victoria Legal Aid provides a vital defence against this compounding disadvantage, aiming to provide much needed legal information and representation to those who can least afford it. The support from Victoria Legal Aid not only gives recipients a better chance to make their case to the court or tribunal, it also highlights to the court the vulnerability of the person before it, which may in turn have an impact on the legal outcomes. It is essential that vulnerable people are able to access aid both to protect their immediate interests and to help stem a potential slide into criminal behavior.

Bail restrictions introduced in recent years have led to a growing number of people in our prisons and youth detention centres who have not been sentenced. People experiencing disadvantage are at heightened risk of falling into this situation as their ability to argue for and access bail is diminished by their vulnerable circumstances. We are concerned about the unprecedented growth in the use of remand and the extent to which this falls disproportionately on the vulnerable.

¹ Vinson, T & Rawsthorne, M (2015) *Dropping off the Edge 2015*, Jesuit Social Services and Catholic Social Services Australia, <http://www.dote.org.au/findings/full-report/>; Vinson, T (2007) *Dropping Off the Edge*, Jesuit Social Services, Richmond; Vinson, T (2004) *Community Adversity and Resilience - The distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion*, Jesuit Social Services, Richmond; Vinson, T (1999) *Unequal in Life*, Jesuit Social Services, Richmond.

We believe there is an opportunity for legal aid reform to address this disadvantage. Currently, the threshold of the means test is set so low and the contributions set so high, particularly for Category 2 and 3 matters, that those least likely to be able to navigate the court system are often excluded from aid. As a result the disadvantage they already face in the community is exacerbated as they come before the courts, and the increased risk of remand rather than bail sets in train a deeper contact with the justice system that is costly on so many levels. We believe the legal aid system must recognise the significant impact that can be had at this point, not only on the life of the particular person affected, but also on community safety in the future and on the cost to society of an individual deeply embedded in the justice system.

We also note that the increased use by courts of community corrections orders has particular compliance risks for those who are disadvantaged (e.g. those with cognitive impairment, mental illness, homeless, etc.). Vulnerable people are more likely to struggle with the conditions of an order and will likely need assistance in representing this to the court. Where a person fails to comply with an order, he or she risks being pulled further into the criminal justice system, with prison the potential next step.

In rural, remote and outer metropolitan areas, where access to the range of specialist courts and lists is less likely, the ability to access legal aid, especially representation, is critical. There is an opportunity for Victoria Legal Aid to fill a gap in service provision, to ensure people are not unfairly treated because of their geographic location.

Practical accessibility of Victoria Legal Aid should also be closely examined, as we are aware of cases of difficulties in accessing aid, even when means-test criteria are met. In addition to the challenges imposed by certain types of disadvantage, there is an emerging risk of specific disadvantage from a lack of access to the internet or the tools of internet (laptops, iPhones). *Dropping off the Edge 2015* found lack of internet access was near the top of the list of indicators of social disadvantage². Although internet technology, interactive tools and other innovations have led to vital gains in reach and efficiencies for Victoria Legal Aid, it is important to recognise this “progress” may leave some of the vulnerable even further behind.

Recognising disadvantage

Jesuit Social Services’ experience working with young people and adults involved in the criminal justice, education and training, and mental health systems, as well as a robust evidence base, has focused our efforts on supporting people to build pathways to productive lives. We believe this works to reduce crime, strengthen our communities and enhance community safety.

It is in the justice system at the intersection of disadvantage, mental and physical disability, and their travelling companions – poverty, homelessness, disengagement from education and employment, drug and alcohol use and family violence – that we see a need for greater availability of legal support.

Of particular concern for Jesuit Social Services is the extent to which failures in access to legal aid enable circumstances in which people, particularly the poor and disadvantaged, are drawn further into the criminal justice system. We know that people with cognitive impairment, mental health problems, intellectual disabilities, and those with an acquired brain injury are significantly overrepresented in their contact with the justice system and substantially overrepresented in our youth detention

² Vinson, T & Rawsthorne, M (2015) *Dropping off the Edge 2015*, Jesuit Social Services and Catholic Social Services Australia, <http://www.dote.org.au/findings/full-report/>

facilities and in adult prisons. For example, 42 per cent of men and 33 per cent of women in prison have an Acquired Brain Injury (ABI), compared to 2 per cent in the community³.

The Enabling Justice Project

Jesuit Social Services and the Centre for Innovative Justice at RMIT established the Enabling Justice project in 2015 to understand why people with an ABI are so overrepresented in the criminal justice system and to offer alternative responses that would provide greater support to this group and direct them away from the criminal justice system.

Through one-on-one interviews and the establishment of a justice user group, the project has sought to explore why people with ABI are so over-represented. Justice users themselves identified areas in need of reform and participated in discussions about issues and ideas for improving the criminal justice system. A Consultation Paper was produced to give voice to the experiences and views of the justice users involved in the project. The full consultation paper can be found at <http://jss.org.au/enabling-justice-project-consultation-paper/>.

Sometimes brain injury is not easily recognisable as it can affect specific and isolated areas of functioning. Because a brain injury can happen at any time in a person's life, in either childhood or adulthood, it is possible for the injury to go undetected, particularly if it is the result of a cumulative process (as with alcohol-related brain injury), or the person was experiencing homelessness, mental illness, family violence, or drug and alcohol misuse, where comprehensive medical treatment and rehabilitation services may never have been accessed. For this reason ABI is often referred to as a 'hidden' disability, and the actions of people with ABI may be put down to behavioural and personality issues.

Some of the ideas that emerged through discussions with the justice users who participated in the project include:

- People with ABI feel vulnerable in police interactions and would benefit from clearer language and respectful communication.
- Appropriate legal support is not always offered to those who need it
- Plain, clear language and respectful communication at Court is important for people to understand and engage with what is happening to them, but it is rarely experienced
- Current sentencing options for people with an ABI are too limited, meaning that prison is often the only available option
- A term of imprisonment should be a punishment of last resort for low-level offending
- A breach of a CCO may be an indication of a cognitive impairment and/or multiple and complex needs, and should prompt referral to a solution-focused Court or list rather than an immediate return to mainstream Court and prison. Legal support is vital in this process.

The Consultation Paper asks stakeholders to provide feedback and the project will continue to examine options for reform. A final report of the project will be released in early 2017.

³ Victorian Ombudsman (2015) *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015, page 87.

Dropping Off The Edge

In 2015, Jesuit Social Services along with Catholic Social Services Australia released the findings of its *Dropping off the Edge* report (DOTE)³, which found that complex and entrenched disadvantage continues to be experienced in a small number of locations in each state and territory across Australia, including in Victoria.

Our research confirms that disadvantage, and the human and social conditions it fosters, is heavily concentrated within relatively few locations.

DOTE looked at a range of indicators, including evidence of interaction with the criminal justice system. Our research found that those living in the most disadvantaged 3 per cent of postcodes in Victoria are:

- twice as likely to have criminal convictions
- 3 times more likely to be experiencing long term unemployment
- 2.6 times more likely to have experienced domestic violence
- 2.4 times more likely to be on disability support.

There was a correlation across the various indicators of disadvantage that suggested many people are caught in a “web” of disadvantage, resulting in multiple barriers to productive community engagement. The research supports the notion that it is ineffective to consider any one element of disadvantage in isolation, as various challenges interact with one another to produce a much harsher picture than may at first be perceived. This aspect of *Dropping Off The Edge* has informed our comments on the means test.

In late 2015 we were reminded by Victoria’s Supreme Court that:

*Legal aid is closely connected with human rights. For the poor and disadvantaged who are most vulnerable to having their human rights infringed, legal aid can be indispensable for obtaining redress against the infringement and vindication of their rights through the legal process. VLA ...are public authorities under the Charter (s 4(1)(b)) and, under s 38 (1) of the Charter, must act compatibly with and make decisions giving proper consideration to the human rights in the Charter.*⁴

We highlight four specific structural problems with the legal aid process that prevent those who desperately need aid from promptly receiving it:

1. The means test thresholds and exemptions do not sufficiently recognise the weight of disadvantage, especially where disadvantage is present in multiple forms.
2. The geography of access to justice is not sufficiently recognised and weighted in the decision for legal aid.
3. The means and processes to access legal aid remain a significantly hurdle, particularly where internet and phone are the standard for general advice and as an entry point for legal aid.
4. People suffering disadvantage are in particular need of legal support during initial bail applications, yet this is not recognised in current practice.

In making the following recommendations, we acknowledge the significant processes Victoria Legal Aid has developed over the years to focus its service on those who need it most, and the fact that the

⁴ Bayley v Nixon and Victoria Legal Aid [2015] VSC 744 (18 December 2015) [37]

current consultation responds to evidence that some of those who do need it the most, miss out. We understand that most of the work of Victoria Legal Aid is with the 'socially and economically disadvantaged, people with disability or mental illness, children, the elderly, people from culturally and linguistically diverse (CALD) backgrounds and those who live in remote areas'⁵.

Addressing disadvantage through Victoria Legal Aid reforms

1. Recognising disadvantage in means test exemptions and calculations

Access to a Duty Lawyer – Victoria Legal Aid currently applies a different test for access to a duty lawyer compared with subsequent services.

In allocating a duty lawyer to a matter, Victoria Legal Aid prioritises a number of categories, being people who:

- cannot afford a private lawyer
- have an intellectual disability, acquired brain injury or other mental health issue
- are experiencing homelessness
- cannot communicate effectively in English
- are a child or young adult going before the Children's Court
- are dealing with a family violence matter
- are in custody or facing a serious penalty
- are indigenous Australians⁶.

For access to duty lawyers on affordability grounds, a concession card is sufficient proof to meet the income test, and an income declaration is sufficient for other accused people.

Victoria Legal Aid's guidelines require that 'The benefit of the doubt about whether an accused person qualifies for Duty Lawyer Services is to be exercised in favour of providing the service'⁷. Ad hoc duty lawyer services require simplicity and speed. Duty lawyers are less likely to be able to take the time to fully consider an individual's disadvantage as it relates to their case and as it relates to their capacity to participate in the process. As one Enabling Justice participant described:

*'... I'm sitting up the back of this court and this man...strode over to me and said his name and said you're going to prison, we just have to work out how long. That's how I met my barrister...So there wasn't the opportunity to say, hang on a minute, this and this and this ... I was still 22 drinking and taking drugs. I was suicidal and I was homeless...I was in no fit mental state for anything.'*⁸

At the duty lawyer stage it is a limited, but important, set of circumstances that define priority. It doesn't include social and economic disadvantage, or living in remote areas and it is likely to exclude some who are not able to articulate why they should be given the benefit of the doubt.

⁵ Victoria Legal Aid (2016) *Means Test Review Consultation Paper*, page 6.

⁶ <https://www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-court>, accessed 15 September 2016.

⁷ Duty Lawyer Guidelines - criminal law (Magistrates Court cases - Victoria Legal Aid), page 1.

⁸ Participant survey response from Jesuit Social Services and Centre for Innovative Justice (2016) *Enabling Justice Project Consultation Paper*, June 2016, <http://jss.org.au/wp-content/uploads/2016/06/EJ-Consultation-Paper-FINAL-1.pdf>.

Recommendation 1: That Victoria Legal Aid include more categories of disadvantage in its priority groups to be given access to a duty lawyer. Examples of categories that could be included are rural or remote residence, the elderly and those with a physical disability.

Grants for Legal Assistance

Subsequent access for clients to a grant of legal aid depends upon a means test threshold and a very constrained set of allowable deductions (housing, childcare and dependents) which are set to restrictive limits. Unlike the duty lawyer process it draws everyone into a means test process, including those considered priority clients at the duty lawyer stage. The means test (and contributions policy) applies to almost all applications for grants of legal assistance. War veterans, children and persons on a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* are specifically exempted. There are also other matters – such as indictable criminal matters and family violence proceedings – where VLA may be required to provide representation to people who may not qualify for assistance under the means test.⁹

Otherwise, the only way to avoid the means test is to request discretion (available in respect of both assets and expenses) for an application to be approved that does not meet the means test. As noted in the *Means Test Review Consultation Paper*, this raises issues of transparency, consistency and clarity, carries administrative costs, and also may unfairly disadvantage vulnerable people who are unaware of the availability of this avenue.

We believe there are clear pragmatic and equity reasons to expand the categories of people exempted from the means test. Those identified above as priority clients from a duty lawyer’s perspective (including expansions recommended under our Recommendation 1) should also be exempted from the means test for accessing additional aid, recognising the particular vulnerability of these clients in accessing assistance, navigating legal aid entry and requirements, and particularly being unassisted at court.

In addition, we believe the guidelines would be improved by more routine and systematic inclusion of a broader range of allowable deductibles (for both assets and expenses) to reflect the real impact of particular disadvantage. Current inadequacies with the means test are highlighted by the fact that the prevailing threshold lies below what is widely regarded as the poverty line.

Recommendation 2: That Victoria Legal Aid include more categories of disadvantage in its exempted groups, and that this reflects the thresholds for access to duty lawyers.

Recommendation 3: That Victoria Legal Aid considers a broader range of assets and expense deductibles in the means test and, in particular, ensure that the test will be met by anyone living below the poverty line.

2. Responding to the geography of access to justice

Victoria Legal Aid is required by legislation to make legal aid available ‘on an equitable basis throughout the state’¹⁰.

⁹ For example, sections 71 & 72 of the *Family Violence Protection Act 2008* and section 197 of the *Criminal Procedure Act 2009*.

¹⁰ Legal Aid Act (Vic) 1978, section 4.

In 2015, Jesuit Social Services, along with the Catholic Social Services Australia released the findings of its *Dropping of the Edge* (DOTE) research, detailed earlier in this Submission, which found that complex and entrenched disadvantage continues to be experienced by a small but persistent number of localities in each state. Where an individual resides can have a particular impact on their access to justice because of the availability or lack of specialist services.

Specialist courts, court lists and court support including Koori courts, Assessment and Referral Court lists, drug courts, Mental Health Court Liaison, the CREDIT/Bail Program and the Court Integrated Services Program are not available across the state, nor do they necessarily align with the areas of greatest disadvantage.

Yet these options have demonstrated effectiveness in acknowledging the circumstances of the vulnerable and working with individuals to help them navigate their court appearances.

These options can make a significant difference to those suffering certain forms of disadvantage, even without the support of Victoria Legal Aid. The probability that the courts and its actors can work effectively with the individual is enhanced – there are supports and assessors, a particularly focused and skilled magistrate, other direct supports to the accused or applicant – to mitigate the absence of legal representation.

Outside these settings it is Victoria Legal Aid that is the assurance of a voice to represent the vulnerability of the person before the court. Given this, access to these specialist courts and services should be a specific factor in determining access to Victoria Legal Aid. It should be one of the methods of determining priority access.

The difficulties where disadvantage is not given sufficient attention is demonstrated by this comment from an Enabling Justice participant:

'Like, if some bloke's at court, and he gets a legal aid [duty] solicitor, his legal aid solicitor is going to ask his basic details, walk in, give them to the magistrate, talk a little bit of nonsense, and really not do much. That kid's probably got one of the ID's, that's why he keeps getting pinched -[either an intellectual disability or an ABI].'¹¹

The structural disadvantage of lack of access to specialist courts and services is a specific inequality that should be addressed in Victoria Legal Aid reforms.

Recommendation 4: That Victoria Legal Aid increase its access to legal aid for individuals who do not have access to specialist courts and services.

3. Accessing Victoria Legal Aid - no wrong door approach

Victorian Legal Aid has evolved significantly in its service and access process, working to simplify the process of procuring assistance. But even this simplified process – a phone call, a visit to the website, stepping through the door – remains a challenge for many.

We know from *Dropping Off The Edge 2015* that many people living in Victoria's most disadvantaged postcode areas lack internet access. Other vulnerabilities, such as difficulty communicating in English, lack of transport, lack of phone access, an assumption of exclusion, and feelings of confusion, depression and fear, may also hamper reaching for legal aid.

¹¹ Jesuit Social Services and Centre for Innovative Justice (2016) *Enabling Justice Project Consultation Paper*, June 2016, <http://jss.org.au/wp-content/uploads/2016/06/EJ-Consultation-Paper-FINAL-1.pdf>.

We believe barriers to accessing, and then using, Victoria Legal Aid are considerable for the most disadvantaged in our community, and that these barriers could be eased by extending the many existing specialist pathways available for vulnerable individuals. Justice plans, mental health plans, and support from an independent third person or translator all provide opportunities for linking a person with legal aid and assisting them with the process, including the means test element.

There is a need for “no wrong door” in enabling access into Victoria Legal Aid processes. Just as social service providers and councils have established frameworks in other areas (e.g. vulnerable youth) to ensure that every person receives adequate support for their needs, regardless of which “door” in the service system they walk through, Victoria Legal Aid should work with service providers across the sector to promote connection with legal aid, while also ensuring its staff are appropriately trained to recognise, respond to and work with particular forms of disadvantage. Making the process easy for users, together with positive experiences, will produce better outcomes for all. This is supported by clients interviewed as part of Jesuit Social Services’ Enabling Justice project:

‘I get legal aid and I think they do marvellous work...the way they treat you with respect is very good and it makes you feel at ease and your life story answers their questions for what they want to know about this person, so when they face up to the judge they can say ‘this guy tries.’

‘I feel like my solicitor comes down and explains it to me while they’re talking in their jargon...It’s pretty easy to communicate with my lawyer. I’ve had her for a long time. Like a friend. She’s looking out for my best interest.’

Connection and relationship matter. Where a person feels they have a constant, reliable legal support, this engenders a feeling of “inclusion” rather than the “exclusion” often experienced through an foreign and alienating legal process. A sense of “sticking with the individual” is especially important for people with cognitive disabilities, or people who are living at the edges of community

Recommendation 5: That Victoria Legal Aid works with stakeholders to strengthen methods to ensure people who are disadvantaged are brought to, and assisted into, their services. This might include assertive outreach, an increase in support services, or assistance for people without access to technology (i.e. internet, mobile phones).

4. The importance of support for disadvantaged people during bail applications

In Victoria a significant number of young people in youth detention are unsentenced. Quarterly data compiled from the Department of Health and Human Services quarterly admissions records show since the introduction of the amendments to the Bail Act in December 2013 the number of individual young people admitted to remand increased from 112 in the second quarter of 2013-14, to 200 young people in the third quarter of 2015-16, an increase of 79 per cent¹². Currently, around thirty per cent of people in adult prisons are unsentenced, up from 20 per cent two years ago¹³.

Growth in prisoner numbers in Victoria is mostly driven by increasing numbers of unsentenced prisoners who have been denied bail. Tighter bail arrangements are sweeping the disadvantaged into

¹² Department of Health and Human Services (2016) *Diversion of children and young people from the criminal justice system*, prepared for the Youth Justice Ministerial Roundtable, June 2016.

¹³ Corrections Victoria Monthly Prisoner and Offender Statistics, July 2014 and July 2016, accessed online at http://assets.justice.vic.gov.au/corrections/resources/d71ce2d8-dd4d-4aba-a87b-0afc03e0d090/data_set+monthly+prisoner+and+offender+statistics+2014+15.xls and <http://assets.justice.vic.gov.au/corrections/resources/5de5a4da-d129-478e-8d72-95e096aad04b/monthlyprisoneroffenderstatistics+2016-17%28to+august+2016%29.xls>

our prisons, making it essential that access to legal representation is given close examination at all stages of the bail and remand process.

As highlighted earlier in this submission, the eligibility processes for legal aid too often work to the detriment of disadvantaged groups. At the same time, people suffering disadvantage have the attributes that often make it more likely that remand will be recommended¹⁴. It is a “perfect storm” that must be addressed. Victoria Legal Aid should have a particular responsibility in bail cases to maximise its capacity to be present in the court.

This need for increased access – and the economic and social justifications for it – are apparent from the evidence, which shows that increased numbers on remand do not translate to increased numbers of sentenced prisoners. The majority of those on remand return to the community, rather than prison, when they have a further appearance before court – with legal aid or other legal support in place, they either successfully apply for bail or otherwise have their matter finalised in court. For the period 1 July 2014 to 3 June 2015, there were 8,258 prisoners discharged from prison, 3,296 or 40% of them unsentenced¹⁵. Being on remand can often be a result of inadequate legal representation.

Victoria Legal Aid guidelines appropriately provide legal aid for people in custody, yet the result is perverse – that a person only receives the legal support they need when they have passed the point when it would first have made a real difference. A person is remanded, providing time to stabilise, to treat, and to prepare the case for return to the community, when perhaps the incarceration (and the associated detriments mentioned earlier regarding the deepening spiral of contact with the justice system) could have been avoided in the first place. Provision of early legal aid would ensure disadvantage is considered and addressed more thoroughly in the first instance.

Recommendation 6: That Victoria Legal Aid provides legal assistance for all bail matters.

¹⁴ Instability of housing, relationships, income, access to treatment and employment, as well as mental health problems, lead toward refusal of bail and toward assessments of a risk of reoffending.

¹⁵ Victorian Ombudsman (2015) *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, <https://www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17>