



SUBMISSION

MEANS TEST REVIEW

Prepared by Women's Legal Service Victoria for Victoria Legal Aid

June 2017

INTRODUCTION

VLA has sought submissions on possible changes to the means test and contributions policy. It has consulted widely and produced an [Options Paper](#) divided into Parts A-D, with its proposed changes summarised in an Appendix (reproduced at Appendix 1 below for reference). Women's Legal Service Victoria (WLSV) did not provide a submission to the initial round of consultations, and we appreciate the opportunity to comment now.

This submission has two parts: **Part One** addresses the overarching context of means test and contributions policy amendments within a sector that is resource-scarce. It also includes some comments on methodology, as the Merits Review Options Paper requested. **Part Two** looks at specific aspects of the proposed changes, and makes submissions against issues our staff and clients have previously identified as priorities.

WOMEN'S LEGAL SERVICE VICTORIA

WLSV is a state-wide community legal centre (CLC) that has been providing free legal services to women for over 30 years. We specialise in issues arising from relationship breakdown and violence against women. WLSV provides free and confidential legal information, advice, referral and representation to women in Victoria.

Through our associated service, Family Law Legal Service (FLSS), we operate a daily duty lawyer service at the Family Law Courts and provide legal advice and representation to participants in Victoria Legal Aid Roundtable Dispute Management and clients of the Melbourne Family Relationship Centre.

WLSV contributes to the development of law and policy by challenging laws that unfairly impact on women experiencing violence and relationship breakdown and informing and advancing policy initiatives that promote the rights of women. We deliver training programs and share our expertise with other professionals regarding effective responses to violence and relationship breakdown. We also coordinate a volunteer program with over 100 volunteers.

WLSV are funded by the Indigenous Justice and Legal Assistance Division, Attorney General's Department, Canberra and Victoria Legal Aid.

SUMMARY OF RECOMMENDATIONS

Section One – Comments on approach and methodology

- We note and appreciate the extensive efforts to address disadvantage, including that of women experiencing family violence and relationship breakdown, that mooted discretions and exclusions to the current means test would allow.
- Perhaps the most important aspect of the VLA Means Test Review is the search for a contemporary understanding of disadvantage. That said, the Options Paper would benefit from

a clear definition of “disadvantage” drawn from the literature reviewed, and which considers VLA’s vision and objectives. Financial disadvantage is a relatively narrow lens, and this Review should make clear when it is considering broader or narrower definitions, noting the difference in approach that each engenders.

- The Options Paper invites submissions on “whether there’s an entirely different way of doing things that places our client’s experiences at the centre of the (means) test”. Our view is that there is an entirely different way that reflects emerging Australian and global good practice, which should be among options for reform. It would place disadvantage at the heart of efforts to increase access to justice (i.e., the “capability approach”), rather than at the centre of a means test. This approach would better reflect a contemporary understanding of disadvantage, and would likely identify very different cohorts as disadvantaged than the current and proposed ones do. It may also better serve VLA’s overall objectives as stated in the Options Paper.
- It is very useful that some data that are presented in the Options Paper already draw out some intersectional categories of vulnerability or disadvantage (e.g. disability, homelessness). In order to come to a clearer understanding of disadvantage, even in purely financial terms, we strongly recommend that VLA provide gender-disaggregated data.
- It is our experience that it is difficult for lawyers to effectively apply a means test. The proposed amendments to the VLA Means Test, while seeking to better target the disadvantaged, may further complicate a test that lawyers already find hard to apply.

Section Two – Responses to suggested changes to the Means Test

- We understand that some of the recommendations cover a range of options that include alternative approaches, and comment on that basis.
- We note the consideration already given to women and children experiencing family violence within the recommendations, and make some additional suggestions.
- In particular, given that child protection and family violence matters represent such a high level of resource drain and risk to women and children, an exemption from the means test should be considered, in line with the good practice literature. This could be discretionary, and guidelines around the operation of a discretion might address the nature of proceedings under way (for example, a family law matter where a property settlement would likely be minimal despite the apparent property pool).
- Guidelines should also address circumstances where an applicant needs urgent representation where they have little or no access to income or assets (for example where they need assistance with asset protection).
- We note also that there are VLA policies that operate as means tests, in particular the Contributions Policy, and the application of the Financially Associated Persons (FAP) Policy. We agree that there needs to be more nuanced application of the FAP approach, and make some observations to that end. The restrictions that apply to the availability of legal assistance for those seeking representation in family law property matters also operate to exclude women from that assistance.

SECTION ONE – *Comments on approach and methodology*

We confirm the overall conclusion of the literature review that means testing is not the best way to identify disadvantage. This raises the question of why VLA has confined the review to means testing, if understanding contemporary disadvantage is a driver of the review.¹

Understanding Disadvantage

There is consensus in the literature presented in the paper, and in the objectives of the Review itself, that disadvantage cannot be understood with reference to financial criteria alone. Part A cites quantitative data around poverty and access to legal aid in Australia². It also notes that the means test when created was based on financial criteria alone, and that VLA now has better information about household income and expenditure, and challenges in meeting the cost of living. It notes some issues that impact WLS clients particularly and have bearing on the means test in practice: such as the costs of raising children, which has increased by 50% since 2007, while incomes have risen 25%; as well as the disproportionate economic cost that women bear as a result of family violence. **These are important improvements that do consider context, and yet they keep a consideration of disadvantage *prima facie* within financial circumstances.** There are discretions that allow exceptions to this approach (below).

It is noteworthy that none of the data presented are gender disaggregated. **In order to come to a clear understanding of disadvantage, we strongly recommend that VLA present gender disaggregated data.** It is very useful that graphics in the Options Paper assess categories of aid refusal from VLA against categories of disadvantage. These data (see graphic below)³ will tell a clearer story about different impacts on women and men of particular demographics and circumstances, and therefore where disadvantage lies. Women's Health Association of Victoria and Women's Health West Victoria will likely have an informed view of what constitutes disadvantage, which may be very helpful in a broader inquiry.

¹ Options Paper Part B, p. 17.

² Citing, among other things, the Productivity Commission (2014) *Access to justice arrangements. Inquiry report*, (72) p 103.; Richard Dennis, Josh Fear and Emily Millane (2012), *Justice for all: Giving Australians Greater Access to the Legal System*, Institute Paper No 8, Australian Institute, March 2012; Centre for Innovative Justice. (2013). See Paper A for the full list of references.

³ Options Paper A, p.12.

Diagram 1: Who is being refused a grant of aid because of their means?

Who is being refused a grant of aid because of their means?



Means and Capabilities

In its current form, and with some exceptions, the **Means Test** essentially analyses what people have (e.g. their means of living), when according to the good practice research set out in the Options Paper, their **capabilities** or opportunities should be the focus⁴. **The capability approach holds that low income is not a good proxy for deprivation.** The Options Paper presents very good research on disadvantage from within Australia. For example, it cites NSW Legal Aid research pointing to a range of social disadvantage indicators, including social identity, exclusion and economic vulnerability.⁵ The paper presents other Australian-derived data that are not gender disaggregated so do not tell us how many women and girls are poor, or current comparative measures of female and male inequality.⁶ It sets out sophisticated, context specific, participatory research from developed and developing countries – at

⁴ Citing Sen, 2009, p. 253.

⁵ Options Paper A, p.14.

⁶ This information is presumably available from the Australian Bureau of Statistics, among others.

least some of which is gender disaggregated. It also defines disadvantage in a range ways (i.e. multi-dimensionally) that includes but is not limited to financial considerations.

The common aim of much of that research is to identify the most vulnerable by identifying *overlapping* categories of vulnerability.⁷ Some approaches were also participatory, i.e. using indicators that people living in poverty themselves identified.⁸ Safety, voice, agency, and social relationships are among poverty indicators that the research nominates. Interestingly, as the Options Paper notes, Australia is leading innovation in understanding of the multi-dimensional nature of poverty globally, with concerns around violence and gender disparity embedded in that work. The Options Paper does come to its own definition of disadvantage, though considers a range of good practice research that includes but is not limited to the *financial criteria* that other agencies use to determine disadvantage.⁹ That said, the overall sense of the Paper is that an income and assets based assessment of financial resources should remain a first step, and other categories of disadvantage should be addressed through discretions and exclusions.

In short, the good practice research set out at length in Part A is only to a limited extent reflected in the Options Paper's suggested changes to the Means Test. **Its take-up would require a novel approach, which may well identify very different cohorts as disadvantaged than the current means-led approach does.** There are local precedents for this: the Consumer Action Law Centre gives priority assistance to Victorians facing a range of circumstances including: income; family violence or relationship breakdown; living with disability or significant health problems; experiencing homelessness; facing marginalisation due to gender.¹⁰

WLS's approach to means testing

WLSV in November 2015 moved from a means and merits approach to an impact and barriers approach (see Diagram 2, below). In short, a client who scores high on both axes of impact and barriers (which are categories of disadvantage) is more likely to be given priority. We developed this approach to help us identify women in greatest need, also considering broader policy and law reform implications. This shift also mirrors the categories of disadvantage set out in the National Legal database standards of the Commonwealth Attorney General's Department.

⁷ See [video](#) of Dr Jenny Klugman, Senior Adviser, World Bank and Fellow, Kennedy School Harvard University.

⁸ The fifteen measures identified across 6 developing countries and 18 research sites are described in this [video](#).

⁹ Options Paper, Part A, p.15.

¹⁰ See the Consumer Action Law Centre [website](#).

Diagram 2: WLSV matrix (impact and barriers)

Impact	Policy issue identified, to be acted on	7	8	9
	High Impact for individual	4	5	6
	Low to Medium Impact for individual	1	2	3
		Only barriers are those experienced by average person in accessing justice system	Significant additional personal barriers to access to justice	Severe or multiple additional barriers to access to justice
<u>Barriers</u>				

Our quarterly monitoring and evaluation data for the two years 2015 – 2016 show that this change in approach has allowed us to reach more women experiencing entrenched disadvantage. We have increased, for example, our provision of more intensive legal services to women with disabilities, Aboriginal and Torres Strait Islander women and women suffering the effects of family violence. In our view there needs to be an avenue of inquiry into the circumstances of the applicant which allows more than just the current “snapshot in time” - which paints a limited financial picture. More important is the likelihood of financial recovery from circumstances such as family violence, and/or relationship breakdown.

This approach also enables referring agencies throughout Victoria to speak with a WLS lawyer ahead of time, and helps us to establish the sometimes multiple barriers to justice that a woman faces. It has reduced the risk of “referral roundabout” for the client. As a result, we have taken on more complex casework which is deeply impactful both for individual women, and which informs our policy and advocacy work.

We note that the National Partnerships Agreement on Legal Assistance Services (which will expire on 30 June 2020), sets out a list of priority clients. It seeks in Para 3 (a) “to improve the targeting of legal assistance services to *people facing disadvantage who have the greatest legal needs, including people experiencing, or at risk of, family violence*”. This is also framed as an outcome: 9 (a) legal assistance services are targeted to priority clients with the greatest legal need”. That said, under the Agreement (18 (a)), legal aid commissions must deliver “95% or more of total representation services...to people experiencing *financial disadvantage*”. We note that there is internal inconsistency in these two standards. As the good practice research suggests, these different standards can identify very different categories of client.

SECTION B – MAKING THE MEANS TEST BETTER

In this section we offer specific recommendations against proposed changes in Options Paper Part B, and some additional observations. We recognise that our focus largely on gender and family violence is narrow and cannot take the place of a very necessary gender analysis of the proposed changes. Nor does it bring the intersectional analysis (i.e. across categories, especially where categories overlap) that the deeper discussion of disadvantage begs.

- Paragraph 17: *Increase the allowable assets threshold*
 - In the context of family law, there current guideline providing that non-superannuation assets (e.g. cash) of more than \$50,000 is sufficient to exclude an applicant from legal assistance. If during the property settlement the applicant is able to buy out the other party's interest in the home (including by accessing credit) they can remain eligible for legal aid despite there being a generous allowable equity in the asset. In contrast, that parties who cannot borrow are not eligible for legal aid. Increasing the allowable non-superannuation assets threshold would go some way to addressing this. Removing the requirement that a party is able to retain the family home as part of the property settlement would be more effective and equitable.
- Paragraph 28: *Allow a higher income threshold before a person is found ineligible for assistance, where the matter is of strategic advocacy priority, including: Family violence, Mental Health Tribunal and child protection matters. We suggest the addition of "relationship breakdown", (following the Consumer Action Law Centre's example), because of its financial impact, and correlation with social vulnerability particularly for women.*
- Paragraph 42: *Exempt certain matters from the contributions policy*
 - We broadly support the need for a closer consideration for equity and reasonableness when deciding whether an applicant should pay a contribution towards the cost of legal assistance. As Part D notes, contributions may be an instrument of access to justice for some people, and where people are happy to pay a small contribution out of their income, they should do so.
 - We agree that any amendment to the contributions policy "should be measured not only against the likelihood of recovery and the administrative costs involved in recovering any outstanding debt"¹¹ but should also take into account the differential impacts on women and men of the contributions policy.
 - We strongly support the exemption of equal opportunity and discrimination matters from contributions.
 - We urge VLA to index its contributions requirements to account for the wage gap between men and women in Australia.

¹¹ Options Paper Part D, citing LIV (2106), p. 29.

- We note that an equitable charge or caveat in favour of VLA on jointly owned property subject to family law proceedings most often disadvantages one partner, particularly where the property can't readily be sold. It also keeps the matter and potentially the conflict alive longer.
- Paragraph 45: *Exempt certain categories of people from the operation of the means test* Child protection and family violence matters represent such a high level of resource drain and risk to women and children that, as occurs in other jurisdictions, they should be exempt from the means test. Where a person's safety is at issue, this should not be a discretionary exemption. Guidelines should set out the standard of proof required, and the exemption could operate for an initial period during that client's matter, or longer term if, on review, required. A mandatory exemption would also be in keeping with the policy priority which the Government of Victoria is giving this issue.
- Paragraph 46: *Exempt certain categories of people from the operation of the means test.* The proposal to exempt certain categories of people from the operation of the means test is welcome. It should comprise categories of male and female Victorians that a participatory capability analysis would identify.
- Paragraph 47: *Priority access for priority clients.* This paragraph focusses on vulnerability, and should therefore identify greatest disadvantage in nominating those clients. As it stands 47 seems weak and is perhaps where there is greatest scope to consider the good practice literature in more depth.

Additional Observations

VLA's *Funding Guidelines* also operate as a means test which can exclude women in situations of vulnerability. For example, in a family law matter, where there is no parenting dispute VLA will not assist in relation to property matters (including superannuation-only disputes, which are particularly likely to affect older women). The impacts on women and their children can be severe, and include homelessness. For other assets the guidelines can also operate as a means test. If the matrimonial home is sold, and the proceeds of the sale are greater than \$50,000 VLA can't assist. The proceeds may be nevertheless be frozen and therefore inaccessible.

Financially Associated Persons - We agree that there needs to be more careful use of the FAP approach, particularly in the assessment of the joint resources of a household or partnership.

Narrowing this test to include just the resources of an applicant's spouse or partner can be too restrictive – women may be drawing support from parents, and therefore be less disadvantaged than other women without that support. At the same time, we agree that one-off support from family (such as elderly parents on a low income) in a time of crisis should not necessarily indicate ongoing support, and that the applicant is a FAP. We strongly support the view that a perpetrator of family violence should not be treated as a financially associated person, and that friends or family providing emergency accommodation in such cases should not mean the person escaping violence is a FAP. There are other

provisions we support: for example, FAPs should not be under consideration during family violence proceedings; and the definition of FAPs should take into account the costs of supporting children.

CONCLUSION

We appreciate the effort that VLA is making to increase the reach of its legal services to more disadvantaged members of the community in Victoria. It is committed to using a means test, based on assets and income, as a first point of consideration for access to legal aid. Within this rubric, the scope for improvement that the VLA means test review process has identified is largely sound. Noting that the Women's Legal Service Victoria focusses its efforts on Family Law, Family Violence and Child Protection, we are particularly pleased to see exemptions to the means test and guidelines in relation to Family Violence (including Intervention Orders) and child protection. Any changes to the operation of the means test and its guidelines should consider the impact on potential applicants, including changes in how property will be considered in Family Law matters.

If you have any questions, please do not hesitate to contact Marianne Jago-Bassingthwaighe on (03) 8622 0206.