

## **Maximising value through strategic advocacy**

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## Acknowledgement

The insights in this paper would not be possible without the inspiration and example of Victoria Legal Aid (VLA) staff who toil tirelessly to tackle injustice and unfairness wherever they find it. VLA staff give so much of themselves in the name of work to help clients achieve fair hearings, safety and respect and in doing so, promote checks and balances that help make for a civil society.

## Introduction

As the Australian legal aid system has evolved since its formal establishment in the 1970s, so too has our appreciation of legal need and the most effective ways to address it.

As VLA has modernised, so too have our methods. Individual services are increasingly being complemented with approaches that seek to tackle injustice or problems unfairly affecting many people, at their source. This is partly fuelled by financial imperatives, but also by the innate desire of staff to make an enduring difference.

When it is well conducted, strategic advocacy can positively shape the development, implementation and application of laws and practices to prevent or minimise the impact of legal problems. This benefits clients and the broader community.

This paper outlines the role of legal aid commissions in contributing to improvements to the law. It provides an overview of key considerations in undertaking strategic advocacy work, with reference to the practical experiences of VLA lawyers who undertake this work on a daily basis.

## Context

The extent to which lawyers should proactively seek to shape the law, as opposed to assisting individuals with an individual legal problem, is a debate that occurs in cycles.

There is debate about what publicly funded legal aid lawyers should and shouldn't do with taxpayer's money, not unlike debates about the propriety of judicial activism, as compared to the strict application of the principles of statutory interpretation. What we know from both is that reasonable minds can and do differ.

Competing priorities for limited funding, greater complexity of the law and burgeoning activity in parts of the justice system have brought these divergent views to the fore. One view is that, diminished funds place an even greater imperative to ensure they are directed at tangible services, rather than more esoteric efforts at improving or changing laws. This mindset necessarily views strategic advocacy as non-essential, afforded only when times are good.

For example, when explaining new funding guidelines limiting community legal centres (CLCs) from undertaking 'lobbying activities', former New South Wales State Attorney-General, Greg Smith, said:

*"In tight financial times we need to make sure the money goes to where it is most needed – to give advice and representation to people who cannot otherwise afford it..."<sup>1</sup>.*

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<sup>1</sup> Smith, Greg, 2012. *Greater Access to Justice for Disadvantaged*, NSW Government, 20 December, accessed on 8 April via

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This view is mirrored by the current Federal Attorney-General, Senator George Brandis QC, who has said:

*“...increasingly over recent years an increasing percentage of the legal assistance dollar has been spent on what is called advocacy work or policy work, which is not directed to helping specific clients with specific needs but in participating in—as it were—society’s discussion about various areas of potential law reform or identifying gaps in the legal system.*

*Now, that is a good thing to do but in my view—and I hold this view very strongly—where resources are limited, I would rather see that money spent helping individual people in need who cannot afford a lawyer rather than spent on policy development.”<sup>2</sup>*

An alternative view is to acknowledge that a purely individualised service model can be expensive and benefit only the lucky few who actually receive a service. Upon this view, strategic advocacy is a way to maximise the benefits of existing funding:

Rich noted in her 2008 report on community legal centres (CLCs) that:

*“Individual legal assistance alone cannot address the underlying causes of various legal problems that disadvantaged people present to legal services with. Further, continuing to undertake individual casework without a broader change focus can have negative, not just neutral, consequences, if CLCs simply assist an unjust system to process the cases which are put before it.”<sup>3</sup>*

In a recent submission to the Australian Productivity Commission,<sup>4</sup> VLA articulated the view that:

*“A highly individualised service model weighted towards the acute end of the legal spectrum is arguably inequitable and an inefficient use of the Legal Aid Fund. VLA must use its knowledge of the client experience and their problems to develop holistic and innovative approaches to the prevention and early resolution of legal problems.*

*VLA is achieving this through a process of service reweighting, geared towards prevention and early intervention. While often construed as secondary or optional, community legal*

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[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/vwFiles/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf/\\$file/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/201212_MR_Access_to_justice_disadvantaged.pdf/$file/201212_MR_Access_to_justice_disadvantaged.pdf).

<sup>2</sup> Legal and Constitutional Affairs Legislation Committee, 2014. Transcript, Senate Estimates, 20 February, The Committee, accessed on 8 April 2014 via

[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,doc\\_date\\_rev;page=0;query=Dataset%3Aestimate%20george%20brandis;rec=14;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,doc_date_rev;page=0;query=Dataset%3Aestimate%20george%20brandis;rec=14;resCount=Default).

<sup>3</sup> Rich, Nicole, 2008. *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs*, Final Report, Consumer Action Law Centre/Victoria Law Foundation CLC Fellowship Report, December 2008, p.13, accessed on 8 May 2014 via <http://www.victorialawfoundation.org.au/images/stories/files/Grants/CLC-report-08.pdf>.

<sup>4</sup> The Productivity Commission is a publicly funded research and advisory agency, which offers policy advice on a range of economic, social and environmental issues. For further information, particularly in relation to its current Review of Access to Justice Arrangements in Australia, visit [www.pc.gov.au](http://www.pc.gov.au).

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*education, information and strategic advocacy are statutory functions and rightly form part of core business.*

*Our experience demonstrates that modest investment in these areas ensures our services are still accessible to those most in need whilst reducing pressure on our other more resource and cost intensive services.*<sup>5</sup>

The importance of advocacy forming part of the core work of legal aid commissions was endorsed by the Productivity Commission in its draft report into Access to Justice in Australia, released in April 2014, where it noted:

*“Strategic advocacy can benefit those people affected by a systemic issue, it can also benefit the community more broadly and improve access to justice.”*<sup>6</sup>

Further, the Productivity Commission confirmed its view that strategic advocacy:

*“...should be a core activity for legal aid commissions.”*<sup>7</sup>

## **What is strategic advocacy?**

The defining characteristic of strategic advocacy is that its ambition is for far-reaching beneficial impacts. Strategic advocacy seeks change with wider community, not just individual, application.

Rather than judging success with reference to the value of services for the relatively small number of clients who actually get help, the success of strategic advocacy can be judged with reference to its beneficial effect on the broader community, including those persons who may never seek assistance and/or who may not be eligible to obtain a service. It takes account of the number and type of legal problems that were prevented as well as those that were actually responded to.

Strategic advocacy includes focused casework, law and policy reform and communication with stakeholders *and the community* to improve laws. It may involve litigation to obtain a binding precedent, or submissions to law reform inquiries tasked with reviewing the operation of legislation. It can include liaison with government departments on the design of laws and entitlement based decision-making frameworks. Increasingly, strategic advocacy will involve the use of the media to engage the community in understanding how to obtain the protection of the law or to hold other government agencies or private interests to public account.

At its highest, strategic advocacy includes and can facilitate advanced citizenry.<sup>8</sup>

Successful strategic advocacy requires clear thinking around which individuals and organisations are best placed to perform certain tasks. It requires clarity of purpose about what is being sought from those individuals, organisations or legislative processes that are targeted for influence.

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<sup>5</sup> Victoria Legal Aid, 2013. *Submission to Productivity Commission*, November, VLA. Note that parts of this paper have been drawn from this submission, which is available on the Productivity Commission’s site, accessed 7 May 2014 via <<http://www.pc.gov.au/projects/inquiry/access-justice>>.

<sup>6</sup> Productivity Commission, 2014. *Access to Justice Arrangements*, Draft Report, The Commission, April at p623 accessed on 1 May 2014 via <<http://pc.gov.au/projects/inquiry/access-justice/draft>>.

<sup>7</sup> *Ibid*, at p.625.

<sup>8</sup> Further information on the corollary to active citizenship, open government, can be found at the Open Government Guide, accessed 16 May 2014 via <<http://www.opengovguide.com/about-this-guide/>>.

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For public funds or effort to be applied to strategic advocacy, its purpose or objective must be publicly disclosed. It must withstand criticism from opponents as well as garner support from those of a similar view. It is not enough to be in fierce agreement with the like-minded if beneficial change is what is sought. Overcoming resistance to change through persuasive evidence-based reasoning requires extensive preparation and a sophisticated understanding of alternate views.

### **An extension of social justice lawyering**

Strategic advocacy is often thought of as public interest litigation in appellate courts. Of course, strategic advocacy includes refined legal argument, but it is not limited to this important work.

VLA lawyers in their day-to-day work bring judicial attention to anomalies in the law, alert regulatory bodies to poor practices and persuade decision-makers to adopt pragmatic interpretations of the law that properly reflect the needs and circumstances of their clients. These actions all have a systemic impact.<sup>9</sup> To do a good job before a tribunal or judicial setting, effort must be expended to understand the whole person and their antecedents. As Justice Sackville noted, "... the poor are not simply rich people without money but are persons with distinctive problems."<sup>10</sup>

Social justice lawyering views clients within a broader context rather than the narrow focus of the presenting individual legal problem. O'Brien has described social justice lawyers as those who are interested in changing the systemic conditions that contribute to legal problems.<sup>11</sup>

Strategic advocacy is not new, it is social justice lawyering by another name. Both seek to identify and respond to the underlying source of unfairness to achieve beneficial change.

### **Applying limited resources purposefully**

No one would argue that legal aid commissions should not work with child welfare authorities on sensible protocols for the management of the safety of children or with courts and prosecuting agencies on the processes supporting fair hearings and the conduct of criminal trials. It is a given that legal aid lawyers support the work of busy local courts to work fairly, effectively and at least cost. However, high profile 'test cases' or 'inappropriate' media comment, may raise eyebrows. So what is appropriate and what isn't, and why?

Choosing to advocate for reform or to shape the law requires decisions about which issues to pursue amongst a myriad of injustices that affect clients. Of course, a lot of decision-making relates purely to legal matters, including legal merit. But, it also requires a decision on *which* injustice or failing of the law to proactively pursue and highlight at the expense of others.

Planning our strategic advocacy requires us to identify priority issues and to pursue them intentionally. This involves deliberative consideration of the priority issues and intended objectives, similar to that which we go through when deciding how to allocate scarce resources across different legal services and problem types.

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<sup>9</sup> O'Brien, Paula, 2011. "Changing public interest law: Overcoming the law's barriers to social change lawyering", *Alternative Law Journal*, Vol 36, No. 2, 2011 at p.82.

<sup>10</sup> Sackville, Ronald, 1974. *Legal Aid in Australia: Discussion Paper*, Commissioner for Law and Poverty, November, at p.336.

<sup>11</sup> *Ibid*, at pp.84-85.

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For legal aid commissions, priority issues must be those injustices or outcomes that are having an unfair and disproportionate impact on acutely vulnerable people. Linked to those priorities must be clearly defined objectives to ameliorate, remedy or raise awareness of these impacts.

If reasonable minds can differ, then who determines which change is beneficial? Does beneficial change lay in the subjective eye of the beholder or can its objectives be clearly stated to engender debate and in so doing, add to civil society?

Every day, legal aid commissions make value judgements about legal need and disadvantage in making choices about the availability and intensity of different forms of publicly funded assistance. The subjective eye of the beholder can be cast on almost all decisions legal aid commissions make.

Which persons to help, with what form of assistance and at what cost; given that funds spent on one person won't be spent on another, involves balancing the relative need of individuals on the one hand, with service design or limitations on the other to achieve the best mix of services that serves the greatest public good.

Some liken this 'rationing exercise' undertaken by the independent statutory board as a moral quandary. What it shouldn't be is an exercise of purely personal, political, value judgements. What it should include is an articulation of priority need and how that need can be best addressed to balance the needs of the individual with the overall public good.

In essence, the value judgements or choices made to pursue particular forms of strategic advocacy can be viewed as a simple and legitimate extension of the moral quandaries that lie at the heart of the independent statutory board's eligibility or guideline setting role. Statutory boards exist precisely to make or sanction these choices.

## The case for strategic advocacy

### Legal need outstrips legal services

The reality in Australia is that the demand for individualised legal services is far greater than we are able to provide.<sup>12</sup> For better or worse, there is acceptance from all sides of Australian politics that publicly funded legal services can generally only extend to the poor.<sup>13</sup> When deciding how we allocate our resources, we know that for every person we are able to assist, there will be others that miss out. As we cannot help everyone who seeks assistance with intensive services, a focus on strategic advocacy is a means to increase our reach and minimise the need for legal services in the community.

This view has been acknowledged in the draft findings of the Productivity Commission, which has noted: "[Strategic] Advocacy can also be an efficient use of limited resources" and "...can be an important part of a strategy for maximising the impact of LAC [legal aid commission] and CLC [community legal centre] work."<sup>14</sup>

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<sup>12</sup> Coumarelos, Christine, et al, 2012. *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney.

<sup>13</sup> Note for example that 25% of VLA clients have no income and 55% are on Government benefits, Victoria Legal Aid, *Annual Report 2012-13*, accessed 15 April via <<http://ar2013.vla.vic.gov.au/our-clients>>.

<sup>14</sup> Productivity Commission, 2014 at p.623.

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## Prevention is better than cure

It is generally accepted amongst lawyers and policy makers that priority should be given to the avoidance of legal problems and their resolution at an early stage, rather than waiting to react to legal need when it becomes acute.<sup>15</sup>

When done effectively, strategic advocacy can save money not simply for the legal assistance sector, but for other agencies as well. Better primary decision making or providing government with cost savings that flow from getting a decision right the first time, is but one example.

Sometimes, strategic advocacy can prevent disputes from arising at all. The case study below demonstrates how VLA used strategic litigation to benefit our client and others in a similar situation. In this case, our actions in highlighting the unfairness of retrospective legislation prevented many costly criminal prosecutions from continuing or being commenced.

### Case study – Kelli Keating

Ms Keating, was charged with the criminal offence of welfare fraud under backdated legislation introduced by the then Federal Government in July 2011. She had received an alleged overpayment of \$6,942 from the agency responsible for welfare payments, due to what that agency said was a failure to declare her income.

The backdated or retrospective legislation was passed to improve the prospects of ‘tough on welfare cheat’ criminal prosecutions being successful, despite civil and administrative processes for recovering legitimate overpayments being available.

VLA is of the view that retrospective criminal legislation should only ever be used sparingly, if at all. In light of this, VLA engaged extensively with popular media about this issue and (with consent) Ms Keating’s circumstances, which can be characterised as her having made an ‘honest mistake’ or ‘a failure to do something she wasn’t aware of’.

VLA elevated Ms Keating’s case to the High Court (Australia’s superior court of appeal) to determine whether this retrospective legislation was constitutional. It also sought much needed clarity on the prosecution of offences on the basis of omissions (which, VLA argued, could result in criminal prosecutions in circumstances where people made honest mistakes or did not understand their reporting obligations).

On 8 May 2013, the High Court handed down its unanimous decision *in Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20.

The decision has far reaching implications for the conduct of social security fraud prosecutions in Australia. It is estimated that this decision has or will alter around 15,000 previous prosecutions where people had been charged with welfare fraud, because they mistakenly omitted to tell authorities of a change in circumstances, as these matters are now arguably unsound on the basis of the High Court’s decision.

In response to the High Court decision in *Keating*, the Federal Director of Public Prosecutions (CDPP) has adopted a national policy of not prosecuting on the basis of omissions and has withdrawn prosecutions on foot that are based solely on omissions.

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<sup>15</sup> This has informed the principles underpinning the *National Partnership Agreement on Legal Assistance Services* and is a guiding principle in modern service delivery in the legal assistance sector.

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The Court's judgment also provided clarity around the impact of notices sent by authorities to welfare recipients asking them to report changes in their circumstances. The Court recognised that sending a notice does not necessarily mean that the intended recipient has done the wrong thing if they don't respond. A notice sent may not have been received or understood.

For VLA, this means up to 100 matters are no longer proceeding in Victoria with savings of approximately \$84,000 in case expenditure alone.<sup>16</sup> However, the benefits of this case were Australia-wide following the national decision to not proceed on any purely omission cases.

Taking on Ms Keating's case was part of our commitment to better primary decision making and improving government compliance with administrative law principles. More generally, preserving a person's income is of key concern to VLA, as welfare payment recipients include the most vulnerable and socially excluded members of our community. In addition to the obvious human benefit for the persons concerned, getting these decisions right the first time saves the community money within government agencies; on legal and compliance costs, and by preventing other problems such as homelessness and family breakdown.

In this instance, our advocacy also shed light on laws that are bringing people into contact with the criminal justice system unnecessarily. Other recovery options were available and denunciation and punishment through the criminal law, was arguably unnecessary in Ms Keating's case.

Legal aid commissions know well that interaction with the criminal justice system is often a manifestation of disadvantage and the law can operate unfairly in the face of vulnerabilities, such as mental illness or disability. We have advocated for policy reform which would reduce the number of people brought into the criminal justice system for failure to pay fines where their vulnerabilities are relevant to their breach.

### **Case study – Fines or infringements reform**

Government is increasingly opting for larger and larger monetary fines as a sanction for low level offending, including in parking and traffic matters. Some people are accruing a large number of infringement notices that together, add up to large sums of money that they have difficulty re-paying. Failure to make payment can, and does, result in custodial sentences when certain court orders are breached.

Some people are able to expiate their fines by payment within the relevant timeframe, whereas others have circumstances that make compliance more difficult – such as financial hardship, mental illness and disability. Some of these people are being imprisoned for circumstances stemming from their disadvantage, who arguably shouldn't be.

For almost three years, VLA has been active in drawing attention to some of the unjust consequences of the current fines system. We have supported measures to address the underlying characteristics and circumstances that increase the vulnerability of people to imprisonment for non-payment of fines. We have also advocated directly with the Victorian Government, as well as its Sentencing Advisory Council, for improvements to the fines system.

Amongst the issues we identified were:

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<sup>16</sup> Note that this saving does not take into account matters that were withdrawn prior to *Keating* being handed down or those pending the *Keating* decision where charges had not been laid. In addition, since *Keating* there have also been cases where people who were previously found guilty have had their matters "re-opened" and then struck out with the active co-operation of the Commonwealth Director of Public Prosecutions.

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- vulnerable people were not being diverted away from the system at the earliest opportunity;
  - internal review processes were complex and inconsistent;
  - people who were too poor to pay their fines were vulnerable to strong enforcement action, including imprisonment;
  - the system did not facilitate sufficient access to support to address underlying issues that may contribute to offending conduct; and
  - the processes and outcomes of the system were inflexible and do not accommodate the particular needs of vulnerable people.

Rather than simply continuing to deal with each individual as they presented, on a case by case basis, VLA has persistently advocated for beneficial changes to the infringements system.

One component of our advocacy was the deliberate decision to pursue judicial review, in the case of *Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor [2013] VSCA 37*, which resulted in important safeguards being incorporated into magistrates' obligations when dealing with breach matters involving non-payment of fines (see below).

Another component was a comprehensive set of proposals put to the Victorian Sentencing Advisory Council in October 2013 as part of its examination of fines as a sentencing option in Victoria.<sup>17</sup> Our well publicised proposals supported the early exit of vulnerable people from the fines system – either through diversion to support services or through discharge of fines due to special circumstances, with a view to alleviating some of the intensity of support and enforcement activity required for this cohort, at later stages of the process.

In May 2014, the Fines Reform Bill 2014 was introduced into Parliament with many of our proposals adopted. That Bill makes provision for discharge of fines through work programs or through medical, drug and alcohol treatment in some circumstances. We will continue to advocate for, and to work with the Government to achieve a fairer infringements system.

### **Strategic advocacy can promote a fairer legal system**

When concerted efforts are made to identify dysfunctional – or systematically unfair – aspects of the justice system, legal aid commissions can take targeted steps to promote the rights of those directly affected by their operation. This may be through submission writing and liaison with government departments and/or through litigation, with a view to spotlighting the operation of the law for government or through the creation of favourable precedent.

The *Taha* case below demonstrates how the legal system itself was used address a systemic problem in the operation of infringements law, which was impacting disproportionately on already vulnerable and disadvantaged members of our community.

Extremely busy lawyers don't always have the time to analyse trends and pursue systemic problems. However, as the *Taha* case demonstrates, when the opportunity presents itself, the rewards can be great.

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<sup>17</sup> Victoria Legal Aid, 2013. *Submission to Sentencing Advisory Council on Infringements*, VLA, Melbourne, accessed 10 May via <<http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/vulnerable-people-and-fines>>.

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## Case study – Casework triggering legislative reform to infringements law

Mr Taha has an intellectual disability and had accumulated fines totalling \$11,000. At the time of sentence, the magistrate was unaware of his intellectual disability and sentenced him to 80 days jail for failure to pay. Even when the disability was subsequently identified, the absence of an appeal right in the legislation prohibited the magistrate from being able to revisit the client's circumstances and review the decision.

Given the constraints of the infringements legislation, an application for judicial review was made to the Supreme Court. In *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor [2013] VSCA 37*, the Court of Appeal subsequently upheld the initial Supreme Court ruling that a magistrate is under a duty to inquire into the circumstances of an infringement offender, including whether they have a disability or other special circumstances, before making an imprisonment order against them for a failure to pay fines under the *Infringements Act 2006*.

Importantly, for Mr Taha, the case was remitted to the Magistrates' Court and the remaining fines were discharged. More broadly, the effect of the decision is to impose a duty on magistrates to inquire about the circumstances of all people appearing before them.

The Victorian Parliament has now passed reforms which will allow a limited rehearing right, through its *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013*. Introducing the amendments to Parliament, Victorian Attorney-General, Robert Clark, said the reforms responded to issues brought to light by two test cases in which VLA represented people with disabilities who faced jail for unpaid fines.

## Why should legal aid commissions do strategic advocacy?

### Statutory mandate

VLA considers strategic advocacy to be core business and this is reflected in our enabling legislation. The *Legal Aid Act 1978* (the Act) expressly requires VLA to look beyond individual clients to determine how we can have a bigger impact on the operation of the justice system. Specifically, the Act requires VLA to:

- provide legal aid in the most effective, economic and efficient manner (s4(a));
- pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community (s4(d)); and
- make recommendations to or through the Attorney-General with respect to any reforms of the law the desirability for which has come to its attention in the course of performing its functions (s6(2)(c)).

As we noted when appearing before a parliamentary committee investigating legislation which criminalised the transportation of asylum seekers to Australia – referred to as “people smuggling”:

*“It is really about our role and statutory function. It is really important that people understand that Victoria Legal Aid can and must do things that governments do not like or wish to hear. That is our statutory role. Like this committee, we have a role in helping make governments*

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*accountable. Of course we do this through the conduct of individual cases and appeals, and through the provision of advice about the desirability of changes to the law.”<sup>18</sup>*

Despite this, strategic advocacy has not always been a key focus for the organisation. After all, the job of busy lawyers is to think about resolving the specific issues facing the clients immediately before them. Supporting efforts to spot patterns and to work ‘on the system’ as well as ‘in the system’ has required a clear cultural intent to shift the organisation’s mindset over time and remains a work in progress.

## **The right incentives and a broad outlook**

The private legal profession alone has neither the infrastructure nor the incentive to prevent legal problems from arising. While free information and community legal education are cost effective ways to reduce demand for justice services, they also reduce demand for the services offered by private practitioners. Publicly funded legal services do not have a profit motive, and are well placed to pursue an agenda of minimising legal disputes in the community.

As the Productivity Commission noted:

*“Strategic advocacy is an area where there are few incentives for private lawyers to act. Private lawyers are focused mainly on achieving outcomes for individual clients. They are less interested in achieving broad based reforms that could result in positive outcomes for the wider community. There are good reasons for this. Where individuals are the principal beneficiaries of services, lawyers can charge for the work that they undertake.”<sup>19</sup>*

A private lawyer’s business model is not geared towards lasting, systemic reform within the justice system. In contrast, legal aid commissions have a unique opportunity to identify systemic issues and tackle them with a broader lens where this promotes the interests of our clients and the community.

### **Case study – Bulk Debt Project**

VLA and Legal Aid NSW joined with the community legal sector to assist people in long term financial hardship struggling with debt. The National Bulk Debt Project involves negotiating with selected debt collectors and credit providers for bulk waivers of debt incurred by people with no or virtually no capacity to pay. Waiving the unrecoverable debts has made sense for creditors, who have little likelihood of recovering the debt, and it is also fairer on vulnerable people with low or no incomes. Negotiating in bulk was far more efficient and cost effective for all involved, compared to simply assisting each individual client in isolation.

Financial counsellors, State Trustees and lawyers refer debts of eligible people through the project website (National Bulk Debt Project). Eligible people must be dependent on social security benefits or have no income at all; have no assets; have no prospect of employment in the short to medium term and be unable to repay the debt.

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<sup>18</sup> Warner, Bevan, 2011. Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, public hearing transcript, 11 November 2011 at p.19, accessed 20 May via <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20Inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~media/wopapub/hansard/senate/commtee/s442.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20Inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~media/wopapub/hansard/senate/commtee/s442.ashx)>.

<sup>19</sup> Productivity Commission, 2014 at p.622.

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To date, the project has negotiated waiver or closure of debts worth over \$20 million with creditors such as major banks, insurance companies, credit providers, debt collectors and utility service providers.

Clearing these debts gives people breathing space from what can seem like a crushing burden and ensures they can use their limited income for food, housing and other necessities.

Legal aid commissions and community legal centres are working with the Australian Bankers' Association and Financial Counselling Australia to clarify what constitutes good industry practice for unrecoverable debts.

Throughout the project, we have adopted a collaborative approach to our advocacy, applying specialist legal skills while avoiding the courtroom. Collaboration with industry as part of this project has led to strong outcomes for both our current clients involved and more broadly for disadvantaged and vulnerable consumers, through lasting systemic change.

### **We offer a well informed and evidence based perspective**

VLA is the largest provider of legal services to vulnerable people, in Australia's second most populous state. The number and breadth of legal disputes that we deal with creates knowledge and enlivens our capacity to inform public policy.

Government policy makers have specialist expertise but are not always attuned to the practical reality of how laws play out in practice. Independent think tanks and other non-government commentators offer valuable analysis and impartial insights, but also do not see laws in operation. In contrast, our commentary is backed up by direct observations of the way in which legal policy, court procedure or administrative practices affect the general community and our clients every day.

Unlike many other commentators, we generally do not need to rely on theoretical predictions of how a proposed change might work or play out. We see it through the experiences of our clients and the practice wisdom that accrues in our staff. The fact that we also operate a legal information and advice telephone call centre and monitor traffic to our legal information website, makes us well placed to spot the latest trend or unscrupulous practice in the general community, who may freely access these non-means tested services.

On one view, legal aid commissions operate like a representative body for vulnerable and disadvantaged consumers of the law and legal services. As unions represent the views of their members and business peak bodies represent the views of industry, legal aid commissions give voice to our constituents, the poor and marginalised – those who cannot afford private legal representation.

That does not mean that we are the only ones who use poverty law practice experience to inform strategic advocacy. Community legal centres are smaller and play a different role that is further from government. Because of these characteristics, they can sometimes be responsive and flexible in a way that legal aid commissions cannot. Working in tandem allows local initiatives first piloted by community legal centres, to be scaled up later by legal aid commissions, as happened with the development of a free education kit about common legal problems that people newly arrived to Australia may encounter called "What's the law"<sup>20</sup>.

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<sup>20</sup> 'What's the law' had its genesis in research undertaken by the Footscray Community Legal Centre in 2009, which showed that many of the legal issues encountered by new arrivals in the first few years of settlement are preventable.

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Because of their ‘coal face’ exposure, legal aid commissions are well placed to advocate for change where change is needed. This is particularly important in areas where there is limited involvement of the private profession or other agencies in assisting a particular client group or legal problem type.

### **Case study – Involuntary patients**

In recent years, VLA has deliberately shifted attention and resources to better assist persons facing unwanted medical treatment and involuntary detention in closed psychiatric facilities.

Persons facing unwanted medical treatment are able to challenge their treatment regime before a three person tribunal comprised of a lay person, a legal member and a non-treating psychiatrist.

Part of VLA’s motivation for increased attention and resources for this particular jurisdiction was the degree of patient vulnerability and the low rates of access by persons to legal advice and assistance. Only seven per cent of persons, who appeared before the tribunal, did so with a lawyer, despite lawyer involvement making it four times more likely that a client would receive an outcome they were happy with. This acutely vulnerable, high impact, low coverage scenario remains a concern to VLA.

The nature of the jurisdiction means that it is not commercially attractive to the private market and highlights the necessity for publicly funded civil law practices of sufficient size and expertise to work ‘on the system’ as well as ‘in the system’. We don’t expect to ever be able to all patients and need to progress our work in such a way as to strengthen compliance with the law - irrespective of whether a patient is a VLA client or not. Although we have lifted access rates to approximately twelve per cent of persons with a legal proceeding, we still see troubling patterns of the legal rights of this vulnerable client group not being upheld. We are spotlighting and challenging medico (and hospital) behaviour in new and more public ways, as the following de-identified case demonstrates:

‘Our client (WB) was admitted to a hospital as an involuntary patient under the *Mental Health Act 1986*. Eight days later the tribunal reviewed her involuntary treatment order. The tribunal accepted that our client did not meet the criteria necessary for involuntary treatment and ordered that she be discharged. The decision did not depend on her remaining in the hospital as a voluntary patient. Within three hours, WB sought to leave the hospital and WB’s treating doctor made a new recommendation for involuntary treatment. The reason appeared to be that WB’s treating doctor and psychiatrist did not agree with the Board’s decision. WB’s situation was a continuation of a concerning pattern noted by us, that hospital psychiatrists did not appear to be respecting tribunal decisions. We sought an urgent Supreme Court injunction to release the client, which was abandoned after WB was discharged at an

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VLA worked with other legal aid commissions on a national strategy, adapting Footscray’s work to create an education kit. It has since been endorsed by the Federal Department of Immigration and Citizenship, with over 16,000 kits distributed nationally. ‘What’s the law’ was one of three finalists in the recent Australian Migration Settlement Awards, run by the Migration Council of Australia. The resources are available online via <<http://www.vla.vic.gov.au/about-us/community-education/resources-for-educators/whats-law-australian-law-for-new-arrivals-kit>>.

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emergency tribunal hearing three days after the new order was made. The defendant hospital sought to have the substantive proceeding struck out but was unsuccessful and argument in open court about this conduct is still pending.’

The Mental Health Review Board plays a crucial role protecting the rights of people caught up in the mental health system. It is the only way of challenging involuntary psychiatric treatment decisions. This case, which is ongoing, has the potential to help thousands of Victorians who are ordered into involuntary psychiatric treatment every year when the serious step is taken to detain or treat them against their will.

Decision makers and the community should be informed about how laws affect people in practice and strategic advocacy can inform public discourse and contribute to this awareness.

### **Case study – People smuggling**

In February 2011, the Australian Federal Police commenced charging boat crew of vessels carrying asylum seekers on route to Australia with the offence of aggravated people smuggling. This carries a 5 year mandatory minimum term of imprisonment, with a 3 year non-parole period. By 2012 over 350 people had been charged. Cases against alleged people smugglers were distributed throughout Australian states and territories, with 66 boat crew being prosecuted in Victoria.

The legal processing and incarceration costs for those found guilty and sentenced to a five year term across all States and Territories would exceed \$175 million. The sheer number of trials would also have a significant impact on the operation of State courts and add to delay in the finalisation of other cases.

The accused persons had been demonised in the popular, political press as ‘evil’, notwithstanding our investigations revealing them to be low-level operatives rather than organisers.<sup>21</sup> Those charged were poor, illiterate Indonesian fishermen who were either tricked or promised a paltry sum to transport passengers. Many were unaware they would be travelling to Australia or transporting a human cargo until they were already at sea and had no choice but to continue to their nominated destination, that happened to be in Australia’s territorial waters. In short, their moral culpability was low<sup>22</sup> and the justice to be meted out was disproportionate to their level of offending.

In responding to the needs of our clients, VLA decided to make their circumstances known to the general community and to the media by participating in public hearings before Senate Legal and Constitutional Affairs Committee.<sup>23</sup> Our lawyers travelled to Indonesia to gather evidence, we hosted a legal symposium for practitioners defending boat crew to discuss defence strategy and we spoke to the media on matters of fact.

These facts helped distinguish the role of the ‘true organisers’; who were not on the boats, from the ‘expendable Indonesian boat crew’; whom the criminal enterprise considered pawns in their

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<sup>21</sup> Victoria Legal Aid, 2012. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, VLA, Melbourne, accessed 20 May 2014 via <http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/other-activities#People-smuggling>.

<sup>22</sup> Victoria Legal Aid, 2011. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Deterring People Smuggling Bill 2011*, VLA, Melbourne at pp.7-9.

<sup>23</sup> Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, public hearing transcript, 11 November 2011.

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enterprise, and who needed to get caught for the enterprise to succeed. These facts gradually altered the tone of the accompanying media debate as our clients' circumstances were humanised.

We subsequently made a submission to the Australian Human Rights Commission's inquiry into the treatment of individuals suspected of people smuggling offences who say they are children,<sup>24</sup> and were successful in having charges dropped against a number of juvenile clients who had been prosecuted as adults on the basis of unreliable evidence.

Before the Victorian Court of Appeal, we submitted that the prosecutions must fail because boat passengers have a lawful right to enter Australia. This caused the Government to introduce retrospective legislation to prevent any chance of a successful appeal.

Our submission to the Senate Inquiry into the *Deterring People Smuggling Bill 2011*<sup>25</sup> focused on the moral culpability of those involved in people smuggling offences, and the inappropriateness of retrospective criminality. The evidence given by VLA's senior leaders to the Senate Committee was supported by real life scenarios based on our clients' experiences. We noted:

*"Prospective operation of the law would clearly be better, as would an enhancement to the sentencing regime that produced fairer outcomes that recognise the difference in degree of criminality between true organisers and boat crew. This would achieve what the parliament is intending to achieve."*<sup>26</sup>

The cumulative impact of this advocacy resulted in a Directive by the then Attorney-General in August 2012 that low-culpability offenders be charged with an offence that did not carry a mandatory minimum sentence. Soon after, those accused of people smuggling offences were either sent home to Indonesia after prosecutions were discontinued or pleaded guilty and were sentenced to the time they had already spent in custody before being sent home.

Beyond alleviating the human suffering to our clients and their loved ones, it is estimated that over \$2 million in Victoria was saved in defence costs alone as a result of the change in policy, with a total estimated saving upwards of \$33 million in Victoria arising from saved prosecution, courts and incarceration costs.

On 4 March 2014, the current Attorney-General revoked the August 2012 Directive, thereby reintroducing prosecutorial discretion to pursue the aggravated offence (and therefore mandatory

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<sup>24</sup> Victoria Legal Aid, 2012. *Submission to Australian Human Rights Commission inquiry into the treatment of individuals suspected of people smuggling offences who say they are children*, VLA, Melbourne, accessed 10 May 2014 via <<http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/other-activities#People-smuggling>>.

<sup>25</sup> Victoria Legal Aid, 2011. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Deterring People Smuggling Bill 2011*, VLA, Melbourne accessed 10 May 2014 via link above. Victoria Legal Aid, 2011. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Deterring People Smuggling Bill 2011*, VLA, Melbourne accessed 10 May 2014 via link above. See also Karlsen, Elibritt et al, 2011. *Deterring People Smuggling Bill 2011*, *Senate Bills Digest* no. 82 2011–12, 21 November 2011, accessed 20 May 2014 via <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1112a/12bd082#\\_ftn39](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1112a/12bd082#_ftn39)>.

<sup>26</sup> Warner, Bevan, 2011. Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, public hearing transcript, 11 November 2011 at p.17, accessed 20 May via <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20Inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~/\\_media/wopapub/hansard/senate/commtee/s442.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20Inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~/_media/wopapub/hansard/senate/commtee/s442.ashx)>.

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minimum sentences) for low culpability conduct.<sup>27</sup> Notwithstanding this, VLA is not aware of low-culpability persons having been prosecuted in Australia for aggravated people smuggling offences since the March revocation.

In relation to people smuggling, we were able to use our 'on the ground' knowledge to challenge misconceptions which had been influential in shaping policy and community sentiment - unfairly.

Our public advocacy exposed some of the misleading rhetoric about the culpability of the accused individuals and demonstrates the benefits of having the knowledge of those directly involved in service delivery in the public domain.

## **Potential (and avoidable) pitfalls in strategic advocacy work**

While many of the benefits of well-executed strategic advocacy are documented and well understood, some of the risks and pitfalls are often less explored or acknowledged. This is notwithstanding the fact that poorly executed strategic advocacy can lead to poor outcomes for clients, the entrenchment of bad law, the prompt legislative reversal of a hard fought win or lead to aggrieved taxpayers questioning why their dollars are being invested in frivolous or unmeritorious legal action. More broadly, this undermines the reputation of strategic advocacy and the agencies undertaking it.

Adopting an unhurried and deliberative approach, within the context of a coordinated and committed organisational framework, can ameliorate but not extinguish these risks. Outlined below is an overview of key considerations when undertaking strategic advocacy work.

### **Choose the right client as your vehicle**

The most important aspect to selecting a client as a test case is ensuring a client's circumstances are sufficiently general and common to maximise the value of the strategic advocacy effort. A client with niche or specific circumstances can be easily distinguished as an exception or anomalous case, greatly limiting the impact of the strategic advocacy action and its utility for others.

Having a sympathetic or relatable client can be important in certain circumstances, but is not always essential. It is beneficial in circumstances where the success of the strategic advocacy activity hinges on recasting community perceptions of misunderstood or unpopular client groups, where your client will publicly 'champion' a particular reform or where a relatable client story can be used to powerful effect. In those circumstances, choosing an unsympathetic client in those instances can be counterproductive, in reinforcing stereotypes or providing ammunition for inaction. In extreme cases, having a particularly notorious client as a vehicle for strategic change can trigger detrimental intervention, buoyed by community concerns or outrage, which may have been averted with a less divisive client.

### **Don't forget your client is a person**

VLA is unashamedly striving to involve clients more directly in telling their stories as a basis for our strategic advocacy. We believe that highlighting the client experience is the most powerful way to illustrate failures in the law.

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<sup>27</sup> Director of Public Prosecutions—Attorney-General's Instrument of Revocation 2014, accessed on 29 May 2014 via: <http://www.comlaw.gov.au/Details/C2014G00412>.

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In the quest to achieve a strategic outcome, it is important to ensure the individual client is aware, informed and prepared to be a vehicle for strategic advocacy. While it can be an empowering experience,<sup>28</sup> being the face of a strategic advocacy initiative can come at the cost of privacy and speedy resolution of a legal matter, which requires a degree of personal resilience. Litigation can also raise the stakes and carry greater legal risks for clients, such as adverse costs orders which may or may not be indemnified by a legal service provider. It can also lead to a poorer or unexpected outcome.

The following case study gives an example of how VLA is using client stories to illustrate the legal problems of our clients.

### **Case study – Telling stories about pregnancy discrimination**

In contributing to the Australian Human Rights Commission Pregnancy and Return to Work National Review, VLA contacted clients from its Equality Law Service, seeking consent and participation of clients to describe their experience of pregnancy discrimination in a de-identified way, in their own words. Take Julie's story as an example:

“ I worked as a full time sales consultant for about three years. I told my manager that I was pregnant early on because I was so sick that I thought he needed to know. When I told him I was pregnant, he asked me in a disparaging way if I would keep it. I replied ‘of course’.

My pregnancy was very rough. I was sick from day one with nausea, dizziness, hot flushes and vomiting. My ‘morning sickness’ actually lasted all day. Sometimes I was vomiting 10 times a day. My boss got angry because I took frequent toilet breaks. Even though he knew I had morning sickness, he’d text me while I was vomiting and tell me to get back onto the floor immediately. I had bad back and leg pain, but I wasn’t allowed to sit down. If I did, he’d click his fingers at me like I was a dog and tell me to stand up.

My doctor gave me a medical certificate saying that I should reduce my hours. My boss refused. He said that I was employed full time so they didn’t have to accommodate my request for part time work. I said ‘I’ve got no choice do I?’ He said ‘not really’. I was left with an ultimatum: resign or work full time hours, which I couldn’t keep doing because I was so sick and uncomfortable. He left me with no choice but to resign.

I’m not on Centrelink, and after I pay rent I’ve got no money for food let alone stuff for the baby. I can’t afford to pay my bills and I’ve maxed out my credit cards. I’m on the verge of having my car repossessed and my utilities cut off. I’ve got nobody who can loan me money so I could even lose the roof over my head. I’m so stressed I can hardly breathe.”<sup>29</sup>

Personal stories such as these not only highlighted the serious impact of discriminatory practices on our clients, but powerfully demonstrated the important role the law plays in ameliorating discrimination by ensuring employment practices reasonably accommodate pregnancy and parenthood.

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<sup>28</sup> Ball, Rachel, 2013. *When I tell my story, I'm in charge: Ethical and effective storytelling in advocacy*, Human Rights Law Centre/ Victoria Law Foundation CLC Fellowship Report 2013, accessed on 10 April 2014 via: <<http://www.victorialawfoundation.org.au/grants/fellowship/2012-13-fellow>>.

<sup>29</sup> Victoria Legal Aid, 2014, Submission to Australian Human Rights Commission Pregnancy and Return to Work National Review, VLA, accessible via <<http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/other-activities>>.

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While practitioners are mindful of their obligations to their clients, client selection is particularly important, given the vulnerable nature of legally aided client groups. Client care must come first, notwithstanding the occasional disappointment with a lost opportunity to spotlight an injustice for a highly meritorious and deserving client.

Not all clients will or can remain de-identified in the face of court proceedings and their informed wishes should remain paramount. However, not inviting informed consent from appropriate clients to tell their stories, risks disempowering them<sup>30</sup> and VLA has chosen not to 'protect all clients' by maintaining a default setting of 'hiding them', but to work with selected clients, to ascertain if they wish to be involved in explaining their circumstances and if so, on what terms.

### **Think the strategy through from beginning to end**

Thoughtful planning is the critical factor for successful strategic advocacy, but perhaps more importantly, for avoiding tactical missteps that can act to further entrench or affirm an injustice or unfairness in the law.

Key factors to consider include the purpose and objective (including a common definition of success), and the means to achieve the objective (policy submissions, stakeholder and community engagement, litigation or a combination). It requires stepping through the permutations of each of the pathways the strategic advocacy action can take (success/failure in court, recommendations accepted/ignored, positive/hostile responses from decision-makers, significant/inadequate media traction), how those will further or hinder the objective and what level of preparedness is required for each step.<sup>31</sup>

### **Patience can be a virtue**

The temptation to hit the ground running, particularly in the face of a perfect client, can be overwhelming; however, one can pay dearly for poor timing or being oblivious to context. A single judicial member with an unfavourable interpretation or a quick clarificatory legislative amendment from government can quickly remove a previous discretionary grey zone susceptible to persuasion, and put beyond doubt an unjust outcome. A strong backlash from stakeholders or the community can quickly take a reform opportunity off the government agenda in the short to medium term.

Injustice can often be ameliorated gradually over time through persuasive legal argument on a case by case basis that creates good precedent. Changes to the composition of appellate benches or governments and their reform agendas, can alter the odds of an argument being successful. The development of an evidence base over time may provide greater ammunition to prove the need for change than a single effort would achieve. It is sometimes important to wait until the timing is favourable for the outcome sought to be achieved. This is ultimately an exercise of judgement that balances virtue with patience.

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<sup>30</sup> Ball, Rachel, 2013. *When I tell my story, I'm in charge: Ethical and effective storytelling in advocacy*, Human Rights Law Centre/ Victoria Law Foundation CLC Fellowship Report 2013, accessed on 10 April 2014 via: <  
<http://www.victorialawfoundation.org.au/grants/fellowship/2012-13-fellow>>

<sup>31</sup> For a useful planning framework, see 'Seven steps to effective advocacy', *SVA Consulting Quarterly*, Issue 5, 2003. Accessed on 8 May 2014 via <<http://svaconsultingquarterly.com/2013/09/01/seven-steps-to-effective-advocacy/>>.

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## Consider context

Practical considerations of expertise, resources and the broader policy landscape should also play an important role in shaping the issues that are prioritised for strategic advocacy.

This includes taking into account not only the values that underpin prioritisation, but also practical considerations, including skills and expertise and the strength of the evidence base, such as data and case studies. It involves looking externally to consider whether other agencies may be better placed to lead particular issues, owing to their expertise, priorities or constituency. Analysis of the current policy context, including the stated priorities of government, also informs the issues that are likely to attract the interest and attention of decision-makers in the short to medium term.

## Create a coordinated infrastructure to support good strategic outcomes

Strategic advocacy will likely fail when internal communication is poor. At best, the benefits derived from good ideas and innovation being piloted in discrete pockets of the organisation risk not being maximised. At worst, strategic advocacy efforts get undertaken in a confused and uncoordinated fashion, without necessary planning and organisational readiness, leading to poor outcomes.

An excellent strategic litigation outcome does not count for much if no one is aware of it or knows how to apply it. Media releases unsupported by a foundation of empirical evidence can ring hollow and be interpreted as sloganeering. Representations to government in the form of submissions can easily slide into wastepaper baskets if they aren't accompanied by direct engagement, which keeps the issue at the forefront of policy minds.

Good strategic advocacy employs different tools and communication methods to achieve the same ends, albeit to various degrees. Some issues require amplification through the media and communication channels to leverage connections to the community we serve and who contribute their taxes to our endeavours, while others are best resolved in the courtroom, with policy and media work playing a supporting role.

Having a clear understanding of which tools are required and employing them in combination to maximum effect is critical.

## Our approach to strategic advocacy

### We continue to learn and improve

The lessons above have in some instances been borne of bitter experience. The case of *Magee* taught VLA a number of the valuable lessons described above.

#### **Lessons learned – *Magee v Delaney [2012] VSC 407***

Mr Magee was charged with the offence of damaging property after using water soluble paint to paint over an advertisement in a bus shelter near the County Court and affixing a 'wet paint' sign as a form of protest. He had some previous convictions for similar conduct.

Mr Magee's solicitor contended that the facts supported a lesser charge attracting a non-custodial penalty but the most serious of charges, on the same set of acts, was preferred by police prosecutors that when admitted or proven would almost certainly result in a gaol term, which would be a disproportionate and costly way of dealing with his pattern of offending. The wider benefit in exploring judicial review was to examine the appropriate use of police prosecutorial discretion and

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the impact the laying of charges has on the ultimate outcome, given the separate and distinct role afforded police and the judiciary.

Mr Magee made full admissions in interview, but characterised his actions as ‘a simple non-violent protest against the practice of advertising’ designed to stimulate public debate, consistent with rights to freedom of expression under the Victorian *Charter for Human Rights and Responsibilities Act 2006* (the Charter).<sup>32</sup> Ultimately, Mr Magee sought to demonstrate that he should be excused from criminal liability on the basis of ‘lawful excuse’, in light of the protected right to freedom of expression. These arguments were unsuccessful, with the Court finding that the right to freedom of expression does not extend to all forms of expressive conduct, including damage to a third party’s property or a threat of such damage. However, the judgment went on to be highly critical of the arguments put forward in the case, noting the premise on which the appeal was brought as “fundamentally flawed” and “...had no realistic prospect of success”. The Court made a costs order against Mr Magee. Many legal commentators interpreted the case as one which acted to confine the interpretation of the right to freedom of expression, with a ‘substantial chilling effect’.<sup>33</sup>

Subsequent to the decision, VLA was subject to stakeholder criticism for funding the action, particularly in the context of budgetary pressures and changes to eligibility requirements in a range of service areas.

The case review illuminated deficiencies in our authorising processes and internal communication in relation to this particular case. This extended to the legal team pursuing legal arguments that were not approved as part of the original grant of aid, that were subsequently approved by an independent reviewer over which VLA appropriately has no control.<sup>34</sup> It extended to also not making the primary argument challenging the use of police prosecutorial discretion, which formed the basis for the action in the first place, as it was considered at late notice that these arguments had a limited chance of success. It was further compromised by an unpreparedness and inability to communicate the purpose and public interest associated with the matter to stakeholders and the wider community. Inadequate internal communication compounded these issues.

## **Making strategic advocacy a genuine priority**

While strategic advocacy has always been part of VLA’s remit, in the past few years VLA has made a conscious decision to try to do it better and to elevate the importance and awareness of strategic advocacy opportunities within the organisation. This includes greater recognition and support of the systemic outcomes achieved through our lawyers in their day-to-day advocacy and providing support and resources to help try and improve the law for vulnerable people.

The establishment of the Strategic Advocacy Advisory Group (SAAG) within VLA, comprised of senior representatives from across the organisation (including the civil, criminal and family law programs, VLA Chambers as well as corporate support areas), was established in late 2012 as a means to better coordinate and test the rigour of proposed strategic advocacy work. Its cross-organisational nature means that it is able to reflect a diversity of perspectives and breadth of

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<sup>32</sup> Section 15(2) of the Charter provides that “Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria”.

<sup>33</sup> Purdue, Emma, 2012. Case note, Human Rights Law Centre, accessed on 1 May 2014 via <<http://hrlc.org.au/victorian-supreme-court-reads-down-the-right-to-freedom-of-expression/>>.

<sup>34</sup> *Legal Aid Act 1976*, s.36.

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practice experience. Its primary responsibility is to monitor, oversee and embed good strategic advocacy practice in the organisation.

It fulfils this function by scrutinising and offering contestable advice on applications for legal aid decided by the Managing Director,<sup>35</sup> developing annual strategic advocacy priorities<sup>36</sup> to be endorsed by the VLA Board, considering and scrutinising strategic advocacy plans and supporting and empowering staff to work towards positive, systemic changes to the law. This forum acts as a sounding board to test ideas, strategy and share information. It provides staff lawyers, who attend by invitation, with the opportunity to participate in deliberative decision-making at a senior level.

While there is undoubtedly some way to go to fully embed SAAG within the organisation, it has ensured strategic advocacy is prioritised and valued.

### **The public doesn't value what it doesn't understand – embracing the media**

The law is out of reach and arguably out of touch for many in the community.

The public can't be expected to value what it doesn't understand. Elected representatives are responsive to community consciousness, and in the face of other worthy competing priorities on the public purse, increased investment in publicly funded legal assistance programs is most unlikely to arrive by itself or be achieved solely by rational argument behind closed doors.

Just as access to information can help people resolve their own legal problems, so it can help to expand community consciousness about the civic value of our work. A taxpayer embracing the civic value of legal assistance programs, without expectation of needing or receiving a service, strengthens the scheme. Increasingly, we are doing our work out in the open for the *entire community* to see. Promoting our work and why we do it has high purpose. It can be corrective, empowering and the source for community understanding and support.

Increasingly we are looking to engage mainstream media in carrying our message, to solve unfairness, and to integrate our work through multi-disciplinary teams. The partnerships between our staff to support strategic advocacy symbolises a broader change of approach to media relations at VLA in recent years.

Traditionally, legal aid commissions in Australia, bound by legislation which protects client confidentiality, have been reticent to engage with the media. In Victoria, section 43 of the *Legal Aid Act 1978* generally prohibits VLA from revealing any information about an applicant for legal assistance.

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<sup>35</sup> Such as applications for legal aid pursuant to the Public Interest and Strategic Litigation guideline (Accessible via < <http://handbook.vla.vic.gov.au/handbook/212.htm> > and the guideline for appeals to the High Court (Accessible via < <http://handbook.vla.vic.gov.au/handbook/195.htm>>).

<sup>36</sup> For information on VLA's current strategic advocacy priorities, visit < <http://vla.vic.gov.au/about-us/justice-and-law-reform> >.

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However, in *Keating, Taha* and the people smuggling matters<sup>37</sup>, our lawyers obtained client consent to communicate publicly about their cases and the important issues underpinning them. Our lawyers worked closely with our communications specialists to develop proactive responses targeting print, online and broadcast media. The aim was not to garner attention for VLA, but to assist the community; that contribute their taxes to our work, to understand the harsh impact of unfair laws, made out in their name. This approach was a turning point for VLA that had previously engaged with the media only in a tentative way – usually to invoke confidentiality.

Since taking a more proactive approach to media our level of engagement has grown dramatically. Before 2010, we engaged with the media on only a handful of occasions each year, but by the end of 2010–11 we had 222 contacts with the media, which resulted in 161 media items. Two years later in 2012–13 this grew to 389 substantive contacts resulting in 210 media items.

Since 2011, 25 of our key staff have undergone media training and many have given interviews on a diverse range of topics from ‘sexting’ and pregnancy discrimination to family violence and criminal appeals. We now receive requests and engage with outlets that are not the traditional followers of legal aid issues – such as the *Australian Women’s Weekly* and *Marie Claire* magazines.

Our media approach has created opportunities and challenges. A raised profile allows us to advocate more effectively on the issues that affect our clients, but has also opened us up to more scrutiny. It has also, in some instances, created an expectation that we will release confidential client information on cases beyond those with a strategic advocacy focus.

However, the benefits outweigh the challenges. If we did not support our legal efforts with strategic communications, important legal gains would remain in court transcripts without adding to the community’s understanding of the many injustices that impact and are perpetuated on disadvantaged and vulnerable people, in their name.

## **Celebrating our successes**

The nature of being an organisation promoting the rights of vulnerable people within the justice system is that our work is never done. In an organisation where staff are driven by the never-ending pursuit of achieving fairness in the law, it is important to ensure there are opportunities to collectively reflect and celebrate success.

Whether it be a well crafted negotiated outcome, a hard-fought win in court, or a noticeable change in practice and procedure arising from our actions – we need to remind ourselves and each other of the significance of the work that we do. Every day, legal aid commissions are ensuring that some of the most acutely vulnerable and overlooked members of our community are treated with dignity, respect and fairness in their interactions with the law and that their experiences are understood and reflected in the design and operation of our justice system.

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<sup>37</sup> Between June 2011 and July 2012 we had 150 contacts with the media over the people smuggling matters – both proactive and reactive – resulting in more than 50 media items, including prominent coverage in Melbourne daily newspaper *The Age* and on flagship Australian Broadcasting Corporation radio and television programs such as *AM*, *PM* and *The 7.30 Report*.

More than 90 per cent of the media reporting was positive despite the controversial nature of people smuggling. There was a strong uptake of our key messages around the impoverished background of the accused and the unfairness of mandatory sentencing.

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The importance of the role of legal aid was recognised by the Chair of the Senate Legal and Constitutional Affairs Committee in the context of VLA's appearance before the Committee for oral hearings as part of its inquiry into the Deterring People Smuggling Bill 2011, in which the Chair noted:

*"...I do not think this committee, under previous governments or under this government, would be as successful as it is in suggesting sound amendments to legislation if it were not for people like those in your organisation putting forward submissions and being prepared to answer our questions. So you do play a valuable role in our deliberations. Don't ever forget that."<sup>38</sup>*

## Conclusion

The purpose of this paper has been to demonstrate that austerity imperatives should not serve to diminish the commitment of legal aid commissions to undertake strategic advocacy, but should in fact, affirm it. VLA has elevated strategic advocacy as a key priority for the organisation and is working to consolidate it in daily practice. While strategic advocacy requires a degree of organisational investment and carries risks, if done thoughtfully with a close nexus to practice wisdom, it can achieve positive results for clients and the community at large. Not only is effective strategic advocacy cost-effective, it is also a powerful way to shape positive changes to the law.

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<sup>38</sup> Crossin, Trish, 2011. Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, public hearing transcript, 11 November 2011 at p.19, accessed 20 May via <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~//media/wopapub/hansard/senate/commtee/s442.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~//media/wopapub/hansard/senate/commtee/s442.ashx)>.

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## Appendix 1 - About Victoria Legal Aid

Victoria Legal Aid (VLA) administers a mixed model of legal aid delivered through a staff practice, community legal centres (CLCs) and private practitioners. These services include legal representation through grants of legal assistance and duty lawyers, community legal education, legal advice, information and referrals in person and by telephone, all designed to improve the effectiveness and fairness of the justice system. All Australian states and territories operate on a similar mixed model with varying proportions of the work being done by the different elements or components of the model.

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is one of the biggest legal services in the country, providing legal information, education and advice for all Victorians.

Our clients are often people who are socially and economically disadvantaged; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

VLA helps people with legal problems about criminal matters, family breakdown, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account. We take on important cases and advocate for reforms that improve the law and make it fairer for all Victorians.

In 2012–13 VLA assisted over 86,800 unique clients with:

- 89,463 information services;
- 51,598 legal advice and minor assistance;
- 65,303 duty lawyer services; and
- 39,782 grants of legal assistance.

In addition, we distributed over 615,500 publications, held 350 community legal education sessions attended by over 12,700 participants and made over 71,000 external referrals.

In 2013-14, VLA's strategic advocacy priorities are:

- Access to justice for people with mental illness and disability;
- Appropriate interventions for children and young people;
- Better administrative decision making; and
- Vulnerable people and fines.

Further information about our services can be found on our [website](#) and [Twitter](#) account.